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NATIONAL SECURITY IN CANADA:
A CRITICAL PERSPECTIVE OF THE STATE'S TALISMAN

By J. Stuart Russell

In partial fulfillment for the degree of Master of Laws,
Faculty of Law, University of Ottawa,
Ottawa, Ontario.



J. Stuart Russell, Ottawa, Canada, 1990



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ABSTRACT

The goal of this thesis is to critically examine the major constituent elements of the State Security system in Canada from a legal perspective. The underlying argument advanced throughout is that the notion of National Security is not an ideologically-neutral precept, designed to protect the entire population from threats generated by individuals and organizations across the political spectrum. Rather, it is a historically-contingent notion essential not for the protection of the population as a whole, but for the preservation of State hegemony, which is directed almost exclusively against left-wing dissent and protest.

As the ideological foundation of State Security in Canada, this notion constitutes the politico-legal framework for each of the arms of the State Security hydra, each of which is examined in some depth: (1) crimes against the State, (2) official State secrets, (3) the right of access to government and personal information, (4) the Crown privilege to refuse disclosure of National Security information, and (5) the centrepiece of State Security, the Canadian Security Intelligence Service (CSIS). While all of the traditional constituents of National Security (subversion, terrorism and espionage) are examined, the overwhelming emphasis of this study is on subversion, protest and dissent. Some areas have been omitted, however, and most notably emergencies legislation, due to time constraints. Similarly, Canada is the almost exclusive focus of this study, although references to other countries are made where necessary.

It should be noted that the scope of this examination has been slightly broader than a traditionally narrow legal analysis. Due to the inherently

political nature of the subject matter, and considering the crucial role politics, history and other factors play in this discussion, a number of extra-legal considerations have been relied upon. Moreover, due to the ultra-secretiveness of the State Security apparatus in Canada, accessing materials for the preparation of this thesis has been extremely onerous, notably with respect to CSIS. These two considerations explain the necessity of relying upon somewhat non-traditional sources, for instance news reports from the popular media, as well as unpublished sources.

Chapter I, an introductory chapter on National Security and the Lawful Interests of the State, seeks to situate the other chapters in a broader theoretical context by examining the notion of National Security. It begins by situating National Security in Canada as an integral part of an international ideology. It then briefly looks at the constitutional underpinnings of the notion, from the perspective of Canadian constitutional law. The manner in which National Security has been interpreted, historically and legally in Canada, is then addressed in some detail, particularly with reference to the way this interpretation has served to protect the State. It concludes by attempting to determine what are the legitimate interests of the Canadian State concerning National Security, particularly in light of the *Canadian Charter of Rights and Freedoms* and other considerations, arguing that the State should have no role in the surveillance or suppression of political protest or dissent, which has been categorized as "subversion".

Chapter II, Crimes Against the State, assesses the last line of defence designed to protect the State: those criminal sanctions in the *Criminal Code* concerning the State. It begins by sketching out the history of crimes against the State in English Common Law, which was later transplanted into

Canadian criminal law, designed to protect the hegemony and survival of the State. The offences currently contained in the *Criminal Code* are then set out, with special emphasis on the peculiarities of the offence of sedition. This chapter concludes by introducing a critique of the liberal minimalist perspective for reform of this area of the law, which is completed in the following chapter.

Chapter III, Official Secrets: Spying and Leakage, examines the remaining criminal statute protecting State Security: the *Official Secrets Act*. It examines the *Act* in some detail, including the various statutory amendments. The way in which the *Act* was employed to foster anti-Soviet hysteria, particularly during the "Gouzenko Affair" and its aftermath, as well as to justify and improve the public image of security services, is then dealt with. The critique of the liberal minimalist perspective for reform of the *Act* and other crimes against the State is then completed, with particular emphasis on the proposals of the Law Reform Commission of Canada. It concludes by advancing another perspective for reform, which seeks to maximize the necessity for political protest and dissent.

Chapter IV, The Right of Access to Government and Personal Information Denied, focusses on the role National Security plays in refusing access to such information. After briefly setting out the legislative history of access and privacy legislation, it examines the present legislative scheme, with special emphasis on the multitude of exemptions. The way in which the privacy and access to information commissioners, as well as the courts, have wielded this scheme to prevent access to National Security information, despite the reduced number of totally exempt information banks, is then analyzed in considerable detail. The various legal policy proposals for access to National Security information are then canvassed and critiqued.

Chapter V, *The Crown Privilege to Refuse Disclosure of National Security Information*, concerns the complement to Chapter IV in the judicial arena. The Common Law and statutory evolution of Crown Privilege is first examined. A lengthy assessment of the jurisprudential evolution of Crown Privilege in Canada, focussing on the virtually insurmountable requirements for the release of National Security information in the courts, is then set out. The chapter concludes by analyzing the various arguments for enhanced disclosure of such information, and proposes a new statutory framework for increased disclosure.

Finally Chapter VI, *A State Within the State: The Canadian Security Intelligence Service*, analyzes Canada's security service in great detail, primarily from the perspective of its anti-subversive mandate. The statutory mandate accorded to CSIS, to investigate "threats to the security of Canada," is examined in theory and in practice. Particular emphasis is placed on the use of its counter-subversion mandate to target and undermine legitimate protest and dissent, in response to which reform proposals are advanced. This is followed by a detailed examination of the way in which security assessments for immigration, citizenship and employment have been primarily used to exclude those promoting left-wing protest and dissent, rather than terrorists and spies, with emphasis on the jurisprudential evolution in the area.

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CHAPTER I
NATIONAL SECURITY AND
THE LAWFUL INTERESTS OF THE STATE

Largely undefined, yet awesomely powerful, the quintessentially elastic concept of National Security lacks a well accepted core legal meaning. It is also connected to, and interacts with, related concepts in the politico-legal sphere. Hence, in this introductory chapter the anatomy of National Security will be set out, as well as its international context and constitutional foundations. Assuming that the notion can be identified, the next hurdle will be to determine which, if any, lawful and legitimate interests the State has and *should* have based on National Security. The mainstream assumption that the State has an unrestricted prerogative in declaring what interests shall be protected by National Security will be re-examined, and the argument for a new and diminished involvement of the State in this area will be elaborated.

A. An International Ideology

While the notion of National Security has evolved in Canada according to the specificities of the Canadian politico-legal context, its emergence is not an isolated phenomenon. National Security has been employed internationally by liberal democratic States, "socialist" States and dictatorships to justify and execute a seemingly endless array of repressive acts, including torture, detention without trial and assassination, as well as other political and economic measures "in the interests of National Security." The common denominator in each example is the use of National Security to delegitimize and combat *ideas* opposed to the existing form of government, to ensure

that governments maintain their hegemony, legitimacy and control, and to repress or eliminate long-term threats to their authority.

In South Africa, for instance, those deemed by government officials to be a "danger to the state" have been detained for renewable six months periods.¹ Under the new Philippine constitution, *habeas corpus* can be suspended when required in the interest of "public security."² The obvious clash between human rights and National Security is particularly evident in the militarization of many countries. In the Philippines, under former dictator Ferdinand Marcos, this process

was given an ideological framework with the adoption by the martial law regime of the "doctrine" of National Security. This doctrine, which provides the theoretical "raison d'être" of many contemporary military régimes in Latin America, has inexorably led to the surrender of civil liberties to what may be called the "National Security State" through the institutionalisation of states of exception or martial law.³

¹ John D. Battersby, *South Africa Bars Protests Backing Detainee Freedom*, The New York Times, April 12th, 1987, 1. State security was also invoked to support the South African government's banning of the film "The Stick," by filmmaker Darrell Roodt, in 1988. See Maurie Alioff, *The Stick, A War Against the War*, Cinémag Cinéfestival, Montréal, 24-26 août 1988, 4. See also Michael Mandelbaum, *The Fate of Nations [:] The Search for National Security in the Nineteenth and Twentieth Centuries* (1988); Anthony Matthews, *Freedom, State Security and the Rule of Law [:] Dilemmas of the Apartheid Society* (1988).

² *La constitution philippine limite l'état d'urgence*, Le Devoir, 3 février 1987, 5. See also Caésar Espiritu, *The Militarized Society and the Law* (1987) 28 C. de D. 689, 690-691.

³ Caésar Espiritu, *The "rule of Law" is a product of political power*, Le Devoir [supplement], 13 décembre 1986, 49. This supplement contains excerpts of the proceedings of the Fourth International Conference on Constitutional Law, on the theme of "Peace, International Relations and Respect for Human Rights" at Laval University in June 1986. Espiritu is a leader of the Asian Coalition of Human Rights Organizations in Manilla, and Philippine Ambassador in Bonn. See also J. Zylberberg, *Nous avons une complaisance permanente pour les mesures d'ordre et de sécurité*, *ibid.*, 51; *Towards National Security. State, Rights & Freedoms*, September-October 1979, 36 (arguing that a "National Security State" is growing in Canada); Allan Hutchinson & Patrick Monahan, *The Rule of Law [:] Ideal or Ideology* (1987).

Elsewhere, Libyans have been deported from England "in the interests of national security,"⁴ and Basque refugees have been expelled from France to Spain on the basis that they constituted a "serious threat to public order."⁵ National Security Acts exist in a number of countries,⁶ while National Security Ministers govern in others.⁷ General Augusto Pinochet in Chile has crafted the notion into an omnipresent element of Chilean life: as well as being a significant component of its constitution, National Security has been used as a pretext to impose states of emergency.⁸

Even in the Western liberal democracies National Security has become a significant element in the politico-legal mosaic. The British government maintains its military presence in Northern Ireland, for instance, "in the interests of National Security." Even the mere presence of left-wing literature can apparently threaten National Security. Recently, the Grenadian government banned 86 left-wing publications from entering the

⁴ *L'Europe annonce l'expulsion prochaine de dizaines de Libyens*, *Le Devoir*, 23 avril 1986, 1.

⁵ *La France expulse un autre réfugié basque vers l'Espagne*, *Le Devoir*, 23 juillet 1986, 2. "National Security," "public security" and "public order" are interrelated concepts. In England, for instance, National Security takes the form of "national interest" or "public interest." See, e.g., E.P. Thompson, *Writing by Candlelight* (1980).

⁶ Michel C. Auger, *Louise Harel plaide la cause des réfugiés*, *Le Devoir*, 12 mars 1987, 2 (Chile); *Taiwan annonce la levée de la loi martiale*, *Le Devoir*, 4 juillet 1987, A-5 (Taiwan). South Africa also has an extremely harsh *Internal Security Act*.

⁷ E.g., National Security Minister Lalith Athulathmudali in Sri Lanka. See *Sri Lanka halts Jaffna offensive 'to give peace a chance'*, *The Gazette*, [Montréal], June 11th, 1987, A-9.

⁸ Clément Trudel, *Les tribunaux aux mains liées*, *Le Devoir*, 9 octobre 1986, 5 (quoting Rafael Retamal, Chief Justice of the Supreme Court of Chile); *Pinochet échappe à un attentat*, *Le Devoir*, 8 septembre 1986, 1.

country on the ground that they "threatened Grenada's public interest and national security."^{8a} It has arguably reached its highest stage of development in the United States, where National Security has been stretched to the breaking point. As Richard Barnet vividly describes:

In the name of "national security," telephones are tapped, mail is opened, countries are invaded, American citizens are put under surveillance, Congress is deceived, the Secretary of State -- perhaps even the President -- is deceived, and, in the Nixon era, high crimes and misdemeanors were committed.⁹

The official definition of National Security used under President Eisenhower's security program is a vivid example:

The term "national security" relates to the protection and preservation of the military, economic and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion and any and all other illegal acts designed to weaken or destroy the United States.¹⁰

^{8a} See Michael Baumann, *Stream of protests challenge book banning by Blaize government in Grenada*, *The Militant*, July 14th, 1989, 10; *Broad opposition to book ban*, *The Militant*, August 4th, 1989, 14. The banning order includes the speeches and writings of Marx, Lenin, Che Guevara, Fidel Castro and others.

⁹ Richard J. Barnet, *Reflections [:] Rethinking National Strategy*, *The New Yorker*, March 21st, 1988, 104, 197. See also, Cotler, *infra*, note 62, 91; Harry Kalven Jr., *A Worthy Tradition [:] Freedom of Speech in America* (1987); Benno Schmidt Jr., *A Nation Without Heretics*, *The New York Times Book Review*, February 21st, 1988, 12.

¹⁰ Quoted in Ralph S. Brown, *Loyalty and Security [:] Employment Tests in the United States* (1958), 8. See also Morton Halperin *et al*, *The Lawless State: The Crimes of the U.S. International Agencies* (1977); Center for Research on Criminal Justice, *The Iron Fist and the Velvet Glove: An Analysis of the U.S. Police* (1975); David Wise, *The American Police State* (1976). Oftentimes National Security and financial prosperity are cited as interconnected goals. See Alan Tonelson, *Institutional Structures Blues*, *The New York Times Book Review*, April 13th, 1986, 28.

More recently, former President Ronald Reagan attacked the House of Representatives for waging "a reckless assault on the national defense of the United States," for military cutbacks and proposals on arms control, which would represent a potential danger to National Security.¹¹

This megaconcept is so powerful that it even appears to supercede the law itself. Former U.S. Defense Secretary Caspar Weinberger stated, for instance, that American National Security, and not the SALT II Agreement, was the only determining factor in deciding American arms policy.¹² More spectacularly, perhaps, is that in the U.S. Congressional Contragate Hearings both Lieut. Col. Oliver North and Rear Adm. John Poindexter, two of the principal figures eventually indicted in the Iran-contra scandal, partially defended their lies and misdeeds on the basis that they were patriots acting in the interests of National Security.¹³ This is hardly surprising in a country where National Security is so deeply imbedded that there exists an ultra-

¹¹ Bernard Weinraub, *Reagan Assails House Democrats on Military Cuts*, The New York Times, August 17th, 1986, 30. In the U.S., National Security is seen as the equivalent of national defence or foreign relations. For instance, with respect to its use in Executive Order 11,652 (51, 3 CFR 375 (1973)), the General Counsel for the U.S. Department of Defense has stated:

'National security' is a generic concept of broad connotation referring to the Military Establishment and the related activities of national preparedness including those diplomatic and international political activities which are related to the discussion, avoidance, or peaceful resolution of potential or existing international differences which could otherwise generate a military threat to the United States or its mutual security arrangements.

House Committee on Government Operations, Executive Classification on Information -- Security Classification Problems Involving Exemption (b)(1) of the Freedom of Information Act, H. R. Rep. No. 93-221, 93d Cong., 1st Sess. (1973), 65. The notion also, however, extends to the domestic sphere.

¹² "La sécurité nationale a primauté sur l'accord de SALT-2," *Le Devoir*, 30 mai 1986, 4. In this sense, National Security is now considered to be a higher value than the survival of the human race.

¹³ Susan F. Rasky, *2 In Iran Affair Prepare Defenses Citing Patriotism*, The New York Times, March 22nd, 1987, 1.

secret creature labelled the National Security Council, established in 1947 -- one year after the "Iron Curtain" was invented -- to coordinate domestic, foreign and military policies with respect to National Security.¹⁴

The Canadian National Security context does, however, differ in some respects from this international framework, particularly with respect to its constitutional foundations.

B. Constitutional Underpinnings

The Canadian version of National Security is an integral part of this multi-faceted worldview. Importing extra-territorial experiences, the federal government has grafted some of the international experiences onto the Canadian National Security tree. But National Security in Canada has also had its own distinct heritage and internal dynamic. Constitutionally, it is now well established that National Security is a federal concern, the legislative authority for which is found in the "peace, order and good government" phrase in the preamble to s. 91 of the *Constitution Act, 1867*.¹⁵ Moreover, the McDonald Commission has correctly observed that the security of Canada is a concern for both the federal and provincial governments. But while there is no specific assignment of legislative authority to either level of government in the *Constitution Act, 1867*, the federal Parliament's power

¹⁴ Rober Pear, *Assembling Some of the Pieces of the Puzzle*, The New York Times, December 14th, 1986, E1. See also the *National Security Act*, 50 U.S.C. 413; Douglas Dowd, *Anything Goes*, Monthly Review, November 1988, 54, 55; Saul Landau, *The Dangerous Doctrine: National Security and U.S. Foreign Policy* (1988).

¹⁵ 30 & 31 Vict., c. 3 (U.K.), as am. See Kenneth P. Swan, *The Use of Science by the State for Security and Control; Legal and Civil Liberties Aspects of Information and National Security* (1983) [unpublished paper], 2; Irwin Cotler, "Freedom of Expression," in Armand de Mestral *et al.* eds., *The Limitation of Human Rights in Comparative Constitutional Law* (1980), 353, 358.

under the s. 91 preamble "undoubtedly provides constitutional support for a large federal role in security, especially in emergency situations."¹⁶ The federal jurisdiction over defence, substantive criminal law and criminal procedure in s. 91 provides further constitutional support for the role of the federal Parliament in protecting National Security.¹⁷

Historically, National Security and defence, both of which have been closely associated with each other, have formed part of the Crown Prerogative, a vague and ill-defined concept which consists of

those surviving rights, powers, privileges and immunities that are recognized historically as belonging to the Crown, which may still be exercised or enjoyed by the Crown without prior authorization from Parliament or accountability in the courts for the manner of their exercise.¹⁸

Other examples of the Crown Prerogative are the power to declare war, sign treaties, confer naturalization and deal with immigration.¹⁹ Some of the

¹⁶ Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report -- Volume I (:) Freedom and Security Under the Law* (1981), 42. See, e.g., *Ref. re Alberta Statutes* [1938] S.C.R. 100, 133-134; *Switzman v. Ebling* [1957] S.C.R. 285, 324.

¹⁷ See, e.g., the Crimes Against the State part of the *Criminal Code*, R.S.C. 1970, c. C-34, as am.; *infra*, ch. II; the *Official Secrets Act*, R.S.C. 1970, c. O-2, *infra*, ch. III; Cotler, *supra*, note 15. Since the text of this thesis was prepared before the coming into force of R.S.C. 1985, all citations to federal statutes that have been compiled in the Revised Statutes are to R.S.C. 1970.

¹⁸ Emergency Planning Canada, *Safety and Security in Emergencies (:) Background Papers* (1985), 25.

¹⁹ See, e.g., S.A. de Smith, *Constitutional and Administrative Law* (2nd ed., 1973), 114-140; Peter W. Hogg, *Constitutional Law of Canada* (1977), 6, 49. Dicey describes the Crown Prerogative as "both historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority, which in any given time is legally left in the hands of the Crown." A.W. Dicey, *The Law of the Constitution* (10th ed., 1960), 424. See also Y. de Montigny, *La Charte des droits et libertés, la prérogative royale et les questions politiques* (1984) 44 R. du B. 156; B. Murphy, *Operation Dismantle Inc. et al v. The Queen: The Application of the Cana-*

prerogative powers to respond to insurrection or the breakdown of public order have, however, been superceded by statute.²⁰ But there are still gaps in legislation for situations which can be addressed by the Crown Prerogative, the exercise of which could now be challenged in the courts in light of the *Canadian Charter of Rights and Freedoms*.²¹

C. The Meaning of National Security

Considering its pivotal importance in protecting the security of the State, one would expect that a well accepted statutory or judicial definition of National Security would have been created. Although notions like "threats to the security of Canada" have been defined recently,²² National Security itself remains suspiciously lacking of any formal definition. In June 1978 the then Solicitor General made the following rather illogical comment concerning this lacuna before the House of Commons Standing Committee on Justice and Legal Affairs: "There is no definition of the term 'national security' because in effect national security is basically a term that refers to protection of sovereignty, and activities related to the protection of national sovereignty."²³ Although apparently incapable of definition, National

dian Charter of Rights and Freedoms to Prerogative Powers(1984) 33 U.N.B.L.J. 354; A. Desjardins, *The Queen's Prerogative in Canada*(1976) [unpublished paper]; P. Garant, *Droit administratif*(1981), 47-76; H.L. Molot, *Administrative Discretion and Current Judicial Activism*(1979) 11 Ottawa L.R. 337.

20 *E.g.*, riot and unlawful assembly in the *Criminal Code*(ss. 64, 65), the *War Measures Act*, R.S.C. 1970, c. W-2; repealed and replaced by the *Emergencies Act*, S. C. 1988, c. 29, s. 80.

21 Being Schedule B of the *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.), 1982, c. 11. See *supra*, note 18, 31-43.

22 *E.g.*, s. 2 of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21 [hereinafter cited as *CSIS Act*].

23 Quoted in M.L. Friedland, *National Security: The Legal Dimensions*(1979) [A Study

Security is still an identifiable concept, according to the U.K. Committee of Privy Counsellors on Ministerial Memoirs:

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.²⁴

Other commentators do not share this certainty, that National Security matters are so easily identifiable. In fact, the absence of a definition in Canada may be due to the desire of government not to restrict the ambit of the notion, for the purpose of allowing it to shape its contours according to particular circumstances. One critic, for instance, has condemned National Security for being "intrinsically vague, prophylactic, and policy-oriented [. . .]"²⁵ There is indeed no consensus with respect to its meaning:

Such 'real or apprehended' threats as external attack or subversion and internal unrest and

prepared for the Commission of Inquiry Concerning Activities of the Royal Canadian Mounted Police, 1 [hereinafter cited as *National Security*]. See *Justice and Legal Affairs*, June 1st, 1978, Issue No. 34, 12.

²⁴ Quoted in *National Security*, 1. See Cmnd. 6386, January 1976, 18. In *Re Public Service Employees Relations Act (Alberta)* (1987) 38 D.L.R. (4th) 161 Chief Justice Dickson stated that one kind of exception where compulsory labour arbitration could be substituted for the right to strike was in the case of "essential services," which he defined as "the interruption of which would threaten serious harm to the general public or to a part of the population" in the sense of threatening "life, personal safety or health." This included maintaining "the rule of law *and national security*." (at 204; emphasis added)

²⁵ Note, *National Security and the Amended Freedom of Information Act* (1976) 85 Yale L.J. 401, 416. See also Mandel, *infra*, note 39a, 85.

violence are commonly lumped together under the national security umbrella. There is no precise meaning for the term 'national security.' The phrase may refer specifically to 'the government's capacity to defend itself from violent overthrow by domestic subversion or external aggression.' On the other hand, it may simply encompass the government's ability to function effectively in order to serve the interests of the state -- or its governing elite -- both at home and abroad.²⁶

A working definition was, however, formulated in the *First Report* of the McDonald Commission, which regards the security of Canada as synonymous with National Security and is based on two notions:

The first is the need to preserve the territory of our country from attack. The second concept is the need to preserve and maintain the democratic processes of government. Any attempt to subvert these processes by violent means is a threat to the security of Canada.²⁷

The 1969 Royal Commission on Security drew attention to the elements of espionage and State secrets, noting that the State has a duty "to protect its

²⁶ Murray Rankin, *National Security: Information, Accountability, and the Canadian Security Intelligence Service* (1986) 36 U.T.L.J. 249, 250 [note omitted]. See also T. Vote, *The national security interest and civil liberties* (1972) 85 Harv. L.R. 1130, 1133; Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report [:] Security and Information* (1980) [the "McDonald Commission"].

²⁷ *Ibid.*, 15. *Cf supra*, note 23. Note that in the first sentence the operative term is *country*, while in the second it is *government*, which only serves to blur the basic distinction between *State* security and the security of *individuals* in Canada. The Commission was called upon, as part of its terms of reference, to report and make recommendations on the policies, procedures and laws regarding the RCMP "in the discharge of its responsibility to protect the security of Canada." (Order-in-Council P.C. 1977-1911, July 6th, 1977; set out in *Second Report -- Volume 1 [:] Freedom and Security Under the Law* (1981), 14 and 1149 [App. "B"].)

secrets from espionage, its information from unauthorized disclosure, its institutions from subversion and its policies from clandestine influence."²⁸ Two basic needs of the State underlie these attempted definitions, according to the McDonald Commission:

[F]irst, the need to protect Canadians and their governments against attempts by foreign powers to use coercive or clandestine means to advance their own interests in Canada, and second, the need to protect the essential element of Canadian democracy as attempts to destroy or subvert them.²⁹

Nevertheless, the fundamental characteristic of National Security, like any other legal concept, is its unbridled, variable content, which is also contingent upon geopolitical, temporal and subjective viewpoints. To the poor in the developing countries National Security may mean food, water, shelter and health care. Worldwide it also means the desire for peace and the absence of the threat of nuclear war. Some in the American "New Right" have even argued that feminism is a threat to National Security.³⁰ This

²⁸ *Report of the Royal Commission on Security* (Abridged) (1969), par. 28. See also Pat Walsh, *RCMP Security Service and Intelligence Against Communism in Canada* (1967) (an extreme right-wing analysis, arguing that anyone or anything connected to communism should be targeted by intelligence operations).

²⁹ *Supra*, note 26, *Second Report*, 40. This elaboration marks a shift from the *First Report*, where it is stated that subversion must be associated with violent means, while this "definition" in the *Second Report* is broader since violence seems to be associated only with "to destroy," (which presumably could include fundamental change through the electoral process and other "peaceful means") the word "subvert" being left without qualification. *Cf.* the definition of "threats to the security of Canada" in s. 2 of the *Canadian Security Intelligence Service Act*.

³⁰ See Barbara Ehrenreich, *The Hearts of Men (:) American Dreams and the Flight of Men from Commitment* (1984), 157-158 (assessing the argument that the conscription of women into armed forces active combat duty, spawned by the Equal Rights Amendment, would constitute a threat to National Security). *Cf.* Cotler, *infra*, note 62, 115.

belief reconfirms the historically-contingent nature of National Security. While in the 1950s it was almost exclusively associated with Communism, in the 1980s it has been expanded greatly to include many critical ideologies of the political establishment. Those who adopt such critical postures are characterized as subversives, and consequently become "threats to National Security." Since the "New Right" in North America has appointed itself as the repository of legitimacy, any views opposed to it, or even critical of it, become //legitimate, and deserving of surveillance and suppression.

What then are the *threats* to National Security? The three basic categories accepted by the McDonald Commission and currently defined in vague terms and with little detail by statute are: (1) foreign intelligence activities, (2) political terrorism, and (3) "subversion" of democratic institutions.³¹ The first concept is essentially espionage. Political terrorism is regarded as "politically motivated acts of violence and threats of violence aimed at forcing governments to act in a certain way." Due to the global spread of terrorism since the late 1960s, the severity of the threat to Canada's security has been "significantly increased," according to the McDonald Commission.³² But, as University of Toronto criminology professor Stuart Farson correctly notes, "there was no analysis of the capacity, extensiveness, and origins of such terrorists. Nor did they provide any detailed analysis of what targets were most likely to be the subjects of attacks."³³ The third category involves activities directed toward the

31 See *Second Report*, 40; section 2 of the *CSIS Act*.

32 *Ibid.*

33 A. Stuart Farson, *Countering the Security Threat in the 1980s: McDonald's Legacy and the Need for Effective and Efficient Control* (1985) [a paper presented to the October 1985 research seminar held by the Security Intelligence Review Committee], 26. See also *The Report of the Special Senate Committee on Terrorism and*

"subversion" or destruction of the State, which shall be the focus of this and following chapters. According to the Commission:

Fortunately, since the Second World War subversive organizations on the extreme left and the extreme right of the political spectrum have not posed a serious threat to the democratic process in Canada. There remain, however, a few small groups, some with considerable foreign support, which are committed to the destruction of democracy in Canada. A democratic state such as Canada has a duty to protect itself against those who work actively to overthrow the foundations of our parliamentary democracy [. . .].³⁴

Yet these organizations were not identified, nor "was any assessment made of how such groups were supported or how they might destroy Canadian democracy."³⁵

The common characteristic of all these "threats" to National Security is that it is a notion created by the State, for the purported protection of the State as well as the inhabitants of Canada. But National Security is a convenient catch-phrase allowing the State to do what it desires with remarkably little accountability. For rarely does one demand of the State: "prove the National Security issue here!" And even when such a challenge is

the Public Safety (1987) [the "Kelly Committee"].

34 *Ibid.* Note that the passage begins by using the terms "democracy" and "democratic system," which then slides into "democratic state," *i.e.* the latter term being used in the territorial sense as compared to the primary function of National Security, which is to protect the institution within that territory known as the State. Due, in part, to the persuasiveness of Canadian nationalism, it is significantly easier for government to rally Canadians around the defence of their country, instead of the State or their government.

35 Farson, *supra*, note 33, 26. For a civil libertarian analysis of the relationship between National Security and dissent, see Thomas Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (1981).

formulated, the State can still safely hide behind the shield of National Security to refuse to disclose the reasons for such a designation. National Security is rooted in a pronounced ideological dimension, for one of its central aims is to do combat against competing and threatening bodies of thought, and to "destroy or at least neutralize intolerable opposition [. . .]."³⁶ The great irony is that in doing so it threatens the fundamental rights and freedoms of the inhabitants it purports to protect. As Grace and Leys have argued so cogently:

The concept of subversion belongs to a succession of concepts associated with the development of the modern state. These concepts including 'sedition', 'treason', 'subversion', and recently, 'terrorism' -- have performed an essentially unchanging function: to delegitimise activities and ideas opposed to the established order, and hence to legitimise the state in acting against them, even though the activities may be lawful. The central mechanism of this deligitimation is to portray internal opposition as somehow linked to, and actually or potentially an extension of, an external enemy.³⁷

All of these purported threats primarily challenge the legitimacy, hegemony and control of the State, rather than the territorial entity known as Canada or its inhabitants. As Farson explains:

On one hand, there is a need to bring threats to the security of the state under firm control. This need is familiar to both countries of a democratic nature and those of other forms. Here the

³⁶ Turk, *infra*, note 67, 62, 173. Cf. *Kleindienst v. Mandel* (1972) 408 U.S. 753, *per* Douglas J., dissenting: "Thought control is not within the competence of any branch of government." (at 772). See also Marshall J., dissenting, at 774 *et seq.*; *Harisiades v. Shaughnessy* (1952) 342 U.S. 580, 598; *Galvan v. Press* (1954) 347 U.S. 522, 553.

³⁷ Elizabeth Grace & Colin Leys, *The Concept of Subversion* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 1.

purpose of control is primarily administrative. It is there to ensure that the bureaucratic apparatus operates both effectively and efficiently in carrying out its task.³⁸

While an analysis of State theory is beyond the scope of this study, it should be noted that the reference to "the State" is not mere rhetorical flourish. Rather, it is a reference to that *segment* of society primarily composed of government, its departments and agencies, as well as the legal system, as opposed to the notion that the State is society *as a whole*.

The belief that *National Security* aims to protect Canada and its inhabitants masks and legitimizes the true aim of National Security, which is primarily *State Security*. National Security is an integral component of the Canadian legal order, which, as I have written elsewhere, "serves an ideological purpose by 'masking' exploitation with apparent fairness, thereby legitimating class structures." Accordingly, the ideological imagery of National Security serves to legitimize an oppressive socio-economic reality, including the National Security apparatus, by denying its oppressive character and masking it in imagery terms.³⁹

On the other hand, National Security is legitimized, in part, in the natural human desire to protect one's self and one's community from attacks and threats. By perverting this need, and instilling a sense of low-level, permanent hysteria in the minds of the population, based on the exaggerated

³⁸ *Supra*, note 33, 1. See *infra*, note 62, 23-51.

³⁹ J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy* (1986) 18 Ottawa L.R. 1, 14. See also Normand Marion, "Le Droit pénal à l'ère néo-libérale: le danger croît avec son usage," in Robert Bureau & Pierre Mackay, eds., *Le droit dans tous ses états* (1987), 55, 62-64; Mandel, *infra*, note 39a, 158.

fear of potential attacks and harm by terrorists, spies and subversives, National Security also deflects public concern from more *real* and *urgent* threats to the safety and security of Canadians, notably the threat of nuclear war, unemployment, poverty and similar problems.^{39a} By purporting to protect all Canadians, National Security masks the class character of Canada, although it primarily serves to protect the State and those individuals of the ruling élite and its institutions it serves to protect.

National Security is furthermore characterized by reification, "a degree of distortion of meaning that occurs within communication when an abstraction is drawn from a concrete situation, which abstraction is then mistaken for the concrete."⁴⁰ The legal reification of National Security is also "a form of coercion in the guise of passive *acceptance* of the existing world within the framework of capitalism."⁴¹ Canadians are coerced into political apathy due to the belief, inspired by the State, that anyone who vigorously criticizes government threatens not merely National Security, but the entire politico-legal system it is designed to protect. Since the State has a monopoly over the protection of the security of the country, Canadians are disenfranchised, to this extent, and remain passive observers, resigned to accepting the *status quo*.

National Security is intimately connected to a cluster of related notions, amongst them nation, national unity,^{41a} loyalty and patriotism. The

^{39a} See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989), 74.

⁴⁰ Russell, *supra*, note 39, 18 [note omitted]. See also P. Gabel, "Reification in Legal Reasoning," *in* P. Beirne & R. Quinney, eds., *Marxism and Law* (1982), 262, 263.

⁴¹ Russell, *ibid.*, 19 [emphasis in original].

^{41a} According to Neil Mullin, "it was in the rarified language of national (i.e., class) unity that the [U.S.] Constitution was elaborated and it was that conceptual frame-

challenge to Canadian unity posed by the Québec independence movement, particularly since the 1960s,⁴² has resulted in numerous operations against the nationalist movement and even the Parti Québécois, notably during the "FLQ Crisis," under the banner of National Security.⁴³ As Plamondon and Garneau have stated:

Le concept de la sécurité nationale qui est central dans le problème de ce colloque est le jumeau identique de l'unité nationale lorsque celle-ci est menacée d'une manière réelle ou appréhendée. L'unité nationale et la sécurité nationale ne sont que l'unité de la bourgeoisie et la sécurité de sa domination nationale de classe.⁴⁴

Even the 1969 Royal Commission on Security readily admitted that the Québec nationalist movement represented a serious threat to national unity, which would in turn jeopardize National Security.⁴⁵ Since national unity is

work that gave rise to our tradition of judicial supremacy." Neil Mullin, "Judicial Supremacy, Edwin Meese, and the Relative Autonomy of the State," *in* Jules Lobel, ed., *A Less Than Perfect Union* (1988), 195, 201.

⁴² *Infra*, note 85, 56.

⁴³ Ligue des droits de l'homme, "L'escalade de la répression: signification et importance du phénomène au Québec et au Canada," *in* Cahiers de documents, *Police et Liberté* (1978) 3, 19, 21 [Un colloque de la Ligue des droits de l'homme en collaboration avec la Faculté d'éducation permanente de l'Université de Montréal; 26-28 mai 1978]. See also John Starnes, *Danger of Independence*, Montreal Star, November 5th, 1977, C-1. For a fascinating discussion of the difficulties in interpreting National Security in the American context, see Barnet, *supra*, note 9.

⁴⁴ Marc Plamondon & Jean Garneau, "Les Enjeux de la "sécurité nationale" au Québec et au Canada," *in* Ligue des droits de l'homme. *ibid.* 63, 70.

⁴⁵ *Supra*, note 27, para. 21-23. Petras also views National Security as being connected to related ideological constructs, like national unity:
La notion de sécurité nationale devrait renforcer "l'unité nationale" telle que la conçoit la classe dominante, c'est-à-dire sans tenir compte de la lutte de classes et de l'exploitation. Elle servait donc l'élément mystificateur des relations sociales. Elle fournissait en même temps une logique spécifique qui permettait de rendre

essentially concerned with a stable political relationship between provincial and federal *governments*, and the preservation of the economic *status quo*, rather than simple tranquility between the *inhabitants* of those geo-political entities, this analysis buttresses my argument that National Security is primarily *State Security*. The Report was published in 1969, at the peak of that wave of Québec nationalism, and its emphasis on the Québec nationalist movement confirms the essentially historically-contingent nature of National Security. Prior to 1969 the principal threat to National Security was perceived to be communism, while in 1969 it was Québec nationalism, and in the late 1980s it is now "subversion" and "terrorism." At various times efforts have been made to further blur these distinctions by associating "separatism" with terrorism and communism.

To not believe in national unity has been labelled disloyal, which has, in turn, been closely associated with endangering National Security. This fuzzy notion of loyalty is "something one *feels*, a generous emotion, personal and free,"⁴⁶ and is closely related to patriotism, both of which are largely, but not exclusively, American preoccupations.⁴⁷ The 1969 Royal Commission on

légitime toute opposition sociale et politique visant la classe dominante, en identifiant cette opposition à la subversion ou à des menaces extérieures.

James Petras, "La Répression dans les pays capitalistes avancés," *in supra*, note 42, 38, 54. For a history of nationalism, see Benedict Anderson, *Imagined Communities [:] Reflections on the Origin and Spread of Nationalism* (1988).

⁴⁶ Brown, *supra*, note 10, 5 (emphasis in original). Cf Edward Said, *Identity, Negation and Violence*, *New Left Review*, Sept./Oct. 1988, No. 171, 46, 59. National Security and loyalty are, what one author so disparagingly described as, "benign bubbles of togetherness." Howard Zinn, "Nothing Human Is Alien To Me," *Zeta Magazine*, June 1988, 41, 41. See also Reg Whitaker, *Left-Wing Dissent and the State [:] Canada in the Cold War* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 14.

⁴⁷ Will Kymlicka, *Dissent: Bibliography* (Aug. 1987) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 1. For an excellent analysis of the rise of patriotism in the English

Security declared that disloyalty was incompatible with public service employment since loyalty to a communist, fascist or other legal or illegal organization "whose purposes are inimical to the processes of parliamentary democracy" dilutes one's loyalty to Canada and its governmental system. Accordingly, the Commission recommended that the following individuals should not be employed by the public service where they may have access to classified information:

- (1) a member of a communist or fascist party or affiliated organization;
- (2) a person who supports, in words or deeds, such party or organization;
- (3) a person who is a member or supporter of a "front group;"
- (4) a person who is a secret agent of or an informer for a foreign power, or who assists such an individual; and
- (5) "a person who by his words or his actions shows himself to support any organization which publicly or privately advocates or practices the use of force to alter the form of government."⁴⁸

There is, however, no consensus as to the constituent elements of this construct, and it would be erroneous to believe that disloyalty and adherence to communism are synonymous.⁴⁹ Certainly the campaign against disloyalty is not distinguished by a flawless past. During the Cold War hysteria of the 1950s, Senator McCarthy made wild accusations of disloyalty

context, see Raphael Samuel, ed., *Patriotism [:] The Making and Unmaking of British National Identity* (1989, 3 vols.).

⁴⁸ *Supra*, note 28, 35.

⁴⁹ Brown, *supra*, note 10, 6.

against U.S. citizens.⁵⁰ In Canada the shibboleth of loyalty has been increasingly coloured by cynicism and criticism, no doubt due in part to anti-monarchist feelings, since loyalty and allegiance to the Queen are so intimately wrapped together.⁵¹ Authors elsewhere have almost universally concluded that loyalty, while a virtue, is not a useful concept for assessing the legitimacy of dissent.⁵² Moreover, a persuasive argument can be made that loyalty oaths may be a violation of the freedom of thought, belief, opinion and conscience, guaranteed by s. 2(b) of the *Canadian Charter*.⁵³

It may, in fact, be more appropriate to examine all of these highly politically charged constructs from a new perspective. Pierson has also challenged us to critically examine these traditional catch-phrases:

Military history appropriates such terms as "national defence" and "patriotism" and "heroism." A step toward new modes of thinking would be to question the use of such terms. The person willing to kill for her country is not the only patriot. Supporting the spiraling escalation of the arms race is not the only means of national defence. Indeed, those who work for disarmament may be the ones truly devoted to national defence.⁵⁴

⁵⁰ See, e.g., R.H. Roy, *The Canadian Security Intelligence Review Committee* (1987) (unpublished paper), 4.

⁵¹ There has been criticism recently of the notion of allegiance to the Queen in the oath of allegiance to Canada used in citizenship ceremonies. See Hubert Bauch, *Drop Queen from oath of allegiance: Tory MP*, *The Gazette* [Montréal], July 3rd, 1987, B-1.

⁵² *Supra*, note 47, 1. See, e.g., Henry Steele Commager, *Freedom, Loyalty, Dissent* (1954); Morton Grodzins, *The Loyal and the Disloyal: Social Boundaries of Patriotism and Treason* (1956); Alan Barth, *The Loyalty of Free Men* (1951).

⁵³ See, e.g., *Re Mackay and Government of Manitoba* (1985) 23 C.R.R. 8 (Man. C.A.). Loyalty oaths have been struck down as unconstitutional by the U.S. Supreme Court. See, e.g., *Elfbrandt v. Russell* (1966) 384 U.S. 11.

⁵⁴ Ruth Pierson, *Toward a New Way of Thinking*, *Peace Magazine*, April/May 1987, 31.

D. What are the Legitimate and Lawful Interests of the State Concerning National Security?

Consistent with its use internationally, National Security has been employed in Canada to justify and legitimize an impressive list of attacks on fundamental rights and freedoms,⁵⁵ amongst them: the mass internment of Japanese-Canadians during World War II, which was "perhaps the most dramatic restriction of civil liberty on this basis";⁵⁶ the Gouzenko Affair;⁵⁷ the invocation of the *War Measures Act*⁵⁸ during the "October 1970 Crisis"; the "dirty tricks" of the RCMP during the 1970s; the new version of "dirty tricks" used by the Canadian Security Intelligence Service (CSIS) against the union movement, periodicals as well as organizations and individuals engaged in lawful dissent;⁵⁹ the deportation of refugees and the denial of citizenship;⁶⁰ and the refusal to disclose information held by the federal government.⁶¹ In this sense, it well deserves the description as "the occult underside of parliamentary democracy."⁶²

55 Rankin opens his article on National Security with the same bold assertion: "'National Security' has been the basis for restricting many freedoms of many Canadians.": Rankin, *supra*, note 26, 249.

56 *Ibid.*

57 See *infra*, ch. III.

58 R.S.C. 1970, c. W-2.

59 See *infra*, ch. VI; Marion, *supra*, note 39, 63.

60 See *infra*, ch. VI, Part B.

61 See *infra*, ch. IV.

62 Perry Anderson, *The Affinities of Norberto Bobbio*, *New Left Review*, July/August 1988, No. 170, 3, 25.

These violations have been and continue to be firmly rooted in the traditional notion of the supreme and absolute nature of National Security. This idea traces its lineage to certain U.S. Supreme Court decisions, notably the *Chinese Exclusion Case*⁶³ which decided that the preservation of National Security is "the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated." In Canada the "noble cause"⁶⁴ of the cult of National Security has achieved the status of a virtual State religion.⁶⁵ An exceedingly high value was placed by the Royal Commission on Security on the notion: "Defence against threats to security is a duty and responsibility of a state comparable in meaning and relevance with defence against armed attack and insurrection."⁶⁶

It is indisputable, therefore, that National Security is the primary politico-legal instrument the State employs to protect its very existence. But, in light of society's promise to protect fundamental rights and freedoms, articulated most poignantly in the constitutionally-entrenched *Canadian Charter of Rights and Freedoms*, this absolutist notion of National Security is

⁶³ (1889) 130 U.S. 581, 606. See also the opinion of Frankfurter J. in *Dennis v. U.S.* (1951) 341 U.S. 494, 517 *et seq.* Cf. dissenting opinion of Douglas J.

⁶⁴ See *R. v. Couteillier, Cobb & Cormier* (unreported, Court of Sessions of the Peace, Montréal, Vincent J., June 16th, 1977) (a prosecution against a number of RCMP officers for wrongdoing). See also Harry S. Glasbeek & Michael Mandel, *The Crime and Punishment of Jean-Claude Parrot* (1979) 21 Canadian Forum 10.

⁶⁵ Durland defines a "state religion" as "a religio-political condition wherein the nation-state, whether organized or autocratic or democratic, assumes or is such power and authority that it usurps God's overriding dominion and sovereignty." *U.S. v. Boertje* (U.S. Dist. Ct., East. Dist of Penn.; Crim. No. 87-30). Attached to the Defendants' Offer of Proof at Retrial in Support of Affirmative Defenses is Proffer of Testimony to Be Offered by William R. Durland, a teacher and theologian, 1. The Defendants' Offer of Proof argues that in the U.S. nuclear weapons have achieved the status of idols, components of a state religion which makes a cult of National Security.

⁶⁶ *Supra*, note 28, 1.

no longer defensible. For the legitimacy of the State's interest in employing the harsh machinery of National Security must now be assessed in light of its *legality, i.e.* its impact on basic rights and freedoms. The principal test of this thesis is that the only *legitimate* interests of the State concerning National Security are those which are *lawful*, since they now must not violate the *Canadian Charter*. This more modern appreciation for the central role of rights and freedoms in National Security matters is embraced by Kurt Herndl, the Deputy Secretary General on Human Rights and Director of the U.N. Centre for Human Rights. While acknowledging that every nation "naturally seeks to defend its legitimate national security," he goes on to add:

But -- and let us not shirk away from the matter -- we have also seen the doctrine of "national security" and its often negative impact upon human rights. Indeed, all kinds of violations of human rights have been defended in the name of "national security". . . Defence of national security must have as its object the defence of freedom and the promotion of human rights at large. Although unavoidable security measures may occasionally have the effect of diminishing individual freedoms in various well defined parameters, the very *raison d'être* for permitting [*sic*] this ought to be that defence of national security must seek to defend and enlarge freedom for the population as a whole (. . .).⁶⁷

Others have attempted to strike a balance between the National

⁶⁷ Kurt Herndl, *The notion of "respect for human rights" is the key element in any concept of "order" or of "security,"* Le Devoir, Supplement, 13 décembre, 1986, 42, 47. See also Sebastien Cobler, *Law, Order and Politics in West Germany* (1978), 9, 12. As Turk persuasively argues, "[i]n practice, 'national security' turns all such freedoms into contingent privileges rather than inalienable rights." Austin Turk, *Political Criminality [:] The Defiance and Defense of Authority* (1982), 29.

Security interests of the State and the interest of individuals to ensure the protection of their rights and freedoms. Amongst them the McDonald Commission recognized that a variety of activities attacking civil liberties can be conducted in the name of National Security. Consequently, more readily understood concepts such as "national defence" or "law enforcement" have been used in some cases rather than "National Security." The Commission questioned "whether these alternative phrases adequately cover the security activities that, in our view, need to be carried out in all states, including Canada."⁶⁸

In assessing the McDonald Commission Report, Farson points to the rights of individuals -- in particular, the right to dissent, freedom from surveillance and interrogation and knowledge about State activity -- which come into conflict with the rights of the State "to protect its integrity, property, interests, relationships, and its values and principles from subversion and external attack." The question, therefore, for the Commission was "how to chart a course that would allow both sets of interest to maximize their objectives," by finding a balance between these interests. Unfortunately, Farson collapses the security of the State into the security of Canadians, stating that "if the state fails to move far enough against threats

⁶⁸ *Supra*, note 16, 39. There is a hidden danger in this approach, however. It could easily be advanced by a government which could say: "we are suppressing the rights and freedoms of this segment of the population on the basis of defending our legitimate National Security interest in order to protect the rights and freedoms of the population as a whole." *Cf.* the October 1970 Crisis in Québec. In the introduction to the workshop on "Order, Security and Respect for Human Rights," during which Herndl delivered his paper, Gerald Beaudoin correctly stated that the question of the extent to which legislation and states can limit rights and freedoms on the basis of morality, security and public order is a "débat fondamental" in Canada.

to its existence and its principles, its citizens also run the risk of losing their democratic freedoms."⁶⁹

Attempting to resolve the conflict between National Security and individual freedom is linked to traditional liberal theories of the State and the individual:

Both Hobbes and Locke assumed that the state resulted from the individuals in a territory relinquishing a portion of their liberty in exchange for personal security. The state would provide the backdrop of security upon which economic progress, culture, and justice are predicated in the civil society. Even modern political theorists like John Rawls seem to assume the existence of the state as the provider of security. Liberal-democratic theory usually perceives the state not as a core concept in understanding society but as a neutral arbiter of clashing interests. In liberal ideology, the state has an important legitimating function; it acts for the benefit of society as a whole.⁷⁰

Liberals accept the concept of National Security "because it allows restraints on freedoms only on the basis of a consensus as to the "public interest" which transcends specific interests or claims of the ruling élite," and because

⁶⁹ *Supra*, note 33, 2.

⁷⁰ *Supra*, note 55, 251 [note omitted]. In this regard, Turk makes the following incisive observations:

To be sure, under objective and occasionally subjective pressures to take liberal, humanistic, and democratic values into account, the proponents and users of such laws [political crimes] play down the extent to which they are aimed at defending incumbent regimes and ruling group interests, and stress rather the protection of the (real or putative) interests of the people as a whole against the (again, real or putative) threats of foreign aggressions and machinations, alien ways and ideologies, dangerous internal political and intellectual aberrations [. . .]
supra, note 67, 55.

National Security supposedly involves the interests of the entire nation and security.⁷¹ Rankin questions this classical liberal paradigm, stating that the protection of National Security may only benefit a particular segment of society:

C.S.I.S., therefore, is said to be engaged in protecting the 'national security,' but instead of protecting the rights of all citizens it rather protects the power of financial, political and military élites. Many would acknowledge, for instance, that the primary task of the South African Security Police is not to protect the majority of citizens in that society, but rather to buttress the position of the privileged white élite which governs that state.⁷²

But anti-subversion, the pre-eminent component of National Security, is not designed to protect the entirety of the nation. Moreover, while the meaning of terrorism and espionage is certain, to a fairly high degree of precision, "subversion" is notoriously fluid and historically-contingent in nature. Mr. Justice Horace Krever, who chaired the Ontario Royal Commission into the Confidentiality of Health Records, provided some examples of this characteristic, during his comments on the RCMP submission on policy:

Historically, when one looks back and takes the historical view, you don't have to be a political scientist or much of an historian to realize that at

⁷¹ *Ibid.*, 252. See also Rankin, *Democracy versus the national security state* (1976) 40 *Law & Contemp. Prob.* 189, 218, 219.

⁷² *Ibid.* See also *infra*, ch. VI; Noam Chomsky, *The Chomsky Reader* (1987) (demonstrating that what is declared to be in the interests of the National Security of the U.S. usually amounts to aggression, carried out in the name of all Americans, but actually benefiting only the élite).

any given time in history, movements that became acceptable, including Christianity, at a certain time were considered to be subversive movements and hostile to the interests of the status quo of the state . . . I used Christianity as perhaps the most glaring example of what was considered to be so subversive that drastic measures had to be taken to deal with it, but in our own time and in your force's own time, the example that keeps recurring is that of the Winnipeg General Strike and the prosecution of the various people, not East European Bolshevik immigrants, but people of Anglo-Saxon [*sic*] stock, members of the clergy, J.S. Woodsworth charged with sedition because an account, as I recall it, was simply one sentence from Isaiah.⁷³

While terrorism can result in the indiscriminate injury of individuals and property, and the State promotes the notion that espionage can lead to enhancing the vulnerability of the security of a country's inhabitants, "subversion" is directed at only one small segment of society: the State and the narrow political and economic interests it serves to protect. For the goal of "subversion" is not harm to individuals, rather it is to promote deep-going *dissent* and eventually fundamental progressive political change. Since its essence is the expression of dissenting opinions, it should be shielded from State interference, by including it as a legitimate form of freedom of expression.⁷⁴ As such, it is deserving of constitutional protection. In this sense it cannot be subsumed under the umbrella of *National Security*.

⁷³ R. Dowson *et al*, *Ross Dowson v. R.C.M.P.* (1980), 51. This is a fascinating account of a public campaign waged in the courts by a Canadian socialist against the RCMP in response to the force's attempts to discredit, harass and intimidate members of left-wing organizations and the New Democratic Party. See also J. Stuart Russell, *Discrimination on the Basis of Political Convictions or Beliefs* (1985) 45 R. du B. 377, 377-378.

⁷⁴ See, *e.g.*, *infra* note 82. As Cobler astutely argues, counter-subversion "is inspired by two ideas: fear of people acting in solidarity, and the need to bring forward every form of surveillance and defence into the area of opinions, discussion and

Nevertheless, the entire National Security apparatus is designed for and mobilized against this "subversion from within,"⁷⁵ thereby demonstrating its profound political potential. The fear is not so much of a few terrorists, or a handful of spies, none of whom have the power to fundamentally alter the politico-economic structure of the country, rather it is of those *movements* which directly challenge the political authority, legitimacy and hegemony of the State. For many the spectre of revolution looms closely on the horizon, including James Anderton, Chief Constable of Greater Manchester, who stated perceptively in 1979:

I think that from the police point of view [. . .] in ten to fifteen years from now [. . .] basic crime such as theft, burglary, even violent crime will not be the predominant police feature. What will be of greatest concern will be the covert and ultimately overt attempts to overthrow democracy, to subvert the authority of the state, and to involve themselves in acts of sedition designed to destroy our parliamentary system and the government.⁷⁶

What, then, are the legitimate and lawful interests of the Canadian State in mobilizing the notion of National Security? In my view there are only three: (1) the interest must be truly national in dimension, (2) it must be aimed at preventing real (as opposed to potential or apprehended) criminal conduct, and (3) it must respect the rights and freedoms guaranteed by the

alternative publicity." *Supra*, note 67, 14.

⁷⁵ The phrase is taken from the English translation of Simone de Beauvoir's autobiography, *All Said and Done* (1972), 452.

⁷⁶ Quoted in T. Bunyan, *The Police Against the People*, Autumn 1981-Winter 1982 *Race & Class* 164. See also R.N. Berki, *Security and Society: Reflections on Law, Order, and Politics* (1986).

Canadian Charter of Rights and Freedoms. I have already stated that "subversion" should not be included as an aspect of National Security since it should be constitutionally protected as a form of freedom of expression and since it is not truly national in dimension. As for the criminality requirement, both terrorism and espionage are presently regarded as criminal offences, since both are considered to jeopardize the safety of the State and society as whole: a plethora of charges may be laid under the *Criminal Code* for conduct relating to terrorism (*e.g.*, concerning attempted or real injury to persons or property), and espionage is considered to be a very serious criminal offence (whether it be under the *Official Secrets Act* or that *Act* is revoked and espionage is integrated into the *Criminal Code*, as many have recommended).⁷⁷ They are also concerned with the prevention of actual and imminent harm, whereas "subversion" only contains a *potential* and distant goal (a given movement for social change may never realize its objectives), and due to the slow pace of tangible results based upon subversive action such goal is far from imminent. This distinction is partially reflected in the codification of terrorism and espionage as criminal acts, while "subversion" remains outside the scope of criminal statutes, with the exception of treason and related conduct.⁷⁸ But since the criminal law's prohibition against espionage and terrorism has been regarded as inadequate by itself, "[a]dvance intelligence is needed to prevent espionage

⁷⁷ See *infra*, chapters II, III.

⁷⁸ See *infra*, ch. II; Government of Canada, *The Criminal Law in Canadian Society* (1982); Law Reform Commission of Canada, *Crimes Against the State* (1986) [Working Paper 49]; Commission of Inquiry, *supra*, note 16, 41.

networks or terrorist support systems being established in Canada. [. . .]"⁷⁹
Hence the need for security intelligence in these two areas.

But when we examine more closely the nature of "subversive" activities it becomes quite clear that what is involved is lawful political protest and dissent (thus the concepts overlap), which should be protected by the *Canadian Charter*. The Royal Commission on Security tried to portray "subversion" as a dangerous and cloak-and-dagger form of anti-social conduct:

Overt lobbying or propaganda campaigns aimed at effecting constitutional or other changes are part of the democratic process; they can however be subversive if their avowed objectives and apparent methods are cloaks for *undemocratic intentions* and activities. Political or economic pressures from domestic or foreign sources may be subversive, particularly when they have secret or concealed facets, or when they include attempts to influence government policies by the recruitment or alienation of those within government service or by the infiltration of supporters into the service.⁸⁰

Consequently the Commission proposed the following working definition of "subversion:"

[Those] organizations or individuals [who] usually constitute a threat to the fundamental nature of the state or the stability of society in its broadest sense, and make use of means which the majority would regard as undemocratic.⁸¹

79 Commission of Inquiry, *ibid.*, 41.

80 *Supra*, note 28, 2-3 (emphasis added). *Cf.* the definition of "threats to the security of Canada" in s. 2 of the *CSIS Act*.

81 *Ibid.*, 3.

What the federal government and the National Security establishment presently label derogatorily as "subversive" is actually a panoply of lawful criticism, which should be the essence of any liberal democracy. Individuals and groups who oppose government engage in a host of activities to express their criticism: petitions, demonstrations, meetings, rallies, letters to politicians and the media, publications, and so on. The essence of this criticism is that it aims to convey dissenting *ideas*, a form of expression, which should benefit from the protection of the freedom of expression.⁸² The use of National Security to fight "subversion" may, in fact, lead to National *In*security and impede democracy, according to Grace and Leys:

The history of 'countersubversion' does not show that it has enhanced the security of either the states or the citizens of the liberal-democracies; if anything it may have made them less secure, by inhibiting the radical impulses from which timely reforms have always come.⁸³

⁸² See, e.g., *Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984) 7 C.R.R. 129 (Ont. C.A.); *Retail, Wholesale and Dept. Store Union, Local 380 v. Dolphin Delivery* (1986) 25 C.R.R. 321 (S.C.C.); *Re Fraser and Public Service Staff Relations Board* (1985) 19 C.R.R. 152 (S.C.C.); *Re R. and Video Flicks Ltd.* (1985) 14 D.L.R. (4th) 10 (Ont. C.A.); Clare Beckton, *Freedom of Expression -- Access to the Courts* (1983) 61 Can. Bar Rev. 101; C.F. Beckton, *Freedom of Expression in Canada - How Free?* (1983) 13 Man. L.J. 583; Cobler, *supra*, note 67, 74, 76; Michael Mandel, *The Character of Rights and the Legalization of Politics in Canada* (1988), *passim*. It is, however, probably rather unrealistic to expect the Canadian Government to relinquish its counter-subversion powers on the strength of this argument. As Turk notes, "it is difficult to find convincing evidence of any real desire on the part of authorities to curtail intelligence because of belief in democratic principles." Turk, *supra*, note 67, 124.

⁸³ *Supra*, note 37, 49. See also Stanley Barrett, *The Far Right in Canada* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 1.

Conclusions

The attempts to suppress democratic activities in the guise of protecting National Security also infringes a number of other basic rights and freedoms: (1) the surveillance of subversive activities is oftentimes conducted by wiretaps and other surreptitious entries, a form of search and seizure, which represent a violation of the freedom from unreasonable search or seizure (s. 8 of the *Canadian Charter*);⁸⁴ (2) such surveillance, especially by the infiltration of informants and *agents provocateurs*, denies the freedom of association of the members of the targeted group, since such activity usually leads to disruption and therefore *unpeaceful* association (contrary to s. 2(d));⁸⁵ (3) surveillance also pries seriously into the private lives of individuals (*e.g.* buggings, mail openings or use of confidential records), representing a violation of the reasonable expectation of privacy which should be attached to the freedom from unreasonable search and seizure;⁸⁶ (4) freedom of expression can also be attacked by the use of threats, black mail, intimidation of activists and psychological pressure; and (5) the free circulation of ideas (a subcategory of (4)) may be violated by the

⁸⁴ See *Katz v. United States* (1967) 389 U.S. 347; David Rudovsky, "Crime, Law Enforcement, and Constitutional Rights," *in* Jules Lobel ed., *A Less Than Perfect Union* (1988), 361, 369; *R. v. Glesby & Deloli* (1982) 2 C.R.R. 203 (Man. Co.Ct.).

⁸⁵ *En collaboration, La Police secrète au Québec [:] la tyrannie occulte de la police* (1978) 47.

⁸⁶ *La sécurité nationale vs Le citoyen* (1978) 38 R. du B. 400, 404. See also *supra*, note 84; *supra*, note 39a, 199; Kalven, *supra*, note 9. As Borovoy correctly argues: [. . .] it is very difficult to conduct such pervasive intelligence operations without casting a chill over political liberty and personal privacy. At the very least, many people are likely to *feel* that they are under surveillance. This will particularly apply to those who have unconventional beliefs and ideologies.
Canadian Civil Liberties Association v. Attorney-General of Canada, Supreme Court of Ontario, File No. RE 1193/89, affidavit by Alan Borovoy in support of the application, 5, 22 [emphasis in original].

manipulation of media outlets, distribution of fabricated information and surreptitious entries.⁸⁷

It could be argued that the surveillance and suppression of "subversion" is a necessary State interest notwithstanding these basic rights and freedoms, since it meets the requirements of s. 1 of the *Canadian Charter*.⁸⁸ But this would deny the expression of significant and socially-useful forms of dissent and criticism, thereby reducing the volume and quality of democratic discussion in society. It would also bring Canada dangerously close to the totalitarian model of National Security, wherein all forms of criticism are surveilled and viciously repressed. Surely such results are not justified in a free and democratic society. The curtailment of the democratic right to dissent is far more significant to the whole of society than the gain the State derives from surveilling and seeking to repress "subversion."

The surveillance and suppression of "subversion" does not meet the Supreme Court's test in *R. v. Oakes*. First, it is not sufficiently important to Canadian society to override freedom of expression protecting dissent and protest. Second, the means chosen to limit dissent and protest are not reasonable and demonstrably justified. They interfere too much with the free expression of dissenting ideas, and they are arbitrary and unfair, since primarily left-wing ideas are targeted. The means do not impair as little as possible the freedoms in question, since State surveillance and interference results in diminishing or eliminating the quantity and quality of dissent and protest. Third, there is no proportionality between the effects of the measures limiting the freedoms and the objective, which has been identified

⁸⁷ *Supra*, note 85.

⁸⁸ See, e.g., *R. v. Oakes* [1986] 1 S.C.R. 103.

as of sufficient importance. The objective of counter-subversion is, in the first place, not sufficiently important for the protection and preservation of the political order, since "subversion" presents such a minor challenge to the *status quo*, and other less intrusive means (notably the general criminal law powers) are adequate.

I am not saying, however, that the State has no lawful National Security interests, since I have acknowledged that the State may have a valid interest in dealing with terrorism and espionage. To say otherwise would be to advocate the radical libertarian model, which is indefensible. What I do urge, though, is the elaboration of a new and critical model for National Security, one which limits the involvement of the State to a strict minimum, in harmony with the requirements of the *Canadian Charter*.

The absence of illegality and necessary State interest was evident in *Socialist Workers Party v. Attorney General*,⁸⁹ where it was held that the disruption, surreptitious entries and use of informants by the Federal Bureau of Investigation (FBI) against the Socialist Workers Party and the Young Socialist Alliance constituted constitutional violations. Griesa J. based this ruling, in part, on the constitutionally protected right to privacy, and stated that the use of informants violated that right. He also held that the actions of the FBI were not justifiable on the basis of "National Security interest," even regarding those operations initiated or approved by the President of the United States, and that since the targeted organizations were engaging in lawful activities the surveillance was unjustifiable.

This ruling confirms the part of my argument that only those National Security provisions and operations which do not violate the Constitution and

⁸⁹ (1986) 642 F.Supp. 1357 (S.D.N.Y.).

relate to real criminal conduct are justifiable and lawful, which will be employed in assessing whether the use of National Security is justified in the following chapters.

CHAPTER II

CRIMES AGAINST THE STATE

Introduction

It is not without reason that the *Criminal Code*¹ begins with a plethora of crimes against the State, ostensibly designed to protect "National Security," but whose real purpose is to safeguard the State from political dissent, radical social change or revolutionary upheaval.² As such, these provisions represent a mini criminal code for left-wing radicals, protesters, the labour movement and other movements for social change. They are also the final line of defence for the preservation of the State, and contain alarmingly harsh sanctions.

The Law Reform Commission of Canada characterizes these crimes as falling under the rubric of "Offences against Society and the State," which they define as "acts threatening the general peace and order of society and acts threatening the security of the State and its basic institutions."³ In its

¹ R.S.C. 1970, c. C-34, as am. Part II is entitled "Offences Against Public Order."

² William J. Chambliss, "Toward a Radical Criminology," in David Kairys, ed., *The Politics of Law [:] A Progressive Critique* (1982), 230, 234.

³ Law Reform Commission of Canada, *Crimes Against the State* (1986) [Working Paper 49], 1. The apparent precursor of this Working Paper is an unpublished paper prepared for the Commission: M.L. Friedland, *Tentative Draft Working Paper on "Offences against the Security of the State"* (1984). See Law Reform Commission of Canada, *Fifteenth Annual Report [:] 1985-86* (1986), 30. The *Crimes Against the State* Working Paper is particularly significant in that it was prepared in conjunction with the drafting of the long-awaited new "Draft Criminal Code" submitted by the Commission. Volume I of the new Code was submitted to the Government of Canada in October 1986; Law Reform Commission of Canada, *Recodifying Criminal Law* (1986) [Report 30, Vol. I], 4. Report 31, a revised and enlarged edition of Report 30, was released in late 1987, and includes a part on Crimes Against the Governmental Order (Title VI), a chapter of which is entitled Crimes Against State Security (Ch. 26): *ibid.*, Table of Contents. See also: Law Reform Commission of Canada, *Recodifying Criminal Law* (1987) [Report 31]. Sebastien Cobler describes this area of the law as "political criminal

Working Paper on *Crimes Against the State* the Commission deals with the "most serious crimes" of this group of crimes, *i.e.* those threatening the security of the State and its institutions found in Part II of the *Criminal Code* and the *Official Secrets Act*.⁴ The Commission correctly notes that these crimes are "rarely committed and even more rarely charged," nevertheless they are indeed "some of the most serious offences in the whole *Criminal Code*" because "such conduct jeopardizes the security and well-being of *the whole nation and its inhabitants*."⁵ Regrettably, despite the Commission's oft-repeated desire to achieve precision in language and in ideas, they confuse the significant distinctions between the State, the geopolitical entity called Canada and society as a whole. Crimes against the State are in fact not primarily designed to protect Canada nor its inhabitants, rather they seek to ward off attacks against only one segment of our society: the State. This is demonstrated by the evolution of these offences in the rich mix of politico-legal history in Europe and in Canada.

A. The History of Crimes Against the State

The crimes against the State in the *Criminal Code* find their genealogy in legislation, such as the 1892 Canadian *Criminal Code*,⁶ the Canadian *Treason Act* of 1886⁷ and the English *Statute of Treasons* of 1351,⁸ as well as

law," which he defines as "the state's confrontation with its political opponents through the forms of justice, their suppression and neutralization by means of a specially created and uniquely applied body of law." *infra*, note 80, 72, 72-118. For an excellent study of political criminality, see Turk, *infra*, note 70, *passim*.

4 R.S.C. 1970, c. 0-3, *as am.*

5 *Crimes Against the State*, *supra*, note 3, 1 [emphasis added].

6 55-56 Vict., c. 29.

7 *An Act respecting Treason and other Offences against the Queen's authority*, 1886,

from the English common law, feudal, Roman and early Germanic law.⁹ Similarly, the Canadian *Official Secrets Act* is derived from the English *Official Secrets Acts* of 1889, 1911 and 1920.¹⁰

The earliest crimes against the State found expression in early Germanic law and in ancient Rome, and were designed to prevent social uprisings against the State or the sovereign.¹¹ The Roman law of treason was called *crimen læsæ majestatis*, which served to protect the person and authority of the sovereign, *viz.* the Roman Emperor, developed into a very extensive concept, and included a number of major offences.¹² After the fall of Rome treason became focussed around particular feudal obligations in Europe, and under feudalism the offence could be committed against one's lord whether or not he was the King.¹³ But following the reintroduction of Roman law in Europe in the 11th Century the absolute or near absolute Kings adopted the

49 Vict., c. 146. For an excellent review of the early history of crimes against the State, see Elizabeth Grace & Colin Leys, *The Concept of Subversion* (1988) (unpublished paper presented at the February 1988 conference at Queen's University on "Advocacy, Protest and Dissent"), 4 *et seq.*

8 25 Edw. 3.

9 See *Crimes Against the State*, *supra*, note 3, 3-12.

10 *Official Secrets Act*, 1889, 52 & 53 Vict., c. 52; *Official Secrets Act*, 1911, 1 & 2 Geo. 5, c. 28; *Official Secrets Act*, 1920, 10 & 11 Geo. 5, c. 75. Although the *Official Secrets Act* will be discussed separately in the next chapter, since its historical evolution is so intimately connected to that of the other crimes against the State, it will be discussed here.

11 In fact "sedition" is derived from the Latin *seditio*, which means uprising or insurrection.

12 See, *e.g.*, A. Vitu, *Crimes et délits contre la sûreté de l'état* (1973) *J.C.P.* Fasc. II, para. 8.

13 See F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I*, Vol. 2 (1895), 501-502.

Roman notion of *crimen læsæ majestatis* to model their offences against the State.¹⁴

In 1351 England's first codification of treason law was enacted in the *Statute of Treasons*. Although two main offences in the statute (influenced by Germanic, feudal and Roman law) were compassing and imagining the King's death and adhering to the King's enemies, it was also treason to levy war against the King and "violate the King's companion" or a number of other close relatives. The statute was enacted at the height of the reign of Edward III in order to reduce the scope of treason. Accordingly, it has been described as a "lean and lenient enactment" which "made no provision for lesser acts of violence against the king or violent disturbances that did not amount to levying war."¹⁵ But consistent with my view that virtually all concepts relating to National Security are notorious for their inherent elasticity and historically-contingent nature, Friedland observes that the 1351 *Statute* has been used over the centuries "to deal with a variety of apparent threats to the state arising from economic and political changes."¹⁶

The law of treason subsequently evolved according to the needs of the monarch in power:

In the following centuries, at times of crisis, English monarchs enacted more detailed and oppressive laws to clothe the bare, skeletal *Statute of Treasons*, but these temporary addi-

¹⁴ See *supra*, note 12, para. 10; René David & John C. Brierley, *Major Legal Systems in the World Today* (2nd ed., 1978), 33 *et seq.*

¹⁵ *Crimes Against the State*, *supra*, note 3, 5 [note omitted].

¹⁶ M.L. Friedland, *National Security: The Legal Dimensions* (1979) [A Study prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police; known as the McDonald Commission], 6. See J.R. Mallory, *Review* (1981) *Cdn. J. Pol. Sci.* 416, 417.

tions were more in the nature of orders given by a military commander in times of war than principled reforms of the law of treason.¹⁷

Moreover, the courts enlarged the scope of the Statute by broadly interpreting its words.¹⁸ For instance, "levying war" against the King included "everything from riot to revolution, that is to say, any amount of violence with a political object."¹⁹ In this early period sedition developed as a distinct crime from treason: the invention of the printing press "sparked the State's interest in controlling the expression of critical ideas and eventually led to the development of the law of sedition,"²⁰ which was initially tried by the Star Chamber, then later by the ordinary courts. Statutory additions were also made to the offences against the State around the end of the 18th Century, each of which gradually expanded the notion of sedition.²¹ According to Dicey the meaning of sedition was extended to include the notion of class struggle, since "seditious intention" meant *inter*

¹⁷ *Crimes Against the State, supra*, note 3, 6 [notes omitted].

¹⁸ See, e.g., *R. v. Maclane* (1797) 26 Howell's State Trials 721; *R. v. Henry 2nd & John Sheares* (1798) 27 State Trials 255.

¹⁹ *Crimes Against the State, supra*, note 3, 6 [note omitted]. See J.F. Stephen, *A History of the Criminal Law of England*, Vol. 2 (1883, [1964 reprint]), 266-269; L.H. Leigh, *Law Reform and the Law of Treason and Sedition* [1977] Public Law 128, 131; Duncan Kennedy, *The Structure of Blackstone's Commentaries* (1979) 28 Buffalo L.R. 205.

²⁰ *Crimes Against the State, supra*, note 3, 6 [note omitted]. See Stephen, *ibid.*, 302. The broadening scope of sedition is exemplified in *The Case of Tutchin* (1704) 14 State Trials 1095, where it was held that defaming the government was a crime.

²¹ See *Fox's Libel Act*, 1792, 32 Geo. 3, c. 60; *An Act for the Safety and Preservation of his Majesty's Person and Government against treasonable and seditious Practices and Attempts*; 1795, 36 Geo. 3, c. 7, continued in 1817 by 57 Geo. 3, c. 6; *An Act for better Prevention and Punishment of Attempts to seduce Persons serving in His Majesty's Forces, by Sea or Land, from their Duty and Allegiance to His Majesty, or to incite them to Mutiny*, 1797, 37 Geo. 3, c. 70, made permanent in 1817 by 57 Geo. 3, c. 7.

alia "to excite British subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to promote feelings of illwill and hostility between different classes."²²

In the 19th Century this "wave of legislative activity continued [. . .] gaining momentum with each passing year."²³ Finally, in 1879 the Draft Code of the English Law Commissioners proposed a consolidation of the statutes and common law rules concerning crimes against the State, which were to have "a major impact on the shape and substance of the offences against the State in Canada's first *Criminal Code*."²⁴

In Canada the first major statute on treason was enacted in 1886:

The Canadian *Treason Act* of 1886, which consolidated earlier legislation on treason, summarized (in s. 9) the judicial and statutory extensions of the 1351 *Statute of Treasons* without attempting to supercede that Act. The 1886 Act was also designed to deal with the particularly Canadian problem of rebellions and uprisings aided or instigated by foreigners and non-residents.²⁵

²² A. V. Dicey, *The Law of the Constitution* (4th ed., 1893), 231, 232. See also Peter Hain, *Political Trials in Britain [.] From the Past to the Present Day* (1984).

²³ *Crimes Against the State*, *supra*, note 3, 7. See, e.g., *An Act for the Support of His Majesty's Household and, of the Honour and Dignity of the Crown of the United Kingdom of Great Britain and Ireland*, 1820, 1 Geo. 4, c. 1; *An Act for providing for the further Security and Protection of Her Majesty's Person*, 1842-43, 5 & 6 Vict., c. 12 (passed during the Continental Revolutions of 1848).

²⁴ *Crimes Against the State*, *supra*, note 3, 7.

²⁵ *Ibid.*, 8. See *An Act respecting Treason and other Offences against the Queen's authority*, 1886, 49 Vict., c. 146. The early cases on treason are: *R. v. Slavin* (1886) 17 U.C.C.P. 205 (C.A.); *R. v. Rownes* (1914) 4 O.W.N. 467 (H. C.); *R. v. Snider* (1915) 24 C.C.C. 256 (Ont. C.A.); *R. v. Fehr* (1916) 26 C.C.C. 245 (N.S.S.C.); *R. v. Bleiler* [1917] 1 W.W.R. 1459 (Alta. C.A.); *Schaefer v. The King* (1919) 58 S.C.R. 43. See also K. McNaught, "Political Trials and the Canadian Political Tradition," in M.L. Friedland, ed., *Courts and Trials: A Multi-Disciplinary Approach* (1975), 137, 158-159, 138-139, 143-146.

Relatively few treason charges were laid under this statute, but such occurrences coincided with significant events in the history of Canada. In fact no other treason cases were tried after the World War I trials, since the *Official Secrets Act* was then used, and during World War II the *Treachery Act*²⁶ was available.

In 1890 Canada enacted its first *Official Secrets Act*²⁷ the purpose of which was to prohibit the improper use of secret government information, which was copied almost verbatim from the 1889 English *Official Secrets Act*.²⁸ Shortly thereafter the offences in the *Official Secrets Act* were transferred to Canada's first *Criminal Code* in 1892.²⁹ In 1939 a new *Official Secrets Act* was enacted in Canada, which consolidated the 1911 and 1920 English Acts and made them the law of Canada.³⁰

The law of sedition blossomed in Canada during World War I, when six reported sedition cases occurred, of which five resulted in convictions.³¹ In the eyes of the judiciary simple criticism of the government was sufficient

²⁶ S.C. 1940, c. 43.

²⁷ S.C. 1890, c. 10.

²⁸ 1889, 52 & 53 Vict., c. 52.

²⁹ *Supra*, note 6, ss. 77, 78. The other crimes against the State in the 1892 *Code* were derived from the 1886 *Treason Act* and the English *Draft Code* of 1879.

³⁰ S.C. 1939, c. 49. The *Criminal Code* sections dealing with communicating government information and breaches of official trust and the 1911 English *Act* were repealed. Since then no changes have been made to the substance of the *Official Secrets Act*. The maximum penalty for offences was, however, increased from seven years to 14 years in 1950, in response to the Cold War: S.C. 1950, c. 46, s. 3.

³¹ *R. v. Felton* (1915) 9 W.W.R. 819 (Alta. C.A.); *R. v. Cohen* (1916) 10 W.W.R. 333 (Alta. C.A.); *R. v. Manshrick* (1916) 27 C.C.C. 17 (Man. C.A.); *R. v. Trainor* [1917] 1 W.W.R. 415 (Alta. C.A.); *R. v. Geisinger* [1917] 1 W.W.R. 595 (Sask. C.A.); *R. v. Barron* [1919] 1 W.W.R. 262 (Sask. C.A.). Note that they were all from Western Canada.

for a finding of guilt. "You are slaves, you have to do what King George and Kitchener say," stated one convicted accused.³² Implored another: "Every one who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop."³³

Following World War I the sedition prosecutions were fuelled by the "red scare" hysteria unleashed in reaction to the Russian Revolution of 1917 and the tremendous political and labour agitation in Canada, which also caused Parliament to increase the penalty from two to 20 years in 1919.³⁴ In the same year, in the midst of the Winnipeg General Strike,³⁵ provisions were introduced into the *Criminal Code* criminalizing "unlawful associations" and removing the proviso in the sedition provisions excepting certain lawful activities from punishment.³⁶ The 1919 provisions against "seditious organizations" (s. 98 of the 1927 *Criminal Code*) made it an offence to "become and continue to be a member" of an "unlawful association," which was defined as

one of whose purposes is to bring about *any governmental, industrial or economic change* within Canada by use of force, violence or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence,

³² *R. v. Cohen, ibid.*

³³ *R. v. Barron, supra*, note 31. A union leader was also prosecuted for sedition in 1923: *R. v. McLachlan* (1924) 41 C.C.C. 249 (N.S.).

³⁴ S.C. 1919, c. 46, s. 5.

³⁵ See, e.g., Lorne & Caroline Brown, *An Unauthorized History of the RCMP* (1978), 38.

³⁶ S.C. 1919, c. 46, s. 1. See also E. McNaught, *Political Trials and the Canadian Political Tradition* (1974) 24 U.T.L.J. 149; P. MacKinnon, *Conspiracy and Sedition As Canadian Political Crimes* (1977) 23 McGill L.J. 622.

terrorism, or physical injury to person or property, or threats to such injury, in order to accomplish such change, *or for any other purpose*[. . .]³⁷

A person who had attended meetings of the association, had spoken publicly in its advocacy, or had distributed its literature through the mail was subject to a rebuttable presumption that he or she was a member of the association.³⁸

These new enactments were in reaction to and reproduced the general government-provoked "red menace" hysteria sweeping North America. But they were also designed to respond effectively to the Winnipeg General Strike, which, Friedland correctly observes, "was then the most successful general strike in North American history."³⁹ It is, therefore, surprising to consider that serious debate occurred as to whether the Winnipeg General Strike caused these provisions to be enacted.⁴⁰ But Friedland is also of the view that the prosecutions following the Strike involved "very serious conduct." He cites Manitoba Chief Justice Perdue, who described the

³⁷ Sections 98(1), (3), 1927 *Criminal Code* [emphasis added]. Cf. the definition of "threats to the security of Canada" in s. 2 of the *Canadian Security Intelligence Act*, S.C. 1984, c. 21; the definition of "subversive or hostile activities" in s. 15(2) of the *Access to Information Act*, S.C. 1980-81-82-83, c. 111. See also Kenneth McNaught & David Bercuson, *The Winnipeg General Strike: 1919* (1974); Donald Masters, *The Winnipeg General Strike* (1950).

³⁸ Section 98(4), 1927 *Criminal Code*.

³⁹ *Supra*, note 16, 23 [note omitted]. See also Grace & Leys, *supra*, note 7, 6-7.

⁴⁰ Cf. McNaught, *supra*, note 25, 151; J.B. MacKenzie, *Section 98, Criminal Code and Freedom of Expression in Canada* (1972) 1 Queen's L.J. 469, 470-475; P. R. Lederman, *Sedition in Winnipeg: An Examination of the Trials for Seditious Conspiracy Arising from the General Strike of 1919* (1976-77) 3 Queen's L.J. 3, 12 (providing a qualified defence of these prosecutions for sedition); Lita-Rose Betcherman, *The Little Band: The Clashes between the Communists and the Political and Legal Establishment in Canada, 1928-1932* (1982) (documenting the way in which the federal government used s. 98 to repress the "little band" of radicals, and how the Communist Party responded).

intentions of the Strike leaders: "revolution, the overthrow of the existing form of government in Canada and the introduction of a form of Socialistic or Soviet rule in its place. This was to be accomplished by general strikes, force and terror and, if necessary, by bloodshed."⁴¹ In the post Winnipeg General Strike era only three reported prosecutions were brought under s. 98, including the 1934 conviction of Tim Buck, the leader of the Communist Party of Canada.⁴²

The "unlawful associations" provisions were repealed in 1936, and a partial definition of "seditious intention" was added: such intention would be presumed of one who taught or advocated the use, without lawful authority, of force as a means of accomplishing governmental change.⁴³ Friedland comments that

[i]n some respects this provision is stronger than section 98 because most active members of what would have been an illegal association would now be caught as persons who circulated "any writing that advocates the use . . . of force as a means of accomplishing a governmental change" and, unlike section 98, this is a conclusive and not a rebuttable presumption. But, at least it did not make mere membership, however casual or innocent, a crime.⁴⁴

⁴¹ *R. v. Russell* (1920) 51 D.L.R. 1, 12 (Man. C.A.). Quoted in *supra*, note 16, 18. Of the eight strikers prosecuted, only one was acquitted. The commentators are also divided as to the justification of the charges. *Cf.* McNaught, *supra*, note 25, 149-150; MacKinnon, *supra*, note 36; Lederman, *ibid.*

⁴² *R. v. Weir* (1929) 52 C.C.C. 111 (Ont. Co.Ct.); *R. v. Buck* (1932) 57 C.C.C. 290 (Ont. C.A.); *R. v. Evans* (1934) 62 C.C.C. 29 (B.C.C.A.). See also Reg Whitaker, *Left-Wing Dissent and the State [.] Canada in the Cold War* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 3, 5.

⁴³ S.C. 1936, c. 29, adding s. 133(4) of the *Criminal Code*. *Cf.* s. 60(4) of the present *Criminal Code*, and the related definitions in the *Canadian Security Intelligence Act* and the *Access to Information Act*, *supra*, note 37.

⁴⁴ *Supra*, note 16, 23-24.

Later, in the leading Supreme Court of Canada decision in *Boucher v. The King*,⁴⁵ the Court "gave to sedition a concreteness that was not there before, [. . .]"⁴⁶ Although strong words were no longer sufficient, an excessively broad construction of "seditious intention" was rendered, *i.e.* "an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority."⁴⁷ Applying this incredibly elastic notion the caustic comments of Toronto lawyer Harry Kopyto did not amount to mere "scandalizing the court," but were in fact seditious.⁴⁸ But Friedland mistakenly reads *Boucher* as only requiring an intention to incite to *violence*,⁴⁹ whereas in fact the Court ruled that "an intention to incite to *violence or resistance or defiance*" was required.

⁴⁵ [1951] S.C.R. 265, [1951] 2 D.L.R. 369, 99 C.C.C. 1, 11 C.R. 85 [hereinafter cited to [1951] S.C.R.]. *Boucher* was a Jehovah's Witness, who had published a pamphlet entitled *Quebec's Burning Hate for God and Freedom Is the Shame of all Canada*. See *R. v. Kopyto* (1987) 61 C.R. (3d) 209, 39 C.C.C. (3d) 1, 47 D.L.R. (4th) 213 (at 227-228 (C.R.)) (Ont. C.A.).

⁴⁶ Friedland, *supra*, note 16, 18.

⁴⁷ *Supra*, note 45, 301.

⁴⁸ Kopyto was involved in lengthy and unsuccessful proceedings against the RCMP for disruptions of the League for Socialist Action. After a claim was dismissed against the RCMP by Ontario Small Claims Court Judge Marvin Zucker he was quoted in *The Globe and Mail* as stating: "This decision is a mockery of justice. It stinks to high hell [. . .] The courts and the RCMP are sticking together so close you'd think they were put together with Crazy Glue." Kopyto was later convicted of the criminal charge of "scandalizing the courts," and was ordered to apologize for his comments. But on appeal, the Ontario Court of Appeal quashed the conviction, and a majority concluded that the offence of scandalizing the courts violated his freedom of expression under the *Canadian Charter*. See *supra*, note 45. See also Marion Cohen, *The Trials of Harry Kopyto*, *Canadian Dimension*, March 1987, 7.

⁴⁹ Friedland, *supra*, note 16, 25, 19.

As Borovoy correctly points out, the origins of sedition are rooted in the "fear of revolutionary violence."⁵⁰ But the *Criminal Code* provisions prohibit such acts of violence, as well as a certain amount of the speech preceding them. Borovoy's concern is that the *Criminal Code* can apply to "the soapbox orator who seeks no followers," since these individuals are not necessarily threats. He does not, however, quibble with the need to retain the essential purpose of the offence, since the incitement to violent overthrow of government "where there is a clear and present danger that the incitement will be acted upon" (*i.e.*, the presence of "followers") should continue to be prohibited criminal conduct.⁵¹ Tarnopolsky is even more boldly categorical than Borovoy, condemning sedition as "[o]ne of the greatest restrictions on freedom of speech and the press in Canada."⁵²

In 1951, one year after Canada became involved in the policing activity in Korea, substantial amendments were made to the *Criminal Code* offences against the State. Amongst them the new offence of sabotage was introduced, requiring that a "prohibited act" be committed, for a purpose prejudicial to the security or interests of Canada, or the security of foreign armed forces legitimately present in Canada.⁵³ Extensive changes to the

⁵⁰ A. Alan Borovoy, "Freedom of Expression: Some Recurring Impediments," in Rosalie S. Abella & Melvin L. Rothman, eds., *Justice Beyond Orwell* (1985), 125, 155 [proceedings of the 1984 Annual Conference of the Canadian Institute for the Administration of Justice]. See also Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (1988) (analyzing the 1919 U.S. Supreme Court decision which upheld the conviction of four Soviet anarchists charged with sedition, for advocating a munitions workers strike). See also Turk, *infra* note 70, 58-61.

⁵¹ *Ibid.*, 156.

⁵² W.S. Tarnopolsky, *The Canadian Bill of Rights* (2nd, rev. ed., 1975), 184-185.

⁵³ S.C. 1951, c. 47, s. 18, enacting s. 509A of the *Criminal Code*.

form of the *Code* offences against the State, and some minor amendments, were made in 1953.⁵⁴ Treason was redefined (in s. 46 of the *Criminal Code*) to include *inter alia* communicating to a foreign agent information likely to be used in a manner prejudicial to the safety or defence of Canada, a much broader notion than "the security of Canada." Once again these amendments were ushered in by particular socio-political events of the period:

The inclusion of espionage as a form of treason no doubt came as a result of the Gouzenko trials and the general Cold War concern about disclosure of highly sensitive military information to agents of communist countries.⁵⁵

In 1953 the ancillary crimes against the State were also amended. For instance, the sabotage offence was replaced by s. 52 of the *Criminal Code*, which theoretically narrowed the scope of the offence from "a prohibited act for a purpose prejudicial to the safety or interests of Canada" to "safety, security or defence of Canada," consistent with the new espionage provision. But since these amendments little change has occurred to the *Code* offences against the State or the *Official Secrets Act*, such that today the latter is virtually the same as the 1939 *Act*.

The notion of illegal organization did live on, however, in the regulations issued pursuant to the *War Measures Act*⁵⁶ in October 1970, during the "FLQ Crisis." It was an offence under these regulations to belong to the Front de Libération du Québec (FLQ), or any group of persons or association

⁵⁴ S.C. 1953-54, c. 51.

⁵⁵ *Crimes Against the State*, *supra*, note 3, 11.

⁵⁶ R.S.C. 1970, c. W-2. *Public Order Regulations*, 1970, SOR/70-444, proclaimed October 16th, 1970. See MacKinnon, *supra*, note 36, 634-636; Tarnopolsky, *supra*, note 52, 331 *et seq.*

advocating the use of force or the commission of crime to accomplish any governmental change in Canada. Later a temporary statute, the *Public Order (Temporary Measures) Act, 1971*⁵⁷ replaced these Regulations, which declared that the FLQ

or any group of persons or association that advocates the use of force or the commission of crime as a means of or as an aid in accomplishing the same or substantially the same governmental change within Canada with respect to the Province of Quebec or its relationship to Canada as that advocated by the said Le Front de Libération du Québec, is declared to be unlawful association.

In the wake of the "FLQ Crisis" seditious conspiracy charges were brought against five individuals connected with the independence movement in Québec.⁵⁸ Initially the indictments were quashed as being overly vague, and three were recharged with the same offence but were acquitted, while Pierre Vallières later pleaded guilty to a lesser charge and received a suspended sentence.

The interconnectedness and historically-contingent nature of these crimes against the State is therefore of great significance. As Grace and Leys have argued:

⁵⁷ S.C. 1970, c. 2, s. 3; repealed by the *Emergencies Act*, S.C. 1988, c. 29. *Cf.* the related definitions in the *Canadian Security Intelligence Service Act* and the *Access to Information Act*, *supra*, note 37.

⁵⁸ Lemieux, Gagnon, Vallières, Chartrand & Larue-Langlois. These cases are unreported. See MacKinnon, *supra*, note 36, 634-636; McNaught, *supra*, note 36, 151-155; Gerald Pelletier, *The October Crisis* (1971); Pierre Vallières, *White Niggers of America* (1971); Turk, *infra*, note 70, 119-120. "Sedition" was also part of the discourse employed by then Québec Premier Robert Bourassa and other officials to justify their request for the invocation of the *War Measures Act*. See Tarnopolsky, *supra*, note 52, 338-339.

[T]reason, sedition, subversion and more recently, terrorism should thus be seen as forming a continuum of terms whose purpose is to label as a threat to the existing order dissenting political views, and the activities to which these views give rise, and *as such* earmark them for state repression. What differentiates these words from one another is essentially the historical context in which each has arisen.⁵⁹

B. The Present Offences

Today the most serious offences against the State are treason in the *Criminal Code* and spying in the *Official Secrets Act*. The present *Criminal Code* contains the more traditional offences against the State, while the newer espionage offences, which will be examined in the next chapter, are found in the *Official Secrets Act*.

The primary crimes against the State in the *Criminal Code* are high treason (s. 46(1)) and treason (s. 46(2)). The punishment for both offences is contained in s. 47 (ranging from 14 years to life imprisonment), while s. 48 sets out time limitations for commencing treason proceedings. There are a number of noteworthy special features of the law of treason.⁶⁰ First, there is extra-territorial jurisdiction, unlike almost all other *Criminal Code* offences, if the offence is committed by "a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada." (s. 46(3)). Secondly, it is an offence for a person who knows that treason is about to be committed not to inform the police, unlike every other criminal offence (s. 50(1)(b)). Thirdly, there are policy and practical problems with respect to the notion of

⁵⁹ Grace & Leys, *supra*, note 7, 8 (emphasis in original).

⁶⁰ Friedland, *supra*, note 16, 11-13. See Law Reform Commission of Canada, Report 31, *supra*, note 3, 125 *et seq.*

attempted treason. Fourthly, since treason is committed by everyone who "forms an intention" to engage in certain treasonable conduct "and manifests that intention by an overt act" (s. 46(2)(d)), it is "the only crime where bare intention, plus very little more, constitutes an offence."⁶¹ Finally, the evidence of only one witness is insufficient, "unless the evidence of that witness is corroborated" by other evidence (s. 47(3)).

The use of "force or violence for the purpose of overthrowing the government of Canada or a province," (*e.g.* by way of revolution or secession) is a form of treason under s. 46(2)(a), which was first enacted in this form in the 1953-54 *Criminal Code*.⁶² Previously, Friedland notes, revolutions would have constituted treason under the "levying war" provision (s. 74(f) in the 1927 *Criminal Code*), which has always been given a very generous interpretation. The common matter-of-fact attitude regarding the need to criminalize these activities is illustrated by Friedland's remark that "there is no question, of course, that [conduct aimed at overthrowing the State] should be punishable in some manner [. . .]"⁶³

The remainder of the offences against the State are "really supportive of the main crime of treason," according to the Law Reform Commission of Canada,⁶⁴ and are accordingly ancillary in nature. They include acts intended to alarm Her Majesty or break public peace (s. 49), assisting an

⁶¹ *Ibid.*, 12 [note omitted]. *Cf.* common law conspiracy, *infra*, note 68, and accompanying text.

⁶² S.C. 1953-54, c. 51, s. 46.

⁶³ Friedland, *supra*, note 16, 15. See also The Law Commission (England), *Working Paper No. 72*, 37; *Final Report of the National Commission on Reform of Federal Criminal Laws (Proposed New Federal Criminal Code)*, § 1101.

⁶⁴ *Crimes Against the State*, *supra*, note 16, 15.

alien enemy to leave Canada or omitting to prevent treason (s. 50), intimidating Parliament or a legislature (s. 51), acts of sabotage intended to jeopardize the "safety, security or defence of Canada" (s. 52) and sedition, which prohibits spoken words, writings and conspiracies that tend to encourage others to commit treasonable acts or other crimes against the State (ss. 60-62). A series of secondary crimes against the State are also designed to preserve the State monopoly over the use of military force, in part to avoid the creation of insurgent forces.⁶⁵

A significantly broader notion of "ancillary" crimes against the State than the Law Reform Commission's is advanced by Friedland, since he includes in his enumeration the following:⁶⁶ uttering a forged passport (s. 58), hijacking aircraft (ss. 76.1-76.3), unlawful possession of explosives (ss. 77-80), riot and unlawful assembly (ss. 64-70),⁶⁷ divulging military or scientific information (s. 46(2)(b)), advocating genocide (s. 281.1) and other aspects of hate propaganda (s. 281.2).

Yet another crime against the State, which has been notably absent from the analyses of a number of the commentators, is common law

⁶⁵ Sections 53, 54, 57, 63 and 71 of the *Criminal Code*. See Friedland, *supra*, note 16, 28-30.

⁶⁶ *Supra*, note 16, 26 *et seq.*, 5. The fraudulent use of a citizenship certificate (s. 59) might also be added. The McKenzie Commission goes further by including certain breaches of security, including bribery, attempts to weaken the loyalty of officials or breaches of trust by a public officer. See *Report of the Royal Commission on Security* (Abridged)(1969), 78.

⁶⁷ See Tarnopolsky, *supra*, note 52, 204 *et seq.* Friedland comments on the riot and unlawful assembly provisions as follows: "It is an odd offence since it makes persons punishable by up to 6 months imprisonment who have no intent to 'disturb the peace' or even intent 'to cause persons in the neighbourhood' so to fear. Surely intent (purpose or possibly knowledge) on the part of the participants should be required." Friedland, *supra*, note 16, 27 [notes omitted]. See also Irwin Cotler, "Freedom of Expression," in Armand de Mestral *et al.*, eds., *The Limitation of Human Rights in Comparative Constitutional Law* (1980) 353, 362-363.

conspiracy. Everyone who conspires with anyone to effect an unlawful purpose or to effect a lawful purpose by unlawful means commits an indictable offence under s. 423(2) of the *Criminal Code*, which, read in conjunction with s. 8(a), provides for common law conspiracy. The elasticity and historically-contingent nature of the offence is well described by MacKinnon:

Vague in definition and unpredictable in application, the offence is uniquely adaptable to turmoil of what is, or what is perceived to be, a threat to existing order or stability. When such a threat, real or imagined, is recognized, it is usually seen as arising from the preconcert of several persons. The ingredients of conspiracy are readily inferred and it remains only to find an appropriate label by which it may be characterized as unlawful.⁶⁸

Similarly, as Tarnopolsky observes, the breadth of s. 423(2) is sweeping since it "not only provides for the crime of conspiracy where the object of the conspiracy is other than that of committing an indictable offence, it also embodies what has been accepted as the common law definition of criminal conspiracy."⁶⁹ While these are the most apparent crimes against the State there are additionally a theoretically infinite variety of other offences which can apply to similar acts against the State. For often those individuals and

⁶⁸ *Supra*, note 36, 622, 636-642. MacKinnon terms conspiracy and sedition as "political crimes." For a very conservative view, supporting the use of the conspiracy offence against subversion, see William Kelly & Nora Kelly, *Policing in Canada* (1976).

⁶⁹ *Supra*, note 56, 206-207 [note omitted]. See, e.g., *Wright, McDermott & Feeley v. The Queen* [1964] S.C.R. 192, 194 [1964] 2 C.C.C. 201 ("unlawful" includes more than criminal offences); *Re R. and Gralawicz* [1980] 2 S.C.R. 493, (1980) 54 C.C.C. (2d) 289; *R. v. Celebrity Enterprises Ltd. (No. 2)* (1977) 42 C.C.C. (2d) 478 (B.C.C.A.); *Brodie v. The King* [1936] S.C.R. 188; *Mulcahy v. The Queen* (1869) L.R. 3 H.L. 306, 317; *R. v. Parnell* (1881) 14 Cox C.C. 505, 513.

organizations seeking to disrupt the stability of the State, in particular those engaging in "terrorist" activities, are charged under the "ordinary" provisions of the *Criminal Code*, or other federal statutes.⁷⁰ Thus the dialectic of crimes against the State becomes clear: while the traditional crimes against the State exist to ward off direct life-threatening attacks, the vast reservoir of other criminal offences can be utilized for arguably less direct attacks. Many times the successful prosecution under these "ordinary" offences can have devastating consequences on the individuals and organizations involved, primarily due to lengthy periods of incarceration.⁷¹

C. The Special Case of Sedition

More than perhaps any other crime against the State sedition, rooted in the ancient notion of government as divine and above reproach,⁷² has been

⁷⁰ Perhaps the best example is the well-publicized prosecution of the "Vancouver Five," a group of militants propelled into action by their concerns about the environment, nuclear war and poverty. They were involved, *inter alia*, in the bombing of the Litton Plant in Mississauga, Ontario and the Red Hot Video store in Vancouver. Each were convicted of a variety of offences, including: conspiracy to commit robbery (s. 423(1)(d), *Criminal Code*), automobile theft (s. 294(a)), possession of stolen property (s. 312(1)(a)), activating an explosive substance (s. 79(1)(a)), possession of explosives with intent to cause damage (s. 80), possession of weapons for dangerous purpose (s. 85), arson (s. 389(1)), breaking and entering and theft (s. 306(1)(b)) and possession of explosive substances (s. 79(1)(d)(i)). See *R. v. Belmas, Hansen & Taylor* (1986) 27 C.C.C. (3d) 142 (B.C.C.A.); Austin Turk, *Political Criminality [:] The Defiance and Defense of Authority* (1982), 40, 61.

⁷¹ In the appeals of the "Vancouver Five" from their sentences Juliet Belmas saw her sentence reduced from a total of 20 years to 15 years (since she had recanted and expressed remorse), while Brent Taylor's total sentence of 22 years and Ann Hansen's life imprisonment were confirmed: *ibid.*

⁷² David Kairys, "Freedom of Speech," in D. Kairys, ed., *The Politics of Law [:] A Progressive Critique* (1982), 140, 146-147, 155-156. See also P. Reddie, *The Crimes of Treason and Sedition in Canada* (1978) 11 *Laurentian U. Rev.* 17; Grace & Leys, *supra*, note 7, 5 *et seq.* This offence, arguably more than any other, demonstrates that the "real point of political criminal law [. . .] is to have definitions flexible enough to allow every new set of "enemies of the state" to be labelled and fought at any time, or, more accurately, as the occasion demands." Cobler, *infra*, note 80, 119.

wielded over the years as a powerful ideological weapon against a wide spectrum of dissenting opinions and world views. In addition to the use of sedition in the longstanding war against communists and radicals, seditious conspiracy has been employed to counter far less politically dangerous organizations, including the Doukhobors. In the 1950s two of their leaders were charged and convicted of the offence for their alleged promotion of arson and nudity, but their convictions were overturned on appeal.⁷³ But another Doukhobor leader was convicted of seditious conspiracy for having signed a document in which he refused to obey certain federal laws, including one concerning registration of births, deaths and marriages, as required by provincial law.⁷⁴

More recently is the disturbing attempt by the B.C. government to import sedition into trade union disputes under provincial jurisdiction. The B.C. Attorney General, for instance, presented a motion for an injunction in the B.C. Supreme Court on June 1st, 1987, the day of a one-day general strike

⁷³ MacKinnon, *supra*, note 36, 633-634. See also Holt, *Terror in the Name of God* (1964), 139.

⁷⁴ His appeal to the B.C. Court of Appeal was dismissed: *R.v. Lebedoff (No. 2)* (1950) 98 C.C.C. 117. In the U.S. a number of Black periodicals were threatened with prosecution under wartime sedition laws, which were obviously just as broadly applied as in Canada. See, e.g., Patrick S. Washburn, *A Question of Sedition [:] The Federal Government's Investigation of the Black Press During World War II* (1986); Jervis Anderson, *The Crackdown That Never Was*, *The New York Times Book Review*, August 17th, 1986, 9. A number of seditious conspiracy charges have also been brought in the U.S. recently against Puerto Rican nationalists and Marxist-Leninists, which allege that these individuals conspired to overthrow the government by force or forcefully opposed the authority of the government or forcefully prevented the execution of its laws. Some of the accused have charged that the prosecutions are rooted in the U.S. Government's desire to repress unpopular ideas. See Katherine Bishop, *U.S. Dusts Off an Old Law*, *The New York Times*, March 27th, 1988, E9. See also Nicholas N. Kittrie & Eldon D. Wedlock Jr., eds., *The Tree of Liberty: A Documentary History of Rebellion and Political Crime in America* (1986); James W. Ely Jr., *Review* (1988) 21 *Law & Society Review* 875.

by the province's trade union movement, purportedly designed to prevent a repetition of the walk-out.⁷⁵ The government sought a prohibition on advocating work stoppages, slow-downs, study sessions or "the use of force [. . .] as a means of accomplishing a governmental change in the province."

"Accomplishing a governmental change" was defined as

resisting legislative change, showing Her Majesty has been misled or mistaken in her measures, pointing out errors in the government of the province [. . .] or otherwise interfering with, intimidating, or subverting the democratic and Constitutional law-making process in the province.⁷⁶

Several days later the B.C. Government filed a notice of motion which somewhat subdued the sharpness of the original motion, which had completely collapsed the razor-fine distinction between lawful advocacy and dissent, on the one hand, and illegal subversion, on the other.⁷⁷ Under the new motion the Government sought an injunction to prevent union leaders from conspiring or threatening to use unlawful strike action to prevent

⁷⁵ John Cruickshank, *Not against legal protests Vander Zalm says*, *The Globe & Mail*, June 5th, 1987, A3. To justify draconian legal repression federal and provincial governments have sometimes resorted to mystically concocting illustory "conspiracies" and "sedition." *E.g.*, in the wake of the invocation of the *War Measures Act* in 1970 some critics accused then Prime Minister Pierre Trudeau of fabricating an alleged "conspiracy" to justify his actions. See Tarnopolsky, *supra*, note 52, 341.

⁷⁶ The presentation of the motion provoked widespread and indignant opposition across the country. One newspaper editorial harshly criticized the wording of the motion for being "ludicrous. It is as though dissent in B.C. should be treated as treason, criticism of the government as sedition, and demonstrations as insurrection." *A government in error*, *The Gazette*, [Montréal], June 6th, 1987, B-2. Few critics characterized the proposed injunction as a violation of freedom of speech or expression, however.

⁷⁷ See definition of "threats to the security of Canada" in s. 2 of the *Canadian Security Intelligence Service Act*, *supra*, note 37.

passage of two controversial and notoriously regressive labour bills,⁷⁸ or conspiring to advocate unlawful work actions. The motion for an injunction was, however, dismissed on June 11th, 1987 by Mr. Justice Kenneth Meredith of the B.C. Supreme Court.⁷⁹

This experience demonstrates that in times of crisis the instrumentality and discourse of National Security -- particularly sedition, common law conspiracy and treason -- can be creatively and fluidly implemented to seek to repress movements for social change. As Grace and Leys have demonstrated: "The language and the ultimate objectives of the treason and sedition laws of England, the United States and Canada are strikingly similar to the few 'official definitions of 'subversion' which exist."⁸⁰ It is also unusual in that some of the core notions of crimes against the State have been transplanted from the *Criminal Code* into civil proceedings, in a situation where the unions were not attacking the State, but only protesting proposed legislation. Despite the division of jurisdictional powers "conundrum,"⁸¹ the provinces are obviously still quite ready to intervene in volatile social situations with sweeping penal-type prohibitions.⁸² In this

⁷⁸ The first was the *Industrial Relations Reform Act, 1987*, 1st Sess., 34th Parl., 36 Eliz. II, B.C. Legislative Assembly ["Bill 19"]. Introduced by Minister of Labour and Consumer Services Lyall Hanson, and adopted June 23rd, 1987: S.B.C. 1987, c. 24 (See *B.C. enters 'a new era' as labor bill is passed*, *The Globe & Mail*, June 24th, 1987, A1.) The second was the *Teaching Profession Act, ibid.*, ["Bill 20"]. Introduced by Minister of Education Anthony J. Brummet, and adopted May 19th, 1987: S.B.C. 1987, c. 19.

⁷⁹ *B.C. loses bid to ban protests against labor bill*, *The Gazette*, [Montréal], June 11th, 1987, B-1.

⁸⁰ *Supra*, note 7, 4. See also Sebastien Cobler, *Law, Order and Politics in West Germany* (1978), 7.

⁸¹ *E.g.*, ss. 91(27) and 92(24) of the *Constitution Act, 1867* (U.K.), 1982, c. 11.

⁸² See, *e.g.*, *Dupond v. City of Montreal* [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 421; *Switzman*

sense State security is concerned with both the security of the federal *and* the provincial State.

Furthermore, these experiments with sedition highlight some of the characteristics of all the crimes against the State: they are explicitly *political* offences; they employ very sweeping and ambiguous language and exceptionally vague terminology;^{82a} they tend to rely strongly upon intent, association and preparation rather than actual acts; they violate several formal rights and freedoms (notably freedom of expression and association); they tend to have very severe punitive sanctions; their application by the courts expands and contracts in relation to the prevailing political climate;^{82b} and they are largely aimed at collective as opposed to individual actions. Similarly, Cotler doubts whether the sedition offences are consistent with the *Charter*:

Although freedom of expression, even in Post-*Charter* law, is clearly not unlimited; it may well be that a court will find that the limitations on expression imposed by the sedition offences in sections 60, 61 and 62 of the *Criminal Code* are too intrusive to be considered "reasonable limits." They purport to limit not only a fundamental freedom to criticize government, but a freedom, as argued in *Switzman*, that is bound up with the effective exercise of the franchise and political participation in the electoral process; as well, the very overbreadth of the offences, or sheer vagueness of the provisions, may not only "chill" legitimate speech, but breach the requirement for limitations "prescribed by law" under section 1 of the *Charter*. Having regard to the judgments in the *Sunday Times Case* and *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*, the provisions respect-

v. Elbling [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

82a See Turk, *supra*, note 70, 54-62.

82b See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989), 243.

ing sedition may be said not to be law to begin with.⁸³

Despite these problems, most of the commentators have largely failed to question the validity of the substance of these offences, rather they have become obsessed with organizational structure and other matters of form.

D. The Liberal Minimalist Critique

The Law Reform Commission of Canada and the McDonald Commission exemplify this common liberal obsession with organizational structure, which avoids and deflects criticism from the substance of the crimes against the State. In assessing their shortcomings in terms of form, the Commission notes that a number of ambiguous phrases are used in these offences: "for a purpose prejudicial to the safety or defence of Canada" (s. 46(2)(b), *Criminal Code*), and "for any purpose prejudicial to the safety or interests of the State" (ss. 3, 4, and 5, *Official Secrets Act*). Accordingly, the Commission comments that it is not clear

(1) whether the accused must know his purpose is prejudicial or whether it suffices that the court finds it so; and (2) whether the existence of such a prejudicial purpose is a matter to be determined by the Crown in the exercise of its prerogative power or by the jury.⁸⁴

⁸³ Cotler, *supra*, note 67, 359 [notes omitted].

⁸⁴ *Supra*, note 3, 32. In Volume I of the Commission's "new Criminal Code" they also recommend that with respect to territorial jurisdiction, Canadian courts have jurisdiction over "crimes against state security committed anywhere by Canadian citizens and others who benefit from the protection of Canada." The Report explains that such a provision is an application of "the protective principle of international law pursuant to which a state may exercise jurisdiction over crimes committed anywhere by anyone against state security [. . .]." Law Reform Commission of Canada, *Recodifying Criminal Law*, *supra*, note 3, 47, 50. This is the only recommendation concerning crimes against the State in the first volume. *Cf.* s. 46(3), *Criminal Code*; *supra*, note 60, and accompanying text.

But while the Commission presents a number of worthy, although timid, criticisms of the content of these offences, their main project is the rearrangement of offences between the *Criminal Code* and the *Official Secrets Act* (in the tradition of the McDonald Commission proposals), which will be assessed in the next chapter on the *Official Secrets Act*.

The Commission also quite rightly notes that a number of the crimes against the State are simply out of date and lacking in principle. The expression "levies war" in s. 46(1)(b) (high treason), for instance, is intended to describe "mere insurrection or rebellion by Canadians."⁸⁵ These offences are moreover "out of date, complex, repetitive, vague, inconsistent, lacking in principle and overinclusive," as well as potentially offensive of the *Canadian Charter of Rights and Freedoms*.⁸⁶ Perhaps the most vulnerable provisions for constitutional challenge are the sedition offences of ss. 60 to 62 of the *Criminal Code*, which are probably in conflict with freedom of expression, as protected by s. 2(b) of the *Canadian Charter*, and may not be considered reasonable limits within s. 1. Two of the grounds for this conclusion are:

first, freedom to criticize government and express political opinions is essential for the effective exercise of the democratic right to vote guaranteed by section 3 of the Charter; and second, the seditious offences are so vague and uncertain that they needlessly "chill" legitimate expression.⁸⁷

⁸⁵ *Ibid.*, 35 [note omitted]. See A.W. Mewett & M. Manning, *Criminal Law* (1985, 2nd ed.), 434. Report 31, *supra* note 3, 125.

⁸⁶ *Ibid.*, 38-39 [notes omitted]. *Canadian Charter of Rights and Freedoms*, being Schedule B of the *Constitution Act 1982*, as enacted by the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸⁷ *Ibid.*, 39 [notes omitted].

But while the crimes against the State are anachronistic in that they overemphasize the monarchy and fail to respect important political rights, the Commission cautions that Parliament cannot repeal all of them because "[t]he conduct proscribed by the most serious of these offences strikes at the very core of the security and well-being of *this nation and its inhabitants*"⁸⁸ Once again the Commission carelessly throws "nation," "inhabitants" and "State" into the same cauldron, as if they were interchangeable terms, thereby further masking and legitimating the sole institution for the protection of which these offences are designed: the State, and the ruling élite it serves to protect.⁸⁹ More specific proposals for reform of crimes against the State will be studied in the next chapter, since such reform has traditionally been discussed in conjunction with the *Official Secrets Act* by so many commentators.

⁸⁸ *Ibid.*, 41 [emphasis added]. For a sharp critique of the Law Reform Commission's uninspiring record in reforming criminal law, see Pierre Robert, "Le discours de la réforme: du solilique à la polysémie. Les modulations du discours de la Commission de réforme du droit du Canada et le droit pénal, 1970-1986," in Robert Bureau & Pierre Mackay, eds., *Le droit dans tous ses états* (1987), 71.

⁸⁹ J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy* (1986) 18 Ottawa L.R. 1, 14-16.

CHAPTER III
OFFICIAL SECRETS:
SPYING AND LEAKAGE

Introduction

More sensational and considerably more Orwellian in nature than the crimes against the State found in the *Criminal Code*¹ are those crimes aimed at spies and leaking State secrets contained in the *Official Secrets Act*.² Despite its singular importance in the National Security State and its impressive but excessively prolixic provisions, second only to the *Income Tax Act*,³ the *Official Secrets Act* suffers from a less than inspiring track record: since 1946 only six cases have been tried under the *Act*. But one of the pillars of the National Security State is not merely aimed at criminalizing spying and leaking State secrets, rather it "prevents public disclosure and discussion of matters that authorities prefer to keep to themselves,"^{3a} and is "an overtly political law drafted in order to preserve the state in its present form."⁴

¹ R.S.C. 1970, c. C-34, as am. See ch. II, *supra*.

² R.S.C. 1970, c. 0-2, as am.

³ R.S.C. 1952, c. 148, as am.

^{3a} Austin Turk, *Political Criminality (I): The Defiance and Defense of Authority* (1982). 133.

⁴ Murray Rankin, *National Security: Information, Accountability, and the Canadian Security Intelligence Service* (1986) 36 U.T.L.J. 249, 272.

And, it is important to emphasize, the *Act* seeks to preserve the "safety or interests of the *State*,"⁵ which is significant in that it is the only National Security statute to refer to "the State" with a capital "S," although the institution is undefined in the *Act*. For decades the *Official Secrets Act* has symbolized the almost dictatorial desire on the part of the Canadian government to guard its secrets, as well as other government information. Yet its State secrets provisions do not concern solely, or even particularly, information relating to National Security, rather they cover all official documents and information, and "promotes a general aura of secrecy in government [. . .]."⁶

A. The Act Demystified

The two central offences of the *Official Secrets Act* are spying (s. 3) and leakage of State secrets (s. 4). Most espionage cases have been prosecuted under s. 3(1), which is extremely broadly worded and is punishable by a maximum penalty of 14 years imprisonment. Section 3(1)(a) prohibits being in or in the neighbourhood of a "prohibited place" (which is very broadly defined in s. 2(1)) "for any purpose prejudicial to the safety or interests of the State." The production of sketches, plans, models or notes useful to a foreign power (s. 3(1)(b)), and obtaining, collecting, recording, publishing or communicating any secret official code, pass word or document related to

⁵ *Official Secrets Act*, s. 3(1) [emphasis added]. All the prosecutions in Canada under s. 3 have been brought under s. 3(1). Cf. the preamble to the new *Emergencies Act*, S.C. 1988, c. 29, which concerns the "preservation of the sovereignty, security and territorial integrity of the *state* [. . .]" (emphasis added). In the French version the "state" is graduated to the superior status of a capitalized "State" ("l'Etat").

⁶ *Supra*, note 4, 273. See, e.g., s. 4(3).

those items referred to in s. 3(1)(b) for the same purpose (s. 3(1)(c)) are also offences. On the basis of the English decision of the House of Lords in *Chandler v. D.P.P.*,⁷ which decided that the similar provision in the English *Act* applied to sabotage as well as espionage, Friedland is of the view that these provisions are wider than espionage.⁸

The notion "prejudicial to the safety or interests of the State" is more advantageous to the Crown in prosecutions than the comparable phrases in the treason and sabotage sections of the *Criminal Code*⁹ since it is broader and much more ambiguous. As to the interpretation of this key notion, Friedland observes:

It is unlikely that the Courts will construe the word "interests" as narrowly as the word "defence". It could, for example, encompass economic matters relating to trade, or monetary and fiscal policy. This interpretation would be consistent with Lord Pearce's remarks in *Chandler v. D.P.P.* that "the interests of the State must. . . mean the interests of the State according to the policies laid down for and by its recognized organs of government and authority. . . Anything which prejudices those policies is within the meaning of the Act 'prejudicial to the interests of the State.'" Surely the word "interests"

⁷ [1964] A.C. 763 (H.C.).

⁸ M.L. Friedland, *National Security: The Legal Dimensions* (1979) [A Study prepared for the Commission of Inquiry Concerning Activities of the Royal Canadian Mounted Police, known as the McDonald Commission], 38. In *Chandler* it was argued that the provision was limited to spying since the marginal note to the section was "Penalties for Spying" (in Canada it is "Spying"), but the House of Lords dismissed the accused's appeals from their convictions, stating that the marginal notes were not an integral part of the *Act*.

⁹ *Cf.* ss. 42(2)(b) ("safety or defence of Canada") and 52(1)(a) ("safety, security or defence of Canada"), *Criminal Code*.

should be replaced with something more concrete.¹⁰

No "purpose prejudicial to the safety or interests of the State" is, however, required for s. 4, the leakage provision, for which a 14 year maximum penalty is imposed.¹¹ Everything is a State secret in the eyes of government: *all* official documents and information are covered, and *all* information which *all* civil servants encounter in the course of their duties is "official," irrespective of its nature, importance or source. This catch-all section is absurdly all-encompassing:

A former Attorney-General of England described the breadth of the English section by stating that section 2 "makes it a crime, without any possibility of a defence, to report the number of cups of tea consumed per week in a government department, or the details of a new carpet in the minister's room. . . . The Act contains no limitation as to materiality, substance, or public interest." If we substitute "coffee" for "tea", the comment could be equally applicable in Canada.¹²

In camera hearings may be held, upon application, during prosecutions under the *Act* if "the publication of any evidence to be given or of any

¹⁰ *Supra*, note 8, 40 [note omitted]. Rather than urging the repeal of the offence, he simply proposes minor tinkering amendments, *i.e.* that "safety or defence" or "information" should replace "interests."

¹¹ Section 15(1), *Official Secrets Act* (the general penalty provision). Friedland terms this penalty as "ridiculously high." See Friedland, *supra*, note 8, 54. This is the same penalty for a conviction under s. 3. Both are indictable offences. The compatibility of s. 4 with the notion of the right of access to information will be discussed in the next chapter.

¹² Friedland, *supra*, note 8, 55 [note omitted]. For Friedland s. 4 is too broad, and most such cases could be treated by discretionary action. *Ibid.*, 58. Cotler believes all of the provisions of the Act may be constitutionally overbroad. See Irwin Cotler, "Freedom of Expression," in Armand de Mestral et al, eds., *The Limitation of Human Rights in Comparative Constitutional Law* (1986), 353, 359. He also states that s. 4 is capable of supporting 2,000 offences.

statement to be made in the course of the proceedings would be prejudicial to the interests of the State."¹³ Sections 5 and 6 prohibit, *inter alia*, persons from attempting to gain access to or interfering with the security at a prohibited place, while s. 8 makes it an offence to harbour spies. Under s. 9 those who incite or attempt an offence under the *Act* are also liable. Search warrants may be obtained from a justice of the peace under s. 11(1), except that in the case of a "great emergency" and where it is in "the interest of the State [that] immediate action is necessary" a superior RCMP officer may give authority for such warrants.

In 1973 the wiretapping provision (s. 16) was introduced into the *Act*,¹⁴ which provided for the issuance of a warrant authorizing the interception or seizure of a communication where the Solicitor General is satisfied that such interception or seizure is "necessary for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada or is necessary for the purpose of gathering foreign intelligence information essential to the security of Canada." "Subversive activity" is very broadly defined as meaning:

- (a) espionage or sabotage;
- (b) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
- (c) activities directed toward accomplishing governmental change within Canada or elsewhere by

¹³ Section 14(2). Although Friedland believes that the courts would not have declared the section inoperative as contrary to the *Canadian Bill of Rights*, R.S.C. 1970, App. III, could it stand the test of the *Canadian Charter of Rights and Freedoms*? (Schedule B of the *Constitution Act, 1982*, as en. by the *Canada Act 1982* (U.K.), c. 11).

¹⁴ *Protection of Privacy Act* S.C. 1973-74, c. 50, ss. 5, 6. A brilliant example of Orwellian doublespeak: "protecting" privacy by permitting it to be intruded by electronic surveillance and other intrusions. See Friedland, *supra*, note 8, 78-88.

- force or violence or any criminal means;
 (d) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada; or
 (e) activities of a foreign terrorist group directed toward the commission of terrorist acts in or against Canada.¹⁵

This definition is significantly broader than the contemporary statutory definitions of subversive activities.¹⁶ For instance, s. 16 could be employed against a striking union since Canadian courts have already considered massive picketing during a strike as a form of sabotage.¹⁷ The notion that governmental change can be by "any criminal means" in s. 16(3)(c) is so broad as to include virtually any expression of anti-government opposition, and such attempted governmental change could be sought *outside* of Canada. In 1978 this search and seizure power was further expanded to permit the interception of first class mail, since previously s. 16(2) had been interpreted, in light of the *Post Office Act*,¹⁸ as not applying to first class mail.¹⁹ Section 16 was, however, repealed upon the introduction of the *Canadian Security Intelligence Service Act*,²⁰ and thus similar warrants are now issued subject to the conditions of that *Act*.

¹⁵ Section 16(2) and (3), *Official Secrets Act*.

¹⁶ See the definitions of "threats to the security of Canada" in s. 2 of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, and "subversive or hostile activities" in s. 15(2) of the *Access to Information Act*, S.C. 1980-81-82-83, c. 111.

¹⁷ En collaboration, *La Police secrète au Québec [:] la tyrannie occulte de la police* (1978) la collective project of the Ligue des droits de l'homme "National Security" Committee), 67-68. See also at 211-212.

¹⁸ R.S.C. 1970, c. P-14, s. 58.

¹⁹ *Supra*, note 17, 68.

²⁰ Sections 87, 88, *Canadian Security Intelligence Service Act*, *ibid*. See also s. 22 re-

B. The "Gouzenko Affair" and its Aftermath

To date almost all of the prosecutions under the *Official Secrets Act* occurred as a result of the "Gouzenko Affair" in 1945, just before the outbreak of the Cold War. Igor Gouzenko was a Soviet cipher clerk who defected from the Soviet Embassy in Ottawa and "uncovered" a "spy network" in Canada.²¹ Gouzenko's fingering revealed a number of committed members of the Communist Party of Canada who allegedly had been communicating State secrets to the Soviet Union. The federal government responded by staging a spectacular series of spy trials, which were of international significance:

They were the first big show trials in the West.
Communists are denounced as traitors, and

garding warrants. Section 16(5) of the *Official Secrets Act* provided for a reporting scheme with respect to the number of warrants issued, and an average of 200 warrants per year were issued under s. 16 to authorize bugging against new targets since 1974, according to the McDonald Commission. See *infra*, note 43, 152-153. No such reporting is required under the *Canadian Security Intelligence Service Act*. Following the Report of the Taschereau/Kellock Royal Commission, set up in the wake of the "Gouzenko Affair," a number of small changes were made to the *Official Secrets Act* in 1950: S.C. 1950, c. 46. See *infra*, note 23. See also *Canadian Forces Reorganizations Act*, S.C. 1966-67, c. 96, Sch. B.

²¹ For accounts of these events see, e.g., Ivan Avakumovic, *The Communist Party of Canada [:] A History* (1975), 167 *et seq.*; W. S. Tarnopolsky, *The Canadian Bill of Rights* (2nd, rev. ed., 1975), 327-328; M.H. Fyfe, *Some Legal Aspects of the Report of the Royal Commission on Espionage* (1946) 24 Can. Bar Rev. 777; I. Gouzenko, *This was my Choice; Gouzenko's Story* (1948); John Sawatsky, *Gouzenko: The Untold Story* (1984); Ian Adams, *S. Portrait of a Spy* (1982), 42-43; J. Stuart Russell, *Discrimination on the Basis of Political Convictions or Beliefs* (1985) 45 R. du B. 377, 378; Ian Adams, *Gouzenko -- Fear and Self-Loathing*, *This Magazine*, December 1982 - January 1983, 17 (concerning his death); Kenneth P. Swan, *The Use of Science by the State for Security and Control; Legal and Civil Liberties Aspects of Information and National Security* (1983) [unpublished paper], 4; Lorne & Caroline Brown, *An Unauthorized History of the RCMP* (1978), 87 *et seq.*; Merrily Weisbord, *Le Rêve d'une génération [:] Les communistes canadiens, les procès d'espionnage et la guerre froide* (1988); Reg Whitaker, *Left-Wing Dissent and the State [:] Canada in the Cold War* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 6-7.

tarred and feathered publicly. Red-baiting destroys the popular-front groups and the lobby for the international control of atomic weapons. It destroys the militant unions and is used to discredit the Canadian attempt to keep its unions independent of the American Internationals. The trials are the basis for a tidal wave of anti-Russian propaganda. They prepare the way for the North Atlantic Treaty Organization (NATO) and the era of atomic diplomacy. They justify the growth of the Secret Security service.²²

As is the longstanding tradition in Canadian security and intelligence matters, a Royal Commission arose out of the ashes of this scandal,²³ designed to legitimize the government's harsh action and defuse public criticism.²⁴

Since the 1940s only six cases have been tried in Canada under the *Official Secrets Act*, only two of which resulted in a conviction.²⁵ This

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- 22 Merrily Weisbord, *The Strangest Dream [.] Canadian Communists, the Spy Trials and the Cold War*, This Magazine, January 1984, 35. Weisbord focusses, in particular, on the 1946 espionage case of former Montréal MP Fred Rose. See also Fred Rose, *Spying on Labour* (1939); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989), 12.
- 23 The "Kellock-Taschereau Commission," *supra*, note 20. See also R. Bothwell & J.L. Granatstein, *The Gouzenko Transcripts: The Evidence Presented to the Kellock-Taschereau Royal Commission of 1946* (1982).
- 24 Actually, the government only succeeded in obtaining convictions in less than half of the prosecutions. See Friedland, *supra*, note 8, 34-37. The cases were: *R. v. Rose* (1947) 3 D.L.R. 618 (Qc C.A.); *R. v. Lunan* (1947) 3 D.L.R. 710 (Ont. C.A.); *R. v. Smith* (1947) 3 D.L.R. 798 (Ont. C.A.); *R. v. Mazerall* (1946) O.R. 762 (C.A.); *R. v. Willsher* (1946) [unreported]; *R. v. Gerson* (1948) 3 D.L.R. 280 (Ont. C.A.); *R. v. Woikin* (1946) 1 C.R. 224; *R. v. Boyer* (1948) 7 C.R. 165 (Qc C.A.); *R. v. Carr* (1949) [unreported]; *R. v. Adams* (1946) [unreported] [but see (1946) 86 C.C.C. 425]; *R. v. Nightingale* (1946) [unreported] [but see (1946) 87 C.C.C. 143]; *R. v. Shuger* (1946) [unreported]; *R. v. Chapman* (1946) [unreported]; *R. v. Poland* (1946) [unreported]; *R. v. Halperin* (1946) [unreported]; *R. v. Benning* (1947) 3 D.L.R. 908 (Ont. C.A.); *R. v. Harris* (1947) 4 D.L.R. 796 (Ont. C.A.). For related cases see also *R. v. Pochon* (1946) 87 C.C.C. 38 (Ont. H.C.); *R. v. Bronny* (1940) 74 C.C.C. 154 (B.C.C.A.); *R. v. Jones* (1942) 77 C.C.C. 187 (N.S.C.A.); *R. v. Samson* (1977) 35 C.C.C. (2d) 258 (Qc C.A.).
- 25 See Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report [.] Security and Information* (1979) [the "McDonald

demonstrates not only the difficulty in proceeding with a charge under the *Act*, but more importantly confirms that relatively few resources have been assigned to counter-espionage by the State security establishment. The priority has always been on counter-subversion, and only very recently has counter-terrorism become a serious concern for the State. In *R. v. Biernacki*²⁶ the charge was dismissed at the preliminary inquiry since the kind of information the accused had been collecting (data about Canadian residents of Polish birth or extraction) was not of the type targeted by the *Act* since information was non-governmental and in the public domain. The accused was, however, convicted in *R. v. Featherstone*,²⁷ under s. 3 of the *Act*, and sentenced to two and a half years imprisonment for *attempting* to pass secret marine charts to the Soviet Union.

In *R. v. Treu*²⁸ the accused, an engineer under contract with the government, was charged under s. 4(1)(c) and (d) of the *Act* with unlawfully retaining classified documents and failing to take reasonable care of them with respect to NATO's secret air defence communication system. He was convicted and sentenced to two years imprisonment, after an *in camera* trial. His conviction was, however, reversed by the Québec Court of Appeal. For Murray Rankin this case in particular "forcefully indicated the ambiguity in the statute, particularly in defining the types of information which cannot

Commission", 4-8.

26 (1961) [unreported], but see (1962) 37 C.R. 226 (motion to quash a preferred indictment).

27 (1967) [unreported].

28 (1978) [unreported]; (1979) 49 C.C.C. (2d) 222 (Qc C.A.). See also Cotler, *supra*, note 12, 360.

be released."²⁹ Finally, in the first *Official Secrets Act* prosecution against a newspaper, the Toronto Sun publisher and editor were tried in the case of *R. v. Toronto Sun Publishing Co. Ltd.*,³⁰ after a Member of Parliament disclosed "top secret" information on alleged Soviet espionage activities in Canada, subsequently reported by the newspaper, which was allegedly secret conduct concerned with National Security. At the preliminary inquiry the charges were dismissed on the ground that the document, if it had ever been secret, was no longer so. Waisberg Prov.Ct.J. went further to criticize the statute as "ambiguous and unwieldy," urging that it be completely redrafted.³¹

A similar incident in West Germany, a few years prior to the Toronto Sun case, provoked a public outcry, leading to the reform of the West German press legislation.³² Journalists at the weekly magazine *Der Spiegel* were charged with treason for the publication of State secrets, which allegedly threatened the security of the country and its people. The articles published concerned the national defence policy of the country, referring to certain differences within the department of defence.

²⁹ *Supra*, note 4, 274.

³⁰ (1979) 24 O.R. (2d) 621 (Prov. Ct.). See Ian Adams, *The Search for the 'Real' McGuffin or How to Make Suckers out of The Media*, *This Magazine*, January-February 1980, 4. Hitchcock movies focus on the search for "McGuffin," the name Adams attributes to secret documents and related information: *ibid.*, 43.

³¹ *Ibid.*, 632. In 1986 former RCMP corporal James Morrison pleaded guilty to a charge under the *Official Secrets Act* for allegedly selling secrets to the Soviet Union some three decades before. See *infra*, note 93, and accompanying text.

³² Recounted in *La sécurité nationale vs Le citoyen* (1978) 38 R. du B. 400. This is a report of the workshop held on this topic at the Joint Convention of the Québec Bar and the Québec Division of the Canadian Bar Association, held in Montréal in May 1978.

Almost a decade elapsed before another, and the most recent, prosecution was commenced in Canada. In June 1988 Stephen Joseph Ratkai was arrested in St. John's, after a two and a half year investigation by CSIS in collaboration with the U.S. Naval Investigative Service, and charged with three counts under s. 3(1)(c) of the *Official Secrets Act*.³³ He had been under surveillance since soon after a Canadian named Stephen Ratkai visited Hungary several years ago. Ratkai was alleged to have attempted to transfer classified U.S. military documents to the Soviet Union. They were believed to have originated at a U.S. naval installation at Argentia, Newfoundland, where the Soviet Union's submarine fleet in the Atlantic Sea is monitored. A fourth charge of attempted espionage was added at the completion of his preliminary inquiry.³⁴

At the commencement of his trial in the Newfoundland Supreme Court, Ratkai pleaded guilty to one charge of espionage, and another of attempted espionage. He was sentenced to nine years in prison on both charges by Mr. Justice Fintan Aylward, who concluded that Ratkai was more than a simple messenger, and was deserving of severe punishment. This was the longest sentence ever rendered under the *Official Secrets Act*.³⁵ and demonstrates

³³ See Paul Koring, *Spy operation broken up by arrest, Ottawa believes*, The Globe & Mail, June 14th, 1988, A1; Paul Koring, *Double agent helped track Newfoundland spy suspect*, The Globe & Mail, June 15th, 1988, A1; Deborah Wilson, *Accused enters no plea as source in spy case hints at fresh suspects*, The Globe & Mail, June 16th, 1988, A1; Canadian Press, *Man accused in spy case picks jury trial*, The Globe & Mail, June 29th, 1988, A4.

³⁴ Canadian Press, *Ratkai must stand trial on spy charges*, The Gazette [Montréal], September 10th, 1988, G-7; Canadian Press, *Accused spy says not guilty*, The Globe & Mail, October 4th, 1988, A10.

³⁵ Kevin Cox, *Canadian admits spying for Russians*, The Globe & Mail, February 7th, 1989, A1; Kevin Cox, *Confessed spy jailed 9 years for selling secrets to Soviets*, The Globe & Mail, March 10th, 1989, A4.

that the Court wished to use the sentence for its general deterrence value. It is, however, an extremely harsh sentence, especially in light of the recent considerable reduction in tensions between the West and the Soviet Union, as well as the fact that no *Canadian* government documents or information were alleged to be involved.

But while six prosecutions in over 30 years does not an anti-espionage campaign make, it would be misleading to conclude that this is the only fruit of the *Official Secrets Act* in action. Undoubtedly, many investigations have occurred, allegedly for violations of the *Act*, although due to "National Security reasons" such investigations cannot be documented. One noteworthy example is the surveillance of Toronto lawyer Paul Copeland by the RCMP Security Service, in part pursuant to s. 11 of the *Act*.³⁶ And occasionally, over the years, Soviet diplomats and diplomats from other missions have been expelled or reduced to being a *persona non grata*, on the basis of alleged espionage.³⁷ Nevertheless, the paucity of *Official Secrets Act* prosecutions since the 1940s clearly demonstrates that from the viewpoint of the National Security apparatus spies are not the most serious threat to the

³⁶ See Ian Adams, *The Real McGuffin*, This Magazine, December 1981-January 1982, 19, a fascinating account of this rare report of an *Official Secrets Act* investigation. See also Friedland, *supra*, note 8, 35.

³⁷ Foreign diplomats cannot be prosecuted under the *Act*, since they enjoy immunity from prosecution under international law. Most recently 17 Soviet diplomats were expelled from Canada after allegedly secretly photographing defence installations, entering military facilities and attempting to infiltrate the RCMP and CSIS. Some commentators quickly concluded that it was simply a crude effort to improve the tarnished image of CSIS. See *Spy caught 'red-handed': Soviets*, The Gazette (Montréal), June 25th, 1988, A-1; Presse canadienne, *Les 17 diplomate soviétiques auraient d'abord été expulsés pour des raisons publicitaires*, Le Devoir, 19 juillet 1988, 2; Ross Howard, *Ottawa in hot seat*, The Globe & Mail, June 30th, 1988, A1; Jean-Claude Leclerc, *Ces espions qui n'en sont pas*, (éditorial), Le Devoir, 28 juin 1988, 6.

security of Canada. Consequently, the grossly inflated anti-espionage network is a needless waste of public funds. As Gandall cogently argues:

I think we've got to show them that the unknown millions we spend on maintaining a political police could be better spent on the criminal side. I think people would quickly appreciate that their most pressing concerns are not spies and terrorists but safe streets and protection against burglary and theft and vandalism and, not least, against white collar and corporate crime like tax evasion, price fixing, and the production of shoddy or hazardous goods which cost us billions as taxpayers and consumers.³⁸

C. Reform of the Official Secrets Act:

The Liberal Minimalist Critique Revisited

One positive outcome of the recent *Official Secrets Act* prosecutions is that more support was generated for the repeal of the *Act*. The sentiment was so pronounced, in fact, that it even forced the federal government to consider reforming the *Act*, although to date regrettably no progress has been made.³⁹ But generally the criticism has been restricted to the safe confines of government commissions and committees, and lately has steered towards an almost exclusively unthreatening liberal vision of restructuring offences between the *Criminal Code* and the *Official Secrets Act*. Despite widespread criticisms of the *substance* of these offences, the challenge,

³⁸ Marv Gandall, *Do We Need a Security Service?*, Canadian Dimension, December 1983, 6, 7.

³⁹ *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (1987) [Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act; Blaine Thacker, M.P., Chairman], 85.

according to the proponents of this view, is merely to rearrange and slightly reword the statutory powers of the National Security State.

The Royal Commission on Security⁴⁰ was the first such commission to recommend major reform and revision of the *Act* in 1969. Later the minimalist statutory reorganization panacea flowered in the Report of the McDonald Commission. In its *First Report*⁴¹ the Commission uncritically recommended the retention of an offence for espionage, but urged that since s. 3 of the *Act* overlapped with s. 46(2)(b) of the *Criminal Code* new espionage legislation should incorporate these two offences in a single enactment, either in the *Criminal Code* or a separate statute. As for the phrase "the safety or interests of the State" found in s. 3, this was simply too broad in scope. Instead, the Commission preferred a high degree of definitional precision:

We believe that the phrase "security of Canada," if it is used in the definition of espionage, should be defined with as much precision as is possible so that people will know the kinds of conduct that will subject them to prosecution. On the other hand, as we have said, it is not possible to be exhaustive. [. . .] Yet the definition should go at least as far as identifying the concepts already mentioned.⁴²

One of the recurring themes of the critique of the leakage provision is that it is contrary to freedom of information legislation, which the Commission articulated in its *Second Report*:

The Official Secrets Act is so broad that it covers

⁴⁰ *Report of the Royal Commission on Security* (Abridged) (1969), 77 [the "Mackenzie Commission Report"].

⁴¹ *Supra*, note 25, 11.

⁴² *Ibid.*, 15.

in section 4 any official document, whether classified or not, entrusted to a civil servant or government contractor. Release of any government information to the public or the media with authority constitutes an offence. In this respect, the Act runs contrary to the Freedom of Information proposals which assume that information may be released to the public unless there is good reason shown for not doing so.⁴³

As for the *mens rea* required for espionage, the Commission, in the spirit of the strict liability notion embodied in s. 3(2) of the present *Act*, recommended that the new offence should apply to a person who "communicates to a foreign power information prejudicial to national security, whether he acts knowingly or with reckless disregard of consequences." As well, "a person would be convicted even if the information he communicated was not classified, provided that the release of the information might be prejudicial to national security."⁴⁴ The recommendations regarding the leakage offence closely parallel its espionage proposals. An offence should continue to exist for a person who, entrusted with security and intelligence information, disclosed that information, regardless of his or her motives. Moreover, the courts should not be bound by the security classification imposed by the government, but should be able to determine the appropriateness of that classification.⁴⁵ A person should not be convicted, however, if he or she was authorized to disclose the

⁴³ Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report -- Volume 2 (./Freedom and Security Under the Law* (1981), 939.

⁴⁴ *Ibid.*, 940.

⁴⁵ *Ibid.*, 941.

information. As for the right to an *in camera* or "secret" trial, the judge should only hold *in camera* those parts of the trial that might be kept confidential for National Security reasons.⁴⁶

While primarily concerned with reviewing the privacy and access to information legislation, the recent Report of the Standing Committee on Justice and Solicitor General on the subject also briefly examined the *Official Secrets Act*,⁴⁷ and urged the federal government to review the *Act* in connection with the *Access to Information Act*.⁴⁸ The Committee criticized the *Official Secrets Act* for being a "serious restraint on public servants," and "couched in very sweeping and ambiguous language." Moreover, the *Act* "encompasses much more than the traditional notions of spying," it "embraces far more than classified information," and "it makes it an offence to *receive* information."⁴⁹

An added obstacle placed in the way of an accused person, under a prosecution pursuant to s. 3 of the *Act*, is the statutory presumption created by s. 3(2), which states that he or she may be found guilty even if the prosecution does not "show that the accused [. . .] was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, [. . .]" and he or she may be convicted if "it appears that his purpose was a purpose prejudicial to the safety or interests of the State; [. . .]"

⁴⁶ *Ibid.*, 942-943.

⁴⁷ *Supra*, note 39, 85.

⁴⁸ S.C. 1980-81-82-83, c. III. See also ch. IV, Part B, *infra*. Strictly speaking, this was not a formal recommendation, since the Committee's mandate was limited to a review of the privacy and access to information legislation, aside from the *Canada Evidence Act*, R.S.C. 1970, c. E-10, as am.

⁴⁹ *Supra*, note 39, 85 [emphasis in original].

This appears to shift the traditional burden of proof to the accused, contrary to the presumption of innocence guaranteed by the *Charter*.⁵⁰

D. The Law Reform Commission's "New Scheme" of Crimes Against the State

The crowning exercise in liberal statutory restructuring finds expression in the recent Working Paper of the Law Reform Commission of Canada on crimes against the State,⁵¹ discussed in detail in the previous chapter. Essentially the Commission fine-tunes this area of the law by retaining the core of a number of *Criminal Code* offences,⁵² and the substance of s. 3 of the *Official Secrets Act* in new and more palatable packaging. But these are hardly the "sweeping recommendations" lauded by the Standing Committee on Justice and Solicitor General.⁵³ For the Law Reform Commission has simply redrafted the crimes against the State, which would combine the offences found in the *Official Secrets Act* and Part II of the *Criminal Code* into a Special Part of the new criminal code. According to the Commission, this would, *inter alia*, serve as a reminder to Parliament that "only very serious conduct should be treated as crimes against the State," and "a

⁵⁰ See, e.g., *R. v. Oakes* (1986) 26 D.L.R. (4th) 20 (S.C.C.); *Fleming v. The Queen* (1986) 24 C.R.R. 66 (S.C.C.); *Apsit v. Manitoba Human Rights Commission* (1985) 22 C.R.R. 134 (Man. Q.B.); *R. v. Hamilton* (1985) 17 C.R.R. 153 (Ont. Prov. Ct.).

⁵¹ Law Reform Commission of Canada, *Crimes Against the State* (1986) [Working Paper 49].

⁵² E.g., ss. 46(1)(b), 46(1)(c), 46(2)(a), 46(2)(b), 50(1)(b), 51 and 52(1)(a).

⁵³ *Supra*, note 39, 85.

reminder to Canadians generally that this kind of conduct must be proscribed in order to ensure a peaceful, ordered and democratic society."⁵⁴

Treason would remain as one of the primary crimes against the State, and the Commission recommends the retention of the term "treason" since, in its familiar sense, it means "the crime of betraying one's own country." The newly renovated mini-code of crimes against the State in the Special Part of the new criminal code would also include the offence of using "force or violence for the purpose of overthrowing the constitutional government of Canada or a province."⁵⁵ This is justified on the basis that such an act

breaches the obligation to maintain peace within the State. In addition it is a direct attack upon the democratic institutions and principles upon which the State is founded. This offence aims more at the enemy within the country than the traitor without, although a clear line cannot be drawn between external and internal threats to national security.⁵⁶

Such an explanation is consistent with Friedland's proposal for minor adjustments:

The advocacy of revolution could be dealt with as incitement to treason, or preferably, [. . .] as part of an offence relating to armed insurrection. Subsection 4 of section 60, which presumes that a person has a seditious intention if he circulates any writing that advocates armed insurrection, could be dropped from the Code or could become a presumption which the accused would be entitled to rebut.⁵⁷

⁵⁴ *Supra*, note 51, 46. See also Law Reform Commission of Canada, *Recodifying Criminal Law* (1987) [Report 31], 125.

⁵⁵ *Supra*, note 51, 46. See Report 31, 126-127.

⁵⁶ *Ibid.*, 47 [note omitted]. *Cf.* s. 46(2)(a), *Criminal Code*.

⁵⁷ Friedland, *supra*, note 8, 26 [note omitted].

A reformed offence of failing to prevent treason, which would include a very narrow exception, would also be created.⁵⁸

In Working Paper 49, it was originally recommended that espionage would be

- (a) without having received lawful authorization, intentionally to communicate or make available *classified national security information* to another State or its agent, other than a State engaged in war or armed hostilities against Canada, or
- (b) to obtain, collect or record *classified national security information* for the purpose of committing the offence in (a).⁵⁹

The basis for this new espionage provision is that

[n]owadays espionage presents an ongoing threat to national security, threatening both the physical safety of the State and the integrity of its democratic institutions, even where no state of war or armed hostilities exist. This is truly the modern form of treason.⁶⁰

Accordingly, giving State secrets to an enemy would violate the new offence of "assisting the enemy," while giving State secrets to *other* States would constitute espionage.

It should be noted that the accused need no longer have a "purpose prejudicial" to the State, rather the lesser requirement of intention would

⁵⁸ Report 31, 128-129.

⁵⁹ *Supra*, note 51, 47 (emphasis in original).

⁶⁰ *Ibid.*, 47-48.

suffice for the requirements of *mens rea*. An offence would therefore be committed whether or not the accused had a purpose prejudicial to the State. As for the new notion of "classified national security information," this would include "any matter with respect to which secrecy is required in the interests of national safety, security or defence," which has been classified according to a classification scheme.⁶¹

Certain changes were made in the final Report of the Commission, and the proposed new offence now reads as follows:

26(3) Espionage. Everyone commits a crime who gathers *classified information* for, or makes it available to, another State not engaged in armed hostilities with Canada.

26(4) Gathering and Disclosing Information. Everyone commits a crime who gathers *classified information* for, or makes available to, any person not authorized to receive it.

26(5) Exception. Clauses 26(3) and 26(4) do not apply where the information subject of the charge was improperly classified.⁶²

It is noteworthy that the kind of information contemplated is now the much broader notion of "classified information," rather than "classified national security information" (the term used in Working Paper 49). The Commission justified this change on the basis that "[c]lauses 26(3) and 26(4) draw no distinction between the two types of classified information on the ground that disclosure of both sorts of information can cause serious injury to the national interest."⁶³ Although it is laudable that an exception may be

⁶¹ *Ibid.*, 48. Presumably such a broad scope of interests would cover virtually any degree of security classification. *Cf. R. v. Toronto Sun Publishing Co. Ltd.* (1979) 24 O.R. (2d) 621 (Prov. Ct.).

⁶² Report 31, 129 [emphasis added].

⁶³ *Ibid.*, 129.

applied where the court concludes that the information was improperly classified, no defence of public interest is provided for, where the accused could argue that the gathering or disclosure of the information was necessary in the public interest.

This mini-code of crimes against the State should also contain crimes "that tend to support the objectives of the primary offences. This is the approach taken in existing legislation, and the principle commends itself" to the Commission.⁶⁴ Significantly, the Commission has considerably expanded the notion of National Security to include national *safety* and *defence*; the notion of "safety, security or defence of Canada" now being the operative catchphrase. In the new sabotage offence recommended in the Working Paper, for instance, it would be an offence "intentionally to jeopardize the safety, security or defence of Canada" by engaging in a variety of acts with respect to property.⁶⁵ Accordingly, the Commission seems to desire a return to a less enlightened era, when the virtually all-encompassing notion of the safety or defence of Canada was omnipresent.⁶⁶ The new element of "defence" is also consistent with the growing trend of militarization in Canada, as illustrated in the new emergencies legislation, to be administered by the Minister of National Defence,⁶⁷ and Canada's participation in U.S. defence initiatives, such as the Strategic Defence Initiative, also known as Star Wars. And what would *not* imperil the "safety" of Canada?

64 *Supra*, note 51, 49. *Cf.* s. 51, *Criminal Code*.

65 *Ibid.*, 50.

66 See, *e.g.*, *supra*, ch. II, note 50, and accompanying text.

67 See *supra*, note 5.

The offence of sabotage was, however, narrowed and expanded at the same time in Report 31. Fortunately, the notions of "safety" and "defence" were eliminated, but if the damage jeopardized the security "of the forces of a foreign State lawfully present in Canada," this too would constitute the offence of sabotage. The Commission admits, moreover, that the offence is "primarily an offence of jeopardizing the safety of the State,"⁶⁸ although it insists on retaining the erroneous phraesology "security of Canada."

A new offence of failing to inform authorities that an offence of engaging in war or assisting the enemy is about to be committed or preventing wartime treason would also be created. Considering the importance of the right of the individual to be left alone, this duty would be limited to wartime situations, and to two offences: engaging in war or armed hostilities, and assisting anyone therein.⁶⁹ Report 31 contains a somewhat scaled down version of this proposal, now called "failing to prevent treason."

Leaking classified government information would still be retained as an offence. The Commission assembles a number of the arguments against criminalizing the leakage of such information:

First, the government does not want to be seen as using strong-arm tactics to protect itself (cover up) and to keep secrets from the public. Second, the public has a right to know whatever it can get its hands on, and a leakage offence would be inconsistent with the policy of freedom of information behind the *Access to Information Act*. Third, the administrative powers -- disciplinary measures and dismissal, and the civil process -- injunctions and suing for damages, are the appropriate remedies for such wrongdoing.

⁶⁸ Report 31, 130.

⁶⁹ *Supra*, note 51, 51-52. *Cf.* ss. 8, *Official Secrets Act*, and 50(1)(b), *Criminal Code*.

Fourth, it is argued that there may be situations in which the well-being of the nation actually depends on the immediate public disclosure of classified information.⁷⁰

Despite these weighty considerations and the opinions of National Security experts, who expressed "some ambivalence about criminalizing such acts," the Commission stated that it was "generally agreed" that:

- (1) it is wrong to leak national security information to anyone, not just foreign States;
- (2) some government policies require at least short-term secrecy; and
- (3) some information about private individuals that is held by government also requires secrecy.⁷¹

The Commission therefore recommended in its Working Paper a leakage offence concerning "classified national security information" as well as "classified personal or government interest information," the latter being less severely punishable than the former. No defences to these offences were contemplated, although the Commission was of the view that the "classification should be based on there being real injury to the protected interest if the information were to be publicly disclosed."⁷² Moreover, the offence would be committed regardless of the motive of the accused, although intention would still have to be proven. Clause 26(4), contained in Report 31, now contains the proposed new offence of "Gathering and Disclosing Information," referred to earlier.

⁷⁰ *Ibid.*, 53 [notes omitted].

⁷¹ *Ibid.*, 54.

⁷² *Ibid.*, 55. Presumably, as opposed to apprehended, possible or probable injury.

As for the ancillary crimes against the State, the Commission was slightly bolder in recommending that some of these offences simply be repealed, *e.g.* sedition, "partly as being unwarranted restrictions on freedom of expression and partly as being already covered by the new Code's general provisions [. . .]"⁷³ Friedland, on the other hand, proposed that the "import limitation" found in *Boucher v. The King*⁷⁴ should be introduced into the *Criminal Code* offence of sedition. Alternatively, he was of the view that there is no need for a sedition offence since under *Boucher* charges of incitement or conspiracy could be brought.⁷⁵ A number of other offences are not serious enough to be considered as crimes against the State, according to the Commission, *e.g.* killing or harming the Queen (ss. 46(1)(a), 49), sabotage (s. 52) and unlawful drilling (s. 71). Finally, it is proposed that the Commission's new General Part rules of the criminal law on secondary liability (*e.g.* attempt and conspiracy)⁷⁶ should also apply to crimes against the State.⁷⁷

E. Other Proposals for Reform

The Law Reform Commission's minimalist proposal for statutory restructuring is the latest in a long series of liberal critiques urging minor reform of crimes against the State. Friedland, for instance, recommended

⁷³ Report 31, 130.

⁷⁴ [1951] S.C.R. 265. See Ch. II, *supra*, note 45, and accompanying text.

⁷⁵ Friedland, *supra*, note 8, 25.

⁷⁶ Law Reform Commission of Canada, *Proposal for a New Criminal Code* (1985) [Internal Paper]. *Cf.* s. 46, *Criminal Code*.

⁷⁷ *Supra*, note 51, 58-59.

that the espionage provisions of the *Official Secrets Act* should be redrafted and placed in the *Criminal Code*, while the leakage provisions should be in a separate statute concerning access to government information. Accordingly, once gutted, the *Official Secrets Act* could be repealed.⁷⁸ Criminal liability should be limited to a narrow range of cases in a new Official Information Act, according to him, which would specify the types of information subject to criminal penalties for improper disclosure, and also contain a classification system.⁷⁹ Consistent with an old line of case law, he was also willing to agree that information which has already been released or is in the public domain should not be an official secret.⁸⁰

Most critics have thus been content to inoffensively redesign the *status quo*. Others have been concerned primarily about the alarming impact the *Official Secrets Act* has on the right of access to government information. Even the federal government has been forced to admit that s. 4 is "at variance with the general objective of the Access to Information legislation."⁸¹ Similarly, in Rankin's lengthy analysis of freedom of information he expressed alarm: "Although the Act was passed in order to

⁷⁸ *Supra*, note 8, 30-31.

⁷⁹ *Ibid.*, 58. See also *Reform of Section 2 of the Official Secrets Act 1911* (1978) Cmnd 7285; B. Crane, *Freedom of the Press and National Security* (1975) 21 McGill L.J. 148.

⁸⁰ *Ibid.*, 49. Rather than the present requirement that the information must be both "official and secret." See *Boyer v. The King*, *supra*, note 24, 237-238.

⁸¹ Secretary of State and Minister of Communications, *Access to Information Legislation [:] Cabinet Discussion Paper* (June 1980), 31 [presented by Francis Fox]. Accordingly s. 4 of the *Act* should be modified to be consistent with the access to information legislation. But preparation of amendments to the *Official Secrets Act* could have unduly delayed the introduction of an access to information Bill, and therefore it would be sufficient for such a Bill to provide "that no disclosure of information made in good faith under the legislation could give rise under the *Official Secrets Act* or other relevant legislation." An examination of the present legislation does not, however, reveal any such exemption from liability.

deter espionage it has served to codify the concept of government property in information. Couched in very sweeping, ambiguous language it encompasses much more than traditional notions of spying."⁸²

In addition, assuming the arguable benefit of a metamorphosis, the reformed offences would do little to diminish this potentially frightening abuse. The *Official Secrets Act 1911*, which served as the basis for the original *Official Secrets Act* in Canada, has been invoked in England recently to cover a wide variety of activities. For instance, BBC TV broadcasted a documentary series entitled "The Secret Society," and after journalist Duncan Campbell wrote about it in the *New Statesman* his home, and the magazine's offices, were searched, pursuant to the English *Official Secrets Act*.⁸³ These events, plus the poll showing that Britons prefer more access to government information, have advanced the movement to repeal the British *Official Secrets Act*, launched by the Campaign for Freedom of Information.⁸⁴

But they also spurred Home Secretary Douglas Hurd to introduce a White Paper in July 1988, setting forth proposals for a reform of the *Act*.⁸⁵

⁸² T. Murray Rankin, *Freedom of Information in Canada [:] Will the doors stay shut?* (1977) [a research paper prepared for the Canadian Bar Association], 32.

⁸³ See, e.g., Jonathan Caplan, *The Criminal Liability of the Media Under Section 2 of the Official Secrets Act* (1988) J. of Crim. L. 67; Howell Raines, *Challenges for the Bee's New Head* *The New York Times*, April 19th, 1987, H36; Tyler Marshall, *Why British have a stiff upper lip: official secrecy keeps it buttoned*, *The Gazette*, [Montréal], February 10th, 1987, A-1; Jay D. Palmer, *A Police "Bust" for the Beeb*, *Time*, February 16th, 1987, 40. As for espionage in the U.S., see, e.g. D. Kairys, "Freedom of Speech," in David Kairys, ed., *The Politics of Law [:] A Progressive Critique* (1982), 140, 153 *et seq.* For a British analysis of the nature of official secrecy, censorship and the power of the State, see David Cauter, *The Espionage of the Saints* (1986).

⁸⁴ Francis X. Clines, *British Urge Uncloaking of Their Secrets Act*, *The New York Times*, August 24th, 1986, 14.

⁸⁵ White Paper, *Reform of Section 2 of the Official Secrets Act 1911*, Cmnd 408. See also Peter Jenkins, *Not-so Free Speech in Britain*, *The New York Times Book Review*, December 8th, 1988, 17. Edward Greenspon, *Proposed U.K. secrecy re-*

In place of one all-encompassing prohibition, the White Paper proposed six broad areas of information, whose disclosure would be subject to penalty: defence, international relations, security and intelligence, interception of communications, confidential information from other governments or international organizations, or anything likely to be useful in criminal investigations. While some critics were pleased with this improvement, others rejected it, arguing that several important categories of information will still remain secret. One critic, author Peter Jenkins, forcefully rejected this reform proposal:

Since the government is already armed with the law of confidence and its own disciplinary code for civil servants, I do not see why Section 2 simply cannot be repealed. That would entirely eliminate criminal penalties for unauthorized disclosure except when done "for any purpose prejudicial to the safety or interests of the State" (in effect, espionage), as is prohibited by Section 1 of the act.⁸⁶

The government of Prime Minister Margaret Thatcher decided to act on the White Paper, and in the November 1988 speech from the throne, it was announced that a Bill reforming the 1911 *Act* would be introduced in Parliament.⁸⁷

A similar, although much more muted, outcry occurred in Canada in response to the Toronto Sun prosecution,⁸⁸ as well as after the courts cited

forms assaulted as Draconian, The Globe & Mail, June 30th, 1988, A11.

86 *Ibid.*

87 Reuter. *Queen's opening speech pledges less secrecy on security forces*, The Globe & Mail, November 23rd, 1988, A10.

88 *Supra*, note 30.

the *Official Secrets Act* to justify the termination of the Keable Commission Inquiry into wrongdoings of the RCMP in Québec.⁸⁹ But generally there has been disappointingly little in the way of vocal protest in Canada articulating the need to repeal the *Official Secrets Act*, due in part, at least, to the extreme paucity of prosecutions, coupled with relentless low-level anti-Soviet hysteria, which has somewhat attenuated in light of *perestroika* and *glasnost* in the Soviet Union.^{89a}

In addition to criticizing the extreme breadth of the language of the *Act*, other critics, like Borovoy, have also expressed concern about the absence of adequate safeguards.⁹⁰ For him the problem with the *Act* is not only the prosecutions undertaken "but also the ones that can be threatened. After all, the precious freedom of expression can be diminished as much by the fear, as the reality, of prosecution." But despite his biting criticisms, Borovoy only recommends a "statutory overhaul," rather than more profound change: the provisions should merely be *narrowed* so that "the only state secrets which it is criminally unlawful to disclose are those that could reasonably be expected to cause serious injury to the physical safety

⁸⁹ See *Bisailon v. Keable* [1980] C.A. 316, 127 D.L.R. (3d) 368, 62 C.C.C. (2d) 340, 17 C.R. (3d) 193.

^{89a} Despite the overwhelming welcome the recent reform efforts have received in the West, CSIS Director Reid Morden is, however, of the view that the Service should be more rather than less vigilant in dealing with Soviet espionage. At the 1989 annual conference of the Canadian Association for Security and Intelligence Studies he admitted that CSIS targets ethnic groups in Canada who allegedly have connections with the Soviet Union, for instance the Baltic republics. See *Presse canadienne*, *Le Canada invité à être plus vigilant que jamais face à l'espionnage soviétique*, *Le Soleil* (Québec City), 1er juin, 1989, A-11.

⁹⁰ A. Alan Borovoy, "Freedom of Expression: Some Recurring Impediments," in Rosalie S. Abella & Melvin L. Rothman, eds., *Justice Beyond Orwell* (1985), 125, 153.

and defence of Canada."⁹¹ For him, tradition, discipline and civil liability should suffice to maintain government secrecy.⁹²

A pillar of official secrecy, which will remain firmly intact even after a renovated *Official Secrets Act* is eventually introduced, is the notion that spying is the supreme violation of a person's loyalty to Canada. This was clearly reiterated with respect to James Morrison, a former RCMP corporal who had sold the identity of a double agent to the Soviet Union in the 1950s, for which he was sentenced to 18 months imprisonment by Mr. Justice Coulter Osborne of the Ontario Supreme Court. It was reported that Crown prosecutor Doug Rutherford was satisfied with the sentence's "public message" that "loyalty and fidelity to the national interest is a very, very important thing."⁹³ As will be seen in a later chapter,⁹⁴ the concept of loyalty to Canada is also an integral part of the rationale for security clearances. Inspired by the disciplinary effect of devout adherence to religion, the notion of loyalty draws an equal sign between the flag, the country, the head of State and "the Canadian way." As such it has a deeply conservatizing effect, suppressing or deadening political opposition,

⁹¹ *Ibid.* See also Normand Marion, "La Notion de 'sécurité nationale' et les libertés démocratiques dans la législation canadienne," in *Police et liberté* (cahier des documents) [Un colloque de la Ligue des droits de l'homme en collaboration avec la Faculté d'éducation permanente de l'Université de Montréal, 26-28 mai 1978], 197, 214. The participants at this conference adopted a declaration in which they called for the repeal of a number of National Security provisions, including the *Official Secrets Act*. See *Opération liberté*, octobre 1978, vol. 1, no. 4, 8-10.

⁹² *Ibid.*, 154. See also Canadian Civil Liberties Association, *Public Disclosure and the Official Secrets Act* (1979) [submission to the McDonald Commission].

⁹³ *RCMP's 'Long Knife' gets 18 months*, *The Gazette*, [Montréal], May 27th, 1986, B1. He pleaded guilty in January 1986 to one count of violating the *Official Secrets Act*, while two other charges were withdrawn.

⁹⁴ Ch. VI, Part C, *infra*.

especially due to the popular connection between *dis*loyalty and communism.⁹⁵

A corollary of loyalty is that in matters of espionage and crimes against the State it is assumed that *all* Canadians are victims. But contrary to ordinary criminal offences, which purport to protect the whole of society, crimes against the State have several distinguishing features that demarcate them from ordinary offences: they are primarily designed to protect the State, rather than society as a whole;⁹⁶ in the event of a violation, the principal victim is accordingly the State (how does spying or the leakage of National Security information have a direct prejudicial effect on the people of Canada?); they benefit from the illegitimate hierarchy⁹⁷ of criminal offences in the sense that they are perceived to be more serious in nature and in terms of consequences because they threaten the functioning of the State and the hegemony of the ruling élite;⁹⁸ accordingly special rules of evidence (*e.g.* regarding intention under the *Official Secrets Act*) and procedure (*e.g.* *in camera* hearings) should apply.

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- 95 *E.g.* James Barros believes that by definition communists are disloyal. See Roger Bowen, *Searching for Evil-Doers*, Canadian Dimension, March 1987, 32 [a review of James Barros, *No Sense of Evil: Espionage: The Case of Herbert Norman* (1986)]; James Littleton, *Target Nation [:] Canada and the Western Intelligence Network* (1986).
- 96 Threats to National Security are solely "threats to the stability of the State." Michael Howard, *Cowboys, Playboys and Other Spies*, The New York Times Book Review, February 16th, 1986, 6 [reviewing Christopher Andrew, *Her Majesty's Secret Service [:] The Making of the British Intelligence Community* (1985)].
- 97 J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy* (1986) 18 Ottawa L.R. 1, 19.
- 98 Mark Kelman, "Criminal Law [:] The Origins of Crime and Criminal Violence," *in* Kairys, *supra*, note 73, 218, 221. While an analysis of the Canadian ruling élite is beyond the scope of this study, for the purposes of this discussion it refers to the upper echelons of the political and economic establishment.

Conclusions

The justification for a separate, special breed of offences called crimes against the State can no longer be sustained. Many of the crimes against the State (notably treason and sedition) limit public protest and the tolerance for dissent, and thereby represent unnecessary limitations on some of the most fundamental rights and freedoms of Canadians, including freedom of expression, association and assembly, as well as the right to privacy.⁹⁹ Moreover, there are no compelling reasons why the State should be treated differently or more favorably than other institutions or individuals. To maintain the *status quo* only perpetuates its status as an illegitimate hierarchy, able to benefit from innumerable rights and protections not afforded to ordinary institutions and individuals. Accordingly, what are now known as crimes against the State should be abolished, and the State should only be able to rely upon the *ordinary* crimes under the criminal law, (of which there is no shortage) which are the proper subject of criminalization. This is all the more justifiable given the trend towards recognizing the protection of society as a whole as the central reason for criminalization.¹⁰⁰ The security of the State simply must yield to the security of the people of Canada. Applying the Law Reform Commission of Canada's declaration of principles for recodifying criminal law by analogy, it could be stated that political criminal law (crimes against the State and official State secrets legislation) should not be used since other means of social control are

⁹⁹ See, e.g., J. Stuart Russell, *The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law* (1982) 14 Ottawa L.R. 270, 310-311.

¹⁰⁰ See, e.g., Government of Canada, *The Criminal Law in Canadian Society* (1982).

adequate and appropriate (*i.e.* general criminal law offences), and since it interferes more than necessary with individual rights and freedoms.¹⁰¹

It is true, of course, that crimes against the State exist in most, if not all, countries of the world. This empirical fact alone may demonstrate the inherent need for States generally to enact special political crimes in order to "ensure the survival and well-being of their respective polities, most especially of the dominant classes within their polities."^{101a} While a comparative analysis is outside the scope of this study, I would be tempted to argue that the same critique I have made concerning Canada should apply elsewhere. No State, no matter what its political ideology may be, should be permitted to wield such unique criminal powers specially designed to protect and preserve its authority.

This examination of official secrecy also demonstrates the essentially *secretive* nature of the National Security State, the most secret institution in our society. The principle of government secretiveness is partially rooted in tradition and a deeply conservative view of democracy. Based on the fear of participatory democracy, it also serves to prohibit popular access to information, and therefore *control*, by the people over government.¹⁰² By excluding the State from the basic democratic principle of accountability, and shrouding it in a mystical, impenetrable fog, this sacred principle also legitimizes its status as an illegitimate hierarchy. With the recent advent of

¹⁰¹ Law Reform Commission of Canada, *Report 30 [:] Recodifying Criminal Law* (Vol. I), (1986), 8.

^{101a} Turk, *supra*, note 3a, 176.

¹⁰² See, *e.g.*, Allan Hutchinson & Patrick Monahan, "Democracy and the Role of Law," *in* Allan Hutchinson & Patrick Monahan, *The Rule of Law [:] Ideal or Ideology* (1987), 97.

access to information and privacy legislation this shibboleth is, however, finally beginning to crumble, albeit at a veritable snail's pace.

CHAPTER IV

THE RIGHT OF ACCESS TO GOVERNMENT AND PERSONAL INFORMATION DENIED

Introduction

Until relatively recently the omnipotent fog of "executive secrecy" quietly hung unchallenged over the federal government, rendering the disclosure of government information a virtual impossibility. Over the years it became apparent that such absolute secrecy was no longer defensible in a system of government purporting to be democratic. Canadians were becoming increasingly cynical over the malfunctioning of government, and began to assert the notion that they had the *right* to obtain access to information held by government about themselves, as well as other government information. The government, for its part, recognized that in order to protect its legitimacy and authority, as well as continue to foster its "democratic" ideals, the doors to government would finally have to creak open, ever so slightly.¹

This movement for access to government and personal information was also advanced by the encouragement of legal and non-legal commentators, some of whom were inspired by the U.S. freedom of information legislation. But the first government initiative in Canada was a dismal failure. A limited

¹ A 1980 Cabinet Paper described the purpose of access legislation as: "to support democratic government, by providing information to allow citizens to influence government policy, to hold government accountable for what it does, and to vote in an informed way." Secretary of State and Minister of Communications, *Access to Information Legislation (:) Cabinet Discussion Paper* (June 1980), 2. An excellent historical overview of privacy legislation is found in Peter Gillis, *The Privacy Act: A Legislative Overview* (1987) 4 Cdn H.Rt.Y.B. 119.

right of access was allowed by Part IV of the *Canadian Human Rights Act*,² but it was ill-used, and did not succeed in furthering the goal of open government.³ In an attempt to enhance access the federal government issued a "Green Paper" in 1977 entitled *Legislation on Public Access to Government Documents*,⁴ which elicited the following condemnation from a well-known access to information critic:

[This represented] a passionate attempt to avoid any meaningful legislation. By means of misleading appeals to ministerial responsibility and public service neutrality, the Government has clearly revealed its intention to perpetuate the paternalistic tradition of official secrecy in Canada.⁵

The Paper was referred to the Standing Joint Committee on Regulations and Other Statutory Instruments for review, which issued its report and recommendations in June 1978.⁶ The Green Paper did, however, provoke considerable public discussion about the need for access to information legislation. A Canadian Bar Association research study was also published in August 1977 (*Will the Doors Stay Shut?*),⁷ followed by its release of a Model

² S.C. 1976-77, c. 33.

³ See J.D. McCamus, *Freedom of Information: A Canadian Perspective* (1981); Cahiers de documents, *Police et liberté* (Un colloque de la Ligue des droits de l'Homme; 26-28 mai 1978), 215. Sections 53 and 54 of the *Act* permitted exemptions from access "in relation to national security." Part IV was repealed upon the enactment of the present access and privacy legislation: S.C. 1980-81-82-83, c. III, Sch. IV, s. 3.

⁴ (1977). John Roberts, Secretary of State.

⁵ T. Murray Rankin, *Freedom of Information in Canada [.] Will the doors stay shut?* (1977) [A research paper prepared for the Canadian Bar Association], 2. [hereinafter cited as *Freedom of Information*].

⁶ *Supra*, note 1, 1.

⁷ *Ibid.*

Freedom of Information Bill in March 1979.⁸ In fact, so much controversy was generated that the government was able to stall on introducing legislation for a number of years. The Bill was passed in June 1982, and finally on July 1st, 1983 the *Access to Information Act*⁹ and the *Privacy Act*¹⁰ were proclaimed "in an apparent desire to reverse a long tradition of government secrecy in Canada."¹¹

It would not, however, be accurate to assert that prior to the introduction of this new legislation the federal government had no statutory protection from disclosure of information. Where the Executive claimed that a document could not be disclosed due to reasons of National Security, extra-judicial assistance could be sought from an interested civil servant. But unauthorized disclosure in this manner was pregnant with proscription and potentially drastic consequences.¹² Every federal civil servant must, for instance, swear an oath of secrecy in which one affirms that "[. . .] I will not, without due authority [. . .] disclose or make known any matter that comes to my knowledge by reason of such employment."¹³

⁸ Canadian Bar Association, *Freedom of Information in Canada [:] A Model Bill* (1979).

⁹ S.C. 1980-81-82-83, c. 111, Sch. I. Assented to July 7th, 1982.

¹⁰ *Ibid.*, Sch. II.

¹¹ Murray Rankin, *National Security: Information, Accountability, and the Canadian Security Intelligence Service* (1986) 36 U.T.L.J. 249, 262 [hereinafter cited as *National Security*].

¹² *Freedom of Information*, 30 *et seq.*

¹³ *Public Service Employment Act*, R.S.C. 1970, c. P-32, Sch. III.

In addition to the leakage provisions of the *Official Secrets Act*,¹⁴ certain *Criminal Code*¹⁵ offences prohibit disclosure by civil servants, breach of public trust (s. 111), theft (s. 283) and treason (s. 46), some of which were examined in previous chapters. The classification system is also of assistance, which states:

Documents, information and material are to be classified 'secret' when their unauthorized disclosure would endanger national security, cause serious injury to the interests or prestige of the nation or would be of substantial advantage to a foreign power [. . .].¹⁶

A document is merely "confidential", however, if unauthorized disclosure "would be prejudicial to the interests or prestige of the nation, would cause damage to an individual and [*sic*] would be of advantage to a foreign power."¹⁷ Rankin correctly concludes that

The cumulative effect of the oaths of secrecy, the Criminal Code sanction, the Official Secrets Act and the classification system create a very pervasive veil of secrecy surrounding "national security" matters which largely succeed in inhibiting any possibility of extra-judicial information access.¹⁸

¹⁴ R.S.C. 1970, c. 0-3, as am. See generally ch. III, *supra*.

¹⁵ R.S.C. 1970, c. C-34, as am. See generally ch. II, *supra*.

¹⁶ Cited in the *Report of the Royal Commission on Secrecy* (Abridged) (1969) [the "MacKenzie Report"], 69.

¹⁷ *Ibid.*, 70. As Rankin correctly observes, "[a]part from difficulties with the vagueness of the term 'national security' itself, by what possible standard might a properly instructed official differentiate between these two categories, without complete reliance on subjective whim?" *Freedom of Information*, 37.

¹⁸ *Freedom of Information*, 38.

Notwithstanding the supposed "open doors" principle underlying the new *Access to Information Act* and the *Privacy Act*, the "pervasive veil of secrecy" still almost entirely insulates national security information from public disclosure and access.

A. The New Legislative Scheme

The new legislation was actually an *omnibus*-type Act which primarily introduced the *Access to Information Act* and the *Privacy Act*, but also amended the *Federal Court Act*,¹⁹ the *Canada Evidence Act*²⁰ as well as other related statutes. The purported global overhaul was, however, far from complete. While, for instance, the doctrine of "public interest immunity" was reformed,²¹ the *Official Secrets Act* remained in force. The general principles of the *Access to Information Act*, which are designed to guide its interpretation, are set out in s. 2(1) of the *Act*:

[. . .] to provide a right of access to information in records under the control of a government institution in accordance with the principles that [1] government information should be available to the public, [2] that necessary exceptions to the right of access should be limited and specific and [3] that decisions on the disclosure of government information should be reviewed independently of government.

19 R.S.C. 1970, c. 10 (2nd Supp.). See generally ch. V, *infra*.

20 R.S.C. 1970, c. E-10. See generally ch. V, *infra*.

21 *An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canadian Evidence Act, and to amend certain other Acts in consequence thereof*, S.C. 1980-81-82-83, c. 111, s. 3, repealing s. 41 of the *Federal Court Act*.

The disclosure of information may be refused, under the "harms test" of s. 15(1), where such disclosure "could reasonably be expected to be injurious to the conduct of international affairs, to the *defence of Canada* or any state allied or associated with Canada or the *detection, prevention or suppression of subversive or hostile activities*, including, without restricting the generality of the foregoing,"²² nine broad classes of exemptions. The definitions of the terms "defence of Canada or any state allied or associated with Canada" and "subversive or hostile activities" are set out in s. 15(2). The former "*includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada [. . .]*."²³ As for "subversive or hostile activities," such term *means* espionage, sabotage, terrorism, intelligence gathering, activities threatening the safety of certain individuals as well as "activities directed toward accomplishing governmental change within Canada or foreign states by the use of force or the encouragement of the use of force, violence or any criminal means."²⁴ These exemptions are sharply criticized by Rankin:

There is no indication of the amount of injury or harm that must occur before the record can be withheld. For example, if the anticipated harm caused by disclosure would be trivial in comparison with the potential benefits, it is unclear whether the record must be withheld. Moreover, the list of classes of information may be viewed as simply illustrations of what might reasonably be regarded

²² [emphasis added].

²³ [emphasis added].

²⁴ *Cf.* the definition of "threats to the security of Canada" in s. 2 of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21. See generally ch. VI, *infra*.

as injurious to the interest at issue. It may be argued, however, that the listed classes may be deemed to be injurious and exempt, even if no harm could reasonably be expected.²⁵

The "law enforcement" exemption is equally widely framed. Although no "harms test" is provided, all investigative records of the RCMP and the Canadian Security Intelligence Service (CSIS) may be withheld under the class exemption of s. 16(1)(a), which "makes a mockery of the spirit of the legislation,"²⁶ according to Rankin. Information "that could reasonably be expected to facilitate the commission of an offence" may be withheld under s. 16(2), and an extremely broad mandatory class exemption for RCMP

²⁵ *National Security*, 267 [note omitted]. Similarly, in the U.S. a majority of the commentators criticize the freedom of information legislation for being highly ambiguous, and believe that the exemptions do not provide objective guidelines for the courts. See, e.g., John Moon, *The Freedom of Information Act: A Fundamental Contradiction* (1985) 34 Am. U.L.R. 1157, 1177; Kramer & Weinberg, *The Freedom of Information Act* (1974) 63 Geo. L.R. 49; Wade, *Freedom of Information: Officials Thwart Right to Know* (February 1972), 175 Science 498; Emerson, *The Danger of State Secrecy* (March 30th, 1974) *The Nation* 395; J. O'Reilly, *Federal Information Disclosure* (1977). The 1960 draft of the U.S. *Freedom of Information Act* provided only three exemptions, include national defence secrets, but not National Security. The first of nine exemptions in the *Act*, when it was adopted in 1966, was for security classified materials, which was modified and expanded in 1974: Act of June 5th, 1967; Pub. L. 90-23, 81 Stat. 54 § 552(b)(1); am. by Pub. L. No. 93-502 (1974). See Harold C. Relyea, *A Comparative Review of the Access to Information Act and the U.S. Freedom of Information Act* (1986) [unpublished paper]; supra, note 5, 44 *et seq.*; supra, note 11, 263-266. Presently the *Act* does not apply to matters that are "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defence or foreign policy and, (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b) (1982), am. by Pub. L. No. 98-620, 98 Stat. 3335 (1984). See *E.P.A. v. Mink* (1973) 410 U.S. 73. Under the British *Data Protection Act* of 1984 information kept by government or private agencies for National Security purposes is exempted from access. See M.D.A. Freeman, *Law and Order in 1984* (1984) 37 *Current Legal Prob's* 175, 200.

²⁶ *National Security*, 267. According to s. 16(1)(a)(iii) (introduced by s. 70(2) of the *Canadian Security Intelligence Service Act*,) records concerning "activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*" may be withheld [emphasis added]. The mere suspicion of threatening activities is considerably more encompassing and less stringent than a test requiring reasonable belief.

information obtained in the performance of policing services for a province or municipality is provided for under s. 16(3). Information obtained in confidence from a foreign government, *e.g.* the CIA or other foreign security service, or an international organization of states, must be withheld.²⁷ Also information protected by other statutory provisions listed in Schedule II to the *Access to Information Act* must be withheld. A reference therein to s. 18 of the *Canadian Security Intelligence Service Act* means that

an individual generally cannot obtain access to information obtained in the course of C.S.I.S. activities if the identity of a confidential source of information, or of an employee engaged in covert operational activities, can be inferred. Nevertheless, despite this wall of broadly drafted exemptions, C.S.I.S. is generally subject to both the Access and Privacy Act, and limited information may also be obtained directly from C.S.I.S., [. . .].²⁸

Virtually all Privy Council confidences are exempt from access under s. 69. Rankin has expressed concern that the "process of "Cabinet-laundering" will undermine any opportunity of government accountability if this gaping loophole remains open," merely by information concerning CSIS finding its way into the Cabinet's Committee on Security and Intelligence, or by information being appended to a Cabinet briefing book or memorandum.²⁹

An elaborate review mechanism is created by the *Access to Information Act* under which the Trial Division of the Federal Court is able to review any record to which the *Act* applies that is under the control of a government

²⁷ S. 13(1) *Access to Information Act*; s. 19(1) *Privacy Act*.

²⁸ *National Security*, 268.

²⁹ *National Security*, 269. He hopes that this blanket exemption will be removed and replaced with a "more conventional one."

institution, with the exception of Cabinet records.³⁰ The burden of proof is on the government institution to justify its refusal to disclose the information.³¹ In such proceedings the Federal Court may examine any record, "and no such record may be withheld from the Court on any grounds."³² But "the Court shall take every reasonable precaution, including, when appropriate, reviewing representations *ex parte* and conducting hearings *in camera*" to avoid disclosure in certain circumstances.³³ *In camera* and *ex parte* hearings are also allowed where information concerning international affairs and national defence are also in issue.³⁴

The Court can order disclosure if, in its opinion, its retention does not fall within one of the exemptions.³⁵ The notable exception is information relating to international affairs, national defence and certain aspects of law enforcement and penal security, where the Court can only order disclosure "if it determines that the head of the institution did not have *reasonable*

³⁰ S. 46 *Access to Information Act*; s. 45 *Privacy Act*. Only after a complaint has been received and investigated by the Information Commissioner (s. 30 *et seq. Access to Information Act*; s. 29 *et seq. Privacy Act*) can recourse be had to the Federal Court (s. 41 *Access to Information Act*; s. 41 *Privacy Act*). See also John D. McCamus, "The Protection of Privacy: The Judicial Role," in Rosalie S. Abella & Melvin L. Rothman, eds., *Justice Beyond Orwell* (1985), 163.

³¹ S. 48 *Access to Information Act*; s. 47 *Privacy Act*. The burden generally rests on the government institution to show that National Security or some law enforcement interest is threatened by disclosure.

³² S. 46 *Access to Information Act*; s. 45 *Privacy Act*.

³³ S. 47(1) *Access to Information Act*; s. 46(1) *Privacy Act*.

³⁴ S. 52 *Access to Information Act*; s. 51 *Privacy Act*.

³⁵ S. 49 *Access to Information Act*; s. 48 *Privacy Act*.

grounds on which to refuse to disclose the record or part thereof."³⁶ The scope of this review power is unclear according to Rankin:

It seems that if the government can prove some reasonable ground for the secrecy alleged, the court cannot order the disclosure of the documents -- even if there are more compelling reasons favouring disclosure or if, although reasonable, the grounds are not satisfactory. Under this more limited review power, the court must be more concerned with the government's belief that the information should be withheld than with whether the disclosure would in fact be likely to cause any harm to a stated public interest. In an apparent effort to preserve ministerial responsibility for classically 'political' information, effective judicial review has been thwarted, ostensibly in preference for ultimate accountability to Parliament and the electorate. The net effect, however, is to narrow significantly the courts' ability to pierce the veil of secrecy surrounding our organs of national security; the accountability of these bodies to ordinary Canadians is commensurately reduced.³⁷

The purpose of the *Privacy Act* is regarded as the corollary to that of the *Access to Information Act*: to "protect the privacy of individuals with respect to personal information about themselves held by a government institution and [to] provide individuals with a right of access to such information." (s. 2) Although similar exemptions from access in the *Access to Information Act* are also found in the *Privacy Act*, the latter contains some additional exemptions of notoriety. One exemption allows withholding personal information obtained or prepared by CSIS with respect to security clearances "if disclosure of the information could reasonably be expected to

³⁶ S. 50 *Access to Information Act* (emphasis added); s. 49 *Privacy Act*.

³⁷ *National Security*, 270.

reveal the identity of the individual who furnished the information to the investigative body." (s. 23).³⁸ Disclosure of personal information *may* be refused under s. 21, in the case of a non-exempt bank, where such disclosure

could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, [. . .] or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, as defined in subsection 15(2) of the *Access to Information Act*, including, without restricting the generality of the foregoing, any such information listed in paragraphs 15(1) (*a*) to (*i*) of the *Access to Information Act*.

Totally exempt banks may be created by Order in Council where such banks "contain files all of which consist predominantly of personal information" concerning international affairs, national defence or law enforcement (s. 18(1)), and no judicial review of these exempt designations is provided for.

Rankin characterizes the total exemptions as a "mockery" of the general principle of the *Act*,

to enhance access by citizens to their records found in government files. [. . .] Even the Reagan administration has not dared to go as far as to enshrine secrecy for entire classes of information -- wholly exempt from a disclosure statute. When added to the already long list of gaping exemptions found in the Privacy Act, very little indeed in fields such as law enforcement and national security will be made available to Canadians; the legislation simply and deceptively freezes the status quo.³⁹

³⁸ Schedule IV (Investigative Bodies) of the *Privacy Regulations* has been amended to include CSIS for the purpose of s. 23 (SOR/85-216). See also SOR/86-138.

³⁹ *National Security*, 271. *A contrario*, Gillis issues an exceedingly glowing report card on the *Privacy Act* overall, a statute he terms "'cadillac' privacy legislation." *Supra*, note 1, 147.

Rounding out his critique of the legislation he makes other perceptive observations:

No guidelines are provided as to how, when and why information is collected in exempt banks. There is no method for correcting erroneous information or finding out why it is stored in exempt banks, as there is in other areas of the Privacy Act. Security intelligence and law enforcement services need not admit that a particular record exists, under either the Access Act or the Privacy Act. Moreover, the right to refuse to acknowledge the existence of a record in [*sic*] not limited to sensitive information in national security or law enforcement files.⁴⁰

But while security information is largely inaccessible to ordinary Canadians, CSIS enjoys favoured status, and may easily access and collect such information. Under s. 8(2) disclosure can be authorized to an investigative body specified by regulations for the purposes of carrying out a lawful investigation. Swan believes that "it appears to be intended that the Canadian Security Intelligence Service will be designated as an investigative body for the purposes of this section."⁴¹ As well, s. 9, which requires that records be made of all inconsistent use of personal information was amended to provide that no record need be kept of requests for access by investigative bodies, like CSIS. The result, according to Swan, is to give the Service access, upon a request in writing,

⁴⁰ *Ibid.*, [note omitted]. See s. 10(2) *Access to Information Act*; s. 16(2) *Privacy Act*.

⁴¹ Kenneth P. Swan, *The Use of Science by the State for Security and Control; Legal and Civil Liberties Aspects of Information and National Security* (1983) [unpublished paper], 11-12. *E.g.*, CSIS has been included in the *Privacy Regulations*, Schedule II (SOR/84-571), Schedule III (SOR/84-571) and Item 1 of Schedule IV (SOR/85-216). As well, Schedule I of the *Access to Information Regulations* includes CSIS (SOR/84-570).

many of the government data banks including personal information, without any record being kept of this access attached to the personal information bank, and entirely upon the authorization of the Service itself.⁴²

B. The Commissioners and the Courts Keep the Doors Shut

Confronted with such an impressive array of exemptions, and such circumscribed review powers, it is perhaps not surprising that the decisions of the Information Commissioner and Privacy Commissioner, as well as the Federal Court, have been singularly uninspiring. Although some individuals have brought their cases before the Commissioners, alarmingly few have appealed to the Federal Court, and in all instances the effect has been total or near total refusal of access where National Security matters are in issue.⁴³ The doors to National Security information are remaining tightly shut.

⁴² *Ibid.*, 12.

⁴³ The most recent annual report of the Privacy Commissioner, his fifth annual report, glibly reports that "few applicants have been given access to their files or have even received confirmation whether a file on them exists." *Annual Report [.] Privacy Commissioner [.] 1987-88* (1988), 13. In fact the Privacy Commissioner only ruled that *one* out of a total of 20 complaints files against CSIS in that year was justified: *ibid.*, 32. The Commissioner concludes fatalistically as follows: This should come as no real surprise to anyone; silence is in the nature of CSIS's business. There has been no pattern of non-compliance by CSIS with the Privacy Act and Parliament specifically provided exemptions for disclosure requirements, recognizing the special circumstances of security and intelligence work. (at 13) The Report does, however, concede that "as time diminishes the sensitivity of information or because of its seemingly innocuous nature [. . .] it becomes difficult to explain how the release injures CSIS." (*ibid.*) This issue is being explored between the Privacy Commissioner and CSIS. See also Susan Delacourt, *Ottawa asked to define policy on privacy, AIDS*, *The Globe & Mail*, June 28th, 1988, A12.

The first case to deal with the National Security exemptions was decided in 1984 by the Federal Court in *Re Ternette & Solicitor General*.⁴⁴ An Order in Council was adopted on April 22nd, 1983 which exempted, pursuant to s. 18(1) of the *Privacy Act*, a data bank of the RCMP called "Security Service Records No. RCMP-P130,"⁴⁵ and specified s. 21 of the *Act* as the basis for the exemption. Shortly thereafter Nick Ternette, a political activist in Winnipeg, applied under s. 12(1) of the *Privacy Act* for access to any personal information about him contained in this bank, and in particular information concerning "activities directed towards [*sic*] accomplishing governmental change within Canada or elsewhere by force or violent means, the use or the encouragement of the use of force or the creation or exploitation of civil disorder [in Manitoba and Alberta]."⁴⁶ The RCMP Departmental Privacy and Access to Information Coordinator responded, stating that this bank was exempt, and adding: "We cannot comply with your request nor can we confirm whether or not such information exists concerning you. This is necessary to preserve the integrity of this information category." Ternette complained to the Privacy Commissioner, who, after an investigation, concluded that he had not been denied a right under the *Act*. He then

⁴⁴ (1984) 10 D.L.R. (4th) 587, [1985] 5 W.W.R. 612, 9 A.L.R. 24 (F.C.T.D.) [hereinafter cited to 10 D.L.R. (4th)], *per* Strayer J. At the time of this judgment it was only the second application made to the Court under the *Privacy Act*. See also Gillis, *supra*, note 1, 138; Tom Onyshko, *Access to Personal Information: British and Canadian Legislative Approaches*, (1989) unpublished paper, 14-16.

⁴⁵ *Exempt Personal Information Bank Order, No. 14 (RCMP)*, SOR/83-374. The facts are reviewed at 588 *et seq.* This bank was formerly kept by the RCMP Security Service.

⁴⁶ Paraphrasing the definition of "subversive or hostile activities" in s. 15(2) of the *Access to Information Act*.

presented a motion for review of the decision to refuse access to information before the Trial Division of the Federal Court.

Mr. Justice Strayer observes that under a review pursuant to s. 41 of the *Privacy Act* the Court is entitled to determine if the bank in question actually has been subject to an exemption order. The Applicant argued *inter alia* that s. 45 of the *Act*, giving the Court the right to examine certain personal information, gives the Court a *carte blanche* to look at any information under government control other than a Privy Council confidence, which "clearly casts upon the court a power and a responsibility to deal with such applications having regard only to the need to avoid improper disclosure as prescribed in s. 46."⁴⁷ Ternette was not represented by counsel, and apparently advanced no arguments with respect to the validity of the exemption or the *Canadian Charter of Rights and Freedoms*.⁴⁸

Strayer J. concluded that under s. 41 "this court is entitled to ascertain whether there is indeed a file in this data bank with respect to the applicant and, if so, whether it is properly included in the data bank." An "objective" prerequisite is found in s. 18, accordingly if the Court finds that such a file does not consist predominantly of personal information described in ss. 21 or 22, the file is not properly included in that bank and "the court is entitled to make an appropriate order under s. 48."⁴⁹ He directed, under s. 46, that the subsequent hearing be held *in camera* with both parties present.

⁴⁷ *Supra*, note 44, 593-595.

⁴⁸ Schedule B of the *Constitution Act, 1982*, as en. by the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴⁹ *Supra*, note 44, 597. Section 48 allows the Court to make orders where no authorization to refuse disclosure is found. Strayer J. also concluded that the proper procedure for hearing such an application is under s. 46, not s. 51.

The response to Ternette's application only referred to the bank as being "exempt from access under section 18 of the *Privacy Act*" For Strayer J. this was insufficient, since pursuant to s. 16(1)(b) the institution head must state the *specific* provision of the *Act* on which the refusal is based. The institution head is thereafter bound by the grounds asserted in the notice of refusal, and consequently the refusal was regarded as based on s. 18 and not s. 21.⁵⁰ A notice of appeal from this decision, originally filed by the Solicitor General, was discontinued in November 1984.⁵¹ After the decision Rankin reports that the Department of Justice conceded it could not prove that all the files in the bank had been examined prior to the enactment of the Order in Council. For Rankin this admission "poses serious questions about the legitimacy of exempting information banks from the Privacy Act."⁵²

With the assistance of the Privacy Commissioner Ternette was eventually able to obtain some 159 pages of his RCMP file. The documents, which covered the period from 1966 to 1980, demonstrate that the RCMP monitored his activities and analyzed his influence among university

50 *Ibid.*, 594. Confirmed in *Davidson v. Solicitor General* (1987) 9 F.T.R. 295, 298-300 (T.D.) (the government institution cannot rely upon exemptions not identified in the notice of refusal). Similarly, CSIS refused to confirm or deny if it held any files on James Harding, a professor at the University of Regina School of Human Justice, who was denied entry into the U.S. in 1986. Harding was en route to Costa Rica, to attend the United Nations University for Peace, when he was barred from entering the U.S. at the Calgary Airport. He believes American immigration officials acted on information supplied by CSIS, and stated that he would present a complaint to the Privacy Commissioner. See Geoffrey York, *Professor seeking file from CSIS*, *The Globe & Mail*, December 3rd, 1987, A11.

51 See *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (1987) [Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act; Blaine Thacker, M.P., Chairman], 48 [hereinafter cited as *Open and Shut*]; Privacy Commissioner, *Annual Report 1985-86* (1986), 21-23, 54.

52 *National Security*, 272. See *The Vancouver Sun*, October 4th, 1985.

students, as well as his role in the NDP. But they contain no evidence to suggest that he was a threat to National Security.⁵³

Ternette subsequently returned to the Federal Court with the view of gaining access to the remaining records retained by CSIS. Counsel for the Solicitor General then filed in July 1988 a lengthy affidavit sworn by a veteran high-ranking member of CSIS to describe the policy on its secret files.⁵⁴ The deponent, CSIS Director General of Information Management Joseph Dagenais, stated that Ternette had already received 364 pages of documents, but that a further 150 pages had been completely exempted, pursuant to ss. 19(1), 22, 22(1)(a)(iii), 22(1)(b) and 26 of the *Privacy Act*. He asserted that "foreign influenced subversive organizations" operate in Canada by "attempting to exploit volatile issues" within legitimate broad-based organizations. But the fear of CSIS is not that these legitimate organizations will engage in activities described in s. 2(b) of the *CSIS Act*, rather "[t]hese legitimate organizations, through manipulation, may be used

⁵³ Geoffrey York, *Secret file reveals 14-year RCMP surveillance of activist*, *The Globe & Mail*, November 11th, 1987, A3.

⁵⁴ *Ternette v. Solicitor General*, T-522-84, sworn July 14th, 1988. See Geoffrey York, *CSIS defends spying on legitimate groups to identify 'subversives'*, *The Globe & Mail*, July 30th, 1988, A1. *Cf* the affidavit filed in *Zanganeh v. CSIS*, *infra*, note 78, and cited in part at 9-12. The deponent in *Ternette* was examined on his affidavit in Calgary in January 1989, who asserted that "[t]his file does not necessarily mean that Mr. Ternette was investigated by the R.C.M.P. Security Service." File No. T-522-84, January 26th, 1989, 42. See also Doug Smith, *Lifting the Veil*, *This Magazine*, May-June 1989, 8. Onyshko is highly critical of the manner in which the RCMP and CSIS have conducted this case:

The arbitrary closing of many exempt banks and the method of release of Ternette's personal information display an unwillingness on the part of government to respect the spirit of the Act, while the length of time between Ternette's application and the eventual release of information is appalling. In light of these facts, one is forced to consider whether the government has taken the provisions of the *Privacy Act* seriously.

Supra, note 44, 16.

to confuse public perceptions, sway opinions, and generate public attention on specific issues."⁵⁵ Consequently, CSIS must monitor "subversive elements" within such legitimate organizations.

Moreover, since it is "necessary to keep informed of political, social and economic conditions in order to detect exploitation and anticipate potential threats to security," both the RCMP Security Service and CSIS have maintained files by "extensive cross-referencing" to the "file of a group or individual all reports, public information or assessments relating to that group or individual or to that group of individual's activities."⁵⁶ As the disclosure of the remaining documents would involve disclosing the identity of CSIS sources, Dagenais is of the view that such revelations would "have the effect of causing all sources to become more hesitant about co-operating with CSIS." Consequently, "covert sources and the general populace would be much less willing to co-operate with CSIS and assist it in its investigations."⁵⁷

CSIS cannot allow targets to ascertain what CSIS knows about them, the methods used against them, the extent of the targeting or the sources used because:

If targets of investigations had such knowledge, they would be able to take specific precautions and counter-measures against future surveillance, and they would be in a position to introduce false or misleading information into the investigative process. As a result, the scope and reliability of information available would be severely affected.⁵⁸

55 *Ibid.*, 7.

56 *Ibid.*, 8.

57 *Ibid.*, 10.

58 *Ibid.*

A further gloss on *Re Ternette* was provided recently by Mr. Justice Jerome in *Vienneau v. Solicitor General* and *Kealey v. Solicitor General*.⁵⁹ The two complainants had sought access to certain CSIS records. A part of their records was disclosed, the rest being exempt pursuant to the *Privacy Act*, but CSIS failed to specify which exemptions applied to which particular part of the record that had been deleted. Mr. Justice Jerome ruled that nothing in the *Act* required that the particular exemption sections be written directly on the released document, although such a practice would be highly commendable.

In a more recent case under the *Access to Information Act* an individual requested a copy of parts of the Canada Employment and Immigration Commission's (CEIC) *Immigration Manual IC (Immigration Classified)*.⁶⁰ He was informed that certain parts thereof would not be disclosed under ss. 15(1) and 16(2)(a) of the *Act*. Following a complaint the investigator was unable to obtain answers to certain questions, and therefore a formal recommendation for disclosure was made to the Minister of Employment and Immigration. The Minister's response clearly indicated that disclosure would not be made, and the Information Commissioner therefore took the unusual step of applying for Federal Court review.⁶¹

The Information Commissioner brought a similar application against the same Minister, under s. 42(1)(a) of the *Access to Information Act*, to review

⁵⁹ T-842-87, T-1106-87, March 3rd, 1988, unreported. On appeal, by the Information Commissioner. See *infra*, note 124, 87-88.

⁶⁰ Summarized in *Annual Report [.] Information Commissioner [.] 1985-86* (1986), 175.

⁶¹ *Information Commissioner v. Minister of Employment and Immigration* (T-2606-85, filed December 2nd, 1985). The case had not been set down for hearing as of March 31st, 1986.

the refusal by the CEIC to disclose a record requested by Vancouver lawyer Gerald Goldstein. Citing *Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce*⁶² Jerome A.C.J. restrictively construed the exemptions in the *Act* as follows:

[. . . T]he purpose of the *Access to Information Act* is to codify the right of access to information held by the government. It is not to codify the government's right of refusal. Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute.⁶³

The Minister was accordingly ordered to make public some 200 pages of secret immigration documents.⁶⁴

The Information Commissioner and Privacy Commissioner have, however, acted far less boldly than this cautious judicial activism exhibited by the Federal Court. The complainant in one case asked to see Department of National Defence records regarding the number of unauthorized overflights of Canadian territory by Soviet aircraft.⁶⁵ The request was

⁶² [1984] 1 F.C. 939.

⁶³ *Information Commissioner v. Minister of Employment and Immigration* [1986] 3 F.C. 63, 5 F.T.R. 287 (at 69 [1986] 3 F.C. 63)). Confirmed in *Davidson v. Solicitor General*, *supra*, note 50, 300. This is consistent with the policy of the Information Commissioner, who narrowly interprets every exemption. See Inger Hansen, Information Commissioner, *Background Notes on the Access to Information Act vs. Records Management at the 4th Canadian Records Management Conference in Ottawa, Ont. [,] 11 February 1984* (1984) [unpublished], 11.

⁶⁴ Peter Calami, *Make immigration files public: Court*, *The Gazette* [Montréal], May 8th, 1986, B-4. Reportedly Goldstein expected that the documents would reveal that immigration officials used unreliable information from the Phillipines concerning a previous marriage by a woman married to a Canadian citizen who unsuccessfully sought her sponsorship. Immigration officials initially refused to let the husband see certain immigration documents.

⁶⁵ *Annual Report, Information Commissioner, 1983-84* (1984), 20-21. No file number or other identification is provided, any only summaries of these cases are given.

refused under s. 15(1) of the *Access to Information Act* on the basis that disclosure would involve military defence intelligence and could damage international affairs, the defence of Canada or an allied state and the detection, prevention or suppression of subversive or hostile activities. The Information Commissioner tentatively concluded that disclosure could cause one or more of the anticipated injuries, although the complainant could not be told the basis of her decision, since she is prohibited from disclosing information provided for investigations.

Similarly, in another case the complainant requested background information from the Department of Justice on an application for extradition of a person living in Canada.⁶⁶ The Department of Justice gave him an English translation of the foreign judgment, and no extradition took place. But the Information Commissioner was satisfied that the documents that were withheld qualified for exemption under ss. 13(1)(a), 15(1), 17 and 19(1).

Another complainant, a researcher, requested access to issues of certain intelligence bulletins for dates from 1939 to 1941, and a copy of an RCMP document entitled *Ukrainians in Canada* (1939), from the RCMP.⁶⁷ Portions of the documents were exempted by the RCMP under ss. 13(1)(a), 15(1)(d)(ii) and 19(1). The Commissioner concluded that the information was properly exempted by the RCMP. She did, however, suggest to the complainant that he ask the RCMP to release certain records to him as a researcher, pursuant to s. 8(2)(j) of the *Privacy Act*, although the results of this suggestion are not reported. In the spirit of the decision in *Re Ternette*, as a result of this

⁶⁶ File: 1.84-91. Extradition. *Annual Report [:] Information Commissioner [:] 1984-85* (1985), 31. Once again only summaries are provided.

⁶⁷ File: 1.84-112. Intelligence Bulletin. *Ibid.*, 34-35.

complaint the RCMP agreed to identify the exemption(s) applied to each particular record or portion thereof, rather than providing the reasons for exemptions in a blanket manner.

The complainant in one case challenged the exemptions under s. 15(1) of portions of Cabinet documents held by the Privy Council Office with respect to the Cuban Missile Crisis.⁶⁸ The Commissioner was satisfied, upon a reviewal of the documents, that the material could reasonably be expected to be injurious to the conduct of international affairs or the defence of Canada. Another complaint involved the Privy Council Office where the complainant challenged the exemptions, under s. 13(1)(c), of portions of records on terrorist activities in Montréal.⁶⁹ The Commissioner confirmed the exemptions on the basis that the documents contained information obtained in confidence from a province. The complainant had requested access to "all records related to foreign intelligence activities in Canada between January 1, 1982, and July 17, 1984, including policy and coordination records."⁷⁰ External Affairs stated that all of the documents in question were classified and, following consultations with other government institutions, a total exemption was declared. The Information Commissioner found that the exemptions were justified, under a host of provisions: ss. 13(1)(a) and (b), 15(1), 16(1)(c)(ii), 17, 19(1), 21(1)(a) and (b).

Information was requested by one complainant from the RCMP, Privy Council Office and External Affairs concerning "Security Policy 1939-1957"

⁶⁸ File: 1.84-230. Cuban Missile Crisis. *Ibid.*, 65. See also File: 227. Cuban Missile Crisis. *Annual Report [;] Information Commissioner [;] 1985-86 (1986)*, 35, regarding an exemption under s. 13(1)(a).

⁶⁹ File: 1.84-239. Terrorist Activities. *Ibid.*

⁷⁰ File: 1.84-245. Intelligence Activities. *Ibid.*

held by the Public Archives.⁷¹ Some of the information was refused under ss. 13(1)(a) and (b), 15(1)(d)(ii), 16(1)(c)(ii), 17 and 19(1), and the complainant challenged the exemptions under ss. 13, 15 and 16. Although a number of records were disclosed, the Information Commissioner ruled that the remaining exemptions were proper. This is significant because it demonstrates that recently, faced with mounting criticism on the part of the public and even by legislators concerning the exemptions,⁷² the Information Commissioner and some government institutions have been compelled to disclose at least some information.

Another example of this new limited *glasnost* is where the Privy Council Office originally exempted all of a record relating to terrorism in Québec on the basis that it consisted of confidences of another government, under s. 13(1)(c).⁷³ Following an investigation, however, the Privy Council Office released *all* of the records requested, except one sentence. The Information Commissioner was satisfied that this sentence contained information received from another government which objected to its release. Similarly, in another case the complainant objected when some records

71 File: 109 Security Policies. *Annual Report of the Information Commissioner (1985-86)* (1986), 24. An excellent example of the absurd lengths that CSIS will go to attempt to prevent disclosure of extremely dated historical records is recounted in Gregory Kealey, *The Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Public Archives of Canada, and Access to Information: A Curious Tale* (1988) 21 *Labour/Le Travail* 199. The author sought access to four RCMP reports from 1919, which was initially refused by CSIS. After a review by the Information Commissioner he received parts of the documents he requested, then the Commissioner proceeded to the Federal Court for the remaining documents, since he agreed with the author's position. But just before the deadline for the proceeding to be brought before the Federal Court, CSIS announced that it would release all the records in question.

72 See, e.g., *Open and Shut*, *supra*, note 51.

73 File: 237 Terrorism. *Supra*, note 71, 37.

requested from National Defence were exempted under ss. 13, 15, 16(2) and 19(1).⁷⁴ Following an investigation and representations to the Department, additional records were released, and the Information Commissioner was satisfied that the records withheld were properly exempted. The complainant requested access to parts of the Service Operational Manual regarding counter-subversion and counter-espionage in one case.⁷⁵ CSIS provided some of the records, but withheld the rest invoking ss. 15(1)(c), 15(1)(f) and 16(1)(c). The Information Commissioner was, however, satisfied that the exemptions were justified, on the basis that release could seriously jeopardize ongoing and future operations.

Notwithstanding this recent breath of relative openness, the dominant trend of government institutions and the Commissioners is still to refuse access in National Security matters. In one case, for instance, the complainant requested access to records on counter-intelligence investigations concerning activity by the Soviet Union in Canada, from CSIS,⁷⁶ which invoked a dazzling list of exemptions: ss. 13, 15(1)(c), (d)(ii), (f) and (i)(iii), 16(1)(c), 17 and 19. The Information Commissioner investigated the matter and ruled that the records he sought, *if* they existed, were for the purpose of intelligence relating to the detection, prevention or suppression or subversive or hostile activities.

Finally, a complainant requested access to "all records concerning counter-intelligence activities concerning intelligence activity directed by the Soviet Union in Canada" between 1963 and 1965 from the Privy Council

⁷⁴ File: 221 Security Measures. *Ibid.*, 35.

⁷⁵ File: 368 Security Service Operational Manual. *Ibid.*, 59-60.

⁷⁶ File: 369 Counterintelligence. *Ibid.*, 60.

Office.⁷⁷ Exemptions were claimed under s. 15(1)(d)(ii), 16(1)(c) and 19(1). The Information Commissioner concluded that with one exception the information dealt with the prevention or suppression of subversive or hostile activities and its disclosure could reasonably be expected to injure ongoing investigations. Moreover, as narrow an interpretation as possible was used by the Privy Council Office, which had released the maximum information.

But just like *glasnost* currently unfolding in the Soviet Union and Eastern Europe, this recent apparent and limited openness rests on a vast foundation of secrecy with respect to National Security matters. And despite the Commissioners' restrictive interpretations of the exemptions the predominant theme is still one of government institutions refusing disclosure, basing themselves on a panoply of exemptions, sometimes followed by complaints which largely confirm these refusals.^{77a}

This trend towards ultra-secretiveness has been strongly reinforced by the recent alarming decision in *Zanganeh v. CSIS*⁷⁸ Jamshid Zanganeh, a former Iranian diplomat, applied for access to CSIS personal information banks SIS/P-PU-005, SIS/P-PU-010 and SIS/P-PU-015. With respect to bank SIS/P-PU-010, CSIS refused access on the ground that the bank was exempt pursuant to ss. 19, 21 and 26 of the *Privacy Act*. After the Privacy

⁷⁷ File: 453 Prevention of Hostile Act. *Ibid.*, 75.

^{77a} The best recent example of this trend is the most recent Annual Report of the Privacy Commissioner, who reports that of 49 complaints he received concerning CSIS 40 were dismissed as ill-founded. Even more glaring is the fact that all four complaints filed concerning the Office of the Inspector General of CSIS were dismissed. Privacy Commissioner, *Annual Report 1988-89* (1989), 34-35.

⁷⁸ (1988) 50 D.L.R. (4th) 747, [1989] 1 F.C. 244 (F.C.T.D.), *per* Muldoon J. [hereinafter cited to 50 D.L.R. (4th) 747]. See Southam News, *CSIS needs to stay secret, just like KGB: judge*, The Gazette [Montréal], April 28th, 1988, B-7.

Commissioner dismissed his request for review, Zanganeh filed an application for review before the Trial Division of the Federal Court.

In confirming the refusal by CSIS to grant access, Mr. Justice Muldoon offered the most honest and brutally forthright defence of the ultra-secretive nature of the personal information retained by CSIS. It merits recital at length:

In light of six years of rhetoric and jurisprudence about the *Charter*, some Canadians may shudder to realize that the security needs of a free and democratic society are, in a few basic essentials, much the same as those which totalitarian societies arrogate unto themselves. Utter secrecy, subject to certain checks, in security intelligence matters is one. That necessary degree of secrecy is so much more fissiparous in freedom and democracy than it is under the stifling oppression of a totalitarian régime, and it is therefore objectively justifiable in terms of paragraph 46(1)(b) of the *Privacy Act*. What no doubt distinguishes this free and democratic society from those which are less or not at all so, are the right to apply for, and obtain the results of, the Privacy Commissioner's investigation, and the right to apply to this Court for a review.

[. . .] the very acknowledgement of the existence of any information in the bank, whether or not such information exists, can -- and certainly would -- compromise the security of Canada by providing a referential insight, a chink in the armour of secrecy which the Canadian service must maintain no less than those in the U.K., the U.S.A., the U.S.S.R., France, India, Israel and Iran to name a randomly mixed bag of societies. In effect, it is quite clear that the reciprocal criteria of trust and mistrust in vogue abroad, must be accommodated and observed by C.S.I.S. and the Court within Canada, without exception for allegedly minor matters.⁷⁹

⁷⁹ *Ibid.*, 756-757. After citing a part of this passage from the judgment, Michael Mandel offers the following sober comment: "All this goes to show that even the most tenuous political supervision can be infinitely more responsive than an

As to Applicant's argument that his rights under ss. 2, 7 and 15 of the *Charter* had been violated, Mr. Justice Muldoon hastily brushed it aside:

When [. . .] as here, the respondent's conduct is lawfully in conformity with the *Privacy Act* and with its own statute, that tight secrecy of its information, if any, including the secrecy of whether it even has any information is justified not only under that ordinary legislation but, more importantly, justified under section 1 of the Charter.⁸⁰

In any event he concluded that the Applicant could not be permitted access to the CSIS personal information banks, and could not be permitted to know whether any personal information existed in such banks.

C. The Dwindling Number of Totally Exempt Banks

army of judges." Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989), 161, 214.

The 1988-89 Annual Report of the Privacy Commissioner reports a slight change in CSIS policy concerning its refusal to confirm or deny the existence of personal information, namely that

[. . .] CSIS will confirm the existence of certain personal information which was gathered by the former RCMP Security Service. Dated, less sensitive information of this type is maintained in bank SIS/P-PU-015. Its existence will be confirmed and the information will be released to a requestor *subject to any of the specific exemptions which are set out in the Privacy Act*. It has not proved possible to reach agreement with CSIS on a set of guidelines which would define what constitutes "less sensitive" information, [. . .]."

Supra, note 77a, 20 [emphasis added].

⁸⁰ *Ibid.*, 757. An application for leave to appeal was subsequently brought before the Federal Court of Appeal: File No. A-669-88. The appeal was dismissed on January 31st, 1989, without any motivated reasons. See also *Russell v. CSIS*, T-1318-88, F.C.T.D., also an application for review pursuant to s. 41 of the *Privacy Act* against refusals to grant access to personal information allegedly contained in the same personal information banks. This case was filed in July 1988, and has yet to be heard by the Court.

The notion of totally exempt banks, pursuant to s. 18(1) of the *Privacy Act*, has been consistently criticized for its absence of discretion and since it runs contrary to the general statutory principle of the right of access. To contain these criticisms the federal Cabinet has limited the number of totally exempt banks, by way of Order in Council, to those containing only the most sensitive information, usually matters concerning security and intelligence, criminal investigations and law enforcement. Until 1986, of the more than 2,200 personal information banks, there were only about 20 such totally exempt information banks, which reportedly contained files on an estimated 1.5 million Canadians.⁸¹ A subsequent review of these exempt banks resulted in 15 no longer being exempt under s. 18.⁸²

Interestingly enough, CSIS no longer maintains any totally exempt banks. One of its previous totally exempt banks well illustrates the potentially vast amount of information the Service collects, as well as the equally unrestricted interpretation of its statutory mandate:

This bank contains information on individuals whose activities may, on reasonable grounds, be suspected of directly relating to espionage or sabotage that is directed against or is detrimental to the *interests of Canada*; or, activities directed toward or in support of

81 *Open and Shut*, 46. Robert Winters, *Too many personal files kept secret, report says*, *The Gazette*, [Montréal], August 8th, 1986, A-4.

82 *Statement by the President of the Treasury Board to the Parliamentary Committee respecting the three-year review of the Access to Information Act and the Privacy Act*, *Access to Information Act and Privacy Act Bulletin*, November 1986, No. 6, 2, 5-6. Among the no longer exempted banks are: Canada Employment and Immigration Commission and Department of Employment and Immigration (EIC/-P-PU-260 Immigration Security and Intelligence Data Bank), Canadian Penitentiary Service (CPS/P-PU-005 International Security Threats Records; CPS/P-PU-065 Preventive Security Records), CSIS (SIS/P-PU-010 Canadian Security Intelligence Service Records), Department of Solicitor General (SGC/P-PU-025 Security Policy and Operational Records; SGC/P-PU-030 Police and Law Enforcement Records Relating to the Security and Safety of Persons or Property in Canada).

such activity; 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; activities within or relating to Canada directed towards 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, 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. [. . .] Information is also held in respect to CSIS providing advice relating [to] the *Citizenship or Immigration Acts*.⁸³

Another no longer totally exempt bank, which clearly contains information collected in processing security clearances in immigration and citizenship matters, includes "information gathered by Canadian or foreign investigative bodies or law enforcement agencies" with respect to

permanent residents abroad known to be or suspected of being associated with terrorist, criminal or subversive organizations, or other persons whose entry would be dangerous to Canadian security. Information may be used in refusing entry to Canada or expelling such

⁸³ SIS/P-PU-010 Canadian Security Intelligence Service Records [emphasis added]. Collected and obtained pursuant to s. 12 of the *Canadian Security Intelligence Service Act* with respect to "threats to the security of Canada," and under s. 15 regarding security assessments, *inter alia*. Cf. definition of "threats to the security of Canada" in s. 2 of the *CSIS Act*, *supra*, note 24. The text of the cited bank is set out in Government of Canada, *Personal Information Index [:] 1985* (1985), 27-2 [hereinafter cited as *Personal Information Index*]. See also Canadian Security Intelligence Service Records SIS/P-PU-015, *ibid.*, 27-3; RCMP: National Security Enforcement Records CMP/P-PU-025, 85-3. Under the *Access to Information Act* see in particular: CSIS: Counter-intelligence, Counter-terrorism, Counter-subversion SIS/DDS-010, *Access Register 1985* (1985), 27-3; Department of the Solicitor General: Contingency Planning -- Security Planning and Co-ordination SGB/PSB-020; Security and Intelligence Committees SGC/P-PSB-030, Security Information SGB/PSB-035, and Security Planning SGC/PSB-040; *ibid.*, 90-6.

persons from Canada.⁸⁴

In 1987 apparently there were only five totally exempt banks, according to the information supplied to the Parliamentary Committee reviewing the privacy and access to information legislation by the Treasury Board.⁸⁵ These five remaining exempt banks form the core of the most highly sensitive and jealously-guarded security and intelligence information held by the government, in the "higher interests of the State."⁸⁶ The very fact that the Cabinet persists in retaining their totally exempt status after a review of exempt banks confirms its commitment to keeping this information utterly secret. They are:

(1) National Defence: Military Police Investigation Case Files (DND/P-PE-835).⁸⁷

(2) National Defence: Communications Security Establishment, Security and Intelligence Investigation Files (DND/P-PU-040), which contains "information concerning individuals identified as potential risks to national security [. . .]. This information is used to advise the government with respect to international affairs, security and defence."⁸⁸

⁸⁴ EIC/P-PU-260 Immigration Security & Intelligence Data Bank, *ibid.*, 38-19. See ch. VI, Part B, *infra*.

⁸⁵ *Open and Shut*, 46. See *supra*, note 51.

⁸⁶ *Supra*, note 1, 5.

⁸⁷ P.C. 1985-798, March 14th, 1985.

⁸⁸ *Personal Information Index* 60-3. P.C. 1984-4088, December 20th, 1984.

(3) Privy Council Office: Security and Intelligence Information Files (PCO/P-PU-005), which contains "documentary information concerning individuals identified as potential risks to national security."⁸⁹

(4) Revenue Canada: Tax Evasion Cases (RCT/P-PU-030).⁹⁰

(5) RCMP: Criminal Intelligence Operational Records (CMP/P-PU-015), which contains "personal information on individuals who have been involved in criminal intelligence investigations relating to such things as [. . .] terrorism [. . .]," the purpose of which is the "detection, prevention or suppression or crime generally." This information is used "by federal departmental security officers for security and reliability screening, as well as for research, planning, evaluation and statistical purposes."⁹¹

The most recent Annual Report of the Privacy Commissioner reports that compliance audits by the Privacy Commissioner on these five banks found only one (DND/P-PU-040) "properly constituted." The other banks, with the exception of CMP/P-PU-015, "are now treated as open and their exempt status will be rescinded." Although the Privacy Commissioner found that CMP/P-PU-015 had not been properly constituted, and recommended to the Solicitor General that the exempt status be rescinded, the latter refused such recommendation.⁹²

The shrinking volume of totally exempt banks may herald a movement slowly gravitating towards a more open federal government. But such a

⁸⁹ *Ibid.*, 77-2. P.C. 1983-1230, April 23rd, 1983. An Order-in-Council was recently adopted to remove the totally exempt status from this bank: P.C. 1987-2414, December 3rd, 1987.

⁹⁰ P.C. 1985-800, March 14th, 1985.

⁹¹ *Personal Information Index*, 85-3. P.C. 1985-864, March 14th, 1985.

⁹² *Supra*, note 43, 21.

naively hopeful assessment is unwarranted considering the sweeping array of discretionary exemptions made available in the *Privacy Act* and *Access to Information Act*. For, as previously demonstrated, even after a personal information bank is declared no longer totally exempt, in most cases requests for access to security information are still denied under such discretionary exemptions as those contained in ss. 19, 21, 22, 23 and 26 of the *Privacy Act*. As a result, the recommendation of the Committee which issued *Open and Shut* that the concept of totally exempt banks be removed,⁹³ will hardly unleash the floodgates of security information some might have feared.

D. The Mystifying Arguments for an "Open Government"

Prior to the enactment of privacy and access to information legislation many critics justifiably castigated the government for its iron-clad secrecy. Some mobilized arguments such as freedom of expression to argue for access to government information: "[. . .] la libre circulation de l'information, dont les idées, étant la base de toute démocratie, sans cette première liberté, toutes les autres deviennent illusoires."⁹⁴ While others pointed with alarm to the chilling effect of the *Official Secrets Act*, and speculated that legislation would counteract it. In the words of the Franks Committee in Britain, this statute creates "a general atmosphere of unnecessary secrecy.

⁹³ *Open and Shut*, 48-49.

⁹⁴ *La sécurité nationale vs Le citoyen* (1978) 38 R. du B. 400.

[. . .] a general aura of secrecy."⁹⁵ Still others drew attention to the "inherent dangers of the 'darkness of secrecy,'"⁹⁶ amongst them the growing trend towards demystifying the democratic nature of government, widespread cynicism, and lack of faith in politicians, all of which have the capacity to converge into anti-government opposition, as well as potential dissent and protest. Gerald Baldwin articulately summarized this diminishing confidence in government as follows:

At the present time there exists a breakdown in communications between the rulers and the ruled. It is a phenomenon which has been apparent for some years, and new governments inherit the problem.

Needless to say, this breakdown vastly emphasizes the difficulty of government.

Laws providing access to government information will not immediately or automatically improve the relationship between the people and the executive. But if it is *perceived* that those in control are honest and open in their disclosure of the facts it will do much to restore the *goodwill and faith* between the citizens and those who govern.⁹⁷

For the McDonald Commission the two main interests in favour of greater disclosure of information regarding security and intelligence are:

First, there is the public's interest in the scrutiny and control of all arms of government, including the

⁹⁵ *Reform of Section 2 of the Official Secrets Act 1911*, Cmnd 7285 (1978), quoted in M.L. Friedland, *National Security: The Legal Dimensions* (1979), 53. For a discussion of the interrelationship between the *Official Secrets Act* and access to information legislation see Government of Canada, *Legislation on Public Access to Government Documents* (1977), 14-15 [Green Paper].

⁹⁶ Friedland, *ibid.*, 67 [notes omitted]. Quoting Jeremy Bentham, cited in *Scott v. Scott* [1913] A.C. 417, 477.

⁹⁷ *Infra*, note 114, 116 [emphasis added].

security activities. [. . . Second,] the right of a citizen to some recourse if he believes he has unjustifiably been adversely affected by the security machinery of government [. . .].⁹⁸

The federal government has responded to these concerns with a traditional, simplistic balancing-of-interests approach: while Canadians have a legitimate interest in seeking access to information, the government has an equally (and arguably *more*) legitimate interest in safeguarding from disclosure certain sensitive types of information "in the national interest." This conflict has been described as the "inescapable tension"⁹⁹ between the desire for greater open government and the need to refuse disclosure of information which would be harmful to State interests. In matter-of-fact fashion most commentators who embrace this classical dichotomy automatically agree that all security and intelligence matters should be exempt from disclosure and shrouded in the utmost secrecy. The reason in favour of such a policy, for the McDonald Commission, "is simple but weighty: if the government is to function effectively in the security and intelligence field, then most, although not all, of its operations and activities must remain secret."¹⁰⁰ On the side of openness, the Commission believed that the general authority of security and intelligence agencies, the general controls on their activities and the manner of their accountability should be subject to public access. But a massive amount of information should be exempt

⁹⁸ Report of the Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police, *First Report (Security and Information)* (1979), 41.

⁹⁹ *Reform of Section 2...*, *supra*, note 95, 4.

¹⁰⁰ *Supra*, note 98. Otherwise stated: while a considerable body of information relating to security and intelligence can be made public, some areas of security and intelligence activities cannot be made public "without completely destroying their effectiveness." *ibid.*, 39.

from disclosure, *viz.* "virtually all operational and administrative security and intelligence information [. . .],"¹⁰¹ otherwise the "striptease of government" might ensue.¹⁰²

E. The Demystifying Real World of Exemptions Based on National Security

This "inescapable tension" has helped considerably to legitimize the notion that an exemption from access for National Security matters is *necessarily* required. Even some of those who have argued vigorously for open access to government agree on this notion:

*Inevitably, any general principle of disclosure will necessarily be tempered by an exception in the name of "national security." This exception, therefore, may represent the bottom line of any legislation on the subject and contains the greatest potential for scuttling any would-be changes in the status quo.*¹⁰³

In the late 1970s the federal government laid the foundation for the widespread acceptance of a National Security exemption in its Green Paper on access to information, which included an exemption for documents or information, the release of which might be injurious to "national defence or security,"¹⁰⁴ inspired by former s. 41(2) of the *Federal Court Act*. The Standing Joint Committee on Regulations and Other Statutory Instruments

¹⁰¹ *Ibid.*, 41-42.

¹⁰² This disparaging phrase was used by a member of the British Secret Service in the British film "Defense of the Realm" (1986), directed by David Drury, to describe freedom of information legislation.

¹⁰³ *Freedom of Information*, 3 [emphasis added].

¹⁰⁴ Government of Canada, *Open Government* (1979), 10-11.

studied the Paper, and in June 1978 its report recommended the elimination of "national security" as "too imprecise," and the use of non-limitative examples for terms such as "national defence," as well as substituted "might be injurious" with "could be reasonably expected to be detrimental."¹⁰⁵

But it would appear that the federal government paid more attention to the *First Report* of the McDonald Commission in drafting its privacy and access to information legislation. The Commission recommended that no less than 11 main classes of information were in need of "protection."¹⁰⁶ A "special" exemption for security and intelligence documents should exist, according to the Commission, since the notions of "law enforcement," "national defence" and "foreign relations" cover only part of security and intelligence activities. Such an exemption should apply to all government departments and agencies, and due to the extreme sensitivity of this area it should be "heavily weighted in favour of secrecy."¹⁰⁷ The test for the exemption should be class-based, *i.e.* the "nature of the document" should be determinative, rather than an injury test based on possible or probable harm to a particular interest. The government should also be permitted to refuse to disclose the existence or non-existence of information in response to requests for information in response to requests for information exempted on the basis of security or intelligence. In addition to this exemption, there should also be a secondary "security of Canada" catch-all exemption, which would "employ a 'damage to the security of Canada' test, and would apply to *all* classes of government information." The test thereunder would be

¹⁰⁵ Friedland, *supra*, note 95, 68. Appended to the Senate Debates of June 30th, 1978.

¹⁰⁶ *Supra*, note 98, 45-47.

¹⁰⁷ *Ibid.*, 47.

whether the document "could, if released, reasonably be expected to threaten the security of Canada."¹⁰⁸

Based on these considerations the federal government was able to maintain strong support for exemptions based on National Security. Not surprisingly, the RCMP has continued to express enthusiasm for the principle of exempt banks:

This requirement has become more vital since the RCMP has been given the added responsibility of combating nation wide terrorism. The exempt bank and the authority to neither confirm nor deny an investigation is in progress until the proper moment, is vital in our fight against crime and terrorism.¹⁰⁹

The former RCMP Privacy and Access to Information Coordinator also argues that the release of information in exempt banks could jeopardize investigations or reveal the identity of informers, thereby resulting in a "chilling effect on the administration of justice."¹¹⁰

Others have not shared this enthusiastic zeal for sweeping exemptions to the right of access. Ken Rubin, a frequent access to information user, consultant and researcher, believes that the *Access to Information Act* is "undermined by the continuation of secrecy and arrangements made without

¹⁰⁸ *Ibid.*, 48-49 [emphasis in original].

¹⁰⁹ P.E.J. Banning, *The RCMP Perspective on the Access to Information and Privacy Acts* (1986), 8. This is an unpublished paper delivered to the National Forum on Access to Information and Privacy, held in Ottawa on March 6-7, 1986 by the Department of Justice and Treasury Board. One of the sessions was entitled "Law Enforcement and Security Issues Under Access to Information and Privacy Laws," which included Banning and R.H. Roy (Chairman of the Canadian Association for Intelligence and Security Studies), Ken Rubin and Justice M.D. Kirby.

¹¹⁰ *Ibid.* Banning waxed eloquent about the legislation, stating that the RCMP expressed its "total support" for it, which demonstrates just how harmless it is. *ibid.*, 3.

public scrutiny."¹¹¹ He is also of the opinion that Canada's legislation is even less open than that in the U.S., citing as an example the exempt status of records on terrorists and "extremist" individuals (according to the RCMP these ran to 75,000 pages of records), which would not have been so restricted under the U.S. freedom of information legislation. Characterizing the Canadian *Act* as a "predominantly secrecy act," he recommended that government "plug the most blatant secrecy loopholes contained in the Access Act exemptions and exclusions."¹¹²

Others have alluded to the much neglected class dimension in the access to information scheme. Mr. Justice M.D. Kirby, President of the Court of Appeal, Supreme Court in Sydney, Australia, has stated:

There is also the suggestion that depending as it does on the activities of enthusiastic individuals, our FOI [Freedom of Information] and privacy laws are very much the guardians of the educated middle class. They provide little in the way of enhanced freedom for those people who are most dependent on, and under the surveillance of, government -- the social service recipients, veterans, hospital patients

¹¹¹ Ken Rubin, *The User and Canada's Access to Information Act* (1986), 6. Also an unpublished paper presented at the National Forum on Access to Information and Privacy. See *supra*, note 109.

¹¹² *Ibid.*, 4, 7. Following a U.S. Federal District Court action settled in 1980 the New York Police Department was compelled to release all information collected with respect to police surveillance. Although the files are believed to run from 1904 to 1986, those from 1955 to 1986 encompass about 1.2 million documents, photographs, films and tapes concerning approximately 250,000 individuals and groups. See *City Police Secret Files Are Opened to Public*, *The New York Times*, December 14th, 1986, 58. Author Herbert Mitgang was also able to obtain heavily-censored files showing that more than 50 of the best-known authors in the U.S. were targeted by the FBI, which considered their writings to be subversive. Among them were Ernest Hemingway, Sinclair Lewis, Pearl Buck, John Steinbeck, Truman Capote, Thornton Wilder, Tennessee Williams and W.H. Auden. See Herbert Mitgang, *Dangerous Dossiers: Exposing the Secret War Against America's Greatest Authors* (1988); Elinor Langer, *Writers Under Suspicion*, *The New York Times Book Review*, April 10th, 1988, 13.

and other whose very position of dependence often makes the enforcement of their information right a matter of theory rather than practice."¹¹³

Less critical observers are of the view that the *status quo* is quite acceptable since they believe the exemptions are not arbitrary, and can be interpreted so as to maximize access to information. Gerald Baldwin, for instance, offers the following classically positivist comment on s. 15 of the *Access to*

Information Act:

The Act does not invest the head of the [government] institution with any arbitrary right to make decisions. Instead there is a statutory requirement to make a finding of *fact*, then apply the appropriate section and determine if an application is subject to an exempting clause, thus bringing it under a *rule of law*.¹¹⁴

Similarly, there is the view, vigorously propounded by the Privacy and Information Commissioners, that a strict interpretation of exemptions will right any potential wrongs. The Québec Access to Information Commissioner shares this misleading view, which conveniently overlooks an assessment of the *merits* of the exemptions themselves. She notes that the Québec Access to Information Commission "a constamment affirmé le principe de l'interprétation large du droit d'accès au détriment des restrictions qui

¹¹³ Justice M.D. Kirby, *The Ten Information Commandments* (1986), 7-8. See *supra*, note 109.

¹¹⁴ Gerald W. Baldwin, *A Review of the Access to Information and Privacy Laws as Applied to the Department of External Affairs and Suggested Changes to the Access to Information and Privacy Laws* (1986), 5 [emphasis added] [unpublished paper]. He quotes an internal guideline of the Department dated June 1983 that "[i]t should be noted in particular that embarrassment to the government or to individuals is not a reason for exempting information under the Act," followed by a most revealing comment: "I am afraid that some officers either skipped these sections or read them and promptly forgot them." *ibid.*, 6-7.

doivent, justement, recevoir une interprétation restrictive."¹¹⁵ But as the decisions of the Commissioners themselves reveal, the obfuscating restrictive interpretation technique has utterly failed to enhance access to security information.

F. Open and Shut: The Total Exemptions Come Tumbling Down?

To date the single most comprehensive reassessment of the privacy and access to information legislation has been provided by the Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act released in 1987.¹¹⁶ The Report deals with exemptions and Cabinet documents very thoroughly, noting with brutal frankness that the exemptions protect "a variety of interests, both governmental and non-governmental."¹¹⁷ It quotes a

¹¹⁵ Thérèse Giroux, Commissioner, Québec Access to Information Commissioner, *L'Accès à l'information : l'expérience québécoise* (1986), 9. See *supra*, note 109. One of the five categories of exemptions in the Québec Act, which was adopted in June 1982, and has largely been in force since July 1st, 1984, is concerning "public security" rather than National Security: *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q. ch. A-2.1, s. 28. As to the rudimentary rule of construction that exceptions must be restrictively interpreted, see also J. Stuart Russell, *Discrimination on the Basis of Political Convictions or Beliefs* (1985) 45 R. du B. 377, 422; J. Stuart Russell, *Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada* (1981) 27 McGill L.J. 92, 116.

¹¹⁶ *Open and Shut*, *supra*, note 51. The unanimous Report, tabled in the House of Commons on March 31st, 1987, is designed to be a "comprehensive review of the provisions and operations of the Access to Information Act and the Privacy Act" pursuant to s. 75(2) of each of these Acts. *Ibid.*, v, quoting from the Order of Reference of the Clerk of the House of Commons, November 19th, 1984. David Flaherty reported at the 1987 Annual Conference of the Canadian Law and Society Association, held in Hamilton, Ontario during the Meeting of the Learned Societies, that the Report was in fact drafted by him and Murray Rankin, the two principal consultants to the Committee. The federal government had 120 days to table a "comprehensive response," pursuant to Standing Order 99(2). See Department of Justice, Access and Privacy, *The Steps Ahead* (1987).

¹¹⁷ *Ibid.*, 19.

document of the Department of Justice, which sets out the various tests to justify exemptions:

The exemptions are based on either an "injury test" or "class test." Some exemptions are discretionary, while other are mandatory. Exemptions which incorporate an "injury test" take into consideration whether the disclosure of certain information could reasonably be expected to be injurious to a specified interest. Information relating to activities essential to the national interest, the security of persons or their commercial affairs are examples. "Class exemptions" refer to a situation in which a category of records is exemptable because it is deemed that an injury could reasonably be expected to arise if it were disclosed. An example of this is information obtained in confidence from the government of a province or an institution thereof.¹¹⁸

But as a result of the judgment in *Information Commissioner v. Chairman, CRTC* the exercise of discretionary exemptions in the *Access to Information Act* by government institutions will likely not be disturbed.¹¹⁹ In that decision Jerome A.C.J. of the Trial Division of the Federal Court, a former Liberal M.P. and Speaker of the House of Commons, ruled that the Court will not review the exercise of discretion by a government institution once it rules that a record falls within the exemption, despite the fact that the Information Commissioner had reviewed the record and was arguing for its disclosure. The Report makes the general recommendation that all exemptions should be discretionary in nature, *and* they should also "generally contain an 'injury test,' so that the government institution is

¹¹⁸ Department of Justice, *The Access to Information Act: A Background Study* (1986), 3. Quoted in *Open and Shut* at 19.

¹¹⁹ No. T-707-85, F.C.T.D., February 25th, 1986, unreported.

required to demonstrate in each case the kind of harm that could reasonably be expected to occur as a result of disclosure."¹²⁰

The exemptions for three major State interests, namely international affairs, national defence and National Security, are examples of discretionary exemptions containing an injury test.¹²¹ But according to the Department of Justice no sensitive National Security information has been released thereunder,¹²² which leads one to conclude that they have shifted from ostensible discretionary exemptions to *mandatory* exemptions. Regrettably, however, the Report is more concerned with fine-tuning the provisions than overhauling them. Accordingly, their only recommendation for these exemptions is that the *Acts* be clarified such that the classes listed "are merely illustrations of possible injuries; the overriding issue should remain whether there is an injury to an identified state interest which is analagous to those sorts of state interests listed in the exemption."¹²³

Since these exemptions are both discretionary and contain an "injury test," the only other change recommended would be to add that the potential injury must be "significantly injurious" in nature. This might enhance the possibility of disclosure, but considering the decision in *Information*

¹²⁰ *Open and Shut*, 20. The degree of injury to a stated interest resulting from disclosure would have to be "significant." Previously the government was very reluctant to advance such a test, in part due to the need for a subjective assessment, but also since it is more apt to lead to litigation: "Injury exemptions, based as they are on somewhat vague and general criteria, are more likely to give rise to disputes between government institutions and applicants." *Supra*, note 1, 3.

¹²¹ S. 15 *Access to Information Act*; s. 21 *Privacy Act*.

¹²² *Open and Shut*, 21. See *supra*, note 51, 23.

¹²³ *Ibid.*, 23. Although no specific recommendations are proposed for s. 16 of the *Access to Information Act* the Report does also recommend that the exemptions for Cabinet confidences be subject to a class-tested, discretionary exemption. *Ibid.*, 23-33. Cf. s. 36.3 *Canada Evidence Act*.

Commissioner v. Chairman, CRTC the Court is prevented from reviewing the exercise of discretion to refuse access to information held by government institutions, and it is doubtful that the long-entrenched secrecy of the State would be loosened by this new test. Yet on this crucial issue of exemptions the federal government refused to act. In its response to the Committee's Report, entitled *The Steps Ahead*, the Department of Justice refused to follow the bulk of the Committee's recommendations.¹²⁴ And to date no amendments have been introduced into the House of Commons to reform access and privacy legislation, which indicates that the federal government is either quite content with the *status quo*, or does not regard this area of the law as much of a priority for law reform.

As noted previously, the federal government has been slowly decreasing the number of totally exempt banks under s. 18 of the *Privacy Act*. In the view of the Committee, in light of the *Re Ternette* decision¹²⁵ "and subsequent developments, the concept of exempt banks has lost much of its rationale and validity."¹²⁶ Concurring with the opinion of the Privacy Commissioner and the Canadian Bar Association, the Report recommended

that the concept of exempt banks be removed from the *Privacy Act* by repealing sections 18 and 36, since there is no compelling need to retain such a concept in light of the other strong exemptions on disclosure that exist in the legislation.¹²⁷

¹²⁴ Department of Justice, *supra*, note 104. See also *Annual Report (./) Information Commissioner (./) 1987-88* (1988), 11-17. This is the Information Commissioner's fifth annual report. See also Susan Delacourt, *Access to information blocked, official says*, *The Globe & Mail*, June 29th, 1988, A4.

¹²⁵ *Supra*, note 44.

¹²⁶ *Open and Shut*, 48. See also Privacy Commissioner, *Annual Report 1985-86* (1986), 23.

¹²⁷ *Ibid.*, 48-49. See also *Minutes of Proceedings and Evidence of the Standing*

For the reasons previously enumerated it is, however, highly doubtful that this modification would result in increased access.

Conclusions

Nevertheless, the Report was generally greeted with enthusiasm by commentators, many of whom accepted the mystifying notion that fewer exemptions will lead necessarily to greater access. One editorialist declared that a "refreshing current of good sense" flows through the Report, which recommends "intelligent amendments."¹²⁸ The Report furthermore heightened the legitimacy for the remaining exemptions in the legislation. One journalist fell prey to this traditional discourse by stating that the "exceptions" are "intended to protect *legitimate interests*, such as national security and the privacy of individuals."¹²⁹ In fact the Committee has been so successful in promoting this false notion of greater access to National Security information that some have even falsely concluded that the National Security exemptions are being diminished. Journalist Tom Riley claims it is unusual that the Report "has flown in the face of developments in other jurisdictions. The trend in other countries with such legislation has been to attempt to undercut its efficacy on two grounds: national security and fiscal restraint."¹³⁰ Yet considering its nature as a global Parliamentary review,

Committee on Justice and Solicitor General, 11: 30-1; 20: 19.

¹²⁸ *Public and private* [Editorial], *The Globe & Mail*, April 4th, 1987, D6. This editorial urges the federal government to act on its recommendations.

¹²⁹ Jeff Salbot, *Report said to urge wider access to files*, *The Globe & Mail*, March 28th, 1987, A5 [emphasis added].

¹³⁰ Tom Riley, *Right to information needs beefing up*, *The Globe & Mail*, June 12th, 1987, A7. He cites Australia, Britain and the U.S. as examples. Cf. Sebastien Cobler, *Law, Order and Politics in West Germany* (1978), 71.

and in light of the positive reaction it has elicited, Flaherty is perhaps correct to say that the Report has set the tone of the privacy and access to information debate for the next three to five years.¹³¹

Nevertheless, in light of the generally negative jurisprudential evolution combined with the refusal of the government to increase access to National Security documents, the conclusion drawn by William Kaplan, after his critical analysis of the *Access to Information Act*, would apply equally to the *Privacy Act*: the "future prospect of giving full effect to the purpose provision looks extremely bleak."¹³² But to ensure proper and full access to information which may be categorized as concerning National Security, the only effective solution is the repeal of all exemptions in access to information and privacy legislation on the ground of National Security.¹³³ The government could still rely upon a variety of other exemptions which could be employed to prevent disclosure, while Canadians would finally have fuller access to National Security information.

131 *Supra*, note 116.

132 William Kaplan. *The Access to Information Act: A 1988 Review* (Fall 1988) 22 *Labour/Le Travail* 181, 198.

133 *Cf. Mandel, supra*, note 79, 214.

CHAPTER V

THE CROWN PRIVILEGE TO REFUSE DISCLOSURE OF NATIONAL SECURITY INFORMATION

The previous chapter demonstrated that under the privacy and access to information legislation the federal government possesses sweeping powers to prevent disclosure of information on the grounds of National Security and related exemptions. This virtually iron-clad principle of non-disclosure finds expression in the judicial arena as the Crown privilege, which can be invoked in judicial proceedings on certain grounds to block the disclosure of information or documents in the possession of the federal government. But although the goal of the Crown privilege and the National Security exemption to privacy and access to information legislation is the same, each has its own distinct, although interrelated, common law and statutory evolution. In recent times the Crown privilege has also provoked a growing number of judicial decisions and critical scholarly commentary, as well as some pleas for reform.

A. Historical Evolution

(1) The Common Law Position

The Crown privilege¹ is rooted in the absolute common law principle that once a minister of the Crown asserts that the disclosure of information or documents in judicial proceedings would be contrary to the public interest the court must follow that decision and refuse disclosure in all

¹ In the United States it is called "Executive privilege," while in England it is known as the "public interest privilege." See, e.g., Cross, *Evidence* (1979, 5th ed.), 305. For a terminological criticism see *Rogers v. Home Secretary; Gaming Board for Greater Britain* [1973] A.C. 388, 400 (H.L.), *per* Lord Reid.

circumstances. Over the course of time, and under the weight of considerable criticism, particularly since the introduction of access to information and privacy legislation, the absolute character of this principle has fortunately begun to slowly evolve towards greater judicial intervention, accompanied by limited possibilities for disclosure.

For several decades the repository of this traditional view was the House of Lords decision in *Duncan v. Cammell, Laird & Co. Ltd.*² which stood for the proposition that if a minister of the Crown swore an affidavit that disclosure of certain documents would be contrary to the public interest, the court would respect that decision and refuse production. Lord Simon laid down the general approach that was to be followed both in Britain as well as Canada for many years:

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the *public interest* requires that they be withheld. The test may be found to be satisfied either

- (a) by having regard to the *contents* of the particular documents, or,
- (b) by the fact that the *document belongs to a class* which, on grounds of *public interest*, must *as a class* be withheld from production.³

According to Murray Rankin this "class" test would also cover National Security documents, but since World War II the invocation of such "class"

² [1942] A.C. 624, [1947] 1 All E.R. 587 (H.L.). See also S. Linstead, *The Law of Crown Privilege in Canada and Elsewhere* (1966-69) 3 Ottawa L.R. 79, 100; C.A. Wright, *Comment* (1942) 20 Can. Bar Rev. 805 (criticizing *Duncan*); Peter W. Hogg, *Constitutional Law of Canada* (1977), 163, 167.

³ A.C. 624, 636, *per* Viscount Simon, L.C. [emphasis added].

claims have evoked increasing skepticism, leading ultimately to the scope of the privilege being greatly reduced.⁴

Most notably, in *R. v. Snider*⁵ the Supreme Court of Canada held that *Duncan* was restricted to civil actions, and therefore the Court was not bound by that decision, since the issue was the production of income tax returns in a criminal proceeding. Accordingly, it held that the affidavit of the Crown opposing production of the returns was not conclusive, and the ministerial opinion should be refused unless it was shown clearly that the production of the documents might prejudice the public interest: "It must follow that as a class these documents, in the ordinary course, do not involve questions of safety or security and as such their production would not be prevented upon the basis of public interest."⁶ This conclusion reaffirmed the foundation of the rule, that injury to the public interest is the principle factor, and not the fact that the documents are confidential or official.⁷ Moreover, Rankin concludes that the opinions of Rand and Estey JJ. "implicitly accept the class/contents distinction enunciated in *Duncan* and affirm that 'national security' information falls within a sacrosanct 'class' for which the Minister's affidavit forecloses further judicial inquiry."⁸

⁴ T. Murraray Rankin, *Freedom of Information in Canada [:] Will the doors stay shut?* (1977) [A research paper prepared for the Canadian Bar Association], 15 [hereinafter cited as *Freedom of Information*].

⁵ *Re Constitutional Questions Determination Act (B.C.) sub nom. R. v. Snider* [1954] S.C.R. 479, [1954] 4 D.L.R. 483, 109 C.C.C. 193. See also, in the same sense, *Gronlund v. Hanson* (1968) 64 W.W.R. 74 (B.C.C.A.).

⁶ 4 D.L.R. 483, 497, *per* Estey J.

⁷ See *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.* [1916] 1 K.B. 822, 830.

⁸ *Freedom of Information*, 18 [note omitted]. He cites as an example *Re Lew Fun Chave* [1955] O.W.N. 821, [1955] 5 D.L.R. 513 (O.H.C.) where the Crown successfully claimed that documents relating to immigration matters belonged to a "class" of

The *Duncan* rule was further undermined in *Gagnon v. Québec Securities Commission*,⁹ where the Supreme Court of Canada held that a Crown certificate affirming that it was not in the public interest to disclose certain facts and documents was not conclusive, and the Court had the discretion to determine whether the public interest would be threatened by disclosure. In fact, in one recent decision the Ontario Court of Appeal questioned whether *Duncan* had ever been accepted in Canada.¹⁰

A procedural upheaval in the law of Crown privilege occurred shortly thereafter in the celebrated House of Lords judgment in *Conway v. Rimmer*.¹¹ Here the ministerial affidavit declared that each government document formed part of a class of documents, the production of which would be injurious to the public interest. But the House of Lords ruled that the documents should be produced for inspection, and if the possibility of harm to the public interest was insufficient to justify their retention,

documents which should not be disclosed on the ground of public interest. Here the Court held:

[. . .] there is little difficulty in concluding that basically the rights of the individual applicants to compel production of these documents are of much less importance than the need to preserve to the Minister complete power to carry out his duties, and curtailment of which would adversely affect the nation as a whole. Accordingly the public interest being clearly paramount, the Court should not order production.

[1955] O.W.N. 821, 826.

⁹ [1965] S.C.R. 73, 50 D.L.R. (2d) 329.

¹⁰ *Smerchanski v. Lewis; Smerchanski v. Astra Securities Co. Ltd.* (1981) 58 C.C.C. (2d) 328 (Ont. C.A.) (an excellent review of the common law is found at 331-333).

¹¹ [1968] A.C. 910. See Lord Denning in *Alfred Crompton Amusement Machines Ltd v. Commissioner of Customs and Excise* [1972] 2 All E.R. 353, 379 (C.A.); M.L. Friedland, *National Security: The Legal Dimensions* (1979) [A study prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police], 60-61.

disclosure should be ordered. The decision represented a victory for the courts in their battle against the executive's exclusive monopoly over deciding what matters should not be disclosed in court. The potential of *Conway*, in this regard, was far-reaching, according to Rankin:

As a result of their decision, the courts have ensured that not only will a minister's affidavit cease to receive automatic acceptance in the future, but also that the judiciary has the authority to inspect requested documents *in camera*.¹²

But the House of Lords failed to upset the applecart on the more substantive issue: is it proper to refuse disclosure of documents on the ground of injury to public interest or National Security? In fact the obsession with procedural reform in the law of Crown privilege, unleashed by *Conway*, has served to deflect concern from this more substantive underlying issue.

The House of Lords did not, however, completely discard the "class" notion. Lord Upjohn, for instance, stated:

No doubt there are many cases in which documents by their very nature fall in a class which requires production such as, only be way of example, the security of the state, high-level interdepartmental minutes and correspondence and documents pertaining to the general administration of the naval, military and air force services. Nearly always such documents would be the subject of privilege by their contents, but by their 'class' in any event they qualify for the privilege. [. . .] But no catalogue can reasonably be compiled.¹³

Rankin believes that this is the "most broadly-worded in its respect for the

¹² *Freedom of Information*, 20.

¹³ *Supra*, note 11, 993.

"class" of documents concerning the "security of the state." In no subsequent case has the Crown attempted to assert the "class" doctrine.¹⁴ And although *Conway* allows the court to analyze the contents of a document to determine where the public interest lies, Rankin cautions that such an analysis may not extend to matters of National Security.¹⁵ Later decisions in Canada have affirmed, however, the general rule of *Conway*.¹⁶

(2) The Statutory Crown Privilege

When the *Federal Court Act* was proclaimed in 1970,¹⁷ shortly after the decision in *Conway*, it was explained by John Turner, then Minister of Justice, that s. 41 was "an attempt to codify"¹⁸ the doctrine of Crown privilege as interpreted by *Conway* and other cases. Section 41(2) 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,

¹⁴ *Freedom of Information*, 23. See, e.g., *Alfred Crompton*, *supra*, note 11; *R. v. Lewes Justices* [1971] 2 All E.R. 1126, 1130.

¹⁵ *Ibid.*, 23-24. "However it is not at all clear that the traditional judicial deference to the Executive in matters of national security has been altered substantially by the decision."

¹⁶ Peter W. McWilliams, *Canadian Criminal Evidence* (1984, 2nd ed.), 977. See, e.g., *Huron Steel Fabricators (London) Ltd. v. M.N.R.*; *Fratschko v. M.N.R.* (1973) 31 D.L.R. (3d) 110, [1972] F.C. 1007, 72 D.T.C. 6426 (T.D.), *aff'd* 41 D.L.R. (3d) 407, 73 D.T.C. 5347, [1973] C.T.C. 422; *Re Blais and Andras* [1972] 30 D.L.R. (3d) 287, [1972] F.C. 958 (F.C.A.); *R. v. Homestake Mining Co.* (1977) 38 C.R.N.S. 214, 76 D.L.R. (3d) 521, [1977] 3 W.W.R. 629 (Sask. C.A.).

¹⁷ R.S.C. 1970 (2nd Supp.), c. 10, as am.

¹⁸ *Parl. Deb.* H.C., 28th Parl., 3rd Sess., October 29th, 1970, 697.

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.

Although Henri Brun agreed with Turner that s. 41 merely codified the case law,¹⁹ Rankin was of a different view:

[I]t is apparent that by virtue of section 41(2), any jurisdiction Canadian courts may have derived from *Conway v. Rimmer* to look behind a Minister's affidavit in respect of documents within the four categories listed in the subsection is expressly curtailed. For matters of "international relations, defence or national security, federal-provincial relations" or Cabinet confidences, the fading "class" principle has been dramatically revived. In all such cases, the executive fiat reflected in the Minister's affidavit is conclusive.²⁰

Section 41(2) did, however, abolish the right to challenge a claim of Crown privilege if the claim was demonstrably (a) taken in bad faith, (b) based on an irrelevant or improper consideration, or (c) based upon a false factual premise. For in *Conway* it was stated that a claim of Crown privilege could be overridden in any of these cases. But as Rankin astutely observes, s. 41(2) could countenance serious abuse:

[. . .]At any time the Canadian Executive sought to camouflage a politically embarrassing document behind the rubric of 'national security', the courts would be powerless to inquire further. In *Conway v. Rimmer* Lord Pearce quoted the comment that

¹⁹ H. Brun, *L'Exécutif et ses documents: Orientation récente du droit canadien* (1974) 15 C. de D. 659, 662-663.

²⁰ *Freedom of Information*, 25.

such a vague undefined doctrine was a standing invitation for executive abuse and that it was not surprising that 'the Crown having been given a blank cheque yielded to the temptation to overdraw.' In section 41(1) the courts were asked explicitly to weigh competing public interests concerning disclosure. It appears that for any matters within the four categories in section 41(2), all of which ostensibly encompass more significant public records, the legislators have concluded that the judiciary cannot be granted responsibility.²¹

Despite these serious objections, there were no reported decisions in which s. 41(2) was interpreted until 1977, when it was held by the Supreme Court of Canada that the provision was neither inoperative nor *ultra vires*.²²

Relatively recent amendments to the *Canada Evidence Act*,²³ made in conjunction with the introduction of the privacy and access to information legislation,²⁴ supercede s. 41(2), and although the prohibition of disclosure is no longer absolute, it is still fraught with troublesome evidentiary obstacles.

²¹ *Ibid.*, 27-28 [note omitted]. With respect to s. 41(1) see, e.g., *Re Blais*, *supra*, note 16; *Churchill Falls (Labrador) Co. Ltd. v. The Queen* (1972) 28 D.L.R. (3d) 493 (F.C.T.D.). Rankin is also alarmed by the absence of any criteria in s. 41(2):

Given that a determination that some matter warrants "national security" protection is totally beyond any external review, what criteria does the Executive employ to reach a conclusion of this sort? Secondly, what degree of potential harm upon disclosure must be perceived before withholding on the basis of this "class" doctrine can be justified? (at 26)

²² *Commission des droits de la personne v. Attorney General of Canada* [1977] C.S. 47; *aff'd* [1978] C.A. 67; *aff'd* [1982] 1 S.C.R. 215, 4 C.H.R.R. D/1585, 134 D.L.R. (3d) 17. The decisions are discussed in J. Stuart Russell, *Discrimination on the Basis of Political Convictions or Beliefs* (1985) 45 R. du B. 377, 398-400. Rankin states that this case demonstrates the judiciary's "particular deference to the executive in national security matters." See Murray Rankin, *National Security: Information, Accountability, and the Canadian Security Intelligence Service* (1986) 36 U.T.L.J. 249, 282.

²³ R.S.C. 1970, c. E-10, as am.

²⁴ S.C. 1980-81-82-83, c. 111, s. 4 and Sch. III; proclaimed in force November 23rd, 1982. See Russell, *supra*, note 22, 403-404.

Three separate situations in which the Crown privilege can be invoked are provided for by ss. 36.1, 36.2 and 36.3 of the *Canada Evidence Act*. First, a federal minister or other interested person²⁵ may object to the disclosure of *information* "on the grounds of a specific public interest." A superior court shall hear or examine the information which is the subject of such an objection and, subject to ss. 36.2 and 36.3, order its disclosure if it concludes that "the public interest in disclosure outweighs in importance the specified public interest."

Secondly, pursuant to s. 36.2(1), where the objection under s. 36.1(1) is made "on grounds that the disclosure would be injurious to international relations or national defence or security," the objection is determined only by the Chief Justice of the Federal Court. An application under s. 36.2(1) must be heard *in camera*, and *ex parte* representations may be made. Finally, s. 36.3 allows for objections to disclosure of Cabinet confidences, where disclosure shall be refused "without examination or hearing of the information."²⁶

These provisions, as well as ss. 41 and 52 of the *Access to Information Act*, now codify the new qualified federal Crown privilege. This positive evolution demonstrates that the federal government has "abandoned the claim to an absolute privilege."²⁷ Subject to certain restrictions in the *Access to Information Act*, for instance, McWilliams believes that

²⁵ See Jacques Fortin, *Preuve pénale* (1984), 148. As to the meaning of who is a "person interested" in s. 36.1 see *R. v. Lines* (1985) 22 C.C.C. (3d) 230 (N.W.T. S.C.); (1986) 27 C.C.C. (3d) 377 (N.W.T. C.A.) ("person interested" must be a person with an authority in relation to the public interest, e.g. a person with an official status in relation to the federal public service).

²⁶ See also ss. 41 and 52 *Access to Information Act*, S.C. 1980-81-82-83, c. 111; *supra*, ch. IV; s. 44 *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as am.

²⁷ See McWilliams, *supra*, note 16, 979; *Procureur général du Canada v. Bélanger*

it may now generally be said that the statutory law in the federal jurisdiction in Canada as to Crown privilege accords with the common law as stated by the House of Lords in *Conway* [. . .]. It sets out in effect a complete code of law and procedure.²⁸

Section 36.1 concerns the production of information, not just documents, but it does not affect the police informer privilege, which is of considerable significance concerning the Canadian Security Intelligence Service (CSIS). For McWilliams correctly observes that it is

apparent that it does not directly concern the police informer privilege. It would moreover be highly inconvenient to the operation of the criminal courts if a resort to this procedure was necessary to invoke that privilege.²⁹

[1988] R.J.Q. 105, 106, 108-110 (Qc C.A.) where Rothman J.A. declared that these new provisions "reflect a notable trend, in recent years, against claims of absolute privilege or blanket immunity for documents as a class -- a trend in the direction of openness." (at 110, note omitted)

- 28 *Ibid.* He also believes that the provisions apply not only in federal courts and to proceedings under federal jurisdiction, but also "whatever the court or statute if the process is directed to the federal government or any agency under it, i.e., the R.C.M.P. and the claim is made on behalf of the federal Crown or any of its governmental institutions." (at 980)
- 29 *Ibid.*, 980. See *Re Bisailon & Keable* (1980) 62 C.C.C. (2d) 340 (Qc C.A.) concerning the scope and method of exercising this privilege. The Supreme Court of Canada held that the Respondent Commissioner could not compel a police officer to disclose his sources of information based, in part, on the common law rule against disclosure of the identity of police informers: [1983] 2 S.C.R. 60, (1983) 7 C.C.C. (3d) 385, 2 D.L.R. (4th) 193, 37 C.R. (3d) 289, 51 N.R. 81. As for the Crown privilege, the Court held that art. 308 of the Code of Civil Procedure of Québec, similar to s. 41 of the *Federal Court Act*, affirms the supremacy of the judiciary over the executive with respect to the Crown privilege or the administration of justice, where the two conflict. (at 102) See also *Davidson v. Solicitor General of Canada* [1989] 2 F.C. 341 (C.A.), *aff'ing* [1987] 3 F.C. 15, 41 D.L.R. (4th) 533, 9 F.T.R. 295 (T.D.) concerning the rule against disclosing the identity of police informers.

This approach was confirmed in *Attorney General of Newfoundland v. Trahey*³⁰ which concerned an application by the Attorney General of Newfoundland for an order, pursuant to s. 36.1, that the testimony of police officers which would disclose the identity of police informants and the contents of information obtained should not be received as evidence, on the ground that it would be contrary to the public interest. The accused submitted that the secrecy rule concerning police informants' identities, confirmed by *Bisaillon v. Keable*,³¹ was not absolute, and the court should balance the public interest, as suggested by the Québec Court of Appeal decision in *Bisaillon*, especially in light of s. 7 of the *Canadian Charter*. Lang J. did not even consider this argument, rather he granted the application on the strength of *Bisaillon*, and disposed of the accused's arguments in the following brief conclusion: "I have considered the submission of counsel [. . .] in this regard and I find that it does not warrant a change to my herein allowing the application."³²

B. Jurisprudential Evolution

Since the enactment of ss. 36.1 to 36.3 of the *Canada Evidence Act* layer upon layer of judicial interpretation have etched out the basic guidelines for interpreting these provisions. One of the first decisions was *Smith, Kline & French Laboratories Ltd. v. Attorney-General of Canada*,³³ where the

³⁰ (1984) 51 Nfld. & P.E.I.R. 203, 150 A.P.R. 203, 15 C.C.C. (3d) 532 (Nfld S.C.T.D.) [hereinafter cited to 51 Nfld. & P.E.I.R. 203].

³¹ *Supra*, note 29.

³² *Supra*, note 30, 210-211.

³³ [1983] 1 F.C. 97 (T.D.), *per* Strayer J. For the history of the Crown privilege or immunity regarding disclosure of documents in civil litigation see, *e.g.*, *Landreville v. The Queen* [1977] 1 F.C. 419, 421-422 (T.D.); *Attorney-General of Canada v.*

Attorney General of Canada asserted a privilege against disclosure of certain documents by way of a Privy Council certificate, pursuant to s. 36.3(1). Strayer J. highlights the advances contained in the new provisions, stating that while s. 36.2 "covers much of the area formally [*sic*] covered by subsection 41(2) of the *Federal Court Act*," objections under s. 36.2 are "subject to some judicial review whereas under the previous provisions [. . .] they were not."³⁴

He was of the view that sections 36.1 and 36.2 "preserve, and extend, the application of the 'balancing' approach favoured in *Conway v. Rimmer and Another* and prescribed in subsection 41(1) of the *Federal Court Act*."³⁵ Strayer J. notes that under s. 36.2 the courts can go behind the certificate and examine the documents in question, which leads him to the following conclusion:

The history of Crown privilege also indicates, however, that the dominant common law view which has developed is that the courts should have a role, in appropriate cases, in balancing the respective public interests. While the Parliament of Canada has not permitted an equally wide role for Canadian courts with respect to federal government documents and information, it must be assumed to have been aware of these common law developments in its most recent legislation. This suggests that Parliament in the amendments to the *Canada Evidence Act* intended to *narrow substantially* the unfettered discretion of the executive to withhold information and documents which would otherwise be relevant to a matter before the courts.³⁶

Commission des droits de la personne (1982) 134 D.L.R. (3d) 17, 24-26. [1982] 1 S.C.R. 215, 4 C.H.R.R. D/1585 (S.C.C.); *Carey v. The Queen* (1983) 39 O.R. (2d) 273 (C.A.).

³⁴ *Ibid.*, 925-926. See *Goguen v. Gibson* [1983] 1 F.C. 872, 872 (T.D.).

³⁵ *Ibid.*, 927.

³⁶ *Ibid.*, 930 [emphasis added].

He fails, however, to indicate whether or not the pre-existing case law should be called upon in helping to interpret the new provisions.

The first objection based on National Security under s. 36.2 came before the courts in *Re Goguen and Albert and Gibson*.³⁷ The Appellants were charged with conspiring to break and enter and commit theft, and breaking and entering and committing theft, arising out of an operation carried out by the RCMP Security Service called "Operation Ham," which involved the theft of tapes containing the Parti Québécois membership lists. The Deputy Solicitor General filed a certificate objecting to disclosure of some 8,200 pages of documents of the RCMP Security Service, stating that their disclosure would be injurious to National Security and international relations.³⁸ In the Trial Division of the Federal Court, Thurlow C.J. dismissed the application for review of the objection pursuant to s. 36.2.³⁹

Le Dain J. of the Federal Court of Appeal was of the view that since a judge has a discretion whether or not to look at the documents in dispute before making a determination, examination should be undertaken only if it

37 (1984) 10 C.C.C. (3d) 492, [1983] 2 F.C. 463, 7 D.L.R. (4th) 144, 3 Admin. L.R. 225, 50 N.R. 286 (F.C.A.), *per* Ryan, Le Dain & Marceau JJ. See *Procureur général du Canada v. Bélanger*, *supra*, note 27, 109.

38 The objection was further supported by a secret affidavit of the Deputy Solicitor General which explained the manner in which disclosure could be injurious to National Security and international relations, identified the general subject matter of the documents and files in question, and invoked the reasons of public interest for the objection to disclosure. The Appellants sought the documents to support their defence of colour of right or lack of fraudulent intent, within the meaning of s. 283 *Criminal Code*, R.S.C. 1970, c. C-34, as am. The incident occurred during the night of January 9th, 1973 when the headquarters of the Parti Québécois was entered surreptitiously, and computer tapes recording membership lists were removed, copies and later returned.

39 [1983] 1 F.C. 872 (T.D.).

appears necessary to determine whether disclosure should be ordered.⁴⁰ With respect to s. 36.1(2), in determining whether to examine the information the judge may consider "the apparent balance of the competing public interests at that stage and the likelihood that examination could alter the view of that balance and the impression as to whether disclosure should be ordered."⁴¹ He therefore concluded that disclosure of the information requested for the Appellants' defence would be likely, for the reasons disclosed in the certificate and secret affidavit, "to be injurious to national security and international relations, and that such injury would outweigh in importance the relative importance of the disclosure to the appellants' defence."⁴²

A more elaborately reasoned judgment was rendered by Marceau J., who begins by declaring that the conflict between a particular public interest and the public interest in the administration of justice is "one of the most delicate situations a court of law may be confronted with."⁴³ He correctly observes that the extensions of the right to object in the new provisions include the following features: (1) it can be exercised orally and not by the production of a sworn certificate in all cases, (2) it is not restricted to

⁴⁰ *Supra*, note 37, 494, 497. Concurred in by Ryan J. The following cases were referred to: *Conway v. Rimmer*, *supra*, note 11; *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090; *Air Canada v. Secretary of State for Trade (No. 2)* [1983] 1 All E.R. 910, [1983] 2 W.W.R. 494; *Re Carey & The Queen* (1983) 7 C.C.C. (3d) 193, 1 D.L.R. (4th) 498, 43 O.R. (2d) 161, 3 Adm. L.R. 158 (Ont. C.A.).

⁴¹ *Ibid.*, 499.

⁴² *Ibid.*, 500. Therefore the information should neither be examined nor disclosed, and the appeal was dismissed. He furthermore declared that the Court could order the disclosure of *some* of the information, but acknowledged the disadvantages inherent in information abstracted from its full context. (at 499-500)

⁴³ *Ibid.*, 500.

documents, but includes any information, and (3) it is granted to any interested person, rather than just ministers of the Crown. He then situates the discussion by placing National Security at the top of the public interest hierarchy: "That there can be no public interest more fundamental than national security is as true today as it was yesterday." And he acknowledges that unlike a Cabinet confidence, "a possible danger to international relations or national security is not so easily capable of being recognized and, as a result, may be feared and evoked somewhat too quickly, albeit in perfect good faith."⁴⁴ For him the purpose of the new provisions is as follows:

The new rule, as I view it, is aimed at thwarting those possible exaggerations, overstatements or abuses by giving the court the authority to examine the information and to declare that the public interest involved as the basis for objecting to disclosure, although related to international relations or national security, is, in any given instance, outweighed in importance by the public interest in requiring disclosure for the due administration of justice. But I would think that, on it being established *as a fact* and *not merely as a mere possibility* that international relations or national security are to be genuinely affected by disclosure, the *harm* that may result to the person seeking the information, if that information is denied, will have to be great indeed for the judge to say that the public interest in the due administration of justice in this particular case nevertheless is predominant and requires that the information be disclosed.⁴⁵

While Marceau J. is not insisting that an applicant prove as a "fact," as opposed to a mere "possibility," that National Security or some other interest

⁴⁴ *Ibid.*, 504.

⁴⁵ *Ibid.*, 505 [emphasis added].

are to be affected by disclosure, this interpretation does pose a paradoxical problem: *before* disclosure is ordered how could such a harm be "established" as a *fact*? Presumably only *after* disclosure is ordered could such harm be ascertained on a factual basis.

Marceau J. concurs with Thurlow C.J. that instances when the public interest in the due administration of justice will prevail over the public interest in refusing disclosure "will be rare," nevertheless he proceeds to set out the factors to be considered in balancing the two interests:

- (1) they must be drawn from the circumstances of each case;
- (2) with respect to public interest immunity, the identity of the party claiming the objection, and what his or her interest in and knowledge of the need for preventing disclosure, may be important;
- (3) with respect to National Security, "circumstances may even be the most forceful one, because of the expertise required to properly assess the situation, an expertise a judge normally does not have;" and
- (4) Finally,

the weight of the public interest in disclosure can only be assessed *in concreto* according to the circumstances of the particular case, and more or less regardless of the contention of the applicant since this assessment is here well within the field of expertise of the judge, relating as it does to the immediate purpose for which the litigant requires the information, the importance of the disclosure to achieve that purpose, the relevancy of such purpose in the whole litigation, the interest, financial, social or moral, at stake in that litigation.⁴⁶

⁴⁶ *Ibid.*, 505-506.

The Appellants had argued that Thurlow C.J. erred in reaching his conclusion before examining the files and documents, and thus Marceau J. devised a two-stage approach for such an application, which has received considerable attention in subsequent cases:

The court will proceed to the second stage and examine the documents if, and only if, it is persuaded that it must do so to arrive at a conclusion or, put another way, if, and only if, on the sole basis of the material before it, it cannot say whether or not it will grant or refuse the application. [. . .]

[T]he reasons [that may lead the court to conclude on the sole basis of the material before it] most likely to come to the fore is certainly the acquired certitude in the mind of the judge that even if the information sought is of the nature or to the effect expected by the applicant, there is no possibility that the importance of the public interest in keeping the information secret will be outweighed by the importance of the public interest in disclosing it.⁴⁷

Furthermore, the burden of establishing that the public interest in disclosure outweighs in importance the particular public interest lies with the applicant, but concerning "intermediate facts" (which Marceau J. leaves unexplained), the onus "will obviously vary from one side to the other according to which side will be prejudiced by the particular facts involved remaining doubtful."⁴⁸

Finally, the Appellants had argued that the certificate and Top Secret affidavit were lacking in clarity and details. Marceau J. dismissed this argument in a deferential manner, however, stating that in a case involving

⁴⁷ *Ibid.*, 507-508. See *Air Canada v. Secretary of State for Trade (No. 2)*, *supra*, note 40.

⁴⁸ *Ibid.*, 508.

National Security to go into more detail would jeopardize the purpose for which immunity is claimed. He admits that the court is not able to determine the *gravity* of the risk to National Security, but the corollary of such a determination would be inspection, which he is greatly reluctant to advocate: "It is to be expected, however, that in many cases, such as this one, an assessment of the gravity of the risk will not be considered necessary."⁴⁹

But with or without the assistance of this two-stage balancing of public interests approach, the conclusions arrived at in applications pursuant to ss. 36.1 to 36.3 are as if s. 41(2) of the *Federal Court Act* were still in force, and disclosure is invariably denied. In *Re Stewart & The Queen*,⁵⁰ for instance, in a ruling on an objection to disclosure pursuant to s. 36.1, Proudfoot J. seemingly avoided the two-stage approach, stating that s. 36.1(2) "provides for the 'examination' of the documentation. I propose to take that step in the particular circumstances of this case."⁵¹ The accused had requested disclosure to help to prove that his alleged admission or confession was induced, since the Parole Board would not grant him parole until he made the alleged admission or confession. Rather than evaluating the elaborate criteria to be considered in balancing the two public interests, set out by Marceau J. in *Re Goguen*, the court here reduced its reasoning to a very narrow issue: whether the documents assist in furthering the accused's argument of inducement. Evidently the balancing of the two public interests was not considered at all, since Proudfoot J. ruled that "if there was *any* evidence at all to support the defence's contention, I would have had these

⁴⁹ *Ibid.*, 509.

⁵⁰ (1984) 13 C.C.C. (3d) 278 (B.C.S.C.).

⁵¹ *Ibid.*, 278.

documents disclosed [. . .]."⁵² Accordingly the documents remained confidential.

The two-stage approach created in *Re Goguen* was also applied in the seminal case of *Kevoork v. The Queen*,⁵³ but here too disclosure was refused. The three applicants, allegedly members of an Armenian terrorist group, were in custody, and were charged with attempted murder and conspiracy to commit murder, with respect to the serious wounding of a Turkish diplomat in Ottawa. During the preliminary inquiry a number of matters were raised by their lawyer: one Ottawa police officer was asked if he was aware of any electronic surveillance concerning the accused; an RCMP constable was asked to produce profiles of two informers which were prepared by CSIS; and Murray Nicolson, a CSIS member, was asked to name the individuals who had taken part in the surveillance of the applicants and informers; Mel Deschenes, the Director General of the Bureau of Counter-Terrorism of CSIS, objected to the disclosure of this information, pursuant to s. 36.1 and 36.2(1), certifying orally that its disclosure would be injurious to National Security. An application was then brought by the accused to the Federal Court Trial Division, pursuant to s. 36.2, in order to obtain a ruling on the objection,⁵⁴ which was only the second such application made at that time.

52 *Ibid.*, 279-280 [emphasis added]. The clash of interests here was rather: [. . .] the right of the accused to prove his innocence by whatever means available as opposed to the right of the Parole Board to keep confidential the information which it collects from the R.C.M.P., the correctional services branch and any other sources. (at 279)

53 [1984] 2 F.C. 753, 17 C.C.C. (3d) 426 (T.D.). The three accused were eventually convicted, and sentenced to relatively lengthy jail terms.

54 At the beginning of the hearing the applicants also sought an order to allow them to cross-examine former CSIS Director Ted Finn on the affidavit made by him

In disposing of the objection Addy J. cites approvingly segments of the decision of Thurlow C.J. in *Re Goguen*, while clearly embellishing on and extrapolating from them. He begins by citing with approval the following ground rule of Thurlow C.J.:

Important as that public interest [*i.e.* in the administration of justice] is, however, I think it is apparent from the nature of the subject-matter of international relations, national defence and national security that occasions when the importance of the public interest in maintaining immune from disclosure information the disclosure of which would be injurious to them is outweighed by the importance of the public interest in the due administration of justice, even in criminal matters, will be rare.⁵⁵

The exceptionally high priority he attributes to National Security is demonstrated by his reference to the decision of Beetz J. in *Bisaillon v.*

supporting the objection, and requested a writ of *habeas corpus* to enable them to attend the s. 36.2 hearing. The oral judgments dismissing both of these preliminary motions are annexed to the reported decision as Schedules "A" and "B" at 769 *et seq.* and 773 *et seq.* respectively. CSIS is now limiting the information it shares with policed forces, according to CSIS spokesperson Gerry Cummings, in order to protect the Service's documents from being disclosed publicly, perhaps due, in part, in response to this case. Only information relating to alleged criminal matters will be communicated to the police. Cummings claimed that the new policy addressed a problem raised by defence lawyers involved in trials that included CSIS obtained information. Citing s. 36.1, he stated that certain lawyers had argued that this provision limited the right of an accused to a full defence when CSIS agents testified. See Canadian Press, *Spy agency curbing info given to police*, *The Gazette*, (Montréal) January 10th, 1987, B-10.

⁵⁵ *Supra*, note 53, 762 (2 F.C. 753); quoting [1983] 1 F.C. 872, 884. He also cites Marceau J. in the Federal Court of Appeal at [1983] 2 F.C. 463. The priority of National Security is stressed by citing two English decisions, *i.e.* *R v. Secretary of State for Home Affairs* [1977] 1 W.L.R. 766, 782, 779 (C.A.), *per* Lord Denning M.R.; *D v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 233 (H.L.), *per* Lord Simon. Addy J. also reaffirms that the applicants have a heavy onus as to whether there should be disclosure (at 763), citing Thurlow C.J. in support of that proposition. (at [1983] 1 F.C. 872, 890)

Keable,⁵⁶ and his statement that the protection of the identity of a police informer is of necessity "of much lesser importance than the protection of national security [. . .]"⁵⁷ Addy J. also states that it is "clear that to justify disclosure it must be established that the evidence in question is such that it will probably establish a fact crucial to the defence."⁵⁸

He acknowledged that one of the factors to be considered in a criminal prosecution is the seriousness of the charges. The applicants had argued that one of the main purposes of disclosure was to impugn the evidence of the two informers by attacking their credibility, and to advance the theory that one of the informers was the person who attempted to commit the murder. But in the view of Addy J. the evidence regarding a witness' credibility is not the type of evidence which must be considered or taken into account regarding a s. 36.2 application since it is "merely a side-issue," it does not counter any of the elements of the offence and it is not "of critical importance for the defence."⁵⁹ Although he dismissed the application for these reasons, he did go on to cite several additional grounds, which create further onerous obstacles for applicants:

- (1) since the disclosures were sought on the basis of *possibility* of there being evidence which might be useful to the defence, rather than the *probability* of the evidence being there, the "proposed exercise amounts to nothing less than a fishing expedition or a general

⁵⁶ *Supra*, note 29, 93.

⁵⁷ *Supra*, note 53, 764. See also *Davidson v. Solicitor General, infra*, note 87, 302-303 (T.D.).

⁵⁸ *Ibid.*, 764. *Cf. supra*, note 52, and accompanying text.

⁵⁹ *Ibid.*, 766.

discovery. This would be fatal to the application even if the evidence sought to be obtained were of vital importance and had a direct bearing upon the issue of guilt or innocence."

- (2) no other reasonable way of obtaining the evidence in question except by disclosure must be established as a preliminary condition;
- (3) the profiles relating to the informants, prepared by CSIS, are a collection of hearsay and could not be used in evidence (they are general discovery documents which have never been contemplated in the cases dealing with the disclosure of protected State documents); and
- (4) the possible consequences from any failure to obtain disclosure must be considered.⁶⁰

As for the *form* of the objection, Addy J. believes that a *bona fide* certificate or objection is required, although this notion may actually go to content rather than form, since he states that the affidavit of former CSIS Director Ted Finn is "most complete and convincing in so far as the threat to national security is concerned [. . .]" In conclusion he does, however, cast a critical eye upon the affidavit in one material respect, namely the absence of categorization of the nature of the confidentiality of the profiles:

Since there are many possible degrees of confidentiality it would have been much preferable to indicate precisely and in detail the restrictions and conditions under which the documents were in fact made available, the persons to whom they were made available and finally the persons, if any, to whom the information contained in them could be further communicated. [. . .]

A broad distribution or lax conditions as to confidentiality might well destroy any fundamental

⁶⁰ *Ibid.*, 767-768.

character of state secret which the documents possessed previous to being released. The degree of protection from disclosure would then be considered on the basis of confidential police information as opposed to the much higher degree of protection founded on national security, national defence or international relations. Had there been any real issue as to whether profiles should be produced I would have required further evidence regarding the confidential basis on which they were made available and precisely to whom they were made available.⁶¹

Further refinements in the approach requiring the balancing of the two public interests are contained in a more recent decision of the Federal Court of Appeal. *Gold v. The Queen*⁶² was the first time the Federal Court had to rule on an objection to the disclosure of National Security information in a civil action, *Goguen* being a criminal prosecution. Jack Gold was employed by the Department of National Revenue, Taxation in 1957, and in 1959 he was subject to a security clearance. Before October 1980 he had been the subject of "active interest" by the RCMP Security Service. In December 1980 the Personnel Security Officer at Revenue Canada confirmed, in response to an RCMP enquiry, that he was "employed in a position which affords access to

⁶¹ *Ibid.*, 768-769. In the affidavit, which consisted of 25 paragraphs, Finn was of the view that the disclosure would be injurious to national security because it would reveal or tend to reveal the methods used for surveillance, the capacity and ability of the Service to carry out electronic surveillance, the places and means used for same and the identity of the persons involved in conducting it. (paraphrased by Addy J. at 770) At the subsequent trial of the accused a motion for an order for production of documents or to stay proceedings was dismissed: *R. v. Kevork, Balian & Gharakhanian* (1986) 27 C.C.C. (3d) 523, 535 (Ont. H.C.J.). The Court did hold, however, that the trial judge could grant a stay of proceedings, considering the breach of the accused's right to fundamental justice due to the unavailability of the evidence, only where the evidence is critical or essential (at 545).

⁶² [1986] 2 F.C. 129, 25 D.L.R. (4th) 285, 18 Admin. L.R. 212 (C.A.), *per* Urie, Mahoney & Lacombe JJ. [hereinafter cited to [1986] 2 F.C. 129]

classified information relevant to national security."⁶³ After a transfer to the Department of Energy, Mines and Resources he was interviewed by an RCMP Security Service officer in May 1981, and in June he was notified that his position would be terminated allegedly due to unsatisfactory performance. In the meantime the security clearance for his position as Senior Rulings Officer had been increased from confidential to secret. Gold was therefore returned to another position at his previous employment level, but he complained that it was not comparable to, and less prestigious and less professionally rewarding than, the Senior Rulings Officer position.

An action alleging a conspiracy among federal civil servants was commenced in November 1982, alleging that he was labelled a security risk for refusing to disclose to the RCMP information on individuals in his union and the peace movement, as well as in an anti-apartheid organization. It has since attained a considerable measure of public notoriety, and after examinations for discovery censored versions of certain documents were produced. In January 1985 a certificate was filed pursuant to s. 36.1(1), and the Appellant applied for review under s. 36.2. But before the Trial Division hearing an amended certificate was filed, "evidently prompted by this Court's decision in *Best Cleaners and Contractors* [. . .], which did not object to the production of information which had been previously disclosed to the appellant."⁶⁴ The Trial Division heard the application for review *in camera*,

⁶³ The rather elaborate facts are set out at *ibid.*, 131-134.

⁶⁴ *Ibid.*, 134. See *Best Cleaners and Contractors Ltd. v. The Queen* [1985] 2 F.C. 293, 58 N.R. 295 (C.A.), *per Pratte, Mahoney & Hugessen JJ.* Here a certificate of the Privy Council was filed, pursuant to s. 36.3(1), objecting to the disclosure of information on the ground that the information sought was a Cabinet confidence. The essence of the information had already been produced on discovery, and therefore a majority of the Federal Court of Appeal (Pratte J., dissenting) held that s. 36.3 protects against compelling the disclosure of information, and not the receipt thereof in evidence if available otherwise (at [1985] 2 F.C. 293, 311). That Mahoney

and dismissed it without inspecting the documents,⁶⁵ and an appeal was taken to the Federal Court of Appeal.

Writing for the Federal Court of Appeal, Mahoney J. begins by taking for granted, in a matter-of-fact manner, the validity and necessity of the provisions in question:

The public interest in national security, served by non-disclosure of information in the present circumstances is self-evident. While it may be taken for granted by the judiciary, the competing public interest which would be served by its disclosure may not be so generally recognized. It is the very essence of any judicial system deserving of public confidence that, above all else, every litigant be given a fair chance and be seen to have been given it. Justice may not be done, and it is most unlikely that it will be seen to have been done, if a party, even by reason of compelling public interest, is prevented from making out its case or answering the opposing case.⁶⁶

Nevertheless, the narrow issue before the Court was whether the failure to inspect the documents in question was an error. Mahoney J. refers approvingly to the Court's decision in *Re Goguen*, and extends its principle that inspection should only occur if it appears to be necessary to determine whether disclosure should be ordered to this case. He agreed with Thurlow

J. refers approvingly to this decision in *Gold* indicates the willingness of the courts to cross-pollinate the principles arising in ss. 36.1, 36.2 and 36.3.

⁶⁵ [1985] 1 F.C. 642. Since the decision on appeal to the Federal Court of Appeal was governed by s. 36.2(1), and therefore heard *in camera*, Mahoney J. also ruled, in chambers, that s. 36.2(5)(a) requires that the appeal also be heard *in camera*. See *Gold v. The Queen* [1985] F.C.A.D. 2944-01.

⁶⁶ *Supra*, note 62, 135.

C.J. in *Re Goguen* that the information's probable tenuous relevance, marginal admissibility and the availability of at least some alternative proof are factors to be taken into account in deciding whether he should examine it. Then he injected a degree of caution:

It is, with respect, a very large step from that position to an established rule that information will not be ordered to be produced, unless it is evidence absolutely essential to the case, if it is merely corroborative evidence or if the matter can otherwise be proved.⁶⁷

As to the balance between non-disclosure and the public interest in the administration of justice, he cautiously expressed a more open attitude toward possible disclosure than found in previous decisions:

There is not, in the legislative scheme, an obvious imbalance between the two. The subject-matter of a particular legal proceeding is only one of the relevant factors to be considered by the judge, whom Parliament has charged with weighing the competing public interests in each application. In my opinion, just as the subject-matter, or substance, of a given legal proceeding is properly to be considered, so must the particulars or substance of a given claim or risk to national security.⁶⁸

He astutely alludes to the fact that the degree of seriousness attributed to National Security matters corresponds to the particular socio-political context of a given time-frame, asserting that in *Camell, Laird*, disclosure of

⁶⁷ *Ibid.*, 137. See also *R. v. Kevork, Balian & Gharakhanian*, *supra*, note 61, 535.

⁶⁸ *Ibid.*

the plans of the submarine "Thetis" was sought in wartime "when the public interest in national security was pre-eminent." But then he makes the incredible statement that judges should be more receptive to disclosure when claims for monetary compensation are in issue, as was the case in *Camell, Laird*: "Cases may well arise which involve only claims for monetary compensation in which disclosure under appropriate conditions or restrictions will be determined, on balance, to best serve the overall public interest."⁶⁹

Mahoney J. concluded that serious consideration of the competing interests must be undertaken:

Among other aspects of the new system, its credibility is dependent on a public appreciation that the competing public interests are, in fact, being judicially balanced. It will not be well served if it appears that the exercise of judicial discretion is automatically abdicated because national security is accepted as so vital that the fair administration of justice is assumed incapable of outweighing it.⁷⁰

Considering that Gold had been found to be a "security risk," Mahoney J. agreed with the Trial Division judge that since "the information is not required as evidence at trial but merely for general discovery to enquire whether any helpful evidence might in fact be available,"⁷¹ disclosure should not be ordered, and the application was therefore dismissed.

⁶⁹ *Ibid.*, 137-138. But no such cases have arisen yet.

⁷⁰ *Ibid.*, 138.

⁷¹ *Ibid.*, 140. Quoting, *supra*, note 65, 647. See also *Fraxis Corp. v. Canada* (1986) 9 F.T.R. 50, 53-54 (T.D.).

At the trial on the merits of Gold's action, for damages in the amount of approximately \$720,000, Dubé J. of the Trial Division of the Federal Court held that he was in fact a security risk, and dismissed the action on the basis that there was no evidence of a conspiracy between the RCMP Security Service and the federal government to penalize him for refusing to become an informant. In addition to Gold's involvement in an Ottawa anti-apartheid organization, the RCMP cited his participation in peace marches, having attended a "Communist-sponsored" dance and having briefly vacationed with his family in Cuba. Dubé J. concluded as follows:

His activities as a member of an association which is considered to be a front for the Communist Party, his participation in anti-war demonstrations, his attendance at meetings of Communist organizations, his socializing with well-known members of the Communist party, his travels to Communist countries, his contacts with the U.S.S.R. embassy, created suspicions with the RCMP and doubts as to his reliability and loyalty.⁷²

More recently, the Trial Division of the Federal Court has ruled that where evidence is adduced before the Security Intelligence Review Committee (SIRC), and a security certificate is later filed with the Federal Court of Appeal, then the provisions of the *Canada Evidence Act* prevail over the duty of SIRC to communicate all of the documents in its file to the Federal Court of Appeal. The decision concerns André Henrie, whose case is set out in part in the following chapter on CSIS.⁷³ Following the recommendation of CSIS that he not be granted a security clearance to

⁷² Cited in Reg Whitaker, *Conspiracy? I Didn't See Any Conspiracy?*, This Magazine, November 1987, 10.

⁷³ *Infra*, ch. VI, note 172, and accompanying text.

confirm his position in Energy, Mines and Resources Canada, an *in camera* hearing was held on his complaint before SIRC. Seven witnesses were heard and 35 exhibits were filed. But 14 of the exhibits, the evidence of one witness whose identity and part of the evidence of another witness was received in the absence of Henrie and his lawyer. Moreover, parts of the submissions presented by counsel for CSIS were not shown to Henrie's lawyer.

Mr. Justice Addy of the Trial Division of the Federal Court found a conflict between Rule 1402 of the Federal Court Rules, which obliges the tribunal to communicate all of the documents in its file to the Registry of the Federal Court of Appeal, and the provisions of the *Canada Evidence Act*.⁷⁴ As to the argument that since the security certificate was not issued at the hearing conducted by SIRC, it was too late to do so before the Federal Court of Appeal, Addy J. stated that the chairman of the hearing

without having stated that there was any objection made by the Director [of CSIS] or any other person, chose to exclude the classified evidence and documents *ex proprio motu* [. . .] There was obviously no reason in those circumstances for the Director to either object orally or to issue a certificate of objection since the chairman was respecting the security classification in any event.⁷⁵

Turning to the substance of the application, Addy J. affirmed that one of the matters to be considered in deciding whether disclosure should be ordered is the importance of the issue to which the evidence relates. Henrie claimed that the refusal of a higher security clearance would deny his

⁷⁴ *Henrie v. SIRC et al*, F.C.T.D., No. CEA-1-88, Addy J., October 18th, 1988, unreported, 4. Since reported at [1989] 2 F.C. 229.

⁷⁵ *Ibid.*, 7.

promotion to a more lucrative position. Addy J. dismissed this consideration since "its relative importance is not great when compared with certain other similar matters which the courts are called upon to decide or especially with criminal proceedings, [. . .]"⁷⁶ The second basic consideration is "the importance of the evidence itself and its relevance to the issue to which it relates, especially where the issue is vital and essential to the ultimate determination of the dispute." According to Addy J. "the relevance and possible importance of the evidence can hardly be of a higher order." The conclusions to be drawn from the aims and actions of the two organizations Henrie was allegedly a member of was the key and the sole issue, and "evidence relating to it is not only relevant but would appear to be absolutely vital in deciding whether the denial of a security clearance was justified."⁷⁷

Addy J. therefore decided to examine the documents and evidence referred to in the certificate of objection. After contrasting the purpose and methods of security intelligence investigation to criminal law investigation, he proceeds to adopt the argument repeatedly advanced by CSIS, that due to the extraordinary nature and secrecy of security intelligence work *all* information concerning such investigations must not be disclosed:

When considering the issue of the relative merits of the public interest in non-disclosure as opposed to the public interest in disclosure, it is evident that the considerations and circumstances to be taken into account which might militate against the proper control or suppression of threats to national security are considerably more numerous and much more complex than the considerations which

⁷⁶ *Ibid.*, 9.

⁷⁷ *Ibid.*, 9-10.

involve a national interest other than those mentioned in s. 36.2 of the *Evidence Act*. [. . .] In security matters, there is a requirement to not only protect the identity of human sources of information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings [. . .]

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 [*s/c*] telecommunications and cypher systems; (f) reveal the intensity of the investigation; (g) reveal the degree of success or the lack of success of the investigation. I also find that most documents fall under two or more of the above categories [. . .].

Having concluded that the disclosure would be injurious to national security, I also find that it is abundantly clear that that national interest served in non-disclosure far outweighs any national interest in disclosure in this case.⁷⁸

Accordingly, the application was dismissed and the security certificate was confirmed. An appeal was thereafter filed before the Federal Court of Appeal.

⁷⁸ *Ibid.*, 12-15. Cf. the affidavits filed by CSIS in *Zanganeh v. CSIS*, *supra* Ch. IV, note 78, and accompanying text; and in the *Ternette* case, *supra* Ch. IV, note 54, and accompanying text.

It could be argued that all or some of the new provisions of the *Canada Evidence Act* are an unnecessary violation of the fundamental rights and freedoms enshrined in the *Canadian Charter*, notably ss. 7 and 11(d), or the *Canadian Bill of Rights*. The inability of a litigant to gain access to essential information or documents may result in an unfair hearing by a partial tribunal, and represent a violation of procedural or substantive due process. But any challenge to the security provisions of the *Canada Evidence Act* based on the *Canadian Charter*, would appear to be problematic in light of the recent decision in *Ouvrage de raffinerie de métaux Dominion Ltée v. Energie atomique du Canada Ltée*.⁷⁹ It was argued that s. 36.3(1) of the *Canada Evidence Act* was incompatible with s. 2(e) of the *Canadian Bill of Rights* in that the non-disclosure of documents violated the plaintiff's right to a fair hearing. While acknowledging the obstacles created by these provisions, Mr. Justice Marquis of the Québec Superior Court nevertheless dismissed this argument:

On peut déplorer la rigueur de l'article 36.3(1) qui exclut tout examen des documents soustraits à la divulgation; les regrets ne permettent pas d'invalider la loi ni de la rendre inopérante. Le Tribunal ne peut y déroger.

La demanderesse est sans doute privée, par l'effet de la loi, de certains moyens de preuve ce qui n'équivaut pas à dire que son droit à un procès juste et équitable est nié ou mise en péril; tout au plus peut-on affirmer qu'il est assujéti à une restriction imposée pas le Législateur.⁸⁰

There are, however, more recent and welcome indications that the law of Crown privilege may be experiencing a cautious movement of gravitation

⁷⁹ J.E. 88-1059. 500-05-006770-869, Qc. Sup.Ct., July 4th, 1988, unreported, 18.

⁸⁰ *Ibid.*, 16.

towards openness, at least with respect to Cabinet confidences, the disclosure of which was previously considered to be absolutely unreviewable. In *Auditor General of Canada v. Minister of Energy*, for instance, Hugessen J., dissenting in the Federal Court of Appeal,⁸¹ made the sweeping assertion that the power of the Auditor General to examine persons on matters pertaining to accounts subject to his audits, pursuant to s. 13(4) of the *Auditor General Act*,⁸² has *primacy* over s. 36.3 of the *Canada Evidence Act*. For him the Crown privilege is "simply a rule of evidence and does not constitute a constitutional limitation upon legislative powers." Parliament can therefore enact rules with respect to Crown privilege, including provisions that can "override any privilege, whether based in statute or in common law."⁸³

An even more hopeful sign is contained in the recent Supreme Court of Canada decision in *Carey v. The Queen*,⁸⁴ decided under the common law in Ontario. In the absence of a provision comparable to s. 36.3, the Ontario

⁸¹ (1987) 73 N.R. 241, 263, 284, [1987] 1 F.C. 406 (C.A.), *per* Pratte, Heald & Hugessen JJ. [hereinafter cited to 73 N.R. 241]

⁸² S.C. 1976-77, c. 34.

⁸³ *Supra* note 81, 285-286. For Heald J., writing for the majority, a s. 36.3(i) certificate would preclude any action under s. 13(4) by the Auditor General with respect to the areas covered by the certificate (at 242, 256). The Auditor General had sought access to documents which were Cabinet confidences to Petro Canada's acquisition of Petrofina. Motion for leave to appeal to the Supreme Court of Canada was granted June 25th 1987: [1987] 1 S.C.R. v, 83 N.R. 80, but no decision had been rendered by the Supreme Court at the date of the completion of this study.

⁸⁴ *Carey v. Ontario* [1986] 2 S.C.R. 637, 30 C.C.C. (4th) 161, 74 C.P.C. (2d) 10, 72 N.R. 81 [hereinafter cited to [1986] 2 S.C.R. 637]. One editorialist wrote, in response to this decision, that too often the doctrine of secret Cabinet confidences "is invoked for the convenience of ministers of the Crown rather than for the public's protection." He therefore was encouraged by this decision, stating that s. 36.3 is a "catch-all that needs to be qualified." See *Keys to the cabinet*, [Editorial], *The Globe & Mail*, December 20th, 1986, D6. See also *Smallwood v. Spurling* [1982] 2 S.C.R. 686, 141 D.L.R. (3d) 395, 68 C.P.R. (2d) 145, 44 N.R. 571.

government had claimed a class-based absolute privilege with respect to all Cabinet documents, arguing that production would breach confidentiality and inhibit Cabinet discussions of public policy matters. Writing for the Court, La Forest J. seems to go further than the balancing of two public interests approach of *Re Goguen*, stating that the nature of the policy concerned and the contents of the documents are more important variables than the level of the decision-making process, although all factors must be considered in determining whether disclosure should occur. An extremely important consideration for him is also the time when a document or information is to be released. As well, there is the importance of disclosure in the interests of the administration of justice, which includes the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented. Accordingly, the public interest in the confidentiality of Cabinet deliberations in developing public policy is only one of a number of variables.⁸⁵

He notes in passing that National Security is one of the "really sensitive issues,"⁸⁶ but that the basis of the policy discussed in the documents was not claimed. To which he responds:

If the certificate had particularized that their divulgence should be withheld on the ground, for example, that they relate or would affect such matters as national security or diplomatic relations, that would be another matter. If the certificate was properly framed, the court might in such a case well agree to their being

⁸⁵ *Ibid.*, 670-673. The general rule he formulates is that Cabinet documents must be disclosed unless the disclosure would interfere with the public interest, citing *Smallwood v. Sparling*, *ibid.*, with approval. Applied in *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marshall Prosecution)* (1988) 42 C.C.C. (3d) 129 (N.S.S.C.).

⁸⁶ *Ibid.*, 12.

withheld even without inspection; see in this context *Goguen v. Gibson, supra*. For such issues, it is often unwise even for members of the judiciary to be aware of their contents, and the period in which they should remain secret may be very long.⁸⁷

It is, however, highly regrettable that this more disclosure-prone movement still views the notion of National Security as an obvious case for non-disclosure. Yet it does reconfirm the absolutely superior ideological and legal position National Security continues to benefit from.

C. The Arguments for Enhanced Disclosure

The new amendments to the *Canada Evidence Act* have not led to substantially more disclosure in security matters compared to the even more bleak experience with the *Federal Court Act* provisions, or at common law. Litigants seeking vital evidence thus continue to suffer, as does the mystifying notion of Open Government. The consequences of non-disclosure can be severe on a litigant or accused person: "In effect, the litigant faces the possibility of having his cause of action expropriated without compensation."⁸⁸ In a criminal trial this translates into the possibility of an accused losing his or her liberty. Koroway proposes that in such cases the "fair solution may be for the Crown to withdraw the prosecution if it is to keep its secrets."⁸⁹ He cites the American position for support, that the

⁸⁷ *Ibid.*, 47. One of the extremely rare cases where a s. 36.1 certificate was simply ignored, as being inapplicable, is *Davidson v. Solicitor General* (1987) 9 F.T.R. 295, 301-302 (discussing the relationship between such a certificate and an application for review before the Trial Division of the Federal Court under the *Privacy Act* S.C. 1980-81-82-83, c. 111). See also *MacKeigan v. Hickman* (1988) 43 C.C.C. (3d) 287, 314-315.

⁸⁸ Peter E.J. Wells, *Crown Privilege* (1976) 3 Queen's L.J. 126, 148 [note omitted].

⁸⁹ Edward Koroway, *Confidentiality in the Law of Evidence* (1978) 16 Osgoode Hall L.J.

accused will be acquitted when information he or she requires is protected by a privilege,⁹⁰ which appears to be a reasonable compromise. In addition, there continues to exist a cynical feeling that government may abuse its use of the Crown privilege. In 1978 Molnar underlined this legitimate concern:

A decade ago the idea of the federal or provincial government abusing its common law right of Crown privilege so as to keep secret embarrassing documents or even documents revealing unethical conduct would have to be treated lightly. Today, with the shadow of the Watergate scandal in the United States still fresh in our minds the prospects of corruption and misuse of government power is a reality.⁹¹

Confronted with this situation it is regrettable that so many commentators uncritically accept the traditional view that National Security matters are an honoured class, well-deserving of the utmost secrecy. Molnar, for instance, believes that "[t]here are *certainly* some classes of documents which it is *vital* to keep secret, for example, those relating to national security, the military or international relations."⁹² Fortunately in

361, 406.

⁹⁰ *E.g.*, *U.S. v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 534. Wells rejects this option, since he argues it could be abused by the accused. *Supra*, note 88, 149. Rather he seems to prefer the Israeli approach, which forbids the use of privileged material as evidence for the prosecution. See, *e.g.*, M. Shalgi, *Criminal Discovery in Israel* (1965-66) 4 Am. Crim. L.Q. 155, 156; *R. v. Kevork, Balian & Gharakhanian*, *supra*, note 61, 543.

⁹¹ Gerry Molnar, *Crown Privilege* (1977-78) 42 Sask. L.R. 173, 186. See, *e.g.*, *U.S. v. Nixon* (1974) 94 S.Ct. 3090. See also S.G. Linstead, *The Law of Crown Privilege in Canada and Elsewhere* (1968/69) 3 Ottawa L.R. 81.

⁹² *Ibid.*, 187 [emphasis added]. Similarly, Wells is of the view that "military plans and international negotiations must be kept secret in order to protect the security of the state can hardly be doubted," although he makes no distinction between external and internal threats to National Security. See *supra*, note 88, 129-130.

security matters there is a movement gravitating away from this class-based non-disclosure rule towards an injury-based test. Lieberman has stated that

the mere fact that the information concerns military or diplomatic affairs and is sensitive or classified does not mean that it must necessarily be kept secret. The information should also be such that its disclosure would probably harm the national security in some defined way.⁹³

One alternative to the *status quo* is to introduce the injury test provided for by access to information and privacy legislation into disputes concerning Crown privilege and National Security. Wells goes even further, advancing a two-tiered rule for disclosure:

[. . .] whoever decides should apply a higher standard where the claim is based upon protection of the state from internal forces. Where the information would enable those outside the state to more easily prejudice the state's secrecy, the evidence ought to be excluded if there is a reasonable possibility that its release would have that effect. Where it is claimed that the information would enable those within the state to prejudice that state's interests, the evidence should be excluded only where it can be shown that the information would doubtless enable a group or individual to endanger the state.⁹⁴

The attractiveness of this test is that it imposes a fairly onerous burden on the government to convince a court that disclosure should not be permitted, which could lead to more openness, and it avoids the troublesome balancing

⁹³ Ronald M. Lieberman, *Executive Privilege* (1975) 33 U.T. Fac. L.R. 181, 186 [note omitted]. See, e.g., James Zagel, *The State Secrets Privilege* (1966) 50 Minn. L.R. 875, 884-885.

⁹⁴ *Supra*, note 88, 731.

of two public interests involved in the operation of the *Canada Evidence Act* provisions. The experience with the injury-based test in the access to information and privacy legislation demonstrates, however, that the courts invariably defer to the government, faced with its claims of potential injury, and refuse disclosure in most cases. As well, this injury-based test does not distinguish between the various types of information sought to be disclosed. While it is arguably defensible to prevent disclosure of information related to terrorism or espionage, any new rules on Crown privilege in National Security matters must make it clear that such provisions specifically do not apply to information or documents related to protest or dissent (*i.e.* "subversion"), for the reasons set forth in the introductory chapter.

Conclusions

But, setting aside the difficulty in giving any real meaning to the notion of "public interest,"⁹⁵ if we are to continue to live with the present legislative scheme it must be accepted that the two public interests should not be treated equally. To protect the rule in favour of disclosure of government information, enshrined in the access to information and privacy legislation, there should be a strong statutory presumption in favour of the public interest in disclosure of National Security information. Otherwise, if the two interests are regarded as being on an equal footing the courts will always resolve the conflict in favour of the State. This presumption should be

⁹⁵ Hutchinson and Monahan have argued, for instance, that "public interest" is "simply an ideological masquerade for the aggregation of private interests. Citizenship involves striking bargains in one's own interest rather than forging and debating the fundamental values of the community."; Allan Hutchinson & Patrick Monahan, "Democracy and the Rule of Law," *in* Allan Hutchinson & Patrick Monahan, *The Rule of Law [:] Ideal or Ideology* (1987), 97, 109.

rebuttable only if the government can clearly demonstrate that the disclosure of the National Security information would enable a group or individual to endanger the State by the use of *illegal* means.⁹⁶ But in no circumstances, for the reasons enunciated in earlier chapters, should the State be permitted to prevent disclosure of information concerning lawful advocacy, protest or dissent, unless proof of such illegal means is provided.

Moreover, since National Security information can be disguised as Cabinet confidences, and in light of the Supreme Court of Canada's strong ruling in *Carey*, it is no longer justifiable for Cabinet confidences to enjoy absolute immunity from disclosure. This is consistent with the recommendation of the Committee which prepared the *Open and Shut* Report on access to information and privacy legislation, namely that s. 36.3 of the *Canada Evidence Act* be deleted, and that s. 36.2 be amended to add a reference to disclosure on the ground that such disclosure would reveal Cabinet confidences (although it makes no recommendations with respect to National Security matters in s. 36.2).⁹⁷

Procedurally, it is unfair and unreasonable for the applicant to have the burden of persuading the court to inspect the information (the "first stage" created by *Re Goguen*, which is independent from the "second stage," whether disclosure will be ordered after examination). After discussing *Re*

⁹⁶ See, e.g., Sidney N. Lederman, *The Crown's Right to Suppress Information Sought in the Litigation Process: The Elusive Public Interest* (1973) 8 U.B.C.L.R. 272, 307-308.

⁹⁷ *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (1987) [Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act; Blaine Thacker, M.P., Chairman], recommendation 8.1 at 88. See also Alan W. Mewett, *State Secrets in Canada* (1985) 63 Can. Bar Rev. 358, 375-376 (suggesting that s. 36.3 may violate the right to a fair trial or undercut the right to be presumed innocent).

Goguen and the Ontario Court of Appeal decision in *Re Carey Mewett* states that

It seems clear that the courts have imposed some sort of onus on the applicant at the second stage. In *Carey*, the court specifically held that the burden is on the applicant to show that the information would substantially assist his case, that the issue is one of real substance and that what is sought to be established cannot be established by other evidence, before it will decide that the public interest in disclosure outweighs the public interest in concealment. But it does not follow from this that there should be any onus on the applicant at the first stage, beyond that of demonstrating relevance, even if it is correct to put the burden of persuasion on the applicant for disclosure at the second stage.⁹⁸

Mewett therefore correctly argues that the approach in *Re Goguen* and *Re Carey* should not be followed:

Once the applicant has demonstrated relevance [. . .] and once the Minister has stated his objection and the ground for it, unless the matter can clearly be decided upon the material then before it, why should not the court [. . .] then examine, under whatever conditions of security may be appropriate, the material in question?⁹⁹

Such a newly revised test for the disclosure of National Security information in judicial proceedings would foster the notion of Open Government, reduce government abuses and be more consistent with the *Canadian Charter*.

⁹⁸ Mewett, *supra*, note 97, 373-374.

⁹⁹ *Ibid.*, 374.

CHAPTER VI**A STATE WITHIN THE STATE:
THE CANADIAN SECURITY INTELLIGENCE SERVICE****Introduction**

The apex of the National Security State in Canada is the Canadian Security Intelligence Service (CSIS). Ostensibly created for the purpose of protecting the "security of Canada," by statute CSIS is responsible for several ongoing security and intelligence projects, notably: (1) information gathering and analysis regarding potential acts of subversion, terrorism, foreign-influenced activities and espionage, and (2) providing security clearances to government in immigration and citizenship matters, as well as clearances for federal civil service employment.

But in carrying out these activities CSIS hardly functions as a passive and inoffensive security service, quietly protecting the "interests of the State." Rather it is an ultra-secret, highly intrusive and largely anti-democratic apparatus whose central goal is to collect information on, harass, infiltrate, disrupt and ultimately disarm political opponents of the State, primarily left-wing organizations and individuals as well as unions and other movements for social change, known in CSIS terminology as "subversives." In so doing it intrudes into the private lives of thousands of Canadians, and engages in activities which run contrary to the *Canadian Charter of Rights and Freedoms*.

A. An Anti-Subversion Security Service

(1) Background

CSIS is only the most recent model of Canada's secret service, which has existed since 1864.¹ Immediately prior to the creation of CSIS the Royal Canadian Mounted Police (RCMP) Security Service was primarily responsible for security and intelligence matters. In the late 1960s and particularly in the 1970s the RCMP Security Service became involved in a series of "wrongdoings," as part of its overzealous attempts to repress "subversion."² The public revelation of these "dirty tricks" led to the creation of the Keable and McDonald Commissions in 1977, which were mandated to investigate these activities and present recommendations for reform.³

¹ For a history of the Canadian security and intelligence network, see, e.g., R. Whitaker, *Origins of the Canadian Government's Internal Security System, 1946-1952* (1984) 65 Cdn Historical Rev. 154; S. W. Horrall, *Canada's Security Service: A Brief History* (1985) 50, No. 3 RCMP Quarterly 38; John Sawatsky, *Men in the Shadows: The RCMP Security Service* (1980).

² The literature on this subject is voluminous. See, e.g., Richard Fidler, *RCMP [:] The Real Subversives* (1978); Edward Mann, John Alan Lee & Norman Penner, *RCMP vs The People [:] Inside Canada's Security Service* (1979); Robert Dion, *Crimes of the Secret Police* (1982); Caroline & Lorne Brown, *An Unauthorized History of the RCMP* (1973); Michael Mandel, *Crime, Punishment and Democracy [:] The RCMP Affair* (June 1984) This Magazine 7 (virtually all the victims of the RCMP "dirty tricks" were on the Left); Michael Mandel, *Democracy, Class and Canadian Sentencing Law* (1984) 21 Crime & Social Justice 163; Ian Taylor, *Martyrdom and Surveillance: Ideological and Social Practices of Police in Canada in the 1980s* (1986) 26 Crime & Social Justice 60, 66-67; En collaboration, *La Police secrète au Québec [:] la tyrannie occulte de la police* (1978), 15, 123 et seq; Gaëtan Nadeau, "La Charte et la sécurité nationale," in Robert Bureau & Pierre Mackay, eds., *Le Droit dans tous ses états* (1987), 97, 100-101; Sawatsky, *supra*, note ¹, John Sawatsky, *For Services Rendered: Leslie James Bennett and the RCMP Security Service* (1983); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989), 160-161.

³ Although severely restrained by attempts orchestrated by the federal government to curtail its investigations, the Keable Commission produced its report in 1981: *Rapport de la Commission d'Enquête sur des Opérations Policières en Territoire Québécois* (1981). See also *Bisailon v. Keable* [1983] 2 S.C.R. 60, (1983) 4 C.C.C. (3d) 385, 2 D.L.R. (4th) 193, 37 C.R. (3d) 289, 51 N.R. 81. The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, called the McDonald Commission, produced three reports: *First Report: Security and Infor-*

But these commissions of inquiry solved few problems for the federal government, rather they provoked widespread public dissatisfaction with both the functioning of the RCMP Security Service as well as the work of the Commissions themselves. One vociferous critic of the McDonald Commission, Michael Mandel, offered a number of perceptive observations:

(1) the RCMP Scandal involved the RCMP Security Service in the investigation, disruption and suppression of "groups and activities that were neither unlawful in themselves nor directed at or preparatory to any violation of the law. The groups 'countered' were involved in the essence of what freedom of expression is supposed to protect -- dissent, protest, and non-conformity."^{*}

mation (1979), *Second Report: Freedom and Security Under the Law* (1981, 2 vols.), *Third Report: Certain RCMP Activities and the Question of Governmental Knowledge* (1981). Examples of some of the numerous critiques of these commissions include: Michael Mandel, *The Discrediting of the McDonald Commission* (March 1983) *Canadian Forum* 14; Michael Mandel, *Crime, Punishment and Democracy*, *supra*, note 11; *Standing On Guard Over Us* (December 1980) *Canadian Dimension* 5; M. I. Watkins, *May the Farce be With You* (Feb.-March 1982) *This Magazine* 16; John D. McCamus, "The Protection of Privacy: The Judicial Role," in Rosalie S. Abella & Melvin Rothman, eds., *Justice Beyond Orwell* (1985), 163, 167. Between 1966 and 1969 three commissions were established in security matters: (1) regarding the activities of G. V. Spencer: Canada, *Royal Commission on Complaints made by G. V. Spencer* (1966); (2) regarding the activities of Gerda Munsinger: Canada, *Royal Commission on matters relating to one Gerda Munsinger* (1966); (3) and the first major inquiry into Canada's security system: Canada, *The Royal Commission on Security* (Abridged) (1969). The latter Commission, called the Mackenzie Commission, held 175 hearings and heard 250 witnesses, and recommended the creation of an independent security service. But this was not acted upon, and the RCMP Security Service increased in size. One of the reasons for its growth was that "[i]t was a period of increasing social unrest, protest and sometimes violence. Long simmering resentments began to bubble to the surface and acts of terrorism both overseas and in the United States were cause for concern." R.H. Roy, *The Canadian Security Intelligence Review Committee* (1987) [unpublished paper], 6. Roy is a former Chairman of the Canadian Association for Intelligence and Security Studies. See also the report of the Duchaine Inquiry into the "October 1970 Crisis": Canada-Québec, *Rapport sur les Événements d'Octobre 1970* (1981).

* Michael Mandel, *Freedom of Expression and National Security* (1985) 23 U.W.O.L.R. 205, 205 [hereinafter cited as *Freedom of Expression*]. This article deals with the implications for freedom of expression of the RCMP Scandal of the 1970s. These

(2) according to the McDonald Commission, the Security Service was characterized by an "anti-left bias."^{**}

(3) the activities conducted by the Security Service involved the commission of serious crimes, *e.g.* break and enter, theft, arson and kidnaping.

(4) outside of Québec no prosecutions were commenced with respect to such criminal activity.¹

(5) the reason for the absence of prosecution was because of criminal law enforcement practices, deeply imbedded in the culture of the criminal process, which undermines the ostensibly democratic nature of the criminal law and protect the social status quo by allowing it to parade in court in the guise of "national security," "noble motives" and "unblemished characters".²

The federal government believed that the most effective way in which this profound critique of the RCMP Security Service could be circumvented, and public confidence in the need to protect "National Security" re-established, was the creation of a new civilian security and intelligence service. Thus Bill C-157, designed to create the Canadian Security Intelligence Service, was introduced in May 1983.³ Amongst the plethora of

points have been presented elsewhere by Mandel. See, *e.g.*, "Law and Social Order: Part I," *Ideas*, CBC, January 4th, 1983, CBC Transcripts, 1-2.

^{**} *Second Report*, Vol. 1, 474.

¹ In Québec most of the charges were dismissed on technicalities or resulted in acquittals, and in the case of findings of guilt, the accused were given suspended sentences or discharges. *Freedom of Expression*, *supra*, note 1, 205.

² *Supra*, note 1, 205-206.

³ 1st Sess., 32nd Parl., 29-30-31-32 Eliz. II, 1980-81-82-83; First Reading May 18th, 1983.

criticisms of the Bill was that the mandate of the security service was too broad and "encompassed virtually all groups and individuals involved in peaceful and legal reform or support activities."⁴ The Bill died on the Commons order paper in September 1983, but was re-introduced in a slightly modified form as Bill C-9, which also unleashed widespread public criticism and opposition. The new *CSIS Act* finally received Royal Assent on June 28th, 1984, and came into force on July 16th, 1984.⁵

(2) CSIS and its Mandate

Unlike its predecessor, CSIS was designed to function only within the parameters of its statutory-defined mandate. One of the main functions of CSIS is described in s. 12 of the *CSIS Act*:

to 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,

⁴ Mary Gandall, *The Struggle Against the Security Bill* (Dec. 1983) Canadian Dimension 4, 4. The Bill also provided for up to five years imprisonment for revealing the identities of security service agents, "something which would effectively paralyze any action at unmasking informers." *ibid.* As well, its critics pointed out that the powers given to the service were too strong, since the Bill would have authorized all of the "dirty tricks" carried out by the RCMP Security Service. But the deepest concern for the opposition to the Bill was that groups and individuals engaged in peaceful dissent not be targeted by the new security service. A minority within the opposition challenged whether *any* kind of security service could act in the best interests of the population. *ibid.*, 5.

⁵ S.C. 1984, c. 21. During the November 1988 Speech from the Throne, the Government of British Prime Minister Margaret Thatcher announced that it would be introducing a Bill to give statutory authority for the first time to MI5, the British domestic security service: John Gray, *U.K. finally bestows legitimacy on spy agency that didn't exist*, *The Globe & Mail*, November 24th, 1988, A9. Its mandate would be to carry on security intelligence with respect to espionage, terrorism and sabotage, as well as "actions intended to overthrow *or undermine* Parliamentary democracy by political, industrial or violent means." *Ibid.*, [emphasis added].

shall report to and advise the Government of Canada.⁶
[emphasis added]

The term "threats to the security of Canada" is defined as meaning, according to s. 2

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities

⁶ The Solicitor General has given the erroneous impression that the role of CSIS is solely to act as a passive information conduit: "The role of a Canadian security intelligence service is to keep the Government informed of activities which may threaten Canada's security. The Service collects information and intelligence on those activities, [...]" Solicitor General, *Canadian Security Intelligence Service Explanatory Notes* (n.d.), 3. See also Note (1985) 26 Harvard Int'l L.J. 234. In the action recently filed in the Supreme Court of Ontario, *Canadian Civil Liberties Association v. Attorney-General of Canada*, File No. RE 1193/89, a declaration is sought that s. 12 is unconstitutional since it authorizes the investigation of activities that are not unlawful, but are defined as threats to the security of Canada: *ibid.*, 2. (The CCLA is, however, not attempting to "overturn the relevant statute, but only to restrict it to ensure that lawful behavior will no longer make Canadian citizens and permanent residents vulnerable to certain intrusive surveillance techniques." Alan Borovoy, Letter to the editor, *The Globe & Mail*, June 2nd, 1989, A6.) The ability to conduct surveillance based on mere suspicions is a characteristic of security services and a necessity for State authority, according to Turk:

Strategies of information control (counterintelligence), neutralization of resistance, and general deterrence depend upon authorities' understandings of realities and probabilities. Indeed, authority is distinguished from power in large part by the greater concern in authority relationships with knowledgeable manipulation, versus steamrolling, of subjects and rivals. Without intelligence, authority cannot exist.

Turk, *infra*, note 170, 123. A good argument could be made that when CSIS acts outside of its statutory mandate granted by, *inter alia*, ss. 12 and 2, it acts in an illegal fashion, *e.g.* where CSIS conducts an investigation where there are no reasonable grounds for a suspicion that some individual or group constitutes a threat to the security of Canada. Accordingly, CSIS should cease such targeting. However, when one complainant attempted to confirm or deny his suspicion that he was being targeted by CSIS he ran up against a stony Kafkaesque silence. He had complained to the Director of CSIS that he was being targeted, but the Director refused to confirm or deny the suspicion. A further complaint was filed with SIRC, which, without holding an oral hearing to which the complainant was invited, concluded that he could be assured that nothing "improper nor illegal" had been done by CSIS in his regard. Dismissing a section 28 application from this "decision," the Federal Court of Appeal ruled that such a decision was not reviewable, in that the SIRC decision was "merely a report of findings that are devoid of any legal effect and do not affect the rights and obligations of the applicant." See *Russell v. CSIS*, A-484-88, January 26th, 1989, *per* Pratte, Marceau & Desjardins, J.J.A., unreported.

directed toward 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 out in conjunction with any of the activities referred to in paragraphs (a) to (d).⁷ [emphasis added]

⁷ The definition in Bill C-157 did not specifically "exclude" lawful advocacy, protest and dissent from the mandate of CSIS, and did not specify that activities directed toward the "destruction or overthrow" of the Canadian government need be accompanied with violence. It read: "(*d*) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow of, the constitutionally established system of government." Some commentators therefore viewed the definition in the final version of the Bill as an improvement over this one.

In Australia, a significantly broader definition of "domestic subversion" is found in the *Australian Security Intelligence Organization Act 1979*, No. 113 of 1979:

- (a) activities that involve, will involve or lead to, or are intended or likely ultimately to involve or lead to, the use of force or violence or other unlawful acts (whether by those persons or by others) for the purpose of overthrowing or destroying the constitutional government of the Commonwealth or of a State or Territory;
- (b) activities directed to obstructing, hindering or interfering with the performance by the Defence Force of its functions or the carrying out of other activities by or for the Commonwealth for the purposes of security or the defence of the Commonwealth; or
- (c) activities directed to promoting violence or hatred between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth (s. 5(1)).

In 1986 this definition was repealed (*Australian Security Intelligence Organization Amendment Act 1986*, No. 122 of 1986, s. 3(b)), and it was clarified that the *Act* "shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organization shall be construed accord-

A number of preliminary observations can be made of this definition of "National Security":

(1) it is riddled with purposively vague, elastic and undefined concepts to be interpreted by CSIS, which is subject to minimal political and judicial control;

(2) the definition of security threats is even wider than under the *Official Secrets Act*;⁸

(3) in s. 2(a) the core activities of espionage and sabotage are already criminal acts under the *Official Secrets Act* and the *Criminal Code*⁹ respectively;

(4) in s. 2(c) the core activity targeted, which even includes violence against property, is terrorism, which is similarly criminalized under ss. 52, 77 to 80 and 85 *inter alia* of the *Criminal Code*, and

(5) "dirty tricks" conducted by CSIS could be covered by s. 2(c).

(6) section 2(d) presents innumerable problems:

[. . .] how in the world do you get evidence of "ultimate" intentions? Can the word "ultimately" deal with any point between now and the end of time? It is obvious that this language puts a premium on speculation about the hereafter rather than evidence of the here and now. These words effectively invite the kind of extravagant predictions of violence CSIS has been accused of making.

[. . .] A broadly preventive mandate tends to encourage

ingly." (s. 9, adding s. 17A to the 1979 Act). See also *Inspector-General of Intelligence and Security Bill 1986*, No. 101 of 1986.

⁸ R.S.C. 1970, c. 0-3, as am. S.C. 1973-74, c. 50, s. 16; S.C. 1984, c. 21, s. 88. See Ch. III, *supra*. As Nadeau states, "[l]'interprétation de cet article ambigu permet d'y inclure tout et rien. On peut ainsi confondre aisément dissidence et subversion." *Supra*, note 11, 102.

⁹ R.S.C. 1970, c. C-34, as am., s. 52. See Chs. II, III, *supra*.

the most groundless of anticipatory speculation. The detection of violence "long before" its actual commission may require not only discernment but also clairvoyance. Moreover, when the goal is prevention, the idea is to amass enough intelligence to make reliable predictions. Thus, there will be a tendency to intrude very pervasively on the investigative targets -- to learn as much as possible about their habits, beliefs, associations and predilections. It is not hard to appreciate the potentially chilling impact of such an approach on the rights of privacy and dissent.¹⁰

Moreover, Swan correctly draws attention to the elasticity of s. 2(c):

[o]ne citizen's subversive is, after all, another person's freedom fighter, and there are a broad range of groups in Canada, including some church groups, which support revolutionary movements abroad with both moral and physical support, the matter ranging from food and medical supplies to money to purchase armaments.¹¹

He misses, however, the purpose of this ideologically-based power, namely the authority conferred upon CSIS to investigate and harass groups and individuals which support anti-capitalist movements outside of Canada. For the relatively brief history of CSIS clearly demonstrates that it "weigh[s] in on the side of the status quo of social power [. . .]" and thus has an "anti-left bias."¹² Although this is contrary to the ideology of liberal legalism that the law is neutral,¹³ it is no surprise that such a position should be adopted:

¹⁰ Alan Borovoy, *Spy agency has a chilling mandate*, *The Globe & Mail*, July 10th, 1988, A7. This is consistent with one of the characteristics of "political policing," according to Turk, which is "less concerned with merely suppressing actual political offenders than with accomplishing this in ways that maximize the deterrent impact upon potential offenders, that is, everyone else." Turk, *infra*, note 170, 122.

¹¹ Kenneth P. Swan, *The Use of Science by the State for Security and Control; Legal and Civil Liberties Aspects of Information and National Security* (1983) (unpublished paper), 15.

¹² *Freedom of Expression*, *supra*, note 1, 207. See also Mark Hollingsworth & Richard Morton-Taylor, *Blacklist: The Inside Story of Political Vetting* (1988), for a vivid

When we think of the enormous power of the business class, the acknowledged rulers of the so-called "private sector," to determine the orientation of government via the power to invest, not to invest, or disinvest according to profitability, and economic security (the idea of "business confidence"), to control ideology through ownership of the media and thereby to define "national security" in its own interests, should we be surprised that the police, the courts and the legal profession in general define "national security" in the same way?¹⁴

This tendency in Canada to equate "left-wing" with "security threat" is due, according to Mandel, to the "practical alliance with the United States, as well as the cultural and economic dominance the U.S. exercises over Canada [. . .]."¹⁵ Similarly he is of the view that the Security Intelligence Review Committee (SIRC), charged with overseeing the activities of CSIS, will support the global suppression of social change under the banner of anti-Communism.¹⁶

It is, however, s. 2(d) and the qualifying exception which pose some of the most troublesome problems. Presumably the phrase "lawful advocacy, protest or dissent" was considered by the government to be conduct

description of the British experience; Theoharis, *infra*, note 38, 21; Cobler, *infra*, note 15, 110.

¹³ See, e.g., J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy* (1986) 18 Ottawa L.R. 1, 10-12.

¹⁴ *Freedom of Expression*, 207-208.

¹⁵ *Ibid.*, 208. See also Sebastien Cobler, *Law, Order and Politics in West Germany* (1978), 7.

¹⁶ *Ibid.* See, e.g., R. Atkey, "Notes for the use of the Honourable Ronald G. Atkey, P.C., Q.C.," *Address to the Human Rights Foundation*, Toronto, March 1st, 1986, 6, 10-11. Ronald Atkey is the former chairman of SIRC.

protected by the *Canadian Charter of Rights and Freedoms*,¹⁷ and was exempted to quell the criticisms formulated by civil libertarians and others, and to indicate that not all anti-government activity poses a threat to National Security. This is reflected in the notion advanced by the government that the mandate strikes the proper balance between the need to protect National Security, on the one hand, and civil liberties and the right to privacy, on the other.¹⁸ The government does acknowledge, however, that there is a "fine line" between subversion and legitimate dissent:

Canadians must be assured of the basic right to engage in political dissent, and to advocate radical change in social practices, government policies, or political institutions. The McDonald Commission describes the exercise of this right as "the life blood of a vibrant liberal democracy" and it must be clearly distinguished from subversive activity.¹⁹

But the notion of subversive activity extends far beyond "criminal" activity. Another principal criticism levelled against s. 2(d) is that it is impossible to define subversion, and to distinguish it from lawful advocacy,

¹⁷ Being Schedule B of the *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.), 1982, c. 11. Conversely, the government would argue that the targeting of all those activities mentioned in (a) to (d) would be defensible as reasonable limits, within the meaning of s. 1 of the *Charter*.

¹⁸ See, e.g., Solicitor General, *Canadian Security Intelligence Service Explanatory Notes* (n.d.), 5. This balance is also established by the investigative powers of CSIS, its controls (powers are exercised with proper authorization) and external review, according to the Solicitor General.

¹⁹ *Ibid.*, 8 [note omitted]. Turk describes it as including "any mode of speaking out against the personages, actions, or structures of authority." Turk, *infra*, note 170, 99-103. Borovoy also makes the rather original observation that "there is a wide variety of lawful activities which may well not be described as advocacy, protest or dissent, for example, the sending of funds to foreign organizations or commercial negotiations on behalf of foreign governments. Even though such activities are lawful, they may not be covered by this exemption." *CCLA v. Attorney-General of Canada*, *supra*, note 6, 21.

protest or dissent.²⁰ When, for example, is advocacy, protest or dissent "in conjunction with" any of the activities described in s. 2(a) to (d)? Is *any* form of support "in conjunction with" the grounds set out in s. 2(a) to (d) justifiable for targeting? Would, for example, an occupation of an office of Correctional Services Canada in support of one of the "Vancouver Five" on a hunger strike in prison be covered? (this event actually took place) Or would more direct involvement be required, for example aiding, abetting or attempting? It now seems clear that while s. 2(d) is primarily directed towards revolutionary activities, in the broad sense of the term, and would cover virtually all of the activities of most leftist groups and individuals, the activities contemplated by s. 2(d) have permitted the targeting of activities

²⁰ After preparing a four-part series entitled "Dissent and Subversion," broadcast on the CBC Radio program "Ideas," Jim Littleton stated: "I have come to the the conclusion in doing this series of programs that there is no such thing as subversion, that it can't be defined -- certainly not in law -- and therefore it shouldn't appear in any public law in this country." Jim Littleton, *Dissent and Subversion* (Dec. 1983) *Canadian Dimension* 8, 8 (an abridged version). Grace and Leys have demonstrated, moreover, that "security services do not, in general, distinguish between subversion and "legitimate dissent"." Elizabeth Grace & Colin Leys, *The Concept of Subversion* (1988) (unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent."), 22 Rankin recently reiterated his concern that the counter-subversion mandate is "too elastic," and hinted that it should be removed entirely from the CSIS Act: Murray Rankin, *The Five-Year Parliamentary Review of the CSIS Act: Notes for the British Columbia Law Union*, September 1988, 4. He has been retained by SIRC to prepare its submissions for the five-year review of the *CSIS Act*, pursuant to s. 69 of the *Act*, which must commence by July 1st, 1989. There are few indications as what positions the various concerned parties will articulate during the review. It appears, however, that neither government nor CSIS desire anything more than minor reform to the *CSIS Act*. Senator William Kelly (Chairman of the Senate Special Committee on Terrorism and Public Safety) has, for example, expressed the view that the review should result in "some minor tinkering with the [SIRC] review superstructure." W.M. Kelly, *S.I.R.C.: A Parliamentarian's Perspective*, unpublished paper presented to the June 1989 annual conference of the Canadian Association for Security and Intelligence Studies in Québec City, 9. CSIS Director Reid Morden has also stated that s. 69 provides for the review of the *Act* only, and not the Service. J.R. Morden, *The Security Intelligence Threats Facing Canada in the 1990's* keynote address to the June 1989 annual conference of the Canadian Association for Security and Intelligence Studies, text unavailable.

of a vast array of lawful organizations and individuals, engaged in perfectly lawful activities, including unions, peace groups, the Communist Party, the NDP, critical magazines and lawyers.²¹

This definition then authorizes the security service to secretly investigate individuals and organizations in order to perpetuate and protect the hegemonic power and authority of the State. It is therefore consistent with the historical goal of security services in Canada, namely to investigate, repress and eventually rid society of any person or organization with anti-government or anti-capitalist views:

From the beginning the S & I [RCMP Security & Intelligence branch] operators conceived of their job as being nothing less than to maintain the political "purity" of Canada. This meant that any individuals or groups of people who were opposed to the capitalist system or any aspect of it might be subjected to RCMP surveillance, harassment and intimidation.²²

This policy of a counter-insurgency strategy

must be one of permanent repression directed against broad public sectors of a political movement. Even in periods of relative calm or inactivity, counter-insurgency principles mandate that the repressive forces be active, identifying potential leaders and supporters or resistance, gathering information and building dossiers about them, as well as infiltrating political and community organizations.²³

²¹ See, e.g., Security Intelligence Review Committee, *Annual Report [.] 1986-87* (1987), 33 *et seq.*

²² Brown, *supra*, note ¹¹, 56. For a discussion of earlier RCMP battles against radicalism see *ibid.*, 50 *et seq.* See also Normand Marion, "Le droit pénal à l'ère néo-libérale: Le danger croît avec son usage," *in* Bureau & Mackay, *supra*, note ¹¹, 55, 62-63.

²³ Michael Deutsch, *New Developments in U.S. Judicial Repression: The Use of*

The definition of "threats to the security of Canada" represents an unbroken line of continuity with the equally broad mandate of the RCMP Security Service, whose terms of reference were in the form of a secret Cabinet Directive, approved by the Cabinet in March 1975²⁴ and made public in July 1978²⁵ by the McDonald Commission. According to this Directive, it was agreed that

the RCMP Security Service be authorized to maintain internal security by discerning, monitoring, investigating, deterring, preventing and countering individuals and groups in Canada where there are reasonable and probable grounds to believe that they may be engaged in or may be planning to engage in:

- i) espionage or sabotage;
- ii) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
- iii) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;
- iv) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada;
- v) activities of a foreign or domestic group directed toward the commission of terrorist acts in or against Canada; or
- vi) the use of the encouragement of the use of force, violence or any criminal means, or the creation or exploitation of civil disorder for the purpose of accomplishing any of the activities referred to above.

Counter-Insurgency Methods Against the Puerto Rican Independence Movement (1988) 45 National Lawyers Guild Practitioner 15, 15.

²⁴ Adopted March 27th, 1975. See Peter H. Russell, *Freedom and Security: An Analysis of the Policy Issues Before the Commission of Inquiry* (1978), App. C. See M.L. Friedland, *National Security: The Legal Dimensions* (1979) [A Study prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police], 2.

²⁵ Assistant Commissioner Chisholm, *RCMP Security Service, Surreptitious Entry Public Statement*, July 25th, 1978, 4.

Concerning (iii) in this mandate, Cotler offered the following thoughts:

The result is the authorization of a standing interference, by a variety of means with individuals and associations respecting the activities set out above, but these activities could amount to nothing more than a *bona fide* organization seeking a change in policy by way of a demonstration or non-violent civil disobedience. In a word, if the Canadian Labour Congress were to engage in an illegal strike (read unlawful act) protesting, for example, wage and price controls under the *Anti-Inflation Act*, they could subject themselves to saturation surveillance, as set forth above.²⁶

A rather extreme example of the elasticity of these concepts is the definition of "subversion" offered by a former RCMP Deputy Commissioner, William Kelly: "To subvert is to overturn, upset, effect the destruction of or overthrow of such things as religion, monarchy, the constitution, principles or morality."²⁷ Who or what would be spared by that definition?

A related concern is that the conduct in question is not easily compart-

²⁶ Irwin Cotler, "Freedom of Expression," in Armand de Mestral *et al.* eds., *The Limitation of Human Rights in Comparative Constitutional Law* (1980), 353, 361. The Cabinet Decision of May 27th, 1976 respecting security clearance procedures referred to and assimilated the Cabinet Decision concerning the mandate of the RCMP, which was equally overbroad in its scope:

The Committee agreed that the Cabinet decision of March 27, 1975 (166-75RD) was not intended to alter the policy of the government with respect to the screening of persons for appointment to sensitive positions in the Public Service, namely that:

- (a) information that a candidate for appointment to a sensitive position in the public service, or a person already in such a position, is a separatist or a supporter of the Parti Québécois, is relevant to national security and is to be brought to the attention of the appropriate authorities if it is available; and
- (b) the weight to be given to such information will be for consideration by such authorities, taking into account all relevant circumstances, including the sources and apparent authenticity of the information and the sensitivity of the position. *Ibid.*, 362.

²⁷ William & Nora Kelly, *Policing in Canada* (1976), 570. See also Final Report of the *Select Committee to Study Government Operations with Respect to Intelligence Activities*, U.S. Senate, April 26th, 1976, Book 2, 4.

mentalized, since many of the concepts overlap, and "because 'subversive' conduct is often on a continuum; an unlawful assembly can become a riot, which in turn may become a seditious conspiracy, which may in turn result in treasonable conduct."²⁸ Conversely, "subversive activities" may transform into lawful advocacy, protest or dissent, which in turn may evolve into mere criticism.

(3) The Mandate of CSIS in Practice

That part of the CSIS mandate which has received the most public scrutiny and criticism lately concerns "counter-subversion." In a relatively brief period of time the CSIS Counter-Subversion Branch was able to assemble files on some 30,000 Canadian individuals and groups, and to gather information on, harass, disrupt and infiltrate a wide variety of organizations, including peace groups, the NDP, unions, periodicals, left-wing parties, as well as individuals such as lawyers.

While many observers believed that such was the case, the 1986-87 Annual Report of the Security Intelligence Review Committee (SIRC) confirmed many of these assertions.²⁹ The Report notes that the supposedly "narrower" mandate of CSIS, compared to that of the RCMP Security Service, has not led to a decrease in targets. In fact "all [RCMP] Security Service investigations reviewed in 1984 were continued by CSIS -- although sometimes under justifications rewritten to ensure conformity with the new

²⁸ Friedland, *supra*, note 24, 8 [notes omitted].

²⁹ *Supra*, note 21, 33 *et seq.* Security and intelligence is generally an excessively unhumorous field of study. For a brilliant exception to the rule see Rick Green & Andrew Green, *In case they want to know*, The Globe & Mail, April 19th, 1988, A7. *Cf.* Cobler, *supra*, note 15, 71.

CSIS Act."³⁰ In addition to targeting leaders, members and sympathizers of targeted groups, CSIS also targets everyone in regular contact with a person already targeted for active investigation. The Review Committee objects to this policy of targeting entire categories of persons, as well as targeting without reference to the actual threats that the individuals pose to National Security, on the basis that it is "insufficiently precise."³¹ The pronounced anti-left/pro-right ideological bias of CSIS is exemplified by the "minimal CSIS interest in fund-raising inside Canada for the Contra rebels in Nicaragua -- although this seems to meet section 2's criterion [. . .]" Conversely, a group which opposed the government in El Salvador was targeted, which again confirms that CSIS also acts in the interests of the foreign policy of the U.S. government. In response to this latter targeting the Report stated that it "cannot agree that a non-violent attack on U.S. foreign policy is *necessarily* a threat to the security of Canada."³² It concludes that minimal threats are posed by many of the groups targeted by the Counter-Subversion Branch, and consequently CSIS should reconsider its possibility of targeting entire categories of people and consider assessing individuals as individuals.

The Report confirms that more than 30,000 files on individuals are kept by the Counter-Subversion Branch, only a "small proportion" of which are under active investigation, the latter statement being not only vague but also probably exaggerated considering the zealousness of this Branch. This does seem, however, to be a relatively small number of files compared to the

³⁰ *Ibid.*, 35.

³¹ *Ibid.*, 36.

³² *Ibid.*, 37 [emphasis added]. This statement appears to leave the disturbing impression that such criticism of U.S. foreign policy might constitute such a threat in slightly different circumstances.

more than 600,000 files on individuals kept by CSIS as a whole, 112,000 of which were alone opened in 1986-1987.³³ After studying five organizations targeted by CSIS, the names of which are not disclosed, the Committee concludes that CSIS is primarily concerned with:

- The potential ability of foreign powers to manipulate Canadian policy through social institutions or legitimate protest groups.
- The possibility that certain groups might undermine Canadian institutions and bring about the violent overthrow of the state.

In both cases, there appeared to be an underlying belief that the Canadian public was only too liable to be duped.³⁴

³³ *Ibid.*, 38. The Committee adds that the number of files "seems to have remained relatively constant compared with the number held by [. . .] the RCMP Security Service." CSIS later disputed the number of subversive files it keeps, claiming that its Counter-Subversion Branch had files on only 3,867 individuals. CSIS spokesperson Gerry Cummings stated that in 1984 CSIS inherited some 60,000 RCMP Security Service files, around 30,000 of which were counter-subversion files. Only 3,867 active individual files are retained by CSIS, he claimed, only 450 of which have been opened since 1984. The inactive files are scheduled either for destruction or transfer to Public Archives. But, as SIRC Chairman Ron Atkey noted, CSIS still has access to those files. Victor Malarek, *Only 3,867 'subversive' files active, not 30,000, CSIS says*, *The Globe & Mail*, July 4th, 1987, A5. It has not, however, been possible to confirm or deny these allegations made by CSIS. The Privacy Commissioner in his 1988-89 Annual Report did, however, confirm that "120,000 [RCMP] security service files have been disposed of. This includes 67,000 which had previously been scheduled for destruction by the RCMP, and 53,000 reviewed prior to disposal by CSIS." Privacy Commissioner, *Annual Report 1988-89* (1989), 20. He notes that "CSIS has set up a unit to review the files, extract what is of continuing legitimate significance to CSIS and dispose of the rest. But, the process is laboriously slow [. . .]." Nevertheless, the Privacy Commissioner "is pleased to report that CSIS plans to accelerate its review and disposal of files. In the next two years it intends to review for disposal twice as many as during the past five years. The Privacy Commissioner applauds the initiative but considers the process should be independently monitored to ensure that all information which does not meet the 'strictly necessary' requirement of section 12 of the *CSIS Act*, is actually disposed of and not merely recycled into other formats." *Ibid.*, 20-21.

³⁴ *Ibid.*, 39.

The Committee also criticizes CSIS for overestimating the potential of violence by some groups. Just how broadly CSIS interprets its mandate is illustrated by the following example:

One targeted group, for example, publishes a magazine that deals with a wide variety of topics -- the arts as well as social policy and other issues -- from the perspective of the far left.

It is true that some members have advocated violent action by this group, but they were brushed aside by the others.³⁵

It was later independently confirmed that *This Magazine* was the "far left" publication in question, which had also been wiretapped by CSIS. One of its editors described *This Magazine* as "hardly left in the political spectrum. I would describe it as an independent voice of criticism and opposition to the way things are done. We've always tended to be left and nationalistic."³⁶ The Committee concludes by recommending that the rather tarnished Counter-Subversion Branch should be dissolved, *but* that its functions be carried on by the Counter-Terrorism and Counter-Espionage Branches of CSIS.

³⁵ *Ibid.*, 40.

³⁶ Victor Malarek, *CSIS probe of leftist magazine called threat to freedom of press*, *The Globe & Mail*, July 9th, 1987, A1. Rick Salutin, a *This Magazine* editor, said it was "preposterous, so off the wall and absolutely outrageous" for CSIS to consider the publication a National Security threat. The editors and contributing editors include: Ian Adams, Margaret Atwood, Myrna Kostash, Carole Corbeil, Mel Watkins, Susan Crean, Lorraine Filyer and Nick Fillmore. See also *This Magazine, That Magazine [:] Does it Matter?* (Aug./Sept. 1987) *This Magazine* 2. This targeting would clearly seem to contravene the criteria for determining what constitutes a National Security threat, proposed by the Review Committee: "[. . .] (a) the magnitude of the threat and (b) its imminence, (c) the need for the type of investigation envisioned compared with less intrusive alternatives, and (d) the goals of investigation." *Supra*, note 21, 38.

Historically, security services in Canada have worked closely with their counterparts in the United States. But not only does CSIS share the foreign policy objectives of the U.S. Government in determining which groups and individuals to target in Canada, it also replicates similar domestic counter-insurgency tactics perfected by the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA) and other intelligence bodies in the United States.³⁷ Early operations of the FBI were aimed at the union and Black movements, which had the potential to seriously threaten control by the government and the ruling élite. The FBI therefore attempted to isolate leaders of these movements who could provide leadership to a broader radical movement.³⁸ The most prominent counter-subversion campaign has been undertaken by the FBI under the code-name COINTELPRO, whose goal was to collect information on, infiltrate and harass political groups, unions and movements for social change. In 1977, for instance, the National Lawyers Guild, a progressive Bar association with more than 8,000 members, filed an action against the U.S. Attorney General, the Director of the FBI, the CIA and other intelligence agencies, seeking equitable relief and damages for 40 years of surveillance, infiltration and disruption of the Guild and its members by government agents. In response the Administration of then President Ronald Reagan argued that the government was completely

³⁷ See, e.g., William J. Chambliss, "Toward a Radical Criminology," in David Kairys, ed., *The Politics of Law: A Progressive Critique* (1982), 230, 237; Nelson Blackstock, *COINTELPRO: The FBI's Secret War on Political Freedom* (1976); En collaboration, *La Police Secrète au Québec, supra*, note 11, 216-220; John Ranetagh, *The Agency: The Rise and Decline of the CIA* (1986); James Littleton, *Target Nation: Canada and the Western Intelligence Network* (1986).

³⁸ See Larry Seigle, *Washington's Fifty-Year Domestic Contra Operation* (1987) 6 *New International* 157, 162; Athan Theoharis, *The FBI and Dissent in the United States* (1988) [unpublished paper presented at the February 1988 conference at Queen's University on "Advocacy, Protest and Dissent."]

immune from liability for acts done in the name of National Security, even if those actions were illegal or unconstitutional, and therefore moved to dismiss the suit.³⁹

A similar action was filed by the Socialist Workers Party (SWP) against the FBI for its disruption, surreptitious entries and use of informants.⁴⁰ At first instance the Court held that the surreptitious operations were illegal in that they were directed against entirely lawful and peaceful activities, and they violated the group's First Amendment rights of free speech and assembly. Moreover, the FBI burglaries, hidden microphones and phone taps violated the 14th Amendment's protection against arbitrary search and seizure and invasions of privacy, and the government had no "National Security" interest to tap phones of political activists.⁴¹ Peaceful political activity therefore did not constitute a threat to National Security, and accordingly the SWP was awarded \$264,000 in damages, and granted an injunction with respect to illegally obtained documents.⁴²

39 See *NLG v. FBI: Court Order on Guild Files Won* (Spring 1985) Guild Notes 4; Michael Krinsky, *The FBI Blacklist of Bar Applicants* (Summer 1985) Guild Notes 1; National Lawyers Guild, *Organizational Report* (1986), 20; National Lawyers Guild, *1983 Organizational Report* (1983), 24; Michael Krinsky, *Cointelpro Lingers On: National Lawyers Guild v. FBI* (1986) 43 Guild Practitioner 51.; Thomas I. Emerson *et al.*, *National Lawyers Guild v. Attorney General* (1985) 42 Guild Practitioner 33; Bob Bailey, *The Lawyers Guild Through Eyes of the FBI* (1977) 34 Guild Practitioner 117.

40 *Socialist Workers Party v. Attorney General* (1986) 642 F.Supp. 1357 (S.D.N.Y.).

41 In the U.S. the Supreme Court has recognized "the constitutional basis of the President's domestic security role." *U.S. v. U.S. District Court* (1972) 407 U.S. 297, 320.

42 Fred Feldman, *Justice Dept. to appeal court ruling against FBI spying*, *The Militant*, Jan. 15th, 1988, 1. The Justice Department appeal was discontinued shortly thereafter. Margaret Jayko, *Socialist Workers Party wins final round in anti-FBI suit*, *The Militant*, March 25th, 1988, 1. See, generally, Margaret Jayko, ed., *FBI On Trial (!) The victory of the Socialist Workers Party suit against government spying* (1988).

In Canada, CSIS has consistently refused to confirm or deny which groups or individuals it targets, and has attempted to justify its actions on the basis that it only uses "defensive methods" to counter espionage, terrorism, foreign-influenced activities and subversion. Former CSIS Director Ted Finn even attempted to give the impression that Canadians had nothing to worry about, concerning the activities of the Service: "Aucune activité du Service ne menace la liberté des Canadiens et les contrôles, judiciaires, civils et politiques, font en sorte que nos agents ne violeront pas les lois canadiennes et les droits de la personne."⁴³ Yet the freedom of expression, right to privacy, freedom of association, freedom from unreasonable search and seizure and right to dissent of Canadians have been consistently violated by CSIS, which has, moreover, engaged in and incited patently criminal activity.

The solicitor-client privilege is furthermore of little concern to CSIS. The Service was authorized by the Federal Court, in one case, to intercept communications between a Vancouver Man, Harjit Singh Atwal, and his lawyer, David Gibbons, to determine whether National Security was in peril.⁴⁴ A one-year authorization was granted to intercept all

⁴³ Jocelyn Coulon, *Le service canadien de sécurité est strictement défensif*, *Le Devoir*, 25 juin 1986, 2.

⁴⁴ *Atwal v. The Queen* [1987] 2 F.C. 309, 78 N.R. 292 (T.D.). Atwal and eight other men were charged with the shooting of a Punjabi state Minister on May 25th, 1986. See also Chris Rose, *Warrant to bug called peril to lawyer-client privilege*, *The Vancouver Sun*, Jan. 8th, 1987, A1; Zuhair Kashmeri, *Warrant breached guarantee of confidentiality, lawyers say*, *The Globe & Mail*, Jan. 8th, 1987, A1. Canadian Civil Liberties Association General Counsel Allan Borovoy correctly observed that unlike the *Criminal Code*, the *CSIS Act* contains no restrictions on bugging solicitor-client conversations or restrictions on disclosure of such disclosures. During the May 1987 conference at "Internal Security: Issues for Democracy," held at York University in Toronto, Vancouver lawyer David Gibbons similarly criticized the ability of CSIS to obtain *ex parte* warrants for surveillance because they lead the Service to present "false, misleading and illegally obtained information." Ross Howard, *CSIS powers of secrecy called threat to freedom*, *The*

communications by tapping the man's telephone, plant listening devices in his car, home or temporary residence, break into any place that he visited and remove or copy any communication. The warrant also authorized the interception of the man's communications with his lawyer or the lawyer's employees for a preliminary period to determine whether they related to the alleged security threat. The conversations from which could be retained if they related to National Security, otherwise they were to be destroyed. Such broadly-worded warrants leave considerable room for abuse, especially considering their duration. In 1986 SIRC reported that there were 94 new warrants granted to CSIS (compared to 82 in 1985), for a total of 105. The *average* duration of such warrants was 162.2 days.⁴⁵

An application by Atwal for an order rescinding the warrant was dismissed by the judge of the Trial Division of the Federal Court who had granted the warrant,⁴⁶ but this decision was reversed on appeal in a

Globe & Mail, May 9th, 1987, A3. Montréal law professor Jean-Paul Brodeur raised similar concerns. SIRC began an investigation to determine whether any breach of the solicitor-client privilege had been committed. See Zuhair Kashmeri, *Probe launched into breach of solicitor-client privilege*, The Globe & Mail, Jan. 14th, 1987. Such requests for warrants are apparently "rubber stamped" by the judiciary. In June 1985, for instance, then Solicitor General Elmer Mackay tabled a report in the House of Commons indicating that of the 710 judicial applications for wiretaps in 1984 by prosecutors, RCMP officers and civilian security agents only one application was dismissed. Canadian Press, *Spy agency did well in e embassy attack: report*, The Gazette [Montréal], June 28th, 1985, B-1.

⁴⁵ *Supra*, note 18, 10. The activities authorized by such warrants include "wiretapping, eavesdropping by microphone, capturing of optical images, interception of recorded communications, searches for documentation and paraphernalia and the interception of mail." In 1983, the last full year in which warrants were issued under the *Official Secrets Act* 525 warrants were approved by the Solicitor General. While in 1985 82 new warrants were issued to CSIS, under s. 21 of the *CSIS Act*, while 27 were renewed, under s. 22, and the average length of time for which warrants were in force was 173.58 days. SIRC, *Annual Report (1985-86)* (1986), 18-19. Although the number of warrants has recently decreased, to a total of 76 in 1987, the average duration of such warrants has increased to 190.82 days: SIRC, *Annual Report (1987-1988)* (1988), 18.

⁴⁶ *Ibid.*

judgment which significantly broadens the ability to challenge the powers of CSIS to conduct surveillance.⁴⁷ A majority of the Federal Court of Appeal⁴⁸ was not persuaded by the argument that the section of the *CSIS Act* which permits warrants to be issued was contrary to s. 8 of the *Canadian Charter*, but they did hold that the Trial Division erred in refusing to disclose the affidavit supporting the warrant application to the defence, in order to determine whether the affidavit was truthful and sufficient. The accused had the right to apply to the judge who issued the warrant to set it aside, but this could only be done if he was given access to the materials used to obtain the warrant. Since the *CSIS Act* did not prohibit the disclosure of the affidavit, the majority reasoned, the public interest in the administration of justice must weigh in favour of openness of all judicial processes. It is, however, extremely important to stress that no objection pursuant to ss. 36.1 or 36.2 of the *Canada Evidence Act* had been raised in this case. If such an objection had been formulated it might have altered its result. And the majority did not prohibit CSIS from monitoring solicitor-client conversations.

An extraordinarily bold decision was rendered by Hugessen J., dissenting in part, who found that s. 21 of the *CSIS Act* was incompatible with s. 8 of the *Canadian Charter*.⁴⁹ Hugessen J. held that this provision was contrary to s. 8 since there was no reasonable and proportionate relationship between the government interest and the proposed intrusion, and

⁴⁷ *R. v. Atwal* (1987) 36 C.C.C. (3d) 161, 59 C.R. (3d) 339, 79 N.R. 91, 11 C.R.D. 850.60-03, [1988] 1 F.C. 107 (F.C.A.) [hereinafter cited to 37 C.C.C. (3d) 161]. For an analysis of this decision see Yves de Montigny, *La protection contre les fouilles, les perquisitions et les saisies abusives: un premier bilan* (1989) 49 R. du B. 53, 126-130.

⁴⁸ Mahoney and MacGuigan JJ. concurring, at 165 *et seq.*

⁴⁹ *Supra*, note 47, 192 *et seq.*

it does not provide any reasonable standard by which the judge may test the need for the warrant. There is no requirement to show that the intrusion into the citizen's privacy will afford evidence of the alleged threat or will help to confirm its existence or non-existence. Nothing in the language of the statute requires a direct relationship between the information 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.⁵⁰

The language found in s. 21 was so broad that no objective standard was provided, and the extent of the intrusion into the citizen's privacy was wholly disproportionate, even considering the importance of the State interest involved. Accordingly, a search and seizure under the provision would not be reasonable, and the section could not stand. When CSIS subsequently confirmed that it had used unreliable and inaccurate information from a discredited informer to prepare the affidavit for the warrant in this case, CSIS Director Ted Finn was forced to resign in September 1987.⁵¹

⁵⁰ *Ibid.*, 198.

⁵¹ Canadian Press, *Tainted wiretap use wider than reported*, The Vancouver Sun, Dec. 2nd, 1987. Charges were eventually stayed against Atwal and his co-accused. See also *Atwal v. The Queen* (1987) 80 N.R. 4 (F.C.T.D.). SIRC, on the basis of briefings, concluded that "the Service did not deliberately 'cook' its warrant application by including information from a discredited source": SIRC, *Annual Report [.] 1987-1988* (1988), 11. It failed to explain, however, why Finn so quickly resigned as CSIS Director, if such was the case. Finn was later appointed as Executive Director of Emergency Planning Canada, the body charged with the administration of the new *Emergency Preparedness Act*, S.C. 1988, c. 11. See Canadian Press, *Former CSIS chief gets new post*, The Globe & Mail, June 11th, 1988, A5.

Even before the release of its 1986-87 Annual Report SIRC expressed the view that CSIS should curtail its counter-subversion activities. According to an unidentified senior source on the Committee, SIRC was particularly concerned about the attempts by CSIS to infiltrate and disrupt activities of student, political, environmental and peace groups. Anonymous sources reported on "virtually ludicrous" instances of CSIS investigating and attempting to disrupt groups it considers to be subversive, as well as intimidation of individuals associated with certain groups.⁵² SIRC did address the concern that CSIS had been conducting "fishing expeditions" in universities and colleges in its 1986-87 Annual Report. But the Committee simply confirmed that the Solicitor General's policy on campus CSIS operations was consistent with the RCMP's position, and agreed to by the Canadian Association of University Teachers (CAUT) in 1963, that

There is at present no *general* RCMP surveillance on university campuses. The RCMP does, in the discharge of its security responsibilities, go to the universities as required for information on people seeking employment in the public service or where there are definite implications that individuals *may* be involved in espionage or subversive activities.⁵³

52 Ross Howard, *Security agency alarming critics*, The Globe & Mail, May 11th, 1987, A1 (another report on the "Internal Security: Issues for Democracy" conference. See *supra*, note 44).

53 *Supra*, note 29, 15-16 [emphasis added]. This would appear to be contradicted by a recent report released by CAUT. It expressed concern that CSIS does not always understand the meaning of freed discussion and academic debate [. . .] and [has] been inclined to perceive threats to national security when liberal or radical political and social views are expressed in debate.

CAUT has urged the security services, in their activities on campuses, to distinguish between legal dissent and subversive activity. [. . .]

CAUT has been concerned about the large number of security files maintained by the RCMP and since 1984 by the CSIS. Many of the files are those of university faculty members.

Victor Sim, CAUT Associate Executive Secretary, *Security, surveillance:*

Moreover, SIRC reported that a ministerial directive of June 8th, 1984 states that such investigations should only occur where there are "objective indications that individuals may be involved in activities prejudicial to Canada," requiring ministerial approval for certain kinds of investigations.⁵⁴

The most glaringly anti-democratic and abusive activities have been conducted by CSIS in the trade union movement. For CSIS has investigated, infiltrated and harassed unions all across the country, and incited their members to engage in criminal activities in order to discredit, disrupt and weaken these organizations by reducing their effectiveness. In this area, more than any other, it is now clearly evident that the "dirty tricks" of the RCMP Security Service were not laid to rest with the creation of CSIS, rather the new security service has inherited this discredited segment of history and carried on similar activities since its formation.⁵⁵ In June 1987, for instance, it was revealed that Marc Boivin, an employee of the Confédération des Syndicats Nationaux (CSN), had been a full-time secret agent of the RCMP

some gains, CAUT Bulletin, Sept. 1984, 29, 34.

⁵⁴ *Ibid.*, 16.

⁵⁵ See Taylor, *supra*, note 11, 67 (informants and provocateurs by the CIA and RCMP Security Service inside Canada's labour and peace movements); Ross Dowson *et al.*, *Ross Dowson v. R.C.M.P.* (1981), 33-34, 60-61; Ian Adams, *A Portrait of a Spy* (1986 ed.), 115; *La Police secrète au Québec*, *supra*, note 11, 55-56, 173-206, 145-147 (concerning the Canadian Forces Security Service). During a trial of anti-apartheid civil disobedience activists in 1986 it was revealed that a video of the protest had been taken for CSIS, which was entered as evidence. See Katherine Lippel, "Les pratiques alternatives du droit," *in* Bureau & Mackay, *supra*, note 11, 597, 615; *Ville de Montréal v. Claret*, 26-5150, Montréal Municipal Court, Judge Micheline Corbeil-Laramée, Sept. 15th, 1987. *Cf.* Cobler, *supra*, note 15, 67-70. The affidavits filed in support of the application in *CCLA v. Attorney-General of Canada*, *supra*, note 6, 28-60, allege that CSIS has investigated a refugee organization (where it sought to cause dissension between members), the Toronto Disarmament Network (on the ground that it has connections with the Soviet Union) and the B.C. Provincial Council of Carpenters (where it interfered with the normal functioning of the organization).

It was also revealed that CSIS had been targeting unions all across the country, including the B.C. Federation of Labour, the Canadian Union of Public Employees, the Centrale de l'Enseignement du Québec and the Canadian Auto Workers.⁵⁹ Allegations of CSIS instigating violent and criminal activities in these unions have also been made by Canadian Labour Congress President Shirley Carr.⁶⁰ Interestingly, none of this extensive union infiltration by CSIS is alluded to in the 1986-87 Annual Report of SIRC. Either CSIS refused to inform SIRC of these targets, in light of the spectacular wrongdoings attached to these operations, or SIRC simply overlooked them, or considered them to be relatively unimportant.

The 1986-87 Annual Report of SIRC contained such a condemnation of the CSIS Counter-Subversion Branch, which provoked such widespread public outrage, that the Solicitor General was compelled to defuse this criticism by creating an independent advisory team, headed by Gordon Osbaldeston, only three weeks after the Report was released. One of the two issues for the team was "whether CSIS operational policies concerning targetting, particularly in counter-subversion, have balanced effectively the needs of the state and the rights of individuals."⁶¹ The principal assumption

⁵⁹ Lorne Slotnick, *Union wants action on alleged spying*, The Globe & Mail, Oct. 30th, 1987, A3. See also Mia Stainsby, *Robinson to demand inquiry into CSIS in union voting*, The Vancouver Sun, Sept. 26th, 1987, A12; Salim Jiwa, *Spying eye miffs labor*, The Province [Vancouver], Sept. 27th, 1987, 6. Reg Whitaker, *Left-Wing Dissent and the State [:] Canada in the Cold War* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 18-21.

⁶⁰ Canadian Press, *'Riot squads' to blame for violent strikes*, The Gazette [Montréal], Sept. 3rd, 1987, A-8 (claiming that violence on union picket lines had been provoked by CSIS, the RCMP provincial police or other forces).

⁶¹ *People and Process in Transition [:] Report to the Solicitor General by the Independent Advisory Team on the Canadian Security Intelligence Service* (October 1987), 1.

Moreover, SIRC reported that a ministerial directive of June 8th, 1984 states that such investigations should only occur where there are "objective indications that individuals may be involved in activities prejudicial to Canada," requiring ministerial approval for certain kinds of investigations.⁵⁴

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54 *Ibid.*, 16.

55 See Taylor, *supra*, note 11, 67 (informants and provocateurs by the CIA and RCMP Security Service inside Canada's labour and peace movements); Ross Dowson *et al.*, *Ross Dowson v. R.C.M.P.* (1981), 33-34, 60-61; Ian Adams, *A Portrait of a Spy* (1986 ed.), 115; *La Police secrète au Québec*, *supra*, note 11, 55-56, 173-206, 145-147 (concerning the Canadian Forces Security Service). During a trial of anti-apartheid civil disobedience activists in 1986 it was revealed that a video of the protest had been taken for CSIS, which was entered as evidence. See Katherine Lippel, "Les pratiques alternatives du droit," *in* Bureau & Mackay, *supra*, note 11, 597, 615; *Ville de Montréal v. Claret*, 26-5150, Montréal Municipal Court, Judge Micheline Corbeil-Laramée, Sept. 15th, 1987. *Cf.* Cobler, *supra*, note 15, 67-70. The affidavits filed in support of the application in *CCLA v. Attorney-General of Canada*, *supra*, note 6, 28-60, allege that CSIS has investigated a refugee organization (where it sought to cause dissension between members), the Toronto Disarmament Network (on the ground that it has connections with the Soviet Union) and the B.C. Provincial Council of Carpenters (where it interfered with the normal functioning of the organization).

Security Service and CSIS for some 15 years inside the Québec union federation.⁵⁶ Boivin had allegedly provoked union leaders to plant bombs at hotels owned by an employer engaged in a vicious labour dispute, which led to serious criminal charges being laid against them. Solicitor General James Kelleher confirmed in the House of Commons that Boivin was in fact a CSIS agent. Both SIRC and the CSN responded by undertaking investigations into the infiltration.⁵⁷ Later the CSN reported that Boivin had been responsible for inciting union members to engage in a litany of criminal activities, including assassinations, kidnappings, bombings, discharging firearms, arson, train derailments and possessing explosives.⁵⁸

56 SIRC, *Annual Report [.] 1987-1988* (1988), 16-17. *Larose se dit blanc comme neige*, *Le Devoir*, 9 juin 1987, 1; William Marsden, *CNTU head suggests police frameup*, *The Gazette* [Montréal], June 11th, 1987, A-4; *La CSN se réunit d'urgence*, *Le Devoir*, 13 juin 1987, A-1; *Marx won't say whether Crown will charge the Boivin brothers*, *The Gazette* [Montréal], June 13th, 1987, A-5.

57 *Une enquête en cours sur l'infiltration de la CSN*, *Le Devoir*, 19 juin 1987, 3; André Noël, *La CSN enquête sur Marc Boivin*, *La Presse*, 20 juin 1987, B4. The SIRC investigation was issued publicly in March 1988: *Section 54 Report to the Solicitor General of Canada on CSIS' Use of its Investigative Powers with Respect to the Labour Movement* (1988). MP Svend Robinson criticized the Report since the Review Committee based its research on an investigation conducted by the Inspector General of CSIS, it did not meet with representatives of the CSN, and did not directly ask the Sûreté du Québec if CSIS had sought to prevent Boivin being arrested and charged. See Marie Tison, *Jusqu'à quel point certains agents canadiens et étrangers infiltrent-ils le mouvement pacifique?*, *Le Devoir*, 15 avril 1988, 6; Jeff Sallot, *CSIS not spying on unions, watchdog committee says*, *The Globe & Mail*, March 30th, 1988, A5; Manon Cornellier, *Boivin n'a pas "infiltré" la CSN, soutient la SCRS*, *Le Devoir*, 30 mars, 1988, 1; Editorial, *Exonerating the agency*, *The Globe & Mail*, April 20th, 1988, A6. Boivin later attempted to regain his position in the CSN before the Labour Court, but this action was dismissed in June 1988. See *Presse canadienne*, *Le délateur Boivin poursuit son syndicat qui refuse de le défendre contre la CSN*, *Le Devoir*, 7 mai 1988, A-9; *Presse canadienne*, *Boivin débouté*, *Le Devoir*, 29 juin 1988, 3. As for the Solicitor General's confirmation that Boivin was a CSIS agent, see *Commons Debates*, September 18th, 1987, 9090.

58 Pierre Cayouette, *Larose divulge les incitations perfides du "barbouze Boivin"*, *Le Devoir*, 22 janvier 1988, 1. See, in particular, *La panoplie du SCRS pour déstabiliser la CSN*, *Nouvelles CSN*, 20 janvier 1988, 4.

It was also revealed that CSIS had been targeting unions all across the country, including the B.C. Federation of Labour, the Canadian Union of Public Employees, the Centrale de l'Enseignement du Québec and the Canadian Auto Workers.⁵⁹ Allegations of CSIS instigating violent and criminal activities in these unions have also been made by Canadian Labour Congress President Shirley Carr.⁶⁰ Interestingly, none of this extensive union infiltration by CSIS is alluded to in the 1986-87 Annual Report of SIRC. Either CSIS refused to inform SIRC of these targets, in light of the spectacular wrongdoings attached to these operations, or SIRC simply overlooked them, or considered them to be relatively unimportant.

The 1986-87 Annual Report of SIRC contained such a condemnation of the CSIS Counter-Subversion Branch, which provoked such widespread public outrage, that the Solicitor General was compelled to defuse this criticism by creating an independent advisory team, headed by Gordon Osbaldeston, only three weeks after the Report was released. One of the two issues for the team was "whether CSIS operational policies concerning targetting, particularly in counter-subversion, have balanced effectively the needs of the state and the rights of individuals."⁶¹ The principal assumption

⁵⁹ Lorne Slotnick, *Union wants action on alleged spying*, The Globe & Mail, Oct. 30th, 1987, A3. See also Mia Stainsby, *Robinson to demand inquiry into CSIS in union voting*, The Vancouver Sun, Sept. 26th, 1987, A12; Salim Jiwa, *Spying eye miffs labor*, The Province [Vancouver], Sept. 27th, 1987, 6. Reg Whitaker, *Left-Wing Dissent and the State [:] Canada in the Cold War* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 18-21.

⁶⁰ Canadian Press, *'Riot squads' to blame for violent strikes*, The Gazette [Montréal], Sept. 3rd, 1987, A-8 (claiming that violence on union picket lines had been provoked by CSIS, the RCMP provincial police or other forces).

⁶¹ *People and Process in Transition [:] Report to the Solicitor General by the Independent Advisory Team on the Canadian Security Intelligence Service* (October 1987), 1.

of the advisory team was that the *status quo* was largely satisfactory, and that only minor organizational adjustments were required to eliminate the high level of criticism directed against CSIS, which, if unchecked, could erode CSIS morale and jeopardize National Security:

[. . .] CSIS is a new and important institution deserving our support and understanding. We would affirm, in the strongest possible terms, that it is a vital and necessary part of the protection of those democratic ideals and principles upon which our nation is built.⁶²

The Report of the advisory team notes that terrorism and foreign interference usually pose more significant danger and urgency than subversion. In most cases domestic subversion can be monitored by using open sources, and only infrequently will more intrusive techniques be required. The Report also states that CSIS dispatches too many resources, many of them of an intrusive nature, to investigate "low-level" "subversive" activities.⁶³ Accordingly, the Report recommends that the Counter-Subversion Branch should be eliminated, and its *duties and functions reassigned* to the Counter-Terrorism and Counter-Intelligence Branches. Overt and covert counter-subversion activities, even those with no possible link to counter-terrorism or counter-espionage, would, however, still be conducted:

The residue of activities that fall under section 2(d) of the *CSIS Act* should *naturally* be assessed through the use of open information; recourse to highly intrusive techniques should be available when dictated by the severity of the threat, but on a very limited basis

⁶² *Ibid.*, 3-4.

⁶³ *Ibid.*, 23.

and subject to the revised targetting and warrant review processes.⁶⁴

To create the erroneous impression that CSIS would no longer be engaging in counter-subversion, then Solicitor General James Kelleher responded to the Report by announcing that CSIS had disbanded its Counter-Subversion Branch.⁶⁵ He stated that he had accepted and had directed CSIS to implement all of the advisory team's recommendations, but conceded that CSIS would only be reducing, and not eliminating, its counter-subversion activities.

It is beyond dispute, however, that these changes amount to mere obfuscation. The definition of "threats to the security of Canada" in s. 2 of the *CSIS Act* still includes subversion. Counter-subversion will continue to be conducted by CSIS, involving "illegal subversion" as well as lawful advocacy, dissent and protest, but only more covertly and professionally, and under the guise of combatting terrorism, espionage and foreign influence, especially considering that CSIS *itself* recommended to the

⁶⁴ *Ibid.*, 25 [emphasis added].

⁶⁵ Solicitor General, *Kelleher Sets Mid-Course Correction for CSIS*, News Release, Nov. 30th, 1987. Kelleher carried this obfuscation one step further in February 1988 when he announced that CSIS must henceforth seek his approval to conduct any intrusive counter-subversion investigations. This move, and the disbandment of the Counter-Subversion Branch, "reflect the reality that subversive activity is not an investigative priority for CSIS," he said. Solicitor General, *Kelleher Announces New Ministerial Controls Over CSIS Investigations*, News Release, Feb. 25th, 1988. He also announced that 95% of counter-subversion files on *individuals*; but not *organizations* have been closed and await either destruction or transfer to Public Archives. The remaining cases would be investigated using non-intrusive open information collection, by the Analysis and Production Branch, a "non-operational" branch of CSIS. The "few exceptions" are those whose activities potentially involve espionage or terrorism. See also *Notes for a Speech by the Honourable James Kelleher Solicitor General of Canada to the Conference on "Advocacy, Protest and Dissent."* Queen's University, Kingston, Ontario February 25, 1988; *Annual Report [.] 1987-1988* (1988), supra, note 49, 1, 13.

Solicitor General that "its Counter-Subversion Branch be dismantled."⁶⁶

Neither the Osbaldeston Report, nor the Solicitor General's cosmetic alterations, nor the present operations of CSIS diverge one particle from the rudimentary, overriding view embraced by CSIS, that counter-subversion is a more important concern than counter-terrorism and counter-espionage.⁶⁷

As Whitaker correctly states:

Yet for the past forty years, counter-subversion has been at the heart of the security service. Counter-terrorism has only recently come to the fore; counter-sabotage [. . .] was always an exercise without a target; and, except for the Gouzenko revelations which fell on the RCMP from the sky, counter-espionage *appears* to have been relatively ineffectual. Counter-subversion has held the place of honour in security service operations for reasons which, perhaps have most to do with the fundamental philosophy and self-definition of that service. The RCMP were the watchdogs of the State, the thin red (but not Red!) line at the edge of the civilization where the law was enforced and order formed out of disorder. In the twentieth century the spectre of revolution began to haunt the Mounties. Crime was the everyday tactical challenge to the very notion of order itself. The Communists, who apparently embodied twin threats to the existing order, overthrow both of capitalist property and of the state, were the ultimate enemy.⁶⁸

⁶⁶ Confirmed by CSIS Director Reid Morden during the CBC "Journal" special on CSIS, January 20th, 1988, apparently for the first time publicly. See also Stafford & Farson, *supra*, note 14a, 4.

⁶⁷ As enunciated by former CSIS Director Ted Finn. See Howard, *supra*, note 52, A2. *CSIS shuffle rejected as a 'shell game'*, The Vancouver Sun, Dec. 1st, 1987, A12.

⁶⁸ Reg Whitaker, *Left-Wing Dissent and the State [.] Canada in the Cold War Era* (1988) [unpublished paper presented to the February 1988 Queen's Conference on "Advocacy, Protest and Dissent"], 17 [emphasis in original, notes omitted].

CSIS will undoubtedly justify targeting Native Canadians, Central American solidarity and peace groups on the pretext that they are "foreign-influenced." While groups promoting the cause of the Palestinians and Black South Africans will be targeted as being "terrorist."⁶⁹ But counter-subversion is also conducted by different means. Other police and security forces (including the RCMP, provincial and local police, as well as military intelligence), provincial and federal governments and the private sector, not covered by the *CSIS Act* and therefore not subject to any controls, are unhindered in conducting counter-subversion campaigns, and recent evidence indicates that they are in fact actively engaged in such surveillance.⁷⁰

⁶⁹ The Review Committee itself has given credence to this association by undertaking an investigation of the infiltration of peace groups by foreign agents and CSIS. See Tison, *supra*, note 57. Ronald Atkey has, moreover, asserted before the Commons Standing Committee on Justice and Solicitor General that some peace groups may be financed and directed by foreign powers. See Jonathan Manthorpe, *Security unit may probe peace lobby*, The Gazette [Montréal], April 16th, 1982, A-12. More recently it was revealed that CSIS has been targeting Labrador Innu (who have been protesting low-level NATO military flights over their homes) and other native groups in Canada on the ground that such groups may be foreign-influenced or might resort to "political violence." See Richard Cleroux, *CSIS probed Labrador Innu and other native groups*, The Globe & Mail, June 1st, 1989, A1. In the U.S. the FBI has sought to justify its surveillance of groups opposed to the policies of President Reagan in Central America by affirming that some of these groups were connected to "terrorist" groups in the region. Philip Shenon, *F.B.I. Papers Show Wide Surveillance of Reagan Critics*, The New York Times, Jan. 28th, 1988, A1; Philip Shenon, *F.B.I. Again Called Lax On Liberties*, The New York Times, Jan. 31st, 1988, E5; Theoharis, *supra*, note 38, 44. Similarly under the administration of President Ford the monitoring of the American Communist Party was shifted from the FBI's "domestic security" mandate to "foreign counter-intelligence." See Theoharis, *ibid.*, 38; *infra*, note 157, and accompanying text; Grace & Leys, *supra*, note 24, 50. The present government in El Salvador has taken the principle of subsuming everything under the rubric of "terrorism" one step further by introducing a Bill which defines most forms of popular protest as "terrorism," punishable by jail terms of two to 35 years. See Linda Hossie, *El Salvador's planned law reform constricts most avenues of protest*, The Globe & Mail, July 7th, 1989, A3.

⁷⁰ See, e.g., Jean Yelle, *Qui menace qui? En marge de l'affaire Boutin*, Option-Paix, hiver 1987, 33 (reporting on the surveillance of the peace movement in the Outaouais region by Réjean Boutin, an informer for the Sûreté du Québec intelli-

The former Attorney-General of B.C. recently confirmed that his office had conducted a covert intelligence gathering operation, using private investigators, against Concerned Citizens for Choice on Abortion and the NDP.⁷¹ As well, it was alleged that Atomic Energy of Canada Ltd. had been spying on and attempting to infiltrate 20 anti-nuclear groups.⁷² Since such operations are not subject to any of the minimal safeguards of the *CSIS Act* those organizations and individuals subject to such targeting are deprived of the guarantees against abuses of their rights. It is moreover safe to assume that a fairly high degree of cross-fertilization exists between such security intelligence bodies. Especially since the nine security intelligence services of the federal government, aside from CSIS, collaborate together so closely, and in conjunction with the private sector.⁷³

gence service); Nadeau, *supra*, note 11, 102; Eric Poole, *Police politique et mouvement pour la paix*, *Le Devoir*, 10 novembre 1987, 11; Jonathan Manthorpe, *Peace groups face probe as foreign fronts*, *The Vancouver Sun*, April 15th, 1987, A7; *Annual Report [1987-1988]* (1988), 67 *et seq.* Recently it was revealed that the RCMP has maintained the National Security Investigation Section (NSIS), at least since the creation of CSIS, for the purpose of gathering security intelligence. The NSIS is not, of course, constrained in any fashion as to its investigations, and is not subject to parliamentary or administrative review or control. Nor is it restricted by the definition of "threats to the security of Canada" in s. 2 of the *CSIS Act*, such that it can investigate any individual or organization it deems to be contrary to National Security. Aside from a report on a NSIS investigation of the El Salvador Information Office in Vancouver, virtually nothing is publicly known about its activities. See Richard Cleroux, *RCMP security team may be rival of CSIS*, *The Globe & Mail*, July 4th, 1989, A1; Canadian Press, *RCMP division said to compete with spy agency*, *The Gazette [Montréal]*, July 4th, 1989, B-4.

⁷¹ John Cruikshank, *Vander Zalm denies role in spying on group*, *The Globe & Mail*, July 27th, 1988, A1; Deborah Wilson, *Harcourt reveals convention spying, demands inquiry*, *The Globe & Mail*, July 28th, 1988, A1.

⁷² Christie McLaren, *Not spying on environmental groups as memo recommended*, *AECL says*, *The Globe & Mail*, July 19th, 1988, A3.

⁷³ See, *e.g.*, Michel Fortmann & Pascal Lagassé, *Le SCRS: qui contrôle les gorilles?*, *Le Devoir*, 13 mai 1988, 11. The nine other security intelligence services include three at National Defence, two at External Affairs, one at Solicitor-General, one at Communications, one at Supply and Services and one at Employment and Immi-

Conclusion

Confronted with these revelations concerning the counter-subversion campaign waged by CSIS, resulting in the invasion of privacy and violations of the rights and freedoms of many individuals and groups in Canada, it is perhaps not surprising that most Canadians are opposed to such activities. A recent study revealed that 62.0% of citizens polled believed that CSIS should not be able to wiretap "subversives," defined as "those who hold ideas that may lead to the overthrow of our democratic system."⁷⁴ As for the other target groups, opposition to CSIS wiretapping is significant amongst citizens polled, ranging from 49.0% for foreign agents to 41.8% for spies to 32.7% for "terrorists." The report concludes that this data suggests

opposing perspectives among those who govern and those who are governed. Across the full range of threats to national security outlined in the CSIS Act, the responses of ordinary Canadians suggest caution or skepticism regarding government surveillance of private telephone conversations whereas the responses of decision makers suggest an acceptance of such intrusions as an instrument of government control in

gration. None are subject to any of the minimal controls imposed on CSIS by the *CSIS Act*. Most of the provinces have entered into agreements with CSIS, which facilitate the communication of information in their possession to CSIS, pursuant to s. 17(1)(a) of the *CSIS Act*. See, e.g., the private Memorandum of Understanding entitled *The Provision of Information and Assistance between the Canadian Security Intelligence Service and the Province of Manitoba*, June 15th, 1988. Under a 1986 secret agreement with Saskatchewan, the province provides certain information, but not employee appraisals or medical histories. See Canadian Press, *Saskatchewan gives data to CSIS*, *The Globe & Mail*, October 18th, 1988, A3.

⁷⁴ Joseph F. Fletcher, Dept. of Political Science and Centre of Criminology, University of Toronto, Institute for Social Research, York University, *Mass and Elite Attitudes About Wiretapping in Canada: Implications for Democratic Theory and Politics* (Dec. 1987), 12. Interestingly, only 46.5% of "decision-makers" were opposed to such surveillance.

service of national security.⁷⁵

Not only do these findings reveal a Canadian public which is critical of the counter-subversion activities of CSIS, they could possibly be extrapolated to indicate criticism of the other equally intrusive powers of CSIS.

What then should be the fate of the counter-subversion mandate of CSIS? Many of the intense debates that circulated immediately prior to the adoption of the *CSIS Act* would appear to be relevant again at this juncture. One of the more articulate spokespersons for the current arguing against the adoption of the *Act* was Marv Gandall, who called for an end to the clandestine surveillance of groups and individuals seeking social change by any security service. But Gandall went much further, questioning the need for *any* security service, while honestly acknowledging the difficulties involved in maintaining such a position:

The myth of a security service is so pervasive that if you suggest that we don't need one, you're regarded as hopelessly naive at best or a traitor at worst, who wants to leave the Canadian people vulnerable to spies and terrorists. Such are the pressures we face in dealing with this question, and they come not only from the right, but also from normally critically-minded and independent groups on the left. Most people accept the need for a security service.⁷⁶

Gandall was of the view that one's class determines whether one believes a security services is needed:

If you belong to what people call the establishment, that

⁷⁵ *Ibid.*, 15.

⁷⁶ Marv Gandall, *Do We Need a Security Service?* Canadian Dimension, December 1983, 6. These are excerpts from a speech on the subject given by the author, of the Ottawa-Hull Coalition Against Bill C-157, to a public forum.

narrow segment of society which has most of the power and the property, a political police makes good sense. If, on the other hand, you belong as we do to the majority of the Canadian population which exercises very little power and has little or no property, we'd probably be better off without it. This is because the essential function of a security service is not, as we're so often told, to protect the Canadian public against spies and terrorists, but to protect the ruling elite from the Canadian public, or, more precisely, from the social movements which Canadians have traditionally organized to change the status quo -- the labour movement, the farm movement, and so on.⁷⁷

This is so, he argued, since the traditional role of the political police is to protect the status quo against dissent:

There hasn't been a ruling group in history which hasn't wanted to know what the broad population was thinking and doing and how close they were coming to challenging the system as a whole. The special role of a security service has been to provide this information.⁷⁸

As Ian Adams' character "EA" says "*in practice*, the Security Services function as an apparatus for controlling dissent."⁷⁹ The experience of the RCMP confirms his assessment:

The RCMP hasn't been primarily engaged in catching spies or terrorists. I'd always sensed that somehow, but I was astounded to read the other day that the RCMP has only been responsible for catching the grand total of 3 Canadian spies since 1946.

The main job of the RCMP security service has been instead to spy on and disrupt groups which have either

77 *Ibid.*

78 *Ibid.*

79 Adams, *supra*, note 55, 114 [emphasis in original].

stood in the way of or threatened the interests of the rich and powerful in this country. That's the way the RCMP began: it was the instrument through which Eastern business interests subjugated the natives and metis in the West and broke the strike of the work crews building the CPR. And the story has been largely the same ever since.⁸⁰

Gandall also argued that the growth of the RCMP did not correspond to changes in international tensions, but to the growth or decline or domestic social unrest. The criticisms advanced by Gandall also contradict the view held by Franks, that whether Canada needs a security service is "not really in dispute,"⁸¹ since the McDonald Commission, the Government and the Senate Committee reviewing Bill C-157⁸² answered in the affirmative.

In light of the revelations that CSIS is targeting peace groups, periodicals, the NDP, the Communist Party and above all trade unions, all of whom threaten the hegemony and stability of government and the ruling élite, many of Gandall's comments are applicable to CSIS. And when one considers that apparently a large majority of Canadian citizens oppose counter-subversion, at least in part rooted in opposition to the intrusive violations of the right and freedoms of individuals and organizations as

⁸⁰ *Supra*, note 76. The reference to three spy cases is apparently to the *First Report* of the McDonald Commission, *supra*, note ^{††}, 4-5, which reports *four* such cases.

⁸¹ C.E.S. Franks, *Parliamentary Control of Security Activities* (1984) 29 McGill L.J. 326, 337. In his view the security service has "an important job to do" (at 338). See also Marion, *supra*, note ^{††}, 62.

⁸² Chaired by Michael Pitfield, which reviewed Bill C-157 and reported in November 1983: Special Senate Committee on the Canadian Security Intelligence Service, *Report -- Delicate Balance: A Security Intelligence Service in a Democratic Society* (1983). See also B.C. Law Union, *British Columbia Law Union Brief to Senate Committee Re: Bill C-157* (1983).

protected by the *Canadian Charter*, the critique developed by Gandall is not merely rhetorical.⁸³

The counter-subversion campaign of CSIS has resulted in a host of violations of fundamental rights and freedoms, which cannot be demonstrably justified in a free and democratic society. In particular, the revelations of the intensive and longstanding disruptions conducted by Marc Boivin in the CSN demonstrate that CSIS is responsible for the same wrongdoings committed by the RCMP Security Service. But even if counter-subversion has been withdrawn as a Branch of CSIS, the Service will undoubtedly carry on counter-subversion, camouflaged as counter-terrorism and counter-espionage. The only proper solution is to remove subversion from the definition of "threats to the security of Canada," found in s. 2 of the *CSIS Act*, and to stipulate that *all* security and intelligence and law enforcement agencies are specifically prohibited by statute from targeting groups and individuals on the basis that they are considered to be subversive, or those engaged in lawful advocacy, protest and dissent. A similar proposal has been articulated in the United States by the National Committee Against Repressive Legislation. The Committee believes that "federal legislation is needed to ensure that the FBI (and, through its example, other federal law enforcement agencies) not use its investigative powers to intrude upon political activities protected by the Constitution," and

⁸³ As Franks correctly asserts, security activities affect the right to privacy, freedom of expression and association, and other fundamental personal and political rights. *Supra*, note 81, 327. Nevertheless, the only suggestion SIRC has formulated with respect to s. 2(d) is that *possibly* special authorization should be required to investigate people involved in neither espionage nor terrorism, and so provided for in the CSIS Act; *Annual Report [.] 1987-1988*, *supra*, note 49, 55.

recently submitted a petition to the U.S. Congress to enact legislation that would achieve the following goals:

1. Provisions limiting FBI investigations to situations where there are specific and articulated facts giving reason to believe that the person has committed, is committing, or is about to commit a specific act that violates federal criminal law, and also limiting such investigations to obtaining evidence of criminal activity;
2. Provisions specifically prohibiting investigations of groups because of their members' exercise of First Amendment rights;
3. Provisions specifically prohibiting preventive or covert action by the FBI designed to disrupt or discredit organizations engaged in lawful political activity; [. . .]^{83a}

B. Immigration, Citizenship and Security Assessments

(1) Immigration

(a) Introduction

Canadian immigration law has always contained a plethora of powers designed to exclude from entry into Canada or deport non-citizens with radical political views. Notions such as "espionage," "subversion against democratic government," "subversion by force of any government" -- key elements in the National Security mega-concept -- have been employed to exclude and remove from Canada individuals whose ideas the government disagrees with, particularly communists or leftists.⁸⁴ Prior to the

^{83a} Quoted in Resolution Supporting NCARL Petition on FBI Excesses, National Lawyers Guild Notes, July/August 1989, 17.

⁸⁴ See Reg Whitaker, *Murder by Decree [:] The New Tory Refugee Policy*, This Magazine, May/June 1987, 14, 17; Reg Whitaker, *Double Standard [:] The Secret History of Canadian Immigration* (1987); Turk, *infra*, note 170, 160. Similar ideological exclusions are found in U.S. immigration law, notably in the McCarran-Walter Act, *i.e.* the *Immigration and Nationality Act*, Pub. L. No. 414, 66 Stat. 163 (1952); now 8 U.S.C. § 1101 (1982). See, *e.g.*, Merrily Weisbord, *The Strangest Dream [:] Canadian Communists, the Spy Trials and the Cold War*, This Magazine, Jan. 1984, 35, 37-37; Kairys, *supra*, note 37, 155-156; C.J. Grossman, *The*

introduction of the present *Immigration Act* the former legislation was breathtaking in its breadth. Some of the prohibited classes denied admission to Canada included:

(/) persons who are or have been, at any time before, on or after the 1st of June 1953, members of or associated with any organization, group or body of any kind concerning which there are reasonable grounds to believing that it promotes or advocates or at the time of such membership or association promoted or advocated subversion by force or other means of democratic government, institutions or processes, as they are understood in

McCarran-Warran Act: War Against Margaret Randall and the First Amendment (1987) 27-28 *Crime & Social Justice* 220 (reporting on attempts to deport Margaret Randall, a writer, photographer, poet, translator, educator, feminist and author of over 40 books); Ann Fagan Ginger, *Political Deportations: 1919-1952*, 14 *Lawyers Guild Rev.* 93; Ann Fagan Ginger, *McCarran Act and the Immigration Laws*, 11 *Lawyers Guild Rev.* 128; Blanch L. Freedman, *Loyalty-Security Program -- Its Effect in Immigration and Deportation*, 15 *Lawyers Guild Rev.* 135; Charles O. Porter, *McCarran-Walter Act*, 13 *Lawyers Guild Rev.* 79; Harry I. Rand, "Loyalty-Security" and the Foreign-Born Citizen: *Naturalization and Denaturalization Statutes* 15 *Lawyers Guild Rev.* 139; Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents* (1983) 100 *Harv. L.R.* 930; *Kleindienst v. Mandel* (1972) 408 U.S. 753; Ann Fagan Ginger, *Learning the Trade in the Palmer Rades* (1982) 39 *Guild Practitioner* 65, 67-68. Under this *Act* a large number of persons have been excluded from entry into the U.S., including: Italian playwright Dario Fo, Farley Mowatt, Gabriel Garcia Márquez, Carlos Fuentes, Pablo Neruda, Jorge Luis Borges, Graham Greene, George Woodcock, Julio Cortázar, Ernest Mandel and Hortensia Bussi Allende. A Bill to amend the *Act* was recently enacted which suspends the exclusion of foreigners solely because of their political beliefs or affiliations for one year: § 901 U.S. Pub. L. 100-204. In October 1988 the U.S. Congress extended the suspension for two years beyond the original March 1989 deadline, but reinstated those provisions which allow exclusion of permanent resident applicants on political grounds. See § 901 U.S. Pub. L. 100-461; Linda Greenhouse, *Redefining the Boundaries: Who May Come In*, *The New York Times*, April 10th, 1988, E5. In Britain, see, e.g., s. 1(1), *Aliens Restrictions Act, 1914*, 4 & 5 Geo. 5, c. 12 (powers to exclude or deport aliens "when it appears that an occasion of imminent national danger or great emergency has arisen."); s. 1(8), *The Aliens Restriction (Amendment) Act, 1919*, 9 & 10 Geo. 5, c. 92. Art. 32(1) of the Geneva Convention on refugees provides that refugees can only be deported on the grounds of National Security or public order: U.N. *Convention Relating to the Status of Refugees*, open for signature July 28th, 1951, entered into force April 22nd, 1954, 189 U.N.T.S. 137. Under art. 32(2) except where "compelling reasons of national security otherwise require," the refugee has the right to submit evidence with respect to deportation proceedings and to appeal from such an order.

Canada, except persons who satisfy the Minister that they have ceased to be members of or associated with such organizations, groups or bodies and whose admission would not be detrimental to the security of Canada;

(*m*) persons who have engaged in or advocated or concerning whom there are reasonable grounds for believing they are likely to engage in or advocate subversion by force or other means by force or other means of democratic government, institutions or processes, as they are understood in Canada;

(*n*) persons concerning whom there are reasonable grounds for believing they are likely to engage in espionage, sabotage or any other subversive activity directed against Canada or detrimental to the security of Canada.⁸⁵

If admitted, a person, other than a Canadian citizen or a person with Canadian domicile, who fell under one of these categories could also subsequently be deported. Immigrants and visitors could be removed if they were found to be part of the following classes:

(a) any person, other than a Canadian citizen, who engages in, advocates or is a member of or associated with any organization, group or body of any kind that engages in or advocates subversion by force or other means of democratic government, institutions or processes, as they are understood in Canada;

[. . .]

(c) any person, other than a Canadian citizen, who, if outside Canada, engages in espionage, sabotage, or any activity detrimental to the security of Canada.⁸⁶

The indeterminacy of these notions is well described in the 1969 Report of the Royal Commission on Security, which stated that the former provisions

⁸⁵ *Immigration Act*, R.S.C. 1970, c. I-2, s. 5.

⁸⁶ *Ibid.*, s. 18(1).

were based on the following idea: "their past records of activities or associations *may suggest* that they are *likely* to behave in ways which *may* be detrimental to the security of Canada *or her allies*."⁸⁷ The following guidelines were therefore established for the invocation of these exclusions:

- (1) persons who are believed to have held a position in a Communist, neo-Nazi, neo-Fascist or other subversive revolutionary organization;
- (2) members of such organizations within the past 10 years;
- (3) agents of such organizations, or those who "have taken part in sabotage or other clandestine activities or agitation on behalf of such an organization"; and
- (4) persons who engage in significant misrepresentations or untruthfulness in completing immigration documents or during interviews.⁸⁸

Fortunately the present *Immigration Act, 1976*⁸⁹ has partially narrowed the all-encompassing breadth of the previous provisions; for instance the mere advocacy of subversion by force is no longer a ground for removal. Nevertheless, the powers to exclude and deport permanent residents and other non-citizens are vast. Engaging in acts of subversion or espionage is a ground for exclusion under s. 19(1)(e):

persons who have engaged in or who there are reasonable grounds to believe will engage in acts of espionage or

⁸⁷ (Abridged)(1969), 45 [emphasis added]. See also J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy* (1986) 18 Ottawa L.R. 1, 8, 17-18.

⁸⁸ *Ibid.*, 51-52.

⁸⁹ S.C. 1976-77, c. 52, as am.

subversion against democratic government, institutions or processes, as they are understood in Canada, except persons who, having engaged in such acts, have satisfied the Minister that their admission would not be detrimental to the national interest;

Once admitted permanent residents may be removed under s. 27(1)(a) if they fall under this category. With respect to s. 19(1)(e) Wydrzynski takes notes of the following problem:

Subversion or espionage against "non-democratic" governments would seem to be excluded from this provision, and might be seen as providing some protection for "political crimes". However, the scope of the remaining provisions would seem to indicate that such protection would be illusory, if exclusion or removal were pursued.⁹⁰

As for s. 27(c)(c) Grey asserts that this provision is also problematic:

Firstly, there is the vagueness of the words "instigate" and "subversion". Is the mere publication of a manifest [*sic*] calling for the overthrow of a government or its takeover by a group a cause for deportation? If it is, are we not by means of the *Immigration Act* violating some of the freedoms that other legislation, such as the *Canadian Bill of Rights*, seeks to protect?

Secondly, it seems strange that *any* government, however bloody or tyrannical, would be protected. There are situations where Canadian public opinion would support an overthrow. Should a permanent resident be punished for expressing such generally accepted views?⁹¹

Although Grey acknowledges that s. 27(1)(c) is in need of reform, he seems to consider it to be less odious by reason of the fact that it is seldomly invoked.

⁹⁰ Christopher J. Wydrzynski, *Canadian Immigration Law and Procedure* (1983), 179.

⁹¹ Julius H. Grey, *Immigration Law in Canada* (1984), 35 [note omitted, emphasis in original]. Cf the definition of "threat to the security of Canada" in s. 2 of the *CSIS Act*.

He even goes so far as to affirm that "*actual* subversion of an ally of Canada may be [a] valid ground for deportation -- but not something as broad as s. 27(1)(c)."⁹²

A related concept is found in s. 19(1)(f), which provides for exclusion of "persons who there are reasonable grounds to believe will, while in Canada, engage in or instigate the subversion by force of any government." Once admitted permanent residents can be removed if they have engaged in or instigated "subversion by force of any government." (s. 27(1)(c)) Individuals other than Canadian citizens or permanent citizens (*e.g.* refugee claimants, Convention refugees or visitors) can be similarly removed for the same reasons (s. 27(2)(c)). It should be noted that many of these provisions are merely based on the test of "reasonable grounds to believe" that a person will engage in subversive-type activities. Terrorism appears to be the object of the inadmissible class described in s. 19(1)(g):

persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence.

The removal of permanent residents for this reason is provided for under s. 27(1)(a). Wydrzynski highlights some of the peculiarities of these provisions:

While the provisions concerning subversion and espionage are limited to activities against democratic governments, those concerning subversion by force are extended to "any government". Inclusion of the words "by force" might be seen as limiting the application of this provision to exclude such activities as fund-raising, distribution of political tracts

⁹² *Ibid.*, n. 48 [emphasis in original].

or political demonstrations, but it does seem to offer protection to various regimes which may not be compatible with basic Canadian principles of government and human rights. On the other hand, violent activities which would threaten the lives and safety of persons in Canada, either by individual terrorists or through terrorist organizations such as the Red Guard or the Baader-Meinhof gang, are not limited by reference to any particular governmental philosophy.⁹³

"Security certificates" may be issued against individuals other than Canadian citizens under s. 39 *et seq.* provisions which were repealed and replaced by the *CSIS Act*.⁹⁴ Previously, s. 39(1) provided for a certificate to be signed, with respect to a person other than a Canadian citizen or permanent resident, by the Minister of Immigration and the Solicitor General, which would be filed stating that in their opinion, based on security or criminal intelligence reports which could not be revealed, the person named in the certificate was a person described in s. 19(1)(d), (e), (f) or (g) or s. 27(2)(c), and that "the certificate is proof of the matters stated therein without proof of the signatures or official character of the persons appearing to have signed the certificate. [. . .]" A similar security certificate could be issued against a permanent resident under former s. 40(1), in the form of a report to the Special Advisory Board, which would undertake a hearing.

⁹³ *Supra*, note 90, 180.

⁹⁴ Section 80 of the *CSIS Act* repealed ss. 39 to 42 of the *Immigration Act, 1976*. A complaint made pursuant to the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as am. may also be referred to SIRC in some circumstances. When the Canadian Human Rights Commission receives a notice from a federal minister that "the practice to which the complaint relates was based on considerations relating to the security of Canada," (s. 36.1(2)) the Commission may either dismiss the complaint or refer it to SIRC. See s. 36.1, *Canadian Human Rights Act*.

This procedure was modified by amendments introduced in the *CSIS Act* to allow for all security reports to be investigated by SIRC. Presently, under s. 39(2) of the *Immigration Act, 1976*, where the Immigration Minister and Solicitor General are of the opinion, based on security or criminal intelligence reports, that a person who is not a Canadian citizen is a person described in s. 19(1)(d)(ii), (e) or (g) or s. 27(1)(c), in the case of a permanent resident, or a person described in s. 19(1)(d) to (g) or s. 27(2)(c), in any other case, they may make a report to SIRC and notify the person concerned. The Minister may file with an immigration officer, a Senior Immigration Officer or an adjudicator a document stating that the person is a person described in any of the categories enumerated in s. 39(2), pursuant to s. 39(4), applying ss. 39(2) and (3), as well as ss. 43, 44 and 48 to 51 of the *CSIS Act*. Upon the filing of a document provided for by s. 39(3) the person may be deported, under s. 39(6). But where a report is made to SIRC, an immigration inquiry must be adjourned until the Review Committee has reported to Cabinet, and the Cabinet has made a decision, pursuant to s. 39(7). After considering a report made by SIRC, where the Cabinet is satisfied that the person is a person described in s. 39(2) the Cabinet *may* order the Immigration Minister to issue a certificate to that effect, pursuant to s. 40(1). The certificate is conclusive proof of the matters stated therein, pursuant to s. 40(2).

The right of appeal to the Immigration Appeal Board by permanent residents and persons in possession of returning resident permits where removal orders are issued is established by s. 72(1), *except* where a deportation order is made against a person to whom a s. 40(1) certificate has been issued, pursuant to s. 72(3). A person being detained pending the hearing of an appeal under the *Act* may be released, pursuant to s. 80(1),

except where the person has been issued a s. 40(1) certificate. Where no s. 39(2) report is issued, a similar report may be issued after an appeal is filed before the Immigration Appeal Board, pursuant to s. 82.1, the object of which is to cause the appeal to be dismissed. For under s. 83(2) the Board *must* dismiss an appeal if a certificate contemplated in s. 83(1), signed by the Immigration Minister, is filed with the Immigration Appeal Board.⁹⁵

The role of CSIS in immigration matters is primarily to provide the Immigration department with the necessary security intelligence for the enforcement of these provisions and for the issuance of immigrant security clearances. CSIS therefore stations agents in visa posts around the world, who work in close cooperation with local security and police forces. It has, however, been widely reported that few persons are excluded from entry into Canada or deported for being threats to National Security.⁹⁶ Yet it would be misleading to conclude from this data that such exclusions or the provisions on which they are based are harmless in nature. The anti-communist and anti-left immigration policy of Canada had dangerous consequences: "This was also the real reason for Canada's blockade of Chilean refugees after the Pinochet coup: security screeners naturally rejected the

⁹⁵ Presumably an appeal still lies, with permission, to the Federal Court of Appeal, pursuant to s. 84 of the *Immigration Act, 1976*. But if the Immigration Appeal Board has no discretion to grant or dismiss the appeal, under s. 83(2), and if the certificate is conclusive proof of the matters stated therein, under s. 83(3), it would be difficult to establish a point of law or of jurisdiction on which the Court should grant leave to appeal.

⁹⁶ The McDonald Commission reported that less than 1% of the total number of potential immigrants are refused entry for security reasons. See Commission of Inquiry Concerning Activities of the Royal Canadian Mounted Police, *Second Report [:] Freedom and Security Under the Law* (1981, vol. 2), 813. Similarly, the 1986-87 Annual Report of SIRC reported that as 1986-87 began only one immigration case was brought before the Committee, and during the year five more were opened. See *supra*, note 21, 57. But this concerned a security report under s. 39.

genuine refugees, the supporters of the Socialist-Communist government overthrown by the military."⁹⁷ As well, little imagination is required to consider the consequences of an individual being deported or returned to one's country of origin after having been branded a "subversive" or "threat to the security of Canada" by Immigration officials.

(b) The Ancien Régime

The few reported decisions prior to the introduction of the *Immigration Act, 1976* demonstrate that judicial challenge once an immigration security certificate had been issued, or an allegation of subversion made out, had almost no chance of success. In one such case, after an appeal from a deportation order based on a criminal conviction was brought a security certificate was filed before the Immigration Appeal Board (IAB), stating that "based upon security intelligence reports received and considered [. . .] it would be contrary to the national interest" for the Board to exercise its discretion and adopt any special relief measure with respect to the Appellant.⁹⁸ The Board dismissed all of the arguments advanced by counsel for the Appellant, and hiding behind the comforting shield of legal positivism, stated that

the issuance of such a certificate does not have the effect of suppressing, restricting or infringing upon the right or a right of an individual, but to suspend, momentarily and in a specific situation, the exercise by the Board of a discretionary power, as immense as it is unique, to grant

⁹⁷ Whitaker, *Murder by Decree*, *supra*, note 84, 17.

⁹⁸ *Montfared Farhad Hateli* (1972) 3 I.A.C. 130 (I.A.B.). The certificate was issued pursuant to s. 21 of the former *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3. The Appellant was represented by the late Bernard Mergler, a well-known progressive lawyer.

special relief. It is quite possible that such an exceptional measure as a certificate (under s. 21) gives rise to disturbing questions in individual cases; but the Court is powerless to answer them [...]⁹⁹

It is unclear from the reported judgment why Hatefi was considered to be a threat to the "national interest," and he did insist that he took part in so-called illegal demonstrations only as a spectator. The appeal was dismissed and the Appellant, a permanent resident, was ordered deported.

In *Thomas Overton Jolly*,¹⁰⁰ an appeal was filed from a deportation order made in Vancouver in 1972, on the basis that Jolly was associated with the U.S. Black Panther Party, which allegedly advocated subversion by force of democratic government, institutions or processes as they are understood in Canada. The Appellant's arguments that his freedom of speech, freedom of association and freedom of the press under the *Canadian Bill of Rights* had been violated were dismissed on the ground that the *Canadian Bill of Rights* dealt with "rights," while the admission to Canada is a privilege.¹⁰¹ Moreover, the *Canadian Bill of Rights* did not apply to "aliens" since they have no substantive or procedural rights to enter or remain in Canada. Although not a member of the Black Panther Party, Jolly was actively associated with it from 1968 to 1971, during which time he distributed Party pamphlets and newspapers, wrote for their newspaper, delivered a speech and participated in a "breakfast program" sponsored by the Party. As for

⁹⁹ *Ibid.*, 156. Mergler characterized s. 21 as a "very exceptional and draconian provision." (at 133) See also *Walter Irving Cronan v. M.M.I.*, 3 I.A.C. 42, 81-82.

¹⁰⁰ (1974) 10 I.A.C. 51 (I.A.B.).

¹⁰¹ *Canadian Bill of Rights*, R.S.C. 1970, App. III. *Ibid.*, 53-54. *Cf. Singh v. M.E.I.* [1985] 1 S.C.R. 177. See also Daniel Paquin, "Canada 1978-1987. Le réfugié face à l'Etat: évolution ou stagnation," in Bureau & Mackay, *supra*, note 58, 211, 218 *et seq.*

the phrase "advocates [. . .] subversion by force" found in the former provision, the Board gave it its "ordinary dictionary meaning: Recommend publicly the overthrow or ruin by force (violent means) of democratic government, institutions or processes [. . .]."¹⁰² The purpose of the provision was therefore clear:

[. . .] s. 5(1) is directly concerned with national security, *not* in respect of the organization, group or body which advocates subversion, but in respect of a person *associated* with such an organization. It is the *person* who may be prohibited and the whole thrust of the section is directed to the preservation of national security against any menace presented by such a person by reason of his association.¹⁰³

Interestingly, the Board ruled that the Black Panther Party was *not* an organization which advocated subversion by force, and therefore the burden shifted to the Minister to prove that the Party advocated subversion, which he failed to discharge.

An application pursuant to s. 28 of the *Federal Court Act* presented to the Federal Court of Appeal was, however, granted from the Board's decision.¹⁰⁴ The Minister argued that the Board should have directed itself to simply determining whether there were "reasonable grounds for believing" that the Black Panther Party was a subversive organization within

¹⁰² *Ibid.*, 86. Cf the phrase "lawful advocacy, protest or dissent" found in the definition of "threat to the security of Canada" in s. 2 of the *CSIS Act*.

¹⁰³ *Ibid.*, 87-88 [emphasis in original].

¹⁰⁴ *Attorney General of Canada v. Jolly* [1975] F.C. 216, 54 D.L.R. (3d) 277, 7 N.R. 271 (C.A.) *per* Thurlow & Ryan JJ., and Sheppard D.J. [hereinafter cited to [1975] F.C. 216]. Application for leave to appeal to the Supreme Court of Canada refused: [1975] S.C.R. ix. The main issue in the Federal Court of Appeal was whether the Board erred in law in failing to find that the Black Panther Party was an organization, group or body within the meaning of s. 5(1) of the former *Immigration Act*.

the meaning of the legislation, rather than whether or not it was in fact such an organization. To this, Thurlow J. made the oft-cited statement establishing the test to be applied:

[. . .] Where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing that the organization is one that advocates subversion by force, etc.¹⁰⁵

The Respondent argued that s. 5(1) was inoperative because it infringed the same *Canadian Bill of Rights* rights and freedoms Jolly had invoked, which was curtly dismissed by Thurlow J.:

[. . .] there is no substance in this submission. As an alien the respondent has no right to be or remain in Canada save in so far as is permitted by the *Immigration Act*. Section 5(1) of that act [*sic*] simply defines a class of aliens who are not permitted to enter or remain in Canada. The *Immigration Act* is not a penal statute and in my opinion subsection 5(1) imposes no penalty upon or infringes no right of any such alien.¹⁰⁶

Jolly may be still relevant today since although s. 5(1) has been repealed, similar language is found in ss. 19(1)(e), (f) and (g) of the present

¹⁰⁵ *Ibid.*, 225-226.

¹⁰⁶ *Ibid.*, 229 [note omitted]. The appeal was therefore allowed.

Act, for instance the "reasonable grounds to believe" notion.¹⁰⁷ Successful judicial review was even more problematic, prior to the introduction of the *CSIS Act*, since those provisions were referred to in ss. 39 and 40.

Moreover, the notion of "subversion by force" still lingers on.

What is still regarded as the leading case on immigration security certificates is the rather brief Supreme Court of Canada decision in *Prata v. M.M.I.*¹⁰⁸ In 1971 a deportation order was made against the Appellant, Vincenzo Prata, who was neither a Canadian citizen nor was he domiciled in Canada. An appeal against the order to the Immigration Appeal Board was dismissed, after a security certificate was filed pursuant to s. 21 of the *Immigration Appeal Board Act* with the Board, and the Board therefore declined jurisdiction to hear the appeal, ordering that the deportation order be executed as soon as practicable. An appeal to the Federal Court of Appeal was dismissed,¹⁰⁹ and leave to appeal to the Supreme Court of Canada was granted by the Federal Court of Appeal.

The Appellant had argued that the s. 21 certificate was invalid since he was denied the opportunity to be heard before it was made, and it violated the *Canadian Bill of Rights*. Speaking for the Court, Martland J. laid to rest any doubts as to the validity of security certificates:

The effect of s. 21 is to reserve to the Crown, notwithstanding the powers conferred upon the Board by the Act, the right, similar to the prerogative right which existed at

¹⁰⁷ See Grey, *supra*, note 91, 150-151; Wydrzynski, *supra*, note 90, 180-181.

¹⁰⁸ [1976] 1 S.C.R. 376, 52 D.L.R. (3d) 383, 3 N.R. 484 [hereinafter cited to [1976] 1 S.C.R. 376]. See John Hucker, *Comment* (1975) 53 Can. Bar Rev. 810; W.S. Tarnopolsky, *The Canadian Bill of Rights* (2nd rev. ed., 1975), 312, 314.

¹⁰⁹ [1972] F.C. 1405, 31 D.L.R. (3d) 465, *per* Jacket C.J., Sweet D.J. concurring; Thurlow J., dissenting, would have allowed the appeal.

common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, would not be conducive to the public good. The certificate provided for in this section is a certificate of an opinion. It is not a decision on an issue, *inter partes*. Furthermore, the section defines the material upon which such material is to be based; *i.e.*, security or intelligence reports received and considered by the two ministers. Based on that material they may form an opinion that it would be contrary to the national interest for the Board to exercise a discretion in a particular case. The section provides that their certificate is conclusive proof of the matters stated in it.

In my opinion the purpose of the wording of s. 21 excludes the suggestion that the two ministers may not formulate their opinion and certify it without first permitting the person to be heard.¹¹⁰

¹¹⁰ *Supra*, note 108, 381 [emphasis added]. As to the argument that the security certificate violated ss. 2(d) and (e) of the *Canadian Bill of Rights*, Martland J. simply adopted the reasoning of Jacket C.J. in the Trial Division of the Federal Court:

There is [. . .] no attack on the validity of the deportation order and there is no contention that that order was not made in accordance with the procedure laid down by the *Immigration Act* and Regulations for making such an order. Neither is there any contention that that procedure does not meet the requirements of "due process" contemplated in section 1(a) of the *Canadian Bill of Rights* or "the principles of fundamental justice" contemplated by section 2(e) of the *Canadian Bill of Rights*. To the extent, therefore, if any, that the deportation order has interfered with the appellant's "life, liberty, security of the person or enjoyment of property" or has affected his "rights" or "obligations", there has been no conflict with the requirements of section 2 of the *Canadian Bill of Rights* in relation to section 1(a) or section 2(e) thereof.

Furthermore, as there has been no attack on the validity of the deportation order or upon the manner in which it was made, there can be no question of the "arbitrary" detention, imprisonment or exile of the appellant within the meaning of section 2(a) of the *Canadian Bill of Rights*. (at 283)

That same day the Court dismissed two similar appeals which were argued at the same time as Prata. In both Martland simply stated "The issues which are raised on the appeal are the same as those which were raised in the Prata appeal." See *Lowe v. M.M.I.* [1976] 1 S.C.R. 385; and *Sciari v. M.M.I.* [1976] 1 S.C.R. 386.

A security certificate was also introduced at the IAB to seek the deportation of the well-known radical student activist Rosie Douglas.¹¹¹ He had been a resident of Canada for almost 10 years prior to a criminal conviction for which he was convoked to an immigration inquiry. In October 1972 a deportation order was made against him, when he was a citizen of the British Commonwealth, but not a Canadian citizen, which was appealed to the IAB. In May 1973, then Minister of Manpower and Immigration Robert Andras and Solicitor General Warren Allman signed a certificate declaring that "it would be contrary to the national interest for the plaintiff [Respondent] to remain in Canada," which was filed before the Board. The Board therefore dismissed his appeal and he commenced an action before the Trial Division of the Federal Court to quash the s. 21 certificate and to prohibit the execution of the deportation order.

In the appeal from an oral judgment of the Trial Division decision dismissing a motion to strike out the statement of claim on the basis that it disclosed no reasonable cause of action, Jacket C.J. encountered no difficulty in ruling on the validity of the s. 21 certificate:

The difficult questions of law as to whether a section 21 certificate can only be made after affording the person concerned a hearing as contemplated by the authorities concerning decisions to which the principles of natural justice apply or whether such a certificate can be attacked by virtue of the provisions of the *Canadian Bill of Rights* have, in my view, been settled, by the 1975 decision of the

¹¹¹ *The Queen v. Douglas* [1976] 2 F.C. 673, 67 D.L.R. (3d) 373 (C.A.), per Jacket C.J., Le Dain J. & Hyde D.J. [hereinafter cited to [1976] 2 F.C. 673]. It was later learned that secret RCMP Warren Hart, working as a body-guard-driver for Douglas, had spied on him. The federal government paid \$56,000 to Warren Hart for his services. See *Ottawa paying off man who bugged minister, MP*, The Gazette [Montréal], May 5th, 1984, A-2. After spending 18 months in jail, in 1973 and 1974, Douglas was eventually deported.

Supreme Court of Canada in *Prata v. Minister of Manpower and Immigration*, contrary to the case set up by the statement of claim on behalf of the respondent, and, from that point of view, I can see no arguably relevant distinction in the special facts of this case such as the fact that, while the respondent was not a Canadian citizen and did not have Canadian domicile, he was a British subject by virtue of his citizenship in some other part of the British Commonwealth other than Canada or the fact that he has been legally resident in Canada for 10 years.¹¹²

A case where it was argued that "national interest" was so broad as to cover someone who had only been convicted of a relatively minor offence is *Omar Ahmad Mohammed Bakir v. M.E.I.*¹¹³ Bakir was a citizen of Jordan who was born in Israel. In 1973 he came to Canada and was granted permanent resident status. In 1975 he was convicted of theft under \$200, and following an immigration inquiry a deportation order was issued against him. An appeal was heard in 1978, when a s. 21 certificate was before the IAB. After two subsequent appeals to the Federal Court of Appeal the deportation order was finally quashed.¹¹⁴

These early reported cases demonstrate that the Immigration department and the courts had no intention to apply its security exclusions

¹¹² *Ibid.*, 676-677 [notes omitted]. In his view there was no arguable case to quash the s. 21 certificate, and accordingly the statement of claim was struck out.

¹¹³ File No. T-78-9045 (I.A.B.), March 6th, 1980, unreported.

¹¹⁴ The Board was initially of the view that Bakir did not fall within s. 27(1)(d) of the *Immigration Act, 1976* and therefore allowed the appeal. (1978) No. 3, 27 June 1979, IAB résumés. An appeal to the Federal Court of Appeal was allowed, which referred the legality of the deportation order back to the IAB. File No. A-566-78, June 27th, 1979. The Board then decided that the deportation order was valid, and the s. 21 certificate prevented it from exercising any discretion. But a final appeal to the Federal Court of Appeal was granted, and the deportation order quashed (File No. A-197-81, Feb. 24th, 1982), for the reasons set out in *Lyle v. M.E.I.*, File No. A-100-80, Feb. 15th, 1982 (FCA).

equally across the political spectrum, nor to question their validity. Rather the certificates were mobilized to primarily exclude leftists and radicals, while it was rare for individuals on the right to suffer similar treatment. This departmental policy remained in force even well after the introduction of the new *Immigration Act, 1976*.

(c) The New Régime

The introduction of a new *Immigration Act* in 1976 had no effect on the validity of immigration security certificates, notwithstanding the *Canadian Charter*. In *Law v. Solicitor General of Canada*,¹¹⁵ for instance, the Plaintiff, against whom had been issued a certificate pursuant to s. 83 of the *Immigration Act, 1976* before the Immigration Appeal Board, relied upon s. 7 of the *Canadian Charter* for his argument that s. 83 was contrary to the *Charter*. Mahoney J., of the Trial Division of the Federal Court, confirmed that s. 83 was "identical in its essentials and effect" to s. 21 of the former *Immigration Appeal Board Act*.¹¹⁶ He did, however, open the door to a reconsideration of *Prata*:

It would be a wrong exercise of discretion summarily to deny the plaintiff the opportunity to have the courts reconsider *Prata* in light of the Charter. It may, as well, otherwise be ripe for reconsideration in light of the rapid evolution of the law. The action should not be dismissed on the ground that the statement of claim discloses no reasonable cause of action.¹¹⁷

¹¹⁵ [1983] 2 F.C. 181 (T.D.) *per* Mahoney J.

¹¹⁶ *Ibid.*, 186. Rep. by s. 128(1) of the *Immigration Act, 1976*.

¹¹⁷ *Ibid.*, 186-187.

Yet he dismissed the action nevertheless, on the basis that the IAB had exclusive jurisdiction to hear and determine all questions of law in relation to the removal order, and the issues in this action were such questions of law.

Arguably the case which best illustrates the nature and intent of security certificates in the contemporary era concerns Victor Regalado. A journalist from El Salvador, Regalado spent several months in Canada in 1980 as a visitor, invited by the Centrale de l'Enseignement du Québec and the Agence latino-américain d'information. In May 1980 he made a claim for refugee status. From August 1980 to January 1982 his work in solidarity with the people of El Salvador made his return to his country dangerous, in light of the prevailing political situation, so he travelled and worked in Nicaragua and Mexico. When Regalado appeared at the Canadian border to claim refugee status anew he learned that following his 1980 visit the RCMP had opened a file on him, and that a security certificate had been issued by then Solicitor General Robert Kaplan and Immigration Minister Lloyd Axworthy, pursuant to s. 39(1) of the *Immigration Act, 1976*.¹¹⁸ He was therefore detained after an inquiry was held in January 1982, where the certificate was introduced as evidence.

In January 1982 he applied for a writ of *habeas corpus* to contest the justification of his detention under the *Immigration Act, 1976*, which was dismissed by the Québec Superior Court.¹¹⁹ On appeal to the Québec Court of Appeal, Montgomery J.A. stated that due to the s. 39(1) certificate the

¹¹⁸ In the certificate, it was stated that Regalado was a person described in s. 19(1)(f) of the *Immigration Act, 1976*.

¹¹⁹ *In Re: Victor Manuel Regalado Brito v. M.M.I.*, 500-05-000776-821, Jan. 20th, 1982, unreported.

Petitioner was deemed to be a person described in s. 19(1)(f) of the *Immigration Act, 1976*.¹²⁰ But even if he were granted Convention refugee status an adjudicator would be required to order his removal. Since Montgomery J.A. was of the view that Regalado's efforts to obtain refugee status were futile, it would be equally futile to issue a writ of *habeas corpus* to determine his right to be at liberty when he had no right to be in Canada.

In February 1982 he was informed that he had been recognized by the Immigration Minister as a Convention refugee. But despite this ruling, 10 days later his immigration inquiry was resumed and the adjudicator made a deportation order against him, on the strength of the security certificate. A notice of appeal was then filed before the IAB.¹²¹ Regalado argued that he should be allowed to present rebuttal evidence against the s. 39 certificate, in order to prove that he was not a person described in s. 19(1)(f).¹²² In response the Board cited the dissenting judgment of Pigeon J. in *Ernewein v. M.E.I.*, who stated:

The government may for reasons of national security prevent

¹²⁰ 500-46-000013-823, Feb. 10th, 1982, unreported.

¹²¹ *Victor Manuel Regalado Britov. M.E.I.*, M82-1053, July 16th, 1984, unreported. At the hearing of the appeal the Minister's counsel presented a motion to quash two subpoenae requiring the Minister and the Solicitor General to appear and reply to certain questions concerning the certificate. The Board granted the motion, stating that it would be "a futile and frivolous exercise to require these gentlemen to appear," but Regalado filed a notice of motion for a writ of prohibition and *mandamus* in the Trial Division of the Federal Court seeking to force the Board to stay all proceedings until it ordered the Minister and the Solicitor General to appear and testify in the Board's appeal. This motion was dismissed (June 7th, 1982, *per* Addy J.), and a further appeal to the Federal Court of Appeal was also dismissed (May 20th, 1983, A-856-82, *per* Pratte, Ryan & Lalande JJ.). His appeal therefore resumed before the IAB.

¹²² As the Board correctly pointed out: "The very existence of this certificate has the effect of preventing Mr. Regalado from pleading that due to the existence of compassionate or humanitarian considerations he should not be removed from Canada." *Ibid.*, 7. See ss. 72(2) and (3), *Immigration Act, 1976*.

the Board from allowing some refugee's appeals by filing a certificate by the Minister and the Solicitor General in accordance with s. 21 of the Act (now s. 83). Such a certificate will be conclusive as this Court held in *Prata v. Minister of Manpower & Immigration*. However, I have grave doubts that the Board may otherwise properly disregard the provisions of the Convention concerning refugees.¹²³

The Minister and the Solicitor General had never communicated to Regalado the reasons underlying the certificate, or the circumstances and information that allowed the Minister and the Solicitor General to issue the opinion contained therein.

The Appellant also argued that although the security and intelligence reports could not be revealed "in order to protect information sources" (s. 39) the Minister and the Solicitor General could explain the accusations against him, without revealing the sources. But the Board reaffirmed that the Minister and the Solicitor General were excused from testifying:

[. . .] because in our view any questions would necessarily have been related to secret reports. [. . .] At the May 10, 1982 hearing it was clear that the Minister and the Solicitor General, even had they been present before the Board, had no intention of revealing anything with respect to the secret reports held by them. It is also clear that the Board cannot force them indirectly to do what they cannot do directly. Oral testimony dealing with secret reports certainly amounts to the partial disclosure of these reports. The legislator forbids any such disclosure.

The Board is also of the opinion that secret reports on matters of security and criminal intelligence, [. . .] are perhaps so complex that the slightest detail about these reports might provide indications about the source. The Board therefore would refuse to require disclosure of any circumstance or opinion, even if it appears unim-

¹²³ [1980] 1 S.C.R. 639, 662 [note omitted]. Beetz and Pratte JJ. concurring. Quoted at *ibid.*, 16.

portant at first glance.¹²⁴

Regalado also argued that if such was the case then it was absurd to allow for a right of appeal, only to withdraw such a right where the appellant is subject to a s. 39 certificate. The Board responded with the following:

We have no doubt that Mr. Regalado's right of appeal is limited. The adjudicator ordered Mr. Regalado's deportation because she felt there were reasonable grounds to believe that while in Canada he would engage in or incite the subversion by force of government (19(1)(f)). The "reasonable grounds" are almost certainly based on the opinion of the Minister and the Solicitor General. [. . .] The appellant could have invoked some grounds of appeal under the circumstances, although we realize his chances of success would have been limited.¹²⁵

A number of arguments based on the *Canadian Charter* were also advanced on behalf of Regalado. The Board disposed of the submission that there was a violation of s. 7 of the *Charter*, stating that Regalado was "not aware of the substance of the secret reports weighing against him, but this situation does not deprive him of his life, liberty or security in Canada."¹²⁶ He also argued that since he received no reasons supporting the s. 39 certificate, this amounted to cruel and unusual treatment or punishment,

¹²⁴ *Supra*, note 121, 18-19. The Board then cites a portion of the Federal Court of Appeal decision in *Goguen v. Gibson* [1983] 1 F.C. 872, 884 in support of their view. The Board concludes with the following illogical statement: "Given that neither the appellant nor the Board knows the content of these secret reports, any evidence by testimony or otherwise that the appellant might present would be irrelevant for the simple reason that it could not contradict the content of the said reports." (at 20)

¹²⁵ *Ibid.*, 21-22.

¹²⁶ *Ibid.*, 28. Section 55(a) of the *Immigration Act, 1976* is cited in support thereof, but this provision allows for a Convention refugee to be sent back to his or her country of origin in certain circumstances, *e.g.* where s. 19(1)(f) is in question.

contrary to s. 12 of the *Charter*, since he was unable to lead rebuttal evidence. The Board cited the decisions in *In re Gittens*¹²⁷ and *Re Soenen & Thomas*,¹²⁸ and concluded that, in the circumstances, the issuance of the deportation order constituted "treatment":

This treatment may possibly be "cruel" and is certainly "unusual", when the individual in question finds himself in a situation where he knows nothing of the content or extent of the information allowing the conclusion that he will engage in or instigate the subversion by force of any government. This method of proceeding prevents the individual from presenting evidence to attempt to refute information about him obtained by the authorities.¹²⁹

Following *Re Gittens* the Board concluded that the Appellant had been subject to cruel and unusual treatment, but decided that the violation could be saved under s. 1 of the *Charter*.

A further appeal was taken by Regalado from this decision to the Federal Court of Appeal.¹³⁰ Marceau J. agreed with the ruling of the IAB on the argument that the s. 39(1) certificate was conclusive evidence, since Parliament did not intend that such a certificate should be subject to challenge.¹³¹ Regalado had argued that s. 2(e) of the *Canadian Bill of Rights* had been violated in his case, but Marceau J. was of the view that the purpose of the immigration inquiry was not "for the determination of his

¹²⁷ [1983] 1 F.C. 152 (T.D.).

¹²⁸ (1983) 8 C.C.C. (3d) 224, 231 (Alta. Q.B.).

¹²⁹ *Supra*, note 121, 31.

¹³⁰ *Regalado v. M.E.I.* [1987] 1 F.C. 80 (F.C.A.), *per* Marceau, MacGuigan & Lacombe JJ.

¹³¹ *Ibid.*, 91-93.

rights and obligations," but to determine whether he was a person described in s. 4(2) of the *Immigration Act, 1976*, in order to be allowed to remain in Canada, one of the conditions of which is that in a refugee case the person must not be a person described in s. 19(1)(f). Regalado never had the right to come into Canada, and his refugee status did not give him the right to remain. Furthermore, the decision of the Supreme Court of Canada in *Singh v. M.E.I.*¹³² did not apply here since

the Immigration Act does not confer any right on someone whose refugee status has been recognized *so long as* the conditions for his admission to Canada are not met. The right at issue in *Singh* was exercised by the appellant since his refugee status had been recognized. When the inquiry resumed before the adjudicator the appellant had no right to exercise, and the decision imposed on the adjudicator by the filing of the certificate did not infringe his rights.¹³³

Since the deportation order was issued before the *Canadian Charter* came into force, it could not come to his assistance. Marceau J. concluded that even though he did not agree with all the reasons of the Board, and had serious reservations as to its reasons, the appeal should be dismissed since its conclusions were correct.

Although MacGuigan J. concurred in the conclusions of Marceau J., he disagreed on his application of s. 2(e) of the *Canadian Bill of Rights*. As to the absolute denial of the right of cross-examination to protect the government's secret sources, he made a timid step in the direction of finding this denial to be unconstitutional: "It seems to me that the means should be proportionate

¹³² *Supra*, note 102.

¹³³ *Supra*, note 128, 95 [emphasis in original].

to the end."¹³⁴ He even went so far as to assert that the courts have the right to intervene in this area, based on developments in the U.S., where

despite their general tendency not to challenge the decisions of a higher authority in matters of national security (*Kleindienst v. Mandel*, 408 U.S. 753 (1972)). U.S. courts have nevertheless asserted their right to determine the good faith and the sufficiency of the decisions of the executive.¹³⁵

Regrettably MacGuigan J. refused to address these issues, contenting himself with the non-committal conclusion that "[t]hese questions remain unanswered in Canada."¹³⁶

Permission for leave to appeal to the Supreme Court of Canada was denied on January 29th, 1987,¹³⁷ and Regalado exercised one final, desperate recourse, by filing a complaint before the U.N. Human Rights Commission in July 1987.¹³⁸ The complaint charged that the procedures followed in his case violated his international civil and political rights.

¹³⁴ *Ibid.*, 100.

¹³⁵ *Ibid.* He cites the Federal Court decision in *Abovrezk v. Reagan* (1984) 592 F.Supp. 880 (D.C.) which dealt with an "alien" invited to enter the U.S., and denied entry due to the content of his proposed message. Here the Court held that the government could not deny them entry on account of the content of speech, and the Court could consider the classified affidavits submitted by the government *in camera*.

¹³⁶ *Ibid.*, 101. Lacombe J. also concurred with Marceau J., but did not entirely agree with this application of s. 47 of the *Immigration Act, 1976* with respect to s. 2(e) of the *Canadian Bill of Rights* (at 101 *et seq.*).

¹³⁷ [1987] 1 S.C.R. vi, *per* Beetz, Lamer & Le Dain JJ. See Michel C. Auger, *Regalado pourra être déporté*, *Le Devoir*, 30 janvier 1987, 3; Canadian Press, *Way cleared to deport Salvadoran*, *The Gazette* [Montréal], Jan. 30th, 1987, A-4.

¹³⁸ Pursuant to Art. 2 of the *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by U.N. General Assembly Resolution 2200A (XXI) of Dec. 16th, 1966. See *Ousted by Canada man appeals to UN*, *The Gazette* [Montréal], July 8th, 1987, A-9. The federal Immigration department continued to allow Regalado to remain in Canada

One of the first immigration cases to be considered by the Security Intelligence Review Committee (SIRC) involved a Hungarian, Otto Gyali, who had been seeking admission to Canada for 12 years to be reunited with his wife and children.¹³⁹ In response to his wife's sponsorship appeal to admit her husband to Canada the matter was brought before the Review Committee, pursuant to s. 84 of the *CSIS Act*. The Statement of Circumstances alleged that Gyali's

long and extensive contact with and activities on behalf of Soviet-bloc intelligence and police services indicate that he is an opportunist utterly lacking in loyalty who would be available to work for whichever government approached him with an offer he saw as being of personal benefit to him.¹⁴⁰

Paul Copeland, who represented the Gyalis, articulated a complaint that a number of lawyers have echoed concerning SIRC hearings, namely that he was "not able to obtain clarification or details of this allegation. At the mere suggestions of national security concerns, I was required to leave the hearing. RCMP electronics specialists were monitoring and sweeping the hearing for electronic surveillance."¹⁴¹ In December 1986 the Committee ruled against Gyali as follows:

[. . .] we have concluded that Gyali is an unscrupulous

pending the outcome of this proceeding.

¹³⁹ See Paul Copeland, *Citizenship and national security*, The Law Union News, Spring 1987, vol. 3 (N.S.), No. 1, 6. Copeland represented Gyali before SIRC.

¹⁴⁰ *Gyali v. Kelleher & Bouchard*, SIRC, Dec. 5th, 1986, File No. 1170/Gyali, 2, *per* Chairman Ron Atkey & member J.J. Blais. The report on Gyali made reference to s. 19(2)(e) of the *Immigration Act, 1976* (engaging in acts of espionage or subversion against democratic government, institutions or processes).

¹⁴¹ *Supra*, note 139, 7.

individual who, [. . .] having shown a strong propensity in the past to become involved in espionage related activities, will gravitate to the intelligence community and/or otherwise engage in disruptive activities within the Hungarian émigré community for purposes inimical to our democratic system of government.¹⁴²

While it is impossible to determine the number of individuals denied entry to Canada or removed for security reasons,¹⁴³ it appears certain that notwithstanding the new procedures introduced by the *CSIS Act* in immigration matters the pronounced anti-communist and anti-leftist ideological perspective underlying these cases is still predominant. The most recent illustration of the application of this perspective is the celebrated case of Mahmoud Mohammad Issa Mohammad. In 1987 he arrived in Canada after having been granted permanent resident status. It was later revealed, however, that Mohammad was involved in an attack on an El Al airplane in Athens in 1968, as an act of solidarity with the Palestinian cause. As a result

¹⁴² *Supra*, note 140, 11. Accordingly a certificate under s. 83(1) of the *Immigration Act, 1976* against him, to the effect that he was a person described in s. 19(1)(e) of the *Act*. An application pursuant to s. 28 of the *Federal Court Act* was subsequently filed in the Federal Court of Appeal to quash the Committee's ruling on the ground that the Committee had failed to observe a principle of natural justice due to Ron Atkey's prior involvement in the case. See *supra*, note 140, 11. The application was never argued before the Federal Court of Appeal, since all the parties agreed that a new Review Committee hearing should be held. Letter from Paul Copeland, April 7th, 1988.

¹⁴³ *Cf supra*, note 96. The SIRC figures only report the number of complaints brought before that body. Presumably the number of uncontested refusals and removals is much higher. Solicitor General James Kelleher disclosed recently that since 1984 CSIS has provided information that resulted in over 100 visa refusals, due to criminal or security concerns, including foreign diplomats being denied entry to Canada. See Deborah Wilson, *Kelleher details CSIS successes*, *The Globe & Mail*, April 22nd, 1988, A10. The 1986-87 Annual Report stated that the Committee recognized that admission should be denied in one case, while investigation was continuing in four cases and another was reopened. See also *Suspected Irish terrorist given time to get lawyer*, *The Globe & Mail*, March 10th, 1988, A12 (report on a deportation hearing of Lawrence McNally, a suspected member of the IRA).

he was convoked to an immigration inquiry in January 1988 in Ontario. One of the three allegations made against him was that he was a member of an inadmissible class, pursuant to s. 19(1)(e) of the *Immigration Act, 1976*, because he was a "person who has engaged in an act of espionage or subversion against a democratic government, institutions or processes as they are understood in Canada."¹⁴⁴ This particular allegation was later withdrawn by the Department of Justice lawyers representing the Immigration department, after Mohammad's lawyers had prepared a

¹⁴⁴ Quoted in Victor Malarek, *Pardon for terrorist covered only penalty, embassy official says*, *The Globe & Mail*, Feb. 9th, 1988, A1. See also *Nouvel avis d'expulsion*, *Le Devoir*, 8 mars, 1988, 4; Victor Malarek, *Deportation hearing for terrorist adjourned*, *The Globe & Mail*, March 30th, 1988, A1.

SIRC ruled in a similar manner in a case involving a man alleged to have been linked to the Armenian Secret Army for the Liberation of Armenia (ASALA). Before Saul Cherniak, who headed a one-member panel of SIRC, Nicoghas Moumdjian admitted to having belonged to the Armenian militia in Lebanon, but he asserted the group was not a terrorist organization. He denied being a member of ASALA, but acknowledged that he was friends with three men involved in the attempt to kill a Turkish diplomat in Ottawa. (See Ch. V, *supra*, note 53, and accompanying text.) Nevertheless, SIRC concluded that he was involved in acts of violence in the past. However, he has made no such admission, nor has he shown any indication of regret or any sign of a change of heart. Also pertinent is the fact that conditions underlying past acts of violence by representatives of ASALA continue to exist.

(Letter from Maurice Archdeacon, SIRC Executive Secretary, to Paul Copeland, lawyer for Mr. Moumdjian, dated October 17th, 1988, File No.: 1170/Moumdjian). Accordingly, SIRC ruled that he came within the class of persons described in s. 19(1)(g) of the *Immigration Act, 1976*. Since the Review Committee had "reasonable grounds to believe that Mr. Moumdjian will engage in activity that constitutes a threat to the security of Canada," a certificate was therefore issued pursuant to s. 40(1) of the *Immigration Act*. An application pursuant to s. 28 of the *Federal Court Act* is currently pending before the Federal Court of Appeal to set aside this decision of SIRC: No. CEA-1-89. See also Victor Malarek, *Facing deportation, Armenian complains of treatment by CSIS*, *The Globe & Mail*, October 29th, 1988, A1; Canadian Press, *CSIS wants Armenian deported as a security threat*, *report says*, *The Gazette* [Montréal], October 29th, 1988, F-7.

comprehensive defence challenging the notion that Israel is a democratic government, within the meaning of s. 19(1)(e).¹⁴⁵

When his inquiry resumed in August 1988 the Immigration department still sought to prove that he had entered Canada illegally by concealing his conviction in Greece and denying that he had been a member of a terrorist organization, in order to obtain his deportation. During the course of the inquiry an RCMP officer testified about information received from Israeli intelligence that Mohammad had continued to work with a part of the PLO immediately prior to his admission to Canada. But a lawyer representing CSIS stopped his testimony when he was about to reveal what he had learned about Mohammad from CSIS, citing provisions of the *Canada Evidence Act*. A request by the lawyers representing Mohammad to allow them to seek review of this objection by the Federal Court before continuing the inquiry was refused by Immigration adjudicator James McNamara.¹⁴⁶ The Trial Division of the Federal Court later ruled that the provisions of the *Canada Evidence Act* should be given effect, since the disclosures about to be made by the RCMP officer would be prejudicial to National Security. The adjudicator eventually concluded that while Mohammad had concealed his criminal record and his affiliation to a Palestinian "terrorist" organization

¹⁴⁵ See Victor Malarek, *Palestinian's lawyers unpaid, sources say*, The Globe & Mail, July 29th, 1988, A5; Canadian Press, *Terrorist's charge is dropped*, The Globe & Mail, August 1st, 1988, A4.

¹⁴⁶ See Gary Webb-Proctor, *Palestinian continued as member of terrorist group, hearing told*, The Globe & Mail, August 9th, 1988, A8; Rudy Platiel, *Adjudicator rejects bid for adjournment at terrorist's hearing*, The Globe & Mail, August 11th, 1988, A8. See also *Mohammad v. M.E.I.* [1988] 3 F.C. 308, (1988) 17 F.T.R. 134 (F.C.T.D.); *aff'd* F.C.A., December 8th, 1988 [unreported]; application for leave to appeal to the Supreme Court of Canada filed February 14th, 1989, No. 21349. At the date of the completion of this study the Supreme Court had not yet ruled on the application.

when he entered Canada, a deportation order would not be issued in view of his claim for Convention refugee status.

But while the federal government vigorously seeks the exclusion and deportation of communists and leftists, it continues to maintain its open-door policy for a variety of anti-communists and right-wing terrorists, notwithstanding the official discourse that terrorists are not admitted to Canada. This, despite the fact that the latter ostensibly fall within the definition of "threat to the security of Canada" within the meaning of s. 2(d) of the *CSIS Act*. Francisco Nota Moises, for instance, the information officer of Renamo, the Mozambican National Resistance, a right-wing terrorist organization supported by South Africa and engaged in violent activities against the government of Mozambique, was admitted to Canada. Before coming to Canada he disclosed his activities to Canadian officials, who assured him he could continue to work for Renamo in Canada. Gerry Cummings, a spokesperson for CSIS, explained that at the time of this interview "there was no information that would meet the rejection criteria. . . there was no reason which would lead us to believe he was a threat to national security."¹⁴⁷

¹⁴⁷ See Kevin Griffin, *Refugee says he declared rebel role*, The Vancouver Sun, June 18th, 1988, A1; Tom Barrett, *The Mozambique Link*, The Vancouver Sun, June 18th, 1988, B1. Nota Moises was initially granted Convention refugee status, then later became a permanent resident of Canada. A recent U.S. State Department report stated that Renamo had caused the deaths of at least 100,000 Mozambique civilians, and has participated in a variety of human rights violations against Mozambique's rural poor. An investigation into the granting of refugee status to Nota Moises by Immigration Canada concluded that he had been properly admitted to Canada, and that the department had known that he was a member of Renamo when he was granted refugee status. See Canadian Press, *Probe back's refugee's admission*, The Globe & Mail, January 25th, 1989, A4; Charlotte Montgomery, *Refugee status granted despite terrorist link*, The Globe & Mail, January 26th, 1989, A10.

(2) Citizenship

A parallel scheme exists to deny citizenship requests under the *Citizenship Act*¹⁴⁸ for reasons of National Security. Not surprisingly, the same ideological bias developed in immigration matters has also emerged in citizenship cases, due, at least in part, to the ease with which principles interact and interchange between immigration and citizenship matters. It is also significant to note that the number of complaints filed against citizenship refusals for security reasons is much higher than in immigration cases.¹⁴⁹ But as in immigration matters, the pendulum has swung between attempts to make security determinations preremptory, to allowing for some form of limited review.

An early example of a case in which judicial review was ordered is found in *Lazarov v. Secretary of State of Canada*¹⁵⁰ The applicant was a citizen of Romania and was lawfully admitted to Canada as a landed immigrant in 1937, resided and was domiciled in Canada continuously since then. Between 1945 and 1955 he was convicted of a number of criminal offences, and in 1972 he applied for citizenship. Although the Citizenship Court found him to be a proper person to be granted citizenship, the

¹⁴⁸ S.C. 1974-75-76, c. 108.

¹⁴⁹ The 1986-87 *Annual Report* of SIRC, for instance, records that as 1986-87 began there were 13 citizenship cases pending before the Committee, compared to only one case in an immigration matter. In the immigration case deportation was recommended due to association with a "terrorist" organization, the IRA. See Peter Moon, *Panel says Irishman should be deported*, *The Gazette* [Montréal], Nov. 20th, 1986. See *supra*, note 96. Of the six citizenship cases closed during that year it was recommended that citizenship be granted in two, one case ended when the applicant died and very significantly CSIS withdrew its objections in three. One case report was being prepared and investigation was continuing in six others at year end.

¹⁵⁰ [1973] F.C. 927, 39 D.L.R. (3d) 738 (C.A.), *per* Thurlow & Pratte JJ., Choquette D.J. [hereinafter cited to [1973] F.C. 927].

Secretary of State refused to grant him a citizenship certificate "[i]n the light of confidential information recently provided by the Royal Canadian Mounted Police [. . .],"¹⁵¹ without having offered him the opportunity to be heard. The Federal Court of Appeal found that the right to a hearing for applications, with respect to the problems arising upon their applicants, was clearly implied. Accordingly,

the rule *audi alteram partem* applies whenever the Minister proposes to exercise his discretion to refuse an application on the basis of facts pertaining to the particular applicant or his application and where he has not already had an opportunity in the course of the proceedings before the Citizenship Court he must be afforded a fair opportunity in one way or another of stating his position with respect to any matters which in the absence of refutation or explanation would lead to the rejection of his application.¹⁵²

But Thurlow J. hastened to introduce a significant qualification regarding disclosure of information or documents:

That is not to say that a confidential report or its contents need be disclosed to him but the pertinent allegations which if undenied or unresolved would lead to rejection of his application must, as I see it, be made known to him to an extent sufficient to respond to them and he must have a fair opportunity to dispute or explain them.¹⁵³

151 *Ibid.*, 929.

152 *Ibid.*, 940.

153 *Ibid.*, 940-941.

This welcome introduction¹⁵⁴ of the *audi alteram partem* principle was short-lived, however, since in 1976 a provision was added to the *Citizenship Act*, designed to counter the *Lazarov* decision, under which the security determination was "preremptory" as to its contents.¹⁵⁵ Such a security certificate could be issued on the ground that to grant citizenship would be prejudicial to the security of Canada or contrary to public order. The pendulum swung to a large extent in the other direction with more recent amendments to the *Citizenship Act*, introduced by the *CSIS Act* in 1984. Now, under s. 17.1(2) of the *Citizenship Act*, where the Minister is of the opinion that a person should not be granted citizenship or administered the oath of citizenship because there are *reasonable grounds* to believe that the person *will* engage in activity that constitutes a threat to the security of Canada, within the meaning of the *CSIS Act*, the Minister *may* make a report to SIRC and must notify the person accordingly.¹⁵⁶ Under s. 17.1(3) the Review Committee undertakes an investigation, and the complainant *shall* be given an opportunity to make representations to the Committee.¹⁵⁷ Under s. 18(1) a person shall not be granted citizenship or administered the oath of citizenship where, after considering the report made by the Review

¹⁵⁴ Grey is of the view that Lazarov held out "some hope." He was reluctant, however, to suggest that it would have an influence in immigration matters. See *supra*, note 91, 151-152. Wydrzynski is even more pessimistic in this regard. See *supra*, note 90, 390. The Trial Division of the Federal Court in *Reyes v. A.G. Canada* (1983) 149 D.L.R. (3d) 748 held that the denial of citizenship on the grounds of alleged prejudice to National Security or being contrary to public order did not violate the *Canadian Charter*.

¹⁵⁵ S. 18(4), *Citizenship Act*, S.C. 1974-75-76, c. 108.

¹⁵⁶ S. 75 of the *CSIS Act* repealed s. 18(1) of the *Citizenship Act* and substituted s. 17.1 therefor.

¹⁵⁷ See s. 48 of the *CSIS Act*.

Committee, the Cabinet declares that there are reasonable grounds to believe that the person will engage in activity that constitutes a threat to the security of Canada.

Apparently the first citizenship case to go before SIRC involved Alberto Rabillota, an Argentine journalist who had been working in Canada since 1970, and who was married to a Canadian citizen.¹⁵⁸ Since 1975 he had worked for Prensa Latina Canada Ltée in Montréal, a Canadian business he founded, which was affiliated with Prensa Latina, Cuba's official news agency. In April 1986 Rabillota received a letter from then Secretary of State Benoît Bouchard, pursuant to s. 17.1(2) of the *Citizenship Act*, advising him that in the opinion of the Minister he was a person who would engage in activities threatening the security of Canada, and that a report in this regard had been presented to the Review Committee.¹⁵⁹ Rabillota, who was a permanent resident, had submitted a citizenship application in 1977, but since he received no response he apparently let the matter lapse.

This letter was based on an investigation conducted by CSIS with respect to his citizenship application. According to reports CSIS believed that during the 1970s he used his agency as a cover to spy for Cuba, and that the Canadian agency was used to direct funds to the FLQ.¹⁶⁰ Rabillota categorically denied the allegations, stating that "[t]hey say I was collecting profiles on Canadian politicians. But my only sources are CBC Radio and the

¹⁵⁸ See Jean-Claude Leclerc & M. Arsenault, *Ottawa accuse un journaliste d'être une menace à la sécurité du pays* Le Devoir, 5 avril 1986, 3; Whitaker, *Double Standard*, *supra*, note 84, 282.

¹⁵⁹ Letter dated March 27th, 1986. File No. 523-85.

¹⁶⁰ L. Harris, *Journalist is baffled by 'spy' allegations*, The Gazette [Montréal], June 2nd, 1986, B-16.

daily papers."¹⁶¹ SIRC later supplied a résumé of the allegations made by CSIS against him, pursuant to s. 17.1(4) of the *CSIS Act*:

1. you engaged in activities as an agent of influence on behalf of a foreign power;
2. more particularly, you attempted to manipulate individuals and groups having influence in Canadian political, social and labour milieux to adopt and promote positions that are dictated by a foreign power;
3. you confer regularly with and taken instructions from foreign intelligence agents and officials of a foreign government;
4. you make use of diplomatic facilities of a foreign power for purposes and in a manner consistent with your role as an agent of a foreign state; and
5. you have facilitated access to individuals potentially useful to foreign intelligence objectives in Canada and abroad.¹⁶²

Counsel representing Rabillota responded by presenting a motion for details and for permission to be present at the hearing conducted by SIRC, when it would be receiving proof presented by CSIS.¹⁶³

The Review Committee had been sitting *in camera* since October 8th, 1986 hearing evidence from CSIS, without the presence of Rabillota or his

¹⁶¹ Quoted in A. Dwyer, *Uneasy Relations* Maclean's, April 21st, 1986, 30. Several days after the public release of the letter from Bouchard it was revealed that Rabillota was not the only journalist whose citizenship could have been refused on National Security grounds. See M. Tison, *Rabillota n'est pas le seul journaliste soupçonné de menacer la sécurité nationale du pays*, affirme Bouchard, *Le Devoir*, 9 avril 1986, 5. But this statement was later denied by an official in Bouchard's office. See M. Arsenault, *Rabillota portera plainte au CPQ*, *Le Devoir*, 10 avril, 1986, 3. According to another report Rabillota was only one of some 15 persons whose citizenship could have been refused on security grounds. See M. Arsenault, *Le Conseil de presse donne raison à Rabillota*, *Le Devoir*, 16 septembre 1986, 3.

¹⁶² SIRC, Statement of Circumstances Giving Rise to the Denial of Citizenship to Rodolfo Rabillota by the Secretary of State, undated. Received by Rabillota in September 1986.

¹⁶³ SIRC File No. 1170/Rabillota, October 7th, 1986. See Lippel, *supra*, note 55, 615-616.

lawyer. But before Rabillota began to testify for the first time with his lawyer, the Review Committee, which had heard CSIS during six days of hearings, informed Rabillota that it was no longer appropriate to continue the investigation. One of the Committee's members, Paule Gauthier, advised him that CSIS no longer had any objection to his citizenship application.¹⁶⁴ Apparently the production of the motion for details had presented CSIS with a potentially explosive situation, since it would have been called upon to state that Rabillota had engaged in "espionage" activity in conjunction with ministers, priests, union leaders and other personalities.¹⁶⁵ The sudden change in the position of CSIS also likely reflected the tenuousness of its case against him. Finally, it appears that SIRC was willing to force CSIS to disclose certain information to Rabillota in order to allow him to prepare a proper defence, to which CSIS responded by withdrawing its objection to citizenship.¹⁶⁶

But the successful outcome of Rabillota's case may not be a mere aberration.¹⁶⁷ In fact all of the other citizenship cases summarized in the

¹⁶⁴ Gauthier stated: "Aussi, le Service m'a avisée que les mesures nécessaires seront prises pour que votre demande de citoyenneté soit acheminée sans objection portant sur des questions de sécurité nationale." Transcript of December 11th, 1986 hearing, 1.

¹⁶⁵ Jean-Claude Leclerc, *Ottawa abandonne son accusation contre le journaliste Rabillota*, *Le Devoir*, 13 décembre 1986, A-3.

¹⁶⁶ This is confirmed, by inference, in the 1986-87 Annual Report of SIRC, which provides a summary of an unidentified case whose brief facts are virtually the ones found in Rabillota's complaint. *Supra*, note 21, 74.

¹⁶⁷ See Whitaker, *Double Standard*, *supra*, note 84, 282. CSIS declared three Chileans who had applied for citizenship to be security risks because they were involved in organizations and protests opposing the dictatorship of General Augusto Pinochet. SIRC member Frank McGee overturned CSIS' finding, by concluding that individuals who fled their countries to become Canadians are not required to abandon their dreams of political change. "Unlike the marriage vow, 'forsaking all others,' Canada should not expect newer comers to expunge their hopes, fears, passions and bitter memories when they swear allegiance to Her Majesty in the

1986-87 Annual Report of SIRC resulted in positive results for the complainants. In one, a landed immigrant, who fled his or her home country after a coup, was denied citizenship when CSIS claimed the individual was a *sympathizer* of a "terrorist" organization in the country of origin. After hearing an expert witness on the terrorist organizations in the country in question, the Review Committee concluded that the individual was not a threat to the security of Canada, but at the time of the presentation of this Annual Report its recommendation had not been acted upon by the Governor in Council. In another, citizenship was denied to a landed immigrant, in Canada since 1966, because CSIS believed that this individual was a threat to National Security. But before the Review Committee began its investigation, CSIS withdrew its recommendation against granting citizenship. In the only other case summarily reported, an individual who entered Canada as a refugee and was granted landed immigration status more than a decade ago was refused citizenship when CSIS alleged that this individual was an agent of influence for a foreign intelligence service. Again CSIS withdrew its

citizenship oath.' Quoted in Deborah Wilson, *Chilean refugees no threat, spy agency is told* The Globe & Mail, January 23rd, 1988, A9. The negative side of this trend is that citizenship applicants can suffer hardship due to the extremely long delay CSIS takes in completing citizenship security clearances.

objection to citizenship before the Review Committee completed its investigation.¹⁶⁸

(3) Security Clearances for Employment

In addition to providing security clearances in immigration and citizenship matters, CSIS is also mandated to provide such clearances for employment, notably in the federal civil service. Where such clearances reveal potential threats to National Security they can result in employment termination, refusal to employ individuals or demotion, and thus give rise to complaints of discrimination on the grounds of political convictions or beliefs.¹⁶⁹ Each year an excessively large number of clearances are

¹⁶⁸ All are briefly summarized in *supra*, note 21, 74-75. More recently Jong-Hun Lee was granted a security clearance for his citizenship application after a delay of more than 22 months. CSIS alleged that he had been a spy for North Korea, and Lee disclosed that the Service repeatedly asked him to help them in spying on North Koreans. See Deborah Wilson, *CSIS clears space scientist after stalling citizenship bid*, *The Globe & Mail*, March 29th, 1988, A3. Lee later complained against the Director of CSIS, and brought a complaint to SIRC, pursuant to s. 41 of the *CSIS Act*. He was granted a hearing before SIRC, scheduled to take place in January 1989. See Deborah Wilson, *Scientist gets hearing on charge that CSIS damaged his reputation*, *The Globe & Mail*, January 3rd, 1989, A4. An even more peculiar turn of events occurred before SIRC with respect to Hardial Bains, the leader of the Communist Party of Canada-Marxist Leninist. Bains had come to Canada almost 30 years ago, and made a citizenship application in 1980. But in March 1986 the then Secretary of State Benoit Bouchard sent him a notice, stating that in his opinion Bains was "a person who will engage in activity described in subsection 17.1(2) of the Citizenship Act." (File No. 1332-85, letter dated March 27th, 1986) A hearing before SIRC was scheduled for January 11th, 1988, which was indefinitely postponed (see *What Changed?! Hardial Bains Wins Citizenship*, *The New Weekly*, Vol. 2, No. 7, November 14th, 1988, 11, 16.) In September 1988 it was learned that the Secretary of State had withdrawn his objection to the citizenship application made by Bains, and shortly thereafter he received a letter from then Secretary of State Lucien Bouchard, confirming that he had become a citizen.

¹⁶⁹ See J. Stuart Russell, *Discrimination on the Basis of Political Convictions or Beliefs* (1985) 45 R. du B. 377, 393-404; Reg Whitaker, *Left-Wing Dissent and the State [:] Canada in the Cold War* (1988) [unpublished paper presented at the Queen's University conference in February 1988 on "Advocacy, Protest and Dissent"], 8-12. Only one such refused security clearance can result in blacklisting, the dreadful

processed by CSIS for the federal government.¹⁷⁰ Although the incredibly vague notion of "loyalty" has been a key ingredient in such clearances in the past, it appears that its significance may have diminished, at least in the eyes of SIRC. For their 1986-87 Annual Report claims that

effects of which are depressingly illustrated in Upton Sinclair's famous novel *The Jungle* (1906)(1982 ed.):

Out of the saloons the man could tell him all about the meaning of it; they gazed at him with pitying eyes -- poor devil, he was blacklisted! [. . .] They had him on a secret list in every office, big and little, in the place. They had his name by this time in St Louis and New York, in Omaha and Boston, in Kansas City and St Joseph. He was condemned and sentenced, without trial and without appeal; he could never work for the packers again -- [. . .] It was worth a fortune to the packers to keep their blacklist effective, as a warning to the men and, a means of keeping down union agitation and political discontent. (at 234-235).

(describing Jurgis Rudkus, immediately after he learned that his hiring had been summarily revoked without any reason)

The "loyalty" criteria, as set forth in Cabinet Directive 35, have long been used to rule in security clearance matters, which goes much further than association with communism. Under this test public service employment will be denied to "a person who by his words, or his actions shows himself to support any organization which publicly or privately advocates or practices the use of force to alter the form of government." Quoted in Cotler, *supra*, note 26, 361. Cotler condemns this standard for its excessive breadth:

It applies not just to communist or fascist associations but to any organization; not just to actions but to words; not just to membership but to simple support; not just to the practices of the organization but to advocacy, even in private; not just to the violent overthrow but participation in an illegal demonstration or non-violent civil disobedience; not just to overthrow of the government but to seeking to alter the form of government -- which could even apply to demonstrations in favour of a different government or even a different constitutional regime. *Ibid.*

¹⁷⁰ In the 1985-86 fiscal year some 70,000 security clearances were processed for the federal government by CSIS, which represents approximately 25% of the public service. See *Ottawa plans cut in security screening*, *The Gazette* (Montréal), June 19th, 1986, B-1. Globally in 1986 more than 250,000 requests for security clearances were dealt with by 110 investigators. See Patricia Poirier, *Screening delays imperil security, CSIS official says*, *The Globe & Mail*, May 23rd, 1987, A1. Cf. the West German policy of *Berufsverbot* (refusal to employ (or retain) people in public service positions on the ground that they are "hostile to the state" or "hostile to the constitution"), described in Cobler, *supra*, note 15, 33-37, 63-66, and in Austin Turk, *Political Criminality I: The Defiance and Defense of Authority* (1982), 57-58..

no one can be refused security clearance for *disloyalty* unless there are reasonable grounds to believe that he or she engages in or may engage in activities that fall within the definition of "threats to the security of Canada" in the *CSIS Act* (section 2).¹⁷¹

Regrettably, the attitude of SIRC in employment complaints is alarmingly sympathetic to the views of CSIS.

CSIS, in one case, reported to Employment and Immigration Canada that André Henrie was a member of the Workers Community Party-Marxist/Leninist (WCP-ML) and the Groupe Marxiste/Léniniste Libération (GMLL), which fell under s. 3(a) of Cabinet Directive 35.¹⁷² The complainant denied being a member of either organization, both of which were small and little-known groups which ceased to function a number of years ago, but he did admit to having attended demonstrations and meetings organized by the WCP-ML, contributing money and subscribing to its newspapers. His complaint from the non-renewal of his security clearance in June 1985 was, however, dismissed by SIRC in April 1986. Although Jean-Jacques Blais and Paule Gauthier admitted that he was only a supporter of the WCP-ML, they concluded that "the evidence was clear" that this group was an organization that constituted a threat to National Security, within the meaning of s. 2(d) of the *CSIS Act*, without any further elaboration. The same conclusion applied to the other organization:

[. . .] we find that the GMLL is a Communist organization whose basic tenets are unacceptable to and incompatible

¹⁷¹ *Supra*, note 21, 60 [emphasis added].

¹⁷² *Henrie v. Employment and Immigration Canada*, SIRC File No. 1170/Henrie, April 14th, 1986. See also Copeland, *supra*, note 139, 11. After the dissolution of the WCP, Henrie became associated with a tiny successor group, the GMLL.

with our Canadian democratic system. While at the present time the organization may be a study group, its purpose is to keep alive Marxist-Leninist principles in anticipation of changes in social and economic conditions that would permit it to develop its membership and its militancy.¹⁷³

Interestingly, the Committee went further to add that Henrie's clearance was also properly denied due to his disloyalty, although this concept is nowhere to be found in s. 2(d). In its view his support of the WCP-ML and membership in the GMLL

put in question his loyalty to Canada as contemplated by the Act. [. . .] an individual who supports or is a member of an organization whose activities constitute a threat to the security of Canada puts his loyalty in question by such membership.¹⁷⁴

This is an extremely insidious decision since such a broad condemnation of the political goals and objectives of these left-wing groups would seem to automatically preclude any supporters or members of a left-wing organization from securing or maintaining federal public employment. Whitaker is similarly alarmed by this decision, characterizing it as "[o]ne of the most shocking cases."¹⁷⁵ According to him, Henrie was denied a

¹⁷³ *Ibid.*, 5. Despite the fact that he had been granted a "secret" classification since 1977, he was denied a lower "confidential" classification in Employment and Immigration Canada.

¹⁷⁴ *Ibid.* An application for judicial review, pursuant to s. 28 of the *Federal Court Act*, was subsequently filed against the decision. Before the application could be heard before the Federal Court of Appeal on the merits, the Deputy Attorney-General presented a security certificate, pursuant to s. 36.1 *et seq.* of the *Canada Evidence Act*, before the Federal Court of Appeal, in support of a motion to vary the contents of the case, under Rule 1402 of the Federal Court Rules. A decision on the objection to the certificate was rendered by the Trial Division of the Federal Court, and since it deals almost exclusively with the question of Crown privilege it is analyzed in Ch. V, *supra*, note 73, and accompanying text.

¹⁷⁵ Reg Whitaker, *Witchhunt in the Civil Service*, This Magazine, Oct.-Nov. 1986, 24. Whitaker was one of the witnesses during the hearings of Henrie's complaint.

clearance because, paraphrasing a CSIS officer, "revolutionary violence existed in the minds of the members of the group -- a very Orwellian concept. But "thought" is not a crime in the laws that govern the country's security clearance."¹⁷⁶ This decision also confirms Whitaker's view that the criteria employed by CSIS in processing security clearances are heavily politically biased: "the careful public servant avoids left-wing or radical groups, left-wing magazines, even left-wing friends. Right-wing, Tory or Liberal politics do not attract the attention of the [political] police."¹⁷⁷

Equally disturbing is Whitaker's observation that Henrie's meeting with two CSIS agents in late 1984 was surreptitiously recorded, without his knowledge or consent. Rather than being an opportunity for him to learn the basis of the allegations against him, and to resolve any doubts, the session became a fishing expedition:

Was he a homo? Henrie quite properly told them it was none of their business. And then the inevitable: what about others? Who had invited him to meetings? Were they friends? Names were dangled. [...] Henrie refused to play their game, indicating that he would talk about himself, but under no circumstances would he involve anyone else. To the CSIS, the case was over at that point, just as Jack Gold's had been. Henrie was not "co-operative." He refused to *name names*.¹⁷⁸

As in Rabillota's case, CSIS had no intention of disclosing its case before the Review Committee hearings:

Henrie was denied access to at least fifteen or sixteen

¹⁷⁶ *Ibid.*, 25.

¹⁷⁷ *Ibid.*, 24.

¹⁷⁸ *Ibid.*, 27 [emphasis in original].

documents furnished to the SIRC by the CSIS as part of its case against Henrie. And in most of these cases, he was not even allowed to know what kind of documents they were, or who wrote them, or when. [. . .] At each instance when CSIS witnesses cited "national security" as reason to refuse to answer questions put to them by [Henrie's lawyer Craig] Paterson, they were automatically upheld by Blais, with no rationale offered. The CSIS's final submission to the SIRC was heavily censored with an ubiquitous magic marker without approval from the SIRC before it was shown to Henrie and Paterson. All of this makes an utter mockery of the notion that the SIRC furnishes the sort of forum in which injured parties can have an opportunity to receive natural justice [. . .].¹⁷⁹

As for the arguments advanced by CSIS, the Service

seemed content to argue that they called themselves "Communist" [. . .] and that they made vague rhetorical gestures toward such notions as armed struggle. [. . .] The CSIS argues that however remote the ultimate aims may be, everything done by a group which had "revolutionary" goals was, by some strange alchemy, subversive -- "even activities with no chance of ultimate success," "everyday activities," "strange but harmless activities" in the CSIS's own words.¹⁸⁰

Whitaker correctly concludes that this case demonstrates how empty the lawful advocacy, protest or dissent exception is. Paul Copeland's equally sober conclusion is that the case shows that "Marxists will not receive a warm welcome by the Review Committee, [. . .]"¹⁸¹

¹⁷⁹ *Ibid.*, 27-28. A graphic example of the censored documents provided by CSIS is found at 24.

¹⁸⁰ *Ibid.*, 28.

¹⁸¹ *Supra*, note 140, 6.

Yet even where SIRC finds that a person is not a security threat for clearance purposes, its recommendation may still be ignored by the federal government. An excellent example is the case of Robert Thomson, who was denied a position with Agriculture Canada, because CSIS believed his loyalty to left-wing causes made him disloyal.¹⁸² Thomson had sent a copy of his Masters thesis entitled "The Potential of Agricultural Self-Reliance in Grenada" to a professor in Guyana who was returning there. This represented, according to CSIS, a "clandestine form of communication [...] on issues ostensibly designed to cause an internal problem within that country."¹⁸³ He also had consulted a Cuban to obtain the Cuban view on the U.S. invasion of Grenada before appearing on a number of TV and radio programs to comment thereon. And he knew the First Secretary of the Nicaraguan Embassy in Ottawa. On the basis of this tenuous information CSIS concluded that "[i]t is consistent [...] with [his] penchant for getting involved in the issues of countries of that political stability."¹⁸⁴ Thomson had also been an active NDP supporter and was involved in human rights groups, such as Amnesty International. Despite SIRC's dismissal of the refusal for a security clearance at the "secret" level, and its recommendation that a clearance be granted, Agriculture Canada continued to rely on the assessment supplied by CSIS and refuse him the position. To enforce the

¹⁸² *Thomson v. Canada* (1988) 50 D.L.R. (4th) 454, [1989] 1 F.C. 86, 84 N.R. 169 (F.C.A.), *per* Hugessen, Stone & Desjardins JJ [hereinafter cited to 50 D.L.R. (4th) 454]. See Zuhair Kashmeri, *A mark that lasts*, *The Globe & Mail*, March 27th, 1987, A1; Don Stewart, *C.S.I.S.: On Guard Against Thee*, *Latin America Connexions* March/April 1988, 1, 10; Don Stewart, *CSIS Update*, *Latin America Connexions*, May/June 1988, 2.

¹⁸³ Quoted in Kashmeri, *ibid.*, A2.

¹⁸⁴ *Ibid.*

recommendation of SIRC Thomson brought an application pursuant to s. 28 of the *Federal Court Act* before the Federal Court of Appeal.

Mr. Justice Stone construed the word "recommendations" in s. 52(2) of the *CSIS Act* very liberally, by taking into consideration the statutory scheme for the investigation of the complaint:

Certain features of that scheme impress me as indicating an intention of Parliament to provide the complainant with redress rather than merely an opportunity of stating his case and of learning the basis for the denial. [. . .]

In my view, the nature of this scheme indicates a desire by Parliament to provide a means of making full redress available to a complainant. [. . .] The adoption of a detailed scheme by Parliament, which includes the obligation for a formal report in which "findings" and any "recommendations" are to be stated, suggests that this latter word was used other than in its literal sense. Secondly, the details of that scheme, [. . .] rather suggests an intention that the Intervenant [SIRC] have the ability to examine the whole basis on which a denial rests to ensure such redress as its investigations may indicate. [. . .] I seriously doubt that [Parliament] intended any "recommendations" to be merely advisory or suggestive.¹⁸⁵

Consequently, the Court concluded that the Deputy Minister of Agriculture

¹⁸⁵ *Supra*, note 182, 476-477. Accordingly Thomson filed an application before the Trial Division of the Federal Court for an order quashing the decision of the Deputy Minister of Agriculture, and compelling him to follow the recommendation of SIRC to grant him a security clearance. See Cristin Schmitz, *Intelligence review body can now bind federal gov't?*, *The Lawyer's Weekly*, April 29th, 1988, 10.

was *bound* to grant the security clearance recommended by SIRC.¹⁸⁶ The decision is of considerable significance since it greatly broadens the powers of SIRC, and may result in more just outcomes of SIRC investigations, if the federal government is compelled to follow its recommendation in favour of the complainant.

Yet Thomson's subsequent application for *certiorari* to set aside the decision of the Deputy Minister of Agriculture and for *mandamus* requiring the Deputy Minister to grant the clearance was dismissed by the Trial Division of the Federal Court.¹⁸⁷ Dubé J. was of the view that the recommendations of SIRC were not intended to and could not bind deputy ministers, since the final decision as to whether a security clearance should be issued was vested in the deputy minister and the minister, according to the present security policy. Since the Deputy Minister was under no duty to follow the recommendations of SIRC, *mandamus* and *certiorari* could not be issued.¹⁸⁸

Conclusions

The Canadian Security Intelligence Service is primarily designed to gather and analyze information concerning potential acts of subversion,

¹⁸⁶ See also Michel Auger, *La cote de sécurité d'un fonctionnaire ne dépend pas des sous-ministres*, *Le Devoir*, 10 mars 1988, 2. Regrettably the Court concluded that it did not have jurisdiction to grant the application, and that it should have been taken before the Trial Division, since the implementation of SIRC's recommendation was a purely administrative act (at 479). See also Canadian Press, *Man wins security clearance case*, *The Globe & Mail*, March 10th, 1988, A8.

¹⁸⁷ *Thomson v. The Queen*, T-890-88, June 15th, 1988, Dubé J., unreported.

¹⁸⁸ An appeal was then brought before the Federal Court of Appeal by Thomson from this decision. See Cristin Schmitz, *CSIS watchdog's findings don't bind gov't: Federal Court*, *The Lawyer's Weekly*, July 8th, 1988, 20.

terrorism, foreign-influenced activities and espionage, and to provide security clearances to government in immigration, citizenship and employment matters. In practice, during the first five years of its existence the overwhelming attention of CSIS has been focussed on what it terms "left-wing subversion" (which is, in reality, lawful dissent and protest), while terrorism, foreign-influenced activities and espionage played a secondary role. Regrettably, the two major review mechanisms for ensuring that CSIS respects its own statute -- the Security Intelligence Review Committee and the Federal Court -- have rarely criticized the Service's exceedingly broad interpretation of its counter-subversion mandate. CSIS has consequently intruded into the private lives of thousands of Canadian individuals and organizations whose basic rights and freedoms have been violated.

For CSIS to cease targeting protest and dissent, and to carry on its activities in conformity with the *Canadian Charter of Rights and Freedoms*, would be a major achievement, and would do much to remedy its bleak record, as set out in this chapter. In the same vein, CSIS security clearances in the areas of immigration, citizenship and employment should not be denied to those individuals considered to be subversive, or who have engaged in lawful advocacy, protest and dissent. There are, however, few indications that the federal government or CSIS are moving in this direction. The five-year review of the *CSIS Act* will likely produce little more than minor reform, mostly in the area of procedural matters, leaving the present mandate of CSIS, as set out in s. 2 of the *Act*, in its present form. Perhaps all that can be expected in the short-term is that with added experience, and with heightened awareness of the activities of the Service, the clamour for substantive reform of CSIS will flourish.

GENERAL CONCLUSIONS

This analysis of National Security in Canada has sought to critically examine the various components of the contemporary Canadian State Security apparatus. The most salient feature of this examination is that from the viewpoint of history, legislation and judicial decisions and practise, National Security has been and continues to be employed primarily against left-wing protest and dissent. (The major exception to this principle, of course, being legislation respecting official secrets, which is primarily designed to counter espionage.) This conclusion flows directly from the central *purpose* of National Security in Canada, which is to protect the legitimacy, hegemony and existence of the State by primarily seeking to prevent left-wing resistance from emerging, and generally to ensure the preservation of the political *status quo*.

Since National Security diminishes the quantity and quality of protest and dissent in Canadian society, the heart of vibrant democratic discussion and debate, it also violates a number of fundamental rights and freedoms of Canadians. Such attacks have not, however, provoked legislators or the judiciary to seek to protect such rights and freedoms by advancing a program of progressive democratic reform. Rather, the balance-sheet of the legislative and judicial experience in this area is extremely disappointing, and there are few indications that much legislative or judicial progress is forthcoming in the near future.

Accordingly a new perspective is called for, especially in light of the five-year review of the *CSIS Act*. One that fully protects lawful advocacy,

protest and dissent, all of which are essential ingredients for any free and democratic polity. The principle test of this thesis is that in order for the State to have a legitimate *and* a lawful interest in the area of National Security, the *Canadian Charter* must be fully respected. The analysis in the preceding chapters has sought to demonstrate that many of the provisions concerning National Security violate the *Charter*, and has attempted to articulate an alternative vision which is in keeping with *Charter* imperatives. Since the enactment of the *Charter*, the supreme and absolute nature of National Security is simply no longer defensible.

The crimes against the State and legislation respecting official secrets should accordingly be abolished, and the State should only be permitted to avail itself of ordinary criminal offences. Access to information and privacy legislation should be amended to eliminate all exemptions from access on the ground of National Security. In the area of Crown privilege, there should be a strong statutory presumption in favour of the public interest in disclosure of National Security information, which could only be rebutted if it is clearly demonstrated that such disclosure would permit a group or individual to threaten the State by using illegal means.

Finally, with respect to CSIS, the notion of subversion should be removed from the definition of "threats to the security of Canada" in its enabling legislation, and it should be specifically prohibited for CSIS or any other security and intelligence or law enforcement agencies to target groups or individuals solely on the basis that they are considered to be subversive, or engaged in lawful advocacy, protest and dissent. Similarly, security clearances in immigration, citizenship and employment should not be denied to those individuals considered to be subversive, or who have engaged in lawful advocacy, protest and dissent.

Admittedly, such a sweeping new *Weltanschauung* on National Security is considerably more critical than what the federal government is willing to entertain, and will not be adopted in the short-term. In the meantime, the popular and scholarly critique of National Security in Canada is developing and increasing in sophistication. It is hoped that this study will contribute to that growing corpus of criticism, and that not only the legal community, but all of Canadian society, will insist that the rights and freedoms of Canadians be fully protected by the National Security State.

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CHAPTER V

THE CROWN PRIVILEGE TO REFUSE

DISCLOSURE OF NATIONAL SECURITY INFORMATION

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CHAPTER VI:

A STATE WITHIN THE STATE:

THE CANADIAN SECURITY INTELLIGENCE SERVICE

Judicial Decisions

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