

Some Consequences of the Failure to Define the Phrase "National Security"

by
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INTRODUCTION

"National security" is a phrase which lacks a definition. M.L. Freidland commenced his study for The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police with the following statement: "I start this study on the legal dimensions of national security with a confession: I do not know what national security means. But then, neither does the government."¹ The dimensions of the concept of national security have not only eluded academics and politicians but also the judiciary.

During a discussion of the diverging views on the use of the investigative technique of eavesdropping, Mr. Justice Black of the United States Supreme Court stated that ". . . others would bar it except in searching for evidence in the field of "national security," whatever that means, . . ."² One view is that the term is indefinable, but, like obscenity, people know it when they see it.³ This was the view held by the UK Committee of Privy Counsellors on Ministerial Memoirs, which in 1976 stated:

National security is a vague enough idea in the conditions of the modern world and its subjects range much further afield than the simpler categories of earlier days, such as the plans of fortresses or the designs of warships or aeroplanes. Nevertheless, experience has shown that, when it comes to a practical issue turning on a particular set of facts, it is not usually difficult to agree whether they fall within or without the security net.⁴

Given the public's reaction to revelations with respect to RCMP activities during the 1970s and the recent controversy surrounding the role of Canadian Security Intelligence Service (CSIS) in Canadian society, it is quite optimistic to assume that there is general agreement on whether or not a particular set of facts fall within or without the security net. In a recent text on national security law the authors point out the importance of defining the phrase "national security":

The stakes in defining national security are high. Those who succeed in associating national safety or national defense with their position on an issue generally achieve the high ground in public debate.⁵

This article will illustrate that there is a need in Canada to develop a workable definition, or test, which can be used as a point of reference in an examination of how the phrase "national security" (and synonymous phrases,

such as "security of Canada") is employed by the Canadian government and the courts. Further, it will suggest criteria for use in determining what "national interests" should be elevated to "national security interests."

In Friedland's 1979 study he stated that the phrase "national security" was not used in Canadian legislation.⁶ Today however, the phrase "national security" is used in no fewer than six federal statutes⁷ and four regulations⁸ pursuant to federal statutes. In addition, a number of other statutes use the phrase "security of Canada,"⁹ and there are other statutes which, while they do not employ the term "national security" or "security of Canada," clearly concern themselves with national security.¹⁰ Even with the increase in the use of the term "national security," nowhere is it defined.

There are three serious consequences of this failure to define or establish a test of "national security" that I will examine. First, because the term "national security" is not defined, Parliament is unable to adequately define what amounts to a "threat to the security of Canada." Second, because there are currently no boundaries as to what can be done in the name of national security, there is tremendous potential for abuse, particularly by the executive branch of government. Third, even in light of the courts' new role since the advent of the Canadian Charter of Rights and Freedoms, in the area of national security the courts appear to show deference to the government's position.

THREATS TO THE SECURITY OF CANADA (Whatever that means)

National security is a term which is used by the government to justify placing the most extreme limitations on Canadian's rights and freedoms. "Threats to national security" is a convenient way of describing a growing range of matters from "espionage" to "subversion" and "terrorism" (a term which also appears to be expanding, eg. "narco"-terrorism). Without a definition of the phrase "national security," however, it is impossible to define those situations which amount to a threat to national security. A brief review of the possible interpretations of section 2 of the Canadian Security Intelligence Service Act (CSIS Act) illustrates this point.

The primary function of CSIS is set out in section 12 of the CSIS Act:

The service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyze and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report and advise the Government of Canada.

Under the authority of a warrant CSIS may employ intrusive investigative techniques such as the opening of mail, electronic surveillance, surreptitious entry, search and seizure. CSIS has, however, been given the mandate to pursue information under section 12 with such vigor only with respect to activities that "may on reasonable grounds be suspected of constituting threats to the security of Canada." Hence, the justification of any possible Charter

violations will rest in the interpretation of a threat to national security or, in the words of the CSIS Act, "threats to the security of Canada."

"Threats to the security of Canada" are defined in section 2 of the CSIS Act as follows:

- (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed towards or in support of such espionage or sabotage,
- (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
- (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and
- (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada, but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

The four general elements of the definition clearly are: espionage and sabotage, foreign-influenced activities, politically motivated violence, and subversion. This definition of a "threat to national security" as disclosed in section 2 of the CSIS Act is ambiguous and open-ended.

Would the phrase "detrimental to the interests of Canada," found in paragraph 2(a), allow CSIS to investigate espionage against another country? Moreover, paragraph (a) suggests that investigations quite removed from actual or apprehended acts of espionage or sabotage, both physically and temporally, would be permitted. Also, does the broad wording of paragraph (b) in regard to "foreign-influenced activities" allow CSIS to investigate economic ventures of foreign countries or foreign based multi-national enterprises in Canada?¹¹

Paragraph 2(c) allows the use of intrusive techniques to monitor "activities . . . in support of . . . acts of serious violence . . . for the purpose of achieving a political objective within Canada or a foreign state." Would intrusive surveillance techniques have been available to collect information about Canadian citizens who, on their own initiative, had collected money for the rebels in Afghanistan or the students' pro-democracy movement in China? Or would this fund-raising have been protected by the final words of section 2 which exclude "lawful advocacy, protest or dissent"? Although it is not clear if section 2 would apply to these situations it could be argued that they present no genuine security threat.

Paragraph 2(d) would make intrusive investigative techniques available for "activities . . . intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada." It has been stated that "[w]hen ultimate intentions become the operative threshold, there is a great danger that speculation rather than evidence would be at a premium."¹² What will constitute the evidence required to illustrate an "ultimate" intention?

Activities "intended to ultimately lead to" the overthrow by violence of the system of government in Canada could include lawful conduct which may take place years before the anticipated illegality. It is difficult to comprehend the necessity of allowing electronic surveillance for something as distant as "activities intended ultimately" to overthrow the government of Canada by violence.

Would paragraph 2(d) allow for the surveillance of members of the Parti Quebecois or the Confederation of Regions party? Both parties advocate major changes to the system of government in Canada. However, neither party advocates violence in pursuit of its goals. Does the word "intended," in paragraph 2(d) refer to a subjective or objective intention? Objectively, activities directed toward the implementation of a policy advocating one official language or the separation of a province from Canada may ultimately lead to violence and a destruction of our present version of a constitutionally established system of government.

The Security Intelligence Review Committee, in both its 1985-86¹³ and its 1986-87¹⁴ annual reports, expressed concern that the definition of "threats to the security of Canada" in section 2 of the CSIS Act may be too broad. The lack of a more precise definition as to what is a "threat to the security of Canada" has not provided CSIS with a clear enough mandate as to what activities they should, and what activities they should not, be investigating. The Independent Advisory Team appointed by the Solicitor General on 22 July 1987 to review, among other matters, CSIS's operational policies, stated that the section 2 definition of "threats to the security of Canada" does not provide intelligence officers with the proper guidance required to target threats.¹⁵ The Advisory Committee recommended that "policy standards" and "operational interpretations" necessary to establish an operational framework for paragraphs 2(a) to (d) of the CSIS Act be developed.¹⁶ As the Review Committee commented: "[S]ome of the threats described by CSIS are clear-cut; all loyal Canadians would agree that they deserve the Service's unremitting attention. But some left us perplexed."¹⁷

In September 1990, the Report of the Special Committee on the Review of the CSIS Act and the Security Offences Act recommended changes to section 2 of the CSIS Act to the government.¹⁸ Pursuant to section 69 of the CSIS Act, this Committee was charged with completing a comprehensive review of the provisions and operation of the Act and submitting a report to Parliament which included a statement of any changes the Committee recommended. The government's response to the Special Committee's suggested

amendments was vague and noncommittal, the spirit of which is captured in the following passage:

There may be reasons to open the two Acts for amendment in the future, given evolving jurisprudence and the continuing development of the new system. But the Government does not believe legislative changes are required at present. In many cases where the Special Committee has recommended amendments to deal with issues, the Government believes further policy development would address the concerns raised. In other cases, further review of the functioning of the national security system is required before definitive judgments can be made. The Government does not favour altering the intricate system of checks and balances established by the Acts. So far, these have served Canadians well in ensuring effective national security with due regard for the fundamental rights of individuals.¹⁹

Be it a change to policy or to legislation, the effect of attempting to narrow or clarify the definition of a "threat to the security of Canada" is a circuitous attempt to identify what the legislation is endeavoring to protect (that is, "national security"). However, without a definition of the term "national security" the government will never be able make its intentions known, either to the public or to intelligence officers, as to what situations they believe amount to a threat to the security of Canada.

NATIONAL SECURITY AND THE EXECUTIVE BRANCH OF GOVERNMENTS' POTENTIAL TO ABUSE THEIR POWER

According to Australian intelligence historian Frank Cain, "[i]ntelligence organizations are political bodies established to solve political problems . . ."²⁰ Historically, governments have received criticism on their use of intrusive investigative techniques under the pretext of protecting "national security." An insight into the reason for this criticism may have been uncovered by recent research. A study by Joseph Fletcher indicates that the ordinary Canadian is more skeptical about wiretapping by security services than are government decision-makers.²¹

The findings reported here on Canadian attitudes likewise suggest opposing perspectives among those who are governed. Across the full range of threats to national security outlined in the C.S.I.S. Act, the responses of ordinary Canadians reveal caution or skepticism regarding government surveillance of private telephone conversations, whereas the responses of the decision makers indicate greater acceptance of such intrusions as an instrument of government control in service of national security.²²

The disparity of opinion between ordinary Canadians and decision-makers may be explained by the fact that the decision-makers have greater

knowledge of the protection afforded by law to individuals suspected of being a threat to the security of Canada. Regardless of this knowledge, when asked about wiretapping, decision-makers "... have a much harder time saying "no" than the public — even when the threat is nothing more serious than holding radical ideas."²³ This difference in attitude between government and the ordinary citizen as to what situations call for the use of wiretapping in the name of national security may even exist between governments and their own security services.

According to Peter Wright, the author of the book *Spycatcher*, in the late 1950's the British Government was hosting an Argentine delegation during negotiations for a meat contract between the two governments.

Hollis [the head of MI5] passed down a request from the Board of Trade for any intelligence, and instructed us to arrange for microphone coverage of the Argentines. Winterborn and I were outraged. It was a clear breach of the Findlater-Stewart memorandum, which defined MI5's purposes as strictly those connected with national security. The rest of the A2 staff felt exactly as we did, and Hollis's instruction was refused.²⁴

It has long been recognized that governments have great flexibility when their actions are cloaked in terms of national security:

Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first. The safety of the people doubtless has relation to a great variety of circumstances and considerations, and consequently affords great latitude to those who wish to define it precisely and comprehensively.²⁵

Therefore, even when politicians have the national interest at heart they may use intelligence organizations in ways that ordinary citizens would not accept. The use of the armed forces during the FLQ "crisis" may have been such a situation. The following transcript of Canadian Broadcasting Corporation's reporter Tim Ralfe's 14 October 1970 interview with the then Prime Minister Pierre Elliot Trudeau illustrates the latitude a government may assume with respect to civil rights when they believe that they are protecting "national security."

Trudeau: There's a lot of bleeding hearts around who just don't like to see people with helmets and guns. All I can say is "Go on and bleed," but it's more important to keep law and order in this society than to uh, uh, be worried about uh, weak-kneed people who uh, don't like the looks of a, of...

Ralfe: At any cost? At any cost? How far would you go with that? How far would you extend that?

Trudeau: Well, just watch me.

Ralfe: At, at reducing civil liberties? To that extent?

Trudeau: To what extent?

Ralfe: Well wouldn't, . . . if you extend this and you say, okay you're gonna do anything to protect them, this . . . include wire tapping, uh, reducing other civil liberties in some ways?

Trudeau: Yes, I think that society must take every means at its disposal to defend itself against the, uh, emergent of a parallel power which defies the elected power in this country, and I think that goes to any distance.

There have also been a number of examples in recent history which illustrate that governments are not reluctant to use the term "national security" to achieve self-serving political goals as opposed to national security ends. The most infamous example is that of past President Nixon's discussion with John Dean and H.R. Haldeman with respect to the break-in at the offices of the Democratic National Committee in the Watergate buildings in Washington DC. The following is an excerpt of a conversation between these three men on 21 March 1973 in the Oval Office:

President: What is the answer on this? How you keep it out, I don't know. You can't keep it out if Hunt talks. You see the point is irrelevant. It has gotten to this point —

Dean: You might put it on a national security grounds basis.

Haldeman: It absolutely was.

Dean: And say that this was —

Haldeman: (unintelligible) — CIA —

Dean: Ah —

Haldeman: Seriously,

President: National Security. We had to get information for national security grounds.²⁶

The argument can be made that, with proper accountability procedures in place, a government would not be able to use security services for their own political purposes. However, without a definition, or test, of "national security" how can any system of accountability recognize when a security service (as agent for a government) is misusing the tremendous power that can be wielded in the name of national security?

NATIONAL SECURITY AND THE CAUTIOUS HAND OF THE JUDICIARY²⁷

Since the advent of the Canadian Charter of Rights and Freedoms the judiciary of Canada has taken on a new role. With regard to the courts' new role Madame Justice Bertha Wilson, while delivering the David B. Goodman Memorial Lectures at the University of Toronto in 1985, noted that:

We can no longer rely on the doctrine of the supremacy of Parliament as a reason for staying our hand . . . I think the conclusion is inescapable that the scope of judicial review of legislative and executive acts has been vastly expanded under the Charter and that, indeed, the courts have become mediators between the state and the individual . . . The courts, in other words, have been given the responsibility for developing some kind of balance between the fundamental rights of the citizens on the one hand and the right and obligation of democratically elected governments to govern on the other. The challenge for the courts is to develop norms against which the reasonableness of the impairment of a person's rights can be measured in a vast variety of different contexts. But not only that. These norms must reflect to the maximum extent possible the political ideal of a free and democratic society.²⁸

The impact of the Charter on judicial decision-making has not had a dramatic effect on their review of legislative and executive acts with respect to national security. In this area the courts appear to show deference for the government's position. The result is the potential for abuse of Canadians' rights and freedoms. This can be illustrated with a review of the two primary areas the courts become involved in when dealing with national security issues. These areas are, firstly, the issuing of warrants in order that CSIS can investigate a threat to the security of Canada, and secondly, in determining the validity of the government's objection to disclosing information on the grounds that disclosure would be injurious to national security.

A. The Warrant Process

The warrant process is governed by sections 21 through 28 of the CSIS Act. An application for a warrant can be made by either the Director or an employee of the Service to a judge of the Federal Court.²⁹ The applicant must have "reasonable grounds" to believe that a warrant is necessary to "enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16." Further, it is a requirement that the approval of the Solicitor General be obtained before any application is made.

Subsection 21(2) sets out the details of what must be specified in the affidavit accompanying an application for a warrant. Paragraph 21(2)(b) sets out three conditions, one of which must be met before an application may be made. The three conditions are as follows:

- (1) other investigative procedures have been tried and have failed or why it appears that they are unlikely to succeed; or
- (2) the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures; or
- (3) without a section 21 warrant it is unlikely that information of importance with respect to a threat to the security of Canada or the collection of information concerning foreign states and persons in order to assist the Minister of National Defence or the Secretary of State for External Affairs would not be obtained.

In *Regina v. Atwal*, the Federal Court of Appeal held that the "... failure to describe in the warrant the perceived threat to the security of Canada in terms other than the words of the Act, does not render the warrant invalid on its face."³⁰ The Federal Court of Appeal found support for this proposition in a number of decisions involving wiretap authorizations.³¹

It is clear that Criminal Code wiretap authorizations have not been struck down for want of particularity when, in the nature of the investigation for which they were issued, the missing particulars were not reasonably to be expected to be forthcoming in advance.

The Court in *Atwal* felt that it would generally be less practical to be specific, in advance, in authorizations to intercept private communications under the CSIS Act than under the Criminal Code. The Code contemplates interception of information after or during an event, while the provisions of the CSIS Act are designed to gather information to anticipate a future event. This distinction was acknowledged by the United States Supreme Court in *U.S. v. U.S. District Court*³² when it stated:

Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime". The gathering of security intelligence is often long range and involves the interrelations of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Although section 21 does not require a judge to believe, on reasonable grounds, that an offence has been committed or that evidence of the offence

will be found at the place of the search, the majority of the Federal Court of Appeal in *Atwal* felt section 21 met the minimum standards for a reasonable search and seizure required by the Charter. The Court relied on the Supreme Court of Canada's decision in *Hunter et al. v. Southam Inc.*³³ in which Justice Brian Dickson, as he then was, said:

The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of search, constitutes the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure.

The majority of the Court in *Atwal* stated that *Hunter* anticipated that a different standard should apply when national security is involved. The Court expressed that this standard is not necessarily lower but one that takes into account reality.³⁴ Justice Hugessen's dissenting reasons in *Atwal* are more attractive than the reasons of the majority. Hugessen recognized that the issue is where to draw the line between the individuals' expectations of being left alone and the state's need to defend itself against attack.³⁵ For any search or seizure to be reasonable, there must be an objective test to guide the judicial officer who is called upon to authorize the intrusion. As the Supreme Court of Canada stated in *Hunter*:³⁶

The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the State cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.

Justice Hugesson stated, "The words 'required to enable the Service to investigate a threat to the security of Canada', employ language that is so broad as to provide no objective standard at all."³⁷ Even when one considers the importance of the state interest involved, the extent of a possible intrusion into the privacy of the citizen is wholly disproportionate.³⁸ As *Hunter*³⁹ pointed out:

... it is the Legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislation lacunae constitutional. With-

out appropriate safeguards legislation authorizing search and seizure is inconsistent with s.8 of the Charter.

Hugesson correctly demonstrated that section 21 does not provide any reasonable standard by which a judge may test the need for the warrant:⁴⁰

There is no requirement to show that the intrusion into the citizen's privacy will afford the evidence of the alleged threat or will help to confirm its existence or non-existence. Nothing in the language of the statute requires a direct relationship between the information it is hoped to obtain from the intercepted communication and the alleged threat to the security of Canada. On the contrary, the relationship that is required to be established on reasonable grounds appears to be between the interception and the investigation of the threat. In practical terms this means that the statutory language is broad enough to authorize the interception, in the most intrusive possible manner, of the private communications of an intended victim of a terrorist attack without his knowledge or consent. Even more alarming, it would also allow an interception whose purpose was not directly to obtain information about the threat being investigated at all, but rather to advance the investigation by obtaining other information which could then be used as a bargaining tool in the pursuit of the investigation.

The dissenting opinion of Justice Hugesson in *Atwal* is particularly convincing when compared to the reasoning of the majority. The majority's unquestioning acceptance of a CSIS affidavit in support of an application for a warrant is an indication of the court's deference to government concerns with respect to national security. The potential victim of this blind faith is Canadians' right to privacy. Hugesson was correct; section 21 of the CSIS Act does not provide an objective standard by which a judge may balance the expectation of privacy of an individual and the need of the State to protect itself.

The CSIS Act should be amended so as to provide the adjudicators with such an objective standard. However, even if the CSIS Act was amended to state that, in order to issue a warrant, the court had to be satisfied that the intrusion into a citizen's privacy will afford evidence of an alleged threat, the court is still left to decide what constitutes evidence of an alleged threat to the security of Canada. In short, the court will have to wrestle with two questions: first, what are the dimensions of the term "national security," and second, is this a case which falls within those dimensions? The problem of uncertainty as to the scope and meaning of the phrase "threats to the security of Canada" does little to help guide the judicial officer to the correct decision when called on to authorize an intrusion.

Unlike Criminal Code warrants, which are subject to review by the courts at the trial of an accused, information collected, pursuant to a warrant by CSIS will not ordinarily be subjected to such a test. In fact, it is unusual

for information collected pursuant to a CSIS Act warrant to be brought into evidence during law enforcement proceedings. Therefore, the requirement that the CSIS Act contain a reasonable standard by which a judge may test the need for a warrant becomes even more evident when a subsequent review of the issuing of a warrant is unlikely.

B. Government's Objection to Disclosure of Information⁴¹

Prior to 1983, the Crown's refusal to disclose a document on the basis that its contents could be injurious to national security was not subject to judicial review. Subsection 41(2) of the Federal Court Act read as follows:

When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.⁴²

Subsection 41(2) was repealed in 1983.⁴³ Now, claims of Crown privilege are provided for by sections 37, 38 and 39 of the Canada Evidence Act.⁴⁴ As a result of these sections, in cases where international relations or national defence or security are said to be compromised by disclosure of information, the government's objection will be subject to review.⁴⁵ Pursuant to subsection 37(2) a superior court has the right to examine the information sought and the power to overrule the objection, "... if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest."

In *Gold v. The Queen In Right Of Canada*⁴⁶ the Federal Court of Appeal stated:

Parliament has recognized that the public interest in national security, militating against disclosure, may be outweighed by the public interest in the administration of justice, militating in favour of disclosure . . . Parliament has manifestly found it expedient to substitute a judicial discretion for what was heretofore an absolute right on the part of the executive to refuse disclosure. It is not to be assumed that any of this transpired because the government of the day was spontaneously taken by a selfless desire to share its secrets. The executive had been unable to sustain the credibility of the system of absolute privilege codified in s-s. 41 (2).⁴⁷

Although it is a court's duty to balance the competing public interests with those of an accused's right to make full answer and defence it appears that upholding the government's objection to the disclosure of information on national security grounds is virtually automatic.

In *Regina v. Kevork, Balian, and Gharakhanian*⁴⁸ the Ontario High

Court was faced with a case in which an accused was denied disclosure of certain evidence because of a Court order pursuant to section 36.1⁴⁹ of the Canada Evidence Act. The accused in *Kevoork* applied for an order for production of documents or an order to stay proceedings on charges of conspiracy and attempted murder. The defence argued that the accused's right to fundamental justice (section 7 of the Charter) would be breached if evidence was not made available to their counsel. Justice Smith stated that the burden is on the accused to persuade the Court that there is evidence being denied of a critical nature without which the applicant will probably not be able to make full answer and defence.⁵⁰ The Court reasoned that this is a reasonable burden in order to avoid fishing expeditions in all cases where it is likely that the CSIS had some hand in gathering information.

Although the Court in *Kevoork* recognized that its decision could put an accused in a "catch-22" situation,⁵¹ unable to mount a challenge for lack of a factual basis, the alternative solution is unacceptable. As the Court stated, "To stay in the case at hand, or in any case, where only some or any material information is withheld comes close to conferring immunity from prosecution upon all those charged with terrorist acts."⁵²

In *Re Goguen and Albert and Gibson*⁵³ it was held that the Chief Justice of the Federal Court can refuse to order disclosure of documents even if he did not inspect the documents. The Chief Justice can simply rely on the certificate of the Solicitor General and a secret affidavit filed to explain why disclosure would be injurious to national security. The courts, both in *Kevoork*⁵⁴ and in *Gold v. The Queen In Right of Canada*⁵⁵ agreed with the decision in *Re Goguen and Albert and Gibson* that there is no requirement for a court to inspect the information before making its determination not to disclose the information. The court in *Gold* did add however, that:

It will not be well served if it appears that the exercise of judicial discretion is automatically abdicated because national security is accepted as so vital that the fair administration of justice is assumed incapable of outweighing it. Each application under s. 36.2 must be dealt with on its own merits.⁵⁶

Moreover, the court in *Kevoork* stated that:

A case could arise where the defence will make a strong case for disclosure, for purposes of a fair trial, in which the Federal court refused even to inspect. The trial court might then have to impose a conditional stay urging inspection at least so that an informed decision can be made.⁵⁷

In *Re Henrie and Security Intelligence Review Committee et al.*⁵⁸ the Court decided to exercise its discretion and examine documents which the government would not disclose to Mr. Henrie, in order to determine if the evidence should be disclosed. Mr. Henrie was an employee of the Federal Government. An upgrade in his security clearance was denied because the organizations which Mr. Henrie belonged to (Workers' Communist Party Marxist/-Leninist (WCPM-L) and the Groupe Marxiste Leniniste Liberation

(GMLL)) were considered by CSIS to constitute a threat to the security of Canada. Mr. Henrie was not allowed to review some of the evidence considered by the Review Committee at his hearing. The Court felt that the non-disclosed evidence was highly relevant in deciding whether the political organizations to which Mr. Henrie belonged could constitute a threat to national security. Therefore, the Court exercised its discretion in favor of examining the evidence. In deciding not to disclose the evidence to Mr. Henrie the Court stated:

An examination of the documents and of the evidence mentioned in the certificate of objection convinces me that the disclosure of whatever information in those documents which might in any way pertain to the issue of whether the W.C.P.M.-L. or the G.M.L.L. were organizations which might or might not constitute a threat to the security of Canada, would prove injurious to national security because, generally speaking, such disclosure would either (a) identify or tend to identify human sources and technical sources; (b) identify or tend to identify past or present individuals or groups who are or are not the subject of investigation; (c) identify or tend to identify techniques and methods of operation for the intelligence service; (d) identify or tend to identify members of the service; (e) jeopardize or tend to jeopardize security of the services telecommunications and cypher systems; (f) reveal the intensity of the investigation; (g) reveal the degree of success or of lack of success of the investigation.⁵⁹

The Court's arguments put forward to justify non-disclosure of the documents did not involve an analysis of the potential threat to national security posed by the political organizations to which Mr. Henrie belonged. Instead the Court felt that the threat to the security of Canada was to be found in the disclosure of the operating methods of CSIS which could be uncovered by disclosing the relevant information. Therefore, if the disclosure of information which pertains to the issue of whether a group or an individual might or might not be a threat to the security of Canada may uncover CSIS operating procedures, it will not be released.

This is an inappropriate test to determine if government information should be released to an individual so that he or she may defend him/herself against government accusations. No matter how innocent the individual's activities (or those of a group to which the individual is associated), this test will effectively stymie an individual's ability to obtain information for defence against career limiting allegations or criminal charges brought by the government.

The Court in *Henrie* continued to show its deference to the position of the government when, refusing to consider editing the documents for Mr. Henrie's use, it stated: "[F]urthermore, there always remains the danger that, however innocuous the disclosure of information might appear to be to me, it might in fact prove to be injurious to national security."⁶⁰

The recent Federal Court of Appeal decision in *Chiarelli v. Minister of Employment and Immigration*⁶¹ provides evidence that the courts may be willing to more fairly balance an individual's right to know about allegations made against him or her and the government's need to safeguard national security information. Mr. Chiarelli, a permanent resident, was convicted of a crime which, pursuant to the Immigration Act, required his deportation. Mr. Chiarelli appealed his deportation order to the Immigration Appeal Board. As part of the appeal process Mr. Chiarelli was entitled to an investigation conducted by the Security Intelligence Review Committee (SIRC) and to make representations to it. In order to protect police sources of information, Mr. Chiarelli was excluded when evidence from the RCMP was heard. Subsection 48(2) of the CSIS Act permitted Mr. Chiarelli's exclusion from the RCMP's representations to SIRC. In finding that Mr. Chiarelli's section 7 Charter right (the right to life liberty and security of the person) had been infringed the majority of the Court stated:

The provision could have achieved its objectives while infringing the appellant's rights far less severely than it has done by providing a balancing mechanism rather than a total denial of the appellant's rights . . . In addition, there may well be circumstances where disclosure of the information is unavoidably necessary to establish the innocence of the person against whom the allegations have been made, and in such circumstances the infringement of the right in question, in my view, would be out of proportion to the objective sought to be achieved.⁶²

Further, the Court held that the infringement of Mr. Chiarelli's rights was not justified under section 1 of the Charter.⁶³

The report of the Special Committee on the Review of the Canadian Security Intelligence Service Act and the Security Offences Act stated that they accepted the decision of the Court in *Chiarelli*.⁶⁴ The Special Committee suggested that the government should amend subsection 48(2) of the CSIS Act in order to better balance the right of an individual to know the allegations made against him or her and the state's interest in safeguarding national security interests.⁶⁵ The Committee's suggestion was ignored by the government in its response to the Committee's report.⁶⁶ However, the government would appear to disagree with the Special Committee's suggestion because it has applied for leave to appeal the decision in the *Chiarelli* case to the Supreme Court of Canada.

CONCLUSION: THE PROBLEM OF DEFINING THE PHRASE "NATIONAL SECURITY"

What is a "threat to the security of Canada"? When are politicians using the term "national security" as an explanation for government action, as opposed to an excuse? What criteria should the judiciary use in order to become more activist in their review of both warrant applications pursuant to

the CSIS Act and the government's objection to disclosing information on the grounds that it would be injurious to national security? In order to answer these questions it is necessary to explore the dimensions of the term "national security." As governments look forward to the 1990s and have to assess the intelligence requirements for the upcoming decade the need to clarify the term "national security" will become increasingly important.

Identifying the dimensions of the term "national security" will be no less complicated than attempting to answer any of the above questions. It has been stated that:

[a]ny attempt to define the interest of national security, and to develop policies and programs to serve that interest, must articulate the conception of the state (or nation) which is to be protected; only then can the tension between the interests of the state and the interests of individuals be placed in its proper context and analyzed with a view to making some progress towards resolving that tension.⁶⁷

Attempting to define what is a "national security interest" will be the first step toward establishing a basis from which we can answer other questions posed in this article.

It is necessary to develop a theory of "national security" which will be able to differentiate between "national interests" and "national security interests." A threat to either of these interests could be seen as detrimental to the interests of Canada. However, it is a question of degree. For example, cross-border shopping is detrimental to the interests of Canada, but few would argue that the arsenal of intrusive investigative techniques available to CSIS should be turned loose on those offenders. Matters which fall within the "national security" net will be those which, more often than not, will require the use of extraordinary powers by the state. When protecting "national security interests" the state's actions will have the propensity to come into direct conflict with individual's rights and freedoms. Infringement of Charter rights and/or freedoms in the name of a "national security interest" will be *prima facie* justifiable. However, it is important to note that not every "national interest" be regarded as a "national security interest."

A "national security interest" is an interest in protecting the security of the state. In international law the essential characteristics of a state are long settled.⁶⁸ Generally, a state must have territory, a population, a government capable of maintaining effective control over its territory and be capable of conducting international relations with other states. International law does not concern itself with the domestic affairs of a state. For example, there is no rule of international law which prohibits secession from an existing state; nor is there any rule which forbids a mother-state from attempting to quash a secessionary movement.⁶⁹

Territorial integrity is the cornerstone of statehood in international law. Therefore, perhaps "national security interests" should be linked to the protection of the territorial integrity of the state from foreign military aggression or

from preparation for military aggression through covert activities. If this were the case it could be argued that only in situations in which a state's territorial integrity is at risk from foreign aggression (or foreign-influenced aggression) should an infringement of an individual's Charter rights and or freedoms be *prima facie* justifiable. In all other matters, including matters of "national interest," the state's laws, and the interpretation of those laws, should include a more balanced approach to dealing with the competing interests of individuals' rights and freedoms and the state's interests.

Endnotes

* The views expressed in this article are solely those of the author.

1. The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *National Security: The Legal Dimensions* by M.L. Friedland (Hull, PQ: Minister of Supply and Services Canada, June 1979), p. 1.
2. *Berger v. N.Y.*, U.S. Supreme Court Reports (U.S.S.C.), vol. 388 (1967), p. 88.
3. See the view of Mr. Justice Potter Stewart in *Jacobellis v. Ohio*, U.S.S.C., vol. 378 (1964), p. 197.
4. Cmnd. 6386, (January, 1976), p. 18.
5. J.N. Moore, F.S. Tipson and R.F. Turner, *National Security Law* (Durham, NC: Carolina Academic Press, 1990), p. 4.
6. *Supra*, note 1.
7. Canadian Human Rights Act, Revised Statutes of Canada (R.S.C.) 1985, c. H-6, s. 33; Diplomatic and Consular Privileges and Immunities Act, R.S.C. 1985, c. P-22, article 26; Geneva Conventions Act, R.S.C. 1985, c. G-3, article 103; Energy Supplies Emergency Act, R.S.C. 1985, c. E-9, preamble and s. 15; Canadian Aviation Safety Board Act, R.S.C. 1985, c. C-12, s. 28; Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38 (the Canada Evidence Act uses the phrase "national defence or security").
8. Safe Containers Convention Regulations pursuant to the Safe Containers Convention Act, c. 1398.8, s. 22; General Radio Regulations, Part II pursuant to the Radio Act, c. 1372, s. 32; Certain Term Employees Exclusion Approval Order pursuant to the Public Service Employment Act, c. 1340, s. 2; Technical Data Control Regulations pursuant to Defence Production Act, c. 553, ss. 3 and 9.
9. Including: Access to Information Act, R.S.C. 1985, c. A-1, s. 16; Canadian Human Rights Act, R.S.C. c. H-6, s. 45; Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, including ss. 2, 12, 21, and 57; Citizenship Act, R.S.C. 1985, c. C-29, s. 19 and 20; Criminal Records Act, R.S.C. 1985, c. C-47, s. 6; Export and Import Permits Act, R.S.C. 1985, c. E-19, s. 3; Expropriation Act, R.S.C. 1985, c. E-21, s. 5; Financial Administration Act, R.S.C. 1985, c. F-11, ss. 13 and 85; Immigration Act, R.S.C. 1985, c. I-2, s. 19 (uses the phrase "national interests"); Official Languages Act, R.S.C. 1985, c. O-3, s. 34; Privacy Act, R.S.C. 1985, c. P-21, s. 22; Public Service Staff Relations Act, R.S.C. 1985, c. P-35, s. 113; Security Offences Act, R.S.C. 1985, c. S-7, s. 2.
10. Including: Official Secrets Act, R.S.C. 1985, c. O-5; Criminal Code, R.S.C. 1985, c. C-46 (in particular Part II which deals with "Offences Against Public Order"); Emergencies Act, R.S.C. 1985, c. 42 (4th Supp.).
11. See generally "A Comparison of Bills C-157 and C-9, The Proposed Canadian Security Intelligence Service Act" (prepared by the Law and Government Division Research Branch Ottawa, 1979).

12. Canadian Civil Liberties Association and An Ad Hoc Delegation, (Submissions to the Honourable Robert Kaplan Solicitor General of Canada; Re Bill C-9 National Security, 3 May 1984).
13. Security Intelligence Review Committee, *Annual Report 1985-86* (Ottawa: Minister of Supply and Services Canada, 1986), p. 44.
14. Security Intelligence Review Committee, *Annual Report 1986-87* (Ottawa: Minister of Supply and Services Canada, 1987), p. 37.
15. Report to the Solicitor General by the Independent Advisory Team on the Canadian Security Intelligence Service, *People and Process in Transition* (Ottawa: Minister of Supply and Services Canada, 1987), recommendation 17, p. 25.
16. *Ibid.*
17. *Supra*, note 14.
18. Report of the Special Committee on the Review of the CSIS Act and the Security Offences Act: *In Flux but Not in Crisis* (Ottawa: Minister of Supply and Services Canada, September 1990), pp. 15-24.
19. The Government's Response to the Report of the House of Commons Special Committee on the Review of the Canadian Security Intelligence Service Act and the Security Offences Act: *On Course: National Security for the 1990s* (Ottawa: Minister of Supply and Services Canada, February 1991) (Solicitor General of Canada) see the Foreword.
20. F.M. Cain, *Accountability and the Australian Security Intelligence Organization. A Brief History* (Department of History, University College, the University of New South Wales, Australian Defence Academy, 1989) [unpublished].
21. J.F. Fletcher, "Mass and Elite Attitudes About Wiretapping in Canada. Implications for Democratic Theory and Politics," *Public Opinion Quarterly*, 53 (1989), p. 225; The decision-maker sample for this study was drawn from the legislative branch of government. Members of federal and provincial parliaments elected between 1979 and 1986 formed the population sampled.
22. *Ibid.*, p. 239.
23. *Ibid.*, p. 242.
24. P. Wright and P. Greengrass, *Spycatcher* (New York: Viking Penguin, 1987), p. 249.
25. J. Jay, "Dangers from Foreign Influence" in, *The Federalist* (New York: The Colonial Press, 1901), no. 10, p. 10.
26. G. Gold, ed., *The White House Transcripts* (New York: Viking, 1973), p. 163.
27. See also P. Hanks, "National Security - A Political Concept," *Monash University Law Review*, 14 (1988), p. 114.
28. B. Wilson, "Decision-Making in the Supreme Court," *University of Toronto Law Journal*, 36 (1986), pp. 238-41.
29. Subsection 21(1) of the CSIS Act.
30. *Regina v. Arwal* (1987), *Canadian Criminal Cases*, vol. 36 (3d series), p. 178 (Federal Court Appeals Division).
31. *Ibid.*
32. *U.S. v. U.S. District Court*, U.S.S.C., vol. 407 (1972), p. 322.
33. *Hunter et al. v. Southam Inc.* [1984], *Supreme Court Reports*, vol. 2, p. 167; C.C.C. 14 (1984) (3d), p. 97; *Dominion Law Reports*, 11 (4th Series), p. 641.
34. *Supra*, note 28, p. 183.
35. *Ibid.*, p. 196.
36. *Supra*, note 31.

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37. *Ibid.*, p. 191.
38. *Ibid.*
39. *Supra*, note 31, p. 169.
40. *Regina v. Arwal*, *supra*, note 28, p. 198.
41. See also A. Mewett, "State Secrets in Canada," *Canadian Bar Review*, 63 (1985), p. 358.
42. R.S.C. 1970, c. 10 (2nd Supp.).
43. Amendments to section 41 of the Federal Court Act were contained in Part III of Bill C-43, which also contained the Access to Information Act and the Privacy Act.
44. Canada Evidence Act R.S.C. 1985, c. C-5.
45. The objection is still unassailable with respect to a confidence of the Queen's Privy Council (section 39 of the Canada Evidence Act).
46. *Gold v. The Queen in Right of Canada*, *D.L.R.*, 25 (1986), (4th), p. 285 (F.C.A.D.).
47. *Ibid.*, pp. 291-92.
48. *Regina v. Kevork, Balian and Gharakhanian*, *C.C.C.*, 27 (1986), (3d), p. 523 (Ontario High Court of Justice).
49. now subsection 37(1), R.S.C. 1985), c. C-5.
50. *Supra*, note 46, p. 545.
51. *Ibid.*, p. 544.
52. *Ibid.*, p. 546.
53. *Re Goguen and Albert and Gibson*, *C.C.C.* 10 (1984), (3d), p. 492 (Ontario Court of Appeal).
54. *Supra*, note 46.
55. *Supra*, note 44.
56. *Ibid.*, p. 292.
57. *Supra*, note 46, p. 546.
58. *Re Henrie and Security Intelligence Review Committee et al.*, *D.L.R.*, 53 (1988), (4th), p. 568, (Federal Court Trial Division).
59. *Ibid.*, p. 579.
60. *Ibid.*, p. 580.
61. *Chiarelli v. Minister of Employment and Immigration*, *Federal Court Reports* 2 (1989), p. 299 (F.C.A.D.).
62. *Ibid.*, p. 326.
63. *Ibid.*
64. *Supra*, note 18, p. 175.
65. *Ibid.*
66. *Supra*, note 19.
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68. M. Akehurst, *A Modern Introduction to Criminal Law*, 6th ed. (London: Allen and Unwin, 1987), see in general Chapter 5; H. Kindred, et al., *International Law Chiefly as Interpreted and Applied in Canada*, 4th ed. (Canada: Emond Montgomery, 1987), see in general Chapter 2.
69. Akehurst, p. 53.