"A View from the Bunker: The Role of the Federal Court in National Security"

The Honourable Richard G. Mosley (Federal Court).[1] Lecture delivered at the Common Law Faculty of the University of Ottawa, November 25, 2015.

Thank you for providing me with this opportunity to speak on the subject of the role of the Federal Court in national security.

It is a pleasure to speak again in this building. I was a member of the first class to graduate from here back in 1974. The law school was a very different place then. Indeed, we did not speak so much of attending law school but of surviving the reign of terror that was the norm for legal studies at that time, particularly in first year.

In second and third year we could relax a bit and do a few interesting things. In my case, that included the Law Review and what was then known as the Student Legal Aid Society. There is no evidence that I contributed anything of value to the Law Review. I devoted most of my spare time to our legal aid clinic and to a hangout called the Law House which had a vending machine that dispensed beer. Notwithstanding that source of diversion, with the help of the faculty advisor and the indulgence of the presiding judges, I was able to represent a few clients on summary conviction and small claims matters. This led to articles with a criminal law defence firm and then a job offer from the Crown Attorney. One thing led to another and before you know it, 40 years have passed and here I am today.

I thought I would describe my talk as "a view from the Bunker" because I spend a good deal of my time there and because much of the work of the Federal Court in national security matters is conducted in that facility. You may have heard mention of the "Bunker" as it is fondly known by those who work there. The location is regarded as a sensitive topic for security reasons so I'm not about to tell you where it is. I can tell you that for many years it was in a deep underground location that had mould in the walls, foul air and a bank vault like door that would be locked behind us when we entered. I never knew the combination for the lock and sometimes wondered when I was working there alone, what would happen if there was a fire in the building. Would someone remember that there was a judge deep underground and come and rescue me? Thankfully it never happened. Now we have a much more pleasant aboveground but still secure facility and I can make good my own escape if need be. But we still call it the Bunker.

In the Bunker, we have courtrooms and offices for the judges and public servants who support our work in what is called the Designated Proceedings Unit. There is also working space for the

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[1] These remarks were prepared with the assistance of Me Sylvia Mackenzie, of the Barreau du Québec, and my law clerk Leah Sherriff.

special advocates, *amici curiae* and law clerks for when they are dealing with classified material. We have secure storage facilities for the files and an internal computer network that is not connected to the outside world. On entry we are required to leave our own electronic devices outside the facility. The unit is largely self-contained When I am working on a computer there I can call up the electronic files that I may need from an internal database. Everything that we may need to do in terms of hearing evidence and writing decisions can be conducted within the walls of the facility.

By "designated proceedings" I mean those matters that Parliament has stated should be determined by the Chief Justice of the Federal Court or a judge of that court designated by the Chief Justice. Parliament has given the Federal Court a substantial role to play in the national security domain under a number of federal statutes. These include provisions in the *Canada Evidence Act* R.S.C., 1985, c. C-5, *Immigration and Refugee Protection Act* S.C. 2001 c. 27, *Canadian Security Intelligence Service Act* R.S.C., 1985, c. C-23, *Criminal Code* R.S.C., 1985, c. C-46, *Access to Information* Act R.S.C. 1985, c. A-1, *Privacy Act* R.S.C. 1985, c. P-21, the *Charities Registration (Security Information Act)* S.C. 2001, c.41, s.113, and the *Secure Air Travel*, S.C. 2015, c. 20, s.11.

The designation formula is generally similar in each of these Acts and is usually to be found in the definition sections. Under the *CSIS Act*, the definition is found in s 2 and applies to each mention of "judge" that may be found in that statute. In other instances, references to the Chief Justice and designated judges may be linked to a specific section or sections of the Act which grant jurisdiction to the Court. This is the case, for example, in the definition of "judge" in section 83.05 of the *Criminal Code* which deals with the list of proscribed entities that may be established by the Governor in Council.

In contrast, sections 83.13 and 83.14 of the Criminal Code pertaining to the seizure, restraint and forfeiture of property refer simply to a judge of the Federal Court. In practice, however, it is likely to be a designated judge who would be called upon to exercise that jurisdiction as the government may rely on classified information and bring a s 38 *Canada Evidence Act* application to protect the information from disclosure.

The registry staff, *amici curiae*, special advocates, law clerks and government officials who enter the bunker all have security clearances and are subject to the *Security of Information Act*. This is either because they work for one of the departments or agencies listed in the Schedule to the Act or have received personal notice that they are persons permanently bound to secrecy under subsection 10(1).

Designated Judges do not receive such clearances or notices. We are, however, vetted for criminal records by the RCMP and subject to a security assessment by CSIS prior to our appointment as judges. This is to ensure that there are no criminal, security or other concerns

which would affect our suitability for appointment. But it would be inappropriate after our appointment for us to be screened for designated proceedings work by the same government agencies that seek our authorization to conduct intrusive operations.

We would, presumably, be covered by offences in the *Security of Information Act* should we be inclined to traffic in the information we become privy to in the course of performing our duties. I assume that to be the case and wouldn't want to be the judge to test whether it is true or not. So I do not intend to disclose any secrets here today but rather to speak, in a general way, about the nature of our work.

I do wish to stress that the selection of the judges who do this work is made by the Chief Justice and that the Government of Canada has no involvement in our selection.

At present there are about ten of us. There are a number of reasons why we have only a small number of judges doing national security work. Designated judges are often among the most experienced judges on the Court, or they may have a particular background or skill set that makes them particularly suited to the work.

In my case, I was appointed to the Court in November 2003 and became a designated judge two years later. The Chief Justice considered that a "cooling off period" was necessary because I had been actively involved in coordinating the federal government's response to 9/11 that resulted in the *2001 Anti-Terrorism Act*[2].

My responsibilities at the Department of Justice, prior to my appointment, were primarily in the domain of criminal law policy. In that capacity, I was a consumer of intelligence products but never directly involved in operational activities or providing advice to the intelligence services. Nonetheless, it could be perceived that I was too close to the government side. Hence a delay was appropriate before I did any work in this area.

Having a small group of judges hearing national security matters limits the potential for the inadvertent dissemination of highly sensitive information.

And limiting the number of judges doing this work also allows for the development and concentration of subject-matter expertise. It encourages collegiality and consistency in our decision making, while recognizing that it always remains open to each judge to decide each case independently, as he or she sees fit. But we do talk among ourselves about best practices, what new issues might arise as a result of legislative changes or something new or different that may have come up in a case. On occasion we have sat *en banc*, as a group, to hear technical evidence that may arise in a series of matters before us

[2] S.C.2001, c.41

We also meet from time to time with national security judges from other jurisdictions, and with scholars in the fields of human rights and civil liberties, privacy, technology and international affairs - as well as national security. We include a variety of perspectives in these discussions.

Caveats

At the conclusion of my remarks I will be happy to respond to questions so long as you do not expect me to talk about any cases that are presently before me or that I am likely to hear in the future. I trust you will appreciate that I will be guarded in my remarks.

While I am certainly aware of the controversy that has surrounded the changes brought about by the recent enactment of Bills C-44, the *Act to Amend the Canadian Security Intelligence Service Act*, and C-51, the *Anti-terrorism Act, 2015*, you will also appreciate that I cannot comment on either the wisdom or the constitutionality of these changes other than through my reasons for judgment. Questions regarding the legislation could well come before me or one of my designated judicial colleagues for decision. For example, on Monday I released a decision[3] interpreting amendments to the CSIS Act adopted through Bill C-44. While I can comment on why that was done at this time, my reasons for judgment must speak for themselves.

Another caveat I must mention is that I am speaking entirely on my own behalf and my comments do not necessarily reflect the views of my designated colleagues or the Court as a whole.

A little history…

Before I get into the actual work that we do I would like to provide you with a little history about our role in national security matters as we have noted that there is a belief in some circles that this is a fairly recent development. To the contrary, it dates back over thirty years. Questions have also been raised as to why Parliament accorded the Federal Court its jurisdiction in this area, as opposed to the provincial superior courts.

The Federal Court's involvement in national security stems largely from the recommendations of the McDonald Commission[4] . The Commission was established in 1977 under the *Inquiries Act* in the midst of allegations of wrongdoing by the RCMP Security Service that had caused public alarm. The Commission, chaired by Justice D.C. McDonald of Alberta, was given a broad mandate to, among other things, advise on the adequacy of our laws in relation to national security. The Commission produced three reports between 1979 and 1981.

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[3] *Re Almalki and others,* 2015 FC 1278

[4] The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, (Ottawa: Supply and Services Canada, 1979-81).

At the time, warrants for the interception of communications by the RCMP Security Service were issued by the Solicitor General (as the Minister of Public Safety and Emergency Preparedness was then called) under section 16(2) of the *Official Secrets Act.* This provision had been enacted in 1974, as part of the euphemistically titled "*Protection of Privacy Act*", which brought into effect what was then Part IV.I (later Part VI) of the *Criminal Code*[5]. The Code amendments criminalized wiretapping and required judicial authorization to do so lawfully in criminal investigations. The security warrants were exempted from the offences and requirement for judicial authorization.

Prior to 1974, there was little control over the use of electronic surveillance by the police, including the RCMP Security Service, other than some provincial legislation. The McDonald Commission heard evidence that under the regime put in place in 1974, Solicitors General did not closely scrutinize RCMP warrant applications and, had, in some instances, been deliberately misled.

The United Kingdom still relies on warrants issued by the Executive. In domestic security matters they are issued by the Home Secretary. Consideration is presently being given to changing the law in part because of the report[6] issued last summer by David Anderson Q.C., the UK's Independent Reviewer of Anti-terrorism Legislation. There is no similar position in Canada. Mr. Anderson examined our system in preparing his report. The UK government tabled a draft *Investigatory Powers Bill*[7] on November 4, 2015 which would, among other things, create a new system of judicial oversight of warrants for interception, hacking and other powers. It is worth noting that the Home Secretary personally authorized 2,345 interception warrants and renewals in 2014[8].

Here in Canada, the McDonald Commission recommended that warrant granting standards, similar to those required for criminal investigations, be adopted for national security purposes and that the decision to authorize the interception of communications be made by a judge rather than a Minister of the Crown. To ensure the availability of reasonably experienced judges to hear such applications, the Commission recommended that a small group of Federal Court judges be designated to hear them. This was the beginning, I believe, of the concept of designated proceedings within the Federal Court.

The McDonald Commission also recommended the adoption of major changes with respect to the disclosure of sensitive information in court proceedings. At common law, Crown privilege was sacrosanct. As stated in cases such as the 1942 decision of the House of Lords in *Duncan v*

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[5] S.C. 1973-74, c.50, s 6.

[6] "A Question of Trust: Report of the Investigatory Powers Review", June 2015.

[7] https://www.gov.uk/government/publications/draft-investigatory-powers-bill, (4 November 2015).

[8] "A Question of Trust": para 7.33

Cammel Laird[9] this meant that declarations by the Executive that non-disclosure was required for reasons of national security were binding on the courts. By 1968, the rule had been relaxed under English Common Law as evidenced by the decision of the Lords in *Conway v Rimmer.*[10] I recall being introduced to this development in law school as an indication of a brave new world in public law.

In Canada, public interest privilege was set out in s 41 (2) of the *Federal Court* Act[11], enacted in 1972. As it read at the time Justice McDonald and his colleagues were doing their work, section 41(2) provided that a Minister of the Crown could bar the examination of any document before any court by issuing a certificate that production of the document or its contents would be injurious to international relations, national defence or security. In other words, a Ministerial objection to disclosure on one or more of those three grounds was conclusive, and not subject to judicial review.

Incidentally, this broad concept of public interest privilege remains the law in the United States in civil matters[12]. Maher Arar encountered this when he sought redress in the US for his rendition to Syria[13]. Effectively, the "state secrets" privilege, as it is called there, means that a civil litigant can have no access to government records to prove his or her case if the government invokes national security in its defence. There is a limited right to disclosure of government secrets in criminal matters under the American *Classified Information Procedures Act*[14].

The McDonald Commission recommended reform in this area. They proposed that legislation should be enacted to adopt a balancing test similar to that developed in *Conway v Rimmer* and that the decision should be made by a judge having heard evidence and argument *in camera*, meaning a closed or private session of the court. The Commission considered that the Federal Court was the most appropriate body to make such decisions.

In its second report, the Commission called for the establishment of a civilian security intelligence agency, separate from the RCMP, and for the development of a statute based investigative regime including the issuance of judicial warrants for electronic surveillance and other intrusive activities. That jurisdiction, the Commission considered, should also reside with the Federal Court.

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[9] *Duncan v. Cammell, Laird and Company Limited*, [1942] AC 264, [1942] UKHL 3.

[10] *Conway v. Rimmer* [1968] AC 910, [1968] 1 All ER 874, [1968] UKHL 2.

[11] R.S.C. 1970, c.10 (2nd Supp.) proclaimed in force August 1, 1972 (S.C. 1970-71-72,c.1,s.41)

[12] See for example: *Mohamed v. Jeppesen*, 579 F.3d 943, 949-52 (9th Cir.); 614 F.3d 1070 (9th Cir. 2010) (en banc).

[13] *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D. N.Y. 2006); aff'd by the 2nd Circuit Court of Appeals en banc 585 F.3d 559 (2d Cir. 2009) (en banc); petition for certiorari denied by the Supreme Court, 2010-06-14.

[14] 18 U.S.C. App. III. Sections 1-16

The recommendations to create a new security intelligence service and to expand the jurisdiction of the Federal Court were implemented by Parliament through amendments to the *Canada Evidence Act*[15] in 1982 and through the creation of the *CSIS Act* in 1984[16]. This regime, with some modifications in 2001 and more recently, shaped the legislative context that we know today.

The legislation required the Court to decide matters that had previously been the sole prerogative of the Executive, and required the Court to abandon centuries-old open court practices as most of the hearings had to be conducted *in camera* and *ex parte (meaning only the Crown or Government is represented at the hearing).*

From the outset, the Federal Court has taken measures to ensure its independence from the Executive branch of government. One example of that I can provide is with respect to training and education. In recent years, cases being heard before designated judges have become steadily more complex. As a result, we have developed our own internal briefing and orientation procedures and a continuing education program that sees experts being brought in to give lectures on various topics relating to our work. In doing so, we have taken great care to avoid any situation of undue influence. When we may need to be briefed on new technologies, for example, we have invited retired senior judges to review the content in advance. In considering complex new issues we have appointed members of the private bar who are not party to the proceedings to act as *amici curiae* to hear the evidence and present submissions on the facts and applicable law.

I would like to turn now to what we understand to be the concept of national security.

The meaning of "national security"

At the heart of the Court's designated proceedings work is the balancing of the rights of the individual against our collective interest in national security. But what is the nature of that collective interest?

"National Security" is a somewhat amorphous concept under Canadian law. The McDonald Commission considered that there were two central requirements: the need to preserve the territory of our country from attack, and the need to preserve and maintain the democratic processes of government. Any attempt to subvert these by violent means, they considered, is a threat to the security of Canada.

Parliament defined "threats to the security of Canada" in the *CSIS Act* as including espionage and sabotage, foreign influenced events detrimental to Canada, efforts to threaten or use serious violence to achieve a political, religious or ideological objective, and efforts to overthrow the government.

[15] R.S.C. 1980-81-82-83, c.111, s.4.

[16] R.S.C. 195, c. C-23.

In *Suresh*[17], released a few months after 9/11, the Supreme Court of Canada concluded that a danger to the security of Canada is not limited to a direct threat to Canada itself. What was required, the Court said was "a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security"[18] And as the Federal Court of Appeal recently observed in the *Re X* case, a state's ability to protect itself from threats to its national security depends upon its ability to obtain accurate and timely intelligence relating to such threats[19].

My colleague Justice Simon Noël found in the Arar Commission case that, at a minimum, national security means preserving the Canadian way of life including the safeguarding of the security of persons, institutions and freedoms[20]

At the outset of the Court's work in national security in the 1980s, the focus was primarily on the issuance of warrants sought to counter the activities or intentions of foreign intelligence agencies; a more straightforward challenge than the ones that were to come later. During the cold war, the major threat to Canadian security came from the Warsaw Pact's military and intelligence capabilities.

As we saw on 9/11 in New York and Washington, and since then in London, Madrid and Paris, the greatest threat today comes from international terrorist networks and individuals motivated by extremist ideology. In October of last year we saw the harm that two disturbed individuals inspired by such extremism could cause here in Canada. Such persons may be "home-grown" citizens born and raised within the very society that they wish to target; as we have just seen in Paris.

The responsibility to deal with terrorist threats from external or internal sources is one of the most important for any government. As Chief Justice Warren Burger said in a frequently cited 1981 decision of the US Supreme Court, *Haig v Agee*[21]: "no government interest is more compelling than the security of the Nation" because without such security it is not possible for the state to protect other values and interests such as human rights.

The Agee case is interesting for its parallels to Edward Snowden's actions and other matters that are taking place today. Agee was a CIA officer who went rogue and released top secret information about US agents operating in foreign countries, some of whom were endangered as a result. The Secretary of State revoked Mr. Agee's passport and he sued to get it reinstated. The

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

[18] *Ibid*, at para 88

[19] *X (Re)*, 2014 FCA 249 at para. 77, 377 D.L.R. (4th) 735.

[20] *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para 68.

[21] 453 US 280 (1981) at 307

controversy was over the scope of the Executive's power to deprive a citizen of the state's protection. In the result, the government's action was upheld. Revocation of citizenship rights is again a significant issue.

The right of the state to take strong measures proportionate to the threats posed against it in order to protect national security is recognized in international law, in multilateral instruments such as the *International Covenant on Civil and Political Rights* and in the jurisprudence of the Supreme Court of Canada in cases such as *Chiarelli*, [22]*Ruby*[23] and *Medovarski*[24].

The Court has emphasized, however, that the Executive must use its police, military, or intelligence resources with due regard to our civil liberties, Canadian values and the rights protected by the *Canadian Charter of Rights and Freedoms*[25]. This was stressed by Chief Justice Beverley McLachlin in the first of the Supreme Court's *Charkaoui* decisions in which she stated the following:

> *One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.*[26]

This tension is reflected in the work that we do as designated judges. Justice Ian Binnie captured this construct in a speech he delivered in Hong Kong in 2004.[27] After reviewing a series of decisions in the courts of Canada and other jurisdictions, Justice Binnie concluded by saying:

> *The conflict between human rights and national security is truly a clash of titans. But surely courts should not be too quick to accept that there is necessarily a clash whenever the government claims one to exist. Often it is possible to see a middle way where the contending interests can be reconciled. An entrenched bill of rights, I am convinced, can be of enormous assistance in this respect but the tools, however helpful, will count for nothing if the courts are not willing to use them.*

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[22] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711.

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

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

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

[26] *Charkaoui et al v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 1 [*Charkaoui I*].

[27] "*Entrenched Rights in the Age of Counterterrorism*", Justice Ian Binnie, Supreme Court of Canada, First Hong Kong Conference in Criminal Law, November 13, 2004.

Justice Binnie was referring of course to instruments such as our Charter when he referred to entrenched bills of rights. He used the theme of a "Clash of the Titans" to discuss the challenge of balancing individual interests while fighting a so-called "war on terror".

In the early post 9/11 years, some judges had said that the courts should defer to the executive in such matters because of the legitimacy that flows to political leaders through the ballot box. Political leaders should, as it was stated in one English case, be given "…an appropriate degree of trust…to satisfy themselves about the integrity and professionalism of the security service."[28]

A commonly held view at the time was that the courts were ill-equipped to assess threats to national security. This was clearly expressed by Lord Hoffman in *Secretary of State for the Home Department v Rehman*[29], shortly after 9/11:

> …the recent events in New York and Washington…are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

Lord Hoffman's remarks were cited with approval by the Supreme Court of Canada a few months later in *Suresh*[30].

I think I can say with some confidence that the courts have learned a great deal over the course of the past decade about the operations of the Executive and the security agencies. Even when undertaken in absolute good faith in the interests of national security, such operations can result in mistakes that have a real impact on the rights of the individual.

In Canada we have had the O'Connor[31] and Iacobucci [32] reports which shed light on what happened to four Canadian citizens. And in the United States the Senate Intelligence Committee

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[28] *A, X and Y & Others v Secretary of State for the Home Department* [2003] 1 All E.R. 816 (C.A.)

[29] [2001] 3 W.L.R. 877 at para 62.

[30] [2002] 1 S.C.R. 3 at paras 31-34.

[31] *Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, Ottawa, Public Works and Government Services Canada, 2006

[32] *Internal Inquiry into the Actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin,* Ottawa, Public Works and Government Services Canada, 2008.

looked closely at the CIA's Detention and Interrogation Program. A great deal of other information about post-9/11 security operations is now in the public domain.

I think we are better equipped now than we were a decade ago to assess whether threats to national security perceived by the Executive are well grounded in evidence and reasonable or not.

The challenge remains to strike that balance between legitimate national interests including security and the rights of individuals that Justice Binnie spoke of in 2004 as a "Clash of Titans".

With this in mind, let me turn to the nature of our work.

The nature of our work [33]

As I noted earlier, we exercise national security jurisdiction under various Acts of Parliament. Before I address the main sources, I will touch briefly on several of the most recent.

The *Secure Air Travel Act* came into force in June of this year. It empowers the Minister of Public Safety and Emergency Preparedness to maintain a "no-fly" list of individuals for whom there are reasonable grounds to suspect that they will engage or attempt to engage in an act that would threaten transportation security; or travel by air for the purpose of committing a terrorism offence. A listed person who has been denied transportation as a result of his or her inclusion on the "no-fly" list may apply to the Minister to have their name removed from the list, and a refusal by the Minister to take the person off of the no-fly list can then be appealed to the Federal Court, where it will be the job of a designated judge to determine whether the Minister's decision was reasonable. That determination may be based on sensitive information such as intelligence obtained from foreign security agencies.

When requested by the Minister, the judge must hear such evidence in a closed session and without the appellant or their counsel if, in the judge's opinion, its disclosure could be injurious to national security. The judge is to ensure that the appellant is provided with a summary of the information so that he or she will be reasonably informed of the Minister's case.

Under amendments to the *Criminal Code* adopted in 2001 as part of the *Anti-terrorism Act* of that year, the Court has jurisdiction to review the listing by the Governor in Council of any entity for which there are reasonable grounds to believe the entity has carried out, attempted to carry out, participated in or facilitated a terrorist act.

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[33] For this section of the lecture I have relied on a speech delivered by the Honourable Justice Anne Mactavish at the Philippe Kirsch Institute, Toronto, September 14, 2015 on "National Security, Human Rights and the Federal Court" and previous presentations delivered by the late Justice Edmund Blanchard and Justice Eleanor Dawson, both then of the Federal Court.

The Court was also given jurisdiction at the same time, under the Code, to issue warrants for the restraint, seizure or forfeiture of property owned or used by a terrorist group. In addition, under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* the Federal Court has been given jurisdiction to consider applications made by CSIS for disclosure of information held by FINTRAC (the Financial Transactions and Reports Analysis Centre of Canada) and jurisdiction to review decisions of the Director of FINTRAC objecting to the disclosure of information to police officers for use in a criminal investigation.

Thus far our experience with these provisions has been limited. The major sources of our work in national security matters have been the *Canadian Security Intelligence Service Act,* s 38 of the *Canada Evidence Act* and the *Immigration and Refugee Protection Act.*

The CSIS Act

CSIS or, as it commonly referred to, "the Service"[34] has two principal mandates. The first is to collect, analyze and retain information and intelligence respecting activities that may, on reasonable grounds, be suspected of constituting threats to the security of Canada. The authority to conduct investigations in furtherance of this mandate is set out in section 12 of the Act.

The second CSIS mandate relates to the defence of Canada and the conduct of its international affairs. Under s 16 of the Act, CSIS is to assist the Minister of National Defence and the Minister of Foreign Affairs, within Canada, in the collection of information relating to the capabilities, intentions or activities of any foreign state, group of foreign states, or any person (other than a Canadian citizen, a permanent resident of Canada, or a corporation incorporated in Canada).

The Federal Court's authority to issue warrants in respect of both mandates is set out in Part II of the *CSIS Act* under the heading "Judicial Control".

The recent trial before the Ontario Superior Court in Toronto of two individuals convicted of conspiring to blow up a Via Rail train enroute to the United States[35] had its genesis, as have others, in warrants issued to CSIS by the Federal Court under s 12 of the Act. In such cases, the RCMP criminal investigation frequently begins with a disclosure or advisory letter from CSIS. Section 19 of the Act allows the Service to share information it has collected for intelligence purposes where the information may be used for the investigation or prosecution of an offence. The RCMP may then seek warrants for criminal investigation purposes under Part VI of the *Criminal Code* relying upon the CSIS information, as they did in the *Jaser* case.

The question of whether CSIS could collect information abroad has long been the subject of controversy. The Service has acknowledged stationing personnel abroad for many years for liaison purposes and has entered into many arrangements with foreign security intelligence and

[34] In contrast to the RCMP which is often referred to as "the Force".

[35] *R v Jaser,* 2014 ONSC 6052

police agencies. But this was not considered to be the same type of intelligence work they were authorized to perform in Canada. For one thing, it was likely to be illegal in the foreign jurisdiction to conduct such operations.

The Federal Court initially took the position[36] that authorizing illegal activities in another state would violate the principles regarding international comity set out by the Supreme Court of Canada in *Hape*[37]. My colleague, the late Mr. Justice Edmund Blanchard, held that Parliament could confer extraterritorial powers in relation to the issuance of CSIS warrants, but that it would have to do so expressly which had not been done.

A few years later I reached a different conclusion on fresh arguments on the ground that the "interception" of foreign communications would be carried out in Canada. I found that a Federal Court judge has jurisdiction under the Act to authorize interception where the first location at which the communication would be listened to is within Canada's territorial jurisdiction[38].

I had occasion to revisit that decision when new facts came to light in the 2013 annual Report of the Commissioner of the Communication Security Establishment. As a result of that report and hearings that I conducted subsequently, I determined that CSIS had enlisted the assistance of foreign powers in implementing my 2009 decision and other judicial warrants. In my view, these were material facts that should have been disclosed at the time of the applications. As a result, I was highly critical of the government authorities for their lack of candour and expressed doubt that the Service's actions were authorized under section 12. I did affirm my earlier decision that warrants with extra-territorial reach could be issued.

In a rare move, the government appealed that decision. While I was upheld on both the lack of candour finding and the finding that a s 12 warrant did not authorize CSIS to engage foreign agencies to work on its behalf abroad, the Federal Court of Appeal also concluded that foreign engagement would not necessarily infringe principles of international comity. The Government's further appeal to the Supreme Court was ultimately abandoned after it introduced legislation to override these conclusions.

The issue has now been resolved as a result of the recent amendments to the CSIS Act[39], which have clarified that there is no territorial limitation on CSIS jurisdiction to investigate threats to the security of Canada. Indeed section 12 (2) of the Act, as amended by Bill C-15, now explicitly empowers CSIS to perform its threat-related functions both inside and outside of Canada. A new section, 12.1, also authorizes the Service to take measures within or outside Canada to reduce threats.

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[36] *Canadian Security Intelligence Service Act (Canada) (Re),* 2008 4 F.C.R. 230

[37] *R v Hape* 2007 2 S.C.R. 292

[38] *Re X. (2009)* 199 C.R.R. (2d) 38

[39] *Anti-terrorism Act, 2015* (S.C. 2015, c.20)

Unlike the new s 12 (2) and 12.1, section 16 stipulates that in assisting the Ministers in carrying out their responsibilities for defence and international affairs, CSIS employees may only assist in the collection of intelligence within Canada.

In carrying out both of its mandates, CSIS relies on both open and covert sources. The open sources may be websites, or newspaper reports. Covert means may involve the interception of communications or other searches and seizures. Any activity of an intrusive nature that would otherwise constitute an illegality or criminal offence, such as a break-in to install a listening device, requires a judicial authorization from the Federal Court.

A Designated Judge is on duty 24 hours a day and 365 days of the year to respond to any warrant application that may be filed, including on an urgent basis. The identity of the duty Judge is not disclosed in advance to avoid any possibility or perception of judge shopping.

The Act stipulates that the applications are to be conducted in private and, as a practical matter, they are heard in the Court's secure premises in Ottawa although that is not expressly required by the statute. The application and the evidence submitted in support are filed with the Court on a confidential basis. This is usually in the form of a lengthy affidavit sworn or affirmed by a senior member of the Service that sets out the factual basis in support of the application

The duty judge studies the materials filed by CSIS to ensure that the record meets all of the requirements of the Act for the issuance of a warrant. These requirements are set out in sections 7 and 21 through 28. There is a lengthy list of approvals required and statutory conditions that must be met before a warrant can issue, and it is the role of the designated judge to ensure that all of these have been satisfied. Most importantly, of course, in the case of section 12 warrants is the question whether the application meets the necessity test stipulated by the statute.

An oral hearing is then held, and a typical hearing is attended by counsel for CSIS, the CSIS affiant, and CSIS analysts knowledgeable about the application. While not strictly necessary, the hearing is conducted as a formal matter with a Court Registrar who takes minutes of the proceedings. The judge may also require the presence of a security cleared court reporter to make a verbatim record. The affiant and/or the analyst will be examined under oath on matters of fact, and CSIS counsel will address questions pertaining to the legal issues that the judge may have. The judge may require that additional information be provided if not satisfied, postpone the matter and schedule additional hearings. Warrants are typically issued for a fixed period of time and may be renewed by the Court on the basis of a fresh application.

On occasion, where a warrant application raises, for example, a novel question of jurisdiction, the Court may appoint *amicus curiae* to ensure that the matter is fully argued with the benefit of competing views. The *amicus* will be a security cleared lawyer with experience in national security matters. In recent years, they have been selected from the list of Special Advocates

prepared for security certificate and other matters under the *Immigration and Refugee Protection Act.*

Periodically, designated judges have provided constructive criticism to the Service and its counsel, keeping in mind human rights, privacy and other issues that have arisen in the warrant context. This has led to a steady improvement in the quality of applications for, and the terms of, the warrants granted by the Court. Warrants may be issued for a shorter period of time than normal while additional conditions are considered. One area in particular that I have emphasized as requiring improvement since becoming a designated judge is the condition associated with solicitor-client privilege in relation to communications between the subject of a warrant and his or her counsel. This was to ensure that the condition was entirely consistent with recent Supreme Court jurisprudence.

And from time to time, the Court has released public versions of decisions issued in warrant cases that raise important issues of law or jurisdiction[40]. These may be partially redacted but in the spirit of the open court principle, the Court strives to release as much information as is possible in the circumstances. I did that, for example, in the matter I referred to earlier involving the extraterritorial reach of the Act.

I first dealt with the application on an urgent basis due to exigent circumstances but granted the warrants for a shorter period than normal to allow for further consideration of the issue. I subsequently published redacted public reasons[41] explaining why I had accepted the fresh jurisdictional argument advanced by the government. Public reasons were again released in 2014[42] when I chose to revisit the matter upon publication of the CSE Commissioner's report.

A decision was also recently made public by my colleague Justice Anne Mactavish relating to who may and may not be the target of a section 16 CSIS warrant[43].

We impose conditions requiring the Service to inform us of any changes to the information submitted that may affect the scope and effect of the warrant during its lifespan; which can be up to a year. Supplementary warrants may also be issued when the targets change.

The role of examining how a warrant has been executed has been assigned by Parliament to the Security Intelligence Review Committee, or SIRC, which annually reviews a number of warrant applications approved by the Court. In fulfilling its review mandate, SIRC has full access to all CSIS file materials to assess the accuracy of the affidavit evidence filed with the Court.

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[40] *Canadian Security Intelligence Service Act (Re),* 2008 FC 300.

[41] *X(re)* 2009 FC 1058

[42] *X(re)* 2013 FC 1275, aff'd 2014 FCA 249

[43] *Canadian Security Intelligence Service Act (Can) (Re),* 2012 FC 1437, [2014] 2 F.C.R. 514.

The 2013-2014 Annual Report by SIRC indicates that CSIS applied for 85 new warrants in that fiscal year and 178 renewal or supplemental warrants for a total of 263. The Report does not state how many of those were reviewed.

Canada Evidence Act

Turning to our work under the *Canada Evidence Act.*

Where the Attorney General of Canada is of the view that "sensitive information" (as the term is defined in the legislation) is about to be disclosed before any court or tribunal in Canada, including a judicial inquiry, section 38 of the *Canada Evidence Act* provides that the issue of disclosure must be referred to the Federal Court for adjudication. This could arise, for example, in a criminal prosecution, a civil action for damages or in a Commission of Inquiry as was the case during the Arar Inquiry, when the Government opposed the release of certain information in Commissioner O'Connor's Report.

As I mentioned before, this jurisdiction stems from the recommendations of the McDonald Commission and dates from 1982. The designated judge in these cases will examine the contested information and hear evidence and submissions from the parties. Applying a three stage test developed in the *Ribic*[44] case, the judge will determine whether the information is relevant to the underlying proceedings, cause injury to a protected national interest if disclosed and, ultimately, whether the public interest in disclosure outweighs the public interest in non-disclosure. That task involves balancing important competing interests such as the right of the individual to disclosure in a criminal trial or to discovery in civil proceedings against those of the state to preserve its secrets.

At one time, the very fact that a s 38 application was being heard had to be kept entirely confidential. That requirement of the Act was struck down by my former Chief Justice, Allan Lutfy, in 2007 in the *Toronto Star* case[45]. He found that the restrictions violated the open court principle; a core democratic value inextricably linked to the fundamental freedoms of expression and of the media protected under paragraph 2(b) of the *Charter.* And, he found, it could not be saved under section 1. As a result, the provisions were "read down" to allow for the presumptive public disclosure of everything filed in a s 38 proceeding save for sensitive *ex parte* material.

We have gradually opened up the process further by conducting as much of it as possible in open court. In addition, when engaged in a lengthy s 38 process we hold regular case management conferences with the parties or authorize communications to inform them of what is happening.

The Court may also receive submissions from the private party as to why it needs the sensitive information, in the absence of the government's representatives. This has been done, for

[44] *Canada (Attorney General) v Ribic,* 2003 FCA 246, [2005] 1 F.C.R. 33.

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

example, in the context of a criminal case where the accused's counsel wished the designated judge to know their defence theory.

The Attorney General has a statutory right to be heard in private on these applications and will present classified documents and testimony *ex parte.* This can be, of course, difficult for judges trained in the adversary system as we are accustomed to hearing from both sides of a matter before rendering a decision. For that reason, in recent years we have from time to time appointed *amicus curiae* to assist us in examining the contested information and to respond to the arguments of the Attorney General. The terms of the amicus' appointment may vary according to the nature of the case. I have issued an order, for example, authorizing them to act as if they are *in camera* counsel for the person affected.

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

At the conclusion of the proceeding, the court may order the disclosure of the information or that it be released in a summary or alternative form. Where the information has been obtained from a foreign intelligence agency under restrictions, known as caveats, our practice is to require the government to seek consent for release. This works sometimes. Some foreign agencies are more forthcoming than others particularly those that are more familiar with the use of intelligence as evidence in court proceedings. Others refuse to have their involvement or any of their information disclosed[46]. In such instances, the Court may authorize the release of the information or a summary with attribution to a generic "foreign service".

It is well known that much of the intelligence obtained by Canada comes from foreign intelligence agencies under an express promise of confidentiality. As the Supreme Court of Canada observed in *Ruby*[47], Canada is a "net importer" of intelligence information, and the receipt of this information is necessary for the security and defence of Canada and its allies. The great fear of our intelligence agencies is that their sources may dry up if Canada were to unilaterally disclose sensitive information that had been received from a foreign service under caveat. How realistic that might be in a particular situation is one of the questions that a designated judge must consider.

The section 38 regime has been criticized for bifurcation of the trial process before the provincial Superior Courts. The constitutionality of the scheme was upheld by the Supreme Court in

[46] Which reminds me of the old joke that the initials "NSA" stood for "No Such Agency".

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

Ahmad,[48] one of the cases arising from the prosecution of members of the "Toronto 18". In doing so, the Court noted that s 38 cases can bring into conflict two fundamental obligations of the state under our system of government: the need to protect society by preventing the disclosure of information that could pose a threat to international relations, national defence or national security; and the ability of the state to prosecute individuals accused of offences against our laws.

Parliament had recognized that on occasion it may become necessary to choose between these objectives but laid out an elaborate framework to attempt where possible to reconcile them. Where that conflict is irreconcilable, the Supreme Court held, the right of an accused person to make full answer and defence could not be compromised.

The adequacy of the disclosure to the accused was very much on my mind when I conducted the s 38 proceeding in the *Khawaja*[49] matter in 2007. In that case Mr. Khawaja was charged with seven counts under the Criminal Code in relation to a conspiracy to commit terrorist acts in the UK. I structured my decision to provide for additional disclosure to the trial judge in the event that a motion for a stay of proceedings was brought on the ground that the accused's fair trial rights had been infringed as a result of the process. No such motion was brought. In *Ahmad*, four years later, the Supreme Court observed that this was an example of how the s 38 process could be flexibly applied to reconcile the competing interests.

Proceedings under the Immigration and Refugee Protection Act

The final area that I will address is the Court's jurisdiction under the *Immigration and Refugee Protection Act*[50]. This statute is the source of much of the court's work load and we deal with a great many applications for judicial review relating to refugee claims, visa issues, admissibility and other matters relating to decisions made by the Minister and the tribunals that exercise functions under the Act. Most of these cases do not involve national security issues and are handled by all of the judges of the Court.

In some instances, the government may wish to protect part of the record of the proceeding under review that would otherwise be produced to the applicant. In such cases, the Minister will apply for non-disclosure, under s 87 of the Act, on the ground that the disclosure could be injurious to national security or endanger the safety of any person. In support of the application, the Minister will file, *ex parte* materials including affidavit evidence. A designated judge will review the application and decide whether it is necessary to conduct a hearing.

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

[49] *Canada (Attorney General) v. Khawaja* 2007 FC 490, [2007] F.C.J. No. 622

[50] S.C. 2001, C. 27

These applications may involve substantive matters but, in my experience, they often concern information relating to methods and procedures or administrative details such as names, file and telephone numbers that the agency concerned, such as CSIS or the Canadian Border Services Agency, does not want to be made public. This information is of dubious relevance and unlikely to have any effect on the outcome of the underlying proceedings. In such cases, the motion can often be dealt with summarily and on consent. When the information is more significant, in my experience the applicant has usually been informed of its substance in the decision that is under review and the non-disclosure is not material and not contested.

The security certificate cases are another matter. This procedure has been in our law since 1978 but has attracted public attention only since it was employed against 5 men following 9/11. In such cases, the Minister of Public Safety and the Minister of Citizenship and Immigration certify their belief that a person, other than a Canadian citizen, is inadmissible to Canada on grounds of security, violating human or international rights, or participation in serious or organized criminality.

The certificate must then be referred to the Chief Justice or a designated judge for a determination as to its reasonableness. If the reasonableness of the Certificate is upheld, it becomes conclusive proof that the person named is inadmissible to Canada and takes immediate effect as a removal order.

This was originally intended to be a scheme for the summary removal from Canada of non-citizens considered to present a danger to its security and, indeed, it has worked that way in a few instances. Justice Pierre Blais, as he then was, dealt with a certificate case involving a Russian spy under this procedure some years ago. It took about a month from start to finish. But in that case, the spy did not contest removal when he realized that the game was up.

The certificate scheme is, in its essence, consistent with long recognized principles of immigration law. In *Chiarelli*[51] the Supreme Court characterized "the most fundamental principle of immigration law" to be that "noncitizens do not have an unqualified right to enter or remain in the country". The Court went on to quote from its earlier decision in *Kindler*[52] that "[t]he Government has the right and duty to keep out and expel aliens from this country if it considers it advisable to do so".

The difficulty of course is that most certificate cases in recent years have not involved Russian spies but persons who have claimed asylum in this country from alleged persecution in their countries of origin. They assert that they would be at risk of torture or worse, if returned home, so they are, in a sense, in a security limbo. They have been found to be inadmissible to Canada, but the Government's efforts to return them have been strenuously contested. These cases have

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

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

proven to be exceptionally complex and have involved difficult constitutional issues which the Supreme Court has been required to address on several occasions.

The security certificate scheme was quashed by the Supreme Court in the first *Charkaoui*[53] decision in 2007 and Parliament given a year to legislate additional protections for the named person. Parliament did so by providing for the appointment of special advocates. These security cleared lawyers participate in the closed sessions in which designated judges examine the sensitive intelligence material held by the government.

As a result of the Supreme Court's decision in the second *Charkaoui* decision in 2008[54] the Government was obliged to disclose all of the information in its possession with respect to the named person, whether or not that information was being relied upon by the Government in support of its case, subject to a determination by the designated judge whether its disclosure would be injurious to national security or to the safety of any person.

This has involved literally thousands and thousands of documents, each of which had to be carefully reviewed so as to ensure that nothing injurious to Canada's national security was inadvertently released. At the same time, it is the duty of the designated judge to ensure that the named person is treated fairly and knows the case that they have to meet. Many issues may arise in these proceedings such as whether information received from foreign agencies was obtained through the use of torture. If so, it will be excluded from the evidence. These questions may require lengthy evidentiary hearings to resolve, and has resulted in the development of detailed jurisprudence by our Court.

In the Supreme Court's most recent examination of the present scheme, the *Harkat*[55] case decided in May of last year, the legislation survived constitutional scrutiny.

I was fortunate to have been assigned the *Almrei* security certificate matter[56] as the issues and the evidence were relatively straightforward. Still it took about two years from start to finish notwithstanding that I had the assistance of very good counsel representing Mr. Almrei and the Attorney General and as special advocates. Other security certificate cases have taken longer and one remains to be decided.

In doing this work, my designated colleagues and I are all "acutely aware that when proceedings are not open to public scrutiny there is a tendency to suspect that what goes on in secret must be

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[53] *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9

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

[55] *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37.

[56] *Re Almrei*, 2009 FC 1263

Kafkaesque or perverse".[57] We endeavour to shed as much light on it as possible. But given the nature of the work, it will never be possible to conduct these proceedings entirely in open court.

The challenge for us, as designated judges, is to strike the appropriate balance between legitimate national interests and security on the one hand, and the rights and equality of individuals, and public accountability and transparent decision-making, on the other.

Looking back over the past ten years, I believe that my fellow designated judges and I have contributed to the development of the law in a positive way. The work is demanding and frankly, much of it consists of tedious attention to detail. But it is meaningful work and it has been an honour to have had the opportunity to specialize in this area. And never, back in the early 70s when I was pushing quarters into that Law House beer machine, could I have ever imagined that my law degree would take me in this direction.

I thank you for your patience and I would be pleased to try to answer your questions.

[57] Justice Eleanor Dawson, "The Federal Court and the Clash of Titans: Balancing Human Rights and National Security", speech delivered at Robson Hall, University of Manitoba, March 30, 2006.