NATIONAL SECURITY, STATE SECRECY AND PUBLIC ACCOUNTABILITY

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Tension between national security and public accountability is present in any democracy. On the one hand, national security routinely requires state secrecy, even though such secrecy hampers the kind of public disclosure required for citizens to judge the success or failure of government policy. On the other hand, public accountability remains a core value within any democracy and gives rise to a demand for widespread public knowledge of even the most sensitive government actions and powers. This tension between security and accountability means that citizens are often precluded from having knowledge of, let alone participating in, activities that are central to the well-being and preservation of their nation.

In this paper, we recognize three main ways in which governments remain subject to the will of their citizens, even in cases relating to national security. These are:

i. the rule of law;

ii. institutions designed to advance indirect accountability; and

iii. direct public accountability.

After briefly touching on the first two of these, we concentrate in some detail upon the third. We explore the statutory provisions constraining the flow of information to the public, and note the effect of expansive definitions of national security on state secrecy and public accountability. We elaborate two specific cases in which public accountability is compromised through state secrecy. Ultimately, we conclude that in Canada today, direct public accountability remains an important, but fragile, safeguard against the abuse of government power.

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Government Accountability and the Rule of Law

The phrase "rule of law" is used more often than it is defined. At its core is the idea that safeguards must exist to prevent the arbitrary or injudicious exercise of government power.[1] The rule of law is thus regularly contrasted with the exercise of arbitrary state power. A government bound by the rule of law (as opposed to a government, say, whose actions are limited only by a lack of resources) is one constrained by non-trivial laws, principles or conventions. The rule of law is thus something more than the mere requirement that governments must act according to the law. Should a law be passed that gave a government the power to act whenever and however it saw fit, such a government would not be bound by the rule of law. The rule of law places genuine, non-trivial constraints upon the exercise of government power; it requires a prohibition on governments undertaking at least some kinds of actions; and it requires public demonstration that such restrictions are successfully upheld and enforced.

Restrictions upon government action are of two main kinds: substantive and procedural. Substantive restrictions designate those actions or types of actions that are disallowed *in toto*. For example, no government bound by the rule of law may engage in the arbitrary execution of its citizens, the arbitrary or capricious confiscation or seizure of land or property,[2] or the arbitrary closure of churches or other religious institutions.[3] Procedural restrictions designate the actions or types of actions that may be permitted, but only after appropriate public consultation and scrutiny. For example, governments may change the criminal code or increase taxes, but only after they have been duly elected and they have introduced, passed and made public the appropriate legislation.

Understood in this way, the main advantages of the rule of law are threefold: individual and other types of non-governmental liberty are increased, government corruption is reduced, and economic prosperity is advanced. In all three cases, these benefits are made more likely by placing limits on the use of arbitrary state power. For example, by placing non-trivial restrictions on government power, the freedom of individuals, families, businesses, churches, synagogues, mosques and other groups to define and pursue their own private interests is increased. By outlawing certain types of government action and government corruption, the use of government power to advance private (rather than public) interests becomes less likely. By

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1 For example, see Albert Venn Dicey, *Law of the Constitution* (London: MacMillan, 9th ed., 1950), pp.187-195, and Lon Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964), at pp.33ff. See also *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 750

2 *Roncarelli v. Duplessis*, [1959] S.C.R. 121

3 *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299

protecting individuals and corporations against the random seizure of their assets and other arbitrary measures, the kind of stability required for successful long-term investment and trade is made more likely.

Of course, the introduction of non-trivial restrictions upon the use of government power means very little if there is no guarantee that these restrictions are in fact enforced. Hence there is the need for public scrutiny and oversight. Such oversight comes in two main forms: institutions designed to establish indirect accountability, and direct public accountability.

In the case of matters relating to national security, institutions of indirect accountability include, among others: the judiciary, the Security Intelligence Review Committee, and Parliament itself.[4] All such institutions are intended to function on behalf of, or in proxy for, the citizenry as they attempt to ensure that government and its agencies remain bound by the rule of law.

Equally important, if not more so, is direct public accountability. The forms of direct public accountability are varied, but consist chiefly of institutionalized public spaces through which information may be transmitted from government sources to citizens. This happens in courtrooms, libraries, through the media and at administrative venues such as immigration or human-rights hearings. Access to information is also gained through freedom-of-information requests or is transmitted directly to the public by way of reports, news releases or whistle blowing.

The rule of law and public accountability are, in a sense, concepts that are inseparable in a democracy. Seen as an aspect of democracy, the rule of law may be understood not only as a limit or proscription on the activities of governing forces, but also as the ongoing activity of justifying state action and institutions through public discourse and reason.[5] It is the participation of citizens in a discourse of legality that bestows upon these institutions the honour of legitimately establishing the law. The flow of information is thus integral to the rule of law.

In the wake of September 11, 2001, Canadians have caught a glimpse of just how difficult it can be to obtain direct public accountability in cases relating to the

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[4] For a discussion of institutions of indirect accountability, see *Commission of Inquiry into the Actions of Canadian Officials in Relation to Mahar Arar: Accoutability and Transparency; A Background Paper to the Commission's Consulation Report*, December 10, 2004. This paper is available online at <www.ararcommission.ca/eng/accountability%20and%20Transparency.pdf>

[5] Hamish Stewart argues for the necessity of a robust notion of the rule of law as a part of any mechanism of review for claims of public interest immunity under the *Canada Evidence Act*. Hamish Stewart, "Rule of Law or Executive Fiat" in The Security of Freedom: Essays on Canada's Anti-Terrorism Bill. Eds. Ronald J. Daniels, Patrick Macklem, and Kent Roach (University of Toronto Press), 2002, at pp.217-237. However, Professor Stewart does not argue for the necessity of direct public accountability.

shadowy world of national security. Several events in the past few years have exhibited the tension between public accountability and the often-perceived need for state secrecy. Four in particular stand out. The first occurred during the Air India trial when Crown Prosecutors attempted covertly to examine an uncooperative witness using the investigative hearing process created under the *Anti-terrorism Act* in 2001. Meeting resistance, the case ultimately found its way to the Supreme Court of Canada.[6] The second occurred when, in an attempt to prevent future terrorist activities, the Minister of Citizenship and Immigration issued Security Certificates under the *Immigration and Refugee Protection Act (IRPA)* to deport five men of middle-eastern descent. While little or no evidence was made public that any of the men are a threat to Canada's national security, the government purported to rely on significant secret evidence.[7] The third was also related to the use (or misuse) of Security Certificates, this time in connection with the deportation of a notorious German anti-semite, Ernst Zundel.[8] The fourth occurred when the R.C.M.P. provided information about a Canadian citizen, Mahar Arar, to the United States, allegedly knowing that he would be sent to Syria to be tortured. Despite the fact that a Commission of Inquiry was established to look into the facts of the case, the federal government has consistently attempted to prevent the public release of information about its involvement in this case.[9] In what follows, we pay special attention to the first and third of these four cases. We believe they are representative of the ways in which secret government powers can be misused.

The paradoxical tension between national security and democratic accountability is most sharply felt during cases in which there is wide publication of potential abuse of authority. Where publicity stimulates public awareness, a demand emerges for the release of information underlying the impugned government action. Information withheld on the basis that its release would be injurious to national security forecloses the possibility of vindication or justification for that action, especially when national security is perceived as a pretext to avoid public scrutiny of malfeasance.

Judicial influence in these types of cases has been mixed, even contradictory. On the one hand, the Supreme Court of Canada confirmed that the presumption of open, public courtrooms applies even in relation to terrorism offences.[10] On the other

[6] *Re Vancouver Sun*, [2004] 2 S.C.R. 332

[7] See, for example, *Re Charkaoui*, [2003] F.C.J. No. 1815

[8] *Re Zundel*, [2004] F.C.J. No. 60,and [2005] F.C. 295

[9] For an example of such skirmishes, see Canada. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. *Ruling on National Security Confidentiality* (December 20, 2004). online at: <http://www.ararcommission.ca/eng/finalrulingonnscREDACTED_Dec20.pdf>

[10] *Re Vancouver Sun*, supra note 6.

hand, the Court presented an expanded definition of the term "national security" and accepted a generally deferential approach to national security issues,[11] which can only serve to facilitate greater state secrecy.

National Security

In Canada, there is no single definition of "national security." Rather, a constellation of related statutory definitions and judicially defined terms trigger secrecy in the exercise of state power. The statutory provisions are often intricate and inter-defined, and there exist various textual subtleties. Even so, without trying to be exhaustive and at the risk of oversimplification, "national security" and its cognate phrases emerge in important and relevant ways in each of the following pieces of legislation:

i. The *Canadian Security Intelligence Service Act (CSISA)* defines four aspects of the phrase "threats to the security of Canada": espionage or sabotage; clandestine, deceptive or threatening foreign-influenced activities; serious violence against persons or property for a political, religious or ideological objective; and acts directed towards the destruction or illegal overthrow of the government.[12] Lawful advocacy, protest and dissent are explicitly excluded.

   Most notably, the *CSISA* definition triggers the institutional power to deny access-to-information requests from members of the public under the *Access to Information Act.*[13] Similarly, an institution may refuse disclosure under the *Privacy Act (PA)* if the information requested was obtained or prepared in the course of investigations into activities constituting "threats to the security of Canada" within the *CSISA* definition of this phrase.[14]

   The *CSISA* definition also gives the Canadian Security Intelligence Service (CSIS) jurisdiction to collect and retain information, and the Attorney General of Canada jurisdiction to prosecute offenders.[15] Reasonable grounds in the presence of a *CSISA* "threat" also trigger an impressive range of powers designed to allow governments to deal with

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[11] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3

[12] *Canadian Security Intelligence Service Act*, R.S. 1985, c.C-23, s.2

[13] *Access to Information Act*, R.S. 1985, c.A-1, s.16(a)(iii)

[14] *Privacy Act*, R.S. 1985, c.P-21, s.22. See, generally, *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3

[15] *Security Offences Act*, R.S. 1985 c.S-7, s.2

"public order emergencies" under the *Emergencies Act.*[16] Finally, the *CSISA* definition triggers reporting requirements by FINTRAC, the financial transactions information clearinghouse.[17]

ii. The *Access to Information Act (AIA)* defines the "defence of Canada or any state allied or associated with Canada" as any acts or efforts to detect, prevent or suppress actual or potential attack or aggression by a foreign state.[18] Similarly it defines "subversive or hostile activities" as including espionage, sabotage, activities directed toward terrorist acts, changing government with violence or force, and gathering intelligence. These *AIA* definitions also trigger the institutional power to refuse an access-to-information request.

iii. The *Security of Information Act (SIA)* establishes as an offence the retaining or distributing of information for a purpose "prejudicial to the safety or interests of the State."[19] In this context, a purpose is deemed prejudicial to the safety or interests of the state whenever a person engages in an indictable offence or terrorist activity, endangers lives or threatens the ability of the government to preserve the sovereignty, security or territorial integrity of the state, or is involved in a long list of other acts impairing the functioning of government.[20] The *SIA* also requires a person to be permanently bound to secrecy if served with notice, in writing, that such action would be in the interests of "national security."[21] Within the act, the term "national security" is not further defined.

iv. The *Canada Evidence Act (CEA)* prevents the disclosure of "potentially injurious information" and "sensitive information" in an otherwise open courtroom or within an otherwise unrestricted administrative proceeding.[22] "Potentially injurious information" is defined as "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security."[23] "Sensitive information" is defined as "information relating to international relations or national

[16] *Emergencies Act,* R.S., 1985, c.22, part II, ss.16-26

[17] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* 2000, c.17, s.55.1

[18] *Access to Information Act,* R.S. 1985, c.A-1, s.15

[19] *Security of Information Act,* R.S. 1985, R.S. 1985, c.O-5, s.4

[20] *Ibid,* R.S. 1985, c.O-5, s.3

[21] *Ibid,* s.10

[22] *Canada Evidence Act,* R.S. 1985 c.C-5, ss.38.01 and 38.02

[23] *Ibid.*

defence or national security that ... the Government of Canada is taking measures to safeguard."[24] Again, the phrase "national security" is not further defined.

In this context, the classification of information as "potentially injurious" or "sensitive" triggers a morass of procedural obligations, including a prohibition on the introduction of evidence without notice being given to the Attorney General of Canada. Potentially it can also require a Federal Court application to gain permission to introduce such evidence.[25]

v. The *Personal Information Protection and Electronic Documents Act (PIPEDA)* eliminates an individual's right to access government information about himself or herself, and prevents the Federal Privacy Commissioner from revealing or retaining information about an individual upon receipt of a Certificate issued by the Attorney General of Canada under section 38.13 of the *CEA*.[26] The *CEA* permits such a Certificate to be issued "for the purpose of protecting national defence or national security."[27]

vi. The *Immigration and Refugee Protection Act (IRPA)* enables the deportation of non-Canadian citizens without many of the bedrock due-process protections taken for granted in the criminal context, including the right of disclosure of the case, the right to be present at one's hearing, and the right to confront one's accusers once a so-called "Security Certificate" has been issued.[28] In such circumstances, a person is not entitled to see any evidence determined by the judge to be "injurious to national security."[29] Once again, the phrase "national security" remains undefined.

The public flow of information relating to national security is thus significantly curtailed by the combined effects of *CSISA, AIA, SIA, CEA, PIPEDA* and *IRPA*. In all cases, perceived threats to national security trigger the government's right or obligation to withhold what is otherwise considered public information from its citizens. Public accountability thus decreases dramatically as the definition of "national security" expands.

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[24] *Ibid.*

[25] *Ibid.*

[26] *Personal Information Protection and Electronic Documents Act*, 2000, c.5, s.4.1

[27] *Canada Evidence Act*, R.S. 1985 c.C-5, s.38.13(1)

[28] *Immigration and Refugee Protection Act*, 2001, c.27, ss.76-87

[29] *Ibid.*

Suresh v. Canada (Minister of Citizenship & Immigration)

The Supreme Court of Canada set out its initial reaction to the events of September 11, 2001, in the *Suresh* case, released on January 11, 2002. The decision concerned the Security Certificate deportation of a member and fundraiser of the Liberation Tigers of Tamil Eelam, a resistance group fighting for a separate homeland in Sri Lanka. As we shall see, the rhetorical approach of the Court signalled extreme deference to executive decision makers, almost to the point of delinquency.

At the heart of the *Suresh* case is a ruling that the (then-titled) Minister of Immigration retains the discretion to deport persons at risk of torture only under exceptional circumstances.[30] In reaching its decision, the Court introduced a new and expansive definition of national security having significant implications in the realm of public accountability.[31]

In *Suresh*, the Court expanded the definition of "threat to the security of Canada" in the context of the Security Certificate powers set out in *IRPA*'s predecessor statute, the *Immigration Act*.[32] The elaboration was intended to answer the claim that the phrase "danger to the security of Canada" was unconstitutionally vague. After acknowledging that the phrase is "difficult to define ... highly fact-based and political in a general sense," the Court stated the following:

> Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts must now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security ...: see Rehman, supra, per Lord Slynn of Hadley, at paras.16-17. International conventions must be interpreted in light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.
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> First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventative or precautionary state action may be

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[30] *Suresh, supra*, at para. 78

[31] In addition to its effect on IRPA, Suresh has a direct effect on *SIA* and *CEA* (where the phrase "national security" is also found) and can be said to have a ripple effect on related security definitions.

[32] The most significant amendment to the Security Certificate regime by the *IRPA* was the elimination of the right to appeal determinations of the Federal Court as to the reasonableness of Security Certificates.

> justified; not only an immediate threat but also possible future risks may be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be 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 ...
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> These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious," in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.[33]

Reading these comments together, a person could be considered "a threat to the security of Canada" if an objectively reasonable suspicion of an indirect threat exists, even to a foreign nation. The standard is akin to the "articulable cause" standard in criminal law.[34] Effectively, the same standard of proof empowering a police officer to pull over a passing vehicle allows a judge to deport someone as a threat to Canada's national security.

In *Suresh*, the Court's attention was drawn chiefly to powers of deportation; no mention was made of the implications of the expanded definition of "national security" in the area of state secrecy. While we would hope that its precedential value will be limited by future decisions, Suresh may inadvertently have expanded the range of "national security" concerns that may restrict the dissemination of information. Extrapolating to the latter context, the standard in *Suresh* suggests that information will cease to flow to the public when there is just a suspicion of indirect harm to national (or international) security. The effect on public accountability is thus potentially catastrophic, and invites a critical approach to *Suresh*.

Suresh trades in the coinage that, since September 11, 2001, the world has witnessed significant changes. Perhaps because the oral and written argument in *Suresh* antedated September 11, 2001, the Court fails to list these changes or provide any evidentiary support for its comments. Instead, the Court identifies a risk that Canada could perhaps be implicated in terrorist activity or that terrorist activity could occur

[33] *Suresh, supra*, at paras. 87-90

[34] See *R. v. Jacques*, [1996] 3 S.C.R. 312, or, more recently, *R. v. Mann*, [2004] 3 S.C.R. 59

close to home. However, the mere identification of a risk is inadequate to support the Court's conclusions. As Ronald Dworkin points out:

> Rights would be worthless – and the idea of a right incomprehensible – unless respecting rights meant taking some risk. We can and must try to limit those risks, but some risk will remain. It may be that we would be marginally more secure if we decided to care nothing for the human rights of anyone else. That is true in domestic policy as well. We run a marginally increased risk of violent deaths at the hands of murderers every day by insisting on rights for accused criminals in order to keep faith with our own humanity. For the same reason we must run a marginally increased risk of terrorism as well. Of course we must sharpen our vigilance, but we must also discipline our fear.[35]

To rephrase for the Canadian context, it is the extent or degree of risk, not the mere existence of risk, which needs to be balanced against the cost of prophylaxis. We must also add that increased state powers do not exist without their own risks. Every increase in unaccountability brings with it its own risk of abuse.

Unsupported concerns dealing with September 11, 2001 manifested themselves in the Court's general comments in Suresh to the effect that the national security climate is defined by a clash of two opposing values:

> On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.
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> On the other hand stands the need to ensure that those legal tools do not undermine our democratic society's fundamental values: liberty, the rule of law, and the principles of fundamental justice. These values lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrric victory if terrorism were defeated at the cost of sacrificing our commitment to those values.[36]

There is no doubt that liberty, the rule of law, and the principles of fundamental justice serve as the bedrock of the Canadian legal system. However, the same cannot be said for the proposition that terrorism is "rippling out in an ever-widening spiral of loss and fear." The Court does not refer to a factual record or empirical study to sup-

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[35] Ronald Dworkin, "Terror and the Attack on Civil Liberties," *The New York Review of Books* 50:17 (6 November 2003), online: NY Review of Books at <http://www.nybooks.com/articles/16738>

[36] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 3 and 4

port the existence of an "ever-widening spiral." This departs from the usual requirement that *Charter* issues be decided on a piecemeal basis in an evidentiary context.

It is tempting (or even charitable) to dismiss the "ever-widening spiral" attitude as a moment of rhetorical weakness or, as one writer puts it, "a political answer to a hard case."[37] Regrettably, there is greater significance. In Kent Roach's article, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism," Roach concludes:

> I do not deny that Canadian law, courts, sovereignty and democracy all face difficult challenges in the wake of the awful crimes of September 11. But the idea that September 11 changed everything must be rejected. It must be rejected not only to preserve our Canadian values, but also to do justice to the world that existed before that awful day. Well before September 11, we had entered a realm in which it was clear that neither fundamental principles of the law, nor the courts, nor the border would save us from ourselves. The lack of guarantees does not mean that the struggle to preserve fundamental legal principles, a healthy democracy, or Canadian sovereignty are futile; indeed it makes the struggle more pressing and vital. That we have seen and survived similar threats in the past also provides some grounds for cautious optimism.[38]

Indeed, we should call for cautious optimism, but only once it is recognized that internal threats to public accountability and the rule of law are just as significant as external threats to national security. In particular, we should consider carefully whether any real change of circumstances occurred that would justify an increase in state secrecy. Without doubt it has become necessary for us to respond to the great events of our day; but it remains equally important that we not lose sight of more mundane threats, threats whose very ubiquity raises them to a level of importance equal to, or greater than, that of the terrorist.

Vancouver Sun (Re)

Two years following *Suresh*, the Supreme Court of Canada had an opportunity to address directly the issue of public accountability in *Re Vancouver Sun*.[39] The decision was a companion to *Re Application Under s.83.28 of the Criminal Code*[40]

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[37] Peter J. Carver, "Shelter from the Storm: A Comment on Suresh v. Canada (Minister of Citizenship and Immigration)" (2002) 40 ALta. L. Rev. 465 at para. 74 (QL).

[38] Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism," (2002) 47 McGill L.J. 893 at para. 82 (QL).

[39] *Re Vancouver Sun, supra* note 4.

[40] *Re Application Under s.83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 (S.C.C.)

which, after extending use and derivative-use immunity to include deportation and extradition matters, had determined that investigative hearings established by the *Anti-terrorism Act* complied with minimum *Charter* guarantees.

The judicial investigative hearing related to two acts of terrorism that occurred on June 23, 1985. The first was an explosion at Narita Airport in Japan that killed two baggage handlers. The second was an explosion that caused Air India Flight 182 to crash off the west coast of Ireland, killing all 329 passengers and crew. At the time of the application for the investigative hearing, the trial of two men accused of the Air India bombing had been underway for two weeks. The witness sought for investigative examination was a scheduled witness who had refused to cooperate with Crown prosecutors.[41] The procedural facts underlying the *Re Vancouver Sun* case are a disturbing example of how easily the public can be kept in the dark on issues of national security.

The Air India trial itself began on April 28, 2003. On May 6, 2003, the Crown applied to a judge *ex parte* for a s.83.28 of the *Criminal Code* order to gather information from an anonymous individual referred to as "the Named Person." Associate Chief Justice Dohm issued the order, directing that the hearing be held in camera without notice to the Air India accused, the press or the public. The Named Person was also prohibited from disclosing any information or evidence obtained at the hearing.

Prior to holding the investigative hearing, counsel for the accused somehow became aware of the order and advised ACJ Dohm that they wished to make submissions. The Named Person advised that he wanted to challenge the constitutional validity of s.83.28. Submissions were set down before Judge Holmes for July 27, 2003. Neither the public nor the press was given notice.

On July 27, a reporter from the *Vancouver Sun* noticed Air India lawyers entering a closed courtroom. Counsel for the Sun was quickly summoned and knocked on the closed courtroom door. He was informed that the Judge would not hear a motion at that time. The *Sun* filed a motion with the courthouse Registry to open the courtroom to the public but the *Charter* challenge and the investigative hearing took place before the *Sun's* application was set down. When the courtroom opened, Holmes, J. delivered a synopsis of her reasons dismissing the challenge to the constitutional validity of the investigative hearing. She proceeded to hear and dismiss the *Sun's* application that it be allowed further access to the pleadings and for a declaration that the investigative hearing should not proceed *in camera*.

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[41] The Defence argued that the Crown's use of the investigative hearing was a colourable attempt to obtain pre-trial examination of the witness. The Crown argued that it wanted only to investigate the offence.

The appeal proceeded directly to the Supreme Court of Canada by way of s.40 of the *Supreme Court Act*. The appeal was heard in open court subject to restrictions preventing counsel from mentioning the name, gender or facts that could identify the Named Person, and any of the material supporting the application for an investigative hearing. The hearing was not broadcast on CPAC.

> In the result, the Court confirmed that the open court principle remains a hallmark of a democratic society. It also confirmed that openness applies to all judicial proceedings,[42] including those aimed at investigating terrorism offences:
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> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.[43]

In accordance with the usual procedure, the Court placed the burden to displace the presumption of open courtrooms on the person seeking to restrain publicity. A judge may close the courtroom, or impose a publication ban or confidentiality order when

i. such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

ii. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of an accused to a fair and public trial, and the efficacy of the administration of justice.[44]

The Court distinguished between the application to hold an investigative hearing under s.83.28, and the holding of the hearing itself. Section 83.28(2) provides that the application is *ex parte* and by its nature must be held *in camera*. On the more difficult question of openness during the investigative hearing itself, the Court rejected the notion of presumptively secret hearings, subject to the following caveat:

> [the presumption of openness] should only be displaced upon proper consideration of the competing interests at <u>every</u> stage of the process. In that spirit, the <u>existence</u> of an order made under s.83.28, and as much of its subject matter as

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[42] Citing *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326

[43] *Re Vancouver Sun, supra* note 4,at para. 25

[44] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442,, *Re Vancouver Sun, supra* note 4 at para. 29.

possible should be made public unless, under the balancing exercise of the *Dagenais/Mentuck* test, secrecy becomes necessary ...

It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case – to our knowledge – in which it has been used.[45]

Although the presumption of open courtrooms was held to apply equally to the investigative hearing context, future cases will show how burdensome it is to displace that presumption. In *Re Vancouver Sun*, the Court held that the since so much of the information relating to the investigation was already in the public domain, and since the investigative hearing was held in the midst of an ongoing non-jury trial, there was no case to be made for extensive secrecy.

Perhaps the key to understanding the Court's insistence on the presumption of openness is their understanding of the purpose of investigative hearings. In the *Re Vancouver Sun* companion case, *Re Application under s.83.28 of the Criminal Code*, the Crown urged the Court to find that the purpose of the investigative hearing should be regarded broadly as the protection of "national security."[46] In contrast to their treatment of "national security" in *Suresh*, the Court found as follows:

We believe that this characterization has the potential to go too far and would have implications that far outstrip legislative intent. The discussions surrounding the legislation and the legislative language itself clearly demonstrate that the Act purports to provide means by which terrorism may be prosecuted and prevented. As we cautioned above, courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere, including very recently in Spain, we must not lose sight of the particular aims of the legislation.

The Court concludes that an investigative hearing into a terrorism offence is not necessarily an issue of "national security." Coupled with *Re Vancouver Sun, Re Application under s.83.28 of the Criminal Code* represents a partial retreat from the *Suresh* attitude that September 11 ushered in a new era marked by an "ever-widening spiral of loss and fear." Although *Re Application* upheld the constitutionality of the investigative hearing process, the openness of the hearing will serve to discour-

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[45] *Re Vancouver Sun, supra* note 4, at para. 41

[46] *Re Application under s.83.28 of the Criminal Code*, [2004] 2. S.C.R. 248 at para. 39

age collateral uses and abuses of the provision such as apparently occurred in Air India.

Re Vancouver Sun is a fetching example of the kind of mischief that thrives in the shadows, and a telling reminder of the need for vigilance and public accountability. The Crown's attempt to examine an uncooperative witness covertly under oath was characterized by counsel for the accused as an abuse of process. A minority of the Court accepted this characterization.[47] Until overturned, the presumption of secrecy at the British Columbia Supreme Court threatened to provide shelter for the Crown's tactical shenanigans.

Although Canadians should see the Supreme Court's affirmation of the presumption of openness in courtrooms as a positive step, we must recall that the expansive definition of national security in *Suresh* may facilitate the displacement of that presumption without significant evidence. *Re Vancouver Sun* is at best a cause for guarded optimism.

Security Certificates

If the potential for abuse sheltered by secrecy is visible in relation to investigative hearings, it is fully radiant in relation to Security Certificates. Security Certificates are intended to be a fast-track process under the *IRPA* for deporting non-citizens who are considered a threat to national security. If the Immigration Minister and the Solicitor General believe an individual is a threat to national security, they may issue a Security Certificate authorizing a person's immediate detention and deportation. The deportee may initiate a judicial review in Federal Court to test the "reasonableness" of the Certificate, but will usually be detained in custody pending the outcome of the hearing.[48]

At the hearing into the reasonableness of the Certificate, the person named in the Certificate has a right to be heard regarding their deportation.[49] However, this is

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[47] *Ibid.*, at para. 167

[48] See *Re Charkaoui*, [2005] A.C.F. No. 269 (F.T.C.); compare with *Jaballah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 420

[49] In *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, the Supreme Court of Canada held that the predecessor Security-Certificate regime, which did not provide the deportee with an opportunity to be heard, comports with the principles of fundamental justice under s.7 of the Charter. Sopinka, J. wrote that Parliament was not required to hold any hearing into the matter whatsoever, and that the process adequately balanced the competing interests of the State and individuals. The decision has been criticized: see John A. Dent, "No Right of Appeal: Bill C-11, Criminality and the Human Rights of Permanent Residents Facing Deportation" (2002) 27 Queen's L.J. 749 at para. 39. As *Chiarelli* involved a Security Certificate issued on the basis of prior conviction for serious criminal offence (with due process attending the conviction), it is arguable that it has no application to an inadmissibility certificate for which there is no underlying due process protection.

a 'hearing' in name only; there is a limited right to disclosure of the evidence, and evidentiary and procedural limitations are placed on the deportee's participation at the hearing. Among other failings, the person has no right to reasonable bail, no right to appeal, no right to cross-examine or confront witnesses, no right to disclosure of the evidence, or even to attend the hearing.

The *IRPA* grants a person named in the Certificate a summary of the information or evidence in advance of the hearing "that enables them to be reasonably informed of the circumstances giving rise to the Certificate."[50] However, *IRPA* ss.78 (b), (e) and (h) restrict the Judge from providing the person with any information that "would be injurious to national security or to the safety of any person if disclosed." To determine what would be injurious to national security, the designated judge reviews the protected information and holds one or more hearings in which only the representatives of the Ministers and their counsel are present.[51] The determination as to what information should be disclosed is not subject to appeal.[52] The *IRPA* thus represents a significant obstacle to the flow of information to the person subject to the Certificate and to the public.

If the Minister of Citizenship and Immigration or the Solicitor General requests that all or part of the information or evidence should be heard in the absence of the person named in the Certificate and his or her counsel, subsection 78(e) requires the judge to exclude that person and his or her counsel if the judge is of the opinion that its disclosure would be injurious to national security or the safety of any person. Members of the public are, of course, also excluded from the hearing. Not only is the flow of information to the subject of the Certificate stopped, but the light of publicity is not permitted to penetrate the process.

The requirement to reasonably inform a named person of the circumstances giving rise to the Certificate falls far below the scrupulous standard of disclosure in criminal cases.[53] Subject to certain exceptions, persons accused of a *Criminal Code* offence must be informed of the case against them, and must be provided all relevant information by the prosecutor and investigators, even if the information is exculpatory.

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[50] *IRPA*, *supra* note 28, s.78.

[51] See *Re Charkaoui*, [2003] F.C.J. No. 1815, in which the designated judge refused to disclose even the dates on which he and the Ministers' representatives and counsel had met in secret to deal with the case, on the basis that it was conceivable that the information could be turned to subversive ends. The ruling is in keeping with the Federal Court's propensity to err on the side of secrecy.

[52] *Zundel v. Canada*, [2004] B.C.J. No. 608 (F.C.A.)

[53] *R v. Stinchcombe*, [1991] 3 S.C.R. 329 at para. 19: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it."

Even on the degraded standard of disclosure in Certificate cases, the dual statutory imperatives of disclosure and secrecy are contradictory. The requirement that the deportee be "reasonably informed of the circumstances giving rise to the Certificate" conflicts with the requirement that the judge withhold information believed to be injurious to national security. In some cases at least, withholding information will be considered necessary for security reasons even though no person without that information could be considered reasonably informed. In those circumstances, likely not infrequent, the judge will no doubt err on the side of national security and the potential deportee will not be reasonably informed on the circumstances giving rise to the Certificate.

Section 78(f) of the *IRPA* provides the Minister with extraordinary power to demand the return of information from the designated Judge if the Judge intends to provide the information to the person named in the Certificate. In those circumstances, the judge is precluded from considering that information in determining whether the Certificate is reasonable. Effectively, the Minister retains editorial discretion over the summary of the evidence provided to the deportee, provided the Minister is prepared to forgo reliance on that information at the hearing.

To date, courts have upheld the process on the basis that detainees held under *IRPA* are entitled to a diminished level of Charter protection. In *Ahani v. Canada (T.D.),* [1995] 3 F.C. 669, and again in *Re Charkaoui,* [2003] F.C. 1419, the Court adopted a contextual approach to section 7 of the Charter, stating that the imperatives of immigration policy must govern the context. In particular, the rights of non-citizens who do not have an unqualified right to enter or remain in the country must be balanced against national security issues, such as the prevention of terrorism and the protection of informants.

The case of Ernst Zundel provides a helpful illustration of the failures of the closed courtroom in this context.[54] A Certificate was issued for Zundel in May, 2003 on the basis that he constituted a threat to national security. The government acknowledged that Zundel had never openly espoused violence and, indeed, that he had encouraged the non-violent dissemination of his opprobrious ideas. Even so, it also pointed out that he was linked to various groups that have used violence in the past. Zundel denied that he advocates violence and denied any participation in violent racist groups. *The Globe and Mail* reported on November 4, 2004, that the U.S.

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[54] Zundel is reviled for his anti-Semitic comments, for publicly lauding Hitler and for his denials of the Jewish Holocaust. He has never been convicted under Canada's hate speech legislation, but he has been successfully sued for contravening Human Rights legislation. The authors believe that the wilful attempt to promote hatred against an identifiable group is immoral, but we also maintain that in a democracy expressions that give form to such attempts must be protected from legal sanction or obstruction.

Federal Bureau of Investigation closed its file on Zundel in 2001 after deciding he was not a security threat.[55]

In this context, the challenge to the open courtroom principle, and the challenge to executive and judicial accountability, is the Crown's assertion that most of the evidence establishing that Zundel is a threat to national security cannot be disclosed to Zundel or to the general public because the release of that evidence would itself threaten national security. The Honourable Judge Blais, designated to preside over the hearing into the reasonableness of the Certificate, put the difficulty in determining whether Zundel's continued detention was warranted on the basis of national security as follows:[56]

> Mr Zundel's activities have in large part been public. In the context of these public endeavors, Mr Zundel has never advocated violence ...
>
> However, there are reasonable grounds to believe that Mr Zundel is a danger to national security ... Although Mr Zundel has virtually no history of direct personal engagement in acts of serious violence, his status within the White Supremacist Movement is such that adherents are inspired to carry out his acts in pursuance of his ideology. The Ministers believe that by his comportment as leader and ideologue, Mr Zundel intends serious violence to be a consequence of his influence ...
>
> Mr Zundel was questioned about a number of people who are part of a dangerous and violent movement, here and abroad, and in every instance, he characterized the relationship as basically superficial, transient, without consequence, and with no funding involved.[57] There is too much evidence to ignore what is obvious. What I have seen *in camera*,[58] and what I heard in Court from Mr Zundel, are completely at odds. Mr Zundel wields much more power within the right-wing, extremist and violent movement known as the White Supremacist Movement (however defined, the only concern for me being the danger it represents to society) than he lets on. He would have us believe that he is only interested in ideas, and that others use his ideas as they see fit, a situation for which he cannot be responsible.

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55 The FBI file was released as a result of a US freedom-of-information request.

56 *Re Zundel*, [2004] F.C.J. No. 60

57 The procedure underlying Zundel's testimony ensured that he was unable to view or directly respond to the evidence brought forward against him. That is not to say that he would have had a satisfactory response, if given an opportunity to speak directly to that evidence. Under the Security Certificate regime however, the public could never know.

58 In this context, the phrase "*in camera*" refers to a courtroom that is closed to both the public and to the person named in the Security Certificate.

> The information made available to me paints an entirely different picture ... the evidence points to his own direct involvement with groups he pretends to know very little about ...
>
> The Ministers have provided considerable evidence, that cannot be disclosed for reasons of national security, that Mr Zundel has extensive contacts within the violent racist and extremist movement. Mr Zundel stated in his testimony that he knows the following people slightly, or had professional contacts with them, or had interviewed them as a reporter. Information showed, rather, that he had dealt with them a great deal more, in some cases had funded their activities, and generally had maintained much closer ties than what he had admitted to in his examination or cross-examination. [Blais, J. then provides a list of names of racists from Canada and abroad] ...
>
> Thus, while overtly condemning the use of violence, he covertly condones it by maintaining his contact and credibility with groups that advocate and engage in violent acts.

It is plain that the Honourable Judge Blais detained Zundel on the basis of evidence to which he and the Minister alone were privy. Through his ruling, Judge Blais advises the public that Zundel has misrepresented himself and that the truth, as revealed by the secret evidence, is that Zundel is a threat to national security.

The disparity between public and secret records in Zundel's case brings the problems with closed courtrooms and secret evidence into sharp relief. Zundel and his lawyers, possibly supported by the FBI, ask the public to believe one version of the truth; the Minister and Solicitor General ask the public to believe another version of the truth. A closed courtroom fails to ensure accountability and inspire confidence in the judicial result.[59]

The Security Certificate regime permits the factual basis for the deportation order to be impervious to public evaluation. Unable to assess the propriety of the judicial reasoning, the public may be forced to withhold its assent to this judicial action. In a secular state, faith in the judiciary cannot cloak the order with legitimacy. Even in the distasteful case of Ernst Zundel, of whom many would gladly see the

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[59] Zundel's case is not unique in raising questions about the integrity of the Security Certificate process. In *Re Ikhlef*, Justice Blais upheld a Security Certificate on the undisclosed basis of evidence of associations between the respondent and members of al-Qaeda, despite the respondent's protests of mistaken identity: *Re Ikhlef*, [2002] F.C.J. No. 352. In *Re Charkaoui*, the person named in the Certificate was alleged to be a "sleeper cell" member of al-Qaeda. Again, however, Mr Charkaoui asserted publicly that he was merely a pizza-store owner and voluntarily submitted to lie-detector tests. In the lead-up to his hearing, Mr Charkaoui was detained for over two years.

last, Security Certificates provide a stark example of the potential for erosion of institutional legitimacy and the need for public accountability.

Concluding Remarks

Abuse of government secrecy laws is possible and may even be inevitable. The wider the use of ministerial privileges and other governmental powers associated with national security, the greater the risk that errors will be made through carelessness or for reasons of political expediency. There is also the risk that Canada's system of justice will begin to lose credibility in the eyes of its citizens. To be sure, institutions of indirect accountability remain valuable. In many cases they are reliable, and are known to be such. However, when questions of confidence arise, nothing can replace direct public accountability as a means of restoring public confidence.

Secret evidence, and *ex parte* and *in camera* Security Certificate proceedings, hinge on the definition of the phrase "national security." But the phrase's ambiguity gives rise to serious worries about ministerial and judicial power. In recent months, the degree of ministerial discretion has become so high and court decisions have become so unpredictable that there is a genuine danger that public confidence in the administration of justice will begin to be eroded.

The tension between security and accountability may never be capable of full resolution. Even so, improvements are both possible and desirable. To begin, at the level of the rule of law, it is true that no government can be bound by laws that are vague or ambiguous. The rule of law requires that genuine constraints be placed upon the exercise of government power. Yet if so, laws and definitions must be precise to a high degree. In particular, the current collection of unrelated definitions of "national security" should be reworked to ensure a more uniform and principled release of information to the public. The definitions should be closely tailored to protect specific categories of information and should be precise enough to be susceptible to meaningful review.

At the same time, if restrictions upon government actions in the area of national security are to be primarily procedural rather than substantive, these restrictions must involve both indirect, institutional accountability *and* direct public accountability. Even the most secret information must at some point be brought before the public, either by early release or in the fullness of time. In our view, the principle of public accountability would be well served with a system of statutory timelines for the release of even the most sensitive and controversial categories of information. The application of those timelines by government agencies should be a proper target of vigorous administrative and judicial review.

In the short term, systems of institutional accountability may be used to balance the competing interests of security and accountability. Ultimately, something

more is required. Nothing can replace direct public accountability, and mechanisms should be introduced to ensure that this becomes the norm, even in cases of national security. Whatever the judicial or parliamentary system chosen, we must honour the principle of public accountability.

Direct public accountability has the added benefit of decreasing the threat of instability. In addressing the need for state secrecy, we should understand that an interruption in the flow of information to the public can sometimes be the first step in a spiral of distorted communication leading to distrust and ultimately to violence.[60] Leaving decisions on what constitutes "national security" issues to a small elite may be the breeding ground of dissent. Silence in a democracy is not golden; it may be the index of violence still to come.

Direct public accountability is thus not just one of several safeguards capable of being implemented; it is the only means by which public confidence can be restored once questions about the impartial administration of justice have been raised. By closing courtrooms and withholding information, governments ask us to accept on faith that they are acting in our best interests. In a genuine democracy, this is not acceptable. At the end of the day, direct public accountability is the sole final safeguard we have against the abuse of government power.

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[60] This type of concern is implicit in the transcribed remarks of Jurgen Habermas in the weeks following 9/11:

> Precisely because our social relations are permeated by violence, strategic action and manipulation, there are two other facts we should not overlook. On the one hand, the praxis of our daily living together rests on a solid base of common background convictions, self-evident cultural truths and reciprocal expectations. Here the coordination of actions runs through ordinary language games, through mutually raised and at least implicitly recognized validity claims in the public space of more or less good reasons. On the other hand, due to this, conflicts arise from distortion in communications, from misunderstanding and incomprehension, from insincerity and deception. When the consequences of these conflicts become painful enough, they land in court or at the therapist's office. The spiral of violence begins as a spiral of distorted communications that leads through the spiral of uncontrolled reciprocal mistrust, to the breakdown of communication. If violence thus begins with a distortion of communication, after it has erupted it is possible to know what has gone wrong and what needs to be repaired.

Jürgen Habermas. *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida*, ed. by Giovanna Borradori. (Chicago: The University of Chicago Press, 2003) at 35.