Opinion

STRIKING THE BALANCE: NATIONAL SECURITY V. THE CHARTER

Catherine Gilbert

Are you now, or, in the past five years, have you been a member of a Canadian peace group? If so, Canada's spy agency may have tapped your phone, opened your mail or secretly searched your home. How can this happen in our democracy which prides itself on a system of government characterized by the freedoms of political dissent and association? It happens in the name of national security and it is a reality that deserves a closer look.

Canada's spy agency, the Canadian Security Intelligence Service (CSIS), was created in 1984 as a civilian security agency separate from the Royal Canadian Mounted Police (RCMP) and with no law enforcement responsibilities.[1] CSIS is monitored by an independent review committee (SIRC) and is now undergoing parliamentary review, five years after its creation.

The spy agency was established in response to the central recommendation of the McDonald Commission. This federal Commission of Inquiry was created in 1977 to determine the extent of illegal acts carried out by the RCMP and to make recommendations for the restructuring of Canadian intelligence operations. During the four year inquiry, Canadians learned that members of the RCMP were involved in a number of illegal activities, including burglary, arson, theft, mail opening, and invasion of tax files. The McDonald Commission recommended that a security intelligence agency should be established by an Act of Parliament which would define the agency's mandate and powers, and provide for accountability and review.[2]

CSIS's primary functions are to collect information on activities constituting "threats to the security of Canada" and to report this information to the government (s.12). How does CSIS collect such information? It can use open sources such as newspapers and published government reports. But CSIS is also authorized to use a number of techniques commonly referred to as intrusive surveillance. Under a judicial warrant, CSIS is authorized to wiretap conversations, open mail, gain access to confidential files, and secretly search property. Without any warrant, CSIS may use covert informants and infiltrators (s.21(3)).[3]

In Canada, the Charter of Rights and Freedoms sets out our democracy's basic rights to freedom of expression and association, the right to security of the person and the right not to be subject to unreasonable search and seizure. Canadians are entitled to exercise these rights without interference, subject only to reasonable limits that can be demonstrably justified in a free and democratic society.

The freedoms expressed in the Charter may be limited by the intrusive surveillance powers of CSIS. Clearly, there are arguments to be made that a Canadian's right not to be subject to an unreasonable search might have been infringed when a governmental spy agency covertly searched his home, or that the right to security of the person might have been violated when conversations were wiretapped, or that the right to freedom of association might have been limited when a member of CSIS infiltrated an organization for the purpose of informing. Powers of surveillance undoubtedly have a chilling effect on the exercise of such freedoms. Citizens become fearful of participating in meetings, signing petitions or voicing their opinions when they believe these activities could render them subject to surveillance.

If CSIS's intrusive surveillance powers limit Canadians' rights under the Charter, are they justifiable as reasonable limits on our freedoms?

The justification for giving CSIS the right to exercise these powers is national security. CSIS is authorized to use its powers of intrusive surveillance to monitor activities only when it considers such activities to be "threats to the security of Canada". What are these "threats"? Generally, the Act defines four categories: (a) espionage and sabotage, (b) foreign influenced activities, (c) violence for political objectives and, (d) subversive activities intended ultimately to lead to the overthrow of Canada's government (s.2). But these definitions are worded so broadly that CSIS has the right to wiretap phones, open mail and search homes even where there is no suggestion of illegal activity or a threat to our national security.[4]

We can look at one of the definitions for an example. Section 2(b) allows CSIS to use intrusive surveillance to monitor "foreign influenced activities...that are detrimental to the interests of Canada and are clandestine or deceptive". "Influence" can cover a wide range of activities. And what does it mean to be "foreign influenced"? If a Canadian subsidiary receives directions from its American parent, is it foreign influenced? And what is the meaning of "detrimental to the interests of Canada"? Cultural interests, political interests, economic interests? If the Canadian subsidiary receives instructions which enable it to negotiate a contract with the Canadian government on terms which favour the American business, might this not be considered "detrimental to the interests of Canada"? Could the Canadian company's officers be subjected to wiretapping, covert searches and mail opening? Of course, these activities must also be "clandestine or deceptive", but there are elements of secrecy and even deception in many commercial transactions.

And what other "foreign influenced activities" might be considered "threats to the security of Canada"? What

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political or social movements might be vulnerable to surveillance? Consider the activities of a Canadian environmental group which meets with its British counterpart to learn of methods for eliminating Canada's fur trade and strategically keeps its new-found methods quiet. Would this environmental group be considered to be carrying on foreign influenced activities which are detrimental to Canada's interests because it is attempting to eliminate one of our industries?

The discussion of surveillance of Canadian social movements is not purely hypothetical. SIRC recently reported that CSIS had invoked the "foreign influenced activities" definition of threats to the security of Canada to monitor members of the Canadian peace movement.[5] Apparently, when CSIS inherited RCMP files on many Canadians who belonged to peace groups, CSIS concluded that nearly all the inherited files fell within its mandate because of suspicion of foreign influence, specifically Communist influence.[6] While a number of changes have been made in the last two years to limit the number of files on ordinary Canadians, and in particular those within the peace movement, SIRC suggests that some CSIS investigators still believe that "espousing the views of the Soviet Union, particularly if it is done in an apparently covert way, is automatically detrimental to Canadian interests and therefore targetable". These investigators view anything that can be construed as reflecting Communist influence as, in itself, dangerous to Canada's security.[7]

Democracies have traditionally restricted the use of intrusive surveillance unless law breaking was involved. Under Canada's Criminal Code, for example, there cannot be wiretaps, entries, searches, or seizures without reasonable grounds to believe the matters under investigation are actually criminal offences.

The "foreign influenced activities" previously described do not appear to be illegal. If the traditional standard to be met before intrusive surveillance powers are used is a likelihood of illegal activity, why do these activities render Canadians vulnerable to intrusive surveillance? And how can these limits on our rights be justified in the name of national security, when, as indicated above, some of the activities vulnerable to intrusive surveillance are not serious threats to our security?

This is not to suggest that "foreign influenced activities" do not require any surveillance. The McDonald Commission indicated the need for monitoring when it described the underhanded tactics used by foreign agents in their efforts to influence Canada and its political processes: threatening reprisals against overseas relatives of ethnic leaders in Canada, blackmailing politicians, attempting to acquire scientific information for international trade competitors and secretly employing Canadian governmental officials to support the interests of certain foreign governments.[8]

However, these activities are for the most part already unlawful or could be made so with minor amendments. There are prohibitions in the Official Secrets Act and Criminal Code provisions on treason, extortion, bribery and secret commissions. If we permit intrusive surveillance by CSIS only when activities are likely illegal, CSIS would still be able to monitor such foreign influenced activities. And, even if, in order to ensure that more trivial breaches unrelated to security are not invoked, we limited CSIS's ability to monitor activities only where there are serious security-related breaches of the law involved, CSIS would still be able to monitor the tactics used by foreign agents.

The McDonald Commission described another measure used by foreign governments, that of secretly funding a political party, movement or group.[9] This tactic would not appear to meet a standard of serious security-related illegal activity. But is it justifiable to use intrusive surveillance to monitor citizens because they take money or directions from outside the country? This kind of activity may be capable of harming our political institutions to a certain extent. But, unless the citizens are breaking the law, could they not be dealt with through democratic debate? Perhaps we should have more confidence in our democratic processes and allow such citizens to be openly condemned by political adversaries rather than subjected to secret surveillance.

By illustrating some of the weaknesses in the legislation which governs CSIS, I am not suggesting that Canada does not need a CSIS or that CSIS should not be authorized to use powers of intrusive surveillance. This would be naive. Our country is just as vulnerable to espionage or terrorism as others.

But the challenge for a security intelligence agency in any democratic society is "to secure democracy against both its internal and external enemies without destroying democracy in the process".[10] In Canada, in particular, the challenge is to meet the test of the Charter by putting, for reasons of national security, only reasonable limits on the rights Canadians are entitled to exercise in our democracy.

CSIS's ability to monitor intrusively the lives of Canadians strikes at the very heart of our democracy. It deserves our closest attention as we strive to find the best balance between national security and fundamental freedoms.

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The betting is now running the other way. Newfoundland, Manitoba and New Brunswick (in order of strength) have supported the need to make changes or create a parallel Accord to eliminate the possibility of weakening the equality rights. In Ottawa, Québec, and some other provinces, the stonewall against change (even minor change to rectify the error in omitting reference to section 28 in section 16 of the Accord) is still in place. Of course, so was the Berlin Wall until it suddenly came down.

From another direction, the British Columbia government has begun an initiative to deal with the Accord's amendments in stages, and to recognize each province (and territory?) as a "distinct society". Without having had the opportunity to read the proposal aside from newspaper commentary, I would venture the comment that it could lead to two possibilities, both of which seem unacceptable;

(1) Any doubt about the potential effect of the "distinct society" clause on equality rights outside Québec would be eliminated. Each and every province and territory would have available the alleged need to preserve distinctly British Columbian/Albertan/whatever values, mores, ways of life, as an argument against claims of violations of equality rights. The matrimonial property issue, for example, could be played out in every province and territory in the way described above,

(2) the "distinct society" clause would become quite meaningless in terms of what it was designed to accomplish -- it may be as meaningless to say that each province or territory is a distinct society as it would be to say that everyone equally has the right to equality. If you are trying to move from inequality to equality, you don't get there by adding the same amount to each side of the balance. Instead, you right the balance by adding to the side that has been lacking. To fulfil Québec's aspirations for distinct recognition within Canada, you cannot say "Yes, yes, all provinces and territories are distinct, including you."

Based upon the newspaper commentary, the British Columbia agenda has "equality rights" set down for the third stage -- which would be around 1993. It is difficult to know what this envisions. The point is not that women want the Meech Lake Accord to improve upon what is already in the Charter -- they just don't want it to make things worse. If that point is understood, there is little sense in putting the issue on the agenda for the somewhat distant future, long after the deed has been done.

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Charter in Andrews v. Law Society of British Columbia[6], also invites an analysis of women-specific legal prohibitions in equality terms. In fact, equality rights analysis promises to be an important part of a distinctly Canadian approach to women's rights in reproduction-related matters. While the application of a woman's rights may become more complex if she is pregnant, any accommodation or balancing with Parliament's interest in fetal life should be done at the s.1 stage and not constructed as an inherent limitation on a woman's vested and inalienable Charter rights.

4. Conclusion

If Bill C-43 becomes law there may not be the race to the courts which many people anticipate. Proponents of constitutional rights for the fetus may be discouraged by the Supreme Court's decision in Daigle v. Tremblay. As well, groups advocating that women's constitutional rights apply in the abortion context may wish to wait and see how the legislation works in practice - to build the evidentiary record which will be so necessary to support claims that the law operates outside the principles of fundamental justice (s.7), places a disadvantageous and unequal burden on women (s.15), or is an improper fit between legislative means and ends (s.1).

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1. [1989] 1 S.C.R. 342.
2. [1988] 2 S.C.R. 1
3. Unreported, Supreme Court of Canada, No. 21533, November 16, 1989.
4. Ford v. Attorney-General of Québec (1988), 54 D.L.R. (4th) 577.
5. [1989] 1 S.C.R. 1219.
6. [1989] 2 S.C.R. 143.

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1. The Canadian Security Intelligence Service Act, RSC 1985, c.C-23, ("CSIS Act").
2. See Canada, Commission of Inquiry Concerning Certain Activities of the RCMP (the "McDonald Commission"), Freedom and Security Under the Law, Second Report and Certain RCMP Activities and the Question of Governmental Knowledge, Third Report (Ottawa: Supply and Services, 1981).
3. While some of the most intrusive techniques of surveillance require judicial authorization, judges determine whether the circumstances fall within the statutory criteria for permissible surveillance, not whether they believe there is a genuine threat to Canada's security.
4. While there is subsequent exemption for "lawful advocacy, dissent or protest" in section 2 of the CSIS Act, it is unclear whether the exemption would prevent CSIS from monitoring such lawful activities as fundraising or commercial negotiations.
5. Security Intelligence Review Committee, Annual Report, 1988-1989 (Ottawa: Supply and Services, 1989) p. 34.
6. Ibid. p. 32.
7. Ibid. p. 34.
8. McDonald Commission, Freedom and Security Under the Law, Second Report, Vol. 1, pp. 414-415, 432.
9. Ibid. p. 433.
10. Ibid. p. 43.