

Security Intelligence Review in Canada:
the Supreme Court of Canada and the Security Intelligence Review Committee.

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ABSTRACT

This thesis provides empirical evidence which challenges the argument articulated by Rory Leishman (2006), Andrew Petter (2010) and others that Canada's system of governance is becoming increasingly authoritarian, as unelected judicial and quasi-judicial bodies exert greater influence over policy processes and outcomes. It also serves to inform the ongoing public discussion that Canada's Security Intelligence Review Committee (SIRC) called for in its 2009-2010 Report regarding the future of security intelligence review in Canada and, more particularly, the question of "whether the status quo meets the goals of the Government of Canada along with the expectations of citizens (SIRC: 2010, 3).

The intent of this thesis is to examine the degree of influence that two such unelected bodies – the Supreme Court of Canada (SCC) and SIRC – are able to exert on the cabinet and Parliament in their review of the Canadian Security Intelligence Service (CSIS). The thesis will also illuminate the distinct but complementary functions of the SCC and SIRC, as external review mechanisms for the security intelligence activities of the executive branch of government.

Toward that end, the thesis employs dialogue theory as a conceptual and analytical framework. As a conceptual framework, dialogue theory postulates that a dialogue is carried on between judicial or quasi-judicial bodies and elected lawmakers, in which Parliament retains the final say. Utilizing dialogue theory as an analytical framework, the thesis examines SCC decisions and SIRC case reports related to CSIS activities, which form one side of a dialogue or exchange that occurs between the SCC and SIRC, on the one hand, and the cabinet and Parliament on the other in relation to security intelligence matters in Canada. More specifically, it examines the instances where SCC and SIRC have determined that the activities of CSIS have violated the Canadian *Charter of Rights and Freedoms (Charter)* enacted in 1982, the *CSIS Act* enacted in 1984, or any other applicable statute or regulation.

The central argument and major conclusion of this thesis is that the SCC and SIRC have shown significant respect for Parliament's constitutional authority to make laws, and the Cabinet's constitutional authority to conduct foreign relations, while demonstrating a strong commitment to upholding individual rights. The evidence shows that when conducting reviews of intelligence collection activities, both the SCC and SIRC have been able to achieve the delicate balance noted in the Senate report of 1984 between the security interests of the state and the human-rights interests of its citizens.

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DEDICATION

I dedicate this work to my Family. Without your love and support this would not have been possible.

LIST OF ACRONYMS

CIA – Central Intelligence Agency
CSIS – Canadian Security Intelligence Service
DFAIT – Foreign Affairs and International Trade Canada
FBI – Federal Bureau of Investigation
FCA – Federal Court of Appeal
FLQ – Front de Libération du Québec
G20 – The Group of 20
M 16 – British Secret Intelligence Service
McDonald Commission - Royal Commission of Inquiry into Certain Activities of the RCMP.
MOU – Memorandum of Understanding
OAG – Office of the Auditor General of Canada
PCO – Privy Council Office
PQ – Parti Québécois
RCMP – Royal Canadian Mounted Police
RCMP SS – Royal Canadian Mounted Police Secret Service
SCC – Supreme Court of Canada
SIRC – Security Intelligence Review Committee

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Chapter 1

Introduction

1.1 Historical Antecedents of External Security Intelligence Review: The FLQ Crisis to Constitutional Reform and the CSIS Act (1960 – 1984)

In order to fully appreciate the function of security intelligence review in Canada, one must understand the context in which the review system emerged. More specifically, one must examine the factors that brought about the system and the issues that the architects of this system sought to address.

Revelations made by Solicitor General Francis Fox in 1977 of illegal RCMP activities against the Parti Quebecois and other Quebec sovereigntists exposed major deficiencies in the governance framework for the security intelligence activities of the Canadian government. To address such deficiencies, Trudeau appointed the Royal Commission of Inquiry into Certain Activities of the RCMP (McDonald Commission). This initiative ultimately led to the implementation of the *CSIS Act*, which separated intelligence gathering from law enforcement by creating the Canadian Security Intelligence Service (CSIS) and its principle review and oversight body, the Security Intelligence Review Committee (SIRC).

In response to the wider disaffection in Quebec resulting from the FLQ crisis and official abuses of power, Trudeau initiated a separate, but not unrelated process of constitutional reform, which led to the constitutional entrenchment of a Canadian charter of rights and freedoms. As a result, the courts have joined SIRC as a de facto review

mechanism for the activities of CSIS, hearing a number of *Charter*-challenges related to the Service's operations, such as the case of *Khadr v. Canada*.

1.1.1 The FLQ Crisis

The Solicitor General's revelations of illegal RCMP activities represented the culmination of an intense battle between federal and Quebec nationalist forces, which can be traced back to the Quiet Revolution of the 1960s. The 1960s in Quebec, as elsewhere in North America, was a time of dramatic social and political upheaval. The province's once conservative and compliant polity, having passively allowed 15 years of autocratic rule by Premier Maurice Duplessis (1936-39, 1944-59), was transformed by a defiant form of civic engagement. This resulted in the proliferation of both social movements and "groundbreaking public policy initiatives" (Clément, 2008: 162). During this decade, the movement for an independent Quebec emerged and was led primarily by the Parti Québécois which won seven seats and 23.1% of the Quebec vote in 1970 by appealing to the popular "frustration and resentment to[wards] the Government" (Ibid., 163). This period also produced one of Canada's first modern terrorist organizations – the Front de Liberation de Québec (FLQ).

In 1966, while in custody awaiting trial on a number of charges from bombings to murder, one of the intellectual leaders of the FLQ – Pierre Vallières – wrote the influential book entitled *Nègres blanc d'Amérique*. Effectively, the book was an 'appel sous les drapeaux' or a "call to arms" under a new flag (Clement, 2008). Four years later, on October 5, 1970, associates of Mr. Vallières kidnapped British diplomat James Cross.

Another faction of the FLQ targeted Canada's Immigration and Labour Minister Pierre Laporte, kidnapping Laporte in Saint-Lambert, as he played football on his front lawn with his family (CBC, 1980).

This initiated one of the most extensive "manhunts in Canadian history" (Clement, 2008). Police conducted over 1,000 raids and arrested roughly 50 people for questioning (Fournier 1984, 221-22). The military was deployed, and began patrolling Montreal streets on October 12th. By October 15th, "six thousand troops ... [had been] stationed in Montreal" (Clément, 2008: 166).

Amidst violent student protests, the recently opened Université de Québec à Montréal was forced to close (Ibid.). On October 16, Mayor of Montreal, Jean Drapeau, in conjunction with Robert Bourassa, wrote to Prime Minister Pierre Trudeau affirming that an insurrection was underway and asking the federal government to intervene (Ibid.). Shortly after this, Trudeau invoked the *War Measures Act*. The next day, Pierre Laporte was found dead in the trunk of an abandoned car (CBC, 1980).ⁱ

The Canadian public's response to the invocation of the *War Measure Act*, and the subsequent violation of the rights of Canadian citizens, was divided between "enthusiastic support and bitter opposition" (Clément, 2008:171). In Parliament, support for the *War Measures Act* was almost unanimous. Led by party leader Tommy Douglas, only the sixteen New Democratic Party MPs voted against its invocation on October 19th 1970 (Clément, 2008).ⁱⁱ

Almost immediately, police mobilized against terrorists and anyone suspected of

giving them support. Over 3,000 searches were conducted and 497 people arrested (Ibid., 167). By their actions, the police demonstrated a clear bias against Quebec nationalists, and anyone considered to be “leftist” (Cardin 1990, 81-82). Pierre Vallières was among the first arrested. Aside from the FLQ members who were complicit in the kidnappings, “only two [of the individuals detained]...were convicted under the Public Order Regulations (Clément, 2008: 167). According to Thomas Berger, former MP and leader of the British Columbia New Democratic Party, "the whole exercise...reveals how unwise it is to have such extraordinary power easily available to any government" (1981, 209).

All those arrested under the *War Measures Act* were denied due process. *Habeas corpus*, the individual’s right to judicial confirmation of legal detainment, was also suspended. Held with no right to outside communication, detainees were prevented from seeking legal counsel. During this time, association with the FLQ was a serious criminal and punishable offence, for which guilt was determined not in a court of law but in effect through executive decree (Clément, 2008).

Suppression of the media was not uncommon, including both student newspapers and mainstream media outlets. Prominent media figures were detained and questioned including *Journal de Montréal* photographer Yves Fabre and CKAC radio host Louis Fournier (Ibid.). E.S. Hallman, vice-president of Radio Canada warned his commentators about reporting on the events, and three reporters were subsequently dismissed for an apparent lack of objectivity (Ibid.).

Rights violations were not limited to Quebec under the *Act*. Members of the Vancouver Liberation Front were arrested for distributing the FLQ manifesto (Ibid). In what is remembered as a moment of rash-extremism, British Columbia Premier W.A.C. Bennett declared that his government had approved a regulatory decree that teachers be banned from expressing sympathy to the FLQ (Clément, 2008).

1.1.2 RCMP Actions in Relation to the Parti Quebecois

Apart from the larger constitutional issues, the other major factor that influenced the philosophy and policies related to the creation of CSIS, and its review and oversight systems,ⁱⁱⁱ, was the RCMP's illegal activities in relation to the Parti Quebecois. Those activities occurred as a result of a preoccupation with the emergence of a number of social and political movements in the 1960s and 1970s, including the Quebec independence movement.

In November 1976, the Parti Quebecois came to power in one of the most stunning provincial election victories in history. Canadians had trouble believing that this sovereigntist party, led by René Lévesque, could win a provincial election, and they were very concerned about the implications that this would have for national unity, harmony and internal security.

In 1977, Solicitor General Francis Fox revealed that the RCMP had undertaken illegal activities against the Parti Quebecois and other Quebec sovereigntists, including break-ins, bombings, barn-burnings, theft of a Parti Quebecois members list, entering premises without warrant, and other subversive activities (Cléroux, 1990). Subversive

activities against an organization openly engaged in violence and terrorist activities was one thing, but when it was revealed that the RCMP had also been spying on the Parti Quebecois, seen by many Quebecois as the legitimate and peaceful alternative to the FLQ, the crisis in Quebec reached a fever-like pitch.

Across the country, and particularly in Quebec, an atmosphere of crisis was perceptible (Ibid). The Solicitor General's revelations further exacerbated the feelings of alienation that had existed in Quebec for more than a century, and added increased fervor to the movement for an independent Quebec. The revelations also contributed to the decision of the Parti Quebecois to hold the 1980 Quebec referendum, in which 40.34% of voters supported Premier Lévesque's proposal for a new relationship with Canada based on the idea of an "equality of nations" (CBC, 2010a).

When the Trudeau Liberals were re-elected in 1980 on a platform of national unity, the consensus across Canada that something had to be done to safeguard the civil and political rights of Canadians. It was largely in response to the sovereigntist movement and other even more de-stabilizing political developments in Quebec that Prime Minister Pierre Trudeau initiated one of the most extensive political reform projects in Canadian history, following his election victory. This included the appointment of the McDonald Commission, constitutional entrenchment of the *Canadian Charter of Rights and Freedoms*, and the implementation of the *CSIS Act*.

1.1.3 Report of McDonald Royal Commission and the *CSIS Act*

In 1981, the McDonald Commission tabled its report in Parliament. The Report identified serious flaws in the auditing system for the activities of the RCMP (Senate, 1983). To address this problem it recommended the separation of security and intelligence activities, which was to be achieved through the creation of a new civilian intelligence agency, to be called the Canadian Security Intelligence Service. To address issues related to control and accountability, the McDonald Commission also called for the creation of a civilian body to review the activities of CSIS, to be called the Security Intelligence Review Committee. This was achieved through the federal government's drafting of Bill C-157 (*CSIS Act*), which was amended and approved by the Senate.

1.1.4 The Charter of Rights and Freedoms

Shortly after the Quebec referendum (1980), Trudeau sought for a second time to patriate the Constitution . He had promised constitutional reform after a debate with Renée Levesque, depending on Quebecers' vote on the question of a 'sovereign association' posed in the referendum (CBC News, 1980). During the constitutional negotiations which followed in 1980-1982 Trudeau fought for an entrenched *Charter of Rights and Freedom*, a measure that was vehemently opposed by the provincial Premiers but that would be supported by Canadians.

The wide-ranging effects of the *Charter* are beyond the scope of this research. The purpose of the thesis is to explore the *Charter's* impact in increasing the scope of the review function of the judiciary in a critical area of Canadian public policy — security

intelligence. More specifically, the thesis will examine a number of highly publicized cases when Canadian citizens brought charges against CSIS, using the *Charter* as the basis of their challenge; the cases are *Khadr v. Canada* and *Charkaoui v. Canada*. As a result of the combined effects of the *Charter* and the *CSIS Act*, Canada has established one of the world's most effective external security intelligence review systems in the world (Farson, 2010).

1.1.5 Debate on the Effects of the *CSIS Act* and the *Charter*

Almost three decades since the implementation of the *CSIS Act* and entrenchment of the *Charter*, significant differences remain as to how these two initiatives have affected: a) the performance of security intelligence review in the country; and b) the balance of power between elected (national cabinet, Parliament) and unelected (SCC, SIRC) officials in Canada.

Intelligence officials have reported to the Special Senate Committee on Security and Intelligence (SSCSI) that no parliamentary committee in the world has close to the access to its own domestic intelligence agencies that SIRC has to CSIS (Ibid.)

Furthermore, a former Solicitor General has told the SSSCI that Canada possesses a review and oversight system that other countries desire to emulate (Farson, 2000: 225).

Conversely, former intelligence officials, such as Mike Frost and Brian McInnis, have lamented the ineffectiveness of the review regime, referring to SIRC as more of a “lapdog” than a “watchdog” (Farson, 1996).

However, the view that SIRC is a toothless organization with no formal authority to check the intrusive powers of Government is a mischaracterization of the review and reporting powers at SIRC's disposal, as it overlooks two key facts.

First, SIRC is not prohibited from criticizing Ministers or other Members of Parliament if they are found to be complicit in CSIS's misdeeds, by virtue of any action or inaction. SIRC demonstrated its willingness to exercise this power in its review of the Heritage Front Affair, in which it deemed policy guidelines provided by the Solicitor General to CSIS to be seriously deficient. Secondly, the legal authority of SIRC Reports was significantly strengthened by the Federal Court of Appeal's unanimous decision in *Robert Thomson v. Her Majesty the Queen*, which stated that "deputy ministers and their equivalents must treat a Committee recommendation as a [judicial] decision; [and that] Committee recommendations may no longer be treated as mere informed advice" (SIRC, 1990: 56).

Leishman and Petter argue that in Canada, judicial bodies now have supreme control over judicial and legislative processes, and that unelected officials continuously dictate legislative policy over the heads of the democratically elected representatives of the people of Canada (2006, 3). Furthermore, they take the view that rule by the courts and parliamentary sovereignty are diametrically opposed, (Bingham, 2010), as unelected bodies necessarily assume roles once reserved exclusively for the elected branches, and that this undermines the country's democratic character.

Dialogue theory is an attempt to reconcile these contending viewpoints, by offering a middle-ground approach that recognizes the significant legal authority of judicial and quasi-judicial bodies, while denying finality to their decisions and pronouncements. Strong courts – with the capacity to invalidate legislation – and stronger legislatures – with the capacity to override these decisions – are unique features of Canadian constitutional democracy that are facilitated by the symbolic and substantive powers granted to legislatures to override and suspend judicial decisions under Section 1 (reasonable limits clause) and Section 33 (notwithstanding clause) of the *Charter* (Roach, 2001).

1.2 Purpose of the Study

There is a continuous need to evaluate the performance of those institutions and agencies charged with upholding our most fundamental values and human rights. There is no other study that examines SIRC and the Canadian courts in tandem, in their respective roles of reviewing the activities and actions of CSIS in relation to the rights of individuals and groups; in short, there is little understanding of how CSIS is held to account. This study will be the first to propose a conceptual framework for understanding the external control and accountability system for CSIS, including both the courts and SIRC — for the purpose of exploring the performance of the independent civilian intelligence review in Canada. It thus lays the groundwork for a more robust discussions and understanding of the nature of security intelligence review in Canada.

The thesis will focus on SCC decisions and SIRC Reports. Specifically, it will look at instances in which the SCC and SIRC have criticized or negated CSIS policies on

the grounds that they violate the *Charter*, the *CSIS Act*, or some other applicable legislation or guidelines. It will explore whether in such instances, the SCC and SIRC have respected Parliament's authority to make laws, and Cabinet's authority over foreign affairs, while remaining committed to upholding individual rights, thereby protecting the "delicate balance" described by the Pitfield/ Buckwold Senate Committee, which conducted the first major evaluation of Canada's security and intelligence services.

The thesis will argue that, contrary to the assertions of analysts such as Leishman and Petter, the principle of legislative supremacy continues to define the Canadian political process in regard to security intelligence review. It demonstrates how the SCC and SIRC have been able to uphold the rights of Canadians while respecting the authority of Parliament and the cabinet. Furthermore, it shows that these bodies have all striven to reach institutional accommodation in the ongoing process of defining the parameters of legal and moral acceptability of the actions of CSIS, as interpreted from the standpoint of the *Charter of Rights and Freedoms*, the *CSIS Act* and other relevant legislation. These findings are supported by my examination of the decisions and actions of the SCC and SIRC in specific case studies, notably *Canada v. Khadr*, *United States v. Burns*, and *Charkaoui v. Canada*, and the SIRC reports on Omar Khadr, Mohammed Mansour Jabarah and The Heritage Front Affair.

1.3 Methodology

Utilizing dialogue theory as an analytical framework, this paper will undertake an analysis of decisions by the SCC and of SIRC Annual Reports related to the activities of CSIS, in order to determine the extent to which the courts and SIRC have demonstrated

respect for parliamentary supremacy, consideration for the security interests of the state, and restraint in attempting to influence policy outcomes. The analysis of SCC decisions and SIRC reports will be informed and supported by a plethora of prominent authors and secondary sources. It must be noted that the documents and literature dealing with the SCC's review function of security intelligence in Canada are more plentiful than those dealing with SIRC's functions, whose decisions and action remain, for security reasons, still, to a large extent, in the shadows. With respect to SIRC's activities, the thesis will thus be forced to focus mostly, with the exception of some prominent secondary sources, on the agency's reports, whose analysis is not always transparent. This will be one of the main challenges of the thesis research.

1.4 Organization of Thesis

This introductory chapter has provided an explanation of the historical antecedents that led up to the two important reform initiatives (the *CSIS Act* and the *Charter of Rights and Freedoms*) undertaken by the Trudeau government, which served to establish the external review system for the security and intelligence activities of the federal government. The chapter also introduced the debate between those who view these reforms as having brought about the demise of legislative supremacy in Canada and those who believe they have served to establish an effective review system. The chapter also outlined the purpose of this study and its methodological approach to exploring judicial review, and to measuring the dialogue that takes place between judicial bodies and the elected branches of government. Measurement will be achieved through a qualitative analysis of selected SCC decisions and SIRC Reports.

The second chapter introduces dialogue theory, which maintains that several different forms of dialogue can take place between judicial bodies and the executive/legislative branches, while giving the executive/legislative branches the final say on matters related to government policy. It is proposed that a declarative dialogue takes place when the SCC and SIRC issue pronouncements and Parliament and/or the government responds.

The third chapter focuses on the role of the SCC as a review mechanism for the activities of CSIS. Its premise is that the *Charter* did not mark the advent of judicial supremacy. The fear that some analysts have of judicial supremacy arises out of their concern about the breadth of interpretation that courts may give to Section 7 of the *Charter*, which pertains to life, liberty and security of the person. However, the chapter demonstrates, courts have taken a considerate, cautious and tempered approach in their interpretation of the *Charter* in regard to national security intelligence. The chapter concludes with an analysis of judicial decisions in the following cases: *Canada v. Khadr*; *United States v. Burns*; *Charkaoui v. Canada*. With the (arguable) exception of *Burns*, the thesis shows that the SCC demonstrated considerable respect for the interests of the state by ensuring that the government had the final say in dealing with these security intelligence issues.

The fourth chapter provides an examination of the body that is directly responsible for reviewing and providing oversight of the activities of CSIS – SIRC. The chapter begins by exploring the genesis of SIRC and then defines its mandate and functions. Attention is given to the legitimacy and effectiveness of the intelligence review

performed by the Committee. A significant part of the chapter examines the inherent difficulty facing SIRC in providing review and oversight of an intelligence agency that is supposed to be operating in secrecy. It explains how SIRC has been able to meet this challenge and achieve institutional accommodation with CSIS and Parliament and the cabinet. Finally, the chapter undertakes an analysis of selected SIRC reviews, including Omar Khadr, the Heritage Front Affair, Mohammed Mansour Jabarah. The thesis shows that SIRC has demonstrated considerable respect for the authority of Parliament and the cabinet, while effectively exerting its review powers. In instances in which SIRC nullifies a particular activity undertaken by CSIS, SIRC has continuously sought to rectify the impropriety by addressing CSIS's internal procedural policies, rather than challenging the sufficiency of the overarching legislative framework that governs CSIS activities.

Chapter 2

Theoretical Perspectives

The acceptable relationship between judicial bodies and the other branches of government when interpreting the Constitution has long been a matter of debate. Efforts to depict the normative and descriptive principles governing the relationship between judicial bodies and the other branches of government have proceeded from two theoretical perspectives. These two theories can be placed on a continuum. At one end of the continuum lies the theory of judicial supremacy described by Leishman, Petter and others — where the Constitution is defined by what they courts say it is; the courts are seen as the sole legitimate entity in the matter of constitutional interpretation. At the other end, lies the theory of parliamentary supremacy, where legislatures can implement and repeal legislation as they see fit, irrespective of the dictates of the judicial branch.

2.1 Dialogue Theory

Dialogue theory serves to reconcile these contending views by its claim that neither the judiciary nor the legislature is supreme in the realm of law-making; rather each influences the other in turn. Proposed by Peter W. Hogg and Allison A. Bushell in 1997, dialogue theory identifies “degrees of dialogue” or venues in which the SCC and the cabinet/Parliament can engage each other in the process of interpreting the Constitution and formulating policies. It acknowledges that the courts have “a wide scope for intervention [and interpretation on constitutional matters, but it denies finality or]... supremacy to their pronouncements” (pp. 3-6).

Justice Frank Iacobucci played a crucial role in introducing, legitimating and operationalizing the “metaphor of judicial review as a form of dialogue” in Canadian constitutional democracy (Roach, 2007a; 449).

Dialogue theory contends that legislatures serve to legitimize the explicit and implicit normative values articulated through judicial decision-making (Petter, 2003). Adherents of this view conclude that *Charter* decisions are inconclusive, and form part of an important dialogue with legislatures “...in which the latter retain the final say” (Hogg et al., 1997). It is the legislature that will determine how to deal with the outcomes of *Charter*-decisions that legitimates *Charter* decision-making by the judiciary. Hogg and Bushell contend that judicial decisions that strike down laws (or executive actions)^{iv} on *Charter* grounds almost always leave room “for the law to be re-enacted by the competent legislative body in a form that still accomplish[es] the objectives of the invalid law...[and furthermore] most judicial decisions striking down laws have been followed by legislative sequels” (Ibid.), as was the case in *Khadr v. Canada*, and *Charkaoui v. Canada*. Described in other terms, “judicially-imposed constitutional norms rarely defeat a desired legislative policy [but rather] they generally operate at the margins of legislative policy, affecting issues of process, enforcement of standards, all which can accommodate more legislative objectives” (Ibid.). This is what we see in the decisions and reports of the SCC and SIRC respectively, which will be examined in the thesis.

2.1.1 Dialogue Between Judicial Bodies and Executive/Legislative Branches

Hogg and Bushel identify six potential degrees or models of dialogue between the SCC and executive/legislative branches. In the first model, legislatures may invoke Section 33 (notwithstanding) of the Charter in a specific case, to take exception to a judicially defined right, or uphold a statute notwithstanding the court's decision. However, John Whyte notes, the use of Section 33 has only been invoked on a few occasions since 1982 (2007).

Secondly, Section 1 of the *Charter* provides room for a direct dialogue between the courts and the government, as the latter must demonstrate to the courts that its limitation of the judicially defined right is 'reasonable'. However, this form of dialogue has yet to take place on matters related to CSIS — likely because there would be a high political cost for any government to abridge such judicially defined rights. Furthermore, when intelligence matters come before the courts, the activities in question have generally been completed and therefore individuals may see little benefit in making such a challenge.

A third model of dialogue is found when “some rights are internally qualified and therefore do not constitute an absolute prohibition on certain actions” (Manfredi, 1999). These include Sections 7, 8, 9 and 12 of the *Charter*, which facilitate dialogue by allowing government to limit these rights in a demonstrably fair and necessary manner.

Fourthly, the *Charter* allows for a wide variance of remedial measures that may fall short of overturning a legislative measure (Ibid.) Even where legislation is overturned by the SCC, it will leave room for a wide variety of potential remedial measures to be drafted and implemented by Parliament. Kent Roach, Professor of Law at the University of Toronto and renowned constitutional expert, concurs with Hogg and Bushel “that the crafting of constitutional remedies is an important site of dialogue between courts and legislatures” (2007; 176). At the remedial stage, courts have demonstrated significant deference to allow Parliament or the executive to exercise its will.

One “instrument of remedial dialogue...[has been the] widespread use of the...[suspended] declaration of invalidity (Roach, 2001; 200). “Suspended declarations of invalidity are also a valuable instrument of dialogue because they give the legislature an opportunity to expand the terms of debate and enact more comprehensive and creative remedies” (Roach, 2007; 176). In this dialogue, it is the responsibility of the SCC to remind Parliament of “values that might otherwise be neglected” (Roach, 2001; 250), and the responsibility of Parliament to refine the debate by clarifying why certain rights must be “limited in particular contexts” (Ibid.).

Fifth, judicial review encourages what Hogg and Bushell call “*Charter-speak*”, where in drafting new legislation or in response to a judicial decision, legislatures “increasingly incorporate the language of *Charter* review” into statutes.

Finally, a sixth type of dialogue may occur when legislation is upheld but flaws are identified in the relevant statute or code (Hogg et al., 1997).

Although the six types of dialogue identified by Hogg and Bushell are evident in varying degrees in the SIRC reports and SCC decisions examined in this thesis, they are all necessary to understand the nature of interactions between the courts and SIRC on the one hand, and Parliament and cabinet on the other.

As discussed, neither Section 33 nor Section 1 has been invoked as justifications to override judicial decisions or limit rights in any security intelligence cases. However, these two Sections still perform an important symbolic role — affirming the authority of Parliament and cabinet vis-à-vis judicial and quasi-judicial review bodies.

The concept of ‘qualified rights’ under Sections 7, 8, 9 and 12 (the third type of dialogue) also serves as an important symbolic reminder of the fact that, under certain circumstances, some rights are not absolute or inalienable. Furthermore, balance is a necessary element of securing human rights. The pressure to balance individual rights against state interests is particularly high in cases that involve matters of national security.

The case studies examined in this thesis also demonstrate that multiple forms of dialogue can take place in a single decision or report. This was the case in *Charkaoui v. Canada*, in which both the fourth and sixth types of dialogue were used by the SCC, which focused on procedural aspects of security certificate legislation rather than striking down the entire bill, and suspended its decision for one year.

Chapter 3

The Supreme Court and Security Intelligence Cases

3.1 Introduction

Since the inception of the *Charter of Rights and Freedoms*, its impact on the Canadian polity has been debated extensively. One of the most prominent debates relates to the perceived growth of the judiciary's influence in areas of public policy. Some of the important questions that are addressed by this debate are: how has the *Charter* affected the balance of power between the elected (legislature and executive) and the unelected (judiciary) branches of government? Can unelected judges be trusted to act objectively and weigh complex social, political and legal considerations in interpreting the *Charter*? Has the *Charter* in fact brought about the advent of judicial supremacy, where any kind of legislative response to judicial decisions is effectively precluded, or do the courts still respect the principle of parliamentary supremacy?

This chapter examines how the *Charter* has affected the role and authority of the judiciary vis-à-vis Parliament and the cabinet. It examines selected decisions by the SCC in *Charter* cases involving the activities of CSIS. The sensitivities and principles of fundamental justice that are at stake in *Charter* challenges related to the security intelligence activities of the federal government make this a particularly valuable area of study.

The selected cases include: *Canada (Justice) v. Khadr; R v. Hape; and Charkaoui v. Canada (Citizenship and Immigration)* (Leishman, 2006; Plaxton et al., 2011; Austen, 2010; Hudson, 2010; Freeze, 2009; Roach, 2008).

The first part of the chapter will examine the merits of Petter and Leishman's claims that the *Charter* has brought, or may bring, about the advent of judicial supremacy. This section will provide a brief overview of the constitutional negotiations that led to the *Charter of Rights and Freedoms*, to provide the reader with an understanding of the types of concerns some Premiers, and other public officials, had with the prospect of entrenching the *Charter* in the Constitution. For these leaders there were two main issues: the desirability of an increased role for the judiciary in public affairs; and the capacity of unelected officials to adequately meet such an important mandate. We will see the potential effects of the *Charter* on the power of the judicial bodies to affect public policies, but as well the limits of such power posed by Section 1 (reasonable limits clause) and Section 33 (notwithstanding clause) of the *Constitution Act 1982*.

The second part of the chapter will cite the criticisms by the authors of *Canada...Notwithstanding* (1984) of the increased power given to the courts in the *Charter* era, and also their characterization of the limited capacity of the courts to appreciate and consider the myriad of socio-political and legal considerations involved in the drafting of legislation.

The third part of the chapter will provide an empirical analysis of three selected judicial decisions related to the activities of CSIS. The objective is to determine whether the SCC has respected Parliament's authority to make laws, or instead sought to provide stringent remedial measures, thereby precluding the possibility of a legislative response.

The chapter will also seek to determine whether the SCC has recognized cabinet's constitutional authority over foreign affairs, while remaining committed to upholding individual rights.

3.2 The Demise of Legislative Supremacy?

3.2.1 Constitutional Negotiations

The *Charter* became a central focus of the proposed constitutional change in 1981 both for the public and the first ministers for two main reasons. First, the *Charter* was the singular aspect of constitutional reform that gave individuals direct protection in relation “...to some public decisions affecting their lives” (Romanow et al., 1984: 218).

Furthermore, “a charter of rights deals in values which are rooted in the claims of individuals, as opposed to the needs and interests of governments and bureaucracies” (Ibid.). In 1982 the Constitution was amended to include a clause stating that the Constitution, including the *Charter*, “is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect” (*Constitution Act*. s. 52(1), 1982). Individuals are also expressly given the right, under s. 24(1) of the *Charter*, “to obtain such remedy as the court considers appropriate and just in the circumstances.”

Thus, depending on its interpretation, the *Charter* can significantly increase the law-making power of the judiciary, by allowing courts to rule on the legality of government policy. In cases where statutes or other policy instruments are overturned, or

deemed to be in contravention of the *Charter*, courts may affect or dictate policy outcomes by prescribing remedial measures. Accordingly, the text of the Constitution reflects the conscious political choice to grant judges extensive power to pass judgment on decisions by the democratically-elected representatives (Sharpe et al., 2002).

The *Charter* became a central issue during the constitutional negotiations because, despite its seemingly progressive nature, most of the provincial Premiers vehemently opposed it (Ibid.). The Premiers' opposition was based on the ascendant view within the "gang of eight",^v that political judgment was inherently superior to judicial judgment "in accommodating competing interests...including...[those in] rights claims" (Whyte, 2007: 82). With the advent of judicial review came concerns regarding judicial activism, or courts imposing their will on legislatures — because "judges are not accountable to electors for the choices they make and electors would have no opportunity to express their approval or disapproval of these outcomes" (Whyte, 2007: 83).

Provincial opposition was based not only on protecting provincial interests but also on "a set of political ideas, drawn from Canada's history" (Sharpe et al., 2002: 5). Opponents of the *Charter* continue to maintain that judicial activism will lead to the demise of parliamentary sovereignty, which has been "the central feature of [Canadian and] British political culture" (Bastien, 2010). Lord Diplock argued that elected parliamentarians were best suited to make decisions related to socio-economic policy, and therefore it was a mistake to entrench the *Charter* in the Constitution, because it would inevitably bring judges into the political arena and compel them to make political

decisions (Ibid.). The Premiers, though not necessarily in concert, were all concerned about the effects of court decisions on government policy.

3.2.2 Effects of the *Charter*

The *Charter* has had a profound impact upon the role of the judiciary in Canada. The courts are now empowered to deal with issues that range far beyond what was seen as appropriate within the scope of the judicial function before 1982. Prior to 1982, Canadians viewed the SCC as a remote institution that had little, if any, real impact upon their lives; this was because SCC cases dealt mostly with disputes over Sections 91 and 92 (federal and provincial legislative powers) of the *Constitution Act*, 1867. The SCC still hears cases around the division of legislative powers, but with an entrenched *Charter* it now spends much of its time deciding issues related to individual rights — which can affect public policy both federally and provincially. In particular, as discussed below, the concerns articulated by Petter and Romanow and his co-authors, as well as others, are grounded in the view that Section 7 (protecting the right to “life, liberty and security of the person”) allows the courts to have inordinate influence in an increasing number of areas of social policy.

Since entrenchment of the *Charter*, the SCC has undeniably become an institution to which citizens increasingly turn for protection of their fundamental freedoms and rights (Ibid.). *Charter* litigation has become an important tool used by interest groups to advance their political goals. The courts thus play a central role in defining what are the most important social and political issues of the day (Sharpe et al., 2002).

On the basis of these developments, some analysts such as former Attorney General of British Columbia Andrew Petter, argue that the introduction of the *Charter* marked the “demise of legislative supremacy in Canada” (2009: 150). Those who supported the *Charter* did so “to provide courts with a constitutional mandate to invalidate legislative and governmental actions that were inconsistent with the fundamental rights and freedoms it guaranteed” (Ibid.). By virtue of this change, Petter proposes, the convention of Crown supremacy was replaced with constitutional supremacy (Ibid.).

Prior to the *Charter*, states Leishman, “Parliament and the provincial legislatures [had absolute power in drafting, implementing and revoking legislation] within their respective spheres of...jurisdiction” (Leishman, 2006: 3) under Sections 91 and 92 of the *British North America Act, 1867*. In the *Charter* era, the SCC has come to have supreme control over judicial and legislative processes, as unelected judges are able to issue directives to the democratically-elected representatives of the people of Canada (Ibid.).

This thesis proceeds from the opposite argument that the framers of the *Charter* did not necessarily grant the last word to the courts. The court cases that it examines related to national security intelligence provide evidence, contrary to the findings of Petter and Leishman, that courts, in interpreting the *Charter*, have continued to respect the authority of Parliament.

3.2.3 Sections 1 and 33 of the *Charter*

There are two sections of the *Charter* that have been pertinent to court cases having to do with security intelligence in Canada — Section 33 and Section 1. Both Sections permit the legislating authority to act so as to override decisions made by the courts – to protect the greater public good or the larger interests of the state. As Alan Blakeney has said: “the decision...of the *Charter* was made knowing that...rights would be best enforced by the legislative, executive and administrative arms of government. Section 33...was included in the *Charter* to ensure that the state could...override a *Charter*-protected right” (2010: 1). Legislatures retain the ability under Section 33 to enact laws, notwithstanding their violation of fundamental freedoms, legal rights, and equality rights, for a renewable five-year period. The existence of the notwithstanding clause in the Charter effectively means that court decisions striking down laws can be reversed in the appropriate legislature (Hogg, 2008: 730). Section 33 states: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of the *Charter*” (Ibid.).

Section 1, which contains the Charter’s “reasonable limitation clause” has a similar effect, by enabling the government to limit *Charter* rights by upholding legislation that might be viewed as contravening the *Charter*. Legislatures can enact laws and justify them to the courts under Section 1 of the *Charter* as “reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society”
(Ibid.).

A review of the jurisprudence in the *Charter*-era reveals that judges of the SCC while attuned to the inherent worth and rights of the individual, are also able to make complex decisions that weigh these rights against the collective interests of the state. We will see below that this consideration was particularly evident in the case of *Khadr*, in which the Court upheld Khadr’s *Charter* rights, while not forcing the Canadian Government to request Khadr’s repatriation to Canada, thereby respecting Parliament’s authority to make law and executive authority over the conduct of foreign relations.

Judges, like other public servants, are compelled by the call of duty to do what is right for the state. The thesis argues that the concerns about judges seeking to assert their personal views in cases affecting policy outcomes, to the detriment of democratic values, (Petter, 2003) are overstated. Judges are in fact properly charged with the task of defining constitutional norms and protecting fundamental rights and freedoms in a modern liberal democracy. Furthermore, the Canadian experience to date suggests that judges, in interpreting the Charter, have acted so as to enhance rather than detract from fundamental democratic values (Sharpe et al., 1991: 3).

3.3 Case Studies

This section will examine Supreme Court decisions in *Charter*-cases related to the activities of CSIS. It will demonstrate that the courts have demonstrated a respect for

Parliament's authority to make laws, and cabinet's authority over foreign affairs — by exhibiting restraint in the exercise of remedial discretion, often allowing room for a legislative response to their decisions that creates a dialogue with elected legislators (Hogg and Bushel, 1997).

In the twenty-two years period following the enactment of the *Bill of Rights* (1960), the Supreme Court overturned only one piece of legislation as incompatible with that statute. Judicial experts expected that the courts would “exercise similar restraint in interpreting the similar provisions of the Charter” (Leishman, 2006: vii). However, analysts such as Ian Hopper remained skeptical and contended that “the courts would break prior restraint and interpret the Charter as a license to routinely strike down and amend statutes duly enacted by Parliament...” (Ibid.). The three court cases examined below, relating to the activities of CSIS, demonstrate that Hopper's predictions regarding judicial activism have not materialized.

3.3.1 *Canada v. Khadr*

In 2009-2010 the SCC rendered a high volume of *Charter* rulings (Plaxton et al., 2011). One of the most high profile of these rulings was the *Khadr v. Canada (Prime Minister)* case. This case clearly demonstrates the power struggle between the judiciary and elected law-makers. Those who had criticized the Harper Government's disregard for constitutional principles hoped that the *Khadr* No.3^{vi} decision would be a victory for the judiciary's ability to check executive powers (Slayton, 2010). There was also speculation that the case would be a harbinger of the coming conflict between Prime Minister

Stephen Harper and Chief Justice Beverly McLachlin (Ibid.).

Seized by US forces in Afghanistan in 2002 and detained in Guantanamo Bay following a fatal firefight, Omar Khadr, a Canadian citizen, became the subject of international media attention as he was the only child soldier to be detained at Guantanamo. Beginning in March 2005, Khadr sought repatriation to Canada, but Prime Minister Harper refused to make such a request of the US government (Ibid. 53). Khadr sought judicial review of this decision in August 2008. Although the Canadian government had been previously ordered by the Federal Court to repatriate Khadr (Khadr. No. 1),^{vii} a decision that was upheld by the Federal Court of Appeal (Khadr No. 2),^{viii} government lawyers and other senior officials in Ottawa maintained that it was not the responsibility of the courts to interfere with the conduct of Canada's foreign relations. Based on this reasoning, the Harper government refused to acquiesce to the mounting public pressure for Khadr's return (Austen, 2010: 7). The government's position on Khadr was informed by the *Regina. v. Hape* case, which found that the *Charter* does not apply to the action of Canadian officials in foreign territory (2007). However, Khadr's lawyers argued that DFAIT and CSIS agents had violated Khadr's international human rights and therefore the *Charter*, from which the applicable international rights codes had drawn much of their language, had been violated by CSIS agents who interviewed him at Guantanamo. It was hoped by many analysts that the SCC would uphold the lower court's decision to request Khadr's repatriation (Plaxton et al., 2011: 55).

The SCC considered whether Khadr's Section 7 rights, guaranteeing the right to

“be free from deprivations of life, liberty, and security of the person in accordance with the principles of fundamental justice” had been violated (Plaxton et al., 2011). Noting that the information obtained by Canadian officials was passed to US officials, and that this information could be used in the military proceedings against Khadr, the SCC found reason to believe that government action constituted “the deprivation of liberty and security of the person”. This deprivation was found to be in contravention of the principles of fundamental justice.

After “briefly reviewing” (Khadr No. 3: supra note at para 18) the conduct of CSIS and DFAIT agents in (Khadr No. 3), the Supreme Court said the following (Ibid.: para 25):

“this conduct established Canadian participation in state conduct that violated the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.”

Furthermore, the SCC found that this abridgement of Khadr’s rights was ongoing, since Khadr continued to be stripped of his liberty in part due to the information provided by officials of CSIS and the Department of Foreign Affairs and International Trade (Para 30). The final task for the SCC would be to determine whether a government request for repatriation was the appropriate remedy for the *Charter* breach.

Employing the language of *Doucet-Boudreau*, the SCC held that such an order could be the appropriate remedy to “meaningfully vindicate the rights [of Omar Khadr]” (Khadr para 28; *Doucet* s 62 at para 55). It found that remedial measures were necessary in Khadr’s case. (Plaxton et al., 54). Yet it cited *Doucet-Boudreau* in requiring that

remedial measures “...employ means that are legitimate within the framework of [Canada’s] constitutional democracy” (Khadr para 33; Boudreau para 56). An order to request repatriation, it declared, would offend against the constitutional authority of the cabinet over foreign affairs (Khadr [No. 2], para 33) “in the context of complex and ever-changing circumstances, taking into account Canada broader national interests” (Ibid., para 37).

Thus, the Court did not challenge the federal government’s refusal to request Khadr’s return (Austen, 2010). It maintained that it had limited purview over the considerations of government in deciding whether to request Khadr’s repatriation, especially given the fact that developments in his legal case were ongoing (Plaxton et al, 55). The SCC declared that Khadr’s Section 7 rights had been violated, but it did not demand a repatriation order, leaving the decision as to how to proceed on the matter up to the cabinet.

According to the SCC, Khadr’s rights under both Canadian and international law had been violated as a result of the interview conducted by DFAIT and CSIS agents with Khadr, while he was detained at Guantanamo. Because Khadr was a minor at the time of the interview with no access to counsel, and given the widespread media coverage of the human rights abuses at Guantanamo, Canadian officials had behaved illegally. But the SCC did not require, as a remedial measure, that the federal Government request Khadr’s repatriation. This decision would be heavily criticized by academics such as Kent Roach (2007), who questioned whether a simple declaration of unconstitutionality was a sufficient and responsible remedial measure.

The SCC’s decision did not require a response from the government, but one

quickly emerged. Within one week, the Canadian government released a statement reaffirming its commitment to leave Khadr's future in the hands of the US legal system. It would not request repatriation unless it was forced to do so.

Since that time, Khadr has pleaded guilty to killing Army Sgt. 1st Class Christopher Speer, as part of a plea bargain, the details of which have yet to be released (Fox, 2010). The SCC's ruling that Khadr's Section 7 rights were violated has raised the ire of some critics who contend that the Canadian government should have reacted differently and at least requested that information obtained by DFAIT agents not be used in Khadr's criminal prosecution (Ibid. 57). This remedy would be seen as "less intrusive than a request for repatriation" (Ibid.) The SCC did not seek such a remedy, but the federal government did request through diplomatic channels in February 2010 that evidence provided by DFAIT agents to US officials not be used in Khadr's trial. However, in July of that year the Federal Court ruled that even this request was insufficient in light of the extent of Khadr's mistreatment, and it requested a more "acceptable remedial strategy within the week" (Ibid., 58). But the Harper government has appealed this decision on the basis that it infringes on cabinet's "prerogative over foreign affairs" (Ibid.)

According to a diplomatic cable released by Wikileaks, former CSIS Director Jim Judd derided the Federal Court's decision in Khadr No. 1, as it "posit[s] that Canadian authorities cannot use information that may have been derived from torture, and that any Canadians public official who conveys such information may be subject to criminal prosecution" (CBC News, 2010). He went on to credit the Harper government for "taking it on the chin and pressing ahead with common sense measures despite court challenges

and political knocks from opposition parties and interest groups.” (Ibid.)

3.3.2 *United States v. Burns*

The case of *Burns*, focused on Glen Sebastian Burns and Atif Ahmad Rafay, two Canadian citizens accused of murdering Rafay’s family by the Bellevue Police Department in Washington. After having returned to Canada, Rafay and Burns confessed their crime to an undercover RCMP officer, who was working as part of a targeted sting operation called Mr. Big (Mulgrew, 2011). Rafay and Burns maintained that their confessions had been falsified. Nonetheless, plans were set in motion to have them returned to the US to face prosecution.

Here the SCC did involve itself in Canadian foreign and security policy matters, by asserting that the circumstances are limited under which cabinet can agree to extradition. Moreover, cabinet must seek reassurances from the requesting state that the individual in question will not be threatened by the death penalty regardless of the effect on Canada’s foreign relations (*Burns*). This seemed to contradict the Court’s ruling in *Khadr*, but the Court explained that in the case of *Burns* the context required a more effective remedy due to the fact that the individual was in Canadian custody and the ability to protect against a *Charter* breach “was entirely within Canada’s power” (Khadr No. 3: para [42]). In the *Khadr* case, the Court noted that “no public purpose would be served by [Khadr’s] extradition” (Plaxton et al., 56). Moreover, “Mr. Khadr [was] not under the control of the Canadian government...[and]... the impact on Canadian foreign relations of a repatriation request [could not] be properly assessed by the Court” (Khadr No. 2: para 42). By contrast, in the *Burns* case the Court recommended that the government repatriate Burns, regardless of the potential diplomatic problems that could

accrue from opposing our US ally (Ibid., 55). This reflected a much greater willingness on the part of the SCC to venture into foreign policy decision-making than in *Khadr*. And it also limited the scope of potential responses that could have been considered by Ministers or debated in Parliament.

3.3.3 *Charkaoui v. Canada*

Since the terrorist attacks on the US in 2001, the Canadian government has adopted a wide range of policies designed to deal with the emerging threat of transnational terrorist activity. The implementation of these policies has been achieved largely through changes to immigration law, which lowered evidentiary standards of proof in deportation hearings to the same level as criminal ones (Hudson, 2010: 129). This makes it easier for officials to remove non-citizens, whom they consider to pose a threat to Canadian national security; the presiding judge now may exercise greater discretion regarding what constitutes reasonable grounds to remove non-citizens. Since 1976, security certificate legislation has thus permitted the government to investigate, compile and retain information on non-citizens in Canada suspected of posing a risk to national security (Ibid.). If such methods are found to be reasonable by the presiding judge, the named persons will now be deported and may be denied the protection of criminal law principles such as the right of appeal (Ibid.).

Charakoui v Canada (No. 1 and No. 2), were landmark decisions by the SCC redefining procedures for assessing the credibility of security certificates and detention under their provisions. The issue in *Charakoui* No. 1^{ix} was that the federal government had been unwilling to follow the order of a Federal Court judge to disclose all information that could be safely released, relevant to Mr. Charkaoui, (Ibid., 130). The

Court found that there was so little left on file after the government redacted the information it considered sensitive that the security certificate was rendered unsupportable (Ibid.).

Although the courts initially demonstrated a reluctance to challenge certificate legislation, substantial changes have taken place over time. In *Charkaoui* No. 2,^x the SCC decided that criminal proceedings and certificate proceedings are comparable and therefore persons named in security certificates have a constitutional right to a fair hearing (Mugerwa, 2008). It struck down “key provisions of security certificates as grossly unfair” (Freeze, 2009: 2), and a violation of habeas corpus under Sections 7, 9 and 10 of the *Charter*.

The SCC ruled that the inability of Charkaoui to know and challenge the secret information being used to support his detention and deportation violated his Section 7 right to fundamental justice, a right extended to everyone in Canada including non-citizens. It also ruled that the limitation of this right could not be justified under Section 1 as there were other measures that could have been implemented, such as the British special advocate system, which would abridge Charkaoui’s rights to a lesser extent. The SCC also ruled that government must store and reveal to judges and special advocates^{xi} all information on file that is relevant to named persons (Ibid.). The SCC gave Parliament one year to improve the system, by suspending its ruling for that period.

Charkaoui v. Canada, exemplifies the struggle (or dialogue) between Parliament, the executive and the judiciary in balancing human rights and national security interests in certificate proceedings. Ultimately, the Court adopted a position that reflected legal pragmatism, focusing to a large extent on the context of the case. Courts have agreed to

allow security certificates, and they have allowed government to exercise its discretion in determining what information can and cannot be made public. Such decisions have served to refine and improve the statutory regime governing certificate proceedings, without undermining their effectiveness.

Supporting the theory that “the *Charter* promotes dialogue between courts and legislatures as an alternative to the theory of either judicial or... [parliamentary] supremacy” (Roach, 2008: 282), in *Charkaoui*, the SCC allowed room for Parliament to determine the degree to which and means by which complainants may challenge security certificates. The SCC suggested several prospective remedial alternatives that would limit rights to an acceptable degree, and suspended its declaration of invalidity for 12 months, effectively allowing the law to remain in effect temporarily to allow time for Parliament to implement an appropriate legislative response (Roach, 2008).

By declining to rule that the legislative provisions governing the certificate system were unconstitutional, the SCC found a balance between protecting the rights of citizens while respecting the security interests of the state (Hudson 2010, 130).

It is worth noting that the prospective remedial measures provided by the SCC, and the unintended results of their application, highlight some of the potential hazards that exist when courts seek to provide such measures in instances that affect government policy. Many took the SCC’s mention of the special advocate system used in Britain as an endorsement of that system, despite the fact that the SCC merely mentioned it as a possible alternative to the security certificate system in Canada, and explicitly recognized that it was “problematic in a number of respects” (Roach, 2008).

The powers held by judiciaries to provide remedy on legal matters that affect policy outcomes have been used wisely. However, it is possible that in the future the SCC may be less cautious and more activist in its prescription of remedial measures on matters that affect government policy.^{xii}

3.4 Conclusion

The *Canadian Charter of Rights and Freedoms* has given a special role to the courts to protect “the powerless against the breach of these rights and freedoms by the legislative and executive arms of government” (Blakeney, 2010: 4). While the three cases analyzed in this section demonstrate that the SCC, in hearing *Charter* cases related to Canada’s security intelligence activities, has undoubtedly taken on this role, it has been careful in such cases to balance individual rights against the collective interests of the state.

The Khadr case involved actions of CSIS officials abroad resulting in the ill-treatment of a Canadian citizen. In its decision, the SCC did not challenge the Canadian government’s refusal to repatriate Khadr, despite the fact that his *Charter* rights had been violated. This demonstrated significant restraint in the use of remedial powers under Section 24, and respect for Cabinet’s authority over foreign affairs.

In the *Burns* case, like *Khadr*, the issue was the operation of CSIS abroad involving a Canadian citizen. In this decision, the SCC employed its remedial power, by demanding the government request Burn’s repatriation, regardless of the potential diplomatic problems that could accrue from opposing the United States (Plaxton et al., 55). It declared that Parliament possessed the authority and legal responsibility to ensure

that Burns was not held indefinitely, as a result of information provided illegally by Canadian officials. Some might contend that his decision was a contradiction of the SCC's decision in *Khadr v. Canada*, in which it did not demand Khadr's repatriation based on the violations committed by CSIS. But from another perspective, this decision could be taken to mean that the courts will not interpret laws in a strict and authoritative manner unless Parliament "has made its intent to violate rights crystal clear" (Roach, 2001; 247). This presumption allows the courts to engage other government institutions in a dialogue concerning the legal and moral parameters governing CSIS's operations.

Another explanation is simply that in a dialogic model, the SCC must be "true to its anti-majoritarian nature... Strong and principled interventions in the dialogue...[ensure that unpopular values] that would not ordinarily be heard" are given consideration (Ibid., 245) . In the case of *Charkaoui*, the SCC ruled that the current system of security certificates was unconstitutional, as it violated the complainant's Section 7 right to know and his right to defend himself against information being used in his prosecution. However, by focusing on procedural aspects of the security certificate legislation, rather than striking down the entire bill, the SCC's ruling did not result in a complete overhaul of the statutory regime governing security certificates. Furthermore, the SCC suspended its declaration of invalidity for one year, to give Parliament time to respond to the decision. This decision exemplifies the fourth type of dialogue identified by Hogg and Bushell, namely suspended declarations of invalidity as a form of remedial dialogue.

According to a 2008 U.S. diplomatic cabled published by Wikileaks, former CSIS Director Jim Judd has said that the current system of intelligence review in Canada has “‘CSIS in knots,’ making it ever more difficult to detect and prevent terror attacks in Canada and abroad.” (CBC News, 2010). According to Judd, the review system has “...left government security agencies on the defensive and losing public support for their effort to protect Canada and its allies” (Ibid.). However, the jurisprudence examined in this chapter demonstrates that this is not the case. The decisions by the SCC on security intelligence cases have recognized that a balance must be struck between collective interests and individual rights, amounting to a practice of legal pragmatism.

Admittedly, the SCC’s position with respect to proposing remedial measures has not always been consistent. But rather than being driven by ideology, or allowing strict jurisprudence to determine the outcomes of cases, the SCC has demonstrated an ability to make pragmatic and dynamic decisions based on the evidence presented and information available, as well as the socio-political context in which such evidence is presented. This was observable in the *Burns* and *Khadr* decisions: in the *Burns* case the SCC remedied a request for repatriation for a *Charter* breach, while in the *Khadr* case it chose not to do this. Thus the SCC demonstrated its capacity to make sound legal decisions while taking into account political considerations and social and economic implications.

This finding represents an important answer to those who assert the *Charter* has brought, or will bring, about an era of judicial activism. Although, the SCC has a mixed record with respect to its utilization of stringent remedial measures in cases that affect

national intelligence policy, it is clear that the fears articulated by Leishman (2006), and Petter (2009), with respect to the advent of judicial supremacy, have not yet been realized.

Chapter 4

The Security Intelligence Review Committee

4.1 Introduction

There is little consensus among academics and security intelligence professionals regarding the degree to which SIRC has demonstrated a capacity to effectively exert its powers of review of the activities of CSIS. For example, a former Solicitor General told the Special Senate Committee on Security and Intelligence that Canada possesses a review and oversight system that other countries want to emulate (Farson, 2000: 225). Similarly, intelligence officials reported to the Senate Committee that no parliamentary committee in the world has close to the access that SIRC has to CSIS, with respect to domestic intelligence activities (Ibid.). Based on these testimonials, Canada's principal security intelligence review body may, in many respects, be regarded as the hallmark of security intelligence review bodies in the 21st century, and a model by which other states may implement oversight and accountability mechanisms for their own security intelligence activities.

Yet former intelligence officials such as Mike Frost and Brian McInnis have lamented the capacity of the review system to hold CSIS to account, and referred to SIRC as more of a "lapdog" than a "watchdog" (Farson, 1996). Conversely, it might be argued that civilian review of secret intelligence operations actually impedes the ability of CSIS to perform its duty effectively, and that when SIRC attempts to interpret and apply the law to the activities of CSIS, beyond the *CSIS Act*, it is overstepping its mandate and

creating undue bureaucratic barriers that undermine effective intelligence operations.

By focusing on SIRC reports, which form an important aspect of the dialogue between SIRC and Parliament on matters related to CSIS operations, this chapter will demonstrate that SIRC has done a creditable job of ensuring that CSIS operates in accordance with its legislative mandate, Ministerial directives,^{xiii} and its own operational policies, without compromising the effectiveness of intelligence operations. It does this by achieving a high degree of comity in its interactions with CSIS, and through recognizing the need in effective security intelligence review for a delicate balance between the rights of individuals and the security interests of the state. One of the most important ways that SIRC is able to achieve such a balance is by asserting its powers of review and reporting in a timely and prudent manner, seeking to provide remedial measures on matters that affect the internal procedural policies of CSIS, while not compromising the overall objectives of legislation or national security objectives and priorities.

The chapter consists of seven parts. The first part explores the role of the McDonald Commission and Pitfield Senate Committee in the genesis of SIRC. The second part examines SIRC's official mandate as defined by the *CSIS Act*, to provide the reader with an understanding of the powers and responsibilities vested in SIRC. The third part demonstrates how SIRC has been able to minimize the tensions that can arise between an intelligence agency and the body charged with holding it to account. The fourth part will examine the role of federal security clearances in the relationship between

CSIS and SIRC, and in building the trust and confidence of CSIS. The fifth part will explain how SIRC's reporting has also contributed to building trust and confidence between the two bodies. The sixth part will examine specific cases of SIRC reviews. Specifically, it will focus on instances in which SIRC has identified a particular action of CSIS as being in contravention of the *CSIS Act*, *the Charter*, or some other applicable legislation. The intent will be to show that SIRC, like the SCC, has, in performing a review function, struck a balance in seeking to protect the rights of individual Canadians while allowing the state to attend to Canada's legitimate security interests.

4.2 The Genesis of SIRC

4.2.1 The McDonald Commission

The Royal Commission of Inquiry into Certain Activities of the RCMP (McDonald Commission) tabled its report in 1981, recommending the separation of law enforcement and intelligence gathering activities, through the creation of CSIS. The report also identified serious flaws in the current auditing system for security intelligence agencies in Canada. To address this problem the Commission recommended the establishment of an external civilian review body (Farson, 1996). This would be achieved through the implementation of the *CSIS Act* (Bill C-157).

Leading up to these events, a thriving human rights culture had emerged in Canada. Although some Canadians were aware that the *CSIS Act* represented substantial progress in protecting against the coercive powers of government, many Canadians remained skeptical that the *Act* had sufficiently addressed the fundamental issues that had

enabled abuses of power by the RCMP in the context of the FLQ Crisis. Based on this fact, the proposed legislation was opposed by a diverse range of groups such as the Canadian Bar Association, civil liberties associations, and several ethnic organizations (Smith, 2003: 2).

In response to these public concerns, a Special Committee of the Senate chaired by Senators P.M. Pitfield and Sidney Buckwold was established to undertake a preliminary review of the *CSIS Act* (Senate, 1983).

4.2.2 The Pitfield/Buckwold Committee: *A Delicate Balance*

There is a very basic tension between the concepts of collective and individual security, and it must be addressed at virtually every stage in the formation and operation of a security intelligence agency. To a significant degree, individual rights depend upon maintenance of collective security. Both ends are desirable, but they also make competing demands on the institutions of a democratic state. Either end, by itself, could be easily attained, but at great expense to the other. The crucial task is to arrive at an appropriate balance of the two (*Senate*, 1983: 8-9).

The Pitfield/Buckwold Committee presented its report entitled *Delicate Balance: A Security Intelligence Service in a Democratic Society* in November 1983. The report has become one of the most influential pronouncements on security intelligence in Canada, enunciating principles that have provided guidance for the activities CSIS and its internal and external review mechanisms.

Seventy-six different organizations and individuals appeared before the Senate Committee including police associations, former Solicitors General, and representatives of various provincial governments (Smith, 2003: 2). In addition, twenty-five briefs were submitted by major organizations (e.g., the Canadian Union of Public Employees, the

Canadian Labour Congress), human rights groups, and several individuals (Ibid.).

As a result of the work of this Committee, the *CSIS Act* (Bill C-9) received Royal Assent. The *CSIS Act* now represents the statutory framework of CSIS, and its internal (The Auditor General, Inspector General, the various Special Committee's and Subcommittee, Ministers, Parliament, Directors, and Commissioners) and external (SIRC, courts) review system.^{xiv}

4.3 SIRC's Mandate: Key Roles and Responsibilities

Undoubtedly, Canadian parliamentarians would not have authorized the extraordinary powers for CSIS, were they not convinced that the use of those powers was going to be subject to "continuous and thoroughgoing review" (SIRC, 1985: 3). To this end, the *CSIS Act* established the Security Intelligence Review Committee (SIRC), the principle review body and watchdog of CSIS. SIRC is required to present an annual report to the Minister of Public Safety, who tables the report in Parliament.

"SIRC's reviews provide Parliament and Canadians with a comprehensive picture of the Service's operations activities. SIRC also carefully examines how CSIS performs its duties and functions to determine if the Service is acting appropriately, effectively and in accordance with the law. SIRC's reviews provide a retrospective examination and assessment of specific CSIS investigations and activities. The Committee's reviews include findings and, where appropriate, 'recommendations' for the Service, and for the Minister of Public Safety. All SIRC's reviews are [also] forwarded to both the Director of CSIS and the Inspector General of CSIS" (SIRC, 2010: 8).

Described as a parliamentary "surrogate" (Farson, 1996), SIRC is given powers "as far reaching as its responsibilities" (SIRC, 1985: 4). It is entrusted by Parliament to

act on behalf of all Canadians not only as the principal external review mechanism for CSIS but also as a quasi-judicial tribunal to consider complaints about the activities of that body (SIRC, 1985: 3). Under the provision of Section 41 of the *CSIS Act*, SIRC must investigate complaints made by any person, pertaining to any act committed by CSIS (Ibid., 5). These complaints must first be filed with the Director of CSIS for vetting. It is worth noting that this practice has the potential to become problematic in the long-term, as it arguably creates a conflict of interest for the Director, who is accountable for misconduct by CSIS officials, but given a privileged role in determining which complaints will be reviewed by SIRC. In extreme cases, this provision of the *CSIS Act* could provide CSIS with increased opportunity to ignore, or clean-up, self-incriminating evidence.

It might be contended that there is an inadequate system of internal and external checks to ensure that the Director remains accountable for mishandling complaints. There is at least a problem of public perception when the Director of an intelligence agency is charged with vetting the legitimacy of allegations against the agency of which he or she is in control. This problem may partially explain why Omar Khadr's legal counsel took his grievance to the courts rather than to SIRC. The concluding chapter of the thesis makes recommendations for a separate statute that includes provisions allowing complaints to be taken directly to SIRC, and vetted internally by the Committee.

Under Section 36.1(1) of *the CSIS Act* when, at any stage between the filing of a complaint to the Human Rights Tribunal, and before the hearing begins, the Canadian

Human Rights Commission receives written notice from any Minister that the practice upon which the complaint is based may related to the security of Canada, the Tribunal may either dismiss the case or refer it to SIRC (Ibid., 7).

Apart from its external review function, SIRC also serves as an appeals tribunal to consider any matter related to federal security clearances (SIRC, 1984: 6). This quasi-judicial role (i.e., acting as an appeals tribunal) ensures fair treatment for Canadians whose employment or citizenship has been adversely affected, as a result of being denied security clearance. Before the *CSIS Act* was promulgated, most individuals remained unaware they had been denied clearance or, even if told, were not be given reasoning for the denial (Ibid., 7). Now, CSIS is required by law to give complainants as much information about their security clearance as is possible, without undermining national security (Ibid.).

Canada's *Citizenship Act* was also amended so that the Minister of Immigration, upon believing that an individual should be denied citizenship because there is valid information to support the belief that the person will engage in actions that threaten Canada or constitute organized criminal activity, may make a report to SIRC (SIRC, 1986: 8).

Finally, Canada's *Immigration Act* was also amended to require that when the Minister of Immigration and the Minister of Public Safety believe that an applicant for admission to Canada will engage in the activities listed above, or subversion of government, or an act which has potential to endanger Canadian's lives, they must report

this to SIRC (Ibid.).

SIRC investigations ultimately result in a report or recommendation to the appropriate Minister (Ibid.) SIRC has the ability to review and rule on any and all CSIS activities, as “the *CSIS Act* gives SIRC full access to any information under the control of the Service... no matter how highly classified that information may be, with the sole exception of Cabinet confidences” (SIRC, 2010: 4). Therefore, SIRC has extensive authority to identify illegal practices and hold CSIS to account. However, if its officials are overbearing, demanding details regarding every activity CSIS performs and condemning even the smallest infractions, its ability to fulfill its mandate in protecting the security of the state will be undermined.

Thus, SIRC must make important judgment calls about what activities to review. The effectiveness of the external review regime rests on the Committee’s ability to make sound judgments. SIRC must ensure that CSIS operates within legal parameters of its defined operational mandate without unduly constraining its ability to conduct intelligence work.

SIRC’s *Annual Reports* serve as the source of information from which cabinet ministers, and to a lesser extent Members of Parliament and the public, may learn about CSIS. In a democratic society, this information can serve to catalyze the public to pressure government into cutting back funding for intelligence services. Therefore, CSIS has an interest in cooperating with the review process and operating within its legally defined parameters. As the legacy of the RCMP Security Service has demonstrated,

corrupt or questionable practices that result from ineffective control and accountability can result in reform of the entire security intelligence system, and the establishment of new principles of operation. Thus CSIS and SIRC have a mutual interest in preserving and refining the current system and operating effectively pursuant to their respective mandates.

4.4 Bridging the Divide: Overcoming the Conflict Inherent in Intelligence Review

The relationship between an organization and its oversight or auditing agency is inevitably prone to tension or conflict as the former attempts to resist the restrictive controls asserted by the latter. SIRC recognizes that its mandate may create an adversarial relationship with CSIS, and that occasions will inevitably arise in which its position differs from that of CSIS (SIRC, 2005: 4). At the same time, the effectiveness of this system depends on a high degree of mutual trust and cooperation between CSIS and SIRC.

This is due to the fact that the effectiveness of intelligence operations is often contingent on being conducted in a manner that goes undetected. As a result, much of what intelligence agencies do cannot be substantiated or corroborated by neutral observers. Because of this, and despite the fact that SIRC, like the SCC, has the power to subpoena any information or persons related to the activities of CSIS, sometimes it must rely on honesty from CSIS officials, even when such honesty may be self-incriminating.

Clearly, in order to maximize effectiveness, intelligence review depends on a high degree of institutional trust between the intelligence agency and its review body. SIRC members knew from the start that CSIS would be reluctant to be totally open with information, especially information that was not even distributed within CSIS itself except on a need-to-know basis (SIRC, 1985: 11). It was recognized at a very early stage that a solid foundation of trust and confidence between the two organizations would be vitally important both for CSIS and SIRC to fulfill their respective responsibilities (Ibid., 11). This was underscored in a recent SIRC publication stating that “the relationship between CSIS and SIRC [has] benefited from a deepening mutual respect for each other’s work and responsibilities” (SIRC, 2005). This is not only due to the affinity they share by virtue of being created for the same purpose — to establish an effective and accountable system of security intelligence and protect the rights and freedoms of Canadians — but also to SIRC’s actions and policies being designed to gain the confidence of CSIS (Ibid.).

Much credit for the positive relationship has been given to the actions of various SIRC members who, due the secretive nature of their work, will receive little recognition for their contributions. In ‘Reflections: 25 Years of Service’, SIRC stated that its second Chairman, John Bassett (1989-1992), deserves credit for the improved relations between CSIS and SIRC throughout the 1990s (SIRC, 2005). Bassett made remarkable contributions in helping construct a more workable relationship with CSIS through responsible and effective leadership, characterized by such traits as mutual respect and open dialogue (SIRC, 2005).

What follows is a brief account of some of the policies that have been undertaken by SIRC to build institutional trust between the two agencies, upon which effective review can occur.

4.4.1 Security Clearances: The Appointment of SIRC Members and SIRC's Review of Federal Security Clearances

In what may be viewed as the first gesture of good faith, Senator Ronald G. Atkey requested that all staff of SIRC be cleared to 'Top Secret' (Ibid.). CSIS is in charge of all security clearances related to employment with federal departments, and as a result is responsible for determining the eligibility of SIRC personnel. SIRC also established the practice of relying on CSIS personnel to handle transportation of its sensitive documents, and also enlisted RCMP specialists to secure its permanent offices (Ibid.). Cumulatively, these measures have facilitated long-term trust and cooperation between SIRC and CSIS, without which the process of security intelligence review would have been undermined.

To anyone who does not have a full understanding of SIRC's hiring process and its power in reviewing security clearances, there may be a concern that the above mentioned measures went too far. A particular concern is that CSIS can be very selective in choosing its preferred candidates for SIRC membership from those referred to it by government. However, the consultation process for selecting prospective SIRC members ensures that CSIS's influence is limited to a list of candidates selected by democratically elected Members of Parliament. Furthermore, it is unlikely that CSIS would have any interest in expressing a preference for some candidates over others, because there is no guarantee that any Committee member would be more lenient in assessing the actions of

CSIS and its members.

SIRC consists of a Chairman, and no more than four and no less than two other members, who are appointed by the Privy Council Office, in consultation with the Prime Minister, the Leader of the Opposition in the House of Commons, and the leader of each party in Parliament holding a minimum of twelve seats (CSIS Act, 34 {1} and {2}). This selection process, which includes consultation with all major federal parties, ensures a high degree of efficacy in the Committee selection process by preventing any one agent or body from have undue influence within the Committee.

4.4.2 Balanced and Conscientious Reporting

SIRC's *1991-1992 Annual Report* remarked that anyone who had read the SIRC reports to that point would likely note the "annual reports change from being compendiums of direct and implied criticism, in the early years, to being a much more supportive account for CSIS's activities in recent years" (SIRC, 2005). Mr. Bassett contended that the progressive and definitive shift in the rhetoric towards increasingly more supportive accounts of CSIS's activities was simply the effect of CSIS maturing as an agency to a point of being unrecognizable as the successor to the RCMP Security Service (SIRC, 1992).

Although there can be little doubt that CSIS was able to improve its practices over the first eight years of its existence, Bassett's comments do not fully explain why SIRC began to tone down the critical language in its reports. Nor does it accurately depict CSIS as it existed in 1992. It is clear from subsequent SIRC reports that ties still exist between

CSIS and the RCMP. Such ties remain not only because SIRC was partially staffed from the RCMP upon its creation but also because of SIRC's inheritance of a massive volume of files from the RCMP Security Service upon the latter's dissolution (SIRC, 2005).

The shift away from hostile criticisms towards a more positive assessment of CSIS activities may be regarded not only as the result of the institutional maturation of CSIS but also pragmatic and utilitarian considerations such as the need to enhance cooperation between the two agencies, through considered and balanced reporting. This should not be seen as regressive, or a sign that SIRC is not fulfilling its mandate, but a progressive evolution towards constructive engagement between the two bodies.

This shift must have been, at least partially, the product of a realization by SIRC that it is ineffective and counterproductive to slap CSIS on the wrist or publicly condemn it for every infraction, however slight. Rather, SIRC's foremost responsibility has been, and continues to be ensuring that any transgressions perpetrated by CSIS are adequately addressed, and do not manifest themselves in the long-term conduct of CSIS operatives in acts of corruption, or in any way contribute to the kind of turmoil and social upheaval that resulted from the actions of its predecessor – the Security Service of the RCMP. This does not mean that violations of law should be tolerated, but rather that intelligence work requires intelligence officers to make difficult judgment calls without warning, and that the legal parameters governing this work must be tested, and cannot be static or overcupulous.

SIRC recognizes that its annual reports have the potential to create doubts about CSIS, in the eyes of the public. They can actually prompt significant public pressure in the form of lobbying and other forms of dissent that constrain CSIS or tighten its accountability structure, thereby limiting CSIS's ability to fulfill its mandate. Therefore, there is a need for balanced and conscientious reporting.

In judging the efficiency and effectiveness of SIRC's work in this regard, one must remember that any review committee or auditing agency will have a tendency to focus on the negative activities of the review subject, by virtue of its role in reviewing complaints and alleged wrongdoing. However, SIRC must be conscious of the integral role it plays in shaping the opinions of government officials and the public towards CSIS. It also must ensure that the CSIS does not become reluctant to share information with its officials — because if that were to happen the control and accountability mechanisms would be weakened. As noted above, it cannot be forgotten that the quality of the review process is ultimately contingent on a degree of institutional trust between SIRC and CSIS. Such trust is imperative especially because there is no official record of CSIS's activities.

There is much reason to believe that CSIS operates in an ethical fashion, and that the increasingly positive and supportive tone with which SIRC has reported on CSIS is due to the improvement of CSIS's intelligence policies and practices over the years. Most obvious would be the fact that there has not been any allegations or proof that CSIS has been part of any illegal or unethical activities comparable to those perpetrated either by

its predecessor in various instances, or by its US counterpart, the Central Intelligence Agency (CIA). There is nothing to compare it, for example, with the CIA's involvement in the Iran-Contra Affair, in training and assisting insurgents (Wolf), or in drug smuggling (Webb, 1996). There have been some serious allegations that have come against CSIS, such as the erasure of tapes in the case of Air India, but they have been infrequent and inconclusive.

4.5 Case Studies

This section will study three reviews, in which SIRC identified a particular action or policy of CSIS as being in contravention of the *CSIS Act* or *the Charter*. The overall goal is to determine the extent to which SIRC, in reviewing CSIS's actions in seeking to protect national security interests, has limited or facilitated the prospective policy options available to CSIS and Parliament.

Again, the study employs dialogue theory as an analytical framework in examining SIRC's judgments. It views SIRC as the principle interpreter of the *CSIS Act*, and makes the argument that its reports form part of a dialogue between itself and Parliament, in which the reports elicit a response from Parliament, which retains the final say in determining policy outcomes.

Having been reviewed by both the SCC and then SIRC, the case of Omar Khadr is of particular interest as it generated both a decision by the SCC and a SIRC report. In the review of matters related to the Mohammed Mansour Jabarah case, SIRC looked at many

of the considerations that likely would have been considered by the courts had the case been reviewed there. Its decision highlights the interplay between SIRC and judges, as well as the capacity of SIRC to act as a quasi-judicial tribunal. Finally, the Report on the Heritage Front Affair remains SIRC's most comprehensive and voluminous report on the conduct of CSIS to date (Farson, 1996), and provides an excellent demonstration of SIRC's capacity to meet the complex challenges required to conduct a thorough security intelligence review.

4.5.1 Omar Khadr

SIRC has increasingly found itself considering *Charter*-related cases, such as the case of Omar Khadr. Khadr is a Canadian citizen who was thrust onto the international stage as having been the only child soldier detained at Guantanamo Bay (CBC News, 2010b). In February 2003, Khadr's lawyers released video footage showing CSIS officials interviewing him at Guantanamo. Immediately after the video was released, SIRC initiated a review to determine the "...nature and extent of CSIS's involvement in this matter, including reasons for the Service's decision to interview Khadr" (SIRC, 2009: 9).

Although SIRC maintained that CSIS had conducted the interviews on reasonable grounds related to national security, and that "the Canadian government fully supported CSIS's visit to and interview of Khadr at Guantanamo Bay" (SIRC, 2009), it concluded that CSIS failed to adequately consider two extra-intelligence matters, namely Khadr's age at the time CSIS conducted its interview, and human rights concerns (Ibid., 10).

SIRC also found and expressed concern that information gained in the interview had been shared with “American partners” (SIRC, 2009).

Due to their status as minors, youth have been granted certain fundamental rights in Canadian and international law embodied in the provisions of the Youth Criminal Justice Act and the UN Convention on the Rights of the Child respectively. SIRC found no evidence to suggest that CSIS considered any of these laws in its decision to conduct the interview (Ibid., 12). Rather, the “decision to interview Khadr was prompted primarily by intelligence considerations” (Ibid., 10). Moreover, according to SIRC, at the time of the CSIS interview in 2003, there had already been widespread media coverage of the alleged abuses and mistreatment of Guantanamo detainees. SIRC found nothing that would lead it to believe that CSIS took into account any of these factors in interviewing Khadr (Ibid.).

SIRC maintains that information sharing with foreign countries will continue to be a difficult issue, possibly placing CSIS in a vulnerable position when courts find that CSIS is in violation of *Charter* rights, as it did in this case (Ibid., 12). Therefore, to “keep pace with the political and legal developments in recent years” (Ibid.), SIRC recommended that CSIS “develop a policy framework to guide its interactions with youth” and “implement measures to embed the values stemming from recent political, judicial and legal developments” in its operations; it also recommended and that in doing so it should seek Ministerial guidance. Additionally, SIRC encouraged CSIS to consider pursuing “extra-intelligence” matters, in carrying out its operations, such as applying the

Charter to international cases. It further remarked that the need to expand CSIS's mandate to include greater foreign intelligence capacity will require CSIS to demonstrate that it has the experience, professionalism and know-how to make difficult and sophisticated decisions when operating abroad (Ibid., 13).

The need for CSIS to be conscientious and act in a sophisticated manner is particularly important during periods of crisis or intense changes as “periods of intense change, [such as that following 9/11,] often result in substantial policy gaps... [as events move more quickly than the ability of policy makers or parliamentarians to make]...necessary statutory or policy reforms” (SIRC, 2010: 6). In a recent parliamentary appearance, former SIRC Chair, Gary Filmon, stated that “CSIS needs government direction on these matters to ensure that it is operating overseas in a way that reflects government priorities” (Ibid.).

Over the years, SIRC has proven its ability to ensure that CSIS operates within the law. Even in cases where no clear law has been broken, SIRC has demonstrated a propensity to identify what it perceives to be CSIS misconduct, as defined by relevant laws such as the Youth Criminal Justice Act and the UN Convention on the Rights of a Child — such as the case of CSIS's interview with Khadr at Guantanamo Bay. In the Khadr case, SIRC made it clear that CSIS must act in accordance with Canadian law, and any other applicable law, regardless of where in the world CSIS may be operating. In *Khadr v. Canada (Attorney General)*, the SCC reached similar conclusions. But SIRC went beyond the SCC decisions — by ruling that CSIS must operate not only legally but

also ethically, and thus must think about the potentially detrimental effects of its operations (Ibid.).

SIRC is not officially mandated to consider any matters related to the operation of CSIS that fall outside of the purview of the *CSIS Act*. When it does, as it did in the Khadr case regarding the applicability of the *Charter* to the operations of CSIS abroad (SIRC, 2009), it is arguable that it was violating the parameters of its official mandate. However, in its review of the Khadr case, SIRC demonstrated respect for the authority of the SCC, the country's supreme legal body. The evidence shows that the SCC and SIRC were actually able to play a complementary role in the function of external intelligence review — although it is . the SCC that, under Section 24 of the *Charter*, has the uncontested power to provide remedial measures in instances in which some branch of government is found to have acted illegally.

Readers of the SIRC's *Omar Khadr* report may remark that it appears truncated, and that SIRC could have expanded the scope of its research and reporting. However, one must consider that SIRC is mandated to review the activities of CSIS, and therefore extra-intelligence matters such as the implications of information sharing with “American partners” (SIRC, 2009) in terms of Khadr's right to be repatriated to Canada, fall outside the purview of this mandate.

In conclusion, SIRC's report on *Omar Khadr* is seen here as forming part of a long-term dialogue between SIRC, CSIS, cabinet and Parliament regarding CSIS's operations abroad. SIRC insisted that CSIS must abide by a number of domestic and

international legal codes in the conduct of foreign intelligence operations including the *Charter*, the *Youth Criminal Justice Act* and the *UN Convention on the Rights of the Child*. SIRC also insisted that CSIS “develop a policy framework to guide its interactions with youth” and “implement measures to embed the values stemming from recent political, judicial and legal developments” in its operations; it also recommended and that in doing so it should seek Ministerial guidance.

SIRC’s *Omar Khadr* report also represents a more direct form of intra-governmental dialogue not covered under dialogue theory—Parliamentary appearances by current and former judges and SIRC members. Such was the case with the recent appearance of former SIRC Chair Gary Filmon before Parliament to discuss matters related the case of Omar Khadr (SIRC, 2010; 6).

4.5.2 Mohammed Mansour Jabarah

Another *Charter*-related review conducted by SIRC was the case of Mohammed Mansour Jabarah, a self-proclaimed al Qaida operative and Canadian citizen. Jabarah had plotted to bomb the US and Israeli embassies in Manila and Singapore, but the plan was thwarted and he was detained in Oman in March 2002. CSIS officials traveled on short notice to interview the detained suspect. Omani officials handed Jabarah over to CSIS, who paid for his return to Canada, and then escorted him to the US to face prosecution (SIRC, 2007: 18). CSIS claims that Jabarah went to the US voluntarily; however, the Canadian Civil Liberties Association, and Jabarah himself have challenged this claim (CBC News, 2004).

Section 54 of the *CSIS Act* provides that SIRC may supply the Minister of Public Safety with a special report on any matter related to CSIS activities. On the basis of concerns raised by the Canadian Civil Liberties Association, SIRC initiated its review of the case (Ibid., 18).

In the prefatory section of its report, SIRC explicitly recognized that “there are individuals who will seek to exploit Canada’s rights and freedoms in order to harm our country...citizens and neighbours [and that]...security intelligence agencies can prompt impassioned debate about whether the ends can ever justify the means” (SIRC, 2007: V). SIRC’s judgment was that, however heinous Jabarah’s crimes were, he was “...entitled to all of the rights and freedoms afforded to any other citizen under our *Charter*” (Ibid.). SIRC’s main responsibility was to protect these rights by making certain that CSIS was acting within the law, as it must always be expected to do – “no matter [where or with whom] unexpected circumstances may arise” (Ibid., 22). Therefore CSIS should carefully consider SIRC’s analysis and try to understand why SIRC was “[taking] issue with some of [its] actions” (Ibid., vi).

SIRC drew on the comments made by Justice Ian Binnie of the SCC in a 2004 speech, in which he described the dichotomy between national security and human rights as a “clash of titans” (Ibid., 20). SIRC acknowledged that the events related to Jabarah occurred immediately after the September 11 terrorist attacks and therefore Canada’s protection and cooperation with its allies throughout the intelligence community would have been a top priority. Regardless, CSIS “[had] knowledge that Section 32 of the

Charter...[applied] to [its] actions” (Ibid.) Having examined the events that transpired during Jabarrah’s time in Canada, and being aware that CSIS arranged for his travel to the US on a Canadian aircraft, SIRC sought assurance that CSIS had “exercised due diligence to ensure its actions were in accordance with Canadian law” (Ibid.).

SIRC measured the legality of CSIS’s activities against Ministerial Directives, CSIS’s operational policy and procedures, their bearing on the *Charter of Rights and Freedoms*, and the relevance of the CSIS Act (Ibid., 19). It rejected CSIS’s claims that Jabarrah had decided to provide information freely and voluntarily. It found that his decision had been made without proper legal representation and thus resulted in his self-incrimination (Ibid.).

SIRC received legal advice from the Honourable Gérard LaForest, C.C., Q.C., an expert on the *Charter* and former member of the SCC. It concurred with LaForest that several issues related to the involvement of CSIS officials would be meticulously scrutinized by the SCC (Ibid.), if this case were to come before the SCC. It also recognized that a court would likely consider other factors such as “his age; his emotional state; whether his fear of the alternatives influenced his return to Canada from Oman; the length of time he spent in the company of CSIS officials while in Canada; and the circumstances surrounding his decision to surrender himself to a foreign jurisdiction” (Ibid.).

SIRC took issue with the fact that Jabarrah was not read his rights by CSIS, a fact that was subsequently confirmed by CSIS. It also rejected CSIS’s attempt to justify its

actions based on the argument that “CSIS is not a police service” (Ibid.). SIRC rejected this claim as a serious “misunderstanding of the application of the *Charter* to government representatives carrying out their official duties” (Ibid.). SIRC concluded that Jabarah was arbitrarily detained by CSIS, in violation of Section 9 of the *Charter*, due to the fact that his crimes predated Canada’s *Anti-Terrorism Act*, and therefore he “could not be prosecuted for any crime in Canada” (Ibid., 21). SIRC also found that Jabarah’s arbitrary detention meant that his right to silence was violated, as protected by Sections 7 and 11(c), “as was his right to counsel under s.10” (Ibid.). Additionally, “his right to remain in Canada as protected by s. 6 of the *Charter* (mobility rights) was breached” (Ibid.).

Acting on information from another Canadian agency that Jabarah could not be criminally charged, since his crimes were not crimes in Canada at the time, but that he could be prosecuted in the US, CSIS materially assisted US enforcement officials in his detention and prosecution. This led SIRC to say that “CSIS could not be independent with respect to any consultations that it carried out with Jabarah” and that CSIS had “...strayed from its security intelligence mandate into the area of law enforcement” (Ibid.).

Based on this review SIRC proposed the following remedial measures:

i) that the Memorandum of Understanding (MOU), signed between CSIS and the DFAIT in 1987 should be updated to specify that DFAIT would in future act as the lead agency in any cases related to Canadian citizens detained abroad. Furthermore, the MOU should reflect recommendations by Mr. Justice O’Connor, namely, that there must be “...timely

and open consultation among Canadian agencies...[involved with Canadians detained abroad] (SIRC, 2007: 21);

ii) that CSIS's internal policies be amended so that all email messages were automatically retained unless "there [was] a conscious decision to delete them" (Ibid.);

iii) that CSIS offer clarification to its employees regarding what constitutes "recorded information" as opposed to "transitory records", and thus regarding which files must be retained under federal legislation (Ibid.);

iv) that CSIS keep written accounts of all "interdepartmental consultations, [whether formal or informal,]... with DFAIT and the Department of Justice" (Ibid);

v) that CSIS take measures to ensure that all information under its control, including but not limited to emails, was stored, retrieved and retained by means that complied "...with all applicable federal legislation, including the CSIS, Privacy, Access to Information and Library and Archives of Canada Acts" (Ibid., 21);

vi) that CSIS request and receive written consultation from Canada's Department of Justice in any circumstance where a Canadian citizen was questioned "in circumstances that [might] give rise to detention in order to ensure that the individual's Charter rights [were] respected, and in all occasions when it [was] unclear whether the Service's activity [fell] within its statutory mandate under Section 12 of the CSIS Act" (Ibid.,22).

The sixth recommendation is particularly reflective of SIRC's overall aims, which are to provide clearer detail on measures that govern the authority of CSIS, to engage Canadian citizens detained abroad, and to improve overall record-keeping practices

(Ibid., 22). Greater detail on such measures was to be achieved primarily through formalizing a request of approval from the Department of Justice when CSIS sought to question individuals in circumstances “which [might] give rise to detention” (Ibid). These measures were recommended “in order to ensure that the individual’s *Charter*-rights [were] respected”, regardless of where in the world they may find themselves (Ibid.).

Although these recommendations made high demands of CSIS’s operational policies, they were consistent with previous and subsequent recommendations by SIRC and the SCC on the handling of Canadian citizens abroad (*Khadr v. Canada; Burns v. United States*; SIRC, 2009). It must be remembered that the issue of CSIS dealing with Canadian citizens abroad has been a recurring one, in relation to several cases. Therefore, SIRC’s recommendations were informed by other official inquiries into the matter, such as that taken up by the SCC in *Khadr v. Canada*.

SIRC found that Jabarah had been arbitrarily detained in violation of Sections 6, 7, 9, 10 and 11 of the *Charter*, and proposed six remedial measures to rectify the errors. However, it did not challenge the provisions of the *CSIS Act*,^{xv} but rather focused on changing procedures such as those around information retention and engagement with other government departments (DFAIT). Although this can be seen as a hard-line report because it had serious implications for Canadian foreign policy related to the treatment of Canadian citizens abroad, it can also be seen as consistent with the principle of dialogue theory that states that “judicially-imposed constitutional norms rarely defeat a desired legislative policy [but rather] they generally operate at the margins of legislative policy,

affecting issues of process, enforcement of standards, all which can accommodate more legislative objectives” (Hogg et al., 1997).

4.5.3 The Heritage Front Affair

In August 1994, a media report alleged that Grant Bristow, a leader in the Heritage Front (a Toronto white supremacist group) who helped build the organization into one of the most successful racist gangs in Canada, had engaged in a harassment campaign against anti-racists, and spied on the Reform Party at the behest of Mulroney’s Progressive Conservative Government, while employed by CSIS, receiving upwards of \$60,000 per year (Chase, 1994: 1; SIRC, 1995: 3).

The day after the initial allegation about Bristow surfaced in the media, SIRC began its review of the case (SIRC, 1995: 3). The review sought to assess the procedures by which the informants had been engaged and handled by CSIS. As months passed, more allegations surfaced suggesting that Bristow had also provided money and intelligence about Jewish groups and individuals to racists in the US, and spied on the CBC as well as the Canadian Union of Postal Workers (Ibid.). In September, Preston Manning, leader of the Reform Party, charged that CSIS had cost his party seats in the 1993 federal election, by successfully planting John Beck, a white supremacist, as a party candidate in Ontario (Alberta Report, 1994).

SIRC submitted its 200-page report on this case to the Solicitor General of Canada on December 9, 1994, entitled *The Heritage Front Affair*. Due to the high level of public attention devoted to this case, SIRC produced a review that remains one of SIRC’s

most critical and detailed reports concerning CSIS's investigative methods involving informants (Farson, 1996). Completed in less than four months, the review addressed all questions that had been raised by government officials and the media prior to the report, and disproved all of the most troubling allegations that had been leveled against CSIS. It ruled that CSIS did not attempt to infiltrate the Reform Party (SIRC, 1994: 13.5), or spy on the Canadian Union of Public Employees, the Canadian Jewish Congress, or the CBC. Most importantly, it found that CSIS had been justified in using a human source to penetrate an extreme right-wing group because the source provided valuable information to government and local police forces that served to protect "...the Jewish community against racists"; and as well it had played an important role in ensuring that a number of extremists were arrested, detained and deported (SIRC, 1994). SIRC did note that, although Bristow had not engaged in subversive activities himself to undermine the Reform Party, his close associate Wolfgang Droege had tried to discredit the party prior to the 1993 federal election (Ibid., 13.5).

SIRC did criticize CSIS on two counts. One was that some of the information that had been collected and retained by CSIS in conjunction with its investigation did not meet the criterion of "strictly necessary" as defined under Section 12 of the *CSIS Act*. Secondly, in one particular case, it took too long to remove Bristow from an assignment. The incident occurred in June 1991 when the CSIS's Toronto regional office was informed that Bristow had been involved with a security group that provided protection for Preston Manning at a rally in Mississauga (Ibid.). It was not until August that

“Service Headquarter instructed the Toronto Region that Bristow, referred to as the ‘Source’, was to have nothing more to do with the Reform Party” (Ibid.). SIRC ruled that this instruction had come two months too late, and that the instruction should have been handed down the same month the Service was informed. SIRC also found that the “instruction from Headquarters...[had] not been sufficiently precise”...[because although it] reiterated that there was to be no reporting on the Reform Party...it did not explicitly state that the Source was to leave the security group” (Ibid.).

SIRC also suggested that improvements were required in the policy guidelines provided by the Solicitor General regarding the operations of CSIS. It noted that, although the Solicitor General released “comprehensive guidelines for the use of Human Sources” on October 20th 1989, the “level of policy guidance available to CSIS officers [was] seriously deficient” (Ibid., 13.11). SIRC concluded that “current directions from the Solicitor General and the Director” should be reexamined and refined to address a number of issues, including how proactive a source may be in engaging an organization targeted by CSIS, and whether the benefits of intelligence or source activities outweigh the benefits of direct police action” (Ibid.).

The Solicitor General, who may issue directives to the CSIS, issued three new Ministerial Directives to SIRC in 1995-96, primarily to address the issues in SIRC’s report on the Heritage Front case. Among these directives was one that sought to provide clearer guidelines for CSIS’s engagement with informants and other human sources: the Assistant Director of CSIS was now required to “oversee and report to the Director on

important operational matters” (SIRC, 1996: 37). In its follow-up report, SIRC continued to insist that “the level of policy guidance available to CSIS” in the area of human sources remained “seriously deficient,” and that “direction and policy in this area should be re-examined” (Ibid.). After identifying the problems with CSIS’s operational procedures in the Heritage Front case, SIRC brought these to the attention of the government and asked it to ensure that appropriate remedial measures were developed and implemented.

SIRC’s *Heritage Front Affair* report demonstrates that not only does SIRC have an important role to play in holding CSIS to account but an equally important role in disproving false allegations that may come against it and compromise its legitimacy. SIRC disproved all of the major allegations against CSIS, however it did criticize the collection and retention of information by CSIS as not meeting the criterion of strictly necessary, as well as the excessive length of time it took CSIS to remove Bristow from assignment, once his association with the Reform Party became known.

SIRC found the level of policy guidance available to CSIS in the “management of human sources” to be seriously deficient, and suggested improvements in the policy guidelines provided by the Solicitor General. Supporting the view that SIRC reports form part of a dialogue with Parliament and the executive, the Solicitor General issued three new Ministerial Directives to CSIS in 1995-96, focusing on the management of human sources. In a follow-up report, SIRC found this response to be insufficient and ruled that the level of policy guidance available to CSIS officers still remained seriously deficient.

The Heritage Front case can be regarded as what dialogue theorists refer to as a ‘second look case’ in which judicial or quasi-judicial bodies determine the sufficiency of legislative replies (Roach, 2007; 173). Kent Roach agrees with the principle articulated by Hogg and Bushell that the correct approach in second look cases is “simply to determine whether the new legislation has been demonstrably justified as a limitation on...rights” (Ibid.). Furthermore, SIRC and the courts must be willing to invalidate reply legislation where appropriate (Ibid., 174), as “striking down reply legislation does not equate to judicial supremacy” (Roach, 2007a; 466).

4.6 Conclusions

By focusing on SIRC reports, viewed as forming part of the dialogue between SIRC and Parliament on matters related to the activities of CSIS, this chapter has drawn attention to the efforts that SIRC has made to find a balance between establishing an effective working relationship with CSIS, cabinet and Parliament based on mutual respect and trust, while protecting individual and group rights by working to hold CSIS to account. A critical element of this balance has been SIRC’s conscientious and prudent approach to exerting its powers of review and reporting, and its cautious approach to the provision of remedial measures in instances in which it judges actions by CSIS officers to be illegal. It has exercised a similar role to the SCC, to the extent that it takes into account a myriad of complex factors that impinge upon intelligence operations and their review, while exhibiting pragmatism in its awareness of the potential effects of its actions

on such operations. This pragmatic approach to intelligence review is clearly evident in the three cases examined above – Omar Khadr, Mohammed Mansour Jabarah, and the Heritage Front Affair, in each of which SIRC found CSIS to be in contravention of the *CSIS Act*, *the Charter* and/or other applicable legislation. Involving similar allegations and circumstances as *Khadr*, the *Jabarah* case is particularly valuable in highlighting what a SIRC decision looks like when its officials consult with judicial experts. SIRC consulted a former Justice of the SCC in the case, who went so far as to suggest how the SCC might have acted, had it been called upon to deliver a judgment. (Ibid.).

Chapter 5

Analysis, Conclusions and Further Discussion

5.1 Analysis

The central purpose of this thesis has been to examine how the SCC and SIRC interact with Parliament and cabinet with regard to the review of the CSIS. Toward that end, the thesis has employed dialogue theory as a conceptual and analytical framework.

As a conceptual framework, dialogue theory tells us that a dialogue occurs between the SCC and SIRC, on the one hand, and the cabinet and Parliament on the other, "...in which the latter retains the final say" (Hogg et al., 1997). This does not mean that SCC decisions and SIRC reports are unimportant; nor does it mean that these institutions should take a deferential approach to upholding rights. Rather, it means that the process of ensuring that CSIS respects the rights of Canadians is a democratic one, whereby judicial pronouncements are to be obeyed, but leave room for a legislative response (Roach, 2001; 239). This dialogue makes all government bodies involved in security intelligence decisions, and the review of these decisions, more accountable to each other thereby enhancing democracy (Ibid., 176).

As an analytical framework, dialogue theory identifies potential avenues of dialogue between judicial and quasi-judicial bodies and Parliament. In this case, it seeks to measure the ongoing interaction, or dialogue, between the SCC and SIRC, on the one hand, and cabinet and Parliament on the other, in security intelligence cases.

Chapters 3 and 4 examined instances in which the SCC and SIRC identified a particular action by CSIS, as a violation of the *Charter*, *CSIS Act*, or some other applicable legislation. They demonstrate the commitment made by the SCC and SIRC to maintain the “delicate” balance between state interests and individual rights, as described by Pitfield/Buckwold Committee Senate Report. This balance includes a demonstrable respect for Parliament’s authority to make laws, and Cabinet’s authority over foreign affairs.

The thesis has also cast light on the distinct but complementary functions performed by the SCC and SIRC in providing independent review of the activities of CSIS. The former (SCC) is a constitutionally created institution with the authority to invalidate statutes. The latter (SIRC) is a statutorily created review body, with significant auditing powers.

It is most accurate to describe the system that performs external review of CSIS as in flux — even though the critics will argue that it is in crisis. Although the system appears to be functioning well, it is important that emerging issues identified by thoroughgoing review be addressed before they become problematic and threaten its effectiveness.

Beyond the Federal Court’s authority to approve CSIS warrants, the *CSIS Act* provides the judiciary with no formal authority to review the activities of CSIS. However, the SCC and SIRC do exercise an important correlated review function, which should serve to enrich and inform the public discussion of security intelligence in Canada which

SIRC called for in its *2009-2010 Report* (2010, 3).

Thus far, the courts and SIRC have demonstrated a high level of mutual institutional respect, facilitating a cooperative, rather than competitive working relationship (SIRC, 2005). In the absence of clear guidelines, SIRC and the SCC have attempted to establish jurisdictional boundaries by refusing to review each other's work (SCC decisions or SIRC reports), as this is not in their mandate (Ibid.).

As SIRC says in its *1989-1990 Annual Report*, its internal processes are much like that of a court (SIRC, 1990). In the review of *Mohammed Mansour Jabarah*, SIRC even enlisted the consultation of the Honourable Gérard LaForest, C.C., Q.C., and as a result, the report included considerations and conclusions that might have been expressed in a SCC decision. In fact there is no policy guidance for when a case should go before SIRC, and when it should go before the SCC. This means that the SCC may be doing some work that should or could be conducted by SIRC, and vice versa. It is arguable that the lack of legal codification addressing the overlapping and complementary roles of the SCC and SIRC has the potential to become problematic if current self-restraint is thrown off, and either review body decides to compete for jurisdictional authority, or if they begin to challenge the authority of the other.

Such an overlapping of jurisdictional authority occurred in the case of Omar Khadr, in which both the SCC and SIRC undertook a review of the matters in question. The success of the SCC and SIRC in conducting their respective reviews without challenging or undermining each other's authority can be attributed to their restraint.

However, under the current legal framework, such restraint is voluntary at best and temporary at worst. If this mutual respect breaks down, it might undermine the entire intelligence review network, which is contingent on a high level of cooperation between all those involved in the security intelligence sector.

It is also arguable that the respective roles of the SCC and SIRC need to be clarified. More specifically, clarification is needed regarding when a review should be undertaken by SIRC, and/or by the courts, and guidance provided as to how SIRC and the SCC might engage each other in such a process.

Rather than amending the current *CSIS Act*, such clarification could be achieved by abolishing the current *Act*, and re-drafting two distinctive pieces of legislation — one governing the mandate of CSIS, and the other governing the mandates of all those charged with ensuring that the CSIS is held to account, including the Director, Ministers, the Inspector General, Auditor General, various House and Senate committees, CSIS and SIRC.

Such a change would allow the SCC to continue to concern itself primarily with matters of substantive justice under the *Charter*, whereas SIRC could be primarily concerned with matters of procedural justice, closely monitoring CSIS policies to ensure legality and fairness. Secondly, the new legislation might include provisions similar to section 36.1(1) of the *Human Rights Act*, which allows complaints to the Human Rights Tribunal to be referred to SIRC, if they involve matters of national security. SIRC could be encouraged to review cases such as Khadr, prior to their submission to the SCC. Then,

if it is found by an independent body (established under the new legislation), that the case still warrants judicial review, than the matter could be reviewed by the courts. This would not mean that SIRC was a substitute for the SCC: regardless of the prospects of reform, the SCC and SIRC must continue to play a complementary role in holding CSIS to account, while avoid unnecessary competition and conflict.

Finally, such a reform would also provide the political space to address a number of other issues that have been discussed above: for example, increasing the scope of CSIS's foreign operations, and increasing the number of intelligence agencies under SIRC's purview. Currently, there are a number of agencies that conduct intelligence operations such as the Communication Security Establishment (CSE) and Canada Post that do not report to SIRC.

5.2 Conclusions

With respect to the SCC, empirical evidence from the three cases examined leads to the conclusion that the SCC has been consistent in protecting the balance between the interests of state and individual rights by facilitating a dialogue between itself, on one hand, and Parliament and the executive branch of government on the other.

While the *Charter* has significantly increased the power of the courts to influence legislative outcomes, the SCC has been cautious and pragmatic in its exercise of these powers, certainly to a greater degree than the proponents of judicial supremacy and/or judicial activism assume. Secondly, the SCC continues to have an important role to play

in protecting Canadians from the intrusive powers of government, as exercised through CSIS. The SCC is a valid alternative to a SIRC review, when the alleged offence is of matter of substantive justice, or when a SIRC review has proven incapable of bringing about satisfactory results. In this regard, the SCC remains an important element of upholding the delicate balance between the rights of citizens and collective interests of the state. That balance is precarious, and requires constant attention, review and refinement.

This thesis draws attention to the continuing need to re-evaluate the purpose and scope of intelligence review, and to determine whether the review function performed by the courts continues to meet the expectations of citizens. Judging by the *Khadr* and *Charkaoui* decisions, it is clear that the SCC is mindful of the interests of state in rendering its verdicts. Still, future decisions related to intelligence operations must be closely monitored to ensure that the balance is not tipped too far either way.

With respect to SIRC, it may be concluded that it has demonstrated a clear willingness and capacity to uphold individual rights, while remaining mindful of the interests of state, thereby serving to uphold the balance described in the seminal Report of the Pitfield/Buckwold Committee. Based on the case studies examined in Chapter 4, the following conclusions can be drawn. SIRC's review processes are similar to those of courts in reviewing the activities of CSIS – a point that SIRC makes explicit in its *1989-1990 Annual Report*, (SIRC, 1990). In the review of *Mohammed Mansour Jabarah*, SIRC even enlisted the consultation of the Honourable Gérard LaForest, C.C., Q.C., and as a

result, the report included considerations and conclusions that might have been expressed in a SCC decision. Not only does this exemplify SIRC's capacity to function like a court, but it also exemplifies a more direct inter-institutional dialogue that occurs in the review of CSIS.

In the Heritage Front Affair SIRC demonstrated its willingness to check the powers of the executive branch of government by concluding that "current directions from the Solicitor General and the Director" should be reexamined and refined (SIRC, 1994: 13. 11). Supporting the notion that judicial review is a manifestation of an ongoing dialogue, the Solicitor General issued three new Ministerial Directives concerning the 'management of human sources'. In what dialogue theorists may refer to as a "second look case", SIRC issued a follow-up report in which it determined that the Ministerial response did not sufficiently address the need for greater policy guidance in this area.

5.3 Points for Further Discussion

"Canada's history in the field of security intelligence...teaches us that it is foresight and opportunity, not crisis and scandal, which should be the spurs to building [an effective review system]" (SIRC, 1999). Information exchanges between CSIS and its counterparts in other countries have come under close inspection by SIRC in the post-9/11 period, as intelligence agencies around the world have begun to take on increasingly cooperative relationships (SIRC, 2009: 11). However, these exchanges create concerns when they include states which do not "share Canada's respect for human rights" (Ibid.).

This has forced some to question CSIS's loyalty to Canada, and its commitment to its upholding Canadian laws and values (Ibid.).

CSIS is not fully mandated to conduct foreign intelligence activities; thus it has been forced to establish robust intelligence networks with foreign intelligence agencies such as the CIA, FBI, MI5, and Mossad (Israeli intelligence), amongst others. While SIRC has required CSIS to provide information on its intelligence links, it has not yet sought to examine any of these associations.

In the *2009-2010 Annual Report*, SIRC reviewed how CSIS's foreign intelligence responsibilities have evolved over the years (SIRC, 2010: 7). After learning that considerable changes have taken place in this area, SIRC put the question to the Minister of Public Safety, Tony Clement, through its Section 54 review of CSIS's foreign intelligence program, as to whether a separate foreign intelligence service should be established. This seems to reflect SIRC's commitment to work with government on the issues around foreign intelligence.

In October 2010, a spokesperson from SIRC called upon Public Safety Minister, Vic Toews, and asked him to consider the idea of a separate foreign intelligence service, and he proposed a national debate on the issue (The Canadian Press, 2010a). CSIS Director, Richard Fadden, has indicated that such a service could be operational in three years (Mansbridge, 2010).

Based on the evidence included and beyond this paper, there is capacity within SIRC and the SCC to oversee a more expansive, international role for CSIS. However,

this does not imply that such an agency is in line with Canadian interests. Nor should it be taken to necessarily imply that the threats to Canadians security merit the establishment of an intelligence branch, comparable to the CIA, mandated to operate abroad.

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ⁱ A week prior, James Cross, a British diplomat, had also been kidnapped by the FLQ. He was eventually released in exchange for the safe passage of his captors to Cuba.

ⁱⁱ Former Conservative Prime Minister John Diefenbaker expressed opposition to the *Act* by speaking against soldiers wearing helmets in Ottawa. In response, Trudeau sarcastically suggested in a cabinet meeting that soldiers should adorn something different when 'Diefenbaker is around' (PCO, 1970).

ⁱⁱⁱ Internal review and oversight of the activities of CSIS is performed by the Auditor General, Inspector General, various special committees and subcommittees, Ministers, Parliament, Directors, and Commissioners. External review is performed by SIRC and the courts.

^{iv} "Executive Action(s)" was a term first used by the CIA to describe assassinations approved by the executive branch. CSIS may receive direct orders from Ministers through Ministerial Directives, and presumably less official and more direct channels.

^v Gang of Eight refers to the coalition of eight provinces that (largely) opposed the Trudeau government during the constitutional negotiations of 1980-1982. The Gang included: British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, Nova Scotia, Prince Edward Island and Newfoundland.

^{vi} *Khadr v. Canada (Prime Minister)*. 2010. SCC 3

^{vii} *Khadr v. Canada (Prime Minister)*. 2009. FC 405.

^{viii} *Khadr v Canada (Prime Minister)*. 2009. FCA 246.

^{ix} *Charkaoui v. Canada (Citizenship and Immigration)*. 2007 SCC 9.

^x *Charkaoui v. Canada (Citizenship and Immigration)*. 2008 SCC 38.

^{xi} Under Bill C-3, 'Special Advocates' are lawyers appointed by the Court to represent the interests of persons named in security certificates during the security clearance hearings, from which the persons named and their legal representation are excluded.

^{xii} For a more in depth analysis of the SCC decision in *Charkaoui* (No. 1 and No. 2) and the response this elicited from Parliament, see Roach, Kent. 2008. "Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures." *Supreme Court Law Review* 42: 281–353.

^{xiii} Ministerial Directives are recorded directives provided by a Cabinet Minister to CSIS.

^{xiv} Although the *CSIS Act* does not provide an official role for the SCC or any other court to review CSIS activities, the *Act* does provide for intrusive investigatory methods such as wire-tapping, authorized by the Federal Court of Canada.

^{xv} The overarching framework governing the activities of CSIS, implemented as a result of a collaborative process between various public officials, government bodies, the House of Commons and the Senate.