Spies Like Them: The Canadian Security Intelligence Service and Its Place in World Intelligence

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1. Introduction

In the past year, intelligence agencies have taken centre stage in world affairs. The onslaught of terrorist attacks against the United States has caused many nations, among them Canada, to take a closer look at national security and the role of their respective intelligence regimes. The Canadian Security Intelligence Service (CSIS) is Canada's civilian intelligence service, created to combat terrorism and other unlawful threats against the government. Since its inception CSIS has suffered criticism, most recently for its inability to cope with Canada's terrorist element. Canada's liberal immigration regime, which may well be laudable, has come under increasing censure for creating a safe haven for terrorists seeking entry into the United States.[1]

This brief note will address some of the ongoing concerns about the role and organisation of CSIS, specifically the implications of a proposed international presence. While an analysis of the hotly debated civil rights issues surrounding intelligence organizations is beyond the scope of this paper, we will examine CSIS's accountability and review mechanisms. A discussion of intelligence agencies from other common law jurisdictions, the United States, Britain, Australia and New Zealand, will offer useful comparisons to Canada's service. This note will conclude by suggesting that CSIS should adopt some form of parliamentary oversight and assume an international mandate, similar to that of Britain's SIS and Australia's ASIS, but lacking the offensive activities of the CIA.

2. Duties and Powers of CSIS

The *Canadian Security and Intelligence Service Act* was passed by the Canadian parliament in 1984 to establish an agency which would collect, analyze and retain information concerning threats to the security of Canada.[2] The *CSIS Act* broadly

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1 See generally Stewart Bell, 'A Conduit for Terrorists' *National Post* (13 Sept 2001); DeNeen L Brown, 'Attacks Force Canadians to Face Their Own Threat' *Washington Post* (23 Sept 2001); Richard Beeston, David Adams, Richard Cleroux & Michael Theodoulou, 'FBI Begins to Uncover Hijacker's Network' *The Times* (13 Sept 2001); and Christie Blatchford, 'Canada and Terrorists: Programmed to Receive' *National Post* (24 Nov 2001). A full examination of Canada's immigration policies is outside the scope of this note.

2 *Canadian Security Intelligence Service Act* R 1985, c C–23 (hereinafter the *CSIS Act*) s12.

defines 'threat to the security of Canada' to mean espionage, foreign influenced activities within Canada detrimental to national interests, and activities supporting violence for a political objective or any unlawful acts.[3] CSIS was created in response to perceived failures on the part of the Royal Canadian Mounted Police (RCMP), the national police force that had before held the responsibility of national security and intelligence.[4] CSIS currently employs an estimated 2000 individuals, making it one of the Canadian Federal government's largest departments.[5] In 2000 it had an estimated annual budget of 157 million Canadian dollars.[6] A 32% budgetary increase was announced for CSIS in December 2001 as a result of the terrorist attacks against the United States on September 11. This represents the largest funding increase for the organization in its 17 year history.

Like most intelligence agencies in the world, CSIS does not have *carte blanche* to conduct any investigative procedure that it sees fit. Rather, warrants must be obtained from a Federal Court Judge following an exhaustive procedure that parallels the requirements of police agencies under the *Criminal Code*.[7] This procedure is an important guard against civil rights violations, and yet not excessively restrictive of the investigative process. Still, the service has broad powers, including access to hospital files, income-tax returns, passport information, employment insurance, welfare records and many other types of personal information such as memberships and associations.[8] Given the horrific potential of terrorist activities, these powers are necessary for the agency to investigate properly individuals who are potentially dangerous. CSIS is, however, not a law enforcement agency. It has no powers of arrest, nor are its agents permitted to carry weapons. CSIS operates where no crime has been committed, but may be at some future time. It reports potential risks to the Prime Minister's Office or other government departments. CSIS presently invests two thirds of its resources combating terrorism, but now also focuses on less traditional forms of violence, such as Cybercrime, that is, using the Internet to disable important computer based systems.[9]

CSIS is permitted under the Act to investigate foreign nationals, provided that such investigations are conducted within Canada.[10] Accordingly, the service looks into the activities of diplomats or other individuals or organizations visiting Canada, discouraging other nations from disguising spy initiatives as trade

3 *CSIS Act* s2. The Act explicitly excludes lawful protest and dissent from the definition of threat to security.

4 For a thorough discussion of the creation of CSIS from the RCMP see Daniel Cayley Chung, 'Internal Security: Establishment of a Canadian Security Intelligence Service' (1985) 26 *Harv J Int'l L* 234.

5 Andrew Mitrovica, 'The Real Problem With Our Spies' *The Globe and Mail* (24 Sept 2001).

6 CSIS official website: <http://www.csis-scrs.gc.ca> (Nov 2001).

7 *CSIS Act* s21(1)(2).

8 Richard Cleroux, *Official Secrets: The Inside Story of the Canadian Security Intelligence Service* (1991) at 71.

9 Remarks by WPD Elcock, Director of CSIS to the Commons Sub Committee on National Security, 27 May 2002.

10 *CSIS Act* s16.

delegations and cultural exchanges.[11] These are important powers that guard against potentially dangerous activities of ostensibly benign and often influential visitors.

Despite CSIS's considerable capabilities, the Canadian public is limited in its ability to obtain the information that the service has derived from its investigations. The Federal *Privacy Act* and *Access to Information Act* both contain exemptions for rights of access to records containing information which '... could reasonably be expected to be injurious to the conduct of international affairs and defence by the government of Canada or any state allied or associated with Canada.'[12] There are also exemptions under these Acts that CSIS has implemented for records discovered by law enforcement agencies.[13] Material obtained by CSIS from another foreign state is similarly excluded because it has been obtained in confidence.[14] Finally, CSIS's work is protected by s18 of the *CSIS Act* itself which prohibits an individual generally from procuring access to information obtained by CSIS. Much of the information analyzed by CSIS is readily accessible to the public from its source, such as newspaper articles. These limits on public access are sound as they are essential for national security, which affects all Canadians. Naturally the utility of information is diminished the more people who have access to it.

There has been some debate over the constitutionality of the service's exemptions from *Privacy Act* requirements and investigatory powers generally. While a detailed analysis of the challenges to the *CSIS Act* under Canada's *Charter of Rights and Freedoms* is beyond the scope of this paper, it should be recognized that CSIS's investigatory powers under ss12–17 of the Act have survived challenge under the Canadian Constitution's *Charter of Rights and Freedoms* as has CSIS's ability to withhold documents and source information.[15] Again, Canadian courts have adjudicated on these issues wisely. In Canada 'rights' are not absolute in the sense they are in other nations, notably the United States. Rather, rights are relative to the conditions of society at the time and the threats it may face.[16] Given the current state of world affairs, certain rights of the person should be diminished in the interest of national security. This is particularly true in Canada where relatively liberal immigration laws consistently fail to screen high-risk individuals prior to their entry into the country. We should be encouraged by new laws enacted since 11 September 2001, which allow for the use of classified information in dealing with refugee claimants. This new process for refugees is analogous to that of the more stringent *Immigration Act*.[17]

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11 Above n8 at 77.

12 *Access to Information Act* RS 1985, CA–1 s15, *Privacy Act* RS 1985, cP21 s21.

13 *Access to Information Act* s16, *Privacy Act* s22. See below n20.

14 *Access to Information Act* s13(1), *Privacy Act* s19(1).

15 See generally *Ruby v Canada (Solicitor General)* (1996) 136 DLR (4th) 74 (hereinafter *Ruby*) and *Corp of the Canadian Civil Liberties Association v Canada (Attorney General)* 161 DLR (4th) 225.

16 For an understanding of Canadian Constitutional law, see Peter W Hogg, *Constitutional Law of Canada* (4th ed, 1997).

17 See generally the Anti-Terrorist Bill C–36, now the *Anti-Terrorist Act* SC 2001, C–41 and *the Immigration Act* RS 1985, c12 s40.1.

In one Federal trial court case, Simpson J cautioned that CSIS should be especially careful not to disclose information sources because Canada

> is a net importer [of intelligence] with far fewer resources [than the United States]. [Consequently], it makes sense that Canada should have a greater concern about its allies' perception of the effectiveness of its ability to maintain the confidentiality of sensitive information.[18]

It is essential to retain the integrity of CSIS's files or else Canada's ability to receive intelligence from other nations will be compromised. This would be extremely unfortunate because, as Canada lacks a foreign intelligence service, it is dependent on other nations for its information.

Commentator J LL J Edwards states that the *CSIS Act* is a 'significant advance on anything that can be pointed to in the same field in other Western Democracies.' He holds that the Act achieves an essential harmony between recognition of civil liberties of citizens and the responsibility of any democratic government to gather information on threats to the security of the state.[19] Other commentators, such as Murray Rankin, accuse CSIS of being shrouded in secrecy with limited accountability. One of Rankin's principal objections is the lack of an express provision in the *CSIS Act* for disclosure of intelligence to the Attorney General of each of Canada's provinces (the agency which has jurisdiction over criminal law enforcement).[20] This view is flawed because the Provincial Attorney General has no place receiving information, let alone rendering any decisions, regarding sensitive intelligence of national importance. The Attorney General's purview should remain rooted in the *Criminal Code*, a statute which has little bearing on the matters outlined under the definition of 'threats to the Security of Canada'.

Canada's other intelligence agency, which works closely with CSIS, is the ultra secret Communications Security Establishment (CSE), an organisation whose powers and duties are not yet codified in statute. With an annual budget of $98 million Canadian dollars, the CSE uses highly sophisticated satellite technology to pick up communications, such as radio, television as well as verbal conversations around the world. As it is part of the military and not CSIS, the CSE does not require judicial warrants.[21] Presumably the CSE manages to glean more information more quickly because of this freedom, making it an essential source of intelligence. It is believed that almost all of the information received by the CSE is sent to the American National Security Agency in Fort Meade, Maryland.[22] CSE has increased its staff by 50% since 1980.[23] Although it was created in 1976, it was

18 *Ruby*, above n15 at 96.

19 J LL J Edwards, 'The Canadian Security Intelligence Act 1984 — A Canadian Appraisal' (1985) 5 *Oxford Journal of Legal Studies* 144.

20 Murray Rankin, 'National Security: Information, Accountability and the CSIS' (1986) 36 *U of T LJ* 255. While criminal law is a federal power in Canada, enforcement and prosecution is conducted by the Provincial Ministry of the Attorney General in each province.

21 Communications Security Establishment official website: <http://www.cse.dnd.ca> (June 2002).

22 Above n8 at 77–78.

23 Above n5.

not mentioned in any law until 1996 when the *Inquiries Act* appointed a Commissioner to oversee the CSE.[24] We shall see that other nations maintain similar communications interception agencies. It is unfortunate that unlike these other bodies, the CSE lacks a legislative framework. This should be modified as any organization with intrusive capabilities must have its powers and duties delineated to avoid overstepping authority to the detriment of the public.

3. *Review Mechanisms of CSIS*

CSIS is reviewed by the Security Intelligence Review Committee (SIRC) established under section 34 of the *CSIS Act*. In addition to overseeing the actions of CSIS agents, the SIRC also reviews reports of the Director of CSIS and directions issued by the Minister of Defence.[25] Lastly, the SIRC administers to complaints made by citizens regarding the conduct of the Service. This power is largely designed for individuals who have been denied security clearance following CSIS investigations.[26] The SIRC is composed of five members and has a staff of numerous investigators. It publishes an annual report, some of which remains secret.[27] The SIRC has access to almost all of the Service's top security intelligence. The only information that can lawfully be withheld from the SIRC is a confidence of the Queen's Privy Council.[28]

Despite these broad oversight powers, the SIRC has been accused of denying natural justice during reviews of security clearance checks. It has refused to offer reasons for its decisions nor allowed a valid opportunity for a complainant to present a case.[29] However, in *Chiarelli v Canada (Ministry of Employment and Immigration)* the Supreme Court of Canada, carefully balancing the interests of national security with the principles of justice, held that the SIRC's exclusion of a complainant and his counsel from certain parts of a hearing was not a violation of the *Charter of Rights and Freedoms*.[30]

Clearly the sensitive nature of the information obtained and withheld by CSIS outweighs the conventional requirement of hearing both sides of an argument, as the Canadian Supreme Court stated. This view is now wisely reflected in changes to Canada's *Evidence Act*, which provides for a public interest exemption from disclosure requirements for the purpose of protecting international relations, national defence or security.[31]

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24 Above n21.

25 *CSIS Act* s38(a)i and ii.

26 *CSIS Act* s42(3).

27 *CSIS Act* s53.

28 *CSIS Act* s39(3).

29 Above n8 at 259–260; above n5.

30 [1992] 1 SCR 711.

31 *Evidence Act* RS 1985, s37(1). This change is the result of Canada's Anti-Terrorist Act, Bill C–36 which came into effect in December, 2001. This determination can only be made by a superior court, and it can be appealed.

Furthermore, in SIRC hearings complainants are afforded the right to present evidence in their defence and to be heard.[32] While the inability to hear the case against oneself is an advantage to the prosecution, the welfare of all Canadians exceeds the necessity of this custom. Indeed, the *International Covenant on Civil and Political Rights* states that individuals facing expulsion from a nation may be denied such procedural rights where there are 'compelling reasons of national security.'[33] The *CSIS Act* generously permits a complainant to be 'as fully informed as possible' of the case against him.[34] Moreover, the SIRC's dual function of investigation and decision-making does not create a reasonable apprehension of bias, according to a sensible Federal Court of Appeal decision.[35] Finally, the SIRC frequently involves the Canadian Human Rights Commission in its decision-rendering as an additional review mechanism.[36] As complainants are afforded all reasonably acceptable means of defence given the severe nature of the information, the SIRC hearing procedures should not be modified. To do so would compromise the integrity and efficiency of investigations while wasting precious federal government resources that have been allocated to national security.

Some commentators feel that the SIRC is severely under-funded for the important role that it plays and also that the SIRC should be able to review the activities of the CSE.[37] The SIRC does need more than five members and a handful of investigators to conduct an adequate review of an agency as large as CSIS. But as the CSE involves merely passive listening, and not the denial of security clearance, or even the physical execution of search warrants or access to personal documents, SIRC involvement in CSE activities is unwarranted. We must keep in mind that the CSE is part of Canada's military and consequently may be better suited to review through the Department of National Defence, particularly since the CSE is forbidden to conduct investigations within Canada.[38]

Perhaps the largest complaint against the SIRC is that it has no powers to enforce its decisions: its recommendations are not binding on the government or on CSIS. This weakness was given judicial recognition by the Supreme Court of Canada in the poorly reasoned *Thompson v Canada* decision.[39] Clearly this unfortunate situation needs to be modified, as some form of active control over security operations that can result in censure and ultimately to charge is definitely required in Canada. This is essential both for the effectiveness of CSIS's activities and the protection of the rights of Canadians.

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32 *CSIS Act* s48.

33 *International Covenant on Civil and Political Rights* 17 Nov1966, GA Res 2200A (XXI), UN Doc A/6316 (1966) Article 13.

34 *CSIS Act* s46.

35 *Zundel v Canada (Minister of Citizenship and Immigration)* (1997) 154 DLR (4th) 216. The SIRC was an intervenor in this case.

36 *CSIS Act* s49.

37 Above n20.

38 Wesley Wark, 'Sharpen Those Little Grey Cells' *The Globe and Mail* (3 Oct 2001).

39 [1992] 1 SCR 385

While the *CSIS Act* itself is subject to parliamentary review every five years, there is no direct parliamentary oversight of CSIS.[40] This has led some commentators, such as Murray Rankin, to condemn the Canadian Senate's rejection of a permanent parliamentary oversight committee to supervise CSIS activities.[41] The Senate's decision reflected the concern that parliamentary access to national security information is dangerous. It was seen as impractical and duplicative of the SIRC, as well as subject to the weakness in maintaining secrecy within a politically partisan system.[42] As we shall see, parliamentary supervision has worked in Britain, the United States, Australia and New Zealand. Canada needs some form of a central oversight body for CSIS that is directly accountable to parliament to ensure that the service is acting within its duties both in terms of its operations, future plans, and spending.

4. *Security and Intelligence Agencies of Other Common Law Nations*

To achieve a better perspective on the Canadian Security Intelligence Service, it is helpful to glance briefly at intelligence organisations from other common law nations. We shall see that although the United States, Britain, Australia and New Zealand each possess intelligence agencies with similar powers and limitations, only Canada and New Zealand do not have a body which conducts extra-territorial investigation. Again, we shall see also that Canada is the only nation which lacks direct parliamentary oversight of its security service.

A. *The British Security Service (MI5) and Secret Intelligence Service (MI6)*

Perhaps better known as MI5, the British Security Service had not been recognised by any statute until 1989 despite being in existence for decades. The SS's original purpose was to combat foreign spies operating in the UK, but eventually the organisation directed its efforts to surveillance and domestic political movements. Similar to CSIS, its primary objective now is the protection of national security against espionage, terrorism and sabotage.[43] The Security Service is governed by the *Intelligence Services Act*.[44]

Like CSIS, Britain's SS is limited to collecting and disseminating intelligence to the government and has no responsibility for policing. While it does not have an international mandate, the SS is authorized to bug diplomatic premises within Britain, much as CSIS does. Some commentators, such as Leigh and Lustgarten, seem uncomfortable with this practice because of conflicts with Britain's international obligations. They add 'it would be naive to imagine that other states

40 *CSIS Act* s56.

41 Above n20.

42 Report of the Special Senate Committee on Security and Intelligence, January 1999.

43 *Security Service Act* 1989 s1(2) (UK).

44 *Intelligence Services Act* 1994 Ch 13.

behave differently in this respect.'[45] Quite simply, it would be unwise not to monitor the activities of foreign nationals within one's own country.

Britain's Security Service employs about 1900 staff and had a budget of less than 140 million pounds in 1998/99.[46] Given that Britain's population is nearly twice that of Canada, yet its domestic intelligence agency has less employees than CSIS, one may be tempted to comment that either Canada's service is over-staffed, or the SS needs more people. As Britain's population is concentrated in a much smaller area, negating extensive travel time, fewer agents are able to investigate more people and places in less time than in Canada with its wide population dispersal.

Britain's other intelligence organisation, MI6, or as it is now called the Secret Intelligence Service, for a long time existed in 'legal darkness' totally outside any statute.[47] It was not even recognised by the *Official Secrets Act*. Critic J LL J Edwards held that this was a major weakness in the organisation as it lacked accountability and jeopardized civil liberties because of unknown and unregulated powers of data collection.[48] This view makes sense as any organisation that is without rules is susceptible to error and abuse. Sensibly the SIS is now acknowledged in the *Intelligence Services Act*. Unlike the SS, the SIS is in charge of foreign security operations, empowered to obtain and provide information relating to actions of persons outside the British Isles.[49] The SIS is given the specific ability to interfere with other sovereign states, without the consent of that foreign state. The Service is not restricted to activities that threaten the UK.[50]

The activity of British agents abroad raises some interesting and tremendously important legal issues. What happens if the SIS violates the privacy laws of another country? No statute of the British Parliament can bestow immunity on the SIS if they violate the civil or criminal laws of any other sovereign state. Consequently a SIS agent could be prosecuted and punished abroad under another country's rules. The actions of a civil servant of the UK in another country are not subject to liability in the UK, although civil servants who commit offences abroad which would be indictable in Britain can be prosecuted and convicted on British soil.[51]

Section 7 of the *Intelligence Services Act* prevents liability under the civil or criminal law of the United Kingdom if the particular act in question is authorised by the Secretary of State. Unlike the more narrow limit for agents of Australia's

45 Below n47 at 805. They refer to the *Diplomatic Privilege Act* 1964 Art 22 which states that diplomatic premises are inviolable.

46 Security Intelligence Service official website: <http://www.mi5.gov.uk> (June 2002). Note that Britain's Secret Intelligence Service (MI6) does not have an official website.

47 Ian Leigh & Laurence Lustgarten, 'Legislation: *The Security Service Act* 1989' (1989) 52 *Mod LR* (UK) 801 at 802.

48 Above n19 at 144.

49 *Intelligence Services Act* 1994 (UK) s1(1)a.

50 *Intelligence Services Act* 1994 (UK) s1(2)c

51 John Wadham, 'Legislation: *The Intelligence Services Act* 1994' (1994) 57 *Mod LR* 916 at 922. Wadham references the *Criminal Justice Act* 1948 (UK) s31.

ASIS, see below, there is no limitation under s7 for the authorisation regarding which laws (particularly domestic laws in other countries) can be violated and for what purpose. This means, for example, whether lethal force can be used or not.[52] Actions authorised under s7 must be necessary for the proper discharge of the functions of the Intelligence Service. The Secretary of State has a duty to be satisfied that there are arrangements in place to ensure that the probable result of the actions will be reasonable considering their purpose. Still, the vagueness of the s7 words 'acts of a description so specified' and 'persons so specified' should allow a wide variety of activities with little control by courts and other bodies. Commentator John Wadham claims that s7 will prevent foreign citizens from challenging actions so authorised. He also feels that actions taken against a British citizen abroad would be outside the law.[53] Presumably by this he means activity by MI6 against a British citizen abroad.

SIS activities are reviewed by a specially appointed Tribunal. Anyone, including non-British citizens, is permitted to use the Tribunal to instigate a complaint about Service procedure.[54] However this review process has been criticised for its secret hearings, failure to provide reasons or access to documents to complainants, and lack of taking action when decisions favouring complainants have been made.[55] Again as we have seen with SIRC methodology, the interests of national security warrant the suspension of conventional procedural fairness in this type of proceeding.

Britain's Intelligence Services have been lauded for their political accountability, which had been lacking for decades.[56] Section 10(1) of the *Intelligence Services Act* states that both of the services must report to the Intelligence and Security Committee. This committee, composed of parliamentarians, was established in 1994 to examine policy and expenditures of the agencies and to act as a general review body. All information is disclosed to the Committee unless it is 'sensitive', in which case it will be withheld by the Secretary of State. Committee reports must first be presented to the Prime Minister, who has the right to censor the information if he feels it would be prejudicial to the functions of the Services.[57] The ISC is not a true parliamentary committee because the members do not report directly to parliament. The members are appointed by the PM in consultation with the leader of the opposition. The ISC is also limited in its oversight mandate with regard to the total operations of the Intelligence Services.[58] This bi-partisan oversight structure is preferable to the

52 Id at 922. Wadham writes that s7 of the ISA essentially authorises illegal activities by the SIS, and is the first legislative codification of James Bond's infamous 'licence to kill'.

53 Id at 923. Wadham offers no explanation for this, but one imagines that the imprisonment or punishment of a foreign citizen would sour diplomatic relations between nations such that some kind of release could be negotiated, albeit after extensive interrogation.

54 *Intelligence Services Act* s8.

55 Above n51 at 923.

56 Id at 925.

57 *Intelligence Services Act* s10(7).

58 Philip Rosen discusses the British system in 'The Canadian Security Intelligence Service' The Library of Parliament: Parliamentary Research Branch, 24 January 2000, Ottawa, Canada.

Canadian system as it suggests a necessarily closer, unbiased supervision. This system also has the advantage of restricted parliamentary review of the most sensitive issues, ensuring a higher level of secrecy for the most delicate operations.

Britain also operates the Government Communications Headquarters (GCHQ) which is the equivalent of Canada's CSE. The GCHQ controls listening stations around the world and in the UK. Like the CSE, no warrants are required for its activities permitting expansive intelligence gathering.[59] The GCHQ, like MI6, had not been recognised by any statute until 1994.[60] Unlike the CSE, the GCHQ is now wisely recognised by statute in the *Intelligence Services Act*.

B. The Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS)

The Australian Security Intelligence Organisation (ASIO) has an almost identical mandate to that of CSIS. Established by the *Australian Security Intelligence Service Act 1979*, the agency's primary function is to collect information concerning activities that might endanger Australia's national security. ASIO is concerned with terrorism, espionage and politically motivated violence. Like CSIS, ASIO also provides security assessments for other government agencies on individuals applying for national security clearances or visas to enter or remain in Australia.[61]

Section 54 of the ASIO Act refers to a tribunal which reviews denial of security clearance decisions, much as the SIRC does in Canada. Under Australian law, this tribunal may withhold evidence in such hearings, and deny the attendance of the applicant or his counsel if it is in the public interest. The findings of the tribunal may even be withheld from the governmental institution to which the assessment was given.[62] Although procedurally unfair, this mechanism is necessary to protect national security.

Interestingly, ASIO's responsibility overlaps that of a conventional police force in instances where minor acts of violence are part of a pattern intended to influence the acts of a government. However the Attorney General's Guidelines make it abundantly clear that lawful protest activity will not be investigated by ASIO, similar to CSIS's prohibition.[63] Any investigations of a criminal nature must be directed at the prevention of future dangers. Once a crime has taken place all subsequent investigation falls under the purview of the police.

ASIO is required to collect information concerning threats to security even when the object of the threat is the government of a foreign country, provided that Australia has responsibilities to that nation in relation to security matters. If there is a danger to another country developing within Australia, ASIO can and should investigate. This is reflected in the ASIO Act's definition of 'security' which

59 Above n8 at 290.

60 Above n47 at 802.

61 ASIO official website: <http://www.asio.gov.au> (June 2002).

62 *Australian Administrative Appeals Tribunals Act* 1975 ss39A(8) & 43AAA(5).

63 This requirement can be found in s17(a) of the *ASIO Act*.

includes 'acts of foreign interference; whether directed from or committed within, Australia or not'.[64]

Still, any foreign intelligence obtained by the organisation is only to be obtained *within Australia*. If there is a danger to Australia from another country, this is beyond ASIO's scope of operations. ASIO is able to consider an act of foreign interference, provided that it occurs within Australia, even if it is directed, financed by, or undertaken in active collaboration with a foreign state. This is identical to the limitation placed on CSIS, which as we have seen operates exclusively within Canada. Paragraph 3.25 of the Attorney General's Guidelines states that ASIO may rely on information drawn from 'other sources'. Presumably these are the intelligence gathering agencies of other countries with which ASIO may have sharing arrangements.

General ASIO investigations are reviewed at least annually. In addition to regular briefings, the Director-General of the organisation must submit an annual report to the Attorney General.[65] ASIO has been applauded for its requirement that the Director must consult regularly with the Leader of the Opposition party.[66] This is seen as another means of ensuring accountability and legality. CSIS does not have this requirement and it should. While conferring with opposition leaders could lead to political posturing which is unwarranted concerning issues of national security, a fully democratic review can challenge decisions and better ensure compliance with duties and procedures. In Australia, as in Britain, national security matters are almost always dealt with on a bi-partisan basis with confidential briefings.

The annual budget of ASIO in 2000–2001 was 62.7 million Australian dollars. The organisation maintains a staff of approximately 500 and operates an office in each state and territory capital, with a Central Office in Canberra. Australia's population of 19 million is just over half that of Canada's, with a domestic security service of roughly one quarter the size. A plausible explanation for this discrepancy is Canada's proximity to the United States. Canada is attractive to terrorists who wish to organise attacks south of the border. Australia is relatively isolated with no international borders.

Australia's other intelligence agency; the Australian Secret Intelligence Service (or ASIS) is responsible for foreign intelligence collection. Its primary purpose is to obtain and distribute information about the capability and activities of individuals outside Australia which may impact on the well-being of Australia. Formed in 1952, the Service is accountable to the government through the Minister of Foreign Affairs.[67] The Service's duties and powers are now outlined in the *Australian Intelligence Services Act*.[68] ASIS is not a police or law enforcement

64 *ASIO Act* s4(a)vi.
65 *ASIO Act* s94.
66 Above n20 at 257.
67 Above n61.
68 *Australian Intelligence Services Act* 2001 No 152.

agency, nor does it have para-military responsibilities. It does not employ force or lethal means.[69]

ASIS activities must be authorised by the Minister of Foreign Affairs, once he or she is satisfied that the actions are 'necessary and proper' and that there are 'satisfactory arrangements' that the activities will be carried out in a manner in keeping with ASIS directives.[70] This language is remarkably similar, albeit somewhat narrower than that of the *British Intelligence Services Act*, both statutes giving vaguely defined discretion to the Minister to ensure that the foreign Service is doing that which it is supposed to while permitting a degree of flexibility.

Section 14 of the Australian Act parallels that of section 7 of the British Act, authorizing the Services to commit illegal activities abroad. Section 14(1) establishes that an ASIS agent is not subject to any civil or criminal liability for any act done outside Australia, provided that the action is done in the proper performance of a function of the agency. The words 'any act' allow a wide variety of activity, but we are reminded that ASIS claims that it does not use lethal force in its operations, nor does it train its officers in such techniques. If lethal force were used, contrary to the *Intelligence Services Act,* the immunity conferred by s14 would be lost.[71]

This supposed lack of an offensive mandate is perhaps the largest difference between ASIS and the American CIA, which has para-military objectives. Again, we do not know what precautions exist to protect ASIS agents if caught violating the laws of other states. Some nations, particularly Islamic ones, implement the death penalty for certain offences. Presumably ASIS would engage in some kind of intervention, but this is unknown.

The Director General of ASIS must ensure that the Service's activities conform to the foreign policy of Australia. There is also extensive scrutiny by an Inspector General of Intelligence and Security (IGIS) who has access to all ASIS information and who must report to the Prime Minister annually.[72] The Director of ASIS must consult regularly with the Leader of the Opposition about the Service's findings.[73] Under sections 28 and 29 of the Act a Parliamentary Joint Committee on ASIO and ASIS was established to review the expenditures of Australia's intelligence agencies, as well as administrative matters. As we have seen in the British model, a bi-partisan, politically accountable oversight mechanism engenders more effective supervision. Still, the Parliamentary Joint Committee cannot initiate any investigations into security activities without parliamentary approval and has no mandate to review activities considered to be of a sensitive nature. This achieves an excellent balance between effective supervision and the risk of leakage of top secret information.

69 *Australian Intelligence Services Act* 2001 No 152 s6(4).

70 *Australian Intelligence Services Act* s9(1)a & b.

71 See the Joint Select Committee on the Intelligence Services (Official Committee Hansard), 20 August 2001, Canberra, Australia.

72 Above n61.

73 *Australian Intelligence Services Act* 2001 (Cth) s19.

Australia's Department of Defence maintains the Defence Signals Directorate, or DSD, which is in charge of satellite communications and electro-magnetic surveillance across the globe and is the equivalent of Canada's CSE and Britain's GCHQ.[74] Fortunately, unlike Canada's CSE, the role of the DSD is referenced by statute in s.7 of Australia's *Intelligence Services Act* 2001 (Cth). The DSD, like ASIS, is overseen by the IGIS as well as by the Parliamentary Joint Committee, which will supervise the expense and administration of ASIO, ASIS and the DSD.

C. New Zealand's Security Intelligence Service (NZSIS)

Founded in 1956 during the Cold War, but existing without a legislative base until 1969, New Zealand's Security Intelligence Service (NZSIS) is a civilian organisation that obtains, correlates and evaluates intelligence relevant to the security of New Zealand.[75] Remarkably similar to the mandate of CSIS, NZSIS investigates espionage, sabotage, subversion and terrorism. It has no police powers but remains exclusively advisory. The Director of Security who heads the Service and is responsible for the proper working of the Service reports to the Minister in Charge of the Service, who is a member of parliament. As in Australia, but unlike Canada, the Director of Security must consult regularly with the Leader of the Opposition. Again, this precaution makes sense as it allows for closer, more objective scrutiny of what can often be invasive investigative operations. The SIS is overseen by the Intelligence and Security Committee, which is composed of members of parliament from both the party in power and the opposition.[76] Once again, the New Zealand approach is laudable; bi-partisan oversight is essential to ensure the needs of the citizens are met.[77]

Section 4(1) of the *NZSIS Act* 1969 (NZL) requires that the NZSIS co-operate with other organisations, both in New Zealand and abroad. While the NZSIS lacks an international mandate, that is, it does not concern itself with threats to other nations, the Service collects intelligence via liaison with other security organisations overseas, recently opening branches in Washington and London. In response to 11 September 2001, NZSIS now operates a National Terrorist Centre from its head office in Wellington which co-ordinates the collection and analysis of intelligence about international terrorist organisations. Intelligence regarding the activities and intentions of foreign organisations which may affect New Zealand is collected in accordance with the requirements of the Foreign Intelligence Requirements Committee, which is a subordinate committee of the Officials Committee for Domestic and External Security Organization. This is in turn a committee of the aforementioned Intelligence and Security Committee. This seemingly complex bureaucracy is useful in that it maintains the integrity of

74 *Australian Intelligence Services Act* 2001(Cth) s7.

75 *NZSIS Act* 1969 (NZL) s4.

76 New Zealand Security Intelligence Service official website: <http://www.nzsis.govt.nz/> (27 August 2002).

77 It is unclear from the material if the ISC is limited in its review powers to matters of expenditure and administration or if it actually reviews substantive operations. Likely there is some form of limitation on review of top secret activities.

parliamentary oversight, namely the Intelligence and Security Committee, while distancing sensitive issues from those who contribute to direct public political debate. CSIS, which has the equivalent international objectives to NZSIS, lacks a specific committee for foreign intelligence. This is unfortunate as one would expect foreign-collected, domestically relevant intelligence to have its own set of concerns, different from those of domestic investigations.

Domestic NZSIS warrants for investigations of New Zealand citizens must be obtained jointly from the Commissioner of Security Warrants, who is a retired High Court Judge and the Minister In Charge of the Service. While the requirements for obtaining the warrant are similarly exhaustive as the Canadian process for CSIS, one is disturbed by the fact that the issuance of a warrant is not, strictly speaking, a judicial decision, but a political one. The judge is not acting in his or her capacity as a judge, but as a commissioner. Similarly, the notion of a retired individual making these findings raises concern of competency levels and familiarity with existing legal procedure. An acting judge should be issuing search warrants following the same process as criminal investigations by police departments.

Foreign interception warrants, permitting searches of non-citizens of New Zealand, must be obtained jointly from the Commissioner of Security Warrants and the Minister of Foreign Affairs and Trade. Again, this is a helpful distinction which Canada does not have: direct involvement of the Minister of Foreign Affairs in foreign investigations as opposed to domestic investigations. Presumably, this Minister is more knowledgeable on issues relating to foreign states than a Minister whose sole prerogative is internal security. It is comforting that like CSIS, NZSIS must obtain a warrant to intercept or seize communications, with no exceptions. As an additional safeguard lacking in the Canadian legislation, NZSIS must take steps to minimize the likelihood of intercepting or seizing communications that are not relevant to the person named in the warrant.[78]

Similar to that which we have seen in Canadian cases and the Australian tribunal procedure, the courts of New Zealand have recognized SIS's right to withhold certain records from court proceedings because of public interest immunity. In *Choudry v Attorney General* the court stated that in deciding the issue of immunity from production it would balance the interest of national security against that of a defendant's right to make proper answer and defence; however, there would be a strong presumption in favour of national security.[79] There was an outcry by civil libertarians when the political activist was prevented from accessing documents relevant to his case because of national security interest.[80]

As a possible solution to the contentious issue of civil rights conflicting with national security, which has plagued intelligence services the world over as well as in New Zealand, one critic has suggested that judges could look at the documents

78 These NZSIS warrant powers were amended following two NZ Court of Appeal cases involving the search of a political activist's house: *Choudry v AG* [1999] 2 NZLR 582 and *Choudry v AG* [1999] 3 NZLR 399.

79 Id (NZLR) at 592.

80 Astrid Sandberg, 'Keeping A Watch on Big Brother: The SIS and the Court of Appeal' (2000) 9 *AULR* 257 at 263.

in question after being briefed on the nature of the security risks involved without releasing them to either party.[81] Some might have difficulty accepting this type of regime, as one of the parties would be the very government which, through another emanation, will be providing the briefing. Of course, the notion of the judiciary reviewing other branches of the government is well entrenched in democratic systems, and the cornerstone of the American 'checks and balances' safeguard. The practice is sensible as the content of the documents can contribute to the judge's verdict while still remaining secret from the defendant, his counsel and any other witnesses to the trial who may be potential security risks for the country. Other mechanisms are available, such as closing the court to the public and media through provisions such as s85(b) of Australia's *Crimes Act* 1914 (Cth) and s486(1) of Canada's *Criminal Code* 1985 (CAN). Clearly, the availability of public interest immunity claims to criminal charges is a highly contentious topic in itself, but a full discussion of this is beyond the scope of this note.

NZSIS's budget for 2001 was NZLD11.6 million, roughly one twentieth that of CSIS even before the Canadian service's budgetary increase in December 2001.[82] It should be noted that New Zealand has a population of only 3.8 million, slightly more than a tenth of Canada's, with a proportionately small gross domestic product. New Zealand recently increased operational funding for the NZSIS by NZLD11.7 million over two years following the terrorist attacks against the US.[83] NZSIS also recently increased the number of its agents from 110 to 140, which is still down from its peak of 159 in 1982–83.[84] These seemingly small budgets and workforces may be explained by New Zealand's geographical isolation from the major players in world affairs: the United States, the European Union and the volatile Middle East.

New Zealand operates the Government Communications Security Bureau (GCSB) in Waihopai as a 'signal intelligence' gathering organisation for intercepting foreign communications. Like Canada's CSE, the GCSB is restricted to gathering information from sources other than New Zealand citizens. While there had been some debate within New Zealand to dismantle this agency because of its lack of accountability, the GCSB received increased funding following 11 September 2001 and will soon become codified in statute for the first time since its creation in 1977. This will place it on an equal legislative framework to the NZSIS.[85] The GCSB's codification in statute is sensible, as no government body with such tremendously intrusive capabilities should not have its role clearly outlined. Also, citizens have the right to have at least some clarification of government spending.

81 Id at 265.

82 Above n76.

83 See 'Government to Spend $30 Million on Counter Terrorism', below n85.

84 'Situations Vacant: Spies' *New Zealand Herald* (3 May 2002).

85 See 'Government to Spend $30 Million On Counter-Terrorism' *New Zealand Herald* (30 Jan 2002); Eugene Bingham, 'Spy Eyes Likely To Focus on Crime' *New Zealand Herald* (30 Jun 2001). In effort to become less secret, New Zealand's GCSB now maintains an official website at www.gcsb.govt.nz.

D. The American Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI)

The vast array of intelligence bodies in the United States has led to the use of the term 'Intelligence Community'.[86] In addition to the Central Intelligence Agency and the Federal Bureau of Investigation, the United States also has the National Security Agency, the Defense Intelligence Agency, as well as the United States Customs Service. Still, the total security budget of the United States is comparable to that of Canada on a per capita basis.[87] There is no shortage of legal analysis over the governmental structure that administers the CIA, but surprisingly little on the extra-territorial legal treatments of American spies. A full treatment of the US intelligence community is beyond the scope of this note.

Having no domestic presence whatsoever, the CIA is responsible for foreign intelligence gathering and analysis of issues which affect national security. According to the CIA itself, the agency coordinates counter-intelligence, as well as 'special activities and other functions' related to foreign intelligence.[88] It was created in 1947 by the *National Security Act* under President Truman.[89] That Act also established the National Security Council (NSC) within the Executive Office of the President which would oversee intelligence operations generally. The President of the United States is the Chairman of the NSC and his Secretaries of State are key NSC members. As the CIA is an executive instrument of the President, it is implicitly empowered to carry out any missions that come within the authority of the Chief Executive of the United States.[90]

This is the major difference between the statutory mandate for the CIA as a foreign spy agency, and its actual activities, which involve *offensive* covert operations in other countries. The CIA is believed to supply weapons, bribe officials, plant newspaper stories, and possibly even organise assassinations, although officially it has none of these roles. The CIA is much more than an investigatory body; it is actually one of the primary instruments of American foreign policy. CIA agents often pose as diplomats or ambassadors and can play very central roles in military intervention.[91]

Such controversial activity has led some commentators, such as Loch Johnson, to advocate more strict oversight procedures for the CIA, including advance briefings for members of Congress on CIA operations.[92] Unfortunately, as Johnson admits, close monitoring of the CIA is not always practical in the real

86 See, for example, Daniel L Boren, 'The Winds of Change at the CIA' (1992) 101 *Yale LJ* 853.

87 Above n5. The US Intelligence Community spends USD3.8 billion per year: CIA official website: <http://www.odci.gov> (27 Aug 2002).

88 CIA official website, ibid.

89 *National Security Act*, c343 para 2, 63 Stat 579 (codified as amended at 50 USC paras 401–405 [1988]).

90 Ray S Cline, 'Covert Action as Presidential Prerogative' (1989) 12 *Harv J of L and Public Policy* 357 at 359.

91 John Pike, 'Central Intelligence Agency Budget': <http://www.fas.org/irp/cia/ciabud.htm> (27 Aug 2002).

92 Loch Johnson, 'Controlling the CIA: A Critique of Current Safeguards' (1989) 12 *Harv J of L and Public Policy* 371.

world. Some circumstances necessitate immediate action with the fewest possible people knowing.[93] This type of debate has pre-occupied the Canadian Senate with respect to the lack of parliamentary oversight for CSIS.[94] Of course this is not to say that the American Intelligence Community would not benefit from more regular reporting to Congress, as well as written prior approval of the President for all covert operations and the prevention of private financing for intelligence operations, which can lead to violations of ordinances. All this would assist in a more methodical, deliberate and likely more organised scheme for national security.

American intelligence operations abroad raise crucial legal issues that remain unaddressed in US statutes. To what extent can CIA agents violate the privacy and other civil rights laws of other nations? More than this, as the CIA conducts active, offensive campaigns, what can happen to an agent who violates criminal laws, perhaps those involving violence? Naturally CIA agents are open to prosecution and punishment in other nations for the violation of their laws. American policy on this is unclear, but it likely that the American military watches over agents who might find themselves in hot water for illegal activities. The CIA's activities are closely tied to those of the American military, which often does not activate until a declaration of war, suspending the operation of normal laws. We do know that there is no formal CIA equivalent to the British and Australian laws which prevent domestic liability for actions of agents taken abroad.

The CIA has a budget of approximately USD3 billion per year and an estimated staff of between 15 and 30 thousand people. Considering that the US population is slightly less than ten times that of Canada, the CIA has a roughly proportionate size to CSIS. This may be surprising to some, as the US has a far more prolific international presence than Canada, and as evinced by the attacks of 11 September 2001, seems to be in greater danger of terrorist activity than Canada. Certainly the United State's position in world affairs necessitates the existence of an organisation like the CIA which can achieve political and hopefully peaceful ends covertly, often eliminating the need for armed intervention.

As CSIS is a domestic intelligence organisation, in many ways it more closely corresponds to the US's Federal Bureau of Investigation (FBI). Founded in 1908, the FBI's objective is to uphold the law of the United States through the investigation of violations of Federal criminal law and to protect the United States from foreign intelligence and terrorist activities. As well as being the lead counter intelligence and counter terrorism agency, it is the principal investigative arm of the Department of Justice.[95] Unlike CSIS, however, the FBI is a law enforcement agency with police powers. Its agents are not civilians and are trained in the use of force. In that sense, the FBI is comparable to the Royal Canadian Mounted Police.

The FBI's powers are derived from congressional statute. Title 28 USC §533 authorises the Attorney General to appoint officials to detect and prosecute crimes

93 Id at 393.

94 Canada, Senate, Parliamentary Debates (Hansard), 4 April 1995.

95 28 USC §533.

against the United States. Special Agents and officials of the FBI are specifically authorised to make arrests, carry firearms and serve warrants, as well as seize property under warrants for violations of Federal statutes.[96] FBI Agents generally have no authority outside the US, except in cases where there is consent of the foreign nation and Congress subsequently grants extraterritorial jurisdiction.[97] Despite its status as a domestic law enforcement agency, the FBI's role in international investigations was expanded under the authority granted by Congressional application of extraterritorial jurisdiction. The FBI currently has 44 foreign posted officers (called Legal Attaches) and offices in 52 foreign countries. These representatives primarily assist foreign police agencies.[98] According to its official website, the FBI employs approximately 28 000 people and received USD3.5 billion in funding in 2000.

Although its investigative powers have recently been enhanced, the FBI must still obtain warrants from a Federal Court judge in order to conduct searches. The FBI must renew its electronic eavesdropping warrant every 30 days by re-appearing before a judge and persuading them that continued surveillance is still required. While CSIS is not required to do this, the Service must renew a warrant once it has expired by proving that it is still needed. Most warrants expire in 60 days.[99] The FBI also must destroy any recordings made of conversations accidentally carried over the same phone lines that are not necessarily pertinent to the investigation. CSIS must do so only if solicitor-client privilege is involved.[100]

In the United States there is both a House of Representatives and Senate committee that review the CIA and the FBI on a regular basis. Both committees hold *in camera* hearings.[101] This is in keeping with the British, Australian and New Zealand systems which maintain a politically accountable bi-partisan review of intelligence activities. Unlike the review agencies of Australia and Britain whose parliamentary oversight is limited to matters of expenditure and administration, under the American system, even current covert action must be advised to Congress with the exception of the most sensitive security issues.[102] The transparency of the US system has increased Congressional support and funding for security, intelligence activities. The details of time sensitive, top-secret operations should not be the subject of bi-partisan public debate.

Since the terrorist attacks of 11 September 2001, the United States, like many nations, has increased the powers of its domestic intelligence and security agencies to facilitate the suppression of terrorist activities. Congress enacted the *Anti Terrorist Act*, (originally named *The USA Patriot Act*) which authorised the FBI to waive some of the Attorney General's guidelines for investigative conduct. The

96 18 USC §3052 & §3107.

97 FBI official website: <http://www.fbi.gov> (Jun 2002).

98 FBI official website: <http://www.fbi.gov/contact/legat/legat.htm> (22 Aug 2002).

99 *CSIS Act* s22.

100 Above n8 at 74.

101 Id at 78.

102 These circumstances and the debate surrounding them are explored in more detail in Cline's article: above n90.

FBI is now permitted to use commercial data bases and enter public places to conduct observations.[103] Investigations can be instigated without authorisation from FBI headquarters, electronic surveillance powers have increased, as have subpoena powers for all forms of records production, most notably e-mail.[104] The US, which spent 10.6 billion American dollars on homeland security in the wake of September 11, has also augmented border and airport security, tightened immigration laws, and restrained funding sources for all forms of politically-motivated violence.[105] Most recently the US President proposed a new Homeland Security Department, a cabinet security department consolidating many government agencies.[106]

5. *Canada's Foreign Intelligence Presence*

As we have seen, the United States, Britain and Australia all operate foreign intelligence services. Since the terrorist attacks of September 2001 there has been much debate within Canada over CSIS's lack of an international presence. When CSIS was created the government expressly rejected the notion of a foreign intelligence service as an unnecessary expense given Canada's limited role in international conflict.[107] Even when CSIS funding was increased in December 2001 the notion of an overseas presence was completely ignored.

The fact that there has been no serious discussion within the Canadian government regarding this topic may be because the *CSIS Act* does not expressly prohibit CSIS from operating abroad.[108] CSIS maintains reciprocal screening agreements with foreign governments and other intelligence agencies, such as the CIA.[109] Typically this means that CSIS will check the background and security of foreign diplomats in Canada provided that the other nation will look into the background of Canadian diplomats abroad.[110] The Service is permitted by statute to enter into such agreements with foreign governments.[111] However the Act says nothing about reciprocal agreements wherein Canada may obtain security assessments from another nation.

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103 *The Anti-Terrorist Act* 2001 (Public Law 107–56) s505.

104 *The Anti-Terrorist Act* 2001 (Public Law 107–56) ss206–218.

105 See the US government webpage: <http://www.whitehouse.gov> (June 2002).

106 Elisabeth Bumiller & David E Sangen, 'Bush, as Terror Inquiry Swirls, Seeks Cabinet Post on Security' *New York Times* (7 Jun 2002).

107 Jeff Sallot, 'CSIS May Do More Foreign Spying' *The Globe and Mail* (5 Oct 2001).

108 *CSIS Act* s16 (1): '... the Service may in relation to the defence of Canada or the conduct of the international affairs of Canada, assist the Minister of National Defence or the Minister of Foreign Affairs, *within Canada*, in the collection of information or intelligence ...' [Emphasis added.]

109 Above n8 at 3. Cleroux writes that the Mossad, Israel's security and Intelligence Agency, has also entered into a similar arrangement with CSIS. Cleroux believes that as much as 90% of Canada's foreign intelligence comes from the United States: above n8 at 111.

110 Id at 248.

111 *CSIS Act* s13(3): 'The Service may, with the approval of the Minister after consultation by the Minister with the Minister of Foreign Affairs, enter into an arrangement with the government of a foreign state or an institution thereof or an international organization of states or an institution thereof authorizing the Service to provide the government, institution or organization with security assessments.'

At one point the SIRC reported that there were at least two dozen countries actively spying within Canada with CSIS's permission.[112] CSIS has signed more than 60 agreements with foreign police forces and security agencies that permit CSIS to supply information on Canadians to other nations.[113] This is permitted by s17(1) b of the Act, which gives the Service very broad powers to 'enter into an arrangement or otherwise cooperate with the government of a foreign state or an institution thereof or an international organization of states or an institution thereof.' Such arrangements must be in writing and delivered to the SIRC.[114] CSIS reported in 2001 that it entered into five new foreign intelligence liaison agreements with other nations. Forty-four of its old arrangements became classified as 'dormant' and six were expanded. In suspending agreements with other nations, CSIS claims that it will consider compatibility with Canada's foreign policy and that it will be reluctant to share information with any nation that violates human rights.[115] It is unclear whether this is a moral decision, that is, that Canada will show its dislike of human rights violating countries by refusing to cooperate with them, or whether information derived from such nations is perceived as unreliable.

While an official foreign presence does not exist, the current director of CSIS, Ward Elcock, maintains that the service does have an international presence, insisting that CSIS can collect information wherever it needs to.[116] This activity is based on s12 of the *CSIS Act* which permits the service to gather intelligence 'by investigation or otherwise.' One expert claims that very little is known about CSIS's extra-territorial intelligence gathering operations, except that they are rare and covert.[117]

While Canada's current focus on intelligence gathering is domestic, it did conduct external intelligence operations in World War II where Canadian intelligence agents worked under the direction of Britain's MI6. The CSE was a significant listening post for the West during the Cold War. But, as Canadian Senator Colin Kenny writes, 'Canada has been limping along by offering what CSE has collected electronically and what CSIS has collected domestically. It's not enough.' Kenny, who is chairman of the Standing Senate Committee on Defence and Security, believes that drastically increased funding for CSIS and legal authorisation for them to act extraterritorially is the only solution that will ensure the safety of Canadians.[118]

112 Above n8 at 270.

113 Id at 287.

114 *CSIS Act* s17(2).

115 *SIRC Annual Report* 2000–2001: SIRC official website: <http://www.sirc-csars.gc.ca/annual/2000–20001/sec1a_e.pdf> (Jun 2002).

116 Richard Foot, 'Canada Needs Foreign Spy Agency: Advisor' *National Post* (3 Oct 2001); above n107.

117 Sallot, speaking of University of Toronto intelligence expert Wesley Wark, ibid.

118 Colin Kenny, 'War on Terrorism Starts with Intelligence' *National Post* (26 Sept 2001).

Commentator Frank Griffiths notes that there has been pressure on Canada to establish a secret foreign spy service from Canada's allies.[119] It is somewhat surprising that one country would actively encourage another to spy within its borders. However this reflects the increasing awareness among nations that security is becoming an international rather than a national concern, with many sovereign states facing threats from similar sources. While falling short of recommending a foreign mandate, Griffiths feels that there is a need for cooperation among nations regarding security, perhaps to the extent that a global security and intelligence service is created.[120]

This view is shared by critic Douglas Bland who believes that security issues must not be divided between domestic and international operations because they flow across borders and jurisdictions. He writes that the current departmental divisions for security policy result in 'slow, cumbersome and ineffective responses to incidents.' Additionally, Bland points to the lack of one security operations centre in Canada and lack of one definitive minister in charge of security as the major flaws in Canadian intelligence and security.[121] Rather than create an entirely new intelligence agency with a foreign mandate, Bland wants all security operations, domestic and foreign, to be united into one centralised agency under the Minister of National Defence. This view is shared by the director of intelligence assessment at the Canadian Privy Council Office. The deputy clerk and co-coordinator for security and intelligence at the Privy Council Office in Ottawa, Richard Fadden, feels that Canada should consider the creation of a foreign spy agency for the safety of Canadians.[122]

Intelligence expert Wesley Wark urges that any improvements in foreign intelligence gathering will augment Canada's ability to barter information.[123] He sees intelligence as the 'first and most important line of defence against terrorism' and the current Canadian intelligence community as 'too weak in every stage of the intelligence process.'[124] Wark believes Ottawa must establish a foreign intelligence service similar to the British SIS or the American CIA. Without such a service, Canada faces a diminished ability to comprehend developments abroad and to contribute in any significant way to the global war on terrorism. In his mind the CSE needs major financial and technological improvements as well as a shift in ideology toward analytical reporting instead of collection. CSE may also need to begin surveillance within Canada, which it is currently forbidden to do. If this is not achieved then Wark fears Canada may face ostracism from the alliance with the US, Britain, Australia and New Zealand.[125] This could have unfortunate economic repercussions, such as tariffs or trade restrictions on Canadian products.

119 Frank Griffiths, 'The CSIS, Gorbachev and Global Change: Canada's Internal Security and Intelligence Requirements in Transition', paper for the Centre for Russian and East European Studies, University of Toronto, January 1990 at 3.

120 Id at 23.

121 Douglas Bland, 'National Security is an Orphan in the Cabinet' *National Post* (2 Oct 2001).

122 Above n116.

123 Above n107.

124 Above n38.

125 Ibid.

Still, a foreign spy service will not be a simple undertaking. Cleroux contends that there is no way Canada's spy service would be ready to conduct a foreign spy operation. Lack of agents, poor training and foreign language capability will hamper any international initiative.[126] This view is shared by journalist Andrew Mitrovica who believes that Canada's security and intelligence operations will be improved not through greater funding but a different approach, including more foreign language trained officers. As Hugh Windsor comments, an organisation that is more sensitive to cross-cultural situations may be warranted.[127]

Others caution that the creation of a foreign intelligence service could be more costly and time-consuming than proponents realise. It was estimated that even a small foreign intelligence agency would cost around 10 million Canadian dollars per year to operate.[128] This represents funding that would likely be diverted from domestic intelligence operations, activities which some might feel better serve the global war on terrorism.

More significantly, an intelligence agency operating abroad would face ethical and political barriers which could involve violating the laws of other nations.[129] We have seen this in the legislation for Britain's SIS and Australia's ASIS where they have explicitly excluded liability for the violation of foreign laws and condoned criminal activity. This represents an enormous conflict should agents be caught committing illegal activities and punished abroad. Agents could face severe prison sentences, torture or even death if convicted of espionage. Currently CSIS agents are granted merely the protection afforded to domestic police officers.[130]

Moreover, uncovering a foreign intelligence operation could lead to international friction, or worse, even outright war. These are risks that many nations may not wish to take. We do not know if Canada would be willing to intervene in any way, let alone militarily, to protect a captured agent, particularly given Canada's international reputation as a peacekeeping nation. Elaborate and costly source protection schemes would be required in the event of operatives being discovered. Some hold that it could take up to a decade before an extraterritorial agency could produce anything equal to the information Canada already receives from its allies. Finally, Canada's more than 200 intelligence sharing agreements with other nations could be threatened if Canada began its own intelligence activities in those countries.[131]

126 Above n8.

127 Hugh Windsor, 'Why We Need a Foreign Spy Service' *The Globe and Mail* (5 Oct 2001). Windsor feels that CSIS' interrogation techniques of suspected terrorist-supporter Mahmoud Jaballah were unduly harsh, resulting in Federal Court Judge Cullen quashing a deportation order.

128 Above n107.

129 Windsor, 'It's Time to Shape Our Spying' *The Globe and Mail* (12 Oct 2001).

130 *CSIS Act* s20.

131 Above n129. Windsor writes that CSIS shares intelligence with the CIA, FBI and MI6.

6. *Recommendations and Conclusions on CSIS*

We have seen that CSIS is for the most part equal to other security organisations in the world in terms of its objectives and statutory basis. CSIS is also well funded and staffed taking into consideration Canada's size and position relative to other nations in the world. But we have seen that there are numerous problems with the Service which should be addressed in the near future.

An additional increase in funding is warranted to place CSIS in a position to combat the heightened threat against terrorism, international crime, and nuclear proliferation. While the existence of the SIRC in theory allows for an effective review of CSIS activities, the SIRC must be given the power to render binding directions on CSIS operations, rather than the suggestive role it currently maintains. The CSE must have a legislative framework, like the GCHQ or the GCSB, to provide structure to the legality of its activities. Perhaps most importantly some kind of parliamentary oversight is needed for Canada's intelligence service. If a parliamentary committee is established, then some balance must attained between the legal requirement of CSIS to withhold information pertaining to specific operations and parliament's need to know in order to properly exercise their authority. A Senate Standing Committee rather than a House of Commons committee might best serve this function as it would allow for continuity of members and provide a solution to the problem of partisanship. Canada's new *Government Anti-Terrorist Act* has already established stronger laws prohibiting espionage and leakage and extended permanent requirements of secrecy to many government positions. This should naturally be applied to the members, and former members, of any parliamentary security committee. More strict penalties, such as life imprisonment could be imposed. Some level of parliamentary supervision would engender confidence among Canadians in their security services as well as ensure proper functioning of the agency.

In addition to parliamentary oversight Canada needs an intelligence agency with a foreign investigative mandate such as Britain, the United States and Australia possess. This organisation would both protect Canada and add manpower to the global war on terrorism, much of which has been fought at the intelligence level rather than on the battlefield. Canada's military operations would benefit from greater information and its international relations would improve from our increased ability to trade intelligence. Canada's foreign spy agency should not become another CIA with an offensive agenda involving active intervention in the government and politics of other states. This would represent overwhelming dangers both to the agents involved and to Canada's international stability should protection of captured agents be required. Foreign activity would be exceedingly expensive and would jeopardise the integrity of Canada's already existing intelligence network. Instead, Canada's international security organisation should be modelled after the British SIS or Australia's ASIS. Agents may be immune within Canada for the violation of Canadian laws, such as privacy regimes, but should restrict their activities to passive investigation and avoid the use of force and other dangerous illegal activity. This will enhance Canada's

intelligence gathering activities without exposing Canada or its public servants to the risks of prosecution in foreign jurisdictions.

There are two options to achieve this. On one hand, the Canadian Government could expand the powers of CSIS to include an international regime. This may represent too much work for one agency, resulting in one enormous branch of the government that may be difficult to administer and even more difficult to review through the SIRC. Efficient reporting to the government would be similarly impaired. Also, specialised training involving language and custom would be needed for foreign posted agents, much of which would be unnecessary for domestic operating agents.

On the other hand, Canada could create an entirely new agency. Perhaps the best model is the Australian Secret Intelligence Service, which as we have seen conducts overseas, defensive investigation. This is a preferable option as an independent, separately administered body would have more streamlined operations resulting in more efficient analysing and reporting abilities. A new agency could employ officers with specialised training more sensitive to different cultures. This organization could have a separate review system, apart from the SIRC, which as we have seen is designed to address the complaints of Canadians against CSIS operations. Again, a Standing Committee within the Canadian parliament could suit this function. The new organisation could also be more closely linked to the CSE, using its information on foreign sources to place spies in optimal regions.

Although it is encouraging that Canada has increased CSIS funding following the terrorist attacks against the United States in September 2001, this remains inadequate. Canada needs a stronger, more politically accountable CSIS and a foreign intelligence presence. While Canada's immigration policies remain among the most open in the world, this is a responsibility both to Canadians and to the world at large.