

# SECRET PROCEEDINGS IN CANADA<sup>©</sup>

BY IAN LEIGH\*

National security and constitutionalism are often thought to be fundamentally incompatible. Recent reforms in Canada involve creative attempts to recognize constitutional rights to fair procedure within processes in which individuals' rights are in conflict with state security interests, such as security clearance, deportation, or access to information. The procedures examined in this article include *in camera* and *ex parte* review by Federal Court judges and the use of the Security Intelligence Review Committee. The analysis draws on interviews with participants and compares these procedures with other situations in which restrictions upon open justice have faced *Charter* challenge, especially under sections 2(b) and 11(d). It is concluded that the courts have had comparatively little direct influence but, nevertheless, there is respect for constitutional values in some surprising places.

La sécurité nationale et le constitutionnalisme sont souvent considérés comme fondamentalement incompatibles. Des réformes récentes au Canada comptent des essais créatifs de reconnaître des droits constitutionnels aux procédures équitables dans le contexte des processus où les droits de l'individu entrent en conflit avec les intérêts de la sécurité nationale, comme le contrôle sécuritaire, l'expulsion, ou l'accès à l'information. Les procédures examinées dans cet article comprennent la revue *in camera* et *ex parte* par les juges de la Cour fédérale et l'emploi de la Security Intelligence Review Committee. Cette analyse se sert des entrevues avec des participants, et elle compare ces procédures avec d'autres situations où des restrictions sur l'ouverture de la justice ont été contestées sous la *Charte*, surtout selon les articles 2(b) et 11(b). Nous concluons que les cours ont eu comparativement très peu d'influence, mais en même temps, que le respect des valeurs constitutionnelles apparaît dans des endroits surprenants.

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## I. INTRODUCTION

Executive secrecy, especially in the realm of national security, poses grave problems for the legal process. This is because of the need to reconcile procedural fairness to individuals affected by contested decisions with the safeguarding of secret material on which such decisions are based. Governmental decisions are normally considered legitimate within liberal democracies if they are demonstrably within the law and are rational, principled, and proportionate. In the security realm, the difficulty is in devising appropriate political and legal mechanisms by which these criteria can be shown to be satisfied while also protecting secret material. The normal constitutional processes of adversarial legal proceedings and ministerial accountability to Parliament may seem to the executive to be insufficiently protective of secrecy. On the other hand, to give the executive free rein to determine the boundaries of its actions without any independent review or control is to invite political abuse and pays no regard to the rights of the individual.

Canada has gone further than any other legal system in devising novel procedures to meet these difficulties. This article is a study of the operation<sup>1</sup> of the processes for review of a number of the situations where individuals are affected by security decisions. What these procedures have in common are processes by which courts or review bodies can consider and, to some extent, probe government material without revealing it to the individual affected by the decision under review. A number of procedural devices are in use that depart from normal adversarial procedures: *in camera* hearings, the use of special security-cleared lawyers, and the use of designated judges with access to

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<sup>1</sup> This is a continuation and development of an earlier study of national security from a constitutional perspective in Britain, Australia, and Canada involving extensive interviewing of security officials and those in security oversight: L. Lustgarten & I. Leigh, *In From The Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994) [hereinafter *In From The Cold*].

security information. The fundamental question is: to what extent can these devices allow security and intelligence decisions to be challenged in the same way as “normal” governmental actions?

Part II of the article provides an exploration of the public and private interests favoured by different kinds of secret proceedings; in particular, it distinguishes between the closure of proceedings to the public and the withholding of information from the other party. The general recognition given to these interests at a constitutional level is introduced in Part III, which also deals with some analogous types of secret proceedings. The application of these arguments to security-related proceedings is preceded in Part IV by an account of the historical context of the legal treatment of security and intelligence decisions within Canada, especially because of the influence it has had in shaping the current legislation. In Parts V and VI, four types of secret proceedings involving intelligence material before the Federal Court are discussed: warrant applications for covert surveillance by the Canadian Security Intelligence Service (CSIS) under section 21 of the *CSIS Act*,<sup>2</sup> Federal Court review of decisions made concerning deportation in refugee cases, refusal of access under freedom of information legislation, and claims of privilege under the *Canada Evidence Act*.<sup>3</sup> The functions of the Security Intelligence Review Committee (SIRC), in hearing complaints against CSIS and in reviewing denials of security clearance and deportation decisions, are discussed in Part VII. The accounts are based partly on interviews held with participants<sup>4</sup> in the processes, as well as official descriptions and relevant constitutional challenges in the courts. Part VIII reflects upon the extent to which constitutional arguments have succeeded in upholding open justice, and the place of

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<sup>2</sup> *Canadian Security Intelligence Service Act* R.S.C. 1985, c. C-23 [hereinafter *CSIS Act*].

<sup>3</sup> R.S.C. 1985, c. C-5 [hereinafter *Canada Evidence Act*].

<sup>4</sup> I am grateful to the following for interviews and assistance: Maurice Archdeacon (Executive Director, Security Intelligence Review Committee), Alan Borovoy (General Counsel, Canadian Civil Liberties Association), Cullen J. (Federal Court Trial Division), Heald J. (Federal Court of Appeal), Paul Dubrule (National Security Directorate, Solicitor General Canada), Tom Bradley and Winston Fogerty (Canadian Security Intelligence Service), Simon Noël (Noël Bethiaume, Avocats), Barbara Jackman (Jackman and Associates, Barristers and Solicitors), Paul Copeland (Copeland, Liss, Campbell, Barristers and Solicitors), and John Sibley and Simon Chester (McMillan Binch, Barristers and Solicitors). I also benefited from discussions with David Peel (Inspector General of Security and Intelligence), and Professors Reg Whitaker (York University), John McCamus (Osgoode Hall Law School of York University), Alan Mewett (Faculty of Law, University of Toronto), and John L. Edwards (Faculty of Law, University of Toronto), although none of them is responsible for the views expressed here. I am also grateful to Clayton Ruby (Ruby and Edwardh, Barristers and Solicitors), and to Professors Bill Angus, Reuben Hasson, and Peter Hogg (all of Osgoode Hall Law School) for supplying useful materials.

the courts and other review bodies in balancing individual and state interests in these proceedings.

## II. OPEN JUSTICE AND *IN CAMERATRIALS*

The conduct of a trial wholly or partially in secret raises controversial questions because of the priority generally given within the legal system to the principle of open justice.<sup>5</sup> The purpose of this part is to present a framework for understanding the different interests at stake where restrictions on publicity occur in legal proceedings.

Previously, the approach of the common law was to stress the primacy of open proceedings except where openness would itself render the administration of justice impracticable.<sup>6</sup> In 1936, Blanesburgh L.J. went so far as to claim that publicity was the “authentic hall-mark of judicial as distinct from administrative procedure.”<sup>7</sup> The passage owes much to the Diceyan distrust of administration,<sup>8</sup> and contemporary lawyers would be less suspicious of administrative procedures and less sanguine about judicial ones. Nevertheless, “open justice” remains a benchmark by which procedural fairness continues to be judged. Modern justifications for the principle are likely to be clothed in different garb. Instead of solely emphasizing natural justice, openness is increasingly seen as a method of ensuring the accountability of judicial officers within a democratic polity. This view may be traced to Bentham:

In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of

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<sup>5</sup> G. Nettheim, “Open Justice and State Secrets” (1985-86) 10 *Adelaide L. Rev.* 281; *In From the Cold*, *supra* note 1, c. 11, which discusses the principle in the context of criminal trials, mainly from a British perspective; M.D. Lepofsky, *Open Justice: the Constitutional Right to Attend and Speak About Criminal Proceedings* (Toronto: Butterworths, 1985); P. Anisman & A.M. Linden, eds., *The Media, the Courts and the Charter* (Toronto: Carswell, 1986); and Law Reform Commission of Canada, *Public and Media Access to the Criminal Process* (Working Paper No. 56) (Ottawa: Law Reform Commission of Canada, 1987).

<sup>6</sup> *Scott v. Scott*, [1913] A.C. 417 (P.C.). In Canada, under the *Criminal Code*, R.S.C. 1985, c. C-46, s. 486(1), “[t]he proper administration of justice,” along with “the interests of public morals” and the “maintenance of order” are reasons justifying the exclusion of the public from a trial.

<sup>7</sup> *McPherson v. McPherson*, [1936] A.C. 177 at 200 (P.C.).

<sup>8</sup> Epitomized in Lord G.H. Hewart, *The New Despotism* (New York: Cosmopolitan Book, 1929).

justice. It is the keenest spur to exertion and the surest guard against improbity. It keeps the judge himself while trying under trial.<sup>9</sup>

The adage that “[j]ustice is not a cloistered virtue”<sup>10</sup> has been given a powerful modern restatement by Wilson J.:

[T]he public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and are sensitive to the values espoused by the society; (3) to provide a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.<sup>11</sup>

Openness may thus be seen as a way of keeping the channels of communication between the outside world and the courtroom free, to the benefit of both.

Arguments in favour of publicity as a vehicle of judicial accountability may apply even where a degree of secrecy is acknowledged to be necessary. For example, in a decision upholding the right (after an appropriate interval) of a member of the public to inspect the material on which a search warrant was issued in an *in camera* hearing, Dickson J. (as he then was) grounded the decision in the need for public policy reasons to subject judicial acts to public scrutiny. He stated that this justification was stronger if the original warrant application was heard *in camera*: “[T]his fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to political malversation.”<sup>12</sup>

It is important to disentangle two issues which, at first blush, seem similar: the closing of proceedings to the public and the withholding of relevant material from a defendant or complainant. Even where the first is justified because of some overarching community interest, it does not follow that the second will be. Although strong, the public interest in open justice is weaker than the public interest in fair

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<sup>9</sup> J. Bentham, *Rationale of Judicial Evidence* vol. 1 (London: Hunt & Clarke, 1827) c. 10, cited by Dickson J. in *Nova Scotia (A.G.) v. MacIntyre* [1982] 1 S.C.R. 175 at 183-84 [hereinafter *MacIntyre*].

<sup>10</sup> Atkin L.J. stated in *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322 at 335 (P.C.): “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

<sup>11</sup> *Edmonton Journal v. Alberta (A.G.)* [1989] 2 S.C.R. 1326 at 1361 [hereinafter *Edmonton Journal*].

<sup>12</sup> *MacIntyre*, *supra* note 9 at 183-84.

proceedings<sup>13</sup> based upon a notion of “adversarialism;” the former may be overborne by circumstances which would be insufficient to displace the latter. For example, the defendant or party to the proceedings may have direct knowledge of developments or events relevant to the proceedings, of which the public as a whole are, perhaps justifiably, ignorant. In the context of governmental secrecy, this is most likely to occur where the defendant is a government employee, former employee, or informer. In such circumstances, limits on the public access to the proceedings may be justified, although limitations on the information available to the defendant may not be. Conversely, in some situations both the state and the other party may agree that they would prefer proceedings to be in private, but considerations of private confidentiality or convenience do not dispose of the community interest in public access to legal proceedings as an aspect of democratic governance.

Deviations from the ideal of open justice may be of three kinds. First, there are proceedings in which the public’s interest is overridden but the complainant’s or defendant’s is not. Examples include the following: publication bans which prevent the reporting of evidence given in open court; providing protective screens behind which a witness testifies screened from the public, but in sight of the defendant, lawyers and jury who, therefore, may still observe the witness’ demeanour;<sup>14</sup> and *in camera* hearings at which the defendant is present for the whole proceedings, for instance in an Official Secrets trial. Disclosure of a document for use in the proceedings on terms that prohibit its publication have the same effect.<sup>15</sup> Second, in some proceedings the public interest may be adequately met but the defendant’s interests are impeded by measures taken to protect secrecy; examples might include allowing anonymous witnesses<sup>16</sup> or disallowing certain questions on grounds of Crown privilege.<sup>17</sup> In these situations, a denial of

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<sup>13</sup> The two interests may clash, for instance, where the effect of pretrial publicity is in issue. Although clashes of this kind have given rise to most of the jurisprudence on open justice, especially through the involvement of the press, they are not the central concern here.

<sup>14</sup> The use of screens that prevent observation of demeanour by the defendant and his or her counsel is more serious, and would fall into the third category, discussed below.

<sup>15</sup> As in *Harman v. Secretary of State for the Home Department* [1983] 1 A.C. 280 (H.L.), where contempt of court arising from breach of implied undertaking not to disclose documents obtained on discovery.

<sup>16</sup> See G. Marcus, “Secret Witnesses” [1990] Pub. L. 207 at 220-23, which criticizes the effects of such orders in criminal trials on the defence.

<sup>17</sup> This is put forward as an instance where the public interest is upheld by the court’s decision, although, in reality, whether the public interest has been favoured by the secrecy is often controversial, quite aside from the impact on the fairness of the proceedings as it affects the other

information to the other party to the proceedings is a denial to the public also. However, the impact of denying the information to the other party is likely to be great, whereas the interference with public interests will be minimal. The third type of deviation arises in proceedings from which the public are excluded, and where the other party's rights are also abridged. Examples include denying access to those parts of the evidence which the tribunal hears and bases its decision upon, or limiting knowledge of the allegations, access to legal representation, or cross-examination. The reviews of security decisions by SIRC, instigated by an individual complaint or by designated judges of the Federal Court, also fall into this category. In extreme circumstances, restrictions in this third category may even deny an individual any forewarning or knowledge after the event that a procedure affecting his or her rights has been invoked. The procedure for authorizing covert surveillance (discussed in Part V, below) is an example.

Significantly, in the context of criminal proceedings, whereas restrictions falling into the first two categories may exceptionally be tolerated, those falling in the third are anathema. The reticence to impose retrictions of the first two kinds, and the failure to distinguish the defendant's and the public's interests may also give rise to or exacerbate the phenomenon of "graymail." "Graymail" occurs where a defendant is able to deter the prosecution from proceeding because the prosecution fears the consequences of a public disclosure of evidence necessary to obtain a conviction, or necessary to enable the defendant to conduct a proper defence.<sup>18</sup> Implicit in the terminology is the suggestion that the defendant's procedural rights to disclosure of prosecution evidence go beyond those necessary to secure a fair trial, into the area where embarrassment of the prosecution is an operative factor.<sup>19</sup>

It is the third type of deviation that is the main focus of this article. However, examination of developments in the first two is an aid

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party.

<sup>18</sup> The abortive prosecution of the *Toronto Sun* under the *Official Secrets Act* R.S.C. 1970, c. O-3, s. 4(3) for communicating the contents of an intelligence report marked "Top Secret" on Soviet espionage activities in Canada is an illustration of "graymail" in a Canadian context: see *R. v. Toronto Sun* (1979), 24 O.R. (2d) 621 (Prov. Ct.). The case failed at the committal stage after the prosecution had been forced to first claim Crown privilege to counter requirements from the defence for disclosure of documents establishing an intelligence officer's view that the disclosure was damaging, and then to alter the basis on which the prosecution was brought. For a discussion, see S.A. Cohen, "Freedom of Information and National Security" in J.D. McCamus, ed., *Freedom of Information: Canadian Perspective* (Toronto: Butterworths, 1981) 152.

<sup>19</sup> In Canada (as in Britain), the "graymail" problem of disclosure of sensitive material is partly addressed by ministerial control of prosecution discretion. Provisions enable the federal Attorney General to take exclusive control and conduct of the proceedings by service of a fiat on the provincial Attorney General: see *Security Offences Act* R.S.C. 1985, c. S-7, ss. 4 and 5.

to clear thinking about the constitutional approach to the relevant interests: after examining instances where they are clearly separable, we can then approach cases where they are comingled. In the discussion below, exclusion of the public and restrictions on disclosure to the other party are, therefore, treated separately from a constitutional viewpoint.

### III. CONSTITUTIONAL ARGUMENTS

In Canadian law, the distinction between the public's and litigant's rights is made more transparent because of the different constitutional rights that may be invoked in support of each interest. The press and public enjoy rights of free speech and expression under section 2 of the *Canadian Charter of Rights and Freedoms*<sup>20</sup> and rely on these to gain access to legal proceedings. It may also be argued that a litigant has a distinct interest in public proceedings as being a public airing of his or her case. These concerns are quite different from other procedural guarantees, such as the presumption of innocence under section 11(d) of *Charter*. In addition, litigants enjoy other *Charter* rights touching on open proceedings, notably the right of a defendant in a criminal trial to make full answer and defence, based partly upon section 11(d) and on section 7. Parties to administrative proceedings may also rely on section 7, and on the administrative law rules of natural justice, depending on the potential consequences. A party also may argue for the exclusion of evidence under section 24(2) on the grounds that a *Charter* violation occurred in obtaining it—for instance an unreasonable search or seizure contrary to section 8. This may form the basis for arguments in favour of the exclusion of evidence obtained by some secretive or sensitive techniques, for instance wiretapping or covert surveillance. Collateral attack on the authorization of the surveillance may have the same effect. The *Charter* does not make express exception from its protected rights for reasons of national security but such limitations may fall within the general limitation in section 1,<sup>21</sup> which has

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<sup>20</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>21</sup> “[S]ubject only to such reasonable limits prescribed by law and necessary in a democratic society;” see generally P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), c. 35 and the literature cited therein.

given rise to a sophisticated jurisprudence.<sup>22</sup>

#### A. Exclusion of the Press and Public<sup>23</sup>

In the post-*Charter* environment, restrictions on public access to trials have been challenged in a number of contexts. One is the right under section 11(d) for the defendant to have a fair and public trial in a criminal case.<sup>24</sup> In the context of discussing whether legislation establishing courts martial departing from section 11(d) of the *Charter* could be justified under section 1, Lamer C.J. has expressed the view that a very strong presumption against overriding the protections of a normal criminal trial exists. It would only arise “in the most extraordinary of circumstances ... [such as] ... a period of war and insurrection.”<sup>25</sup>

However, the most extensive discussion has arisen by way of press challenges to the closure of proceedings, under section 2(b) of the *Charter*.<sup>26</sup> This has been interpreted as providing a constitutional foundation for free access for the public to the courts, which the press, along with other members of the public, may exercise as an integral part of freedom of opinion and expression.<sup>27</sup> As such, it provides a powerful additional argument to the traditional reluctance of the common law to close judicial proceedings.

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<sup>22</sup> In order to justify a limitation, the countervailing public interest concerned must pass an initial threshold test of amounting to a sufficiently important objective. Thereafter, further tests apply to the form of limitation: it must be rationally connected to the public interest in question, it should use the least drastic means, and should be proportionate. See especially *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*]; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; and *Reference Re Section 94(2) of the Motor Vehicle Act*, R.S.B.C. 1979 1985] 2 S.C.R. 486.

<sup>23</sup> For a pre-*Charter* survey in the context of criminal trials: see A.W. Mewett, “Public Criminal Trials” (1978-79) 21 *Crim. L.Q.* 199 at 211-13; post-*Charter*: see J.P. Allen & T. Allen, “Publication Restrictions and Criminal Proceedings” (1994) 36 *Crim. L.Q.* 168 at 177-81.

<sup>24</sup> “Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty by the law in a fair and public hearing by an independent and impartial tribunal.”

<sup>25</sup> *R. v. Généreux*, [1992] 1 S.C.R. 259 at 313. Although made in the context of the requirement of independence of the court under s. 11(d), the point would seem to apply equally to the other requirements of the section.

<sup>26</sup> “Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

<sup>27</sup> MacKinnon A.C.J.O. in *Re Southam Inc. and the Queen (No.1)*(1983), 41 O.R. (2d) 113 at 123 (C.A.) [hereinafter *Southam No. 1*], expressly contrasting simple protection of freedom of the press *per se*.

Lamer C.J. stated in the recent Supreme Court of Canada judgment in *Dagenais v. Canadian Broadcasting Corp.* that the effect of the *Charter* is to adjust the common law approach so as to require equal recognition of freedom of expression and of the right to a fair trial.<sup>28</sup> The Court held that the common law rule allowing a publication ban by a trial judge, where there was a real and substantial risk of interference with the right to a fair trial, gave too little recognition to freedom of expression; accordingly, the rule was modified so that a ban should only be imposed where reasonably available alternative measures would not prevent the risk, and the salutary effects of the ban would outweigh the deleterious effects on freedom of expression. In a significant passage, Lamer C.J. rejected the model of a simple clash between two *Charter* rights. Rather, he drew up a balance sheet of positive and negative effects, both of imposing and not imposing a publication ban, which would be relevant in weighing the constitutional validity of any order.

The effects of imposing a ban could include: limiting freedom of expression; preventing the jury from being influenced by information from outside the courtroom; maximizing the chances of witnesses testifying because of lack of adverse publicity; protecting vulnerable witnesses (*e.g.*, informants); preserving the privacy of witnesses or victims; maximizing the chances of rehabilitation of young offenders; encouraging the reporting of sexual offences; protecting national security; and saving the expense of alternative forms of limitation. On the other hand, the effects of not imposing a ban could include: maximizing the chances of witnesses hearing of the case; placing witnesses under public scrutiny and so helping to prevent perjury; preventing court or state wrongdoing by placing the criminal justice system under public scrutiny; assisting public discussion about (and so reducing) crime; and allowing other important public debate.<sup>29</sup> Most of these effects are potentially applicable in civil proceedings also.

Similar issues have arisen in relation to statutory provisions requiring or permitting closure, when they have been subjected to constitutional challenge. Two key questions arising from the cases are: what discretion is there over closing the proceedings and where does the onus of justifying closure lie? Both issues are considered against the

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<sup>28</sup> [1994] 3 S.C.R. 835 at 877.

<sup>29</sup> *Ibid.* at 882-83.

background of what constitutes a reasonable limitation under section 1.<sup>30</sup>

If the closure of the proceedings is mandatory, it is more likely to fall foul of section 2(b). For instance, in *Southam No. 1*<sup>31</sup> it was held that a mandatory statutory provision that juvenile courts sit *in camera* contravened section 2, and was not saved by section 1.<sup>32</sup> Although there were justifiable reasons for the closure of such proceedings, they did not apply in all circumstances and, overall, the provision inflicted more public harm than good.

Subsequent to this decision, a redrafted provision allowing for *discretionary* exclusion of the public was held to satisfy section 1. There was a reasonable and demonstrably justifiable basis for the statutory discretion to close proceedings—it did not have to be shown to be the perfect solution to the problem.<sup>33</sup> However, it is not necessarily fatal that the closure is mandatory, since sometimes this may be justified on public policy grounds. Accordingly, the Supreme Court of Canada has found the public policy of encouraging sexual complainants to report alleged offences to the police justified a mandatory provision preventing the publication of a complainant's identity.<sup>34</sup> If the provision were merely discretionary, complainants would have no assurance of confidentiality and would be deterred from complaining.<sup>35</sup> Similar

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<sup>30</sup> For instance, in *Edmonton Journal* *supra* note 11, it was held that a ban on the publication of evidence and argument in matrimonial proceedings was a violation of s. 2(b), which could not be justified as a reasonable limitation under s. 1 since, although intended to protect the privacy of the parties, the ban was disproportionate in its impact.

<sup>31</sup> *Supra* note 27.

<sup>32</sup> *Ibid.* The court found that the ban lacked an objective, rational basis. The significant burden was on the proponent of a limitation under s. 1 to justify it. In considering the reasonableness of the limitation, the court engaged in a comparative analysis of similar provisions in other free and democratic states, but ultimately the question had to be considered in the context of Canada's free and democratic society. Judged against these standards, a mandatory ban was not a reasonable limit.

<sup>33</sup> *Re Southam Inc. and the Queen* (1984), 48 O.R. (2d) 678 (H.C.J.), *aff'd* (1986), 53 O.R. (2d) 663 (C.A.). However, later decisions adopt a more sophisticated approach to s. 1, especially to the least restrictive means requirement.

<sup>34</sup> *Canadian Newspapers Co. v. Canada (A.G.)*, [1988] 2 S.C.R. 122.

<sup>35</sup> This is really a variation on what is often called, in the context of Crown privilege, the "candour argument." However, as expressed here, it is more credible and less damaging than in the sexual assault context since it involves the identity of the witness rather than the substance of their evidence.

reasoning underpins the lack of judicial discretion where informer privilege is claimed.<sup>36</sup>

The courts have affirmed the importance of open proceedings by placing the onus on the party seeking closure to justify it. Consequently, a provision mandating *in camera* hearings in applications for refugee status was struck down as contravening section 2(b) of the *Charter* because it wrongly reversed the onus by putting the burden on those seeking to persuade the adjudicator to exercise discretion to open the proceedings.<sup>37</sup> This provision gave scant recognition to the need for quasi-judicial proceedings to be in public. Applying the *Oakes*<sup>38</sup> test in the *Pacific Press* case, MacGuigan J.A. found the provision to be rationally connected to a justifiable aim (the protection of refugee claimants)<sup>39</sup> but disproportionate. The judge stressed, in particular, that the provision did not admit less restrictive alternatives to *in camera* hearings, such as the imposition of publication bans.<sup>40</sup> Accordingly, the legislation failed to provide any compromise between total openness and total closure. Moreover, it required that a final decision refusing access be made too early in the proceedings.

The courts have also recognized that the closure of proceedings to protect witnesses does not contravene *Charter* rights.<sup>41</sup> In *R. v. McArthur*,<sup>42</sup> the non-publication of the names of witnesses at a forthcoming murder trial was held to amount to a *prima facie* violation of sections 2(b) and 11(d), but was justified as a reasonable limitation under section 1.<sup>43</sup> Dupont J. stated that non-publication of the names would benefit the administration of justice, in view of the possibility of witness intimidation.

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<sup>36</sup> See L.E. Lawler, "Police Informer Privilege: A Study For the Law Reform Commission of Canada" (1985-86) 28 Crim. L.Q. 91 at 122-27; and T. Cooper, *Crown Privilege* (Aurora: Canada Law Book, 1990) c. 7.

<sup>37</sup> *Pacific Press Ltd. v. Canada (Employment and Immigration)* [1991] 2 F.C. 327 (C.A.) [hereinafter *Pacific Press*]; subsequently applied to read down the offending provision in the interim in *Armada Communications v. Canada (Employment and Immigration)* [1991] 3 F.C. 242 (C.A.).

<sup>38</sup> *Supra* note 22.

<sup>39</sup> *Pacific Press*, *supra* note 37 at 346-50.

<sup>40</sup> *Ibid.* at 349.

<sup>41</sup> *Needham v. British Columbia* (1992), 35 A.C.W.S. (3d) 789 (B.C.C.A.).

<sup>42</sup> (1984), 13 C.C.C. (3d) 152 (Ont. H.C.J.).

<sup>43</sup> So far as s. 1 was concerned, no analysis of its application was engaged in and the judgment was, in any event, prior to the seminal decision in *Oakes*, *supra* note 22.

All of these situations concern closure of proceedings in the context of anticipated harm or danger to an identifiable individual from publicity, whether the defendant, victim, or witness. Although similar dangers may often arise in a security context, especially where the identity of an informant or intelligence officer is concerned, the state's interests in closure may also be more collective in nature because of the secrecy of the information involved in the proceedings.

However, the broader interests of the community in holding investigatory and judicial decisions open to public gaze have also received recognition, notably in decisions concerning public access to executed search warrants. In a pre-*Charter* decision, the Supreme Court of Canada held that, after the event (if material is found), a member of the public is entitled to inspect the warrant and the information upon which the warrant was issued.<sup>44</sup> The public interest in keeping investigations confidential only applied upon execution of the warrant; likewise, protection of the innocent would only justify non-disclosure if nothing was found when the warrant was executed. Dickson J. (as he then was) specifically argued that the justification was stronger if the original warrant application was heard *in camera*. In a later case, decided under the *Charter*, a restriction preventing publication of information about the execution of search warrants has been held to violate section 1 for over-breadth: in particular, the court stressed that the provision would prevent misconduct or ineptitude in executing such warrants coming to light.<sup>45</sup>

Like its British forebear,<sup>46</sup> the Canadian *Official Secrets Act* provides for *in camera* trials. This provision, in common with the remainder of the *Act*, is unreformed and, due to the paucity of recent trials, has not yet faced *Charter* challenge. The relevant section gives the court power to exclude the public during the trial proceedings or on appeal on the grounds that the publication of the evidence or of any statement "would be prejudicial to the interest of the State."<sup>47</sup> The public may be excluded from any or all of the trial, except that the passing of sentence is required to take place in public. When this

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<sup>44</sup> *MacIntyre*, *supra* note 9.

<sup>45</sup> *Canadian Newspapers v. Canada (A.G.)* (1986), 55 O.R. (2d) 737 (H.C.J.).

<sup>46</sup> *Official Secrets Act, 1920* (U.K.), 10 & 11 Geo. 5, c. 75, s. 8(4); and *Official Secrets Act 1989* (U.K.), 1989, c. 6, s. 11(4); on both see *In From The Cold* *supra* note 1 at 307; and R.M. Thomas, *Espionage and Secrecy* (London: Routledge, 1990) at 63-68.

<sup>47</sup> *Official Secrets Act* R.S.C. 1985, c. O-5, s. 14(2).

provision was invoked in 1979 in the *Treu* case,<sup>48</sup> it caused major political controversy:<sup>49</sup> the trial was held wholly *in camera*, with only the judgment and sentence being passed in open court. The procedure had been adopted (unopposed by Treu's counsel) because the prosecution case rested largely on evidence involving NATO documents. Although the Court of Appeal quashed the conviction, the holding of the trial *in camera* was held to have been the correct course of action. Section 14 of the *Act* has not yet received consideration under the *Charter*, but, applying the principles already enunciated, it seems likely that it would satisfy section 2(b). The discretionary nature of the judicial power to close the proceedings, and the discretion over the extent, suggest a proportionate response, provided the power is not used excessively in a particular trial. The duty to pass sentence in public is a rather minimal recognition of the arguments for public accountability, but the state interests in question would surely satisfy section 1.

#### B. Restrictions on Disclosure to the Parties

Disclosure has arisen as a constitutional question mainly in the context of a defendant's access to prosecution material in criminal trials.<sup>50</sup> Consequently, in *R. v. Stinchcombe*<sup>51</sup> the Supreme Court of Canada held that a defendant has a constitutional right to disclosure of prosecution material in a criminal trial, including all evidence which may assist the defence. Although the prosecution is not obliged to disclose material subject to privilege or where it is clearly irrelevant, the trial judge has the discretion to conclude that a claim of privilege is excessive and detracts from the defendant's right to make full answer and defence.

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<sup>48</sup> Treu was convicted under the *Official Secrets Act* *supra* note 18, s. 4, of leaking information relating to air communications systems that he had previously obtained while working for a government contractor. The conviction was set aside on appeal: see *R. v. Treu* (1979), [1980] 49 C.C.C. (2d) 222 (Que. C.A.) [hereinafter *Treu*]. The appeal was held in open court, but Kaufman J.A. stated that the trial judge had acted correctly in holding the trial *in camera*: see *Treu* at 225; and Cohen, *supra* note 18.

<sup>49</sup> See M.L. Friedland, *National Security: the Legal Dimensions* (Ottawa: Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1980) at 35 and 46; and J.L. Granatstein & D. Stafford, *Spy Wars: Espionage in Canada from Gouzenko to Glasnost* (Toronto: Key Porter, 1992) at 216-17 [hereinafter *Spy Wars*].

<sup>50</sup> Generally, the criminal law procedural standards are seen as more rigorous than the administrative ones. Thus, the classification of courts martial as criminal courts imposed additional constitutional standards: see J. Walker, "Military Justice: From Oxymoron to Aspiration" (1994) 32 Osgoode Hall L.J. 1 at 23, discussing *R. v. Forster*, [1992] 1 S.C.R. 339.

<sup>51</sup> [1991] 3 S.C.R. 326.

In such an instance, the prosecution would be faced with a choice between disclosing the material and abandoning the case.

Similar considerations arise over the use, in a criminal trial, of wiretapping evidence obtained through a warrant issued under the *Criminal Code*.<sup>52</sup> Since this is directly analogous to the treatment of security and intelligence information, it is worth examining in some detail. In wiretapping evidence applications, the affidavits received by the issuing judge are placed in a sealed packet, which can only be opened in limited circumstances. An extensive jurisprudence has grown up on different procedural methods for seeking to exclude wiretapping evidence so obtained, either in the course of the prosecution or under collateral proceedings, to have the warrant declared void.<sup>53</sup> The courts have established both the process and the criteria according to which a judge hearing a challenge to the authorization may open the sealed packet<sup>54</sup> and release to the defence the affidavit supporting the wiretap application. These affidavits will normally contain sensitive details about informants, especially in drug or conspiracy cases, which the prosecution will wish to see withheld from the defence.

It has been held that the constitutional right to fundamental justice under section 7 of the *Charter* requires that the defendant should have access to the sealed packet, subject to judicial editing of the contents to remove information, for instance, about informants.<sup>55</sup> The courts have specifically adopted a low threshold test—it is enough that the defendant asserts that his or her ability to make full answer and defence requires disclosure—because they have recognized that to impose any higher duty on the defendant (for instance to establish a *prima facie* case that his or her defence could be assisted) would present an insurmountable hurdle.<sup>56</sup> This may appear to be a liberal approach, but it has been defended on constitutional principles: “In practical terms, it may, to some extent be a fishing expedition. It is, however, a fishing expedition in what are now constitutionally protected waters.”<sup>57</sup> As we shall see, the liberality of the test contrasts with the more

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<sup>52</sup> *Supra* note 6, ss. 184-88.

<sup>53</sup> *Wilson v. R.*, [1983] 2 S.C.R. 594 [hereinafter *Wilson*].

<sup>54</sup> As provided for under the *Criminal Code*, *supra* note 6, s. 187(1).

<sup>55</sup> *R. v. Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.J.) [hereinafter *Parmar*], *aff'd* (1990), 53 C.C.C. (3d) 489 (Ont. C.A.); and *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

<sup>56</sup> *Dersch v. Canada (A.G.)*, [1990] 2 S.C.R. 1505 at 1517 [hereinafter *Dersch*].

<sup>57</sup> *Parmar*, *supra* note 55 at 279, Watt. J.

restrictive approach to inspection and disclosure of intelligence evidence in criminal cases.<sup>58</sup>

The procedure approved in *Parmar* was for the trial judge<sup>59</sup> to initially undertake the editing of the affidavit to ensure that disclosure is not made which would be contrary to the best interests of the administration of justice. The editing should be kept to the minimum. Prosecution counsel then considers the edited version and may raise objections with the judge. Any such objections are considered in open court in the presence of the defendant and defence counsel. If there are no objections, or they are not upheld, disclosure is made to defence counsel. The judge's editing may be challenged if it is more extensive than the public interest requires and if it impedes the defendant in making "full answer and defence."<sup>60</sup>

From this brief survey of the constitutional terrain, it is evident that the *Charter* has, in general, proved a powerful vehicle for challenging restrictions on publicity and on disclosure of evidence. It has enabled the courts to give a clear priority to the rights both of the press and public and of criminal defendants over other interests. Moreover, the analysis of competing interests under section 1 has enabled a clear and structured approach to be taken with regard to the limitation of these rights, with more serious or automatic closure of proceedings requiring more cogent justification. From a discussion of the constitutional validity of a variety of closed judicial proceedings, we turn to a more detailed analysis of secret proceedings in a security and intelligence context. It is appropriate to set the scene with a brief historical introduction.

#### IV. HISTORICAL BACKGROUND

Canada's international image is of a modern democracy founded on the respect for human rights, fostered at home by a generous

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<sup>58</sup> See Part VI, below.

<sup>59</sup> Section 178.14 of the *Criminal Code*, R.S.C. 1970, c. C-34; now s. 187 of the *Criminal Code*, *supra* note 6, places the discretion to disclose on a superior court judge. The courts have stressed that, where possible, the application should be made to the trial judge. If the trial judge is not a superior court judge, the issue should be dealt with in a separate application, with the result remitted to the trial judge; see *Dersch*, *supra* note 56. The same untidy division of judicial labour can arise where a challenge under the *Canada Evidence Act*, *supra* note 3, is made in the course of a trial.

<sup>60</sup> *R. v. Durette* [1994] 1 S.C.R. 469, L'Heureux-Dubé, Gonthier, and McLachlin JJ. dissenting.

immigration policy, especially toward refugees, and by the the adoption of the *Charter* in 1982. Abroad, the country's image is fostered by its conspicuous humanitarian commitment to international peace keeping. However, a brief study of events in the post-war period shows that where domestic security concerns clashed with individual rights, state interests often prevailed, with a consequent diminution of procedural fairness.

Canada's record of political persecution during the cold war is generally considered to have been more fortunate than that of its southern neighbour.<sup>61</sup> However, it should be remembered that the ideological purge throughout the Western world during that period began largely as a response to events in Canada. The defection of the Soviet Ottawa embassy cipher clerk, Igor Gouzenko, in 1945 sent shock waves through Western governments. Gouzenko's revelations of the penetration of Western public services led, within months, to the exposure of several notable spies, notably the British atom-bomb spy Alan Nunn May.<sup>62</sup> However, following a period of consultation with British and American authorities, it was agreed to attempt to bring those exposed by Gouzenko to trial in all three countries: a concerted international effort was launched to this effect in mid-February 1946. In Canada, the immediate consequence was the establishment of an *in camera* Royal Commission under Kellock and Taschereau JJ. of the Supreme Court of Canada.<sup>63</sup> The Commission enjoyed extraordinary powers under the *War Measures Act*.<sup>64</sup> One infamous result was the arrest, in the early morning of 15 February 1946, of a number of individuals named by Gouzenko, many of whom were subsequently acquitted when put on trial due to lack of independent corroborative evidence. Many of those arrested were held *incommunicado* until their (unrepresented) appearances before the Royal Commission, apparently in a (partially successful) attempt to prevent them receiving advice to

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<sup>61</sup> The difference has sometimes been exaggerated. For a collection of personal recollections of Canadians' experiences of "blacklisting" in the arts, public service, and unions, see L. Scher, *The Un-Canadians: true stories of the blacklist era* (Toronto: Lester, 1992); for a more scholarly survey, see R. Whitaker & G. Marcuse, *Cold War Canada: The Making of a National Insecurity State, 1945-1957* (Toronto: University of Toronto Press, 1994) [hereinafter *Cold War Canada*].

<sup>62</sup> See generally *Spy Wars* *supra* note 49, c. 3.

<sup>63</sup> Canada, Royal Commission Appointed Under Order in Council P.C. 411 of February 5 1946, *Report of the Royal Commission [on Espionage]* (Ottawa: E. Cloutier, Printer to the King, 1946) [hereinafter *Kellock-Taschereau*] (Co-Chairs R.L. Kellock & R. Taschereau JJ.).

<sup>64</sup> R.S.C. 1927, c. 206.

refuse to answer questions.<sup>65</sup> Those who cooperated found that this testimony was subsequently used against them in criminal trials.<sup>66</sup> In some cases, even where individuals were subsequently acquitted in the courts they were named and effectively pronounced guilty in the Commission's report.<sup>67</sup> The whole procedure caused considerable political embarrassment, and there is no doubt that collective shame at this dark moment of Canadian history has subsequently shaped the procedures adopted to deal with security allegations of various kinds against individuals. Apart from the Kellock-Taschereau Commission, the legal response to the cold-war threat was generally lighter than in the United States. However, among other anti-communist measures were the introduction of security clearance schemes in the civil service and informal blacklisting in a number of other areas—the notorious Quebec “Padlock” law—and legislative amendments to the definition of treason and to the emergency powers at the time of the Korean War.

The suspicion that all Western governments shared of the rising tide of left-wing political, ideological, and cultural groups during the 1960s and 1970s, with the tendency to regard them as subversive, took a quite distinct direction within Canada because of the Quebec separatist question. The most publicly conspicuous state response was the invocation, once again, of the *War Measures Act*<sup>68</sup> to proclaim a state of “apprehended insurrection” during the October 1970 FLQ crisis. It is now generally acknowledged that the government considerably overreacted to the kidnapping of James Cross, the British trade attaché in Montreal, and to the kidnapping and murder of Quebec Labour Minister Pierre Laporte. The extended powers of search, seizure, arrest, and detention resulted in relatively few convictions, despite widespread

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<sup>65</sup> See *Cold War Canada*, *supra* note 61 at 52-74; *Spy Wars*, *supra* note 49 at 62; and R. Bothwell & J.L. Granastein, *The Gouzenko transcripts: the evidence presented to the Kellock-Taschereau Royal Commission of 1946* (Ottawa: Deneau, 1982). The commissioners attempted to justify the mandatory interrogation of witnesses without legal representation notwithstanding possible criminal proceedings: see *Kellock-Taschereau* *supra* note 63 at 672.

<sup>66</sup> In *R. v. Mazerall* [1946] O.R. 762 (C.A.), evidence obtained before the Royal Commission was held to be admissible in the subsequent criminal trial on the basis that the defendant had failed to object to the questions: if he had done so he could have been compelled to answer under the Commission's powers but the answers would have been rendered inadmissible. The Commission studiously avoided explaining the effect of an objection to those it questioned and, furthermore, denied witnesses the legal advice by which they might have discovered the importance of the point. For other cases arising from the Royal Commission see *R. v. Rose*, [1947] 3 D.L.R. 618 (Que. K.B.); *R. v. Benning* [1947] O.R. 362 (C.A.); and *R. v. Boyer* (1948), 94 C.C.C. 195 (Que. K.B.).

<sup>67</sup> *Cold War Canada*, *supra* note 61 at 74.

<sup>68</sup> *Supra* note 64.

use: of 497 people arrested and detained only sixty-two were charged, and less than one-third of these individuals were ultimately convicted. This indiscriminate overreaction has been attributed by commentators, in part, to a lack of reliable intelligence on the extent of threat posed by extreme separatist groups, although more recent research suggests a more sophisticated interplay of political factors.<sup>69</sup>

The October Crisis, in turn, seemingly produced a backlash in which intelligence officers were given free rein to obtain information during the 1970s by Cabinet Ministers unwilling to delve too closely into a variety of disreputable methods employed.<sup>70</sup> Among those subsequently exposed, some were straightforwardly illegal, such as burglary, arson, and unauthorized interception of communications, and others were highly questionable, including the use of an agent provocateur, attempts to disrupt pressure groups by disinformation, bringing excessive pressure on trade unionists and other activists to act as informers, and obtaining access to medical and other personal records. As these tactics came to light in the late 1970s, the consequence was the establishment of a number of Commissions of Inquiry, first at the provincial level and then at the federal level.<sup>71</sup>

The Commission of Inquiry established under McDonald J. into wrongdoing by the security branch of the RCMP was perhaps the most

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<sup>69</sup> R. Whitaker, "Apprehended Insurrection? RCMP Intelligence and the October Crisis, 1970" (1993) 100 Queen's Q. 383. On the status of the legal responses, see H. Marx, "The 'Apprehended Insurrection' of October 1970" (1972) 7 U.B.C. L. Rev. 55; and J.N. Lyon, "Constitutional Validity of Public Order Regulations" (1972) 18 McGill L.J. 136.

<sup>70</sup> See G.R. Weller, "The Canadian Security Intelligence Service Under Stress" (1988) 31 Can. Pub. Admin. 279 at 283ff.

<sup>71</sup> The Commissions spawned several legal challenges to their attempts to obtain evidence, based upon Crown privilege. The case that led to the establishment of the McDonald Commission, *infra* note 74, is an example: in the prosecution of a policeman for planting a bomb, his claim to withhold the name of an associate who allegedly told him to go to the premises was refused by the judge. See *R. v. Samson* (1977), 35 C.C.C. (2d) 258 (Que. C.A.). Closely related were two of the leading decisions of the Supreme Court of Canada; both involved attempts by the police to use the privilege to withhold information from Provincial Commissions of Inquiry, which were set up to investigate security abuses by the RCMP and provincial police forces. In the first, the court held that the police and the RCMP could not raise the privilege to impede the Keable Commission in Quebec without the Attorney General's consent, which was conspicuously withheld: see *Bissailon v. Keable*, [1983] 2 S.C.R. 60. However, the claim was more successful in the second, where the investigation of the Ontario Royal Commission (the Krever Commission) into unauthorized police access to medical records was impeded as a result: see *Canada (Solicitor General) v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario* [1981] 2 S.C.R. 494. For critical discussion, see J.F. Harris, "Solicitor General Canada v. The Royal Commission of Inquiry Into The Confidentiality of Health Records in Ontario; Opening the Files for the RCMP" (1983) 12 Man. L.J. 399; and D.B. Evanson, "The Development and Power of the Informer Privilege: The Health Records Inquiry Case" (1984) 9 Queen's L.J. 207.

thorough independent investigation into the activities of an intelligence agency ever conducted, and had a decisive impact in shaping legislative reforms and attitudes. Not only was this the direct precursor of the “delicate balance”<sup>72</sup> contained in the *CSIS Act*,<sup>73</sup> but the events surrounding the Commission live on in the corporate memory of the now civilianized CSIS, an influence apparently favouring protection of privacy as CSIS interviewees for this research freely admitted. Following the report of the McDonald Commission,<sup>74</sup> a new civilian domestic intelligence agency was created, replete with oversight mechanisms, by the *CSIS Act*. The *Act* set formal limits to the CSIS’s mandate and powers, provided a system of ministerial control, and created new bodies to oversee the propriety and legality of its actions and, in some cases, decisions based on its advice. These bodies were an Inspector General and a non-parliamentary committee of Privy Councillors (SIRC). This scheme was reviewed after five years of operation by a Special Parliamentary Committee<sup>75</sup> and has been the subject of continuous review by SIRC itself; it has also attracted the attention of the courts. The account in the sections following focuses on the positions of the Federal Court and of SIRC in handling secret proceedings within this framework.

#### V. JUDICIAL AUTHORIZATION OF COVERT SURVEILLANCE: SECTION 21 OF THE *CSIS ACT*

Following the findings of the McDonald Commission that CSIS’s predecessor, the RCMP Security Service, had broken the law in conducting surveillance, it was recommended that the new civilian agency be granted statutory powers of covert entry and surveillance. These were to be subject to a judicial warrant process, thus conferring

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<sup>72</sup> See Canada, House of Commons, Report of the Special Senate Committee on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society* (Ottawa: Supply & Services Canada, 1983) (Chair: P.M. Pitfield).

<sup>73</sup> *Supra* note 2.

<sup>74</sup> Canada, Commission of Inquiry into Certain Activities of the RCMP, *Freedom and Security under the Law*, Second Report (Ottawa: Queen’s Printer, 1981) (Chair: D. McDonald) [hereinafter *McDonald Commission Report*].

<sup>75</sup> Canada, House of Commons, *In Flux But Not in Crisis, Report of the Special Committee on the Review of the CSIS Act and the Security Offences Act* (Ottawa: Queen’s Printer, 1990) [hereinafter *In Flux*]; see also the government’s response: Canada, Solicitor General, *On Course: National Security for the 1990s* (Ottawa: Supply & Services Canada, 1991) [hereinafter *On Course*].

lawful powers for actions previously illegal.<sup>76</sup> In so recommending, the McDonald Commission was seeking to give effect to its guiding principles: (1) the rule of law should be strictly observed; (2) investigative techniques should be proportionate to the security threat under investigation and weighed against possible damage to civil liberties and democratic structures; (3) less intrusive alternatives should be used wherever possible; and (4) control of discretion should be layered so that the greater the invasion of privacy, the higher the level of necessary authorization.<sup>77</sup>

At first, the government omitted a requirement for judicial authorization from its legislative reforms but, following stringent criticism, the CSIS Bill was reintroduced incorporating a warrant requirement for certain types of surveillance.<sup>78</sup>

The McDonald Commission's concerns are reflected both in the statutory framework and in the administrative practices that have grown up to govern warrant applications. All of CSIS's investigations, whether they require special powers or not, are subject to section 12 of the *CSIS Act*, which establishes a precondition that the collection, retention, and analysis of information must be "strictly necessary" to investigation of threats to the security of Canada. After approval by the Solicitor General, a warrant application may be made where there are "reasonable grounds" for CSIS's belief that it is required to enable the Service to investigate a threat to the security of Canada or to assist in its foreign intelligence-gathering function. It is a requirement either that other investigatory techniques have failed, would be unlikely to succeed, would not obtain important information, or would be impractical on grounds of urgency.<sup>79</sup> The *Act* also requires an accompanying affidavit specifying in detail the person targetted, premises involved, and types of information concerned: these details are to be reflected in the scope of the warrant, together with "such terms and conditions as the judge

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<sup>76</sup> Comparable powers exist in the United Kingdom for ministerial warrants under the *Intelligence Services Act 1994* (U.K.), 1994, c. 14, ss. 5 and 6; see also *In From The Cold* *supra* note 1, c. 3 and at 493ff.

<sup>77</sup> *McDonald Commission Report* *supra* note 74, vol. 1 at 513ff; for an extended discussion see *In From The Cold* *supra* note 1, c. 2.

<sup>78</sup> Bill C-157, *An Act to Establish the Canadian Security Intelligence Service* (st. Sess., 32d Parl., Canada, 1983; and Bill C-9, the amended legislation of January 1984 that ultimately passed in June 1984. On the history of Bill C-157, see C. Franks, "Parliamentary Control of Security Activities" (1984) 29 McGill L.J. 326; and R. Whitaker, "The Politics of Security Intelligence Policy-Making in Canada" (1991) 6 *Intelligence and Nat'l Sec.* 649; continued in (1992) 7 *Intelligence and Nat'l Sec.* 53 [hereinafter *Politics of Security*].

<sup>79</sup> *CSIS Act*, *supra* note 2, s. 21(2).

considers advisable in the public interest.”<sup>80</sup> Actions that may be authorized include covert entry to premises, installation of bugging and visual surveillance equipment, removal and copying of documents, and the surreptitious installation of tracking equipment on vehicles. Such actions in execution of a warrant receive immunity from criminal and civil liability.<sup>81</sup>

An elaborate system of screening warrant applications before submission to the Solicitor General and the court has been established. This involves initial approval of all investigations proposing active intelligence gathering by an internal Target Approval Review Committee (TARC), and prior vetting of covert surveillance applications by a Warrant Review Committee. TARC authorization of targeting is formally graded, with the most intrusive surveillance, level 3, requiring satisfaction of more stringent criteria. Following a 1987 government report by the former clerk of the Privy Council that criticized CSIS’s procedures, and a furore that erupted when it emerged that a number of inaccurate or misleading details had been laid before the courts in an application for surveillance arising out of the bombing of an Air India airplane in 1985, this scheme was revised.<sup>82</sup> After that warrant was successfully challenged by one of the targets at his trial and CSIS informed the original judge what had happened, the warrant was quashed and the director of CSIS resigned. It became apparent during interviews with CSIS officers that the avoidance of public scandal now weighs heavily on all those involved with the process.<sup>83</sup> The reaction to

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<sup>80</sup> *Ibid.* s. 21(4)(f).

<sup>81</sup> *Ibid.* ss. 24 and 25, as am. by S.C. 1993, c. 34, s. 49.

<sup>82</sup> See Canada, Independent Advisory Team on the Canadian Security Intelligence Service, *People and Process in Transition: Report to the Solicitor General* (Ottawa: Queen’s Printer, 1987) (Chair: G.F. Osbaldeston) [hereinafter *Osbaldeston Report*]; see also *Spy Wars*, *supra* note 49 at 244-45; and on the legal issues, see *Atwal v. Canada (Solicitor General)* [1988] 1 F.C. 107 (T.D.) [hereinafter *Atwal*].

<sup>83</sup> The most recent scandal about CSIS surveillance (the Bristow affair) concerned an informer and was therefore beyond the scope of the statutory procedure, although presumably subject to approval under TARC (this view was expressed by a former Deputy Director of CSIS, Phillippe Bibeau: see K. Makin, “Former Deputy Defends CSIS” *The [Toronto] Globe and Mail* (2 September 1994) A1. It involved allegations that Grant Bristow, a prominent member of a white supremacist group, the Heritage Front, was a CSIS informer who had also passed information about Jewish organizations to similar groups in the United States, and had also passed information about the Canadian Broadcasting Corporation and the Reform Party. A subsequent investigation by SIRC criticized CSIS practices in relation to informers but found many of these allegations unsubstantiated: see Canada, Security Intelligence Review Committee, *The Heritage Front Affair: Report to the Solicitor General of Canada* (Ottawa: Queen’s Printer, 1994); and Canada, Security Intelligence Review Committee, *Annual Report 1994-95* (Ottawa: Queen’s Printer, 1995) at 3-16 [hereinafter *SIRC 1994-95*]; but, for a critical review of the report, see R. Whitaker, “The Bristow

this episode was a typically bureaucratic one—the adding of extra stages to the warrant approval process, both regionally and centrally. Perhaps inevitably, the entire process sank beneath its own weight as a result: before simplification, it involved no fewer than thirty-seven stages and the approximately six-month delay inherent in the process was seen by CSIS as a serious operational impediment. Simplification came as a result of a report commissioned by CSIS from a recently retired Federal Court judge, Addy J., who had previously been designated to hear CSIS warrant applications under the legislation.<sup>84</sup>

The *Addy Report*<sup>85</sup> recommended a reduction in the number of stages to thirty-four, with a resulting compression of lead times, and some changes in the way that warrant applications and supporting affidavits were prepared for court. In the preparation of the report, the serving designated judges were “informally consulted” by their former colleague. The report was received in September 1992 and implemented by CSIS with some modifications, designed to achieve the same effect as the original proposals, in 1993. At the time of interviews in June 1994, the process was still subject to further fine tuning and was under review by the Inspector General of Security and Intelligence. While, from an outside perspective, it is not possible to be definitive about the effectiveness of these procedures, the process of review involving legal policy and oversight input at least corroborates CSIS’s professed emphasis on legality.

One of the recommendations of the *Addy Report* was that there should be greater lawyer involvement from an early stage in the preparation of applications to go to the Federal Court. Consequently, CSIS lawyers are now involved in warrant applications from the beginning and the counsel who will present the case in court drafts the supporting affidavit. The process still involves approval of the targetting by TARC at level 3 and, thereafter, submission to the Warrant Review Committee (WRC), including an oral testing of the case by an independent counsel (an innovation introduced following the *Osbaldeston Report*<sup>86</sup>). The

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Affair: a Crisis of Accountability in the Canadian Security Intelligence” (Paper presented to the Canadian Association of Security Intelligence Studies, Montreal, 5 June 1995) [unpublished] [hereinafter *Bristow Affair*]. A further report on the Bristow affair was recently published: Canada, House of Commons, Standing Committee on Justice and Legal Affairs *The Heritage Front Affair: Our View* (First Report) (Ottawa: Queen’s Printer, 1996).

<sup>84</sup> A request to have access to the unpublished *Addy Report* as part of this research was refused on the grounds that the deletions necessary before it could be released under the *Access To Information Act*, R.S.C. 1985, c. A-1, would have been so extensive as to render it worthless: Letter of T. Bradley (CSIS) to I. Leigh, 9 September 1994.

<sup>85</sup> *Supra* note 84.

<sup>86</sup> *On Course*, *supra* note 75 at 63.

independent counsel are a pool of about six security-cleared lawyers from the Justice Department, who will have had no previous association with the case. About a week before the WRC hearing, the independent counsel is given access to all the relevant documentation. His or her task is to test the statement of facts to be included in the affidavit supporting the warrant in order to establish that the information concerned appears in CSIS records, appears reliable, is accurately reflected in the affidavit, and is presented in its proper context. After this process of internal review, culminating in an approval by the WRC, the case is forwarded to the Solicitor General, in whose name the formal application is made to the Federal Court. The Solicitor General's role was described as being one of policy review;<sup>87</sup> for instance, the Minister might consider whether the proposed target is the kind of person in whom CSIS should be taking an interest. However, the Minister may also add conditions at this stage. Commonly there will have been consultation between CSIS and the Solicitor General's Department prior to the warrant application being made, and it is rare for a proposal for a warrant application to be rejected by the Minister. Any disagreements are dealt with before this stage: it was stressed that Ministers like to receive unequivocal advice from their officials, and do not regard it as their role to arbitrate in disputes between bureaucrats.

The *CSIS Act* provides for the warrant application to be made before the Chief Justice or a "designated judge" of the Federal Court (Trial Division).<sup>88</sup> This process was established under the legislation in conscious imitation of the American approach to surveillance.<sup>89</sup> After the *CSIS Act* was passed, Heald J. (one of the earliest judges designated) and two officials went to Washington to study and report on the operation of the American system. Following this visit it was decided that it was unnecessary for hearings to take place outside of Ottawa, notwithstanding that CSIS is a regionally based organization and that applications for warrants come from all over the country. In practice, an application will be forwarded to the central office of CSIS and officers there will make the application in Ottawa on behalf of the regional branch. Another reason given for the designation of Federal Court judges was the need to restrict, to a minimum, the number of individuals to be vetted to deal with secure information. Consequently, initially only

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<sup>87</sup> Interview with P. Dubrule, National Security Directorate, Solicitor General Canada (Ottawa, 20 June 1994).

<sup>88</sup> *CSIS Act*, *supra* note 2, s. 2.

<sup>89</sup> See *Foreign Intelligence Surveillance Act* 50 U.S.C. § 1801 (1978) [hereinafter *FISA*].

three or four judges were designated, although the number has now risen to six or seven.<sup>90</sup> The advantage of the “designation” system is that it allows the judges concerned to build up some expertise in these types of cases. One disadvantage is that if the product of the surveillance is used in a subsequent criminal trial (for instance, in a terrorist prosecution as in *Atwap<sup>1</sup>*), any challenge to evidence obtained under the warrant will require that part of the case be determined in the Federal Court, rather than by the (provincial) trial judge, with a resulting dislocation of proceedings.

In practice, the judges are on duty for one week in turn and may be called upon at any time of day or night to sit to hear emergency applications. Although the judges’ perception is that they are may be called at unpredictable times to hear applications, the picture presented by csis was of months of painstaking preparation before an application is made; plainly, however, this does not preclude emergency applications. The hearings take place in a secure room within a secure building, which has been swept for bugging devices.<sup>92</sup> The judge will usually have received the papers for the hearing earlier in the day and have had several hours in which to read the documents submitted for the application. Typically, the documentation includes a lengthy affidavit submitted by csis setting out the background to the case and the reason why surveillance of the target is deemed to be “necessary” within the terms of the legislation. Where csis is requesting surveillance in support of its foreign surveillance gathering power,<sup>93</sup> an affidavit may be submitted on the policy background in the country concerned. At the hearing itself, the deponent, usually a senior policy officer in csis, will be available together with the lawyer assigned to csis by the Justice Department and sometimes a lower level csis officer who has more direct knowledge of the case and of the sources. The judge will normally wish to hear the deponent’s further evidence and will ask questions arising out of the sworn statement. Both judges interviewed stated that they regarded their role in such hearings as being similar to that where

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<sup>90</sup> A request made to the Chief Justice for a full list of past and present “designated” judges was courteously refused after “appropriate” consultation, for unspecified reasons: Letter of J.A. Isaac, Chief Justice (F.C.T.D.) to I. Leigh, (18 July 1994).

<sup>91</sup> *Supra* note 82.

<sup>92</sup> *Csis Act*, *supra* note 2, s. 27 merely stipulates that hearings shall be in private; s. 28 provides for regulations to be made to govern the hearings but none have been made in fact.

<sup>93</sup> *Ibid.* s. 16, as am. by S.C. 1995, c. 5, s. 25; the power enables csis to assist in relation to the defence of Canada or the conduct of Canada’s international relations on the personal request of the relevant ministers, provided Canadians are not targeted.

an unassisted party is before the court in litigation in person: hence, they would take on some of the burden of cross-examining the witnesses to make up for the absence of the “target” from the proceedings.

Evidence about the effectiveness of this system of judicial scrutiny is hard to evaluate. One judge has claimed:

Judicial intervention was not required to allow the Service to conduct surveillance effectively; that could, more conveniently, have continued under executive fiat. It was required to protect potential targets against unjustified surveillance and to assure the public that such protection was being effectively afforded. The benefit of judicial intervention to the Service and, thus, to Canada, will be imperilled if it is presented to and perceived by the public as primarily a function of the intelligence gathering system rather than of the judicial system. ... What must be sought here is the maximum accountability and accessibility of and to the judicial presence in the intelligence gathering system but not to the extent of impairing the investigation of genuine threats to national security. ... [T]he credibility of the Service has a direct and positive, but by no means exclusive, dependency on the credibility of the judicial presence in the system; since judicial credibility is so dependent on openness, the Service, too, has an interest in the openness of that judicial presence.<sup>94</sup>

In interviews, CSIS argued that the main constraint on the issue of warrants was the process of internal review, rather than that of judicial scrutiny. However, this internal mechanism has been established at least partly to prevent problems arising before the judge. Neither of the judges interviewed knew of any case (out of several hundred; see Table I, below, for figures for 1988-95) in which an application for a warrant had been refused outright.<sup>95</sup> This was the only question that the CSIS officers interviewed refused to answer (although the Service’s record was described as a good one in such applications). However, if the judges were unable to point to an application that had been refused, it was suggested that a small number had been voluntarily withdrawn by the Service in the face of judicial hostility at the hearing, and that in many more cases the judges had imposed conditions upon the grant of the warrant. In practice, some of these conditions<sup>96</sup> have become standard (such as the protection of attorney-client privilege) but others may be

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<sup>94</sup> *Atwal*, *supra* note 82 at 139-40, Mahoney J.

<sup>95</sup> This seems to mirror American experience with *FISA*, *supra* note 89. A 1995 study found that the court had approved 7,539 warrant applications by the U.S. Justice Department to conduct electronic surveillance on grounds of national security since 1987 and denied only one application: see P. Colangelo, “The Secret *FISA* Court: Rubber Stamping on Rights” (1995) 53 *Covert Action* 43 at 43-49.

<sup>96</sup> The Special Parliamentary Committee’s proposal that the standard conditions be incorporated in the legislation has not been implemented: see *In Flux*, *supra* note 75 at 123.

tailored to meet the facts of each individual case.<sup>97</sup> There was some suggestion that experience of applications in the early years of the legislation had led to changed practices and expectations on behalf of the Service: this was one judge's view. Apparent confirmation came in CSIS's suggestion that many conditions were now volunteered in the warrant application so as to minimize the invasion of privacy. Where the warrant application is one for renewal of the warrant (each may last up to a year<sup>98</sup>), the judge will commonly have available, in an updated affidavit, some evidence of what the surveillance previously authorized under the warrant has produced, and why a further extension is necessary. This is the nearest that the judge will get to "feedback" on the usefulness of the warrant.

There are several notable gaps in these figures that make them difficult to interpret. As already noted, refusal rates are not published. Although Table I, below, shows a dramatic growth in warrants issued since 1990-91, SIRC has been at pains to point out that this is not necessarily because of a corresponding growth in CSIS activity requiring authorization.<sup>99</sup> SIRC notes that comparison between years to denote trends is difficult for two reasons. First, a given warrant may cover many or a few individuals, so the number of warrants is not necessarily a helpful indicator of CSIS activity or a measure of the extent of individual privacy invaded. Second, the figures reflect changing interpretations by the CSIS of when a warrant is required.

**Table I**  
**New and Renewed Warrants under *CSIS Act*, Section 21**

	1988-89	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95
New Warrants	55	34	27	39	32	85	85
Renewals	35	50	51	73	115	103	130
TOTAL	90	84	78	112	147	188	215

<sup>97</sup> Examples of judicial conditions imposed on the use of the *CSIS Act*, *supra* note 2, s. 21, may be found in *Atwal*, *supra* note 82 at 120-21.

<sup>98</sup> *CSIS Act*, *supra* note 2, s. 21(5). The Parliamentary Committee believed that this period was excessive: see *In Flux*, *supra* note 75 at 231. Counter Subversion warrants have a maximum duration of sixty days.

<sup>99</sup> See, for example, Canada, Security Intelligence Review Committee, *Annual Report 1993-94* (Ottawa: Queen's Printer, 1994) at 29 [hereinafter *SIRC 1993-94*].

Source: SIRC Annual Reports.

This last point is an interesting example of the ripple effect of *Charter* decisions as they are internalized by bureaucrats. For example, the ruling by the Supreme Court of Canada in *R. v. Duarte*<sup>100</sup> that consensual or participant monitoring of conversations requires legal authority (*i.e.*, a warrant) led to an instantaneous change in CSIS practice. Although the judgment was handed down in the context of police practice in criminal investigations, the implications for security investigations were anticipated and, moreover, CSIS applied the principle also to video recordings in advance of any court ruling to that effect.<sup>101</sup> Similarly, a decision requiring the naming in the warrant of all known suspects in criminal wiretapping applications,<sup>102</sup> rather than relying on formulae such as “persons unknown” (so-called “basket clauses”)<sup>103</sup> has been applied by analogy to CSIS warrants. In interviews, SIRC officials stated that CSIS had also changed its practices in several other respects leading to an increased figure for warrants. These included obtaining more than one warrant where postal interception was employed so that postal workers would not see, from the face of the warrant, the other surveillance techniques employed, and obtaining warrants for telephone toll (metering)<sup>104</sup> surveillance and for access to bank data where these were done “informally” in the past.

*Ex post facto* review of surveillance under warrant is the role of the other personnel operating within the oversight machinery (SIRC and the Inspector General). In practice, both SIRC and the Inspector General attempt to review the use of section 21 powers by each randomly sampling four applications annually, divided between Counter Intelligence and Counter Terrorism. An example of successful review cited was one in which SIRC complained about a warrant in respect of a fax machine to which multiple users other than the target had access.

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<sup>100</sup> [1990] 1 S.C.R. 30 [hereinafter *Duarte*].

<sup>101</sup> Canada, Security Intelligence Review Committee, *Annual Report 1989-90* (Ottawa: Queen's Printer, 1990) at 14-15 [hereinafter *SIRC 1989-90*]; the Supreme Court later so ruled in *R. v. Wong*, [1990] 3 S.C.R. 36.

<sup>102</sup> *R. v. Chesson*, [1988] 2 S.C.R. 148 [hereinafter *Chesson*], holding that because one of the appellants, Vanweenam was known to the police at the time of the warrant application but not named in it, evidence obtained through the wiretapping under warrant could not subsequently be adduced against her. See *SIRC 1994-95*, *supra* note 83 at 32.

<sup>103</sup> *Chesson*, *supra* note 102 at 164-65.

<sup>104</sup> The practice of recording the phone numbers of telephones called but not the conversation.

However, from SIRC's perspective, the usual purpose of this exercise is not to "second guess" the judge who granted the warrant, but rather to check that the affidavit submitted in support of the application "fairly and completely" represented the file information available to CSIS (*i.e.*, that the affidavit was a balanced representation of the situation). To this end, SIRC checks the stages undergone before submitting the affidavit. The reviewing officer will be concerned that there are no obvious jumps in logic and that fact and opinion have been clearly differentiated in submitting the application. The description of this review process mirrors the task of the Independent Counsel, depicted above. In SIRC's view, the quality of the supporting affidavits has improved since 1984—initially affidavits were "full of unsupported opinions and conclusions."<sup>105</sup> But now, due to the involvement of the Department of Justice lawyer, they are considerably improved. Review by the Inspector General has also led to findings that the affidavits were insufficiently accurate on factual questions prior to these changes.<sup>106</sup> The Inspector General has also monitored the Service's *execution* of section 21 warrants and found that the ministerial directives and warrant conditions were being satisfactorily followed.<sup>107</sup>

Attitudes were mixed about the need for reform of the procedure. Understandably, CSIS officials stated that they were satisfied with the procedure as it stood and felt that it adequately protected their interest. Proposals for reform have come from other quarters. The Special Parliamentary Committee suggested that a "devil's advocate" be introduced to contest the need for the warrant before the judge. Unlike the Independent Counsel, the devil's advocate would be a non-government lawyer (from a list of security-cleared counsel drawn up by the Federal Court in consultation with the Canadian Bar Association) who would be briefed to act independently and to challenge the CSIS case.<sup>108</sup> It was clear from an interview with an officer in the Solicitor General's Department that the government's decision not to implement this recommendation<sup>109</sup> was based on political considerations, specifically, that the then Minister did not wish to share involvement in

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<sup>105</sup> Interview with M. Archdeacon, Executive Director of SIRC (Ottawa, 21 June 1994).

<sup>106</sup> *SIRC 1989-90*, *supra* note 101 at 15.

<sup>107</sup> *Ibid.* [emphasis added].

<sup>108</sup> *In Flux*, *supra* note 75 at 125. Alternatively, the same panel of private practitioners currently used by SIRC for complaints hearings could be used: see Part VII, below.

<sup>109</sup> *On Course*, *supra* note 75 at 64. The Government flatly rejected the Special Committee's recommendation, adding only that implementing a devil's advocate as part of the CSIS affidavit procedure "would not enhance the rigour of the ... process."

security decisions with anyone else. The judges interviewed both took the view that a devil's advocate would be an improvement over the current procedures and would assist the court in fulfilling its role. However, one judge pointed out that the court has the inherent ability to appoint, if necessary, *amicus curiae* to fulfill a similar role. In practice it seems that this has never been resorted to, although it has been threatened on one or two occasions.

More sweeping criticism of CSIS's powers under section 21 has come from civil libertarians. The Canadian Civil Liberties Association (CCLA) has argued consistently, since before the establishment of CSIS, that federal investigatory and intrusive powers are excessive, because they allow for the targeting of Canadian citizens and permanent residents where they are not suspected of law breaking.<sup>110</sup> The CCLA would like to see both the powers under warrant under section 21 of the *CSIS Act* and other intrusions (including the gaining of access to confidential records and the use of informants) restricted to instances in which there are reasonable grounds to believe that the target has, is, or is going to commit a serious security-related breach of the law.<sup>111</sup> The CCLA's stance has led it to lobby in the political arena—for instance, by submitting a brief before the Special Parliamentary Committee and by challenging the constitutionality of aspects of the *CSIS Act*.<sup>112</sup>

In the CCLA's view, limitation of the CSIS mandate should go hand-in-hand with organizational reform so that CSIS becomes part of a law enforcement agency once again (reversing, in a sense, the civilianization that occurred following the *McDonald Commission Report*<sup>13</sup>). It was perceived that the resulting increased likelihood of *ex*

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<sup>110</sup> See generally Canada, House of Commons, Special Committee on the Review of the CSIS Act and the Security Offences Act, *Minutes of Proceedings and Evidence of the Special Committee* vol. 1 (Ottawa: Queen's Printer, 1990) at 8:21-51, testimony of Alan Borovoy, General Counsel, Canadian Civil Liberties Association (16 January 1990).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Corporation of the Canadian Civil Liberties Association v. Canada (A.G.)* (1992), 8 O.R. (3d) 289 (Ont. Ct. (Gen. Div.)) [hereinafter *CCLA*]. It was held on a preliminary point in *Re Corporation of Canadian Civil Liberties Association and Attorney-General Canada* (1990), 74 O.R. (2d) 609 (Ont. Ct. (Gen. Div.)) [hereinafter *Re CCLA*] that the Association had *locus standi* to challenge the provisions: Potts J. held, at 619, that although the Association itself did not claim to have been targeted by CSIS, it was able to challenge the legislation since, in view of the surreptitious nature of CSIS surveillance, a clear instance of use of the powers was otherwise unlikely to arise in litigation and the legislation would have been effectively immune from constitutional challenge.

<sup>113</sup> *Supra* note 74, vol. 1 at 19-22. This is a striking viewpoint in view of the events leading up to the report. However, the CCLA's General Counsel, Alan Borovoy, argues that the abuses committed by the RCMP were less a product of its law-enforcement role than of its exalted status as a national institution; for an account which juxtaposes the abuses with the RCMP's traditional image,

*post facto* challenges would act as a form of self discipline. However, it is noteworthy that even without such reform, CSIS interviewees repeatedly referred to the operational corrective of the fear of public exposure and scandal as a major consideration.<sup>114</sup> Nevertheless, if restriction of the mandate to matters of criminality is desirable, it seems better that it be achieved through legislative reform, rather than through self restraint within CSIS.<sup>115</sup> The same point applies to the oversight mechanisms under the *CSIS Act*: however valuable SIRC, in particular, is, it is not a substitute for more closely guarded legal powers, since its function is review of the existing powers.

The CCLA's arguments that CSIS's mandate represents a threat to law abiding Canadians because the mandate is both overextensive and vague, have found little favour in the courts. A challenge to CSIS's mandate and powers based on their alleged effect in "chilling" freedom of expression, assembly, and association failed in the Ontario Court (Gen. Div.).<sup>116</sup> Potts J. rejected the notion that such an argument, based largely on citizens' fears and suspicions, demonstrated the infringement of constitutional rights.<sup>117</sup> An argument based upon infringement of privacy relating to the use of powers under section 21 warrants was more successful in that the section was, in general terms, found to restrict recognizable freedoms. However, on analysis of the relevant criteria, the provision contained an objective standard by which the Federal Court judge could balance the state and individual privacy interests, as required with surveillance for law enforcement purposes.<sup>118</sup>

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see *On Guard For Thee (Part 3)—Shadows of the Horseman* (Montreal: National Film Board/CBC, 1981).

<sup>114</sup> Prophetically as it turned out: within three months of the interviews, the Heritage Front affair, *supra* note 83, came to light.

<sup>115</sup> Thus, while recognizing that the disbandment of the counter-subversion branch of CSIS has probably led to a reduction in unacceptable CSIS surveillance, the CCLA nevertheless wishes to see the *CSIS Act* amended to exclude subversion.

<sup>116</sup> *Re CCLA*, *supra* note 112.

<sup>117</sup> *CCLA*, *supra* note 112. Potts J. applied the two stage test from *Irwin Toy Limited v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, requiring both the activity in question to fall within a protected sphere of conduct and the purpose of the impugned legislation to be to restrict a protected activity. The freedom of expression argument was rejected when the judge found that "chilling effect" had not been adopted within Canadian doctrine to determine the scope of conduct protected under the *Charter*. The challenges based on freedom of assembly and association failed because, while they were within the protected sphere, the applicant did not establish that the purpose of the legislation was to restrict these freedoms. An argument that the *CSIS Act* contravened s. 7 of the *Charter* failed on the ground that the purpose was not to restrict personal decision making.

<sup>118</sup> See *Hunt v. Southam Inc.*, [1984] 2 S.C.R. 145. However, the judge was undecided on whether a test of this kind was appropriate in view of the intelligence-gathering function of CSIS; compare *Atwal*, *supra* note 82 at 133, Mahoney J.

Whereas the *CCLA* case<sup>119</sup> concerned a hypothetical use of section 21, the provision has successfully passed *Charter* challenge in an instance of its use in practice. In *Atwal*,<sup>120</sup> an attempt was made to attack a warrant issued under section 21 so as to prevent the admission in a subsequent terrorist trial of the evidence obtained. The Federal Court of Appeal held that the section did not violate section 8 of the *Charter*. The majority found that different standards were to be applied to national security cases than those applicable to criminal investigations; the standard of “credibly-based probability”<sup>121</sup> of an offence, required in criminal cases before an invasion of privacy could be countenanced, was not appropriate. The *CSIS Act* standard is lower in two respects: it only requires “reasonable suspicion” of a threat to the security of Canada (one opinion describes this as “a bona fide partial belief that a particular activity may constitute a threat”<sup>122</sup>); second, the field of threats to security is wider than activities which could constitute criminal offences. Huggeson J. dissented strongly, and argued that the tests of compatibility for searches in a criminal investigation context should apply. In his view, section 21 failed to demonstrate a reasonable and proportionate relationship between the relevant state interest and the proposed intrusion. He argued that the language of section 21 did not provide an objective standard by which the judge could test the need for a warrant.

There is no requirement to show that the intrusion to the citizen’s privacy will afford evidence of the alleged threat or will help to confirm its existence or non-existence. Nothing in the language of the statute requires a relationship between the information it is hoped to obtain from the intercepted communication and the alleged threat to the security of Canada.<sup>123</sup>

Although the majority in *Atwal* rejected a direct analogy with the criminal law standard in applying section 8, they nevertheless ordered disclosure to the defendant of the *CSIS* affidavit submitted in support of the warrant application. Here the reasoning was by direct analogy with the practice in search warrant and *Criminal Code* wiretapping cases: the disclosure was necessary to enable the defendant to attack the

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<sup>119</sup> *CCLA*, *supra* note 112.

<sup>120</sup> *Supra* note 82.

<sup>121</sup> *Ibid.* at 133.

<sup>122</sup> *In Flux*, *supra* note 75 at 121.

<sup>123</sup> *Atwal*, *supra* note 82 at 151. By illustration, he argued that hypothetically a warrant might fulfill the statutory criteria if its purpose was to obtain material to enable *CSIS* to blackmail the target into becoming an informer.

warrant.<sup>124</sup> However, the Court clearly envisaged a successful application by CSIS for non-disclosure of the affidavit on grounds of Crown privilege: disclosure was ordered on the technical basis that instead of waiting for an application of this kind, the trial judge had suppressed the affidavit on his own initiative. The warrant was quashed by agreement for admitted inaccuracies in the affidavit and so disclosure never took place in the event. *Atwal* was decided before the Supreme Court judgments providing for judicial editing of wiretapping affidavits prior to disclosure,<sup>125</sup> and so this alternative was not considered by the Federal Court of Appeal. In principle, there is no reason why the issuing judge could not edit the CSIS affidavit prior to disclosure where that was necessary to enable a criminal defendant to make full answer and defence. If designated Federal Court judges are competent and appropriate personnel to weigh such affidavits in considering section 21 applications in the first place, it would be inconsistent to argue, on the basis of a difference between security and criminal matters, that they would be unable to carry out such editing. Similarly, the logic of public inspection of search warrants issued *in camera* would appear equally applicable to section 21 warrants, on grounds of accountability of CSIS and of the judiciary to the public.<sup>126</sup> However, in practice it is hard to envisage the courts ordering such disclosure, because of the public interest in secrecy concerning CSIS's surveillance, and it may be argued that review by SIRC and the Inspector General substitute for public scrutiny of this kind.

Following *Atwal*, the government professed itself satisfied that section 21 complied with section 8 of the *Charter* and was not in need of reform.<sup>127</sup> Although the Special Parliamentary Committee anticipated that a body of case law based on examination of the special requirements of national security would build up in the courts, so adjusting section 21 to the *Charter*,<sup>128</sup> this has not materialized in fact, perhaps because of the internal reforms already discussed. In practice, the *Charter* has had its main impact on the use of this power through internalization of its standards in anticipation of what the courts would do, rather than through *ex post facto* judicial review.

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<sup>124</sup> See *MacIntyre*, *supra* note 9; *Wilson*, *supra* note 53; and *Atwal*, *supra* note 82 at 134-35, Mahoney J.

<sup>125</sup> See *supra* notes 55-60.

<sup>126</sup> See *supra* notes 44-45 and accompanying text.

<sup>127</sup> See *On Course*, *supra* note 75 at 65.

<sup>128</sup> See *In Flux*, *supra* note 75 at 119.

From the jurisdiction of Federal Court judges in authorizing CSIS actions in advance, we turn now to situations in which the judiciary is involved in review after the event of decisions dependent on security and intelligence advice.

## VI. FEDERAL COURT REVIEW

Whereas designated Federal Court judges have jurisdiction under section 21 on an *ex parte* basis, there are a further three forms of proceedings where similarly designated judges conduct a form of review on security questions arising in contested proceedings. These are, respectively: where a person claiming refugee status is deported under a ministerial certificate alleging that their presence is a threat to the security of Canada; where an appeal is made against the use of an exemption under freedom of information legislation; and where a claim of privilege against disclosure is made under the *Canada Evidence Act*. In each case, the legislation gives the other party a restricted opportunity to argue against the government's claim, without giving access to the contested information. This requires sensitive procedural protections so as not to prejudice the secret material, but, nevertheless, respects the adversarial rights of the contesting party.

Most immigration, deportation, and citizenship cases with a security aspect are dealt with through SIRC review (described in Part VII, below).<sup>129</sup> However, a variation on these procedures, involving not SIRC but determination of the issues by the courts, applies in refugee cases. In such cases, section 40.1 of the *Immigration Act* provides for a form of judicial review of a ministerial certificate where security is at issue.<sup>130</sup>

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<sup>129</sup> See *In From The Cold*, *supra* note 1 at 191-93.

<sup>130</sup> The procedure was introduced by the *Immigration Act*, R.S.C. 1985, c. I-2, following a recommendation that a person claiming refugee status should have the opportunity to present his or her case: W. Gunther Plaut, *Refugee Determination in Canada: Proposals for a New System. A Report to the Hon. Flora MacDonald, Minister of Employment and Immigration* (Ottawa: Supply & Services Canada, 1985) at 86-87.

In two recent instances, CSIS's alleged previous contacts with applicants for refugee status has become a matter of public controversy when attempts were subsequently made to remove them from Canada on security grounds. A Palestinian refugee claimant, Wahid Baroudh, was deported to the Sudan in January 1996 on grounds connected with his membership of the PLO, despite a finding from the Federal Court that he was not, as alleged, personally involved in terrorism. Baroudh alleged that the action against him followed his refusal to cooperate with CSIS. In the second instance, a former member of the Tamil Tigers, Thalayasingam Sivakumar, alleged that he

The certificate has the effect of suspending the application for refugee status. The Federal Court must determine whether the certificate is “reasonable on the basis of the evidence.”<sup>131</sup> The judge is required to examine the intelligence evidence *in camera* and may do so *ex parte*, but must provide the applicant with a summary in order to be reasonably informed of the circumstances leading to the service of the certificate.

There are conflicting Federal Court decisions on what this test requires. In one case, a ministerial certificate, which stated that the applicants were a security threat because of alleged subversive and terrorist activities, was found to be unreasonable.<sup>132</sup> The decision occurred during the Gulf War and the applicants (who were Iraqis) had entered Canada on forged papers and in possession of a weapons price list, and literature from a militant Shiite Muslim organization which had engaged in terrorist activities against the Iraqi government. The judge heard evidence from a CSIS officer *in camera* and reviewed relevant security intelligence reports before holding that there was insufficient evidence relating to the danger posed by applicants. Cullen J. found that the authorities had failed to satisfy the high standard of proof required in cases involving liberty of the person. However, the test has been diluted by the Federal Court in later decisions. In *Re Fahari-Mahdavi*,<sup>133</sup> Denault J. upheld a certificate served in proceedings for M’s removal and exclusion because there were reasonable grounds to believe that she was a member of an organization that would engage in acts of violence. The judge held that the Minister was not required to show a high standard of probability that acts of violence would actually occur. It was sufficient that M was a member of the Mujahedhin E Khalq (a group whose objective was the overthrow of the Iranian government) and that there was clear evidence linking the group with the planning of an attack on the Iranian Ottawa embassy in 1992. The judge expressly distinguished between the provision’s requirement of reasonable suspicion and *proof*:<sup>134</sup> the Minister did not need to prove that the group was a terrorist one or that M was directly involved in the attack. M’s evidence on the nature of the group from an expert witness,

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supplied information to CSIS in exchange for a promise of safe haven in Canada. In January 1996 SIRC launched an investigation into the allegations. On both Baroudh and Sivakumar: see *Canadian Association of Security and Intelligence Studies Newsletter* (Spring 1996) No. 26 at 9-11.

<sup>131</sup> *Immigration Act*, *supra* note 130, s. 40.1(4)(d).

<sup>132</sup> *Smith v. Canada*, [1991] 3 F.C. 3 (T.D.) [hereinafter *Smith*].

<sup>133</sup> (1993), 63 F.T.R. 120 (F.C.T.D.).

<sup>134</sup> *Ibid.* at 123 [emphasis added].

was finessed for the same reason.<sup>135</sup> This decision was followed in a later case in which Cullen J. appears to have had second thoughts about the test he applied in *Smith*.<sup>136</sup> In *Re Mohamed Hussein Al Hussein*,<sup>137</sup> a certificate was served on the same ground, alleging that the applicant was a member of Hizbollah, which, according to CSIS and the Minister, was a known terrorist organization; the applicant admitted membership in Hizbollah but denied being a terrorist carrying out assignments. After quoting public source material which suggested that Hizbollah was not exclusively a terrorist organization, the judge referred to Denault J.'s standard and stated enigmatically, "I now agree." Cullen J. found that the detailed evidence presented by CSIS indicated that the responsible Minister had a "solid basis of evidence" on which to issue the certificate.

Federal Court challenges to government claims of evidential privilege are also heard by designated judges but take a more limited form, since they necessarily arise in the course of other proceedings. Nevertheless, they are of interest in two respects. First, privilege claims arise where security-related decisions by CSIS, SIRC, or the Solicitor General are subject to legal challenge: the availability of privilege affects the openness of the decisions challenged. Second, the procedure for claiming privilege is of interest in its own right as a form of secret proceeding.

The *Canada Evidence Act* adopts a three-layered approach. Generally, claims to Crown privilege are determined by the judge trying the cases in which they arise; the judge has the discretion to inspect any documents in question.<sup>138</sup> However, where a certificate is served claiming immunity for cabinet confidences, this is conclusive and there is no judicial discretion to order disclosure or to inspect.<sup>139</sup> Claims on grounds relating to national security, defence, and international relations occupy an intermediate position. The claim must be heard by the Chief Justice of the Federal Court or by a judge designated by him

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<sup>135</sup> *Ibid.* at 125-26. Compare Mackay J. who held in *Al Yamaniv. Canada (Solicitor General)*, [1996] 1 F.C. 174 (T.D.) [hereinafter *Al Yaman*], that the relevant burden of proof in the analogous case of a non-refugee deportation on security grounds was the civil law standard of a balance of probabilities. Consequently, he held that there were no grounds for overturning a finding by SIRC that the complainant was a member of Popular Front for the Liberation of Palestine, an international terrorist organization likely to engage in acts of violence that would or could endanger the lives or safety of persons in Canada.

<sup>136</sup> *Supra* note 132.

<sup>137</sup> (13 December 1993), File No. DES-8-93 (F.C.T.D.).

<sup>138</sup> *Canada Evidence Act*, *supra* note 3, s. 37.

<sup>139</sup> *Ibid.*, s. 39, as am. by S.C. 1992, c. 1, s. 144(f).

(this will usually involve the issue being remitted by the trial judge until the privilege claim has been determined).<sup>140</sup> This three-layered approach replaced an earlier provision which made ministerial certificates conclusive in these instances.<sup>141</sup> Despite this change, in practice there are few instances of the courts overruling governmental claims to immunity. In addition to Crown privilege available under the *Canada Evidence Act*, security considerations may arise in a common law claim of informer privilege.<sup>142</sup> The potential overlap between informer privilege and protection of national security appears anomalous in view of the procedural advantages the government enjoys where the latter is invoked. In practice, section 38 of the *Canada Evidence Act* has been used to protect security sources in some instances where informer privilege would have lain, and presumably this is the course the Crown will normally follow where the former is available.

The *Canada Evidence Act* provision regarding privilege applies both to criminal and civil cases. The proceedings must be held *in camera* and the *Act* gives the person claiming the privilege (invariably the government) an automatic right to be heard *ex parte* on demand.<sup>143</sup> Effectively judicial discretion arises at three distinct stages: (1) in deciding whether to inspect the documents in respect of which privilege is claimed (the claim can be upheld without inspection); (2) if inspection does take place, in upholding the claim; or (3) over the degree of disclosure. It might have been thought that this scheme suggests that claims of privilege on grounds of prejudice to national security, defence, or international relations are to be treated less deferentially than before. The availability of designated judges to hear these cases could be taken to signal a legislative intention that government claims be treated sceptically by a specialist cadre of judges exercising their discretion to

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<sup>140</sup> *Ibid.*, s. 38; and *Cooper*, *supra* note 36 at 130-38. See also P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 519-23. Although the federal government has announced that a working group is reconsidering the whole question of the use of security information in the courts, no proposals for reform have emerged: see *On Course*, *supra* note 75 at 49.

<sup>141</sup> Section 41(2) of the *Federal Court Act* R.S.C. 1970 (2d Supp.), c. 10, as rep. by the *Federal Court Act* R.S.C. 1985, c. F-7.

<sup>142</sup> See Lawler, *supra* note 36 at 122-27; and *Cooper*, *supra* note 36, c. 7. There is some overlap between these sources of protection. *Cooper*, at 255, argues—from parallel provisions in the *Access to Information Act* *supra* note 84 and the *Privacy Act*, R.S.C. 1985, c. P-21, legislation referring to protection of sources and introduced by the same provision as the exemptions under the *Canada Evidence Act* *supra* note 3, s. 39—for the view that informer privilege may be claimable under the protected public interests in the statutory scheme.

<sup>143</sup> *Canada Evidence Act* *supra* note 3, ss. 38(5) and 38(6).

inspect the relevant documents. However, this has not been the approach adopted by the courts.

In practice, the judges have erected a high initial threshold before they will be prepared to inspect the documents, with the majority of claims to privilege upheld without inspection. Thus, in the context of criminal trials involving security information, disclosure has been refused without inspection on the ground that the defendants were unable to demonstrate to the satisfaction of the judge how the information requested would assist their defence.<sup>144</sup> The same approach has been followed in a civil action for conspiracy arising from the applicant's refusal of security clearance, where the application was refused.<sup>145</sup>

From the case law, a number of factors emerge as relevant both to the question of whether the judge should inspect and to the balancing exercise over disclosure. One is the importance of the case from the claimant's behalf: this is a complex question involving both the type of claim, and the probable effect of the outcome. Naturally, a defendant who stands to lose his or her liberty through a criminal conviction may be said to have a weightier interest than a plaintiff seeking compensation for government action. However, it is too much of a simplification to say that criminal cases will always have a higher weighting. There are *dicta* suggesting that the severity of the probable sentence may be a factor in addition to the simple question of the likelihood of conviction. Moreover, if the issue about which evidence is sought is central to the litigation, it may weigh heavier in a civil case than a peripheral issue in a criminal case. Accordingly, a statement in one civil action that a monetary claim could hardly ever outweigh an assertion of a threat to national security from disclosure was criticized in the Federal Court of Appeal.<sup>146</sup> Other relevant factors include the age of the information

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<sup>144</sup> *Goguen v. Gibson*, [1983] 2 F.C. 462 (C.A.) [hereinafter *Goguen*], aff'g [1983] 1 F.C. 872 (T.D.); and *Kevorkv. Canada (csis)*, [1984] 2 F.C. 753 (T.D.).

<sup>145</sup> *Gold v. Canada*, [1986] 2 F.C. 129 (C.A.) [hereinafter *Gold*]; see also *Re Canada (Royal Canadian Mounted Police Complaints Commissioner)* [1991] 1 F.C. 226 (T.D.) [hereinafter *Re Rankin*], where disclosure of two intelligence files and a police manual was held to be unnecessary for the disposal of a complaint against the police. The complaint was brought by an anti-nuclear protester concerning excessive force in the policing of a demonstration. In *R. v. Praxis Corp.* (1986), 9 F.T.R. 50 (F.C.T.D.), Addy J. refused an application to set aside a certificate in an action against the RCMP arising from the alleged actions of the security branch, alleging that disclosure would be injurious to national security. The application failed because of lengthy delay (during which the applicants had attempted to have the certificates lifted by political lobbying) and because the applicants were unable to show any reason for the desire to inspect except a generalized suspicion that it would assist their case.

<sup>146</sup> See *Gold*, *supra* note 145.

sought, and the international situation at the time of the request.<sup>147</sup> Although no one factor is decisive, the centrality of the information to the litigation does emerge as a factor capable of outweighing other considerations.

These principles can be seen in operation in instances where judges have inspected security material. In one civil case involving a challenge to refusal of security clearance,<sup>148</sup> the judge exercised the discretion to examine the documents because it was plain from both parties' submissions that the evidence in respect of which the privilege was claimed (CSIS evidence about a particular organization) was determinative of the issue in the action, namely whether the applicant's membership of the organization made him a security threat. Having examined the evidence, the certificate was upheld. In another civil action, a certificate was used in an investigation by a health and safety commission into how an army corporal obtained access to weapons and ammunition for use in an attack on the Quebec Legislative Assembly which left three people dead and nine wounded.<sup>149</sup> The commission had sought full access to a report of an army inquiry into the incident, whereas the government had deleted from the version handed over some paragraphs dealing with security measures at a nearby army base. The judge inspected the unedited version of the report but then upheld the immunity claim. There are no reported cases in which a judge has inspected material subject to a certificate under section 38 of the *Canada Evidence Act* and then ordered disclosure, even in part. A certificate was quashed in one challenge arising from a criminal trial, but this was on the procedural ground that the judge had incorrectly raised the question of privilege, rather than waiting for an application from the Crown.<sup>150</sup>

The two-stage approach to inspection and disclosure mirrors (perhaps too closely) that adopted in the common law of requiring the litigant seeking access to the document to demonstrate relevance before

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<sup>147</sup> See *Goguen*, *supra* note 144 at 904-05.

<sup>148</sup> *Henriev. Canada (SIRC)*, [1989] 2 F.C. 229 (T.D.) [hereinafter *Henriev*].

<sup>149</sup> *Quebec (Commission de la Santé et de la Sécurité du Travail) v. Canada* (1989), [1990] 2 F.C. 392 (T.D.).

<sup>150</sup> *Atwal*, *supra* note 82 at 144. The case concerned an attack on a warrant issued under the *CSIS Act*, *supra* note 2, s. 21, and Marceau J. emphasized that, in his view, disclosure of the original supporting affidavit (which the Crown was resisting) could scarcely have been more relevant to the issue between the parties: see *Atwal* at 138. Following the decision, CSIS admitted inaccuracies in the original warrant application and, following the resignation of the CSIS director, the warrant was quashed. See also *supra* notes 120-124 and accompanying text.

the judge will carry out inspection.<sup>151</sup> The Canadian cases demonstrate a great reluctance to overrule privilege claims, with the courts operating a particularly stringent first limb to the test: few claimants have managed to demonstrate the relevance of the documents they were seeking so as to reach the inspection stage. The erection of such a high initial hurdle can be seen as a somewhat disingenuous judicial technique for avoiding openly favouring the state in balancing interests at the second stage. Away from national security cases a different approach is discernible. In *Carey v. Ontario*,<sup>152</sup> the Supreme Court of Canada took a liberal approach to the onus of proof in a privilege case involving Cabinet documents of a provincial government.<sup>153</sup> The Court recognized the difficulty a litigant faces in asserting the relevance of documents which have not been disclosed and rejected the reasoning of the Federal Court of Appeal that the plaintiff had to show more than bare relevance.<sup>154</sup> It commended, instead, more frequent judicial inspection of the documents.

Although, overall, the judicial record is a disappointing one which fails to mark a departure from the previous practice, there have been indications that the judges recognize the potential importance of their new position. Mahoney J. stated in *Gold*:

The executive had been unable to sustain the credibility of the system of absolute privilege. ... The new system was a politically necessary response to serious public concerns. Effective judicial supervision is an essential element of the new system. Among other aspects of the new system, its credibility is dependent on a public appreciation that the competing public interests are, in fact, being judicially balanced. It will not be well served if it appears that the exercise of judicial discretion is automatically

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<sup>151</sup> *Burmah Oil v. Bank of England*, [1980] A.C. 1090 (H.L.); and *Air Canada v. Secretary of State for Trade (No. 2)* [1983] 2 A.C. 394 (H.L.). However, the recent Scott Report interprets the U.K. cases so that a judge is automatically bound to inspect documents for which privilege is claimed in a criminal case and argues that class claims are inappropriate in a criminal context so that no issue of balance arises: see Great Britain, House of Commons, *Return to an Address of the Honourable Minister dated 15 February 1996 for the Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution* H.C. (1995-96) 115, paras. G.18.43ff. See generally I. Leigh & L. Lustgarten, "Five Volumes in Search of Accountability: The Scott Report" (1996) 59 Mod. L. Rev. 695.

<sup>152</sup> [1986] 2 S.C.R. 637 [hereinafter *Carey*].

<sup>153</sup> At the provincial level, privilege rests on the common law. Federal Cabinet documents are governed by a much-criticized provision (*Canada Evidence Act*, *supra* note 3, s. 39, as am. by S.C. 1992, c. 1, s. 144(f)) purportedly conferring absolute protection on confidences of the Queen's Privy Council in Canada: see *Cooper*, *supra* note 36 at 140-47 for a discussion of the constitutionality of this provision.

<sup>154</sup> *Carey*, *supra* note 152 at 677-83, La Forest J.

abdicated because national security is accepted as so vital that the fair administration of justice is assumed incapable of outweighing it.<sup>155</sup>

At present, though, it is difficult to conclude that the reality of judicial supervision matches the promise implicit in the statutory scheme. Sometimes the limitations on open justice in handling these cases have been transparent: for instance, where the government is permitted to adduce a secret affidavit<sup>156</sup> and *ex parte* arguments, or where the judge comments on the need to generalize statements in his or her judgment so as not to inadvertently provide details which could themselves prejudice security.<sup>157</sup>

The Crown privilege provisions have also been considered from a constitutional perspective. Thus, they were held not to violate section 7 of the *Charter*, when applied to allow an RCMP officer to refuse to answer questions on grounds of national security in an immigration hearing, although the hearing could result in the applicant being deported from Canada.<sup>158</sup> Addy J. reasoned that to find that the provisions conflicted with the *Charter* “would be tantamount to deciding that the *Charter* holds within itself not only the seeds of its own destruction but of all our rights, laws and institutions.”<sup>159</sup> Although he justified this position by comparison with cases upholding limitations on disclosure in criminal cases, the constitutional question has not been addressed in that context. An argument that the *Canada Evidence Act* violates section 11(d) of the *Charter* might still succeed, in relation to Cabinet confidences, because of the lack of judicial discretion,<sup>160</sup> and arguably, in security cases because of the mandatory *ex parte* provision available to the Crown. Certainly, the standpoint of the courts in security cases which require the applicant to demonstrate clear and specific relevance is at odds with the attitude adopted to disclosure in other criminal cases.<sup>161</sup>

Rather different considerations arise in relation to the Federal Court’s role under freedom of information legislation, since in these

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<sup>155</sup> *Gold*, *supra* note 145 at 138.

<sup>156</sup> In *Goguen*, *supra* note 144, a compromise was struck by allowing counsel to the applicants (but not the applicants themselves) to have access to an affidavit of this kind.

<sup>157</sup> See *Henrie*, *supra* note 148.

<sup>158</sup> *Mohammad v. Canada (Solicitor General)*(1989), 23 F.T.R. 186 (T.D.).

<sup>159</sup> *Ibid.* at 188.

<sup>160</sup> See *Cooper*, *supra* note 36 at 144-45, arguing that the section may be rescued by the Executive carrying out a balancing of interests.

<sup>161</sup> See generally the discussion of the *Parmar* cases, *supra* note 55 and accompanying text.

cases the government's objection to the disclosure of the information is, by definition, always central to the issue in question—the refusal of access. There is, therefore, no place for the exercise of a judicial discretion to refuse to inspect the documents. The judges' role must, however, be understood in the context of the legislative scheme.

Freedom of information is provided for in Canada by two parallel pieces of legislation passed in 1982: the *Access to Information Act*<sup>162</sup> (giving a right to documents held by government departments) and the *Privacy Act*<sup>163</sup> (providing a right to personal information held by departments). Each *Act* contains numerous exemptions, but those most relevant to this discussion protect information whose disclosure would prejudice national security, defence, or international relations.<sup>164</sup> An applicant who is refused access may apply to an independent ombudsman (the Information and Privacy Commissioners respectively), who will review the refusal, and, where appropriate, attempt to obtain greater disclosure.<sup>165</sup> However, the Commissioners do not possess powers to order a reluctant department to disclose information: coercive powers lie with the Federal Court alone. After review by the Commissioner, either the applicants or the Commissioner may apply to the Federal Court for review of the department's refusal. The Federal Court normally considers the question of entitlement to access on its merits. However, the security exemptions are one of a number of provisions where the court's role is ostensibly limited to considering whether there are reasonable grounds on which the refusal is based. Furthermore, cases related to the security exemptions are unusual since, unlike other cases under the legislation, they are heard by designated judges.

The Federal Court's performance in encouraging greater disclosure in keeping with the spirit of this legislation has been mixed. On the one hand, it has failed to require departments invoking security

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<sup>162</sup> *Supra* note 84.

<sup>163</sup> *Supra* note 142.

<sup>164</sup> *Access to Information Act supra* note 84, s. 15; and *Privacy Act, supra* note 142, s. 22. Related exemptions apply to information whose disclosure would prejudice lawful investigations (*Access to Information Act* s. 16(1); *Privacy Act*, s. 22(1)); to material received in confidence from other governments or states (*Access to Information Act* s. 13; *Privacy Act*, s. 19); to information from CSIS used for security clearances (*Privacy Act*, s. 23); and for databanks exempted under an Order in Council on security grounds (*Privacy Act*, s. 18).

<sup>165</sup> The Commissioner's investigations are conducted in private, are not subject formally to the rules of evidence, and may involve receiving confidential submissions from one party not disclosed to the other: see the comments of Rothstein J. in *Canada (Information Commissioner) v. Canada (Prime Minister)* [1993] 1 F.C. 427 at 475-76 (T.D.) [hereinafter *Prime Minister*].

exemptions to state the reasons for doing so in sufficient detail to guard against potential misuse. Thus, although the statutory provision contains a detailed list of nine types of harm which may be reasonably considered injurious to foreign relations, defence, or the detection, prevention, or suppression of subversive or hostile activities, the Court upheld a notice of refusal of access which failed to specify which of these was contemplated.<sup>166</sup> Similarly, the Federal Court has upheld the practice employed by csis of not specifically labelling deletions from documents disclosed with the exemption applied but, instead, of referring to them in a general covering letter.<sup>167</sup> However, it has been held that a claim of Crown privilege cannot be used to withhold documents from disclosure to the applicant under the *Privacy Act*.<sup>168</sup> The consequence is that the provisions enabling or requiring the withholding of information under the *Act* are to be treated as a comprehensive code and may not be added to by resort to privilege. Other decisions have increased the potential for judicial scrutiny. In an important case concerning a data bank exempt under the *Privacy Act*, which was held by csis, the Court found that it had jurisdiction to inspect files to ensure that they had been properly included in the bank.<sup>169</sup> The courts have also required it to be shown that there is a “reasonable expectation of *probable* harm” even when the *Access to Information Act* allows information to be withheld where disclosure “could reasonably be expected to” cause the specified injury,<sup>170</sup> as it does in the case of security exemptions.

The review procedure under the *Access to Information Act* and the *Privacy Act* is similar to that under the *Canada Evidence Act*<sup>171</sup> and in the refugee cases, in that they allow the Federal Court to hear applications for review *in camera*. Furthermore, the head of the government department is given the right to make applications in the absence of the applicant<sup>172</sup> and the Court is required to take every

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<sup>166</sup> *Canada (Information Commissioner) v. Canada (National Defence)* [1990] 3 F.C. 22 (T.D.).

<sup>167</sup> *Vienneau v. Canada (Solicitor General)* [1988] 3 F.C. 336 (T.D.).

<sup>168</sup> See also *Davidson v. Canada (Solicitor General)* [1989] 2 F.C. 341 (C.A.).

<sup>169</sup> *Ternettev. Canada (Solicitor General)* [1984] 2 F.C. 486 (T.D.); see also the later case *Ternettev. Canada (Solicitor General)* [1992] 2 F.C. 75 (T.D.).

<sup>170</sup> *Canada Packers Inc. v. Canada (Agriculture)* [1989] 1 F.C. 47 at 59-60 (C.A.), MacGuigan J.A., in relation to the *Access to Information Act* *supra* note 84, s. 20(1)(c) [emphasis in original]; *Prime Minister v. Canada (Solicitor General)* *supra* note 165, in relation to *Access to Information Act* s. 14; see also *Saint John Shipbuilding Ltd. v. Canada (Supply & Services)* (1990), 67 D.L.R. (4th) 315 (F.C.T.D.).

<sup>171</sup> *Supra* note 3.

<sup>172</sup> *Privacy Act*, *supra* note 142, s. 51; and *Access to Information Act* *supra* note 84, s. 50.

reasonable precaution to prevent disclosure of material received *in camera* or *ex parte*.<sup>173</sup> However, in one *Privacy Act* case, the judge attempted to cushion the effect of this by requiring the application for *ex parte* proceedings to be made with the applicant's counsel present, who therefore had the opportunity to object, and by inviting counsel to make submissions and suggest specific questions which should be asked during the closed hearing.<sup>174</sup> The Court is obliged by section 47 of the *Access to Information Act* to take every reasonable precaution to avoid disclosure of information which the head of a government institution would be authorized to refuse to disclose; this necessarily constrains the form of judgment and the fullness of the reasons which may be given to an applicant.

These procedures create a dilemma for judicial procedure when compared to the ideal of open justice, conveniently summarized by Jerome A.C.J.:

Proceedings in our courts must take place in full public view and in the presence of the parties. Exceptions to this principle occur from time to time but must be kept to the minimum of absolute necessity and then directions should be given such as to safeguard the public interest in the administration of justice and the rights of any parties excluded from the proceedings. Since the issue in applications of this sort is confidentiality obviously, a public hearing pre-empts the final decision so there does not seem to be any alternative but to restrict attendance to counsel for the parties. A similar concern arises with the question of access to the documents in dispute. Obviously, counsel should not be asked to argue the nature of a document he has never seen, yet access to the document again pre-empts the judicial determination.<sup>175</sup>

Important constitutional issues about these procedures are raised in a series of cases in which applicants are challenging refusals of access to files allegedly held by CSIS.<sup>176</sup> In *Ruby*,<sup>177</sup> questions of whether

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<sup>173</sup> *Privacy Act*, *supra* note 142, s. 46.

<sup>174</sup> *Reyes v. Canada (Secretary of State)* (1985), 9 Admin. L.R. 296 at 301 (F.C.T.D.) [hereinafter *Reyes*]; compare the procedure adopted by counsel to SIRC: see Part VII, below. See also *Russell v. Canada (Solicitor General)* (1990), 35 F.T.R. 315 at 317-18 (F.C.T.D.) [hereinafter *Russell No. 1*], where precautions in favour of the government included removing the *ex parte* sealed affidavits from the court file after use. In *X v. Canada (National Defence)*, [1992] 1 F.C. 77 (T.D.), Denault J. refused to allow cross-examination on affidavits submitted in a Federal Court review by the Department.

<sup>175</sup> *Reyes*, *supra* note 174 at 298-99; compare Denault J.'s comments in *Maislin Industries Ltd. v. Canada (Industry, Trade, Commerce and Regional Economic Expansion)* [1984] 1 F.C. 939 at 942-43 (T.D.).

<sup>176</sup> *Ruby v. Canada (Solicitor General)* (1996), 136 D.L.R. (4th) 74 (F.C.T.D.) [hereinafter *Ruby*]. In addition, the decision of the Solicitor General to refuse to release some information contrary to the Commissioner's advice (apparently the first time that a Minister has acted in this way) is attacked as wrong in both fact and law. Cases also pending are: *Copeland v. Canada (CSIS and RCMP)*, No. T-1190-92 (F.C.T.D.); and *Russell v. Canada (Solicitor General)* No. T-1318-88

the exemptions under the *Privacy Act* and the procedure for review of refusals contravene sections 7 and 8 of the *Charter*<sup>178</sup> by failing to provide a fair procedure for determining whether information should be released. In the first limb of the litigation,<sup>179</sup> the court rejected a challenge based on the alleged infringement of the applicants' privacy, but did find a conflict between the procedures and the right to receive information as an aspect of freedom of expression under section 2(b) of the *Charter*. Since the provisions were mandatory, the court held that they failed to allow a balance in each instance of the state's and the individual's interests in closed and open hearings.

At a later stage in *Ruby*,<sup>180</sup> Simpson J. found that the restriction on section 2(b) could be justified as a reasonable limitation under section 1 of the *Charter*. She found the objective behind the mandatory *in camera* and *ex parte* procedures in section 51 of the *Privacy Act* to be the need to satisfy Canada's intelligence partners that sensitive information shared with Canadian agencies would be secure from inadvertent disclosure. Affidavits filed by CSIS, the RCMP, and the Departments of National Defence and Foreign Affairs all claimed, that without the assurance of mandatory closure provisions for review of access claims, intelligence sharing by foreign agencies was likely to be adversely affected. The *Oakes* test<sup>181</sup> was held to have been satisfied and the applicant's argument that a less restrictive procedure could be used, a procedure similar to that adopted by a judge editing a wiretap affidavit in open court,<sup>182</sup> was rejected as impractical;<sup>183</sup> it could not be adapted to situations where CSIS relied on the right to refuse to confirm or deny the existence of information and would not be feasible where there were numerous documents to be reviewed. Similarly, the American practice whereby a court may review the *Freedom of Information Act* exemption claims by way of a discretionary *in camera* process<sup>184</sup> did not, in Simpson J.'s view, undermine the minimal impairment claim. In the economy of

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(F.C.T.D.).

<sup>177</sup> *Supra* note 176.

<sup>178</sup> An earlier constitutional challenge was struck out on procedural grounds in *Russell No. 1*, *supra* note 174.

<sup>179</sup> *Ruby v. Canada (Solicitor General)*, [1994] F.C.J. No. 789, Schedule A (amended reasons) (QL).

<sup>180</sup> *Supra* note 176.

<sup>181</sup> See *Oakes*, *supra* note 22.

<sup>182</sup> See *supra* notes 55-60.

<sup>183</sup> *Ruby*, *supra* note 176 at 90.

<sup>184</sup> See *Freedom of Information Act* 5 U.S.C. § 555(a)(4)(b) (1974).

intelligence sharing, it was held, Canada as a “net importer,” was in a more vulnerable position and more reliant on its allies’ perception and goodwill than was the United States, which was a “net exporter.”<sup>185</sup> While the section 1 outcome is not surprising, in some respects the wider reasoning is unsatisfactory. To treat the issue as one of freedom of expression appears a highly artificial approach to the problem of secret justice, since it essentially involved disregarding the applicant’s special interest in the execution of open justice as a party to the proceedings and treating him or her purely as a “member of the reading public.”<sup>186</sup> As a consequence, the Court failed to adequately distinguish between the constitutional impact of *in camera* and *ex parte* proceedings. Plainly, though, the judgment can be seen as weakening the prospect of successful challenges on constitutional grounds to the equivalent *Immigration Act* and *Canada Evidence Act* provisions, because of the essential similarities between them.

Overall, the designation of certain judges to hear intelligence related cases is an experiment which has yet to fulfil its promise. Some of the cases do indicate a more rigorous and probing approach by the judges to the intelligence evidence: *Smith*,<sup>187</sup> above all, stands out in this respect. Equally, some of the cases arising in the freedom of information jurisdiction show the judges approaching arguments about the need to maintain the secrecy of old material with due scepticism. However, in the Crown privilege realm, the reluctance of the courts to inspect the material has frustrated the objective of designating specialist judges to handle these cases. Refreshingly, there is little evidence in the judgments of the characteristic approach of the common law towards the non-justiciability of decisions based on security considerations; the designated judges interviewed stated strongly their view that, where individuals’ rights were at stake, judicial involvement was appropriate.

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<sup>185</sup> *Ruby*, *supra* note 176 at 92. The Australian practice of review by the Administrative Appeals Tribunal, subject to mandatory *in camera*, but discretionary *ex parte* process (*Archives Act*, 1983, Austl. Acts P. 1983, vol. 1, No. 79, s. 47(2)(a)), was also rejected by Simpson J. as a reasonable example of minimal impairment, in view of the recommendation that had been made for their reform; see Australia, Parliamentary Joint Committee on the Australian Security Intelligence Organization, *ASIO and the Archives Act: The Effect on ASIO of the Operation of Access Provisions of the Archives Act* (Canberra: Queen’s Printer, 1992) at 23-25.

<sup>186</sup> See Parts II and III, above. Although *Edmonton Journal*, *supra* note 11, was cited by the Court in *Chiarelli v. Canada (Employment & Immigration)* [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*], for the proposition that freedom of expression under the *Charter* protects readers as well as writers, the situation is quite different where a newspaper is challenging statutory publication bans from where a party is doing so.

<sup>187</sup> *Supra* note 132.

Commendable attempts at procedural innovation have also been made to maintain a measure of adversarialism even where the legislation requires the exclusion of the applicant from the proceedings. However, the danger in using designated judges in conjunction with the *ex parte* hearing provisions is that the judges involved may become over-familiar with and over-respectful of the types of arguments used to justify security decisions. The tendency of intelligence services to make decisions affecting individuals (such as denial of security clearance or deportation) according to quite low levels of probability is one reason the debate over probability and proof in relation to the refugee cases is important. In the same way, it is disquieting to find judicial endorsements of the “mosaic” argument (that the release of seemingly innocuous information may be compromising because a knowledgeable person may be able to piece it together with other information to which he or she has access)<sup>188</sup> in some of the decisions under the *Canada Evidence Act* and under the freedom of information legislation.

The final form of review to be considered is another variation on specialist review. However, the personnel involved are not judges. They are Privy Councillors who are members of the Security Intelligence Review Committee.

## VII. HEARINGS OF THE SECURITY INTELLIGENCE REVIEW COMMITTEE

This part concentrates upon the complaints and curial roles of SIRC;<sup>189</sup> however, in order to understand SIRC’s work it is essential to

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<sup>188</sup> This “mosaic” argument is referred to, although not using that term, by Addy J. in *Henrie*, *supra* note 148.

<sup>189</sup> SIRC comprises five Privy Councillors (who must not be members of either House of Parliament), chosen by the Prime Minister in consultation with the Leader of the Opposition; the convention of appointing two members from opposition parties presents an intriguing prospect with the collapse, in the 1993 federal election, of the Conservative Party and the emergence of the Bloc Quebecois as the Opposition. There has never been a Bloc Quebecois member of SIRC notwithstanding that many of the abuses leading to the establishment of CSIS involved RCMP monitoring and interference with Quebec politics. As of August 1996, the membership of SIRC was: Edwin A. Goodman (a Toronto lawyer), Rosemary Brown (Chair of the Ontario Human Rights Commission and former member of the British Columbia Legislature), Paule Gauthier (a Quebec City lawyer), and George W. Vari (a prominent construction magnate). The fifth committee member position was vacant as of August 1996.

For more general assessments of SIRC, see P. Gill, “Symbolic or Real? The Impact of SIRC, 1984-88” 4 *Intelligence and Nat’l Sec.* 550; *Politics of Security* *supra* note 78; *Bristow Affair*, *supra* note 83; and *In From The Cold*, *supra* note 1 at 458-66. For discussion of its complaints jurisdiction,

appreciate that it also has another legislative function, that of investigation and review of CSIS. It was the clear intention of those who produced the legislation that these two functions should inform each other, although, at certain points there may be a tension between the two roles. The McDonald Commission had recommended that separate bodies be established to undertake reviews and to receive complaints: it envisaged a Security Appeals Tribunal to hear appeals in the fields of immigration, citizenship, and security clearance.<sup>190</sup> The Tribunal would have been presided over by a Federal Court judge. It would have had full access to security information with a discretion over what information it could disclose, but would have been advisory rather than binding in its determinations. Realizing the danger that a tribunal of this kind could lack insight into the policy context in which individual complaints arose, McDonald J. recommended that it should have a broad jurisdiction and that it should automatically see reports of other cases containing adverse information, but where no appeal was made. However, this division was not followed in the *CSIS Act*, probably because the Liberal government had already added to the complexity of the review function by dividing it between the Inspector General and SIRC. Accordingly, SIRC was given a dual mandate.

In interviews, CSIS personnel described the effect of this interrelationship on complaints proceedings as “schizophrenic.” The criticism was that case hearings had a tendency to turn into review hearings as SIRC pursued items of interest which related to policy and oversight, but which were beyond the scope of the complainant’s case. SIRC, on the other hand, stressed the usefulness of the interrelatedness of the functions: in view of the part-time involvement of members of SIRC, complaints hearings were seen as a crucial means by which the members (rather than the permanent staff) obtained an insight into the operational work of CSIS. Counsel to SIRC confirmed that, on occasion, reviews had grown out of case hearings. Occasionally, the reverse has happened: for instance, when a SIRC report criticizing CSIS interviews with Palestinians during the Gulf War was published,<sup>191</sup> it led to an individual complaint about CSIS action from one of the interviewees concerned.

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With Procedural Fairness” (1989-90) 3 Can. J. Admin. Law & Prac. 173.

<sup>190</sup> *McDonald Commission Reports* supra note 74, vol. 1 at 421-26 and vol. 2 at 805-11.

<sup>191</sup> Canada, Security Intelligence Review Committee, *Annual Report 1990-91* (Ottawa: Queen’s Printer, 1991) at 15-16 [hereinafter *SIRC 1990-91*].

SIRC hearings can be subdivided into three kinds: complaints about the alleged action of CSIS;<sup>192</sup> review of refusal of security clearances brought by government employees (these can arise from any government department);<sup>193</sup> and review of certain findings in immigration cases (these are reviews of refusals of citizenship and of recommendations of deportation where it is alleged that a person is either a security threat or, following conviction for a serious criminal offence, that they are involved in organized crime). Although SIRC only has the power to make recommendations at the end of a case hearing, in practice these recommendations have been followed by the Minister concerned in the overwhelming majority of cases.

The format of case hearings is unusual and worthy of greater study. It is governed partly by the requirements of the *CSIS Act* itself and partly by procedural rules which SIRC has promulgated under authority of the *Act*. The rules<sup>194</sup> establish different procedures for the different kinds of cases that may arise in SIRC hearings. However, common provisions deal with the question of representations by the complainant. The complainant has a right under the *CSIS Act* to an oral hearing but, if this is not exercised, the hearing may be dealt with by written representations.<sup>195</sup> The rules put the discretion squarely on the Committee members hearing the case to decide a number of critical questions about representation and evidence “balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected.”<sup>196</sup> The right to receive the substance of the representations made by the other party, the ability to cross-examine witnesses called by other parties, to exclude a party from portions of the hearing, and to decide whether that party is given the substance of the evidence or representations from which they were excluded, are all subject to this test. However, in all cases, SIRC is

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<sup>192</sup> Before making a complaint of this kind, the individual is required to raise the issue with CSIS so that it can be resolved informally if possible. In practice, a large proportion of complainants neglect to do so, resulting in referral back from SIRC. The government has rejected calls for amendment to the legislation to do away with this preliminary stage, from those who argued that it deterred complainants: see *On Course*, *supra* note 75 at 73-74.

<sup>193</sup> The Federal Court also has jurisdiction over some aspects of security clearance decisions. An analogous, but minor, area of SIRC work is complaints raising from security aspects of government procurement decisions.

<sup>194</sup> See *Rules of Procedure of the Security Intelligence Review Committee* (adopted 9 March 1985) [hereinafter *Rules*; unpublished], in relation to its function under the *CSIS Act*, *supra* note 2, s. 38(c).

<sup>195</sup> *CSIS Act*, *supra* note 2, s. 48.

<sup>196</sup> *Rules*, *supra* note 194.

required by section 37 of the *CSIS Act* to consult with CSIS before allowing access to the information, evidence, or representations.

So far as the public interest is concerned, no attempt has been made by a newspaper or other member of the public to test the requirement (section 48(1) of the *CSIS Act*) that all case hearings are to be held in private. Theoretically, as a mandatory closure provision, it is open to attack under section 2(b) of the *Charter*. However, in view of the propensity of the courts to exclude the applicant from parts of SIRC proceedings (discussed below), there seems little doubt that the section would be upheld, possibly under section 1. In any event, even if the public access were granted, it would be minimal because the discretionary closure of SIRC proceedings excluding the complainant (at which point they become *ex parte* as well as *in camera*) would plainly meet the tests developed in the newspaper cases discussed earlier.<sup>197</sup>

In practice, hearings follow a fairly common format. SIRC appoints counsel to assist it in these hearings from a panel of security-cleared private practitioners. There will be one or a number of pre-hearing conferences in which counsel appointed by SIRC will meet with the other lawyers involved in the case. The purpose, according to lawyers who have acted for SIRC, is to establish the “ground rules” for the conduct of the hearing, to ensure that lawyers unfamiliar with the procedure understand how it should work, and to pinpoint the main areas of disagreement which need to be addressed in the hearing (and the procedure which will be applied to them).<sup>198</sup> However, understandably, it is impossible to foresee every eventuality at this stage and CSIS officials, in particular, were of the opinion that cases seldom followed the established format. Typically, after the hearing has been opened, a formal submission from CSIS will be made for the hearing of evidence<sup>199</sup> and representations *in camera*, and this will be opposed by counsel for the complainant. From the experience of all those interviewed, the motion is invariably granted. It is during the *in camera* portions of the hearing that the role of counsel to SIRC becomes critical.

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<sup>197</sup> See *supra* notes 27-45 and accompanying text.

<sup>198</sup> In *SIRC 1994-95*, *supra* note 83 at 68-69, the Committee states that, as a cost-cutting measure, the pre-hearing role of counsel is being increasingly undertaken “in house” by its own staff.

<sup>199</sup> Interviews with M. Archdeacon (Executive Director of SIRC) (21 June 1994) Ottawa, Ont; and Prof. R. Whitaker (complainants’ counsel) (1994) North York, Ont., revealed that evidence has been received in “open” session and with cross-examination from some CSIS witnesses (especially intelligence analysts), independent witnesses called by SIRC as experts, and by witnesses called by complainants. However, evidence dealing with sources (informers) and surveillance tends to be heard *ex parte*. According to SIRC, much written evidence is also relied on.

One counsel who had acted in some twenty or so cases before SIRC described the role as being threefold: first, to assist the members of the Committee in the conduct of the proceedings (with an emphasis on providing a fair and complete hearing); second, to help the complainant in what was described as a “bizarre situation;” and third, to cross-examine CSIS evidence in the *in camera* portion of the proceedings.<sup>200</sup> The position of counsel and the role they play will vary according to the attitude and conduct of the proceedings by the presiding member. One such counsel felt that counsel to SIRC had a clearer role to play in the proceedings when the Chair was an activist one (that is, following an inquisitorial format) than when the Chair was playing a more judicial, and non-interventionist role. In the second situation, ambiguity and conflict in the tasks that counsel was required to perform were likely to arise. This interviewee specifically cited analogous case law upon the role of counsel before administrative tribunals.<sup>201</sup> Another variable affecting the role of counsel to SIRC is the competence (or absence) of the legal representatives for the complainant. Although one or two counsel have experience representing several complainants before SIRC, it is more common for counsel to be involved in a single, isolated case. In these circumstances, counsel for SIRC may compensate by taking a more active role so that the complainant is not disadvantaged by the inexperience or unfamiliarity with *in camera* proceedings of his or her representative.

Two tasks of counsel to SIRC are particularly important: cross-examining in the *in camera* portion of the proceedings (one counsel described this as attempting “to fill the vacuum of the complainant’s absence”), and negotiating with counsel for CSIS on the form of evidence to be disclosed from this portion of the hearings. Additionally, counsel acting for SIRC will liaise with the complainant’s counsel to ensure that the questions the latter wishes to see answered are put in the closed session; this can be extensive (more than fifty such questions were put in one hearing). However, counsel to SIRC, complainants’ counsel, and SIRC all expressed scepticism about the practical utility of this facility. Both SIRC personnel and counsel to SIRC argued that, through ignorance of aspects of CSIS evidence, such questions tended to be peripheral to the central issues in the hearing.

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<sup>200</sup> Interview with S. Noël (counsel to SIRC) (22 June 1994) Hull, Quebec. The “bizarre situation” to which he refers is meant to convey the unusual nature of the proceedings and the position of a complainant in those proceedings, rather than to a particular incident.

<sup>201</sup> See M. Rankin & L. Greathead, “Advising The Board: The State Of Counsel’s Role In Advising Administrative Tribunals” (1993) 7 Can. J. Admin. Law & Prac. 29.

Likewise, without knowledge of CSIS's evidence, counsel to the complainant faced inevitable difficulties in preparing for this vicarious cross-examination.

The practice of SIRC has, until recently, been to release a summary of the evidence heard *in camera*. The summary will initially be prepared by counsel for CSIS and then SIRC will usually attempt to argue for greater disclosure, sometimes with some success. One counsel to SIRC considered that the release of merely a summary to the complainant was fairly uninformative and of little assistance. However, in one recent case<sup>202</sup> a different practice was adopted, with a "blanked-out" transcript of the evidence received *in camera* disclosed instead. This was described by counsel to the complainant in the case (who had experience of the former practice also) as being of much more assistance, since it enabled more effective cross-examination. CSIS officials, on the other hand, were more dubious about the practice, but apparently for the same reasons. SIRC regarded the new procedure a positive development.

The constitutionality of SIRC's procedures was challenged in the case of a review of a deportation of a permanent resident based on the complainant's alleged links with organized crime. Although security information was not involved (the information came from police informers), the procedures adopted by SIRC for the protection of informers were identical to those in security cases. The approaches taken by the Federal Court of Appeal<sup>203</sup> and the Supreme Court of Canada<sup>204</sup> were radically different. The Federal Court of Appeal held, first, that the procedure raised questions under section 7 of the *Charter*, regarding the protection of individual security.<sup>205</sup> Furthermore, the SIRC procedures were held to be in violation of fundamental justice as required by section 7, since the complainant should be given a "meaningful opportunity to be heard," and therefore was entitled to know the information before SIRC, in order to contradict it.<sup>206</sup> However, the court divided on the question of whether this violation could be justified under section 1. The majority (Stone J.A. with Urie J.A. concurring) found it was not, since, although protecting police sources

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<sup>202</sup> Other aspects were challenged by the complainant in *Al Yamani, supra* note 135.

<sup>203</sup> *Chiarelli v. Canada (Employment and Immigration)* [1990] 2 F.C. 299 (C.A.) [hereinafter *Chiarelli F.C.*].

<sup>204</sup> See *Chiarelli, supra* note 186, critically discussed in R.P. Cohen, "Fundamental (In)Justice: The Deportation of Long-Term Residents From Canada" (1994) 32 *Osgoode Hall L.J.* 457 at 470ff.

<sup>205</sup> The effect had been to deprive the deportee of the right to appeal to the Immigration Appeal Board on compassionate grounds where a ministerial certificate was filed.

<sup>206</sup> *Chiarelli F.C., supra* note 203 at 318-19.

and techniques was sufficiently important to justify overriding constitutional rights, and the method chosen demonstrated a rational connection with the objective, it failed the proportionality test because it did not balance the competing state and individual rights and, instead, obliterated the individual's right. Pratte J.A. (dissenting) argued that section 48(2) of the *CSIS Act* imposed a reasonable limit in the light of the need to protect the secrecy of police investigations of organized criminal activities and the restricted right of the complainant being infringed. When the Supreme Court of Canada considered the case, Sopinka J., for the majority, held that a requirement of deportation following conviction for an offence carrying a maximum punishment of five years imprisonment did not constitute a *prima facie* infringement of section 7. However, the Court went on to consider the argument about SIRC procedures notwithstanding, finding that the procedures for review of the certificate by SIRC were not in contravention of fundamental justice, nor did they involve a breach of natural justice. This part of the judgment repays greater study.

According to the Supreme Court of Canada, the principles of fundamental justice under section 7, and under the rules of natural justice in administrative law, had to be construed contextually. Canadian immigration law had never contained an unlimited right of appeal in security cases: historically there had always been either unfettered ministerial discretion or an exception from the normal appellate procedures. The statutory right of appeal on compassionate grounds was deferred, and then excluded, if the Governor in Council directed the Minister to issue a certificate indicating that the deportee was involved in organized crime following a report from SIRC; but, in any event, there was no obligation to provide a right of appeal on compassionate grounds in deportation cases of persons convicted of any offence. Furthermore, accepting that Parliament had done more than was required in providing the SIRC machinery, the SIRC rules of procedure involved a reasonable balance between the interests of the state and of the individual. This is because they conferred discretion on the Committee to balance the competing interests, and the procedure provided for the complainant to know the substance of the case against him or her, and to be able to respond. In view of the state interests in protecting police sources and techniques, fundamental justice did not require that the complainant be given details of the techniques or sources used to gather the information. It followed that no section 1 issue arose.

*Chiarelli*<sup>207</sup> arose in an anomalous part of SIRC's jurisdiction, that concerned with deportations of those convicted of serious offences and suspected of involvement with organized crime. However, subsequently the same principles have been applied in a deportation case concerned with other inadmissible classes of persons based on security.<sup>208</sup> Although in such instances, the state interests are arguably clearer, the individual's conduct is also less clearly reprehensible: there is no prior conviction to trigger the procedure. In *Al Yamani*, MacKay J. held that although the SIRC procedures could not be faulted, the statutory ground for the deportation<sup>209</sup> violated the protection in section 2 of the *Charter* for freedom of association, because it penalized mere membership of a suspect organization and did not constitute a reasonable limitation under section 1. SIRC's procedures have not yet been challenged outside of deportation cases. If a contextual approach to constitutional protection is taken, a court might be more receptive to a challenge to the procedure in a non-immigration case. However, only in security clearance cases will the applicant have sufficient economic considerations at stake to make litigation worthwhile and to raise constitutional questions.

Figures for the outcomes of SIRC hearings show that of a total of sixty-six hearings conducted in the period 1984-1994, some thirty-six resulted in favour of the complainant (see Table II, below).<sup>210</sup> However, because of the mixed nature of SIRC's jurisdiction, these figures do not amount to direct successes against CSIS, since the largest body of successful complainants, by far, were those involving challenges to denials security clearances brought against the Department of National

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<sup>207</sup> *Supra* note 186.

<sup>208</sup> In *Al Yamani*, *supra* note 135 at 231-32, Mackay J. held that *Chiarelli*, *ibid.*, precluded objection under s. 7 of the *Charter* to SIRC's processes in a security-related deportation. In *Canepa v. Canada (Employment and Immigration)* [1992] 3 F.C. 270 at 277 (C.A.), MacGuigan J.A. stated that the ratio in *Chiarelli*, precluded challenge under s. 7 of the *Charter* to any of the restrictions on the right of permanent residents to remain in Canada, not merely serious criminal offences.

<sup>209</sup> See *Immigration Act*, *supra* note 130, s. 19(1)(g), relating to "persons who there are reasonable grounds to believe ... are members ... of an organization that is likely to engage in ... acts ... of violence that would or might endanger the lives or safety of persons in Canada." See also *Al Yamani*, *supra* note at 238-45. However, in *McAllister v. Canada (Citizenship and Immigration)* [1996] F.C.J. No. 177 (QL), a refugee case involving a security certificate, MacKay J. found that there was no error in law in holding the applicant to be a member of an inadmissible class where he admitted he had been a member of a terrorist organization (the Irish National Liberation Army) and had been convicted of terrorist offences.

<sup>210</sup> These figures are taken from *SIRC 1993-94*, *supra* note 99 at 39-41. *SIRC 1994-95*, *supra* note 83 at 47ff, describes the handling of a number of later cases but does not make clear how many involved formal hearings.

Defence (DND) (SIRC claims a significant success in changing DND's policy on security clearances following these complaints). Of the twelve hearings which involved direct complaints against CSIS, four were upheld, a success rate of 33 per cent.

**Table II**  
**SIRC Formal Hearings, 1984-1994**

<i>CSIS Act</i> , Section 41 (Complaints Against CSIS)	
Total Heard	12
Findings in Favour of Complainant	4
Findings in Favour of CSIS	8
<i>CSIS Act</i> , Section 42 (Security Clearance Denials)	
Total Heard	38
Findings in Favour of Complainant	27
Findings in Favour of CSIS	11
<i>Immigration Act</i> Cases	
Total Heard	8
Findings in Favour of Subject	1
Findings in Favour of Exclusion or Deportation	7
<i>Citizenship Act</i> Cases	
Total Heard	7
Findings in Favour of Granting	4
Findings for Denial	3
<i>Canadian Human Rights Act</i> Cases	
Total Heard	1
Findings in Favour of Complainant	0
Findings in Favour of Government	1

Source: SIRC Annual Reports.

However, sensitive to press criticism, SIRC has also pointed out that in six of the eight "unsuccessful" claims, CSIS was ultimately criticized to some degree in the SIRC report. A further 474 complaints were dealt with by administrative action short of a hearing over the same period; of these a total of seventy-six were satisfactorily resolved without a formal hearing. The remainder included 197 outside SIRC's jurisdiction,<sup>211</sup> fifty-four

<sup>211</sup> In many cases, this was because the complainant had not contacted CSIS before approaching SIRC as required under the procedure. In such cases, SIRC advised the complainant of the correct procedure; nothing more was heard in ninety-five cases.

complaints which were abandoned or withdrawn, and a further sixty-nine which were deemed to be irrational or nuisance complaints (perhaps an irreducible minimum in view of the field of work). Thus, of all 277 complaints received within SIRC's jurisdiction, the complainant was apparently satisfied with the outcome in 112 cases.<sup>212</sup>

A fair degree of satisfaction was expressed by all concerned with the form of SIRC hearings. One complainant's counsel, who had extensive experience both before the introduction of SIRC and after, described the Committee as a considerable improvement and made the point that SIRC had successfully obtained greater disclosure from CSIS in hearings since the inception of both organizations in 1984. This was, however, coupled with a criticism: the consequence was that complainants today were more likely to receive a fair hearing than those in preceding years. SIRC itself claimed to have had a positive impact upon CSIS. This was partly through a perceived improvement in the presentation and argument of decisions brought for review, and partly through pushing CSIS toward greater disclosure without compromising security.

After considering a complaint, SIRC issues a report which may contain "recommendations." The use of "recommendations" in section 52(2) of the *CSIS Act* has been interpreted by the Supreme Court of Canada, in a case concerning review of security clearance, to mean that the Deputy Minister is not obliged to follow SIRC's opinion.<sup>213</sup> The majority found that the power (derived from the prerogative) to issue or refuse security clearances still resided with the Deputy Minister, despite procedural provisions dealing with the matter under the *CSIS Act*; the SIRC report was taken to be no more than an additional source of information for reaching the decision, which could be disregarded or outweighed by other factors. The term "recommendation" was to be given its "plain and ordinary meaning."<sup>214</sup> However, as L'Heureux-Dubé J. argued in a dissent, the non-binding nature of the report sits uneasily in the context of the elaborate procedural

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<sup>212</sup> In a further five cases, CSIS withdrew its initial objections to citizenship or immigration approvals.

<sup>213</sup> *Thomson v. Canada (Dep. Min. of Agriculture)*[1992] 1 S.C.R. 385 at 403 [hereinafter *Thomson*], where the Deputy Minister of Agriculture Canada was held to be entitled to rescind a job offer following an adverse security report from CSIS, notwithstanding a report from SIRC that they did not consider the complainant to be a risk, and recommended granting the security clearance. The adverse security report was based on Thomson's admission that he had unauthorizedly disclosed classified information to a Canadian Member of Parliament some twelve years earlier; SIRC took the view that there was no prospect of a recurrence.

<sup>214</sup> *Ibid.*

mechanisms surrounding SIRC hearings. Rather, the complexity of the scheme, in providing prior notice, hearings, the summoning of witnesses, and so on, militated against regarding the SIRC report as merely suggestive. It was further suggested that, in view of the statutory provisions dealing with the role of the Deputy Minister in security clearance complaints, it would be contrary to natural justice to allow that official, after SIRC hearings to which the Deputy Minister had been party, simply to revert to the original decision without further explanation or opportunity to make representations.<sup>215</sup> In practice, despite the decision in *Thomson*,<sup>216</sup> SIRC's view was that its recommendation had been followed in the overwhelming majority of cases, perhaps because departments would inevitably face considerable adverse publicity in going against a reasoned SIRC report. The government has resisted proposals to amend the legislation to make recommendations of SIRC binding, arguing that to do so would cut across the responsibility of Deputy Ministers for their departments by requiring them to retain staff against whom they had security reservations.<sup>217</sup>

Nevertheless, the lack of effective redress for a complainant to SIRC was seen by complainants' counsel as deterring complaints. In particular, the inability to award monetary compensation equivalent to damages meant that there was little incentive to make a general complaint about CSIS under section 41 of the *CSIS Act* (as opposed to section 42 complaints concerning citizenship, deportation, or security clearance).

Another potential area of reform is procedural. One counsel to complainants who had extensive experience argued that SIRC had too little say on the question of disclosure during hearings. A related question was the reluctance of SIRC to order disclosure of transcripts obtained by CSIS through wiretapping,<sup>218</sup> even where it was obvious from the questions that CSIS asked of a complainant that such surveillance had taken place. It was questioned whether, in circumstances where it was obvious that wiretapping had occurred, there was any point in withholding the transcript. Once again, because of the attitude of the Supreme Court of Canada in *Chiarelli*, it seems improbable that the

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<sup>215</sup> *Ibid.* at 416.

<sup>216</sup> *Supra* note 213.

<sup>217</sup> See *On Course*, *supra* note 75 at 75.

<sup>218</sup> Access of this kind was granted in *Chiarelli*, *supra* note 186, but withheld in *Al Yamani*, *supra* note 135.

withholding of such a transcript could be challenged.<sup>219</sup> Nonetheless, complainants to SIRC are treated differently to criminal defendants seeking access to wiretap material.<sup>220</sup> In view of the outcome in *Chiarelli*, it is plainly improbable that any judicial control of the editing of the evidence released to the complainant by SIRC, analogous to that in the criminal law wiretapping jurisdiction, will develop. Moreover, as a specialist tribunal within the security field, SIRC's judgments over disclosure would be difficult for a court to displace. SIRC's policy of withholding material only "where necessary" is, in any event, equivalent to the test operating in the criminal sphere.

It has also been suggested that the procedure would be fairer if complainant's counsel were security cleared and, therefore, able to argue in the *in camera* portion of the hearing. Plainly, such a procedure could only satisfy the state's concerns if counsel operated under a form of self-imposed quarantine from the client, contrary to normal professional ethics. The argument that this would create an artificial barrier between client and counsel<sup>221</sup> was met with the argument from complainant's counsel that if the client was in agreement with the procedure then there could be little objection to it. Interestingly, the counsel proposing this reform had specifically refrained from briefing counsel to SIRC with questions to be put forth during the *in camera* portion of proceedings, preferring instead to see the written summary and then cross-examine in person during the open part of the hearing. A complaint about the exclusion of complainant's counsel was an unsuccessful ground of challenge in *Al Yamani*. It was alleged, among other issues, that SIRC's handling of a deportation review case breached section 7 of the *Charter*, violating fundamental justice by excluding the complainant and his lawyer from parts of the hearing and evidence. The complainant argued that SIRC failed to strike an appropriate balance between the state's and the individual's interests because of its failure to allow for a system of security-cleared counsel representing the complainant in those parts of the hearing from which the complainant was excluded. MacKay J. held

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<sup>219</sup> See *Al Yamani*, *supra* note 135 at 230-38, where a challenge under the common-law requirements of fundamental justice, based on the amount of material disclosed by SIRC, also failed.

<sup>220</sup> See, *mutatis mutandis*, the discussion of editing material in wiretapping cases, *supra* notes 52-57 and accompanying text.

<sup>221</sup> The House of Lords has criticized such practice in England on the ground that it creates a divide between counsel and the client: see *R. v. Preston*, [1993] 4 All E.R. 638 at 671 (H.L.), Mustill L.J.; compare the comments of Ackerman J. in the South African case of *S. v. Leepile (4)* (1986), 3 S.A. 661 (W), cited in Marcus, *supra* note 16 at 217, describing a proposed order of this kind as "unconscionable" and "destructive of the professional relationship between the accused and his legal representative."

that *Chiarelli* was binding on the section 7 issue and that there had been no breach of the common-law requirements of fundamental justice in the procedures adopted by SIRC, since the complainant had sufficient information to know the substance of the allegations against him and to respond. The judge stated that “[f]undamental justice in the context of security reviews, does not require disclosure of full details of the intelligence sources or techniques or the bases of conclusions reached.”<sup>222</sup> This ruling obviously has implications for all forms of *ex parte* procedure considered in this article.

### VIII. CONCLUSION

In conclusion, we can return to the question posed at the outset: to what extent have the secret procedures examined succeeded in rendering the review of security decisions subject to the normal standards of open justice?

So far as the role of the courts is concerned, a curious trend emerges. Unlike in Britain, where national security is a notorious exception to statutory and common-law rights,<sup>223</sup> the Canadian courts have approached the issue obliquely and on several levels. It is initially striking that the non-justiciability argument, which has been featured regularly in the British cases, has not been invoked to render security decisions immune or to restrict procedural rights. Indeed, the breadth of justiciability under the *Charter* ostensibly extends to decisions of extreme sensitivity at the heart of the executive. However, the procedural rights of natural justice and fundamental justice have been given a “contextual” interpretation, with the result that they are curtailed in the security realm.

More striking, however, is the relatively few cases in which section 1 of the *Charter* has been applied to uphold the state’s security concerns. This is more unusual still when one considers the frequency with which it has been invoked as a justification for deviations from open justice for other reasons. Instead, the courts seem to have engaged in restricted interpretations of the primary rights under the *Charter* so that the question of reasonable limitation never arises. This trend can be

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<sup>222</sup> *Al Yamani*, *supra* note 135 at 236.

<sup>223</sup> See *In From The Cold*, *supra* note 1, c. 12.

seen at work in relation to section 7 in *Chiarelli*,<sup>224</sup> section 8 in *Atwal*,<sup>225</sup> and section 2(b) in the *CCLA* case.<sup>226</sup> The only exceptions to this type of approach were the majority judgment of the Federal Court of Appeal in *Chiarelli F.C.*<sup>227</sup> and the judgment of MacKay J. in *Al Yamani*.<sup>228</sup>

It is submitted that avoiding the section 1 question has some unfortunate implications. The first is that the state avoids the rigour of having to satisfy the *Oakes* tests.<sup>229</sup> These are more structured and demanding than inchoate notions of “context” and “balance.” Arguably, the *Charter* becomes redundant since analysis is effectively equivalent to the common-law approach. In any event, balance and context are unsatisfactory tests—the state’s and the individual’s interests are incommensurable. Moreover, the notion of “context” applied by the Supreme Court of Canada in *Chiarelli* is self-defeating since it is purely historical rather than purposive. A better approach would be to consider the overall balance of the controls under the *CSIS Act*.<sup>230</sup> The European courts view this approach as “necessary in a democratic society” under the restrictions to Arts. 8-11 of the *European Convention on Human Rights*.<sup>231</sup> The real question is over justiciability and the constitutional competence of procedures for handling security questions (*i.e.*, whether a court substitute and adversarial procedures are appropriate). This has yet to be squarely faced as a question under section 1 of the *Charter*.

However, if the courts have failed to impose rigorous standards through their interpretations of the *Charter* in the cases which have arisen, this does not imply a total absence of constitutionalism. The preceding account gives much evidence of the incorporation of standards of disclosure of evidence and regard to privacy values by other bodies, irrespective of the courts’ indifference. This shows a recognition that just because procedures are applied in secret does not require them to be applied wholly *ex parte*. The experiments with adversarial procedure undertaken by SIRC in its hearings, and to a lesser extent by

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<sup>224</sup> *Supra* note 186.

<sup>225</sup> *Supra* note 82.

<sup>226</sup> *Supra* note 112.

<sup>227</sup> *Supra* note 203.

<sup>228</sup> *Supra* note 135.

<sup>229</sup> *Supra* note 22.

<sup>230</sup> However, in *Chiarelli*, *supra* note 186, this difficulty may have been obscured because the case arose in the organized crime part of SIRC’s jurisdiction.

<sup>231</sup> See *In From The Cold*, *supra* note 1 at 68-72.

CSIS (in relation to section 21 warrant applications), suggest an effective “internalization” of *Charter* values by building them into the relevant procedures. Some of these innovations, especially the role of counsel to sIRC, the independent counsel operating in section 21 cases, and the release of edited summaries of *ex parte* evidence, would be easily adaptable to *ex parte* proceedings involving judicial personnel.

This is not to say that security decisions have been made unexceptional according to normal adversarial standards. Significant departures from open justice still exist. However, the innovations described in this article have been created to avoid a stark choice between closed and open proceedings. They suggest a sliding scale or proportionate response to the protection of fundamental state interests in keeping with section 1.<sup>232</sup> Further improvements could still be made, but the problems and suggestions for reform highlighted in the previous sections must be understood in context. The Canadian procedures are among the most innovative in the world for dealing with the eternal problem of reconciling state interests and individual rights. They could be usefully copied elsewhere, not least in Britain.

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<sup>232</sup> In a helpful discussion, a former Chair of sIRC has advocated a sliding-scale response to national security under the *Charter*: see R. Atkey, “Reconciling Freedom of Expression and National Security” (1991) 41 U.T.L.J. 38.