Watching the Watchers: Democratic Oversight

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Merci Madame la Présidente.

Avec votre permission, je vais vous parler en position assise. Cela est dû en partie à une déformation professionnelle de ma part, étant membre de la magistrature assise, j'ai pris l'habitude de prendre la parole du siège. Ceci est aussi dû à un autre facteur : vous devez savoir que je suis handicapé de la vue et je ne peux pas lire des notes sauf avec l'aide d'un ordinateur portatif que j'ai devant moi qui me lit dans une voix intelligible les notes que j'ai faites. Je dis une voix intelligible, c'est-à-dire évidemment si les notes elles-mêmes sont intelligibles.

Je suis juge de la Cour fédérale du Canada depuis une vingtaine d'années et avant cela, j'ai été juge à la Cour supérieure de Montréal. J'ai célébré récemment le trentième anniversaire de ma nomination à la magistrature supérieure canadienne. Ce n'est pas bon pour la santé, mais tout de même…

La Cour fédérale joue un rôle important dans le contrôle de l'administration fédérale. En fait, une très grande proportion du travail de la Cour consiste en un contrôle judiciaire des organes du Gouvernement fédéral, soit par voie d'appel, soit par voie de demande de contrôle judiciaire. Parmi ces organes, on note tout particulièrement la Commission d'appel en matière d'immigration et du statut des réfugiés, la Commission de l'assurance-emploi, la Cour canadienne de l'impôt, la Commission canadienne de radio et télédiffusion, et j'en passe. Il y a tout de même un facteur important qui est commun au contrôle qu'on exerce sur tous ces

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organismes fédéraux, c'est-à-dire que la Cour exerce son pouvoir de surveillance en suivant le processus judiciaire traditionnel; le juge entend ce que chaque partie a à dire sur le sujet; il les laisse faire valoir leur point de vue; il apprécie les preuves que les parties apportent et par la suite, il décide. C'est le processus traditionnel du système contradictoire, ce qu'on appelle le système d'adversaire et c'est là le garant, à mon point de vue, du résultat juste et équitable du processus. Maintenant, j'aimerais bien croire que la confiance qu'ont la très grande majorité de nos citoyens dans notre système de justice est fondée sur le caractère tout à fait exceptionnel et la sagesse tout à fait indiscutable des magistrats, mais la modestie m'empêcherait peut-être d'aller plus loin en ce sens... Je suis convaincu toutefois qu'en réalité, c'est e processus de contradiction qui sert de meilleure garantie pour nous que le rocessus judiciaire produira des résultats acceptables pour tous les citoyens.

This brings me to *Bill C-36*.[1]

There is nothing much that is new for the Federal Court in *Bill C-36*. here are some new things, but most of the duties that it lays on the Court e things that the Court has been asked to do over the last several years. oing back in fact to the time of the MacDonald Commission and at the risk of falling into personal anecdote, David MacDonald was a very good friend mine. He and I were together amongst the founders of this Institute and he s its first president. The MacDonald Commission, as you know, oduced or recommended the introduction of legislation with regard to the val of the responsibility for National Security from the Royal Canadian ited Police (RCMP) and its attribution to a new Civilian Agency, ian Security Intelligence Service (CSIS). And it was at that time that deral Court was given in its turn the responsibility for authorizing s of the things that the CSIS was entitled by its statute to do. Amongst hings that were done following the MacDonald Commission was the ction of what are now sections 37 to 39 of the *Canada Evidence Act*,[2]

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1 *Anti-terrorism Act*, S.C. 2001, c. 41 [hereinafter *Bill C-36*].

2 R.S.C. 1985, c. C-5.

replacing the old section 42, which in its turn had replaced or displaced for federal purposes the old common law so-called official privilege.

Let me note here in parenthesis, last night someone asked whether *Bill C-36* had actually been applied. The question was asked in the context of the new criminal provisions of *Bill C-36*. While I did not jump to my feet to interject and answer, I can tell you, because I have done it, that I have myself twice since December 24 applied the provisions of the new section 38 of the *Canada Evidence Act*. Rather interestingly, one of these cases dated back to prior to December 24, but because the statute is almost entirely (that part of the statute anyway) procedural in nature, I took the view that it applied from the time of its proclamation. The other was actually subsequent to December 24 and someone mentioned last night the ping-pong nature of the procedure under section 38 and I can tell you that we are extremely conscious of that. It provides that when an objection, based on national security or international relations or national defence, is made in the course of proceedings before a Provincial Superior Court, that Court must defer that question to the Federal Court and that is certainly capable of producing considerable delay and confusion in the proper forward march of a criminal jury trial. We are very conscious of that and we certainly do everything that is within our power to move these applications when they come to us through our process as quickly as possible. And I can tell you just by way of example that the case that started subsequent to December 24 is now over and the delay for appeal expired yesterday. So it has been decided and done. Now that still is capable of producing unreasonable and unnecessary delay in a criminal jury trial, but the other thing that has happened is that most of these applications under section 38 turn out in fact to be made at the disclosure stage, at the pre-trial stage of proceedings in the Provincial Superior Court, so that in fact we have not yet, as far as I know, encountered a case where a judge has had to bring a jury trial to a screeching halt while the parties went off and debated the question of national security before the Federal Court. But it certainly is an awkward kind of provision and it is not one that is particularly easy to administer. That is the end of that parenthesis, but just to tell you, *Bill C-36* is already not only alive, but kicking and screaming at least in our Court.

I should have mentioned amongst the special duties laid on the Federal Court by the various statutes, and not consolidated in *Bill C-36*, are the special provisions found in section 40.1 of the *Immigration Act*[3] in

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[3] R.S.C. 1985, c. I-2.

relation to persons suspected of terrorist connections and of course the *Suresh* and the *Ahani* cases[4] which were recently decided by the Supreme Court are examples of that. All the national security functions which are laid on the Federal Court have this in common: they involve at one stage or another and sometimes throughout the piece a judge of the Court sitting alone in what are called hearings, but they are held in the absence of one of the parties. That is to say *ex parte* so that the judge may, if he or she sees fit, take communication of the evidence, the information which is said to be too sensitive to be allowed to be revealed to the person concerned and not only evidence, but also argument which may rely on the evidence or may deal with matters which may be too sensitive to be revealed to the public.

This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function. Often, when I speak in public, I make the customary disavowal that I am not speaking for the Court and I am not speaking for my colleagues but I am speaking only for myself. I make no such disavowal this afternoon. I can tell you because we talked about it, we hate it. We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined.

If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that. We do not get to prepare our cases because we do not have a case and we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us. We hate hearing only one party. We hate having to decide what, if any, sensitive material can or should be conveyed to the other party. We hate, or I certainly do, I am not sure that everybody feels the same about this, sitting in a bunker, in a sealed windowless courtroom deep in the bowels of a building in Ottawa where the air is terrible, the only thing that is good is the coffee, but we hate it. I do not think it makes us do our job particularly well. We greatly miss, in short, our

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[4] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [hereinafter *Suresh*] and *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2 [hereinafter *Ahani*].

security blanket which is the adversary system that we were all brought up with and that, as I said at the outset, is for most of us, the real warranty that the outcome of what we do is going to be fair and just.

I want to be very careful because I do not want to give offence to the lawyers from the Department of Justice who appear before us representing CSIS and the other agencies that are sometimes involved in these matters. They do their very best to be fair. We certainly do our best to impress upon them that we expect them to reveal all the facts to us, including those which do not assist their case But they have an impossible job, they are to present the case of the Government and no matter how many strictures we may place upon them, it is extraordinarily hard for them to argue both sides of the case at the same time. They do as good a job as one can expect.

I guess what I am also saying is that one cannot expect them to do very much in the circumstances and it certainly is not as good as it would be if we did have representations from somebody who did represent the other side. There is an analogy that is sometimes made by people who defend this system. First of all, let me say that I guess having us judges at the Federal Court do this, is better than having nobody do it because if it was not us who would it be? But, the analogy is sometimes made to the much more traditional system of search warrants and the somewhat less traditional but pretty well established system of electronic surveillance warrants. It is not a very good analogy, I have to tell you, because persons who swear affidavits for search warrants or for electronic surveillance can be reasonably sure that there is a high probability that those affidavits are going to see the light of day someday. With these national security affidavits, if they are successful in persuading the judge, they never will see the light of day and the fact that something improper has been said to the Court may never be revealed.

Now, I have to say to the huge credit of the Department of Justice, in one case (and it was very much a headline case at the time, I remember it very well, I was in the Court of Appeal at the time), it came to light that there was material in the CSIS affidavit which had been laid before a judge of the Trial Division and the case was then in appeal and was coming on to be heard by us that day. That morning, the Department withdrew the application because it had learned that there was material in the affidavit that was improper and not correct. I have every confidence that the Department of Justice is doing the best it can. I am just not always satisfied that the best it can is always going to be the best. I do not know if there is any solution to this. I was saying that warrants for electronic surveillance are sort of a similar

situation. You heard this morning somebody tell us that the statistics show that of 15,000 odd applications for electronic surveillance, there were 12 that were turned down. That is the trouble. It does not matter how good and how honest the lawyer is. If you have a case that is only being presented on one side, you are not going to get a good case. I do not know if there is any solution, if there was an easy one, of course, somebody else would have thought of it long ago. It does occur to me, however, that it might be helpful if we created some sort of system somewhat like the public defender system where some lawyers were mandated to have full access to the CSIS files, the underlying files and to present whatever case they could against the granting of the relief sought. I am told that this already happens within the CSIS, that within the CSIS the case to be made for concealment has to be presented and has to carry over a case presented by other CSIS officers who have access to all the material. But, if that is the case, then I am not sure what the judges of the Federal Court are doing in the picture and if I may be forgiven for using the expression, I sometimes feel a little bit like a fig leaf.

Thank you.