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THE LEGAL DIMENSIONS OF COMBATTING THREATS TO THE SECURITY OF CANADA

By

SCOT SALTSTONE

Faculty of Law

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ABSTRACT

This thesis reviewed many of the laws designed to detect threats to our national security as well as those laws constructed to punish those who have been found to be a threat to the security of Canada.

The literature concerning the Criminal Code Offences of treason and sedition and the Official Secrets Act Offences of espionage and leaking Government information was examined. The literature prior to the inception of the Canadian Charter of Rights and Freedoms (Charter) and the research published after the Charter came into force agreed that these offences overreach the acceptable limits of criminal law, and needlessly threaten individual rights and freedoms. Further, the literature reviewed noted that these offences are out of date, inconsistent, and vague. This thesis supports the conclusions of the previous writers and argues that a complete reformulation of these offences is required.

This thesis also examined the Canadian Security Intelligence Service Act (C.S.I.S. Act). It is argued that the definition of a "threat to the security of Canada" needs to be defined with greater clarity. Suggestions for reform are put forward in this thesis. It was also argued that the provision of the C.S.I.S. Act (which permits the C.S.I.S. to provide

police forces with information which has been collected by intrusive investigative techniques not available to them) be redrafted.

Lastly, it is the position of this thesis that a warrant issued pursuant to the provisions of the C.S.I.S. Act is inconsistent with the Charter and that the warrant procedure of the C.S.I.S. Act is ineffective if a warrant is required in an emergency. Recommended amendments to the warrant process are proposed.

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PART 1: INTRODUCTION

According to section 2 of the Canadian Security Intelligence Service Act[1] (C.S.I.S. Act) there are four general elements to the definition of "threats to the security of Canada": Espionage and sabotage, clandestine or deceptive foreign influenced activities, acts of serious political violence, and subversion.

After the revelations of the Soviet cipher clerk defector Igor Gouzenko, which were outlined in the report of the Taschereau-Kellock Royal Commission,[2] it became clear that espionage and deceptive, foreign-influenced activities are real threats to the security of Canada. Further, recent incidents in Canada, or involving Canadians, make it apparent that international terrorism is a threat to the security of Canada. These incidents include: Two attacks by Armenian nationalist groups on Turkish diplomats in Ottawa (one diplomat was paralyzed, the other killed); the attempted assassination of a Punjabi Cabinet Minister on Vancouver Island by Sikh extremists; an attack on the Turkish Embassy in Ottawa by Armenian nationalists which resulted in the death of a security guard;

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[1]Canadian Security Intelligence Service Act, Can. Rev. Stat. 1984, c. 21

[2]Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication, by Public Officials and other Persons in Positions of Trust, of Secret and confidential Information to agents of a Foreign Power, [Reports] (Ottawa: King's Printer, 1946)

a bomb-threat involving the Toronto Transit Commission Subway system; and the sabotage of Air India flight 182 that caused three hundred twenty-nine deaths.[3] Hence, Canada requires laws to protect itself against threats to the security of the country, and the security of its citizens.

It is the purpose of this thesis to explore the various Canadian laws which have been drafted to detect threats to the security of Canada as well as those laws designed to punish those who have been found to be a threat to our national security.

This thesis concentrates, for the most part, on criminal offences and the powers granted to intelligence officers under the C.S.I.S. Act. Space does not allow this thesis to cover all aspects of the law dealing with national security. Therefore, this thesis does not provide an exhaustive discussion of the defects of both form and content found in Part II of the Canadian Criminal Code[4] (Criminal Code), or the Official Secrets Act[5] (O.S.A.). Nor is this thesis concerned with either the structure of Canada's Intelligence network or the

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[3]Senate of Canada, Report of the Second Special Committee of the Senate on Terrorism and Public Safety (Ottawa: Minister of Supply and Services Canada, 1989) at pp. 7 - 8

[4]Canadian Criminal Code, R.S.C. 1970, c. 34, as amended

[5]Official Secrets Act, S.C. 1973, c. 50

Government's responsibility for its operation.

What this thesis does examine is a number of the most important offences relating to "national security" provided for in a variety of acts including the Criminal Code, the National Defence Act,[6] the O.S.A. and the C.S.I.S. Act. This is the subject matter of Part 2 of this thesis. Part 3 examines the C.S.I.S. Act including the powers of C.S.I.S., judicial control of C.S.I.S. and the independent review of C.S.I.S. activities. Finally, there is a summary of some of the conclusions in Part 4.

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[6]National Defence Act, R.S.C. 1970, c. N - 4

PART 2: LAWS GOVERNING OFFENCES AGAINST THE STATE

A. CRIMINAL OFFENCES AND NATIONAL SECURITY

In Canada crimes against the State are set out in a number of federal statutes. However, the majority of the more traditional offences are found in part II of the Code.

1. CRIMINAL CODE OFFENCES:

(a) Treason:

(i) Introduction

> The term "treason" is derived from the French trahir meaning and the Latin tradere meaning "to betray". In the broadest statement of the crime, a person commits treason who betrays the organized society in which he lives. He can be found out in time of peace as well as war. His crime is the gravest known to the law.[7]

The law of treason in Canada stems from the English

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[7]Biggs S.C., "Treason and the Trial of William Joyce" (1947 - 48), 7 Toronto L.J. 162 at p. 162

Treason Act 1351.[8] The Act was passed to clarify the uncertainty and arbitrariness of the common law which it superceded.[9] Today the offence of treason can be found in section 46 of the Criminal Code.[10] Although this section provides that such acts as attempting to kill Her Majesty or assisting an enemy at war with Canada are treasonous ones, this thesis will deal with the more contemporary concept of treason provided in paragraph 46(2)(b) and the special features of the offence in general. Paragraph 46(2)(b) of the Code provides that everyone commits treason who,

> without lawful authority , communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada.

This subsection was first added to the Code after the 1953-54 revision. The purpose of the amendment was most aptly put by Minister of Justice Garson when he stated:

> This new sort of treason is in line with

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[8]Statute of Treason, 25 Edw. 3c.2

[9]Smith, J.C. & Hogan, B. <u>Criminal Law</u>, 5th ed. London:Butterworth & Co. Ltd. (London), 1983 at p. 796

[10]Canadian Criminal Code; R.S.C. 1970, c. 34, as amended

> the great change which has come over the offence of treason from what it was in feudal days when it might have been an act of disloyalty to a personal king. But today there could be a disclosure of information with regard to the H-bomb or the atomic bomb which might have consequences much more serious for the state than even a personal attack upon the monarch.[11]

With recent increases in technology and its importance to both the military and economic communities the Minister's statement is no less applicable today than it was in 1953. Unfortunately, the addition of paragraph 46(2)(b) to the Code did nothing to correct the many defects of form and content found in section 46 of the Code.

(ii) Elements of the Offence

The mens rea requirement of the offence contained in paragraph 46(2)(b) is unusual for a serious criminal offence. The use of the words "ought to know" in paragraph 46(2)(b) suggests an objective test. Hence, a researcher would be guilty of treason if, for example, he divulged information, at the request of a foreign government, with good motives and without the knowledge of its possible use, information which may be used for a purpose prejudicial to the safety or defence

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[11]House of Commons, Debates, 1953 - 54, Vol. 4 at p. 3668

of Canada. It has been argued that actual knowledge or even wilful blindness of the potential use of the information by a foreign country should be necessary to secure a conviction for treason under paragraph 46(2)(b).[12]

Further, although the mens rea requirements of the other treasonous provisions of the Code and the espionage provision (section 3) of the O.S.A. are not clear, none would appear to base culpability on the tortious concept of "ought to know". The lack of external consistency of the mens rea requirement with the O.S.A. offence of espionage together with the absence of a uniform standard of mens rea for treason and high treason has particularly serious implications, because of the extreme severity of the punishment for these offences. (The penalty for violating paragraph 46(2)(b) depends on whether a state of war exists between Canada and another country when the offence is committed. An accused is liable to life imprisonment if a war exists[13] or fourteen years in peacetime.[14])

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[12]Friedland, M.L. "National Security: The Legal Dimensions", A Study prepared for the Commission of Enquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980. at p. 14

[13]Canadian Criminal Code; R.S.C. 1970, c.34 as amended at s.47(1)(b)

[14]Ibid., at s.47(1)(c)

Uncertainty of terms is another problem with paragraph 46(2)(b) of the Code. What is a purpose prejudicial to the safety or defence of Canada? Does such a purpose include the divulging of information which could affect the Canadian economy? For instance, is the "safety or defence of Canada" prejudiced if a disenchanted Canadian researcher takes his invention or idea (military or non-military) to another country and the realization that the idea or invention could result in the loss of Canadian jobs? What is meant by "safety or defence of Canada" is not defined.

Moreover, the offence of treason is complete if the mere existence of potential prejudice is proven. Finally, treason does not require the Crown to prove that the information supplied was prejudicially used. Hence, in light of the degree of uncertainty surrounding the elements of the offence of treason the danger of it being used in an arbitrary manner becomes apparent.

A source of internal inconsistency within section 46 of the Code is the fact that it provides a number of different incomplete actions will fulfill the actus reus requirements of treason or high treason. Paragraph 46(1)(a) makes it high treason to kill or "attempt" to kill the Queen; paragraph 46(1)(b) makes it high treason to levy war against Canada or "do any act preparatory thereto"; and paragraph 46(2)(d) makes it treason "to form an intention" to commit high treason and manifest "that intention by an overt act". These inconsistencies are augmented when paragraph 46(2)(d) is used in conjunction with paragraph 46(1)(a) which makes it treason to form an intention to attempt to kill the Queen and to manifest that intent by an overt act.

This unusual relationship between paragraphs 46(1)(a) and 46(2)(d) also exists between paragraphs 46(2)(b) and 46(2)(e). Paragraph 46(2)(e) of the Code provides that everyone commits treason who, in Canada ". . . forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act". It should be noted that it is the forming of the intent (and not having the intent, as required by section 24, the general attempt section of the Code) that is a necessary element of the offence. Further, the second element of the offence of treason is the manifestation of the said intention in an overt act, which does not require that the overt act be itself an offence[15] nor does it have to be an act (as required by section 24 of the Code) for the purpose of carrying out this intention. Moreover, subsection 46(4) of the Code provides that: "Where it is treason to conspire with any person, the act of conspiring is an overt act of treason".

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[15] R. v. Schaefer (1918), 31 C.C.C. 22 (Que. C.A.); per Cross J. at p.27

Although it has been held that there is no such offence as attempted treason[16] in Canada, it would appear that an attempt offence is not needed; an act which would be considered an attempt under section 24 of the Code would be considered treason under section 46.

To be found guilty of treason would, therefore, require the intention to act in a treasonous manner and a nominal amount of actus reus. Treason would appear to be the only complete offence in the Code which requires little more than intention for a conviction. Also, subsection 48(2) of the Code states that simply "open and considered speech" could fulfill the "overt act" requirement of treason. It will be of interest to note what effect the advent of the Charter and in particular paragraph 2(b) (freedom of thought, belief, opinion and expression . . .) would have on any prosecution based on a scientist's thought or belief that the government of Canada should share certain scientific information with a foreign government when that intention is manifested only by "open and considered speech". It has been held that:

> The protection afforded by the proscription tends to banish the

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[16] R. v. Snider (1915), 34 O.L.R. 318 (Ont. C.A.); R. v. Bleiler (1917), 11 W.W.R. 1459 (Alta. C.A.)

> apprehension which might otherwise inhibit certain segments of society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious or spiritual in nature. The unfettered right to express divergent opinions of these topics is the kind of freedom of expression the Charter protects.[17]

There are however, several safeguards incorporated into the offence of treason for the benefit of an accused. One in particular is found in subsection 47(3). It provides that: "No person shall be convicted of high treason upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused". The requirement is, however, less onerous for the prosecution than that prescribed by the American Constitution which states that, "No person shall be convicted of treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court".[18]

(iii) <u>Extraterritoriality of the Offence</u>

There are some other special features of the offence of treason that, for the purpose of this thesis, deserve mention. Firstly, the offence of treason contains provisions which are

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[17] <u>R.</u> v. <u>Keegstra</u> (1984), 19 C.C.C. (3d) (Alta. Q.B.) at p. 268

[18] United States Constitution, Art. III, s.3

extraterritorial in nature. Subsection 46(3) states:

> Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,
> a) commits high treason if, while out of Canada, he does anything mentioned in subsection (1); or
>
> b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

Canada, therefore, assumes jurisdiction for treasonous offences committed outside its borders. Section 13 of the O.S.A. (as well as a number of sections of the Code including; sections 58 (uttering a forged passport), 59 (fraudulent use of a certificate of citizenship) and 6(2) (government employees committing offences outside Canada), contains comparable extra-territorial extensions of the criminal law. However, with respect to subsection 46(3), if the location of the crime is outside Canada, it must be proved that the accused is either a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada.

Who ". . . owes allegiance to Her Majesty in right of Canada"? In Joyce v. D.P.P.[19] an American citizen, who had resided in British territory for approximately twenty-four

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[19] Joyce v. D.P.P. [1946] A.C. 347 (H.L.)

years, applied for and received a British passport after presenting himself as a British subject by birth. It was proved that during the Second World War the accused was employed by the German radio company and had delivered from enemy territory broadcast talks in English hostile to Great Britain. The House of Lords dismissed Joyce's appeal from a conviction of high treason. The Court held that an alien abroad holding a British passport enjoys the protection of the Crown and therefore owes allegiance to the Crown. The Court suggested that the duty of allegiance may be even broader in that an alien who leaves Britain without a British passport but leaves behind members of his family or property under the protection of the Crown may be deemed to owe allegiance to the Crown.[20]

This proposition and the principle that a person who is still in possession of a country's passport owes allegiance to the country has been questioned and criticized.[21] The decision is most likely attributable to the strong nationalistic post-war sentiments of England. If offences

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[20] Ibid., Lord Jowitt L.C. at p. 368

[21] Williams G.L., "The Correlation of Allegiance and Protection" (1948), 10 C.L.J. 54; Biggs S.C., "Treason and the Trial of William Joyce" (1947 - 48), 7 Toronto L.J. 162.

against the State are to be applied extraterritorially, they should not be limited to Canadian citizens. Landed immigrants are also given the protection of the State and would be culpable if they committed these acts in Canada. It has been suggested[22] that legislators should not rely on the intangible concept of allegiance but focus on the underlying reason for imposing liability on someone for offences against the State committed abroad. It is felt that this reason is articulated in the notion of reciprocity whereby, in exchange for the protection afforded by the State, a person has an obligation not to do things that will threaten the security of the State.

(iv) Incidence of Use

Despite the numerous problems with the form and content of the offence of treason it causes very few difficulties in the day to day proceedings in the Courts. This is due to the fact that the offence is rarely committed and even more rarely prosecuted. Hence, there have been very few cases of treason in Canada. Nevertheless, trials with respect to the offence of treason have punctuated Canadian history.

The earliest recorded case was that of R.v.Maclane[23] in

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[22]Law Reform Commission of Canada "Crimes Against the State" working paper 49(1986) at p. 33

[23]R. v. Maclane (1797), 26 State Trials 721 at p. 749

1797. Maclane was found to have tried to synchronize a rebellion in Canada with a potential French invasion. There were convictions of nineteen men (eight out of the nineteen were hanged) for aiding American raiders in 1813 after the War of 1812.[24] The Mackenzie uprising in 1837 was also marked by trials for treason.[25] Other historic moments in Canadian history which were highlighted by trials for treason were the Metis Rebellion in Saskatchewan in 1885[26] for which Louis Riel was hanged; and the First World War[27] from which there are only six reported cases.

The First World War trials, which were of both little consequence or interest,[28] were the last in Canada. The

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[24]McNaught K., "Political Trials and the Canadian Political Tradition", in Courts and Trials: A Multidisciplinary Approach, ed. M.L. Friedland (Toronto, 1975) at pp. 158 - 159

[25]Ibid., at pp. 138 - 139

[26]Ibid., at pp. 143 - 146

[27]R. v. Rowens (1914), 7 O.W.N. 467 (High Ct.); R. v. Snider (1915), 34 O.L.R. 318 (C.A.); R. v. Bleiler (1917), 11 W.W.R. 1459 (Alta. C.A.); Schaefer v. The King (1919), 58 S.C.R. 43 (S.C.C.)

[28]Friedland, M.L. "National Security: The Legal Dimensions" A Study prepared for the Commission of Inquiry Concerning Certain Activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 8

Joyce[29] case in 1946 was the last treason prosecution in England. Since the First World War in Canada the Crown has employed the O.S.A. and, for a time during the Second World War, the Treachery Act.[30]

In summary, the offence of treason contains a number of inconsistent and excessively complex provisions which lead to uncertainty as to scope and meaning. Further, the offence is out of date and contains provisions which may very well infringe the Charter. There are, however, a number of other Code and criminal offences against the State which also contain defects of both form and content.

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[29] Joyce v. D.P.P., [1946] A.C. 347 (H.L.)

[30] Treachery Act, Stat. Can. 1940, c.43 The Act expired on the issuance of the second proclamation under s.2 of the War Measures Act.

(b) Other Criminal Code Offences:

(i) Introduction

There are a large number of Criminal Code offences relating to national security which could play a role in the prosecution of individuals for espionage-related activities. This thesis will not however, except for the offence of sedition, deal with many of the provisions except to mention them. These offences include: Sabotage (section 52), inciting mutiny (section 53), uttering a forged passport (section 58), unlawfully possessing explosives (sections 77 to 80), fraudulent use of a certificate of citizenship (section 59), unlawful electronic surveillance (section 178.18), unlawful disclosure of information obtained by electronic surveillance (section 178.2) and sedition (sections 60 to 62).

(ii) Sedition

The offence of sedition should be considered in slightly more detail because of the way the offence has been defined by the courts and its possible overlap with the offence of treason. Sedition can be committed in three ways. Firstly, by speaking seditious words[31] that demonstrate seditious intent;

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[31]Canadian Criminal Code; R.S.C. 1970, c.34, as amended s.62(b)

secondly, by publishing seditious libel[32] in writings which suggest seditious intent; and thirdly, by being a party to a seditious conspiracy,[33] in that a person enters into an agreement to carry out seditious libel. Subsection 60(4) loosely defines "seditious intention" as follows:

> Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who
> (a) teaches or advocates, or
> (b) publishes or circulates any writing that advocates,
> the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

As stated, treason only requires the intention to commit treason and a nominal amount of actus reus. Hence, it would appear that seditious statements or conspiracy would be ample to constitute treason. However, in the Supreme Court of Canada's decision in Boucher v. The King[34] the majority of the Court held that seditious intention required ". . . an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority."[35] For this

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[32] Ibid., s.62(b)

[33] Ibid., s.62(c)

[34] Boucher v. The King, [1951] S.C.R. 265

[35] Ibid., at p. 30

reason, Boucher, a Jehovah's Witness, was found not guilty of seditious libel for printing a pamphlet that attacked the Quebec judiciary, the courts and the administration of justice, in strong words, but not so as to advocate or incite violence. It has been suggested that, if Boucher states the law, there may not be a need for the offence of sedition, as seditious behaviour could be dealt with under the provisions for treason.[36] This is a logical suggestion since subsection 48(2) of the Code states that "open and considered speech" could fulfil the overt act requirement of the offence of treason. There is the danger that, if the Code is not amended so as to require that for an accused to be found guilty of sedition he must have intended to incite violence, enforcement agencies could give the offence a wider meaning than is presently the law for purposes of investigation, surveillance, or search and seizure.

Paragraph 2(b) of the Charter protects the fundamental freedom of expression. The sedition offences in the Code limit the freedom of expression. All limitations of Charter rights and freedoms may be justified if they meet the requirements of

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[36]Friedland, M.L. "National Security: The Legal Dimensions" A study prepared for the Commission of Inquiry Concerning Certain Activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 25

section 1. These requirements were enunciated in National Citizen's Coalition Inc.- Coalition Nationale Des Citoyens Inc. et al. v. Attorney General of Canada:

> Once the limitation is shown to exist then the party claiming to be entitled to the benefit of s. 1 must show that the limit is a "reasonable limit" that it is "prescribed by law" and that it can be "demonstrably justified in a free and democratic society".[37]

The government may not be able to rely on section 1 of the Charter to justify any of the sedition offences in Code sections 60, 61 and 62. It may be that the courts would find that the limitations on expression imposed by the sedition offences go too far to be considered "reasonable limits" as defined by section 1 of the Charter.

Freedom to express political opinions and criticize government policy and administration are concepts which are important to the true exercise of the democratic right to vote embodied in section 3 of the Charter. Freedom to express oneself freely "... is said by many to be one of the most significant of freedoms in a democratic society since the political structure depends on free debate of ideas and

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[37]National Citizens and Coalition Inc. - Coalition Nationale Des Citoyens Inc. et al v. Attorney-General For Canada (1984), 11 D.L.R. (4th) 481 at p. 487; 32 Alta. L.R. (2d) 249; [1984] 5 W.W.R. 436 (Q.B.)

opinions"[38]. The Supreme Court of Canada has long recognized that freedom of expression is essential to the functioning of a democracy:

> Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the Government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the Government concerning matters of public interest. There must be an untrammeled publication of the news and political opinions of the political parties contending for ascendancy.[39]

It is also possible that the sedition offences in Code sections 60, 61 and 62 could be found to be too broad and discretionary in nature to be considered "prescribed by law" as required by section 1 of the Charter. As stated in the case of The Ontario Film and Video Appreciation Society v. Ontario Board of Censors:[40]

> . . . law cannot be vague, undefined and

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[38]Ibid., at p. 492

[39]Reference re Alberta Legislation, [1938] 2 D.L.R. 81 at p. 119; [1938] S.C.R. 100 at pp. 145 - 146

[40]Ontario Film Video Appreciation Society v. Ontario Board of Censor (1983), 41 O.R. (2d) 583 at p. 592; 147 D.L.R. (3d) 58; 34 C.R. (3d) 73 (Div. Ct.); affirmed, (1984) 45 O.R. (2d) 80; 2 O.A.C. 388; 5 D.L.R. (4th) 766 (C.A.); leave to appeal granted (S.C.C., Apr. 4/84)

> totally discretionary and must instead be ascertainable and understandable. Any limits placed on freedoms . . . must be articulated with some precision or they cannot be considered to be law.

Lastly, the decision of the Alberta Court of Queen's Bench in National Citizen's Coalition Inc.-Coalition Nationale Des Citoyens Inc. et. al. v. Attorney-General For Canada made it clear that "[F]ears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified."[41]

2. OTHER CRIMINAL OFFENCES:

Other relevant criminal offences, in terms of this thesis, include those created by section 18 of the C.S.I.S. Act and section 68 of the National Defence Act.[42]

(a) Canadian Security Intelligence Service Act Offences:

Subsection 18(1) of the C.S.I.S. Act provides that,

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[41]National Citizens and Coalition Inc. - Coalition Nationale Des Citoyens Inc. et al v. Attorney-General For Canada (1984), 11 D.L.R. (4th) 481 at p. 496; 32 Alta. L.R. (2d) 249; [1984] 5 W.W.R. 436 (Q.B.)

[42]National Defence Act C. N-4

> ... no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this Act or the participation by that person in the administration or enforcement of this Act and from which the identity of
>
> (a) any other person who is or was a confidential source of information or assistance to the Service, or
>
> (b) any person who is or was an employee engaged in covert operational activities of of the Service can be inferred.

Subsection 18(3) states that every person who contravenes subsection 18(1) is guilty of either a summary conviction offence or an indictable offence and is liable to imprisonment for a maximum of five years. Subsection 18(2) states that any person who, in order to perform his duties under the C.S.I.S. Act (or to enforce or administer the said act) or any other law, identifies a person described in either paragraph 18(1)(a) or (b) is exempt from the liability provided for by subsection 18(3).

Section 18 appears to be designed to protect the C.S.I.S.'s information sources from detection which could lead to the possible harm of the informants or interfere with C.S.I.S. investigations.

If a government employee or former employee is involved in the unauthorized disclosure of information then the offence embodied in subsection 18(1) overlaps with an offence contained in section 4 of the O.S.A.. By completing the elements of the offence prescribed by subsection 18(1) a government employee or former government employee will have fulfilled the actus reus and mens rea elements of the offence defined by section 4 of the O.S.A.. Briefly, paragraph 4(1)(a) of the O.S.A. prescribes that it is an offence, if a government employee or former employee ". . . communicates . . . information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interests of the State his duty to communicate it". Further, for the offence to be complete, the unauthorized disclosure of information does not have to have been undertaken for a purpose prejudicial to the safety or interests of Canada.

(D) National Defence Act Offences:

The National Defence Act[43] is another federal act whose provisions could be used to combat threats to the security of Canada. Section 68 of the National Defence Act provides that, ". . . every person who is a spy for the enemy is guilty of an offence and on conviction is liable to suffer death or less punishment". Hence, a spy could be subject to the death penalty

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[43]Ibid., s.68

if convicted of spying under the National Defence Act but would only be liable to imprisonment for life under the Criminal Code's treason provisions. Further, a spy could be prosecuted under military law even if he was not a member of the Armed Forces[44] and even if the offence did not take place in Canada.[45] Moreover, section 2 of the National Defence Act defines "enemy" in such a way as to include countries other than those with which Canada may be at war, as well as "armed rebels" and "armed rioters".

Paragraphs (a) to (c) of section 65 of the National Defence Act are also relevant. Paragraphs 65(a), (b), and (c) state:

> Every person who
>
> (a) improperly holds communication with or gives intelligence to the enemy;
>
> (b) without authority discloses in any manner whatever any information relating to the numbers, position, materiel, movements, operations or preparations for operations of any of Her Majesty's Forces or of any forces cooperating therewith;
>
> (c) without authority discloses in any manner whatever any information relating to a cryptographic system, aid, process, procedure, publication or document of any of Her Majesty's Forces or of any forces cooperating therewith; . . . is guilty of

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[44]Ibid., s.55(1)(h) and s.55(7)

[45]Ibid., s.57

> an offence and on conviction, if he acted traitorously, shall suffer death, and in any other case is liable to imprisonment for life or to less punishment.

As can be seen, the conduct which forms the actus reus of the offences contained in paragraphs (a) to (c) of section 65 could also form the actus reus for a prosecution under the treason provision (paragraph 46(2)(b), in particular). However, a difference in penalty exists between the offence of treason and the offence of spying as defined by section 65 of the National Defence Act. If found guilty of contravening section 65 of the National Defence Act the accused may be sentenced to death. On the other hand, if an individual is charged and found guilty of violating paragraph 46(2)(b) of the Code the maximum penalty which a person could suffer is imprisonment for life.

Whether or not the military judicial system would take jurisdiction in cases which could also be dealt with by the civil courts is difficult to answer. One can hypothesize that such a decision would be made on the basis of factors such as whether the offence occurred in or about Armed Forces' property or if the information or material in question was military in nature. Perhaps one answer is that both the service tribunals (military courts) and the civil courts could try an accused whose actions and intentions could be seen to fulfil the requirements of both the civil and the military charges. Subsection 61(2) of the National Defence Act reads:

> Where a person, sentenced by a service tribunal in respect of a conviction on a charge of having committed a service offence, is afterwards tried by a civil court for the same offence or for any other offence of which he might have been found guilty on that charge, the civil court shall in awarding punishment take into account any punishment imposed by the service tribunal for the service offence."

Hence, subsection 61(2) of the National Defence Act envisages that a civil court may try an accused who has already been tried by a service tribunal. It is suggested that this result would be unlikely; subsection 61(2) is most probably of no force or effect as it would appear to offend paragraph 11(h) of the Charter (which prohibits double jeopardy).

There are a number of other relevant offences which are related to espionage which can be found within the O.S.A.. These offences will be dealt with at some length later in this thesis.

3. DIPLOMATIC IMMUNITY:

Due to the nature of the offences that are dealt with in this thesis it is clear that the possibility exists that many of the persons who could be charged with an offence designed to protect national security would have some degree of connection with a foreign country. Depending upon the strength of this connection an accused with foreign government ties may be immune from prosecution under Canadian criminal law. In addition to the common law immunity of foreign sovereigns[46] there are a number of immunities which are based on international conventions into which Canada has entered and which have been implemented by Canadian legislation.

Article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations, 1961[47] states that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. . .". Further, pursuant to article 37, paragraphs 1, 2, and 3, the immunity of a diplomatic agent from criminal jurisdiction is extended to a number of other persons. Firstly, article 37(1) provides that members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving state, be given protection. Secondly, section 37(2) states that members of the administrative and technical staff of a mission and their families forming part of their respective households, so long as they are not nationals or permanent residents of the

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[46]For a discussion of the English common law see: Greig D.W., International Law (2nd ed.) (London: Butterworth & Co. Ltd., 1976) at pp. 220 - 230

[47]Vienna Convention on Diplomatic Relations, 1961 C.T.S. 1966, No. 29

receiving state, are extended immunity from criminal jurisdiction.

Lastly, article 37(3) allows members of the service staff of a mission immunity from the jurisdiction of the receiving state's criminal law if they are not nationals or permanent residents of the receiving state. However, service staff are only provided protection with respect to acts performed in the course of their duties as service staff. Articles 31 and 37 of the Vienna Convention on Diplomatic Relations have been implemented by section 2 of the Diplomatic and Consular Privileges and Immunities Act[48] and hence have the force of law in Canada.

The United Nations Convention on Privileges and Immunities[49] confers immunity from criminal jurisdiction in a receiving state upon representatives of states to the United Nations and, in respect of their United Nations duties, to officials of the United Nations. This Convention has been incorporated into Canadian law by the Privileges and Immunities

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[48]Diplomatic and Consular Privileges and Immunities Act, S.C. 1976 - 77

[49]United Nations Convention on Privileges and Immunities (forms the Schedule to the Privileges and Immunities (International Organizations) Act, R.S.C. 1970 c. P - 22)

(International Organizations) Act[50] and Orders in Council made pursuant to it.

The Vienna Convention on Consular Relations, 1963[51] is another convention which provides protection, although limited, from criminal prosecution. Consular officers and employees enjoy a limited degree of immunity with respect to their official functions. Article 43 of the Convention provides that consular officers and consular employees are not subject to the jurisdiction of the judicial or administrative authorities of the receiving state in regard to acts performed in the exercise of consular functions. Further, article 41 provides that criminal proceedings instituted against consular officers are to be conducted in a manner which will hamper the exercise of consular functions as little as possible, and only in the case of a grave crime should such an officer be arrested or detained pending trial. Nevertheless, there is nothing to prevent the courts from sentencing a consular officer to a term of imprisonment. Both articles 41 and 43 have "the force of

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[50]Privileges and Immunities (International Organizations) Act, R.S.C. 1970 c. P - 22

[51]Vienna Convention on Consular Relations, 1963 C.T.S. 1974, No. 25

law in Canada".[52]

It should also be noted that a foreign state[53] or, in the case of United Nations personnel,[54] the Secretary General of the United Nations, may either waive the immunity of the person which would allow the courts of the receiving state to try that person, or remove the person from the receiving state for possible trial in his home state.

Besides the degree of diplomatic immunity afforded a foreign government employee or official there is another factor which may persuade a state not to prosecute a consular officer or any other recognized foreign government employee for criminal activities. A receiving state's government has to balance the benefits of prosecuting a foreign official with the possible damage that such an action could have on bilateral relations. Nevertheless, states have access to a compromise solution in dealing with suspected foreign spies who are also

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[52]Diplomatic and Consular Privileges and Immunities Act, S.C. 1976 - 77 c. 31

[53]Article 32(1) of the Vienna Convention on Diplomatic Relations, 1961 C.T.S. 1966, No. 29; and Article 45 of the Vienna Convention on Consular Relations, 1963, C.T.S. 1974 No. 25

[54]Section 2 of Article II of the Schedule attached to the United Nations Convention on Privileges and Immunities (forms the schedule to the Privileges and Immunities (International Organizations) Act), R.S.C. 1970, c. P - 22

able to claim diplomatic immunity. The solution that has been used both to alleviate a security threat and minimize damage to bilateral relations between the home state and the receiving state is that of declaring a diplomat persona non grata and requesting him to leave the country. The damage that expulsion can do to bilateral relations can also be mitigated by not making the expulsion public and therefore decreasing the chance of a retaliatory expulsion of the receiving state's diplomats from the accused diplomat's home state.

There have been a number of occasions where prosecutions could not be brought because of diplomatic immunity and or fear of retaliatory prosecutions or expulsions. A total of ninety-three diplomats have been declared persona non grata in Canada since 1950.[55] However, it has been suggested that many more foreign diplomats have been declared persona non grata than the public was ever made aware.[56] One of the most recent diplomats to be declared not welcome in Canada was Bulgaria's assistant trade commissioner Raikov Delibaltov. On July 21, 1985, it was announced, while Delibaltov was on leave in Bulgaria, that he was not welcome back in Canada. Although

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[55]The Citizen "Canada 'fertile ground' for Eastern bloc spies". Saturday July 27, 1985 at p. B5

[56]Ibid.

the exact cause of Delibaltov's in absentia expulsion is not known, officially it was said he had engaged in activities "incompatible with his consular status" in that he was collecting "information to which he did not have authorized access".[57]

It would appear that C.S.I.S. has already furnished information to the Department of External Affairs which has proved useful in declaring foreign diplomats persona non grata. According to the Security Intelligence Review Committee's 1986-87 Annual report, as a result of information C.S.I.S. supplied to the Department of External Affairs, two members of foreign missions were declared persona non grata in 1986-87 and were sent home.[58] Further, the Review Committee inferred that, as a result of C.S.I.S. investigations, six more members of foreign missions were voluntarily called home from Canada.[59]

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[57]Ibid.

[58]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Minister of Supply and Services Canada, 1986) at pp. 29 - 30

[59]Ibid.

B. THE OFFICIAL SECRETS ACT

1. HISTORY:

The development of the O.S.A. in Canada generally parallels the development of secrecy laws in the United Kingdom. Prior to the enactment of the first O.S.A. in Britain there were a number of situations which gave the British government some reason for concern about the improper use and transmission of state secrets. In particular, in 1878 a civil servant by the name of Marvin was prosecuted for divulging to a newspaper the contents of a secret Anglo-Russian agreement with respect to the Congress of Berlin of 1878.[60]

Due to the absence of a more appropriate charge Marvin was prosecuted for the theft of the paper upon which the treaty had been written. However, since he had memorized the treaty the prosecution was unsuccessful. Therefore, in reaction to cases such as Marvin's the British Government of the day enacted the O.S.A. of 1889.[61] The British O.S.A. was copied almost

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[60]See Aitken J., Officially Secret (London: Weiderfeld and Nicholson, 1971) at pp. 7 - 14

[61]52 and 53 Victoria, c.52 (1889)

verbatim by Canada in 1890;[62] and was transferred to the first Canadian Criminal Code in 1892,[63] the provisions of the Criminal Code were later repealed in 1939.[64] However, over the years the British Parliament discovered that the O.S.A. of 1889 was too narrowly drafted and therefore enacted the O.S.A. of 1911[65] which had a much broader scope.

The English O.S.A. of 1911 introduced provisions which could deal more appropriately with the mere disclosure of secrets and/or confidential information, and also provided for a greater range of prohibited activities involving the improper acquisition of any official information. The British Act was not enacted separately in Canada but was drafted in order to apply to the "Dominion", an appropriate process prior to the Statute of Westminster. Due to some weaknesses discovered in the 1911 Act, and in light of difficulties with the Irish and post-war fear of German espionage, the United Kingdom enacted the 1920 Official Secrets Act.[66] This time, however, the

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[62]Official Secrets Act, 1890, Stat. Can. 1890, c.10

[63]Stats. Can. 1892 c.29 ss. 76 - 78

[64]Official Secrets Act, Stat. Can. 1939, c.49

[65]1 and 2 George V. c.28 (1911)

[66]10 and 11 George V. c.75 (1920)

British Act was not made applicable to Canada. Hence, the 1911 Act remained part of the law of Canada until it was replaced by the Canadian enactment of the O.S.A. of 1939.[67]

In short, the O.S.A. of 1939 consolidated and is very similar to the 1911 and 1920 British Acts. The provisions of the O.S.A. of 1939 have remained virtually unchanged except for some minor changes in 1950 and 1967.[68] For the purposes of this thesis the only amendment of consequence was the 1973 inclusion of a wiretap provision[69] which was repealed by section 88 of the C.S.I.S. Act.

The O.S.A. is complicated in that it deals with two separate but related activities, espionage (section 3) and the improper disclosure (leakage) of government information (section 4). The espionage provision of the O.S.A. will be considered initially followed by a brief discussion of the leakage provision and the relationship between sections 3 and 4. As with the offence of treason (section 46 of the Criminal Code) both the espionage and leakage sections of the O.S.A. contain defects of form and content.

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[67]Stats. Can. 1939, c.49

[68]Stat. Can. 1950, c.46; Stat. Can. 1966 - 67, c.96, Schedule B.

[69]Stat. Can. 1973, c.50, ss. 5 and 6

2. OFFICIAL SECRETS ACT OFFENCES:

(a) Espionage:

A large percentage of all the Canadian prosecutions pursuant to the O.S.A. were a result of the 1945 defection of the Russian Embassy employee Igor Gouzenko and the evidence he provided with respect to the existence of a very extensive spy ring operating in Canada.[70] The vast majority of the cases

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[70]Taschereau-Kellock report; Kelly Nora and William, The Royal Canadian Mounted Police: A Century of History 1893 - 1973 (Edmonton: Maclean-Hunter Press, 1973) at pp. 203 - 212; Friedland, M.L. "National Security The Legal Dimensions" A study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada; Minister of Supply and Services, 1980 at pp. 34 and 144.

(1) R. v. Rose, [1947] 3 D.L.R. 618 (Que. C.A.), convicted 6 yrs.
(2) R. v. Lunan, [1947] 3 D.L.R. 710 (Ont C.A.), convicted.
(3) R. v. Smith, [1947] 3 D.L.R. 798 (Ont. C.A.), convicted.
(4) R. v. Mazerall, [1946] O.R. 511 (High Ct.), 762 (C.A.), convicted.
(5) R. v. Willsher (c.1946) unreported, convicted.
(6) R. v. Gerson, [1948] 3 D.L.R. 280 (Ont. C.A.), conviction qwashed on appeal.
(7) R. v. Woikin (1946), 1 C.R. 224, convicted 2 1/2 yrs.
(8) R. v. Boyer (1948), 7 C.R. 165 (Que. C.A.) convicted.
(9) R. v. Carr (1949) unreported, convicted 6 yrs.
(10) R. v. Adams (c.1946) unreported, but see (1946), 86 C.C.C. 425 (on application for change of venue) acquitted.
(11) R. v. Nightingale (c.1946) unreported but see (1946), 87 C.C.C. 143 (a contempt of ct. conviction upheld on appeal), acquitted.
(12) R. v. Shugar (c.1946) unreported, acquitted.

were prosecutions under the espionage section (section 3) of the Act, although in two cases[71] the leakage provision (section 4) was an additional charge and in three other cases[72] the accused were charged solely with breach of the leakage provision. A number of these prosecutions involved conspiracy charges under the Criminal Code to breach the O.S.A..[73]

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(13) R. v. Chapman (c.1946) unreported, acquitted.
(14) R. v. Poland (c.1946) unreported, acquitted.
(15) R. v. Halperin (c.1946) unreported, acquitted.
(16) R. v. Benning, [1947] 3 D.L.R. 908 (Ont. C.A.) conviction reversed on appeal.
(17) R. v. Harris, [1947] 4 D.L.R. 796 (Ont. C.A.), conviction reversed on appeal.
(18) R. v. Biernachi (1961) unreported, but see (1962), 37 C.R. 226 (motion to qwash a preferred indictment), charge dismissed at preliminary inquiry.
(19) R. v. Featherstone (1967) unreported, convicted, 2 1/2 yrs.
(20) R. v. Treu (1979), 47 C.C.C. 222, (Que. C.A.) convicted 2 years; reversed on appeal.
(21) R. v. Toronto Sun Publishing Ltd., Creighton and Worthington (1979), 24 O.R. 621 (Ont. Prov. Ct.); dismissed at preliminary hearing.
(22) R. v. Morrison (1984), 38 C.R. (3d) 351 (Ont. Prov. Ct.); preliminary hearing stayed.

[71] R. v. Mazerall, [1946] O.R. 511 (High Ct.), 762; R. v. Morrison (1984), 38 C.R. (3d) 351 (Ont. Prov. Ct.)

[72] R. v. Woikin (1946), 1 C.R. 224 (Ont. Co., Ct.); R. v. Treu (1979) 49 C.C.C. 222, (Que. C.A.); R. v. Toronto Sun Publishing Ltd. Creighton and Worthington (1979), 24 O.,R. 621 (Ont. Prov. Ct.)

[73] R. v. Rose, [1947] 3 D.L.R. 618 (Que. C.A.); R. v. Mazerall, [1946] O.R. 511 (High Ct.), 762 (C.A.); R. v. Harris,

The offence provisions of the O.S.A. have not been used very often since the disclosures made by Gouzenko. There have only been five prosecutions[74] in Canada since that time.

Section 3 (1) of the O.S.A. states:

> Every person is guilty of an offence under this Act who, for any purpose prejudicial to the safety or interests of the State,
>
> (a) approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place;
>
> (b) makes any sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; or
>
> (c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

(i) <u>Elements of the Offence</u>

There are a number of interesting observations that can

[1947] D.L.R. 796 (Ont. C.A.); <u>R.</u> v. <u>Smith</u>, [1947] 3 D.L.R. 798 (Ont. C.A.); <u>R.</u> v. <u>Boyer</u> (1984), 7 C.R. 165. (Que. C.A.); <u>R.</u> v. <u>Gearson</u>, [1948] 3 D.L.R. 280 (Ont. C.A.); <u>R.</u> v. <u>Morrison</u> (1984), 38 C.R. (3d) 351 (Ont. Prov. Ct.)

[74] <u>R.</u> v. <u>Biernacki</u> (1961) unreported; <u>R.</u> v. <u>Featherstone</u> (1967) unreported; <u>R.</u> v. <u>Treu</u> (1979), 49 C.C.C. 222 (Que. C.A.); <u>R.</u> v. <u>Toronto Sun Publishing Ltd., Creighton and Worthington</u> (1979), 24 O.R. (2d) 621; <u>R.</u> v. <u>Morrison</u> (1984), 38 C.R. (3d) 351 (Ont. Prov. Ct.)

be made with respect to section 3. Section 3 prescribes (as does section 4) that, "Every person is guilty of an offence . . ."; which, according to section 28 of the Interpretation Act,[75] could also include a corporation. It is conceivable that if a corporation's employee, who could be considered the " directing mind or will" of the corporation, was found guilty the corporation could be held directly liable. It is more likely however, that a corporation would be found guilty of an offence under section 4 (the leakage provision).[76] To date there has only been one prosecution of a corporation in Canada.[77] Nevertheless, subsection 14(3) of the O.S.A. provides that:

> Where the person guilty of an offence under this Act is a company or corporation, every director and officer of the company or corporation is guilty of the like offence unless he proves that the act or omission constituting the offence took place without his knowledge or consent.

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[75]Interpretation Act, R.S.C. 1970, c. I - 23, s.28

[76]Friedland, M.L., "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 146 note 86.

[77]R. v. Toronto Sun Publishing Ltd., Creighton and Worthington (1979), 24 O.R. (2d) 621; (1980), 98 D.L.R. (3d) 524 (Ont. Prov. Ct.)

Therefore, subsection 14(3) places a reverse onus on "every director and officer" of a corporation that has been found guilty in that he is presumed guilty of the offence unless he is able to prove his innocence. It is suggested that subsection 14(3) could be invalid in that it offends paragraph 11(d) of the Charter. In the Supreme Court of Canada decision of R. v. Oakes[78] the Court considered the relationship between paragraph 11(d) of the Charter and the reverse onus clause in section 8 of the Narcotics Control Act.[79] In delivering the judgment of the Court Dickson C.J.C. stated:

> . . . the right to be presumed innocent until proven guilty requires that s. 11 (d) have at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear The burden of proof. . . . Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness.[80]

It is suggested that subsection 14(3) of the O.S.A. violates paragraph 11(d) of the Charter. However, it can also be argued that subsection 14(3) could be upheld as a reasonable

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[78] R. v. Oakes (1986), 50 C.R. (3d) 1; 24 C.C.C. (3d) 321 (S.C.C.)

[79] R.S.C. 1970, c. N - 1

[80] R. v. Oakes (1986), 24 C.C.C. (3d) 321 at pp. 334 - 335 (S.C.C.)

limit under section 1 of the Charter. Section 1 provides that "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and can be demonstrably justified in a free and democratic society is on the party seeking to uphold the limitation.[81]

The Supreme Court of Canada held in R. v. Oakes that in order to establish that a limit is justified under section 1, two central criteria must be met.[82] Firstly, the objective of the legislation must be of sufficient importance in order to override a constitutionally protected right or freedom. Secondly, once a significant objective is recognized the onus shifts from the individual to the government invoking section 1 to show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test."[83] In each case the courts will have to balance the

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[81]Ibid., at p. 346

[82]Ibid., at p. 348

[83]R. v. Big M Drug Mart Ltd (1985), 18 C.C.C. (3d) 385, at p. 430; 18 D.L.R. (4th) 321, at p. 366; [1985] 1 S.C.R., 295

interests of society and those of the individuals and groups.

In Oakes the Court identified three important components of the proportionality test. Firstly, the measures must be carefully designed to achieve their objective. They are not to be arbitrary, unfair or irrational. The measures must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective must infringe the right or freedom as little as possible. Lastly, there must be proportionality between the effects of the measures taken to limit the Charter right or freedom, and the objective which has been identified as of sufficient importance.

With respect to the last component of the proportionality test the Court reasoned that the more severe the deleterious effect of a measure, the more important the objective of the measure must be in order to considered reasonably justified in a free and democratic society.[84]

Having outlined the general principles that the Supreme Court of Canada gave to us in regards to section 1 inquiry we now must apply them to the O.S.A. reverse onus provision in subsection 14(3).

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at p. 352 (S.C.C.)

[84] R. v. Oakes (1986), 24 C.C.C. (3d) 321 at p. 321 (S.C.C.)

Subsection 14(3) is designed to curb directors or officers of corporations from using the "corporate veil" to protect them personally from prosecution under the O.S.A.. There is no question that Parliament has a substantial and pressing interest in combatting threats to our national security. The enactment of the C.S.I.S. Act is evidence of this concern. It is self evident that Canadian national security is a sufficiently important objective for the purposes of section 1. Therefore the first criterion of a section 1 inquiry would be met by the Crown.

The next stage of the inquiry revolves around the three components of the proportionality test. Firstly, there is a rational connection between the basic fact of the guilt of a company and the presumed fact that the offence took place with the directors and officers knowledge or consent. The directors of a corporation are the directing mind and will of a corporation. Secondly, subsection 14(3) does not provide an offence of absolute liability: it merely shifts the burden of proof and prescribes that the director or officer may avoid culpability by proving ". . . that the act or omission took place without his knowledge or consent." Thirdly, the deleterious effects of allowing directors and officers of corporations to avoid culpability by hiding behind the "corporate veil" far out weighs a violation of an individual's paragraph 11(d) rights.

Without a provision such as subsection 14(3) we would be essentially providing immunity to those, who in many instances, could gain the most by lucrative sales to foreign countries of information which could be prejudicial to Canada. Further, subsection 14(3) ensures that corporate officers and directors will take all possible care when dealing with the dissemination of goods, services or information to a foreign power. In short, subsection 14(3) imposes a limit on the right guaranteed by paragraph 11(d) of the Charter which is reasonable and demonstrably justified in a free and democratic society.

The offence provided for in Section 3 of the O.S.A. has to be committed "for a purpose prejudicial to the safety or interests of the State". This phrase is extremely broad when compared to the similar wording of the treason section of the Criminal Code (46(2)(b)) which states "prejudicial to the safety or defence of Canada". It has been suggested that the word "interests" would not be construed as narrowly as the word "defence".[85] For example, it could conceivably be interpreted to refer to Canada's economic or trade policy.

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[85] Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 40

This interpretation would appear to be supported by the House of Lords decision of Chandler v. D.P.P.[86] in which Lord Pearce remarked:

> . . . the interests of the State must in my judgment mean the interests of the State according to the policies laid down for it by its recognized organs of government and authority, the policies of the State as they are ... Anything which prejudiced those policies is within the meaning of the Act "prejudiced to the interests of the State."[87]

Hence, it has been wisely suggested that the word "interests" should be replaced by a more specific phrase.[88] For instance, even the "safety or defence" phrase from paragraph 46(2)(b) of the Criminal Code would be more acceptable.

The Chandler case dealt with a situation in which the Committee of 100, a group who sought to further the aims of the Campaign for Nuclear Disarmament, organized a non-violent demonstration at an English airfield (found to be a prohibited place within the meaning of section 3 of the O.S.A., 1911,

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[86]Chandler v. D.P.P., [1964] A.C. 763

[87]Ibid., at p. 813

[88]Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 40

which is similar to paragraph 3(1)(a) of the current Canadian O.S.A.) which was occupied by a United States Air Force Squadron. Their admitted objectives were to ground all aircraft, immobilize the airfield, and reclaim the base for civilian purposes.

The demonstrators (of whom Chandler was one) were arrested and charged under section 3 of the O.S.A., 1911. The demonstrators attempted to lead evidence to show that they believed their purpose was not in fact prejudicial to the safety or interests of the State. In dismissing Chandler's appeal and reaffirming the trial judge's decision not to allow the appellant to lead the said evidence Lord Reid stated that:

> [I]t would be surprising and hardly credible that the Parliament of that date [1911] intended that a person who deliberately interfered with vital dispositions of the armed forces should be entitled to submit to a jury that Government policy was wrong and that what he did was really in the best interests of the country, and then perhaps to escape conviction because a unanimous verdict on that question could not be obtained.[89]

Lord Pearce went on to state that :

> The word "purpose" although it has some subjective content is used in an objective sense. If the purpose was in fact prejudicial, the offence is committed, no matter how benevolent the motives of the

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[89] Chandler v. D.P.P., [1964] A.C. 763 at p. 791

spy or saboteur that led him to essay the purpose.[90]

Therefore, it would appear that an accused would only have to intend to do acts which "objectively" (as seen through the Government's eyes) could be considered to be prejudicial to the safety or interests of Canada.

Where does this leave the Canadian cruise missile protestors who attempted to float nets or balloons in the air, in order to interfere with the cruise missile testing, or for that matter any nuclear protester? One could argue that most protests do not take place in what would be considered a "prohibited place" and hence paragraph 3(1)(a) would not apply. Nevertheless, the definition of "prohibited place" in subsection 2(1) has the potential of being extremely wide. Paragraphs (a) and (b) of section 2 are relatively straight forward in that they refer to any place "belonging to or occupied or used on behalf of Her Majesty" or a place not belonging to Her Majesty but where a person is storing or fixing the "munitions of war or any sketches [or] models . . . on behalf of Her Majesty".

However, paragraph (c) allows the Government to extend the definition of "prohibited place" to include "any place that is

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[90] Ibid., at p. 813

for the time being declared by order of the Governor in Council to be a prohibited place on the ground that information with respect thereto would be useful to a foreign power". No such regulations have yet been declared. It should also be remembered that a protester would only have to "approach" a "prohibited place" in order to be found guilty (given that his purpose was prejudicial to the safety or interests of Canada) of contravening paragraph 3(1)(a) of the O.S.A..

In light of the large numbers of protestors today, and political and public sentiment toward demilitarization and nuclear disarmament, it is unlikely that the government will arrest and prosecute protestors under the O.S.A..

However, if a protestor became the subject of a section 3 prosecution (including arrest and detention) and a court held that he had been denied or had had limited a Charter right or freedom (such as the freedom of thought, belief, opinion and expression (paragraph 2(b)), peaceful assembly (paragraph 2(c)) or freedom of association (paragraph 2(d))), it is possible that the court would not find that the section 3 limitation would be justified according to section 1 of the Charter. To rely on section 1 of the Charter the law in question must not be found to be too broad and discretionary in nature. If a limit is not articulated with some precision it will not be considered law.[91] It is submitted that due to the uncertainty of what may constitute the "interests" of the State section 3 of the O.S.A. could not be justified by the use of section 1.

(ii) Communications with a Foreign Power

As all the prosecutions in Canada have involved paragraph 3 (1)(c) this thesis will explore its affect more thoroughly. It will be recognized that the section's potential scope is extremely broad. Paragraph 3(1)(c) makes it an offence if anyone, for any purpose prejudicial to the safety or interests of Canada, "communicates" any information that "might be directly or indirectly useful to a foreign power". Paragraph 3(1)(b) also includes a similar phrase.

Paragraph 3(1)(c) would appear to contain an objective test and therefore does not concern itself with what an accused might have intended. Hence, the subjective tests held within the words "is calculated to be" or "is intended to be" have little relevance when the subsection contains an objective test.

In addition, it should be noted that the word "communicates" in paragraph 3(1)(c) would appear (by virtue of

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[91] Ontario Film & Video Appreciation Society v. Ontario Board of Censor (1983), 41 O.R. (2d) 583 at p. 592

the definition section, subsection 1(3)) to include the communication of the "substance, effect or description" of a document or information. As well, paragraphs 3(1)(b) and (c) state that the information has to be communicated to "a foreign power". The scope of this phrase is considerably wider than that of the 1911 English legislation which had used the phrase "useful to an enemy". It has been suggested[92] that because of the breadth of the Canadian section, as compared to that of the English, the Canadian courts have attempted to restrict the meaning of the concept of "information".

Paragraph 3(1)(c) is drafted so as to raise the question: Do the words "secret official" pertain only to a code word, or password, or do they also qualify the rest of the clause as well? In one of the most recent cases, R. v. Toronto Sun Publishing Limited,[93] the Court dealt with this question. The accused, who were the distributor, publisher and editor of a daily newspaper, were charged with having violated paragraph 4(1)(a) and subsection 4(3) (both of which contain similar

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[92] Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 41

[93] R. v. Toronto Sun Publishing Limited (1980) 98 D.L.R. (3d) 524 (Ont. Prov. Ct.)

wording to paragraph 3(1)(c)) as the result of publishing a story which gave details from a government document which was stamped "Top Secret" and "For Canadian Eyes Only".[94] In discharging the accused Judge Waisberg assumed that the information had to be secret. Moreover, he stated:

> What is designate "secret", furthermore, cannot be determined to be secret by the mere stamp itself. Secrecy must lie in the very nature of the document itself under the existing circumstances surrounding and affecting the document.[95]

It has been argued however, that the words "secret official" only qualify the words "code word or password" and do not qualify the rest of paragraph 3(1)(c).[96] This argument is quite soundly based on the legislative history of the O.S.A., the grammatical construction of all the sections in the O.S.A. (which uses the phrase "secret official"), and the French version of section 3 in which the word "secret" is not

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[94]The document was entitled "Canadian Related Activities of the Russion Intelligence Services" and was prepared in 1976 by the R.C.M.P. under the Authority of the Chairman of the Intelligence Advisory Committee.

[95]R. v. Toronto Sun Publishing Limited (1979), 98 D.L.R. (3d) 524 at p. 533 (Ont. Prov. Ct.)

[96]Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at pp. 41 - 44

used at all in the section: "un chiffre official ou mot de passe".[97]

We are left with a bipolar interpretation (albeit only one judicial) of paragraph 3(1)(c). On the one hand it is stated that only secret official information comes within the jurisdiction of the Act while, on the other, it is stated that all information does. In finding that the information in question was not secret and official both the Toronto Sun case and the earlier Quebec Court of Appeal case of R. v. Boyer[98] (which, although in obiter, also considered the phrase "secret official") put considerable emphasis on the fact that the information had already been published or publicized or had come to the attention of the public. It has been suggested[99] that this is a sensible compromise between the two extreme positions. It was also suggested that a redrafting of paragraph 3(1)(c) should include a test with respect to the words "secret official" which would take into account whether

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[97] Ibid.

[98] Boyer v. the King (1948), 7 C.R. 165 at pp. 237 - 238 (Que. C.A.)

[99] Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 44

or not the information had been published or publicized. This approach would allow the courts to be more logical in their interpretation of paragraph 3(1)(c) and the three other O.S.A. subsections in which the words "secret official" are used in a similar fashion.[100]

(iii) Extraterritorial Effect of the O.S.A.

Another observation which can be made in regard to section 3 of the O.S.A. is its possible extraterritorial effect when read in conjunction with section 13 of the O.S.A. Every person who breaches section 3 while in Canada is guilty of an offence. However, section 13 states:

> An act, omission or thing that would, by reason of this Act, be punishable as an offence if committed in Canada, is, if committed outside Canada, an offence against this Act, triable and punishable in Canada, in the following cases:
>
> (a) where the offender at the time of the commission was a Canadian citizen within the meaning of the Canadian Citizenship Act; or
>
> (b) where any code word, pass word, sketch, plan, model, article, note, document, information or other thing whatever in respect of which an offender is charged was obtained by him, or depends upon information that he obtained, while owing allegiance to Her Majesty.

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[100]Official Secrets Act, s.4(1), 4(1)(d), 4(3)

If the offence is committed outside Canada then, because of section 13, only those who were either Canadian citizens at the time of the offence or owed allegiance to Her Majesty, (which would include a landed immigrant), could be found guilty. This section overlaps the treason section (subsection 46(3)) of the Criminal Code. It will be remembered that subsection 46(3) extends the extraterritorial effect of the offence of treason to both a Canadian citizen and "a person who owes allegiance to Her Majesty". The difference between the two provisions is found in paragraph 13(b) of the O.S.A.. As previously indicated, paragraph 13(b) extends liability extraterritorially to a person who is no longer a citizen and who no longer owes allegiance to the Crown if the information that is subject to the charge was obtained by him while he owed allegiance to Her Majesty.

(b) Leaking Government Information:

There are other offences under the O.S.A. which should be at least briefly mentioned. First and foremost is the offence provided for in section 4 (the so called "leakage section") which deals with the wrongful communication of information. Paragraphs 4(1)(a) and 4(1)(b) state the following:

> Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access while subject to the Code of Service Discipline within the meaning of the National Defence Act or owing to his position as a person who holds or has held office under Her Majesty, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract,
>
> (a) communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;
>
> (b) uses the information in his possession for the benefit of any foreign power or in

> any other manner prejudicial to the safety or interests of the State;

The distinction between section 3, the espionage section, and section 4, the leakage provision, is that section 3 requires a "purpose prejudicial to the safety or interests of the state". No such purpose is needed in section 4. Although section 4 states that "every person is guilty of an offence . . . who, having in his possession or control . . . information . . . that has been obtained in contravention of this Act", it is primarily directed to civil servants working for the Canadian government under a variety of arrangements. This thesis will not complete an exhaustive analysis of section 4. Such an analysis of section 4 would lead to the consideration of what rules apply to selected bodies and persons such as the courts, researchers, and members of parliament who make special demands for government information. However, it should be mentioned that when viewed in conjunction with other legislation the offence contained in section 4 of the O.S.A. may result in the disclosure of even mundane government information being a criminal act.

The possibility of the offence contained in section 4 overreaching the acceptable limits of criminal law can be illustrated when section 4 is read in light of subsection 19(1) of the C.S.I.S. Act. Subsection 19(1) states:

> Information obtained in the performance of

> the duties and functions of the Service under this Act shall not be disclosed by the Service except in accordance with this section.

The "Service" as defined in section 2 of the C.S.I.S. Act ". . . means the Canadian Security Intelligence Service established by subsection 3(1)". Subsection 3(1) states that the C.S.I.S. ". . . is hereby established consisting of the Director and employees of the Service".

It would appear that section 19 (subsection 19 (2) in particular in that it sets out exceptions to subsection 19(1)) defines the parameters of the type of information which employees are authorized to disclose. In short, subsection 19 (2) authorizes the disclosure of information collected by the C.S.I.S. to a number of government officials or their agents, and in special circumstances to a person in the public service. Any other disclosure of "information" will constitute an unauthorized disclosure and could lead to a conviction under section 4 of the O.S.A..

The difficulty lies in the lack of a clear definition of the word "information" in section 19 of the C.S.I.S. Act. The only restriction on the information which could be the focus of a conviction under section 4 of the O.S.A. is that it has to be ". . . obtained in the performance of the duties and functions of the Service under the C.S.I.S. Act". It should also be noted that as with section 3 of the O.S.A. it is debatable if the information released has to be "secret official". As will be seen, when one considers the powers that the C.S.I.S. possess to gather information one is left with little doubt that both the amount and scope of the information which could be gathered would be immense.

Hence, because of the vast scope of section 4 of the O.S.A., C.S.I.S. employees, as well as most other government employees, face possible prosecution under this section for the disclosure of even the most mundane information. As a former Attorney General of England stated, in relating his sentiments concerning the breadth of the English equivalent to section 4 of the O.S.A., 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 ministers room . . . [T]he Act contains no limitation as to materiality, substance, or public interest".[101]

Paragraph 4(1)(b) of the O.S.A. is important in terms of this thesis because it states that it is an offence for a

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[101]Sir Lionel Heald, Q.C. in the Times, March 20, 1970, at p. 13 cited in Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 55

person to use "information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State". This provision provides an alternate route for prosecution for a Crown Attorney who is unable to prove the more stringent element of a "purpose prejudicial to the safety or interests of the State" as required by section 3. Further, it has been suggested[102] that, by resorting to section 589 of the Criminal Code (the included offence section), there is no reason why a person charged under section 3 of the O.S.A. could not be found guilty of the section 4 offence if it was properly put forth in an information or indictment.

(c) Other O.S.A. Offences:

There are also a number of other offences provided for in the O.S.A. besides the "espionage section" (section 3) and the leakage section (section 4) which should be mentioned. Section 5 states that every person is guilty of an offence who ". . . for any purpose prejudicial to the safety or interests of the State" uses uniforms to impersonate a person who is or has been entitled to use or wear any such uniforms. Section 5 also makes it an offence to falsify or forge documents or reports,

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[102]Ibid., at p. 44

or unlawfully deal in dies, stamps or seals ". . . for any purpose prejudicial to the safety or interests of the State". Section 6 makes it an offence to interfere with or obstruct a police officer or guard in the vicinity of a prohibited place. Section 8 makes it an offence for someone to ". . . harbour any person whom he knows or has reasonable grounds for supposing, to be a person who is about to commit or has committed an offence under this Act . . . ".

3. PROCEDURAL and EVIDENTIARY QUESTIONS:

The O.S.A. contains a number of unusual evidentiary and procedural provisions. Subsection 3(2) states that:

> . . . [I]t is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State. . . .

It has been suggested[103] that this provision goes against the

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[103] Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 44

general grain of the Canadian common law evidentiary rule of the exclusion of similar fact evidence concerning an accused's character.

Further, subsection 3(2) goes on to state that:

> . . . [I]f any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or anything in such a place, or any secret official code word or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.

This provision shifts the onus of proof onto an accused to show that, if any information had been communicated, it had not been done for a purpose prejudicial to the safety or interests of the State.[104]

As discussed earlier, with respect to the ramifications of the reverse onus clause that subsection 14(3) of the O.S.A. places on directors and officers of corporations, such provisions may offend paragraph 11(d) of the Charter. This submission would appear to be buttressed by the Supreme Court

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[104] R. v. Parrot (1913), 8 Cr. App. R. 186 at 192

of Canada's decision in Oakes.[105] It would also appear that the United States felt that such a provision was inappropriate. When the Justice Department proposed legislation containing a similar presumption to that of subsection 3(2) the House Judiciary Committee eliminated it as it was regarded as "not fair".[106]

Unlike subsection 14(3) of the O.S.A. it is submitted that subsection 3(2) of the O.S.A. would not be saved by section 1 of the Charter. This submission is based on two reasons. Firstly, subsection 3(2) is too discretionary to be considered to be a law.[107] There are many government "memos" and other such information which are published without "lawful authority". Investigative journalism would appear to be a fact of parliamentary life. However, subsection 3(2) does not discriminate between the publishing of information relating to the number of shoes that a Prime Minister's wife may have in

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[105]R. v. Oakes (1986), 50 C.R. (3d) 1 (S.C.C.)

[106]Edgar & Schmidt, "The Espionage Statutes and Publication of Defence Information", (1973) 73 Columbia Law Review 929 at p. 1003, n. 184

[107]The Ontario Film & Video Appreciation Society v. Ontario Board of Censors (1983), 41 O.R. (2d) 583; 147 D.L.R. (3d) 58; 34 C.R. (3d) 73 (Div. Ct.); affirmed, (1984), 45 O.R. (2d) 80n; 2 O.A.C. 388; 5 D.L.R. (4th) 766n (C.A.); leave to appeal granted (S.C.C., Apr. 4/84)

her closet and important government secrets. As the disclosure of "any" government information obtained without lawful authority will be considered to have been done for a purpose prejudicial to the safety or interests of the State there is no certainty as to what type of information can be disclosed without fear of being prosecuted pursuant to section 3 of the O.S.A..

Secondly, an analysis of the proportionality test developed in Oakes would surely not allow section 1 of the Charter to be used to justify the presumption in subsection 3(2). Subsection 3(2) is aimed at curbing the communication of government information which would be prejudicial to the safety or interests of Canada. There is no question that such an objective is of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. However, subsection 3(2) fails to meet the first element of the proportionality test. There must be a rational connection between the basic fact of the communication of Government information and the presumed fact that it is communicated for a purpose prejudicial to the safety or interests of Canada. Otherwise subsection 3(2) could give rise to unjustified prosecutions under the O.S.A. of persons who disclose mundane information about Government affairs. Subsection 3(2) cannot meet this test since the passage of everyday Government information does not support the inference that the individual is guilty of an O.S.A. offence. It would be irrational to make this inference. In short, subsection 3(2) is overinclusive and could lead to results in certain cases which would defy both rationality and fairness.

It should also be noted that the O.S.A. appears to allow presumptions to support presumptions.[108] Paragraph 3(4)(b) sets out a wide definition of "an agent of a foreign power" in that it includes:

> . . . any person who is or has been or is reasonably suspected of being or having been employed by a foreign power either directly or indirectly for the purpose of committing an act, either within or outside Canada, prejudicial to the safety or interests of the State, or who has or is reasonably suspected of having, either within or outside Canada, committed or attempted to commit, such an act in the interests of a foreign power. . . .

Paragraphs 3(4)(a) and 3(4)(c) prescribe a presumption with respect to communication with a foreign agent in that they state:

> (a) a person shall, unless he proves the contrary, be deemed to have been in communication with an agent of a foreign power if

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[108]Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 45

> (i) he has, either within or outside Canada, visited the address of an agent of a foreign power or consorted or associated with such an agent, or
> (ii) either within or outside Canada, the name or address of, or any other information regarding such an agent has been found in his possession, or has been supplied by him to any other person, or has been obtained by him from any other person;
>
> (c) [A]ny address, whether within or outside Canada, reasonably suspected of being an address used for the receipt of communications intended for an agent of a foreign power, or any address at which such an agent resides, or to which he resorts for the purpose of giving or receiving communication, or at which he carries on any business, shall be deemed to be the address of an agent of a foreign power, and communications addressed to such an address to be communications with such an agent.

These presumptions would appear to be used to support the presumption in subsection 3(3) that an accused's communication with a foreign agent "is evidence that he has, for purposes prejudicial to the safety or interests of the safety or interests of the State, obtained or attempted to obtain information that . . . might be . . . useful to a foreign power".

As seen subsection 3(3) uses the words "is evidence". Do these words mean conclusive evidence, rebuttable evidence, or simply some evidence? The Ontario Court of Appeal in R. v.

Benning[109] felt that the words, "is evidence", only set out a presumption that would ensure that a case would get to trial and that an accused would not be found culpable without other evidence to warrant a conviction. In Benning the Crown attempted to found a charge under paragraph 3(1)(c) of the O.S.A., upon the presumptions found in subsections 3(3) and 3(4). The accused was a social acquaintance of a foreign agent. The Court reasoned that, notwithstanding subsections 3(3) and 3(4), the presumptions could not be used to establish all the elements of the offence. The Court held that the burden of proof does not shift and the Crown continues to have to provide evidence that the accused committed the offence with which he was charged. Robertson C.J.O. reasoned, that if Parliament had intended to shift the whole burden of proof onto the accused it would have been more specific. This interpretation seems to ignore the obvious parliamentary intention to shift the burden of proof.[110] Although the result to the Court's decision was effective in combatting the use of the reverse onus clauses in the O.S.A., it was certainly

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[109] R. v. Benning, [1947] 3 D.L.R. 908 at p. 915 (Ont. C.A.)

[110] Law Reform Commission of Canada "Crimes Against the State" working paper 49 (1986) at p. 40

not a well reasoned approach.

If the courts were prepared to question the numerous presumptions in the O.S.A. before the inception of the Charter they may now have little difficulty in finding that presumptions such as those contained in subsections 3(3) and 3(4) violate paragraph 11(d) of the Charter. Further, these presumptions, as did the presumption in subsection 3(2), fall short of passing the proportionality test as proposed by <u>Oakes</u>. Too, it had been suggested,[111] before the inception of the Charter, that such presumptions offend paragraph 2(f) of the Canadian Bill of Rights,[112] which provides that "no law of Canada shall be construed or applied so as to . . . deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law".

Subsection 14(2) of the O.S.A. allows a court, during a prosecution under the O.S.A., to make an order that excludes all or part of the public. An application for an "in camera" hearing was made in the case of <u>R.</u> v. <u>Treu</u>. The Court of

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[111]Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 45

[112]Canadian Bill of Rights R.S.C. 1970, Appendix III as amended

Appeal[113] (which quashed Treu's conviction) considered the trial court's decision in holding the trial "in camera":

> . . . [T]he learned trial Judge, faced with an application for the exclusion of the public, had little choice but to grant this since, at the outset, he could hardly foresee the nature of the case and the importance of each piece of evidence. His discretion was therefore severely restricted, and no blame should be attached to his decision to proceed in camera.

Hence, the Court of Appeal did not question nor criticize the "in camera" proceedings.

It is again suggested that the O.S.A. may be in conflict with the Charter and the Canadian Bill of Rights. Both paragraph 2(f) of the Canadian Bill of Rights and paragraph 11 (d) of the Charter are similar in nature in that an accused is to be proven guilty according to law in a fair and public hearing. Therefore, although subsection 14(2) of the O.S.A. provides that the passing of sentence must take place in public it would still seem to be in conflict with paragraph 2(f) of the Canadian Bill of Rights and paragraph 11(d) of the Charter. Moreover, "in camera" proceedings would also appear to breach article 14 of the 1966 International Covenant on Civil and

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[113] R. v. Treu (1979), 49 C.C.C. 222 at p. 225 (Que. C.A.)

Political Rights.[114] However, article 4 allows a state party to derogate from this obligation in a case of public emergency.

Although subsection 14(2) of the O.S.A. may be in conflict with the Charter this restriction on an individual's right to a public hearing would in all likelihood be found to be justifiable under section 1 of the Charter. Subsection 14(2) states that when the prosecution makes an application to exclude the public it must be made on the ground that the publication of evidence to be given in the course of the proceeding would be prejudicial to the interests of the State. From the evidence produced by the Crown a court "may" exclude the evidence. In summary, this limitation would appear to be reasonable when one considers that the purpose of most charges laid under the O.S.A. is to pr~~ohibit~~ the communication of prejudicial information to a foreign power. If a court did not have the authority to limit the publication of evidence or the presence of the public during O.S.A. trials an accused may, with the aid of the press or a spectator, be able to transmit more information to a foreign power than just the information

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[114]International Covenant on Civil and Political Rights Opened for Signature 19 December 1966, G.A. Res. 2200A (XXI), U.N. DOC. A. 16316: Article 2 obligates Canada to adopt measures to give effect to rights that are realized therein. However, no Canadian legislation has been enacted to fulfill the said obligation.

which led to charges being laid.

Lastly, because subsection 14(2) allows a court to make an order excluding all of the public, during a prosecution under the O.S.A., it is possible that an accused could be deprived of a trial by jury. Subsection 14(2) may be another provision of the O.S.A. which although in conflict with the Charter would be a justifiable limit on an individual's rights when analyzed in light of section 1. Paragraph 11(f) of the Charter states that any person charged with an offence has the right:

> [E]xcept in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

Conflict would only appear however, if the Crown elected (pursuant to section 15 of the O.S.A.) to proceed by way of indictment, in which case the penalty is a maximum of 14 years. It is interesting to note that the Crown can elect to proceed summarily for any offence under the O.S.A.. In drastic contrast to the penalty when the Crown proceeds by way of indictment, the penalty upon summary conviction is ". . . a fine not exceeding five hundred dollars, or by imprisonment not exceeding twelve months, or by both".

4. POLICE POWERS:

(a) Arrest:

Section 10 of the O.S.A. states:

> Every person who is found committing an offence under this Act, or who is reasonably suspected of having committed, or having attempted to commit, such an offence, may be arrested without a warrant and detained by any constable or police officer.

Although paragraph 450(1)(a) of the Criminal Code includes the power to arrest a person about to commit an indictable offence it requires that, in all cases, an officer reasonably believe (rather than reasonably suspect) that an offence has been or is about to be committed. It has been suggested[115] that it may be possible, by combining section 10 with section 9 (the attempt section), for a person to be arrested on the suspicion that he is about to commit an act preparatory to the commission of an offence. (It would be interesting to hear a police officer inform a person so charged of the reasons for his arrest (as is required by paragraph 10 (a) of the Charter).)

(b) Detention:

The O.S.A. does not place a limitation on the length of time that the police may detain a person who has been arrested

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[115] Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 48

for "being about to commit" an offence under the Act. Under the O.S.A. it is not an offence to be "about to commit" (which can be distinguished from an "attempt to commit" an offence provided for in section 10) an offence. The Taschereau/Kellock Royal Commission stated that there is no limit to the length of time that the police could detain a person who had been arrested for "being about to commit" an offence under the Act.[116] During the course of their report they stated:

> The release of a person reasonably suspected of being about to communicate information contrary to the statute merely because no charge has been made where no charge could in law be made, would not be in accord with the purpose of the authority given by section 10 to arrest and detain such a person.[117]

This suggestion has been criticized.[118] Subsection 454(1) of the Criminal Code states that a person under arrest must be brought before a justice of the peace within at least twenty-four hours of arrest. The Code is, by the operation of

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[116]Taschereau-Kellock Report, at pp. 654 - 655

[117]*Ibid.* at p. 655

[118]Friedland, M.L. "National Security The Legal Dimensions" A Study prepared for the Commission of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 48

subsection 27(2) of the Interpretation Act,[119] applicable to indictable offences outside the Code. In addition, according to subsection 454(3) of the Code, a peace officer or officer in charge who has the custody of an individual must release that person unconditionally as soon as practicable after he is satisfied that the continued custody of the person arrested is no longer necessary in order to prevent the commission by him of an indictable offence.

It may be that a person detained for being about to commit an offence under the Act will have to have the validity of the detention determined by way of habeas corpus. It should be noted that paragraph 10(c) of the Charter prescribes that, "[e]veryone has the right on arrest or detention . . . to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful". Although the Charter entrenches the right to habeas corpus in the Constitution, it has been held that paragraph 10(c) does not change the existing law[120] in that it does not make the right to habeas corpus or its tests any higher than they were

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[119]Interpretation Act R.S.C. 1970, c. I-23

[120]<u>Re Day</u> (1983), 62 N.S.R. (2d) 67 (N.S.S.C.)

at common law.[121]

(c) Search:

Subsection 11(1) of the O.S.A. states that, "if a justice of the peace is satisfied by information on oath that there is a reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant . . . ". In order to have a search warrant issued under the Criminal Code (subsection 443(1) and section 447) or the Narcotic Control Act[122] (subsection 10(2)), the justice of the peace is required to have a "reasonable ground to believe" rather than a "reasonable ground for suspecting" that an offence has been or is about to be committed. One has to be more certain of the accuracy of a statement to believe that it is true as opposed to suspecting that the statement is true. In short, the standard governing the authorization of search warrants is more relaxed in the O.S.A. than in the Criminal Code or the Narcotic Control Act.

In the recent Supreme Court of Canada decision of Hunter et al. v. Southam Inc.[123] the Court stated, in relation to

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[121] Re Reimer and the Queen (1987), 47 Man. R. (2d) 156 (C.A.)

[122] Narcotic Control Act R.S.C. 1970, c. N - 1, as amended.

[123] Hunter et al v. Southam Inc. (1984), 14 C.C.C. (3d) 97; 11 D.L.R. (4th) 641; [1984] 2 S.C.R. 145 (S.C.C.)

section 8 (. . . "the right to be secure against unreasonable search or seizure") of the Charter, that:

> The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement.[124]

The Court went on to state that:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure.[125]

It will be noted that by prefacing its definition of the "minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure", by stating "[I]n cases like the present . . . ", the Court has essentially narrowed that definition down to a case by case determination. The Court recognized that in cases where state security may be at issue (which would most likely be the case if the O.S.A. is relied

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[124]Hunter et al v. Southam Inc. (1984), 14 C.C.C. (3d) 97 at pp. 114 - 115 (S.C.C.)

[125]Ibid. at p. 115

upon) ". . . the relevant standard might well be a different one".[126] Further, prior to the Charter it was held that reasonable suspicion may form the basis of a reasonable ground for conducting a search. As was held by the Supreme Court of Canada in Eccles v. Bourque et al.,[127] the knowledge acquired by a policeman which gave rise to his suspicion may be proved by way of hearsay. This decision has been confirmed by two cases.[128] Therefore, it is submitted that section 8 of the Charter is not offended by the use of the word "suspicion" in subsection 11(1) of the O.S.A..

Section 11(2) of the O.S.A. provides that:

> Where it appears to an officer of the Royal Canadian Mounted Police not below the rank of superintendent that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice.

This provision allows the police to eliminate judicial

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[126] Ibid.

[127] Eccles v. Bourque et al (1975), 19 C.C.C. (2d) 127 (S.C.C.)

[128] Collins v. The Queen (1987), C.C.C. (3d) 1; 38 D.L.R. (4th) 508; [1987] 1 S.C.R. 265; [1987] 3 W.W.R. 699; 56 C.R. (3d) 193; 13 B.C.L.R. (2d) 1; 74 N.R. 276 (S.C.C.); Gibson v. The Queen (1983), 37 C.R. (3d) 175 (Ont. S.C.)

authority when issuing a search warrant. It may (despite the fact that the subject matter of the search may involve national security and the courts would appear to be more inclined to depart from the minimum standard as set down in Hunter) cause subsection 11(2) to be found to be in conflict with the section 8 of the Charter. In Hunter the Court considered who must grant authorization in order to issue a search warrant. The Court stated that, "[T]he person performing this function need not be a judge but he must, at a minimum, be capable of acting judicially".[129]

The Court also stated that, "[F]or such an authorization to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner".[130] It is submitted that an officer of the Royal Canadian Mounted Police would be viewed as neither capable of acting judicially nor of being a neutral or impartial figure. Further, the grounds for the search warrant would not be established upon oath if a fellow police officer was to authorize a search warrant. Nevertheless, there are times when

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[129] Hunter et al v. Southam Inc. (1984), 14 C.C.C. (3d) 97 at p. 110 (S.C.C.)

[130] Ibid.

an emergency warrant procedure is required, particularly when the interest of the State may be threatened. It is suggested, however, that any emergency warant procedure should be subject to a speedy review by a judicial officer.

There has been a question as to whether or not section 11 would be broad enough to cover electronic surveillance. Further, it has been debated whether or not surreptitious entry is permissible in order, for example, to place a "bug", if a section 11 warrant has been issued for a search. This question, for all practical purposes, is now moot for two principal reasons.

Firstly, section 88 of the C.S.I.S. Act has repealed the power (which was held within section 16 of the O.S.A.) that the Solicitor General of Canada had to ". . . issue a warrant authorizing the interception or seizure of any communication". Secondly, subsection 21(3) of the C.S.I.S. Act empowers a Federal Court Judge to specifically authorize the persons to whom a warrant is directed to use electronic surveillance techniques and to enter any place in a surreptitious manner to place a "bug".

C. CONCLUSIONS ON THE LAWS GOVERNING OFFENCES AGAINST THE STATE

The O.S.A. is a statute in need of redrafting. As Judge Waisberg stated in the Toronto Sun[131] case:

> Since the Official Secrets Act is a restricting statute, and seeks to curb basic freedoms, such as freedom of speech and the press, it should be given strict interpretation.
>
> The statute must, in clear and unambiguous language, articulate the restriction it intends to impose upon a citizen. A reading of ss. 3 and 4 of the Official Secrets Act amply demonstrates its failure to do so; the provisions are ambiguous and unwieldy. The report of the Mackenzie Royal Commission on Security - art. 204, p. 75, confirms this.
>
> A complete redrafting of the Canadian Official Secrets Act seems appropriate and necessary.

The present laws governing offences against the State contain many defects in both form and content.

1. DEFECTS OF FORM:

The major problems with respect to form of the present

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[131] R. v. Toronto Sun Publishing Limited (1980) 98 D.L.R. (3d) 524 at p. 534 (Ont. Prov. Ct.)

offences against the State are caused by the fact that their poor arrangement has resulted in overlapping and inconsistency among provisions. Further, there is uncertainty as to the meaning of certain words and expressions used in the present security legislation.

(a) Overlapping of Provisions:

The fact that espionage-related offences in sections 3 and 4 of the O.S.A. and paragraph 46(2)(b) of the Code overlap is not surprising when one considers their historic roots. Historically, treason provisions were considered to be broad enough to encompass espionage and related activities[132] (an offence now specifically provided for in section 3 of the O.S.A.). In fact, in Canada the 1797 case of R. v. Maclane[133] included espionage as an overt act of treason. Maclane was found to have tried to synchronize a rebellion in Lower Canada with a potential French invasion.

It would appear that the offence of treason and that of sedition could be interpreted to overlap. The courts have suggested that there may not be a need for the offence of

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[132]Bellamy J.G. The Law of Treason in England in the Later Middle Ages, 1st ed. London: Cambridge University Press 1970 at pp. 16, 32, 52, 124, 130, 134 and 220

[133]R. v. Maclane (1797), 26 State Trials 721 at p. 749

sedition, since seditious behaviour could fulfil the overt act requirement of the offence of treason. The offence of sedition may simply be redundant.

Provisions of the O.S.A., the Code and the National Defence Act also overlap. The conduct which forms the actus reus of the offences contained in paragraphs (a), (b) (c) of section 65 of the National Defence Act could also form the actus reus for a prosecution under paragraph 46(2)(b) and sections 3 and 4 of the O.S.A..

There is also overlapping between section 19 of the C.S.I.S. Act, section 4 of the O.S.A. and possibly paragraph 46(2)(b) of the Code. Disclosure of information obtained in the performance of the duties and functions of the C.S.I.S. could constitute an unauthorized disclosure pursuant to section 4 of the O.S.A. and possibly treason under paragraph 46(2)(b).

(b) Inconsistency:

Problems of inconsistency are found within the Code itself, between the Code and the O.S.A. and between the O.S.A. the C.S.I.S. Act and the National Defence Act.

A source of internal inconsistency within the Code exists within section 46. Section 46 provides that a number of different incomplete actions will fulfill the actus reus requirements of the offence of treason and that of high treason.

A major inconsistency exists between the mental elements required for a conviction of the espionage offences of paragraph 46(2)(b) of the Code and section 3 of the O.S.A.. The mental elements of these offences appear to be very different. The O.S.A. refers to doing something "for any purpose prejudicial...", which suggests that an accused would require full mens rea to be convicted. In contrast, paragraph 46(2)(b) of the Code only requires that the accused "ought to know" that the disclosed information may be used by a foreign state "for a purpose prejudicial to the safety or defence of Canada". Paragraph 46(2)(b) appears to impose a standard of only recklessness or even negligence.

Another example of the inconsistency between the O.S.A. and the Code is the extraterritorial scope of the espionage offences. Subsection 46(3) of the Code extends the extraterritorial effect of the offence of treason to both a Canadian citizen and "a person who owes allegiance to Her Majesty". Section 13 of the O.S.A. however, provides that the sections 3 and 4 espionage offences can be committed abroad by a Canadian citizen or by anyone who, at the time he obtained the information, owed allegiance to Her Majesty. Therefore section 13 of the O.S.A. extends liability extraterritorially to a person who is no longer a citizen and who no longer owes allegiance to the Crown if the information that is subject to the charge was obtained by the person while he owed allegiance to Her Majesty.

The punishment for espionage-related offences is different among the various statutes. The punishment prescribed by section 15 of the O.S.A. ranges from twelve months in jail or a five-hundred-dollar fine, to fourteen years imprisonment. Pursuant to section 47 of the Code, the punishment for espionage is either a maximum of fourteen years imprisonment in times of peace, or life imprisonment in times of war. If an individual violates section 18 of the C.S.I.S. Act he would be liable to a maximum penalty of five years imprisonment. Section 68 of the National Defence Act provides that a spy could be subject to the death penalty if convicted.

(c) Uncertainty:

There is a problem of uncertainty as to the scope and meaning of certain words and phrases used in both the O.S.A. and the Code.

With respect to the Code paragraph 46(2)(b) provides that a person has to "know or ought to know...," that the information that he communicates to an agent of another state other then Canada "may be used by that state for a purpose prejudicial to the safety or defence of Canada". The Code however, does not define what is meant by a "purpose prejudicial to the safety or defence of Canada". This phrase would appear to be an important part of the mens rea requirement of the offence of treason. The lack of precision of the mens rea requirement for such a serious offence is disturbing. It is also unclear as to whether the existence of such a prejudicial purpose is a matter to be determined by the Crown in the exercise of its prerogative or by the court.

These same concerns exist with regard to the broader wording of section 3 of the O.S.A.. The offence provided for in section 3 of the O.S.A. has to be committed "for a purpose prejudicial to the safety or interests of the State". Like the Code, the O.S.A. does not define what is meant by this phrase. Perhaps the word "interests" would not be construed as narrowly as the word "defence" in paragraph 46(2)(b) of the Code. "Interests" could conceivably be interpreted as referring to Canada's economic or trade policy.

Both subsection 48(2) of the Code (which provides that "open and considered speech" could fulfil the "overt" act requirement of the offence of treason) and the Code's definition of the offence of sedition, are sources of uncertainty. The degree of uncertainty in both these cases is such that the government may not be able to rely on section 1 of the Charter to justify its breach of the freedom of expression contained in paragraph 2(b) of the Charter.

Another source of uncertainty which is found in the O.S.A.

is related to the difficulty in ascertaining if the words "secret official" in paragraph 3(1)(c) and section 4 pertain only to a code word, or password, or to any kind of information. This is obviously a matter of importance and should be clarified by parliament rather than by the courts.

The procedural and evidential provisions of the O.S.A. are also ambiguous. In particular subsection 3(3) prescribes that an accused's communication with a foreign agent "is evidence that he has...," committed an offence under section 3. There is no indication within the Act if these words mean conclusive evidence, rebuttable evidence, or simply some evidence. Thus, the meaning of the phrase "is evidence" remains uncertain.

2. DEFECTS OF CONTENT:

Many of the laws that have been discussed are dated, tend to criminalise many innocent actions and infringe the Charter.

(a) Out-Of-Date Laws:

Perhaps the best illustration that the provisions of the Code and the O.S.A. which were dealt with are dated is that neither one makes reference to computers nor the technology associated with them. This is not to say that the current provisions could not be interpreted to include information transferred by or about computers. It is, however, clear from the wording of the provisions that the role that computers play in society was not addressed when the provisions were drafted.

The language, general layout, and substance of the treason offence demonstrate that the offence is out of date.[134] This is not surprising when one considers that section 46 contains many of the same phrases that were enacted in 1351. Because there has not been a prosecution for treason since the conclusion of the First World War it may be that prosecutors feel that the offence of treason has been replaced by the provisions of the O.S.A.. Perhaps the reason for this is that Crown prosecutors also consider that the offence of treason is out of date.

The potential Charter infringements which could arise from a prosecution for the offences discussed is in itself an indication of outdated laws. The offence of sedition illustrates this point. Before the development of a parliamentary democracy in the nineteenth century governments were seen as infallible and the purpose of the crime of sedition was to provide punishment for criticism of political authority.[135] The Charter now guarantees the political

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[134]Law Reform Commission of Canada, "Crimes Against the State" Working Paper 49 (1986) at p. 35

[135]Ibid.

freedom of expression (paragraph 2(b)).

(b) Overcriminalization:

Three examples will suffice in order to illustrate that both provisions of the Code and those of the O.S.A. overreach the acceptable limits of criminal law. First of all, the negligence standard of the mens rea requirement for the offence of treason contained in paragraph 46(2)(b) is not appropriate for an offence punishable by life imprisonment. The second example concerns the basic infringement on the freedom of expression by the offence of sedition. Thirdly, the O.S.A. deals with both espionage and espionage-related crimes and breaches of confidence by Crown employees, without differentiating between the two. Crown employees could face prosecution under the O.S.A. for the disclosure of even the most mundane information.

(c) Infringement Of The Charter:

In summary this part of this thesis has raised two main concerns with regard to the Charter. Firstly, both subsection 48(2) of the Code which provides that "open and considered speech" could fulfil the "overt act" requirement of treason and the offence of sedition may infringe the freedom of expression. Secondly, there are numerous presumptions in the O.S.A. which may conflict with an accused's right to be presumed innocent until proven guilty as guaranteed by paragraph 11(d) of the Charter.

Parliament has not expressly declared (as required by section 33 of the Charter) that the O.S.A. should operate notwithstanding section 2 or sections 7 to 15 of the Charter.

As noted previously, it has been suggested[136] that in order to avoid overlapping provisions, both the treason provisions of the Criminal Code and the O.S.A. should be reconciled and united in the Code. This sentiment has also been echoed by the Law Reform Commission of Canada.[137]

The Law Reform Commission states that there should be a reformulation of the present offences against the State based on fundamental principles applicable in the present Canadian context.[138] The Law Reform Commission asserts that the relationship between State and individuals is one of reciprocity with obligations on both sides.[139] The Charter provides us with what this notion of reciprocity means in the

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[136]Friedland, M.L. "National Security the Legal Dimensions" A study prepared for the Commssion of Inquiry concerning certain activities of the R.C.M.P. Canada: Minister of Supply and Services, 1980 at p. 123

[137]Law Reform Commission of Canada, "Crimes Against the State" Working Paper 49 (1986) at p. 41

[138]Ibid., at p.41

[139]Ibid., at p. 44

Canadian context, and thus provides us with guidance as to the kinds of activities which ought to be offences against the State in Canada. Therefore, while there is a common interest in maintaining peace within the State, Canadians will not accept peace at all costs.[140] The State cannot legitimately preserve itself and maintain peace by prohibiting political debate or dissent. Sections 1 and 2 of the Charter protects these activities.

The Law Reform Commission's new scheme would combine the essence of the espionage offences presently found in section 3 of the O.S.A. and paragraph 46(2)(b) of the Code, but would abandon the many modes of commission set out in the O.S.A., and the requirement of proving the accused had a "purpose prejudicial" to the State.[141] The Law Reform Commission states that espionage would be committed if someone "intentionally" communicates or makes available "classified national security" information to another State or its agent, without lawful authorization to do so, and there would be no necessity to show a further purpose. The Law Reform Commission makes it clear that their approach would only work if the

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[140]<u>Ibid.</u>

[141]<u>Ibid.</u>, at p. 48

espionage offence is founded on a clear, uniform system of classification.[142]

With respect to the offence of leaking government information (presently dealt with in section 4 of the O.S.A.) the Law Reform Commission still feels that it is important to continue to criminalise such acts.[143] Although the Law Reform Commission's proposed leakage offence does not contain the detail of section 4 of the O.S.A. the suggested offence still covers the essential matters. The Commission also distinguishes leakage from espionage in that it treats it as a less serious crime.

The proposed offence would prohibit the unauthorized disclosure of "classified" national security, classified personal or government information to anyone other than another State or its agent, regardless of an informant's motive.[144] As with the espionage offence, it would be imperative that the government undertake to create a clear and well-defined system of classification of information, and have effective procedures for authorizing disclosure and declassifying information once

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[142] Ibid.

[143] Ibid., at p. 54

[144] Ibid.

the need for secrecy had passed.[145]

The Law Reform Commission's suggestions with respect to paragraph 46(2)(b) of the Code and sections 3 and 4 of the O.S.A. make sense. Another of the Commission's valuable suggestions is to locate a number of the Code provisions which deal with offences against the state and the provisions of the O.S.A. into a special Chapter of the Code called "Crimes against the State".[146] The Law Reform Commission's recommendation in regard to redrafting certain sections may serve to reduce potential Charter infringements and decrease the complexity, inconsistency and vagueness of the current Canadian laws. However, it is important that the difficulties that exist in the present laws prohibiting threats to our national security are not simply transposed to the system of classification of information which is necessary for their proposed offences to operate effectively.

The Law Reform Commission's proposed "mini-code" of crimes against the State does not include the seditious offences now found in the Code.[147] Firstly, they felt, quite rightly,

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[145] Ibid., at pp. 54-55

[146] Ibid., at p. 59

[147] Ibid., at p. 58

that the offence was unnecessary in that there are other offences within the Code which criminalize particular types of conduct which could be considered to be seditious.[148] Counselling or inciting treason, violent overthrow of the government, or breaches of public order are already criminalized under the Code's General Part rules on secondary and inchoate liability (sections 21, 22, 24, 421-424), and advocating hatred is specifically prohibited in the Code by the offence of hate propaganda (sections 281.1, 281.2). By repealing the offence of sedition the government would not be condoning incitement of offences against the State or hate propaganda; they would simply be articulating the types of activities which should be condemned by the criminal law. Secondly, the offence of sedition would, in all probability, be found to interfere with the constitutionally protected freedom of expression.[149] Therefore, the Law Reform Commission makes a strong argument that the present seditious offences should be repealed.

This thesis argues that the Law Reform Commission's working paper on crimes against the state presents a logical

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[148]Ibid.

[149]Ibid.

alternative to the fashion in which Crimes against the State are currently dealt with in the Code and the O.S.A..

PART 3 THE CANADIAN SECURITY INTELLIGENCE SERVICE ACT

A. HISTORICAL BACKGROUND

Since the days of Sir John A. McDonald, Canada has had some form of security service.[150] In 1864, Sir John A. McDonald, then the Premier and Attorney General West for the United Province of Canada, established a small detective service.[151] This service, under the direction of a magistrate, was created to survey the events of the American Civil War and report any activities which might effect Canada's security.[152] As Canada's first official security intelligence service, it was only able to perform a relatively limited function, operating in a small area along Upper Canada's southern boundary.[153]

Following World War I an intelligence unit was established within the R.C.M.P. in order to deal with the developing threat

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[150]Notes for a speech by the Hon. Bob Kaplan, P.C. M.P., Solicitor General Canada of Canada to the North West Rotary Club of St. John's Newfoundland September 20, 1983 at p. 2

[151]Solicitor General of Canada, "Canadian Security Intelligence Service Explanatory Notes" (Ottawa, 1984) at p.1

[152]Ibid.

[153]Ibid.

of espionage activities and subversion.[154] During this period, however, security responsibilities were fulfilled by officers who spent most of their time on criminal investigation matters.[155] The unit did continue to develop and, following World War II, a special branch of the R.C.M.P. was established to deal specifically with questions concerning national security.[156]

The catalyst in the development of Canada's post-war security policy was the revelations of the Soviet cipher clerk defector Igor Gouzenko which were outlined in the report of the Taschereau-Kellock Royal Commission.[157] Gouzenko's disclosures were continuing to have an impact as late as the mid-sixties.[158]

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[154] Ibid.

[155] R. French and A. Belivreau, The R.C.M.P. and the Management of National Security, Chapter 2 at p. 7 (Institute for Research on Public Policy, 1979)

[156] Canadian Security Intelligence Service Explanatory Notes, Solicitor General Canada, 1984, at p.1

[157] Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication, by Public Officials and other Persons in Positions of Trust, of Secret and confidential Information to Agents of a Foreign Power, [Reports] (Ottawa: King's Printer, 1946)

[158] R. French and A. Belivreau, The R.C.M.P. and the Management of National Security, Chapter 2 at p. 9 (Institute for Research on Public Policy, 1979)

In 1966 Prime Minister Pearson, in the same speech in which he announced the establishment of a new portfolio, the Ministry of the Solicitor General, (which was to handle criminal law enforcement, corrections, and security matters), announced a Royal Commission of Messrs. Maxwell Mackenzie, Yves Pratte, and M.J. Coldwell to look into security methods.[159]

The Mackenzie Commission report was published in 1969. The Commission recommended "the establishment of a new civilian non-police agency to perform the functions of a Security Service in Canada"; an agency which "should eventually be quite separate from the R.C.M.P." and be "generally without law enforcement powers".[160] The Commission had three reasons for this assessment. Firstly, the R.C.M.P., with its "recruiting and training system generally orientated towards the requirements of a police force", was "cutting itself off from the whole of that group of potential recruits who attend a university - in other words and in general terms, from those potential recruits who are likely to possess the most intelligence, initiative and imagination."[161]

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[159]Ibid. at pp. 7 - 8

[160]Report of the Royal Commission on Security (Ottawa: Information Canada, 1969) at p. 105

[161]Ibid., at pp. 19 - 20

Secondly, the Commission felt that the Security Service (which was the successor to Special Branch) had failed to perform an effective role in promoting security policy within the federal power structure. Lastly, the Commission was of the opinion that "the association of the security function with the police role tends to make the work of security authorities more difficult."[162]

For whichever reason, in 1969, Prime Minister Trudeau decided that the security problems in Canada could be better dealt with within a modified R.C.M.P. environment.[163] This decision did not, however, spell the end to the concept of "civilianization" of the Security Service.

The first demonstration of the government's resolve to modify the R.C.M.P. was the appointment of a civilian to be the director general of the Security Service.[164] Secondly, over the period of 1969 - 1972 the Security Service was established as a national division within the R.C.M.P..[165] This allowed

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[162]Ibid., at p. 20

[163]R. French and A. Belivreau, The R.C.M.P. and the Management of National Security, Chapter 2 at p. 9 (Institute for Research on Public Policy, 1979)

[164]Ibid., at p.11

[165]Ibid., at p.12

the recruitment to central positions within the Service from outside the R.C.M.P. career structure.[166]

Although it would appear that Security Service management exploited the civilianization policy after 1970, not until after two further commissions was there enough momentum generated for institutional reform. The two commissions were the provincial (Keable) and the federal (McDonald) Royal Commissions which were designed to investigate allegedly illegal acts in the province of Quebec by police forces including the R.C.M.P..[167]

The McDonald Commission described the two basic needs concerning Canada's security:

> First, the need to protect Canadians and their government 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 elements of Canadian democracy against attempts to destroy or subvert them.[168]

Further, the Commission emphasized that:

> Canada must meet both the requirements

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[166]Ibid.

[167]The Keable Commission was established 27 June 1977 by Order-In-Counsel #1968 - 77 of the Executive Council of the Province of Quebec and its mandate was extended by a number of subsequent Orders-In-Council. The McDonald Commission was established 6 July 1977 by Minute of the Privy Council # 1977 - 1911.

[168]McDonald Commission, Second Report, Volume 1: Freedom and Security Under the Law, at p. 40

> of security and the requirements of democracy; we must never forget that the fundamental purpose of the former is to secure the latter.[169]

Hence, the Commission recommended that a new Security Service must ensure a balance between the need to protect security on the one hand, and civil liberties and the right to privacy on the other.

In August, 1981, the Solicitor General announced that the Security Service would be separated from the R.C.M.P..[170] The new security service was to be a civilian security intelligence agency.[171] A transitional group was established to study the McDonald Commission's recommendations and to take into consideration suggestions from individuals, government departments and agencies in other countries.[172]

The transitional group gave paramount consideration to five principles which were endorsed by the government in 1981. To conform with these principles the new agency must:

- provide effective security

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[169] Ibid., p. 43

[170] Solicitor General of Canada, "Canadian Security Intelligence Service Explanatory Notes" (Ottawa, 1984) at p. 2

[171] Ibid.

[172] Ibid.

intelligence, essential to the security of Canada,

- have an adequate legal framework within which to operate under the Rule of Law, recognizing the democratic rights of Canadians;
- have an effective management system, ensuring responsible direction and respect for the law;
- be effectively accountable to ministers who are responsible to Parliament;
- be open to a satisfactory external review, ensuring that the agency does not abuse its powers and that it is not misused by government.[173]

The intent of these five principles was included in the C.S.I.S. Act.[174] However, prior to the Act coming into force Bill C - 157 was introduced in the House of Commons. The purpose of Bill C - 157 was to establish the Canadian Security Intelligence Service. Immediately Bill C - 157 became the subject of negative comment. It was alleged, that the Bill would give the proposed security service too much power, insulate the government from accountability, offend civil liberties, and fail to provide a workable review system.[175] Public opposition was so strong that the government decided against proceeding to second reading, and instead referred the

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[173] Ibid.

[174] Canadian Security Intelligence Service Act: Can. Rev. Stat. 1984, c.21 (1984)

[175] Rosen, P., The Canadian Security Intelligence Service (Ottawa: Library of Parliament, Research Branch, 1989) at p. 8

subject matter of the Bill to a special committee of the Senate.[176] The Senate Committee heard over thirty witnesses in 18 days of hearings, and also reviewed numerous other submissions from the public. Its report, issued in November of 1983, recommended over forty changes to the Bill so that the revised bill "could adequately deal with Canada's security requirements without unjustifiably infringing on individual rights".[177]

Following the Senate report, Bill C - 157 was allowed to die on the order paper. In the second session of the 32nd Parliament a new Bill, C - 9, was introduced which embodied virtually all of the recommendations of the Senate Committee.[178] Bill C - 9 was given first reading in January 1984, was referred to the Justice Committee of the House of Commons in March, and passed third reading in June, 1984. The C.S.I.S. Act received Royal Assent on June 28th, 1984, and came into force on July 16th, 1984. The C.S.I.S. Act is nearly identical to Bill C - 9.

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[176] Senate of Canada, Report of the Special Committee of the Senate on the Canadian Security Intelligence Service, A Delicate Balance: A Security Intelligence Service in a Democratic Society (Ottawa: Minister of Supply and Services Canada, 1983)

[177] Ibid. at p. 35

[178] Rosen, P., The Canadian Security Intelligence Service (Ottawa: Library of Parliament, Research Branch, 1989) at p. 9

B. FUNCTIONS OF THE C.S.I.S.

1. GATHERING INFORMATION CONCERNING THREATS TO THE SECURITY OF CANADA:

The primary function of the C.S.I.S. is set out in section 12 of the C.S.I.S. Act:

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

It should be noted that the C.S.I.S. is not solely responsible for the gathering of intelligence for Canada. The Departments of National Defence, External Affairs, Employment and Immigration, Transport and Airport Security, and Revenue Canada (Customs and Excise) among others are major components of Canada's intelligence network.[179]

The C.S.I.S. has, however, been given the mandate to pursue information under section 12 with such vigour only with respect

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[179]Senate of Canada, Report of the Special Committee of the Senate on Terrorism and Public Safety (Ottawa: Minister of Supply and Services Canada, 1987) at pp. 46 - 57; The Nugget, "Spies: they're everywhere . . . yet they're nowhere", October 21, 1988 at p. 21

to activities that "may on reasonable grounds be suspected of constituting threats to the security of Canada". Hence, the justification of any possible Charter violations will rest in the interpretation of a threat to national security or in the words of the C.S.I.S. Act "threats to the security of Canada".

"Threats to the security of Canada" are defined in section 2 of the C.S.I.S. Act:

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

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

Paragraph 2(a) states that a "threat to the security of Canada: "means "espionage or sabotage that is against Canada or is detrimental to the interests of Canada". Would the phrase "detrimental to the interests of Canada" allow the C.S.I.S. to investigate espionage against another country? Moreover, paragraph (a) suggests that the wording would permit investigations quite removed from actual or apprehended acts of espionage or sabotage both physically and temporally. Also, does the broad wording of paragraph (b) in regard to "foreign-influenced activities" allow the C.S.I.S. to investigate economic ventures of foreign countries or foreign based multinational enterprises in Canada?[180]

Paragraph 2(c) allows the use of intrusive techniques to monitor "activities...in support of...acts of serious violence...for the purpose of achieving a political objective within Canada or a foreign state." Would intrusive surveillance techniques be available to collect information about Canadian

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[180]See generally "A Comparison of Bills C - 157 and C - 9, The Proposed Canadian Security Intelligence Service Act" prepared by the Law and Government division Research Branch Ottawa, 1979.

citizens who, on their own initiative, collect money for the rebels in Afghanistan or the Iranian government in the wake of its war with Iraq? Or would this fund-raising be protected by the final words of Section which exclude "lawful advocacy, protest or dissent"? Although it is not clear if section 2 would apply to these situations it is clear that no genuine security threat would be involved in any of them.

Paragraph 2(d) would make intrusive investigative techniques available for "activities...intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada". It has been stated that "[W]hen ultimate intentions become the operative threshold, there is a great danger that speculation rather than evidence would be at a premium."[181] What will constitute the evidence required to illustrate an "ultimate" intention?

2. <u>SECURITY ASSESSMENTS</u>:

A further function of the C.S.I.S. is to provide security assessments to departments of the Government of Canada[182] and:

> The Service may, with the approval of

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[181]Submissions to the Honourable Robert Kaplan Solicitor General of Canada; Re Bill C - 9 National Security; From the Canadian Civil Liberties Association and An Ad Hoc Delegation, May 3, 1984

[182]C.S.I.S. Act s.13(1)

> the Minister, enter into an arrangement with
>
> (a) the government of a province or any department thereof, or
>
> (b) any police force in a province, with the approval of the Minister responsible for policing the province,
>
> authorizing the Service to provide security assessments.[183]

Further:

> The Service may, with the approval of the Minister after consultation by the Minister with the Secretary of State for External affairs, enter into an arrangement with the government of a foreign state or an institution thereof or an international organization of states or an institution thereof authorizing the Service to provide the government, institution or organization with security assessment.[184]

The C.S.I.S. Act does not include any indication of what the criteria for "security assessments", which are performed for a foreign state, will be. It is therefore unknown if a group which, for instance, supports the government of Nicaragua could be the target of a "security assessment" on behalf of the United States, while posing no threat to the Security of Canada.

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[183] _Ibid._, s.13(2)

[184] _Ibid._, s.13(3)

3. Collection of Foreign Intelligence:

A third function of the C.S.I.S. Act is that of assisting the collection of "foreign intelligence". Section 16 states:

(1) Subject to this section, the Service may, in relation to the defence of Canada of the conduct of the international affairs of Canada, assist the Minister of National Defence or the Secretary of State for External Affairs, within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of

(a) any foreign state or group of foreign states; or

(b) any person other than

(i) a Canadian Citizen,

(ii) a permanent resident within the meaning of the Immigration Act, 1976, or

(iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.

(2) The assistance provided pursuant to subsection (1) shall not be directed at any person referred to in subparagraph (1)(b)(i), (ii) or (iii).

(3) the Service shall not perform its duties and functions under subsection (1) unless it does so

(a) on the personal request in writing of the Minister of National Defence or the Secretary of State for External Affairs; and

(b) with the personal consent in writing of the Minister.

Although section 16 is designed to deal with foreign states and foreign nationals, it would appear that Canadians who are incidentally subject to surveillance as a result of an investigation of a foreign national would still be affected. Section 16 only allows the C.S.I.S. to "assist" in the collection of information. Among the requirements (as set out in section 21) for a warrant to be issued to allow the C.S.I.S. to complete their duties and functions under Section 16, is that the application depose,

> the facts relied on to justify the belief, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16.

Hence, the C.S.I.S. Act allows a judge to issue a warrant where simply on "reasonable grounds" he believes that it is required to enable the agency to perform its duties and functions under section 16. Under this provision there does not have to be a "threat to Canada's security" in order for a warrant to be issued. The fundamental freedoms enunciated in section 2 of the Charter and the legal rights stated in sections 7 to 12 of the Charter belong to "everyone"[185] or "any

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[185] ss.7 - 10, 12

person".[106] Therefore, the rights and freedoms proclaimed in these Charter sections apply to an individual whether or not he is a foreign national, a Canadian citizen or a permanent resident.

It is unclear why a judge has to be satisfied on reasonable and probable grounds that a "threat to the security of Canada" exists to issue a warrant to enable an investigation of a Canadian citizen but not to investigate a foreign national. In light of subsection 15(1) of the Charter it is questionable if different standards for the issuance of C.S.I.S. warrants to investigate the activities of foreign nationals as opposed to the activities of Canadian citizens, would survive a constitutional challenge. Subsection 15(1) of the Charter guarantees equal benefit of the law without discrimination based on national or ethnic origin.

There are no words within section 21 which would appear to allow a judge to exercise discretion in the assessment of the need for a section 16 warrant. If, for example, the Minister of National Defence was to request a section 16 warrant and the Solicitor-General approved the application being made, then it would seem that a judge must issue a warrant if he believes, on

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[106] s.11

reasonable grounds, that the warrant is required for C.S.I.S. to perform its duties under section 16. In order to issue a warrant to allow C.S.I.S. to investigate a threat to the security of Canada (a section 12 warrant) a judge must be satisfied that a warrant is "required" (paragraph 21(2)(a)) to investigate that threat. It can be assumed that in a situation where a threat to Canada's security is being investigated under section 12, a judge would take into consideration the section 2 definition of what is a "threat to the security of Canada" in order to decide if a warrant is required. No such assumption can be made with respect to a section 16 warrant.

It is therefore submitted that if a warrant was issued for purposes set out in section 16, and that warrant led C.S.I.S. personnel to deny or limit an individual's rights and freedoms under the Charter, the government would not succeed in arguing that the limitation was "prescribed by law" (a requirement if it intended to rely on section 1 of the Charter).

As previously noted, a law which places limits of freedoms cannot be discretionary and must be articulated with some precision to be considered "law".[187]

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[187] <u>Ontario Film & Video Appreciation Society</u> v. <u>Ontario Board of Censor</u> (1983), 41 O.R. (2d) 583 at p. 592 (Div. Ct.); affirmed, (1985), 45 O.R. (2d) 80n (C.A.)

C. POWERS OF THE C.S.I.S.

Subsection 16(2) of the O.S.A. states:

> The Solicitor General of Canada may issue a warrant authorizing the interception or seizure of any communication if he is satisfied by evidence on oath that such interception or seizure was necessary for the prevention or detection or 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.

According to the 1983 Solicitor General's annual report there were 525 warrants issued pursuant to subsection 16(2).[188] The average length of time for which warrants were in force was approximately 253 days. Wiretapping, eavesdropping by microphone, capturing of optical images and interception or recorded communications outside the course of post were the methods of interception utilized. The report went on to state that the interceptions authorized by warrants issued pursuant to subsection 16(2) O.S.A. were indispensable investigative aid in the following areas:

(i) in the prevention and detection of

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[188] Canada Parliament, Report of Solicitor General, Annual Report as required by subsection 16(5) of the Official Secrets Act, 1983.

> subversive activity directed against or detrimental to the security of Canada;
>
> (ii) for the purpose of gathering foreign intelligence essential to the security of Canada;
>
> (iii) for the gathering of information relating to violent, terrorist or criminal activities directed towards accomplishing governmental change in Canada or elsewhere;
>
> (vi) for the purpose of verifying or disproving information derived from other sources.[189]

Although the powers of subsection 16(2) were quite broad, and the subsection was reported to have been used to thwart activities which could have been seen as detrimental to the security of Canada, it was repealed by Section 88 of the C.S.I.S. Act.

In discussing the types of powers a security intelligence service might require to fulfill its mandate, the McDonald Commission noted that:

> Because of the secrecy maintained by those who pose the most serious threats to Canada's internal security, the security intelligence agency must be authorized to employ a variety of investigative techniques to enable it to collect information. The means available to it must range all the way

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[189] Ibid.

> from studying open sources of research material and obtaining information from citizens (foreign and domestic) to using much more covert and intrusive methods that may involve the use of powers not available under law to the ordinary citizen.[190]

Subsection 21(3) of the C.S.I.S. Act replaced subsection 16(2) of the O.S.A. and would appear to fulfill the McDonald Commission's aspirations for a security service to have at its disposal a full range of investigative techniques. Subsection 21(3) states:

> Notwithstanding any other law but subject to the Statistics Act, where the judge to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(a) and (b) set out in the affidavit accompanying the application, the judge may issue a warrant authorizing the persons to whom it is directed to intercept any communication or obtain any information, record, document or thing and, for that purpose,
>
> (a) to enter any place or open or obtain access to any thing;
>
> (b) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or thing; or
>
> (c) to install, maintain or remove any thing.

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[190]Freedom and Security Under the Law, The Second Report of the Commission Inquiry concerning certain activities of the R.C.M.P. (Ottawa, 1981) at p. 513

The powers of the C.S.I.S. are extremely broad. Under the authority of a warrant C.S.I.S. may employ intrusive investigative techniques such as the opening of mail, electronic surveillance, surreptitious entry, search and seizure. Further, C.S.I.S. may also obtain access to confidential government information (subject only to the Statistics Act[191]).

Section 12 of the C.S.I.S. Act states that "[t]he Service shall collect, by investigation or otherwise,...information and intelligence...". The word "otherwise" within section 12 suggests that the collection of information may also include the questioning of persons suspected of being a threat to the security of Canada, informers, or witnesses.

Hence, the number of possible violations of the Charter are considerable. It would appear that the fundamental freedoms listed in section 2, the section 7 guarantee of life, liberty and security of the person, the section 8 right against unreasonable search and seizure, the right not to be arbitrarily detained or imprisoned as set out in section 9, and the section 10 rights on arrest or detention could all be limited by the provisions of the C.S.I.S. Act. Further, although property

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[191] SC 1970 - 71 - 72 c.15, as amended by SC 1976 - 77 c. 28

rights are not entrenched in the Canadian Constitution, the rights to enjoyment of property as provided for in paragraph 1(a) of the Canadian Bill of Rights could also be jeopardized by C.S.I.S. personnel carrying out their duties pursuant to the C.S.I.S. Act.

D. JUDICIAL CONTROL OF C.S.I.S. POWERS

1. WARRANT PROCESS:

The warrant process is governed by sections 21 through 28 of the C.S.I.S. Act. An application for a warrant can be made by either the Director or an employee of the Service to a judge of the Federal Court.[192] The applicant must have "reasonable grounds" to believe that a warrant is necessary to "enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16". Further, it is a requirement that the approval of the Solicitor General be obtained before any application is made. Ministerial approval could be seen as a contribution to the Minister's accountability, and thus viewed as an additional safeguard.

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

(1) other investigative procedures have been tried and have

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[192] s. 21(1) of the C.S.I.S. Act; the definition of "judge" can be found in section 2 and means a judge of the Federal Court of Canada designated by the Chief Justice thereof for purposes of this Act.

failed or why it appears that they are unlikely to succeed; or

(2) the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures; or

(3) without a section 21 warrant it is unlikely that information of importance with respect to a threat to the security of Canada or the collection of information concerning foreign states and persons in order to assist the Minister of National Defence or the Secretary of State for External Affairs would not be obtained.

These conditions are taken from paragraph 178.13(1)(b) of the Criminal Code, which deals with electronic surveillance, and from a recommendation of the McDonald Commission.[193]

In Regina v. Atwal, the Federal Court of Appeal held, however, that a warrant will not be invalid on its face if it is silent as to the judge's specific satisfaction, on reasonable grounds, as to the matters in paragraph 21(2)(b) of the C.S.I.S. Act.[194] Further, the Court in Atwal stated that the

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[193]Macdonald, Donald "A comparison of bills c - 157 and c - 9, the Proposed Canadian Security Intelligence Service Act." Law and Government Division Research Branch Ottawa, Library of Parliament, 1984 at p. 18

[194]Regina v. Atwal (1987), C.C.C. (3d) 161 at p. 176 (Fed. C.A.)

"...failure to describe in the warrant the perceived threat to the security of Canada in terms other than the words of the Act, does not render the warrant invalid on its face."[195] The Federal court of Appeal found support for this proposition in a number of decisions involving wiretap authorizations.[196]

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

The Court in Atwál felt that it would generally be less practical to be specific, in advance, in authorizations to intercept private communications under the C.S.I.S. Act then under the Criminal Code. The Code contemplates interception of information after or during an event, while the provisions of the C.S.I.S. Act are designed to gather information to anticipate a future event. This distinction was acknowledged by the United States Supreme Court in U.S. v. U.S. District Court[197] when it stated:

> Moreover, we do not hold that the same type of standards and procedures

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[195]Ibid. at p. 178

[196]Ibid.

[197]U.S. v. U.S. District Court, 407 U.S. 292 (1972) at p.322 (U.S.S.C.)

> prescribed by Title III are necessarily applicable to this case,. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime". The gathering of security intelligence is often long range and involves the interrelations of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Paragraph 21(2)(g) along with subsection 21(5) allow a warrant to be issued for up to one year. Paragraph 21(2)(h) requires that an applicant give full disclosure of details of any previous application. This provision was included so as to eliminate the risk of "judge shopping" - the attempt to obtain a warrant after initially being refused by simply taking an application to another judge.[198]

It will be remembered that subsection 21(3) of the C.S.I.S.

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[198]Mcdonald, Donald "A comparison of bills c - 157 and c - 9, the Proposed Canadian Security Intelligence Service Act." Law and Government Division Research Branch Ottawa, Library of Parliament, 1984 at p. 19

Act gives the C.S.I.S. power, under the authority of a warrant, to enter, search and remove information, records, documents or things and to install, maintain or remove anything. It should be mentioned that subsection 21(3) does not provide for the destruction of information.

Subsection 21(4) sets out the matters to be specified in a warrant.

> There shall be specified in a warrant issued under subsection (3)
>
> (a) the type of communication authorized to be intercepted, the type of information, records, documents or things authorized to be obtained and the powers referred to in paragraphs (3)(a) to (c) authorized to be exercised for that purpose;
>
> (b) the identity or the person, if known, whose communication is to be intercepted or who has the possession of the information, record, document or thing to be obtained;
>
> (c) the persons or classes of persons to whom the warrant is directed;
>
> (d) a general description of the place where the warrant may be executed, if a general description of that place can be given;
>
> (e) the period for which the warrant is in force; and
>
> (f) such terms and conditions as the judge considers advisable in the public interest.

Subsection 21(4) combines the requirements of paragraphs (d), (e) and (f) of Section 178.12 of the Criminal Code (which prescribes the information required for successful application to obtain a wiretap) and Form 5 of the Criminal Code (the form which sets out the information to be contained in a warrant issued under section 443 of the Code). Paragraph (f), however, gives a judge discretion to require the incorporation into a warrant terms and conditions which he considers advisable in the public interest.

Subsection 21(5) of the C.S.I.S. Act states that the maximum duration for a warrant is 60 days, where a warrant is issued to enable the service to investigate activities directed toward the destruction by violence of the constitutionally established system of government in Canada (a threat to the security of Canada as defined by paragraph 2(d)), or 1 year in any other case.

In comparison paragraph 178.13(2)(e) of the Code allows electronic surveillance to continue for up to 60 days. Subsection 178.12(2) sets out the exception to this 60 days period. If the application for authorization is personally signed by the Attorney General of the province in which the application for authorization is made, or the Solicitor General of Canada if the application for authorization is made by him or on his behalf, the electronic surveillance can continue for up to 3 years. If a warrant is issued under subsection 21(3) it may be renewed on an application to the judge after the applicant has gained the approval of the Solicitor General of Canada for a period not exceeding the period for which the warrant may be issued pursuant to subsection 21(5).

Section 23 allows the persons to whom a warrant is directed to remove from any place any thing installed pursuant to a warrant issued under subsection 21(3) and for that purpose, to enter any place or open or obtain access to any thing.

Section 24 states that a warrant issued under section 21 or 23 is to have effect notwithstanding any other law. Section 24 further authorizes any other person to assist a person who that person believes on reasonable grounds is acting in accordance with such a warrant.

Section 25 of the C.S.I.S. Act provides that the Crown Liability Act is not to apply to the use or disclosure, of communications intercepted under the authority of a warrant issued pursuant to section 21 or to the disclosure of the existence of any communications.

2. <u>CONSTITUTIONALITY OF A C.S.I.S. ACT WARRANT</u>:

Section 27 of the C.S.I.S. Act states that the proceedings in regard to an application for a warrant are to be conducted in private and in accordance with regulations made by the Governor in Council pursuant to section 28. As of July first, 1988 regulations have not yet been made. Section 26 makes it clear that Part IV.I of the Criminal Code (the electronic surveillance provisions) does not apply to any interception of communications under the C.S.I.S. Act. According to the communication branch of C.S.I.S., regulations are not currently necessary because the present practice and procedure of applications for warrants is functioning properly.[199]

Some legal observers have suggested that the lack of regulations could cause the government difficulties if it attempts to enter evidence obtained with a warrant and a question is raised with regard to the warrant's validity, or alternatively, if there is an attempt to force the disclosure of court material.[200] The absence of regulations prescribing the procedure for warrant applications could cause the Government difficulty when attempting to utilize section 1 of the Charter to retrospectively justify a Charter violation carried out in accordance with a warrant issued under the provisions of the C.S.I.S. Act. Such a violation may not be "prescribed by law" as is required by section 1 of the Charter.

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[199]The information was provided to the writer during a telephone conversation with a member of the communication branch of C.S.I.S. on September 12, 1989.

[200]The Globe and Mail, "Spy Court Wields Power Secretly Without Regulation", January 24, 1985 at pp. 1 - 2

It would appear, however, that the government may not have to rely on section 1 of the Charter to justify the interception of an individual's private communications authorized by section 21 of the C.S.I.S. Act. The majority of the Federal Court of Appeal in Regina v. Atwal[201] found that a warrant issued pursuant to section 21 meets the requirements of the Charter's search and seizure provision (section 8). The Court relied on the Supreme Court of Canada's decision in Hunter et al. v. Southam Inc.[202] in which Dickson J., as he then was, said:

> The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.

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[201] Regina v. Atwal (1987), 36 C.C.C. (3d) 161 at p. 183 (Fed. C.A.)

[202] Hunter et al. v. Southam Inc. (1984), 14 C.C.C. (3d) 97; 11 D.L.R. (4th) 641; [1984] 2 S.C.R. 145 at p.115 C.C.C., 167 S.C.R. (S.C.C.)

> That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of search, constitutes the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure.

Although section 21 does not require the judge to believe, on reasonable grounds, that an offence has been committed or that evidence of the offence will be found at the place of the search the majority of the Federal Court of Appeal in Atwal felt section 21 did not fail to meet the minimum standards for a reasonable search and seizure required by the Charter. The majority of the Court in Atwal stated that Hunter anticipated that a different standard should apply when national security is involved. The Court expressed that this standard is not necessarily lower but one that takes into account reality.[203]

Hugessen's J. dissenting reasons in Atwal are more attractive than the reasons of the majority. Hugessen J. recognized that the issue is where to draw the line between the individuals' expectations of being left alone and the state's

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[203] Regina v. Atwal (1987), 36 C.C.C. (3d) 161 at p. 183 (Fed. C.A.)

need to defend itself against attack.[204] For any search or seizure to be reasonable, there must be an objective test to guide the judicial officer who is called on to authorize the intrusion. As the Supreme Court of Canada stated in Hunter[205]:

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

Hugessen J. had a view different from that of the majority[206] with respect to the passage in Hunter in which Dickson J. stated[207]:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure.

Hugessen J. reasoned that these words meant that, for a section authorizing a search warrant to be compatible with section 8 of

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[204]Ibid., at p. 196

[205]Hunter et al. v. Southam Inc. (1984), 14 C.C.C. (3d) 97; 11 D.L.R. (4th) 641; [1984] 2 S.C.R. 145 at p.114 C.C.C., 167 S.C.R. (S.C.C.)

[206]Regina v. Atwal (1987), 36 C.C.C. (3d) 161 at p. 197 (Fed. C.A.)

[207]Hunter et al. v. Southam Inc. (1984), 14 C.C.C. (3d) 97; 11 D.L.R. (4th) 641; [1984] 2 S.C.R. 145 at p.114 C.C.C., 168 S.C.R. (S.C.C.)

the Charter, a reasonable and proportionate relationship between a relevant state interest ("an offence has been committed"); and the proposed intrusion must be demonstrated ("there is evidence to be found").[208]

The majority summarily decided that it is an objective standard if a judge is required to be satisfied, on reasonable grounds established by sworn evidence, that a threat to the security of Canada exists and that a warrant is required to enable its investigation.[209] Hugesson J. however, was more convincing in his dissent, when he stated, "The words "required to enable the Service to investigate a threat to the security of Canada", employ language that is so broad as to provide no objective standard at all."[210] Even when one considers the importance of the state interest involved, the extent of a possible intrusion into the privacy of the citizen is wholly disproportionate.[211] As Hunter[212] pointed out:

> ...it is the Legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to

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[208] Regina v. Atwal (1987), 36 C.C.C. (3d) 161 at p. 197 (Fed. C.A.)

[209] Ibid., at p. 183

[210] Ibid., at p. 191

[211] Ibid.

[212] Hunter et al v. Southam Inc. (1984), 14 C.C.C. (3d) 97; 11 D.L.R. (4th) 641; [1984] 2 S.C.R. 145 at p.115 C.C.C., 169 S.C.R. (S.C.C.)

> fill in the details that will render legislation lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s.8 of the Charter.

Hugesson J. correctly demonstrated that section 21 does not provide any reasonable standard by which a judge may test the need for the warrant[213]:

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

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[213] Regina v. Atwal (1987), 36 C.C.C. (3d) 161 at p. 198 (Fed. C.A.)

Unlike Criminal Code warrants, which are subject to review by the courts at the trial of an accused, information collected, pursuant to a warrant, by the C.S.I.S. will not ordinarily be subjected to such a test. It is unusual for information collected pursuant to a C.S.I.S. Act warrant to be brought into evidence during law enforcement proceedings. Therefore the requirement that the C.S.I.S. Act contain a reasonable standard by which a judge may test the need for a warrant becomes even more evident when a subsequent review of the issuing of a warrant is unlikely.

The Court in Atwal was, however, unanimous in its decision to allow the accused access to the material used to obtain the warrant under the C.S.I.S. Act.[214] The Court stated that if the Crown believed that the disclosure of information contained in the affidavit would be harmful to the national security of Canada then sections 36.1 and 36.2 of the Canada Evidence Act[215] should have been asserted. These sections provide a procedure whereby the responsible Minister of the Crown can claim that the disclosure of material used to obtain a warrant would damage Canada's national security. In the absence of an objection under the Canadian Evidence Act the Court stated it was required to disclose the affidavit.[216]

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[214]Ibid. at p. 184

[215]Canada Evidence Act R.S.C. 1970, c. E - 10.

[216]Regina v. Atwal (1987), 36 C.C.C. (3d) 161 at p. 192 (Fed. C.A.)

The decision of the Court in Atwal, to allow an accused access to material filed in support of an application for a warrant, in the absence of an objection under the Canada Evidence Act, is not settled law. In the case of Dersch et al. v. Attorney General of Canada and Attorney General of British Columbia[217] the British Columbia Court Appeal held that the defendant be allowed access to the material used to obtain a search warrant under the Criminal Code only if he/she adduces evidence of fraud or misleading disclosure, or if access is necessary to establish the innocence of the accused.[218]

In Regina v. Kevork, Balian, and Gharakhanian[219] the Ontario High Court was faced with a case in which an accused was denied disclosure of certain evidence because of a Court order pursuant to section 36.1 of the Canada Evidence Act. The accused in Kevork applied for an order for production of documents or an order to stay proceedings on charges of conspiracy and attempted murder. The defence argued that the accused's right to fundamental justice (section 7 of the Charter) would be breached if evidence was not made available to their counsel. Smith J. stated that the burden is on the

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[217](1987) 59 C.R. (3d) 289 (B.C. C.A.); leave to appeal to the S.C.C. granted (Dec. 3/87)

[218]Ibid. at p. 299

[219]Regina v. Kevork, Balian and Charakhanian (1986), 27 C.C.C. (3d) 523 (Ont. H.C.J.)

accused to persuade the Court that there is evidence being denied of a critical nature without which the applicant will probably not be able to make full answer and defence.[220] The Court reasoned that this is a reasonable burden in order to avoid fishing expeditions in all cases where it is likely that C.S.I.S. had some hand in gathering information.

Although the Court in Kevork recognized that its decision could put an accused in a catch-22 situation,[221] unable to mount a challenge for lack of a factual basis, the alternative solution is unacceptable. As the Court stated, "To stay in the case at hand, or in any case, where only some or any material information is withheld comes close to conferring immunity from prosecution upon all those charged with terrorist acts."[222]

What is most interesting about Kevork is not so much the result of the Court's decision, but the process by which the Court reached its judgement. The Court grappled with its duty of balancing the interests of the individual to make full answer and defence and the interest of the State in national security. Although Smith J. realized that national security is a matter in which the interests of the State must sometimes be allowed to prevail over those of the individual, he did not summarily dismiss individual rights as did the majority of the Court in Atwal.

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[220] Ibid., at p.545

[221] Ibid., at p.544

[222] Ibid., at p.546

E. INTRUSIVE INVESTIGATIVE TECHNIQUES

As previously indicated, subsection 21(3) of the C.S.I.S. Act is worded in a very broad manner, particularly with respect to what types of intrusive investigative techniques C.S.I.S. employees may use to fulfill their objectives under the Act. The following is a discussion of a number of these techniques.

1. ELECTRONIC SURVEILLANCE:

Electronic surveillance is an intrusive investigative technique. The electronic bug is totally indiscriminate. It not only picks up the conversations of a guilty individual but also those of the suspected and the innocent. It has been suggested that some 1,500 people have been convicted of criminal offences arising out of U.S. police bugging in 1969 and 1970.[223] However, during the course of this surveillance American authorities listened to more than forty thousand people in more than half a million conversations.[224] Apart from gambling, the vast majority of intercepted conversations were

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[223]Schwartz, Herman, "Reflections on Six Years of Legitimated Electronic Surveillance", Privacy in a Free Society (Boston, Mass.: Roscoe Pound - American Trial Lawyers Foundation, 1974), at pp. 47, 48

[224]Schwartz, Herman, "A Report on the Costs and Benefits of Electronic Surveillance. - 1972", A.C.L.U. Report, March 1973

non-incriminating; at least seventy-five per cent according to law enforcement authorities, themselves.[225]

In the area of security and national intelligence law, enforcement agencies seem to be even less discriminating in what conversations they overhear. Federal law enforcement bugs in the U.S. lasted an average of 13.5 days and overheard an average of fifty-six people and nine hundred conversations.[226] The average national security bug in the U.S. lasted from 78.3 to 290.7 days [sic] and overheard somewhere between five thousand five hundred and fifteen thousand people.[227] A similar pattern emerges in Canadian Statistics. In 1978, the average duration of a law enforcement bug was 73.5 days,[228] while in the case of Federal Security bugs, it was as long as 244.71 days.[229]

In view of these data it is alarming to note that Canadian

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[225]U.S., Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Washington, 1976, at p.4

[226]Schwartz, Herman, Taps, Bugs and Fooling the People (published by the Field Foundation, 100 East 85th Street, New York, N.Y. June 1977), p.38

[227]Ibid.

[228]Canada, Parliament, Report of Solicitor General, Annual Report as Required by Section 178.22 of the Criminal Code, 1978.

[229]Canada, Parliament, Report of Solicitor General, Annual Report as Required by Section 16(5) of the Official Secrets Act, 1978

law enforcement agencies are more prolific "wiretappers" than their American counterparts. Notwithstanding that the Canadian legislation is similar to, and is in fact based upon, the American legislation, the relative number of wiretap authorizations in Canada is nearly twenty to one.[230]

In 1983, the last full year in which warrants were issued under the O.S.A., the Solicitor General approved 525 warrants.[231] The average length of time a warrant was in effect was 253 days.[232] In 1986 the C.S.I.S. issued 94 new warrants under section 21 and renewed 11 more under section 22.[233] The average length of time for which the 1986 C.S.I.S. warrants were in force was 162.2 days.[234] Activities authorized by C.S.I.S. Act warrants have included wiretapping, eavesdropping by microphone, capturing of optical images, interception of recorded communications, searches for documentation and paraphernalia and the interception

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[230]Law Reform Commission of Canada, "Electronic Surveillance" Woring Paper 47 (1986) at p.10

[231]Security Intelligence Review Committee, 1985 - 86 Annual Report (Ottawa: Minister of Supply and Services Canada, 1986) at p.18

[232]Ibid.

[233]Security Intelligence Review Committee, 1986 - 87 Annual Report (Ottawa: Minister of Supply and Services Canada, 1986) at p.10

[234]Ibid.

of mail.[235] However a direct comparison of the number of warrants issued under the two statutes is not possible as there are differences between them.

In general, under the O.S.A., each warrant authorized the use of only one covert technique against only one target. Hence the warrant statistics provided to Parliament under the O.S.A. accurately showed the extent to which such powers were used. Under the C.S.I.S. Act one warrant can authorize the use of many investigative techniques against many targets. Differences in the average length of time warrants were in force may be explained by the 60-day warrant provided in the C.S.I.S. Act. The 1985 annual report of the Security Intelligence Review Committee stated, after examining the recent trends in the issuing of warrants under the C.S.I.S. Act, that in the opinion of the Committee there has been no increase in the use of intrusive investigation techniques authorized by warrants over the last three years.[236]

The government argues that "...in many cases electronic surveillance techniques, such as wiretapping, provide an

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[235] Security Intelligence Review Committee, 1985 - 86 Annual Report (Ottawa: Minister of Supply and Services Canada, 1986) at p.18

[236] Ibid., at p. 19

effective means of obtaining information concerning the plans and activities of espionage, subversive or terrorist groups."[237]

Others have argued[238] that, at least with respect to serious violence against persons or property (see paragraph 2(c) of the C.S.I.S. Act's definition of a "threat to the Security of Canada") there is no need for a greater electronic eavesdropping power than what is already contained in the Criminal Code. The Code permits electronic surveillance for the investigation of more than forty criminal offences including high treason, sedition, intimidating parliament, using or possessing explosives, murder, arson, forgery, kidnapping, extortion, and even conspiracy or attempt to commit these offences both in Canada and elsewhere.[239] There would not appear to be a conceivable act of terrorism or violence which would not be covered by the Criminal Code provisions.

As mentioned paragraph 2(d) of the C.S.I.S. Act defines "threat to the Security of Canada" as including activities "intended to ultimately lead to" the overthrow by violence of

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[237]Solicitor General of Canada, "Canadian Security Intelligence Service Explanatory Notes" (Ottawa, 1984) at p.11

[238]Canadian Civil Liberties Association submission to the House of Commons Committee on Jus6tice and Legal Affirs with respect to Bill c - 9 National Security, April 5, 1984 at p. 12

[239]s.178.1 of the Criminal Code

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

The C.S.I.S. Act does not provide an indication of how probable the violence has to be in order for a warrant allowing electronic surveillance to be issued. The Security Intelligence Review Commission in their 1986-87 annual report stated that the C.S.I.S. were overestimating the likelihood of violence of some groups.[240] As an example[241] the Review Committee mentioned the case of one group targeted for investigation which publishes a magazine that deals with a wide range of topics (the arts as well as social policy and other issues) from the perspective of the left. Although some members had advocated violent action by the group, they were ignored by others. The Review Committee felt that a good case could be made that the partisans of violence in the group rated investigation as individuals but not

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[240]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Ministry of Supply and Services Canada, 1987) at p.40

[241]Ibid.

the entire group.[242] As the Review Committee stated:

> But we remain to be convinced that the group itself should be targeted for investigation. It opens the door to unnecessary intrusion on the freedoms and privacy of the most innocuous as well as of the most obnoxious members. It also carries the risk of harm to freedom of speech, on or our fundamental social values.
>
> Summing up, it is possible that any targeted group could undertake terrorist acts at some point, but most are not, on the available evidence, likely to do so in the foreseeable future.[243]

The Review Committee, therefore, appears to have provided its own standard as to how probable violence has to be for the C.S.I.S. to obtain a warrant authorizing an investigation. A "likelihood of violence in the foreseeable future" is a more certain standard than activities "intended to ultimately lead to" the overthrow by violence of the system of government in Canada.

2. <u>SURREPTITIOUS ENTRY</u>:

Surreptitious entry is the physical entry into private premises by law enforcement agents without the consent or knowledge of the occupier, for the purpose of installing or

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[242] Ibid.

[243] Ibid.

maintaining anything, or to search for, remove, return or examine anything. The usual circumstance is the installation of a radio transmitter capable of transmitting oral communications to a location outside the premises where the communications can be recorded. Although authorization pursuant to section 178 of the Criminal Code does not specifically allow surreptitious entry in order to install an electronic listening device two decisions of the Supreme Court of Canada[244] have made it clear that such authorization necessarily implies authorization to install or service the equipment.

The authorization for surreptitious entry is outlined clearly in subsection 21(3) of the C.S.I.S. Act. Unlike the search and seizure provisions or the electronic surveillance powers under the Criminal Code which generally require that the person who was the object of the interception be notified of the wiretap,[245] the target of a C.S.I.S. wiretap or surreptitious entry is very unlikely to learn what had occurred. By the very nature of the C.S.I.S. Act the goal of most investigative operations is the acquisition of

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[244]Lyons v. The Queen, [1984] 2 S.C.R. 631; Wiretap Reference, [1984] 2 S.C.R. 677 (S.C.C.)

[245]s.178.23(1) of the Criminal Code

intelligence and not the prosecution of offenders.

A warrant may permit the C.S.I.S. to intercept any communications, or obtain any information, record, document or thing.[246] The legislation is broad enough to cover all forms of communications from that which is stored in a digital form in a computer's memory bank to the opening or removing of private mail.

(3) MAIL OPENING:

Mail opening as an investigative technique is deeply rooted in Canada's English heritage. The earliest recorded instance of mail opening was in 1324 when Edward II, noting the entry into the Kingdom of "many letters prejudicial to the Crown", issued a writ commanding the interception of "all letters concerning which sinister suspicions might arise."[247] This power was later specifically recognized in the Postal Acts of England.[248] In fact, when Cromwell set up the first regular Post Office it was stated in the ordinance to be the "best

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[246]s.21(3) of the C.S.I.S. Act

[247]Report from the Secret Committee on the Post Office (House of Commons, 1844) at 45

[248]See the Post Office (Revenue) Act of 1710, 9 Anne, c.10, s.40; the Post Office (offences) Act of 1837, 1 Vict., c.36, s.25; the Post Office Act of 1908, 8 Edu. 7, c.48, s.56; and the Post Office Act of 1953, 1 and 2 Eliz. 2, c.36, s.58

means to discover and prevent any dangerous and wicked designs against the Commonwealth."[249]

Because Britain controlled the postal service in Canada during the first half of the 19th Century, there can be little doubt that mail could have been opened in Canada during this period. However, when the Canadian Inland Post Act was enacted in 1850 it was stated that it was an offence "to open unlawfully...any Post Letter...".[250] The word "unlawfully" was in the Canadian legislation until recently. Section 58 of the now defunct Post Office Act[251] stated:

> Every person is guilty of an indictable offence who unlawfully opens or willfully keeps, secretes, delays or detains, or procures, or suffers to be unlawfully opened, kept, secreted, or detains, any mail bag, post letters or other articles of mail, or any receptacle authorized by the Postmaster General for the deposit of mail, whether the same came into the possession of the offender by the finding or otherwise.

In 1981 the Post Office Act was repealed[252] and superseded

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[249]Report from the Secret Committee of the House of Lords relative to the post office (House of Commons, 1844 at 1; see the Birkett Report, 1957, at p. 8)

[250]Prov. of Canada, 13 and 14 Vict., c.17, s.16

[251]R.S.C. 1970, c. P - 14

[252]Post Office Act R.S.C. 1970, c. P - 14 repealed 1980-81 c.54, s.57 proclaimed in force Oct. 16, 1981.

by the Canada Post Corporation Act.[253] Up until July 16, 1984, subsection 38(3) of the Canada Post Corporation Act stated:

> Notwithstanding any other Act or law, but subject to this Act and the regulations, nothing in the course of the post is liable to demand, seizure or detention.

Therefore the intercepting and opening of private mail was expressly prohibited by the Canada Post Corporation Act. However, the C.S.I.S. Act incorporates the recommendation of the McDonald Commission which argued that:

> It is in their communication links that (foreign intelligence or terrorist groups) are often the most vulnerable. We think it is unwise to guarantee them a free and convenient channel of communications within Canada by exempting all mail communications from lawful examination by security officers.[254]

Hence, on July 16, 1984, subsection 38(3) was repealed[255] and the following substituted:

> Notwithstanding any other Act or law, but subject to this Act and the regulations and to the Canadian Security Intelligence Service Act, nothing in the course of post is liable to demand,

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[253]Canada Post Corporation Act S.C. 1981, c. - 54

[254]McDonald Commission, Freedom and Security Under the Law, at p. 578.

[255]s.38(3) repealed and substituted by 1983 - 84, c. 21, s.72 (proclaimed in force July 16, 1984).

seizure or detention.

The Security Intelligence Review Committee has made a particular study of mail-opening.[256] They reported that although they believe that mail interception will increase the numbers of mail-openings was small at the end of 1986.[257] The Review Committee appears to realize that the Canadian population is somewhat uneasy with the C.S.I.S. interception of mail. Because of the Canadian perception the Committee seems to be paying special attention to C.S.I.S. use of this investigative technique.

The Review Committee would like to see provisions for cooperation between Canada Post and the C.S.I.S. at a less intrusive level then mail-opening.[258] As an example the Security Review Committee is aware that Canada Post could provide C.S.I.S. with a list of names and addresses with which suspects correspond.[259] However, a question then arises as to whether or not the tracing of an individual's correspondence

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[256]Security Intelligence Review Committee, Annual Report 1986 - 87 (Ottawa: Ministry of Supply and Services Canada, 1987) at p. 11

[257]*Ibid.*

[258]*Ibid.*

[259]*Ibid.*

requires a warrant.

4. <u>EFFECTIVENESS OF INCREASED INVESTIGATIVE POWERS</u>:

It is clear that the main purpose served by the intrusive investigative techniques available to the C.S.I.S. is to apprehend harm before the country suffers injury. How much extra security is obtained by these preventative intelligence gathering techniques? In this respect, the experience of the American F.B.I. is informative. Audits performed by the independent General Accounting Office of Congress discovered that, even with an unencumbered mandate, "generally the F.B.I. did not report advance knowledge of planned violence."[260]

A member of the U.S. Senate Intelligence Committee stated that: "the F.B.I. only provided ... a handful of substantiated cases out of thousands of Americans investigated in which preventative intelligence produced warning of terrorist activity."[261]

Hence, it is questionable if the increased investigative powers of the C.S.I.S. will actually prevent threats to the security of Canada. On the other hand it is important that the

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[260]U.S. Congress Senate Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, Report No. 94 - 755 94th Congress, 2d, Session, 1976.

[261]<u>Ibid.</u> at p. 359

C.S.I.S. have the ability, if needed, to gather information about threats to Canada's security.

F. PROTECTION OF C.S.I.S. EMPLOYEES:

Subsection 20(1) of the C.S.I.S. Act states:

> The Director and employees have, in performing the duties and functions of their Service under this Act, the sole protection under the law as peace officers have in performing their duties and functions as peace officers.

Therefore, the Director and the employees of the C.S.I.S. are given the same protection which peace officers enjoy in the performance of their duties under Section 25 of the Criminal Code, and at common-law.

However, the C.S.I.S. Act would appear to acknowledge the possibility of illegal activities by members of the C.S.I.S.. Subsection 20(2) together with subsection 20(3) requires the Director of the C.S.I.S. to make a report to the Solicitor General and Federal Attorney General when he is "of the opinion" that an employee has acted illegally. After the Solicitor General receives a report from the Director he must forward it to the Attorney General "with any comment he considers appropriate in the circumstances." Pursuant to subsection 20(4) the documentation given to the Attorney General must also be given "forthwith", to the Security Intelligence Review Committee. It is interesting to note that the C.S.I.S. makes no reference to giving provincial attorneys general notice of C.S.I.S. illegalities.

Even if a C.S.I.S. employee commits a clearly illegal act no attorney general, federal or provincial, is obliged to prosecute anyone under general criminal law or any other law. It would not be expected that Parliament will learn of every decision not to prosecute in the reports of the Review Committee.

The Security Intelligence Review Committee commented on the unlawful conduct of C.S.I.S. members in both their 1985-86[262] and 1986-87[263] annual reports. The incidents reported are trivial in nature. Minor parking and traffic violations for which fines were paid,[264] failing to obtain routine signatures from a supervisor on documents authorizing certain acts and "misbehavior" off the job[265] would appear to sum up the unlawful acts of C.S.I.S. employees. There was one exception to the list of minor offences and that involved an incident of personating a

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[262]Security Intelligence Review Committee, Annual Report 1985 - 86 (Ottawa: Ministry of Supply and Services Canada, 1986) at p. 4

[263]Security Inteligence Review Committee, Annual Report 1986 - 87 (Ottawa: Ministry of Supply and Services Canada, 1987) at p. 18

[264]Security Intelligence Review Committee, Annual Report 1985- 86 (Ottawa: Ministry of Supply and Services Canada, 1986) at p. 4

[265]Security Intelligence Review Committee, Annual Report 1986 - 87 (Ottawa: Ministry of Supply and Services Canada, 1987) at p. 18

peace officer.[266] The Review Committee reported that this case was dealt with internally after conferring with the Solicitor General and the Attorney General of Canada.[267]

One potential difficulty the Director of the C.S.I.S. may face is how to know when an employee has overstepped the law or if authorization pursuant to a warrant necessarily implies authorization to commit an offence. For example, subsection 21(3) of the C.S.I.S. Act allows C.S.I.S. employees, acting under the authority of a warrant, "to enter any place or obtain access to anything". Does this authorization allow an employee to damage property to fulfil the goals of the warrant? The damaging or destruction of property (for example, the breaking of a door, a window or a lock) may constitute the criminal offence of mischief.[268] While the authorization of a warrant may constitute a "color of right",[269] upon which an employee of the C.S.I.S. could rely if charged with an offence related to his activities during the execution of a warrant, this is

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[266] Security Intelligence Review Committee, Annual Report 1985 - 86 (Ottawa: Ministry of Supply and Services Canada, 1986) at p. 4

[267] Ibid.

[268] s.387 of the Criminal Code

[269] s.386 of the Criminal Code

clearly another area where the C.S.I.S. must maintain a delicate balance between the rights of the citizens of Canada and effectively combatting threats to our national security.

G. EXCHANGE OF INFORMATION BETWEEN C.S.I.S. AND POLICE FORCES

Section 19 of the C.S.I.S. Act states:

> (1) Information obtained in the performance of the duties and functions of the Service under this Act shall not be disclosed by the Service except in accordance with this section.
>
> (2) The Service may disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,
>
> (a) where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken;
>
> (b) where the information relates to the conduct of the international affairs of Canada, to the Secretary of State for External Affairs or a

person designated by the Secretary of State for External Affairs for the purpose;

(c) where the information is relevant to the defence of Canada, to the Minister of National Defence or a person designated by the Minister of National Defence for the purpose; or

(d) where, in the opinion of the Minister, disclosure of the information to any Minister of the Crown or person in the public service of Canada is essential in the public interest and that interest clearly outweighs any invasion of privacy that could result from the disclosure, to that Minister or person.

(3) the Director shall, as soon as practicable after a disclosure referred to in paragraph (2)(d) is made, submit a report to the Review Committee with respect to the disclosure.

Therefore, Section 19 of the C.S.I.S. authorizes the disclosure of information collected by the C.S.I.S. to law enforcement bodies, the Department of External Affairs, the Department of National Defence or to any minister of the Crown or, under special circumstances, to a person in the public service.

Under subsection 178.2(1) of the Criminal Code it is an offence to disclose or use a private communication or any part thereof that has been intercepted without the consent of the originator of the communication or of the person intended by the originator thereof to receive it. However, paragraph 178.2(2)(f) states that subsection (1) does not apply "where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties or functions under section 12 of the Canadian Security Intelligence Service Act."

The combined effect of paragraph 178.2(2)(f) of the Criminal Code and paragraph 19(2)(a) of the C.S.I.S. Act is to allow free exchange of information between the police and the C.S.I.S.. Paragraph 19(2)(a) of the C.S.I.S. Act allows the police to use information collected by the C.S.I.S. to investigate or prosecute "...an alleged contravention of any law of Canada or a province..." Hence, police forces will be privy to information collected by intrusive investigative techniques not available to them.

Is such an exchange between the C.S.I.S. and the police appropriate? As outlined there is a wide range of activities which could be interpreted as being a "threat to the security of Canada". The possibility exists that the powers conferred on the C.S.I.S. to investigate a "threat to the security of Canada" would be used simply to aid police investigations.

There are a great number of individuals who, although not suspected of violating provisions of the C.S.I.S. Act, may incidentally be subject to intrusive investigative techniques of C.S.I.S. employees. Although extreme intrusions of a person's privacy can be justified to protect the security of Canada, it can be argued that information of an alleged offence which does not arise out of conduct constituting a threat to the security of Canada should not be made available to the police. Otherwise C.S.I.S. employees may choose more intrusive investigative techniques than are necessary to fulfil their objectives, in hopes of gathering information which will be helpful to police forces.

The Review Committee[270] shares the view of the McDonald Commission[271] that the C.S.I.S. ordinarily has a duty to tell the police what it knows about criminal activities. To buttress their position the Review Committee put forth a hypothetical example[272] in which a C.S.I.S. surveillant parked in shadow saw someone breaking into a jewelry store window, looking for all the world like a burglar at work. Quite understandably the

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[270]Security Intelligence Review Committee, 1986 - 87 Annual Report, (Ottawa: Ministry of Supply and Services Canada, 1987) at p. 26

[271]Freedom and Security under the Law, the Second Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (Ottawa, 1981), at p. 605

[272]Security Intelligence Review Committee, 1986 - 87 Annual Report (Ottawa: Ministry of Supply and Services Canada, 1987) at p. 26

Review Committee believes that the police should be called in. The evidence gathered in the Review Committee's example was not collected by the use of intrusive investigative techniques. If, for example, a C.S.I.S. employee who, while opening a suspect's mail, discovered that a correspondent of the suspect grows marijuana plants in his house, the C.S.I.S. is under the same duty to inform the local police department of their discovery as they were when they observed the jewelry store being broken into. The unfortunate correspondent may be subject to criminal prosecution because he was incidentally the subject of an intrusive investigative technique unavailable to the police.

Another facet of the exchange of information between the C.S.I.S. and the police is the fact that subsection 19(2) states that the C.S.I.S. "may" disclose information to a police officer. There is no positive duty for the C.S.I.S. to pass on information, to which it has access, to the police. There would appear to be a good reason why the C.S.I.S. has the discretion to either divulge information to the police or remain silent. As the Security Intelligence Review Committee acknowledged,[273] if a police investigation or perhaps evidence at a subsequent trial could cause irreparable damage to a vital security

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[273] Ibid.

operation then the information should not be shared with the police. If this is the reason that the C.S.I.S. has the discretion to either pass on information to the police or remain silent it should be articulated in the C.S.I.S. Act.

It is suggested that section 19 of the C.S.I.S. Act be amended so as to only allow the C.S.I.S. to share information, gathered by means otherwise unavailable to the police, with police forces when the information pertains to offences defined in sections 46 to 63 of the Criminal Code, an offence contained in the O.S.A., or an offence which is related to a "threat to the security of Canada" as defined by section 2 of the C.S.I.S. Act, and the exchange of information does not irremediably compromise a vital security operation.

H. INDEPENDENT REVIEW OF C.S.I.S. ACTIVITIES

As discussed, before the C.S.I.S. Act was drafted a transitional group was set up to study the recommendations of the McDonald Commission and develop specific plans for creating a new security agency. One of the basic principles, to which the transitional group gave paramount importance, was that the new agency must "be open to a satisfactory external review, ensuring that the agency does not abuse its powers and that it is not misused by government."[274]

The abuse of C.S.I.S. powers, or the mismanagement of its operations, could have serious repercussions both on the security of Canada and on individual Canadians. To combat the potential abuse or mismanagement, an independent review process was established.

The independent review process consist of three elements: Parliament, the Inspector General and the Security Intelligence Review Committee. This thesis will discuss the function of the Security Intelligence Review Committee in some detail. The role of the Inspector General and that of Parliament will however be only briefly mentioned.

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[274]Canadian Security Intelligence Service Explanatory Notes, Solicitor General Canada, 1984, at p.2

1. INSPECTOR GENERAL:

Pursuant to section 30 of the C.S.I.S. Act the Governor in Council must appoint an officer to be known as the Inspector General. The Inspector General is responsible to the Deputy Solicitor General of Canada. The job of the Inspector General is to monitor the compliance of C.S.I.S. to its operational policies and to review its operational activities. Section 31 of the C.S.I.S. Act allows the Inspector General access to any information under the control of C.S.I.S..

Further, when the Director of C.S.I.S. submits reports to the Solicitor General of Canada with respect to the operational activities of C.S.I.S., it is the duty of the Inspector General to certify that he is satisfied with the contents of the report or, if not, to comment upon them.[275] All reports, including the comments of the Inspector General, are forwarded to the Security Intelligence Review Committee after they have been received by the Solicitor General.[276]

2. SECURITY INTELLIGENCE REVIEW COMMITTEE:

(a) Composition and Term of Office:

Pursuant to subsection 34(1) of the C.S.I.S. Act, the

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[275]C.S.I.S. Act s.33(1) and s.33(2)

[276]Ibid. s.33(3)

Security Intelligence Review Committee is to consist of a Chairman and not less than two and not more than four other members, all of whom are to be appointed by the Governor in Council. All of the members of the Committee must be chosen from among members of the Queen's Privy Council for Canada who are not members of the Senate or the House of Commons. Subsection 34(1) states that the Governor in Council is to make his appointments only after consultation with the Prime Minister, the leader of the Opposition, and the leader in the House of Commons of each party having at least twelve members in that House.

The term of office of each member of the Review Committee is five years provided that during their appointment they are of "good behaviour".[277] A member of the Review Committee is also eligible to be reappointed for a term not to exceed five years.[278]

Although the Canadian Civil Liberties Association welcomed the concept of an external review mechanism for C.S.I.S., it felt that the members of the Review Committee should not be

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[277]*Ibid.* s.34(2)

[278]*Ibid.* s.34(3)

Privy Councillors.[279] Their point is well made. As Privy Councillors "...they are likely to have an insiders mentality."[280] It is unfortunate that the only qualification to become a member of the Review Committee is that the individual has to have been a member of the Privy Council. Even though the current Review Committee of five members consists of four lawyers, there is no requirement that members have any legal training. This is particularly worrisome as the Committee also has to act in a quasi-judicial role as a complaints tribunal.[281]

The Canadian Civil Liberties Association also took issue with the term of office that the members of the Review Committee are appointed to serve.[282] Since it is the Government which must decide whether any member of the Review Committee's term would be renewed, Committee members may be

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[279]Submissions to the House of Commons Committee on Justice and Legal Affairs, Re B.11 C - 9 National Security; From the Canadian Civil Liberties Association, April 3, 1984, at p. 29

[280]Ibid.

[281]C.S.I.S. Act s.42

[282]Submissions to the House of Commons Committee on Justice and Legal AFfairs, Re B.11 C - 9 National Security; From the Canadian Civil Liberties Association, April 3, 1984, at p. 29

tempted to curry favour with the Government. At very least, the Committee Members will be susceptible to such a perception.[283] To combat this possible flaw the Canadian Civil Liberties Association suggested that there should be financial benefits to enable members of the Review Committee to live comfortably after their term of office expired.

(b) Review Function:

The Review Committee is required[284]:

(a) to review all reports from the Director of the C.S.I.S. to the Minister, and to review the certificates of the Inspector General;

(b) to review directions issued by the Solicitor General to the C.S.I.S..

(c) to review arrangements entered into by the C.S.I.S. with foreign and provincial agencies and police forces, and to monitor the provision of information and intelligence pursuant to those arrangements;

(d) to review any report or comment made to the Attorney General of Canada by the Solicitor General about any unlawful conduct which C.S.I.S. may have been involved;

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[283]<u>Ibid.</u> at p. 31

[284]C.S.I.S. Act s.39(a)(i) - (vii) and s.38(b)

(e) to monitor any request made to the C.S.I.S. by the Minister of National Defence or the Secretary of State for External Affairs to collect information or intelligence relating to the capabilities, intentions or activities of any foreign state or persons other than Canadian citizens, permanent residents or Federal or Provincial corporations;

(f) to review all internal regulations of the C.S.I.S.;

(g) to compile and analyse statistics on the operational activities of the C.S.I.S.;

(h) to arrange for reviews of specific C.S.I.S. activities to be conducted by C.S.I.S. or by the Inspector General, or if it considers that a review by the Service or the Inspector General would be inappropriate, conduct such a review itself.

(c) Complaint Function Regarding the C.S.I.S.:

Section 41 of the C.S.I.S. Act directs the Review Committee to conduct investigations of complaints made about "any act or thing done by the Service". There are three limitations on the right to complain. Firstly, a complaint must be made initially to the Director of the C.S.I.S..[285] The Review Committee can then accept a complaint if a complainant has not received a response within such period of

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[285]C.S.I.S. Act s.41(1)(a)

time as the Committee considers reasonable or if the complainant is not satisfied with the Director's response. Secondly, the Review Committee can decide not to hear a complaint if it is satisfied that the complaint is trivial, frivolous, vexatious, or made in bad faith.[286] Thirdly, the Review Committee is not permitted to investigate a complaint that can be channeled through another grievance procedure under the C.S.I.S. Act or the Public Service Staff Relations Act.[287]

In the 1985-1986 annual report the Committee stated that almost all complaints made against the C.S.I.S. came from its own employees and focused on just two issues. The first issue has to do with the language policy of the C.S.I.S.. There were 480 complaints, filed by 21 persons, that internal documents were provided in English only, contrary to official languages policy requirements that the documents be made available in both English and French.[288] Staff relations in the C.S.I.S. concerning the use of both official languages were

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[286]Ibid., s.41(1)(b)

[287]Ibid., s.41(2)

[288]Security Intelligence Review Committee, Annual Report 1985 - 86 (Ottawa: Minister of Supply and Services Canada, 1986) at p. 33

sufficiently strained to cause the Review Committee to submit a special report to the Solicitor General of Canada.[289] The name of this report was "Closing the Gaps - Official Languages and Staff Relations in the Canadian Security Intelligence Service."

Of the remaining 49 complaints against the C.S.I.S. 45 were filed by C.S.I.S. employees who felt that their chances of promotion were unnecessarily limited because,they felt, surveillance officers cannot transfer into investigation jobs.[290] The Review Committee reported that there were only 4 complaints against the C.S.I.S. from non-employees. Three of these complaints were found to be outside the Committee's jurisdiction and one was still under discussion with the C.S.I.S..

It would appear, at least in the early stages of the C.S.I.S., that the mandate of the Review Committee to conduct investigations into complaints against the C.S.I.S. mainly provides its own employees with an avenue to complain about

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[289]"Closing the Gaps", Official Languages and Staff Relations in the Canadian Security Intelligence Services, Minister of Supply and Services Canada, 1987

[290]Security Intelligence Review Committee, Annual Report 1985 - 86 (Ottawa: Minister of Supply and Services Canada, 1986) at p. 33-34

office policies.

(d) Complaint Function Regarding Security Clearances:

Distinct from the Review Committee's review function is its role as a complaints tribunal to consider and report on any matter having to do with federal security clearances. Section 42 of the C.S.I.S. Act states:

> (1) Where, by reason only of the denial of a security clearance required by the Government of Canada, a decision is made by a deputy head to deny employment to an individual or to dismiss, demote or transfer an individual, the deputy head shall send, within ten days after the decision is made, a notice informing the individual of the denial of the security clearance.
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> (2) Where, by reason only of the denial of a security clearance required by the Government of Canada to be given in respect of an individual, a decision is made to deny the individual or any other person a contract to provide goods or services to the Government of Canada, the deputy head concerned shall send, within ten days after the decision is made, a notice informing the individual and where applicable, the other person of the denial of the security clearance.
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> (3) The Review Committee shall receive and investigate a complaint from
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> (a) any individual referred to in subsection (1) who has been denied a security clearance; or
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> (b) any person who has been denied a contract to provide goods or services to the Government of Canada by reason only of the denial of a security clearance in respect of that person or any individual.

Section 42 requires the government to inform an individual who has had his security clearance denied and is adversely affected in his employment with the federal government as a result. Until the C.S.I.S. Act was proclaimed many individuals were unaware that they had been denied a security clearance. Moreover, those that were informed that they had been denied a security clearance were often not told why their application for securtiy clearance had been denied.[291]

In their 1985-86 annual report the Review Committee stated that hearings had been completed and recommendations made in 21 security clearance cases.[292] Although they had received more than 600 complaints, fewer than 100 raised strictly security issues.[293] In only eight of the 21 cases in which the Review Committee made findings and recommendations did it support the denial of security clearances. In five of the eight cases the Review Committee recommended that the security status of the individual concerned be reviewed earlier than planned.

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[291] Security Intelligence Review Committee, Annual Report 1984 - 85 (Ottawa: Minister of Supply and Services Canada, 1985) at p. 6

[292] Security Intelligence Review Committee, Annual Report 1985 - 86 (Ottawa: Minister of Supply and Services Canada, 1986) at p. 29

[293] Ibid.

These recommendations were accepted.[294] In only three of the 21 cases considered did the Committee support the denial of security clearances without making any recommendations.[295]

The first of the three cases in which the Review Committee supported the denial of a security clearance, without interference, centered exclusively on the complainant's association with a Marxist-Leninist group.[296] The platform of the Marxist-Leninist group, which the individual was associated, included the use of violence to assist in the overthrow of Canada's present system of government. As with all the cases which it reviews the Committee used the definition of "security assessment" from section 2 of the C.S.I.S. Act to guide its decision whether or not to disturb a denial of security clearance to an individual. According to section 2 a "security assessment means an appraisal of the loyalty to Canada and, so far as it relates thereto, the reliability of an individual." In this case the Committee found that association with a group espousing the use of violence against our system of government cast doubt on the

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[294] Ibid.

[295] Ibid.

[296] Ibid. at p. 54

individual's loyalty to Canada.[297]

The second and third cases in which the Committee recommended that the denial of a security clearance be undisturbed involved members of the armed forces.[298] In the second case the complainant argued that religious beliefs and anti-nuclear views were the cause of the security clearance denial and complained that this was unjust.[299] The Committee, while noting the right of Canadians to hold the views espoused by the complainant, concluded that the strength of those beliefs made the complainant vulnerable to groups or individuals who had aims adverse to Canada's national security.[300] The third case in which the Committee refused to grant relief to a complainant alleging he was improperly denied a certain level of security clearance involved allegations concerning character traits. As with many of the 21 cases which the Committee reviewed they noted that a number of the incidents in question were unsubstantiated, or were mere

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[297] Ibid.

[298] Ibid. at pp. 56 - 57

[299] Ibid. at p. 56

[300] Ibid. at p. 60

hearsay.[301] However, the Committee noted that there was evidence that the individual had not been forthright with them, and had expressed allegiance to countries other than Canada thus raising questions as to both honesty and loyalty.[302]

When reviewing the decisions of the Review Committee it becomes apparent that they made a sincere, and what appears to have been a successful, attempt to differentiate between evidence which called into question a complainant's loyalty to Canada, or reliability as it related to loyalty, and evidence which related to a complainant's defect in character. The Review Committee noted that a previous "defect in character" such as drug use, loose morals, association with known criminals or a suicide attempt could lead to the denial of security clearance if it would so seriously affect the complainant's current reliability as to render him unqualified to hold a security clearance. However, the Committee concluded that such a former defect, in and of itself, would not render the complainant unqualified to hold a security clearance.[303]

The Review Committee commented in their 1985-1986 annual

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[301] Ibid. at p. 61

[302] Ibid.

[303] Ibid. at pp. 53 - 61

report that the Department of National Defence, which was by far the largest source of complaints with respect to security clearances, was not taking enough care in distinguishing between threats to national security and personnel problems when assessing security clearance applications.[304] The Review Committee felt that many of the cases which reached the Committee from the Department of National Defence should not have done so.[305] The Review Committee's criticism was particularly strong when the occasional use of of soft drugs was the principal issue. While the Committee made it clear that they understood the need for strict standards concerning even the minor use of drugs in the Forces, they did not believe that the security clearance procedure should be used as a weapon in the battle against drug abuse.[306]

It can be assumed that it was the Review Committee's criticism of the type of evidence that the Department of National Defence considered important when considering a security clearance application which led to the Department advocating that the Canadian Armed Forces should be exempt from

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[304]<u>Ibid.</u> at p. 31

[305]<u>Ibid.</u>

[306]<u>Ibid.</u>

the security clearance review function of the Security Intelligence Review Committee as provided for in Part III of the C.S.I.S. Act.[307] The Department of National Defence's position, as enunciated by the Review Committee, is that the adjudicative procedures provided in the C.S.I.S. are inappropriate for complaints from military personnel about the denial of security clearance.[308] The Review Committee does not support the Department of National Defence's suggestion.[309]

The security clearance function of the Review Committee, as prescribed by the C.S.I.S. Act, is not without its problems. In fact, the Security Intelligence Review Committee has itself questioned some of the provisions of the C.S.I.S. Act. For example, the Review Committee is concerned that the definition of "threats to the security of Canada" in section 2 of the C.S.I.S. Act is too broad.[310] Further, the definition in section 2 of the C.S.I.S. Act of "security assessment" is uncertain as to scope and meaning.

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[307] Ibid. at p. 45

[308] Ibid.

[309] Ibid.

[310] Ibid. at p. 44

It is not clear what either the words "loyalty" or "reliability" in section 2 mean. Is a person's loyalty to Canada or reliability as it relates to loyalty suspect if that person chooses to invest a substantial sum of money in another country, or has political affiliations to an organization which opposes the government's position on the number of refugees allowed to seek refuge in Canada? The C.S.I.S. Act also does not contain any guidelines as to what extent, if any, life-style issues such as the use of drugs, alcoholism, or homosexuality, should be considered on security clearance applications.

Despite the lack of direction from the C.S.I.S. Act itself, the Security Intelligence Review Committee appears to have done an admirable job in reviewing complaints with respect to denials of security clearances. It is suggested that the reason that the Review Committee has been successful is due to the manner in which the C.S.I.S. itself deals with security clearances. The organization appears to have avoided detailed regulations and adopted a more flexible approach to employment policies with respect to those persons whose security clearance applications may raise life-style issues. This approach allows the Review Committee to focus on an individual's possible threat to the security of Canada if given access to confidential information, as opposed to an individual's personal problems.

C.S.I.S.'s employment policy regarding homosexuals is an example of their sensible approach to hiring. On March 29, 1985 the Chairman of the Review Committee wrote to the Director of the C.S.I.S. asking him for information about the employment policy of C.S.I.S. with respect to homosexuals.[311] The Review Committee had been informed that both the Armed Forces and the R.C.M.P. refuse to employ or retain known homosexuals.[312]

The Director of C.S.I.S replied to the Chairman's letter explaining that C.S.I.S. did not have a formal policy on the employment of homosexuals. The response to the Chairman's request went on to state that C.S.I.S. did not intend to issue detailed guidelines and regulations, but intended to rely on the "intelligent and humane application of broad policies."[313] The Director stated that he intended not to rely on detailed guidelines because the organization is small and this may help facilitate the civilianization of

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[311]Security Intelligence Review Committee, Annual Report 1984 - 85 (Ottawa: Minister of Supply and Services Canada, 1985) at p. 13

[312]Ibid.

[313]Ibid. at p. 14

C.S.I.S..[314] The Review Committee felt that this was an entirely acceptable approach.[315]

The Review Committee's approval of the flexible approach taken by the Director of the C.S.I.S. is an indication of the manner in which the Review Committee responds to complaints about security assessments from other departments of the Federal Government. The message which the Review Committee would appear to be sending those involved in deciding if individuals should be denied security clearances, is to assess each individual applicant's loyalty to Canada and only consider personal traits or past indiscretions as they may relate to the individual being a security risk. This message appears to have been received by the Department of National Defence (DND). In the Review Committee's 1986-1987 annual report it was stated "that DND showed some real sensitivity to individual dignity by radically revising its security clearance procedures."[316] New complaints against the Department of National Defence

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[314]Ibid.

[315]Ibid.

[316]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Minister of Supply and Services Canada, 1987) at p. 55

totalled zero in 1986-1987.[317]

(e) Investigation of Complaints:

The investigation of complaints takes the form of a hearing. All investigations of complaints are conducted in private by the Review Committee.[318] The complainant, deputy head concerned, and the Director of the C.S.I.S. are all given the opportunity to make representations to the Review Committee, present evidence and to be heard personally or by counsel.[319] No one, however, is entitled as of right to be present during, to have access to or to comment on representations made to the Review Committee by any other person.[320] It therefore appears that the Review Committee can receive evidence without any other party present. This would make it impossible for a complainant's lawyer to refute evidence of other witnesses. Rule 48 of the "Rules of Procedure of the Security Intelligence Review Committee in relation to its function under paragraph 38(c) of the Canadian Security

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[317] Ibid.

[318] C.S.I.S. Act s.48(1)

[319] Ibid. s. 48(2)

[320] Ibid.

Intelligence Service Act"[321] (Rules of Procedure) sets out the situations in which the Review Committee will allow a party the right to cross-examine witnesses called by other parties.

Rule 48 provides that, subject to compliance with an oath of secrecy not to disclose any information acquired by the members of the Review Committee by reason of the performance of their duties;

> (2) . . . it is within the discretion of the assigned members in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected to determine if the facts of the case justify that a party be given the right to cross-examine witnesses called by other parties.
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> (3) . . . it is within the discretion of the assigned members to exclude from the hearing, upon request, one or more parties during the giving of evidence or the making of representations by another party.
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> (4) . . . it is within the discretion of the assigned members in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected to determine, when a party has been excluded from portions of the hearing, if the facts of the case justify that the substance of the evidence given or representations made by other parties should be disclosed to that party.

Before members of the Security Intelligence Review Committee

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[321]Adopted March 9, 1985

decide that the substance of the evidence or the representations made by other parties shall be disclosed to a party, they are obliged to consult the Director of the C.S.I.S. to ensure that the disclosure does not violate their oath of secrecy.[322]

The balancing test as described by rule 48 is a logical compromise between the need to prevent threats to the security of Canada and the need to provide fairness to a complainant. If a complainant is a threat to the security or Canada then it is important that an investigation, as carried out by the Review Committee, does not allow a complainant to use the hearing as a process of obtaining more "secret" information about Canada. On the other hand, it is equally important that if someone makes a complaint against the C.S.I.S. or is unfairly denied a security clearance that he or she be given an opportunity to have his or her concern reviewed in a fair and open manner.

Section 50 of the C.S.I.S. Act provides that the Review Committee has the power to call witnesses to give written or oral evidence, administer oaths and receive and accept all

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[322]Rule 48(5) of the Rules of Procedure of the Security Intelligence Review Committee in Relation to its function under paragraph 38(c) of the Canadian Security Intelligence Service Act. Adopted March 9, 1985 .

documents it sees fit (whether or not such information would be admissible in a court of law) in order to complete its investigation. Further, subsection 39(2) of the C.S.I.S. Act allows the Review Committee to have access to any information under control of the C.S.I.S., the Inspector General, and the Deputy Solicitor General.

One major limit on the investigative powers of the Review Committee is that they are not entitled to have access to "a confidence of the Queen's Privy Council for Canada" which could be withheld under subsection 36.3(1) of the Canada Evidence Act.[323] This limit could prevent the Review Committee from having information necessary for the full performance of their duties. In their 1986-87 Annual Report the Review Committee stated that they did not feel that this was a severe limitation but admitted that they could not really assess how much important information they were missing.[324] In this report the Review Committee expressed concern that not being entitled to be told Cabinet confidences could be a problem if a Cabinet

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[323]C.S.I.S. Act s.39(3)

[324]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Minister of Supply and Services Canada, 1987) at p. 68

spread the mantle of confidentiality too widely.[325]

When the C.S.I.S. Act was proclaimed the Canadian Human Rights Act,[326] the Citizenship Act[327] and the Immigration Act[328] were amended so as to provide for a review of cases having to do national security matters by the Review Committee. This thesis will not discuss the amendments to these acts in detail. In brief, the overall effect of the amendments was to give individuals affected by them the opportunity for an independent review of the national security considerations applicable in each case.

(f) Reporting and Effect of Decisions:

After the hearing and upon completion of the investigation the Review Committee is to report its findings.

Upon finishing an investigation of a complaint against the C.S.I.S. the Review Committee is to provide the Minister and the Director of the C.S.I.S. with a report of its findings and any recommendations that the Committee considers

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[325] Ibid.

[326] Canadian Human Rights Act, R.S.C. 1985, c. H-6

[327] Citizenship Act, R.S.C. 1970, c. 108

[328] Immigration Act 1976- 77, c.52

appropriate.[329] At the same time the report is provided to the Solicitor General and the Director of the C.S.I.S. the Review Committee must report the findings of the investigation to the complainant and may, if it thinks fit, report to the complainant any recommendations it made to the Minister and Director.[330]

After an investigation and hearing with respect to a complaint about the denial of security clearance the Review Committee is to provide the Solicitor General, the Director of the C.S.I.S., the deputy head concerned, and the complainant with a report containing any recommendations that the Committee considers appropriate. The report may also contain those findings of the investigation that the Committee considers fit to report to the complainant.[331]

Although the Review Committee is the watchdog of the C.S.I.S. and security denials to government employees, we are still unsure of the extent of its bite. It appears that "recommendations" of the Review Committee bind the federal government, at least in regard to recommendations made by the

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[329]C.S.I.S. Act s.52(1)(a)

[330]Ibid., s.52(1)(b)

[331]Ibid., s.52(2)

Review Committee about security clearance denials to government employees.

In the unreported case of Thomson v. The Queen[332] the Federal Court of Appeal stated that the Review Committee has the power to force federal department officials to issue security clearances to government employees or to would-be employees.[333]

The Thomson case would appear to lack precedential weight because it found that the Court did not have jurisdiction under section 28 of the Federal Court Act[334] and the case should have been reviewed by the Federal Court.[335] Nevertheless, the judgment of the Court clearly rejected the Crown's argument that federal officials are not bound by the "recommendations" of the Review Committee with respect to security clearances. The Court concluded that after a complaint had been made about a security clearance denial, the decision as to the validity of the denial does not lie with the deputy head of a department but rests with the Review Committee acting under its statute.

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[332]Thomson v. The Queen March 7, 1988 (Fed. C.A.)

[333]Ibid.

[334]Federal Court Act R.S.C. 1985, c. F-7

[335]Thomson v. The Queen March 7, 1988 (Fed. C.A.)

The deputy head is then bound to follow the recommendations put forth by the Review Committee.[336]

The Court stated that a number of the C.S.I.S. Act's features showed that Parliament intended "to provide the complainant with redress rather than with merely an opportunity of stating his case and of learning the basis for the denial."[337] The Court decided that the quassi-judicial manner with which Parliament legislated the Review Committee to act indicated that Parliament did not use the word "recommendations" in its literal sense.[338] Therefore the Court did not interpret the word "recommendations" in the literal sense.[339] The Court felt that in the context of the C.S.I.S. Act the recommendations made by the Review Committee to the government as to the correctness of the denial of a security clearance were meant to be binding.

The Court of Appeal's interpretation in Thomson of the powers of the Review Committee could be relied on in other contexts, for example in terms of the Committee's

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[336] Ibid.

[337] Ibid.

[338] Ibid.

[339] Ibid.

recommendations to the C.S.I.S. with respect to complaints received about C.S.I.S. activities.

3. PARLIAMENT:

Section 53 of C.S.I.S. Act states:

> The Review Committee shall, not later than September 30 in each fiscal year, submit to the Minister a report of the activities of the Committee during the preceding fiscal year and the Minister shall cause each such report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the day the Minister receives it.

Parliament will, therefore, have the opportunity to review the report and assess the activities of C.S.I.S..

I. CONCLUSIONS ON THE C.S.I.S. ACT

According to subsection 69(1) of the C.S.I.S. Act, five years after the Act comes into force a comprehensive review of the provisions and operation of the Act is to be completed by a committee of the House of Commons or of both Houses of Parliament. The committee is to be appointed by Parliament. Subsection 69(2) of the C.S.I.S. Act states that the committee which is charged with the review of the C.S.I.S. Act is to submit a report to Parliament including a statement of any changes the committee recommends. This report is to be presented to Parliament within a year after the review is undertaken or within such further time as Parliament may authorize.

The C.S.I.S. Act is scheduled to get its five year review in 1989. Like a number of the Criminal Code and O.S.A. provisions referred to in this thesis, the C.S.I.S. Act contains defects in both form and content.

1. DEFECTS IN FORM:

The uncertainty as to meaning of crucial words and expressions contained in the C.S.I.S. Act is a major defect of the Statute.

The Security Intelligence Review Committee in both their

1985-86[340] and their 1986-87[341] annual reports have expressed concern that the definition of "threats to the security of Canada" in section 2 of the C.S.I.S. Act may be too broad. The lack of a more precise definition as to what is a "threat to the security of Canada" has not provided the C.S.I.S. with a clear enough mandate as to what activities they should, and what activities they should not, be investigating. As the Review Committee commented: "[S]ome of the threats described by C.S.I.S. are clear-cut; all loyal Canadians would agree that they deserve the Service's unremitting attention. But some left us perplexed."[342]

The Review Committee reported that one subject evaluation report prepared by the C.S.I.S. spoke of a certain organization's "attack on the anti-communist, pro-U.S. government of El Salvador... in direct support of ... policy objectives to ... blunt American foreign policy."[343] On the

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[340]Security Intelligence Review Committee, Annual Report 1985-86 (Ottawa: Minister of Supply and Services Canada, 1986) at p. 44

[341]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Minister of Supply and Services Canada, 1987) at p. 37

[342]Ibid.

[343]Ibid.

other hand, the Review Committee noted that there seems to have been minimal C.S.I.S. interest in fund-raising inside Canada for the Contra rebels in Nicaragua.[344] This lack of interest in the fund-raising activities of the Contra's existed even though support of the Contra rebels seems to meet the criterion of paragraph 2(c) of the C.S.I.S. Act, "activities within...Canada...in support of the...use of acts of serious violence against persons or property for the purpose of achieving a political objective within...a foreign state".

The contrast in levels of interest exhibited by C.S.I.S. with respect to persons supporting the objectives of the government of El Salvador and those persons supporting the Contra rebels is an indication of the lack of direction provided by the C.S.I.S. Act as to which activities should be investigated as threats to the security of Canada.

This contrast added weight to the Review Committee's concern that C.S.I.S. may too readily accept the foreign policy objectives of our allies as its own and neglect Canadian foreign policy.[345] The McDonald Commission had also

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[344] Ibid.

[345] Ibid. at p. 23

pointed out the the danger of adopting the "outlook and opinions of a foreign agency, especially an agency which has come to be depended upon heavily".[346] Perhaps the C.S.I.S. should be allowed to conduct information-gathering operations abroad so as not to have to rely on foreign intelligence reports when deciding whether or not a certain organization or individual poses a threat to the security of Canada. The broader policy issue of C.S.I.S. taking an active role in collecting intelligence abroad was mentioned by the Review Committee, in their 1985-86 annual report, as a topic of future debate when the C.S.I.S. Act is reviewed by Parliament in 1989.[347]

Another source of uncertainty which is found in the C.S.I.S. Act is related to the meaning of the phrase "security assessment". The definition of "security assessment" prescribed by the C.S.I.S. Act is inadequate. Section 13 of the C.S.I.S. Act permits C.S.I.S. to perform security assessments for foreign governments. The only definition in

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[346]Freedom and Security Under the Law, the Second Report of Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (Ottawa, 1981), at p. 632

[347]Security Intelligence Review Committee, <u>Annual Report 1985-86</u> (Ottawa: Minister of Supply and Services Canada, 1986) at p. 37

the C.S.I.S. Act of "security assessment" is located in section 2.

According to section 2 "security assessment" means an appraisal of the loyalty to Canada and, so far as it relates thereto, the reliability of an individual." This is the same definition of "security assessment" that is used by the Security Intelligence Review Committee to assess the validity of an individual's complaint of being denied a certain level of security clearance. This definition would not appear to be applicable to security assessments undertaken, pursuant to section 13, for a foreign government. Therefore, the C.S.I.S. Act does not provide any indication of what the criteria for security assessments, undertaken for a government of a foreign state, would be.

As discussed, the definition of "security assessment" in section 2 of the C.S.I.S. Act provides little guidance for the Review Committee. It is not clear what either the words "loyalty" or "reliability" mean in the context in which they are referred to in section 2.

2. <u>DEFECTS IN CONTENT</u>:

The conclusion of this part of the thesis will concentrate on two areas of concern. Firstly, the availability of intrusive investigative techniques to C.S.I.S. employees will be analyzed. Secondly, the possibility that some of the sections may infringe the Charter will be reviewed.

(a) Availability of Intrusive Investigative Techniques:

In an attempt to prevent the C.S.I.S. from itself becoming a threat to the political system the C.S.I.S. Act contains a relatively involved approval system for warrants. Usually an application for a warrant originates with an investigator.[348] After an application is reviewed by senior officers and by a formal Warrant Review Committee[349] it must be personally approved by the Solicitor General in advance of it going before a judge of the Federal Court. There is, however, no provision for speedy approval if an emergency situation exists.

Under the O.S.A. it was possible to obtain a warrant in about three hours.[350] It is the Review Committee's

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[348]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Minister of Supply and Services Canada, 1987) at p. 12

[349]Ibid.

[350]Security Intelligence Review Committee, Annual Report 1985-86 (Ottawa: Minister of Supply and Services Canada, 1986) at p. 44

impression[351] that the lack of an emergency procedure to obtain a warrant in the C.S.I.S. Act will weaken C.S.I.S. effectiveness. As an example the Review Committee referred to a scenario in which C.S.I.S. obtains information about a terrorist stopping over briefly in Canada between flights.[352] It is this type of situation in which the current warrant approval system may prove to be too slow.

The Security Intelligence Review Committee has suggested that the C.S.I.S. Act should be amended so as to allow the Director of the C.S.I.S. to issue a warrant in emergencies, subject to a speedy review.[353] The Committee has proposed that a review of an "emergency" warrant should take place within 48 hours by a judge of the Federal Court and an early report be forwarded to the Solicitor General and the Review Committee.[354] It is important that the government be able to respond quickly to the activities of terrorists. A time consuming warrant procedure during an emergency may prove

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[351]Security Intelligence Review Committee, Annual Report 1986-87 (Ottawa: Minister of Supply and Services Canada, 1987) at p. 12

[352]Ibid.

[353]Ibid.

[354]Ibid.

fatal to an intelligence operation. It is also important to ensure that an emergency warrant provision is not used too readily. Any situation not dealt with in a timely fashion can eventually become an emergency.

(b) Infringement of the Charter:

Parliament has not decided to expressly declare that the C.S.I.S. Act should operate notwithstanding section 2 or sections 7 to 15 of the Charter. Because the powers of the C.S.I.S. are broad, the possibility of a Charter violation is great. Perhaps the most fundamental question as to the constitutionality of the C.S.I.S. Act is the constitutionality of the warrant process itself. As discussed it is the position of this thesis that the warrant application procedure, as found in section 21 of the C.S.I.S. Act, is inconsistent with section 8 of the Charter.

The dissenting opinion of Hugesson J. in Atwal was convincing when compared to the reasoning of the majority. Section 21 of the C.S.I.S. does not provide an objective standard by which a judge may balance the expectation of privacy of an individual and the need of the State to protect itself. The C.S.I.S. Act should be amended so as to provide the adjudicators with such an objective standard.

In order to issue a warrant authorizing the interception of material the Act currently requires a Judge to be satisfied that the warrant is "required to enable the Service to investigate a threat to the security of Canada."[355] The problem of uncertainty as to the scope and meaning of the phrase "threats to the security of Canada" does little to help guide the judicial officer to the correct decision when called on to authorize an intrusion.

The central problem of providing a security intelligence service appropriate for Canada was defined by the leader of the New Democratic Party, Mr. T.C. Douglas, during the presentation of the Mackenzie Commission report to Parliament in 1969:

> We all recognize that dealing with the matter of security is a very difficult one indeed because there are two basic principles which must be reconciled. The task of Parliament, and certainly the task of government, is to find a balance between these two principles. The first principle, of course, is that government is charged with the responsibility of maintaining the security and integrity of of the State against subversion, and any efforts on the part of those who seek to change our society by resorting to force...but against that lies a fundamental principle, that we must guarantee the rights of the individual so that under the guise of security no person can receive unfair treatment...[356]

Since this statement was made the rights and freedoms of everyone in Canada have been entrenched in our Constitution. It can almost certainly be stated that the methods of individuals or groups which could pose a threat to the national

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[355]C.S.I.S. Act s.21

[356]Hansard, 26 June 1969, p. 10640

security of Canada have become more sophisticated, and therefore potentially more damaging and difficult to detect. Hence, the difficulty in balancing the need to protect the freedoms and rights of the individual and the need to legitimize more intrusive investigative techniques to monitor the activities of those that seek to undermine the security and integrity of the state has increased.

Although the C.S.I.S. Act was needed, there are two principal areas, this thesis argues, in which the C.S.I.S. Act is inadequate. Firstly, the public definition of threats to Canada's security lacks precision. The lack of certainty as to what constitutes a threat to Canada's security has left both the public and the C.S.I.S. perplexed as to what situations are the proper subject matter of a C.S.I.S. investigation. Because of the open ended definition of "threats to the security of Canada" warrants may be issued authorizing the use of intrusive investigative techniques which could arguably be employed to gather information on individuals, foreign countries, or businesses which pose little or no threat to our nation. Further, as illustrated, the lack of direction provided by the definition of "threats to the security of Canada" may lead the C.S.I.S. to adopt the foreign policy objectives of our allies.

Secondly, the warrant application procedure, as prescribed in section 21, of the C.S.I.S. Act has not been designed to achieve and maintain the essential balance between protecting the security of the State against subversion and respecting the rights of individuals to be secure against unreasonable search and seizure (section 8 of the Charter). To reach this essential balance section 21 must be redrafted so as to provide the adjudicators with an objective test as to when a warrant, authorizing the use of intrusive investigative techniques, should be issued. For this balance to exist it is equally important that emergency warrant provisions be included in the C.S.I.S. Act so as to allow the C.S.I.S. to perform its essential duties.

PART 4: SUMMARY OF CONCLUSIONS

This thesis analyzed the various Canadian laws designed to detect threats to our national security as well as those laws constructed to punish those who have been found to be a threat to the security of Canada. In order to achieve this goal the characteristics of the various laws were investigated together with their possible effect on civil liberties.

Crimes against the State are some of the most serious offences in Canadian law. Further, the investigative powers made available to intelligence officers to prevent threats to the security of Canada are much more intrusive in nature than those made available to the police. The rationale for this is that conduct which threatens State security jeopardizes the peace and order of society and its basic institutions. Therefore, one would expect that the laws protecting national security would be drafted with particular care. However, this is not the case.

This thesis has recommended changes in the law. What follows is a brief summary of the changes recommended.

Part two of this thesis examined Criminal Offences designed to combat threats to the security of Canada. The Law Reform Commission's recommendations, summarized in the section of this thesis referred to as "conclusions on the laws governing offences against the State", are sound. A complete reformulation of the offences is required. Many of the offences, as they are presently drafted, are out of date, inconsistent, vague, overreach the acceptable limits of criminal law, and needlessly threaten individual rights and freedoms. Therefore, most of the provisions require redrafting while others should be removed from the legislation. The remaining offences should be located in the Code.

Our treason laws require restructuring. In particular, the use of an objective mens rea requirement in paragraph 46(2)(b) should be removed. Moreover, the offence of treason should be revised so that only complete actions will fulfil the actus reus requirements of the offence. Lastly, what is meant by the term "purpose prejudicial to the safety or defence of Canada" and " . . . owes allegiance to Her Majesty in the right of Canada" should be clearly defined.

With respect to the offence of sedition the Law Reform Commission's recommendation to repeal the offence and not replace it is the appropriate solution. If the recommendation is not accepted then the offence should be amended so as to require that for an accused to be found guilty of sedition he or she must have intended to incite violence.

The analysis of the espionage (section 3) provision of the O.S.A. led to the suggestion that the requirement that the offence has to be committed "for a purpose prejudicial to the safety or interests of the State" be abandoned. The Law Reform Commission's suggestion to redefine espionage as having been committed when someone "intentionally" communicates or makes available "classified national security" information to another State or its agent, without lawful authorization to do so, is an appropriate alternative. However, as the Law Reform Commission realized, this new approach will only work if "national security information is founded on a uniform and well defined system of classification. Another good suggestion by the Law Reform Commission, was that the amended section 3 provision of the O.S.A. should be combined with paragraph 46(2)(b) (a treason provision) of the Code.

The offence of leaking government information (section 4 of the O.S.A.) should be amended so as to narrow its scope to the improper disclosure of classified national security information. For such an amendment to be effective, procedures must be developed for authorizing disclosure and declassification of information once the need for secrecy has passed.

Part 3 of this thesis dealt with the C.S.I.S. Act. With respect to the C.S.I.S. Act two major concerns were addressed. Firstly, it was suggested that the definition of a "threat to the security of Canada" needs to be defined with greater clarity. Secondly, it was argued that the constitutionality of the warrant process prescribed by the C.S.I.S. Act is suspect.

The definition of "threats to the security of Canada" in section 2 of the C.S.I.S. is too broad. That a clear and unambiguous definition of what constitutes a "threat to the security of Canada" be developed is imperative. Currently a tremendous range of intrusive investigative techniques are available to intelligence officers to enable them to investigate these poorly articulated threats.

We expect intelligence officers to obey the law. However, vague laws are difficult to abide. Consideration should be given to redrafting section 2 of the C.S.I.S. Act. In particular paragraph 2(b) should be redrafted so as to exclude the lawful activities of foreign controlled companies.

The words ". . . or a foreign state" in paragraph 2(c) should be replaced by the words ". . . or a foreign state which has be identified by the government of Canada." For an individual to be subjected to the interception, in the most intrusive possible manner, of their private communications they should know that the cause which they support in a foreign state is against formal government policy. The success of this recommendation is contingent upon the Government clearly listing the foreign states within which Canadians are not to support acts of serious violence for the purpose of achieving a political objective.

The definition of a threat to the security of Canada, stated in paragraph 2(d), should be amended to require the "likelihood of violence in the foreseeable future" as a standard rather than activities "intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada." Without this amendment, lawful conduct which might have taken place years before, could become subjected to a C.S.I.S. investigation.

The second major concern with respect to the C.S.I.S. Act with which this thesis dealt was that of the constitutionality of a warrant issued pursuant to section 21 of the C.S.I.S. Act. It is the position of this thesis that a warrant issued pursuant to section 21 is inconsistent with section 8 of the Charter and is not a justifiable breach of the Constitutional right to be secure against unreasonable search or seizure. To summarize, it is argued that section 21 does not provide a reasonable standard by which a judge might test the justification for a warrant. Further, this Charter violation could not be justified by the use of section 1 of the Charter. Even when one considers the importance of the State's interest involved, it was argued that the extent of a possible intrusion into the privacy of the citizen is disproportionate.

As imperative as designing a warrant procedure consistent with the Charter (or at least justifiable in light of section 1) is the need to have an effective procedure to employ in the event of an emergency. The C.S.I.S. Act does not have a provision for speedy approval of a warrant if an urgent situation exists. This lack of an emergency procedure for obtaining a warrant in the C.S.I.S. Act may weaken the effectiveness of C.S.I.S.. Therefore the Security Intelligence Review Committee's recommendation to amend the C.S.I.S. Act so as to allow the Director of the C.S.I.S. to issue a warrant in emergencies (subject to a speedy review) should also be considered by Parliament when the Act undergoes its five year review.

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