ACCOUNTABILITY WITH A DASH OF CONTEXT AND A PINCH OF FIRE AND BRIMSTONE

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This article discusses accountability and national security law. It has three objectives. First, it describes the unusual challenges of understanding the "positive" law in the area of national security. Second, it notes that much of what amounts to "accountability" in this area actually takes place internally in government, and at a level difficult for outsiders to discern. Third, it examines two key arm's length instruments of accountability – the Security Intelligence Review Committee (SIRC) and the Federal Court. The article highlights the challenges these two institutions confront in performing their functions.

Cet article porte sur la responsabilisation et le droit de la sécurité nationale. Il a trois objectifs. D'abord, il décrit les défis inhabituels liés à la compréhension du droit positif dans le domaine de la sécurité nationale. Ensuite, il souligne que la plus grande partie de ce qui correspond à la « responsabilisation » dans ce domaine, ne quitte pas les limites internes du gouvernement, situées à un niveau difficile à discerner pour l'observateur extérieur. Enfin, il examine deux instruments indépendants de la responsabilisation : le Comité de surveillance des activités de renseignement de sécurité (CSARS) et la Cour fédérale. L'article souligne les défis que doivent relever ces deux institutions pour s'acquitter de leur mandat.

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1. Introduction

For the last nine years, I have taught, written, spoken and been involved in court cases and inquiries in the area of national security law. With all that effort, I have built a special expertise in the study of the tip of the iceberg. That is, I really know very little despite all my best efforts, because the bulk of the national security legal practice lies below the watermark protected by strict secrecy.

I report this because when I contribute to a collection like this (stemming from an event at which no government speakers were on the roster, although invited), I feel it necessary to point out the limitations we have in knowing the capital "T" truth of how it all works.

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I have the virtue of being in Ottawa, and knowing at least some of actors in the field. And without betraying any secrets, they give me some flavour of what it really means to do national security law. They themselves will acknowledge that this flavour is partial, reflecting the limits of their own experience in a highly partitioned and carefully guarded area of law and policy.

Nevertheless, I feel obligated when I contribute to a collection like this to try to convey these occasional glimpses below the water line, muting the critique I might otherwise offer. If there is one thing I have found, it is that the story is always – always – more complicated than we might expect from what we read and hear and are predisposed to think.

That is not to say that the other side of the story is convincing; it may not be. It is simply to say that there is another side to the story.

In this article, I want to discuss accountability and national security, paying some heed to the invisible. In so doing, I have three objectives. First, I wish to describe briefly the unusual challenges of understanding the "positive" law in the area of national security. Second, I wish to acknowledge my impression that much of what we call "accountability" in this area actually takes place internally in government, and at a level difficult for outsiders to discern. Third, I wish to discuss two key arm's length instruments of accountability – the Security Intelligence Review Committee (SIRC) and the Federal Court. In this last section, I will convey my sense of the challenges they confront in performing their functions.

This article is somewhat different from a conventional academic piece. Not least, it conveys personal impressions derived from anecdotal experience over the last decade. In relation to SIRC in particular, I do try to buttress observations with hard data, but in other instances there is no such quantitative superstructure to my observations. As a consequence, the article may befuddle and misstate more than it enlightens. If it does so, then it accurately conveys the difficulties of gaining a true understanding of this area of law and policy.

2. Challenges of Understanding National Security Law

As lawyers, we look to legislation and case law to frame our understanding of the content of law. We expect law to be overt, and an understanding of the law open to all who apply themselves to the task. This is not always

how it works in national security law. In national security law, there are such things as redacted court decisions.[1]

In national security law, even legislation cannot be read literally. Much legislation in this area is designed to govern the internal affairs of often-opaque security agencies, reviewable by sometimes equally opaque internal or arm's length bureaucratic entities. In their deliberations, these bodies develop an understanding of the applicable rules that is not always easily predicted from the language of the statute. This is not to say that the legal construal is (always or even often) implausible, just that it is developed with an eye to considerations and understandings that are invisible to those looking in from the outside.[2]

3. Invisible Systems of Accountability

These observations lead to a related point. A lot of what we would describe as "accountability" in the national security area takes place behind closed doors. That is, it does not depend on courts or review bodies, and absolutely and definitely not on Parliament.

Instead, much accountability takes place in the form of internal firewalls in executive government and testing, occasionally pseudo-adversarial relationships between units involved in the chain of approvals.

The most famous example of a firewall is the special advocate support unit, housed in the Department of Justice, but at arm's length and often playing a role adverse to government litigation interests.[3]

Other examples of internal accountability through chains of responsibility include the various levels of intradepartmental and

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1 The decisions in the security certificate cases and the occasional reasoned judgments concerning warrant applications under the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*] are cases in point.

2 A case in point is the actual manner in which ministerial authorizations for intercepts by Communications Security Establishment Canada (CSEC) operate in practice. To his immense credit, the Commissioner of the CSEC described in considerable detail the operations of these intercepts in his most recent Annual Report; see Canada, Office of the CSE Commissioner, *2011-2012 Annual Report*, online: Office of the Communications Security Establishment Commissioner <http://www.ocsec-bccst.gc.ca/ann-rpt/2011-2012/5_e.php >.

3 The existence of such a body is mandated, albeit indirectly, by s 85(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

interdepartmental legal approvals for certain sensitive intelligence collection operations.[4]

None of this is overt, although some of it can be predicted from the structure of statutes. Much of the actual manner in which it operates is unclear to an external observer, if not invisible. In the result it quite naturally gets short shrift from those inclined to doubt government bona fides in this area.

It is certainly understandable why we might be suspicious of these systems – they do not enjoy the pure, formal separation of powers and independence concepts everyone from Locke to our first year public law professors told us are the ingredients of accountability. They are real nevertheless – not perfect, sometimes inadequate, but usually evolving and meaningful.

At heart, these systems – like any other system of accountability – depend on good people. Even the most robust pit bull of an accountability system fails when run by the incompetent or the indifferent. Likewise, even anemic accountability systems can outperform their design when staffed with people with fire in the belly. Examples of both such outcomes are legion in Ottawa. At some level, I think we should as attentive to the quality of people in these institutions as to the design features of the institutions themselves.

To repeat an admonition I make to my students, so often preoccupied with civil liberties, and now considering career possibilities: don't abandon the notion of public service in the government because of your presuppositions about the government of the day or the constraints of government service. It is not enough to clamour for civil liberties on the outside. We need people who bring those values to work every day, as is the case with many of the government lawyers I know.

4. Visible Systems of Accountability

In the pages left to me, I turn to two other, more visible institutions of accountability: the SIRC and the Federal Court.

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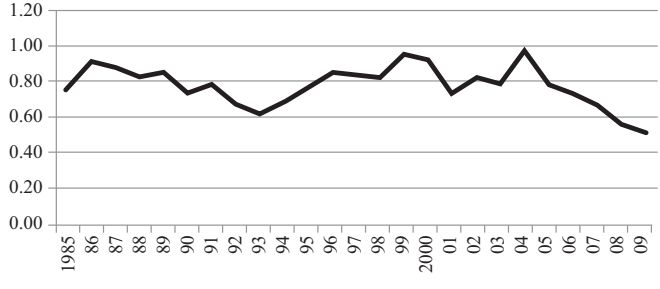
[4] Again using the example of ministerial authorizations for CSEC intercepts, I have been led to believe that there is careful interdepartmental vetting of these activities for their legality. More publicly, the structure of the *CSIS Act* requires levels of bureaucratic blessing (up to the Minister or his or her delegate) for CSIS intercept warrants; see *CSIS Act*, *supra* note 1, s 21.

A) Security Intelligence Review Committee

SIRC has an unenviable job. It is the review body for an agency, CSIS, that dwarfs it in size and resources. Its budget has not kept pace with the core budget of CSIS, even setting aside money spent on CSIS capital projects. Always a partial auditor of CSIS activities, it may be becoming an even more partial auditor.

Let me try to paint this picture with numbers. SIRC funding has always been modest relative to that of CSIS. Between 1985 and 2009, it averaged 0.77% of CSIS funding. At certain periods – especially in the early 1990s – it fell well below this level, before moving back to average or above-average figures in the early 2000s. In 2004, it rose to its highest level ever – 0.97% of CSIS funding – after a 2002 request from SIRC that its funding be increased to reflect the increased size of CSIS post-9/11.[5] More recently, however, SIRC spending has fallen to the lowest levels of its history, relative to that of CSIS. In 2008-2009 and 2009-2010, SIRC spending was 0.56% and 0.51% of CSIS spending. It should be noted that, my calculations for CSIS spending for 2009-2010 subtracted the $44 million spent on the new CSIS headquarters for that year and so can be regarded as capturing only spending on personnel and operations.[6]

Table 1
SIRC Funding as % of CSIS Funding



The impact of budgetary matters on productivity is difficult to measure definitively. Using the index of reports issued by SIRC, however, the

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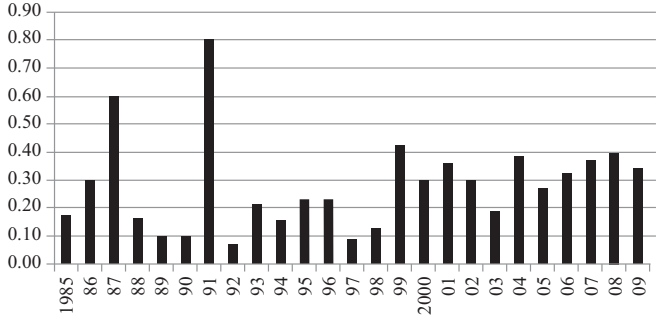
5 See discussion in Canada, *SIRC Annual Report, 2004-2005*, online: Security Intelligence Review Committee <http://www.sirc-csars.gc.ca/anrran/2004-2005/sc03-eng.html#s2 >.

6 Data for these calculations were collected from the SIRC and CSIS annual reports available on the website of these organizations. SIRC annual reports report CSIS budgets throughout the 1980s and into the 1990s. The period for which data on CSIS budgets were available was 1985-2009.

historical average of SIRC spending divided by number of reports is $0.28 million. As Table 2 suggests, that number has varied over time. The budget/report figure fell during the 1990s and has risen in the last decade, suggesting that SIRC is producing fewer reports per unit of its spending than was the case in the 1990s.

Table 2
SIRC Budget ($M) per SIRC Report



Perhaps even more meaningful is a measure of SIRC activity relative to the size of CSIS. One could hypothesize that the tempo of SIRC activity would increase as the scale of CSIS activities increase, since with more activity comes the greater prospect of complaints and error. In fact, however, the number of new complaints brought in relation to CSIS each fiscal year suggests a weak *negative* correlation with the CSIS budget – that is, a bigger budget is weakly correlated with fewer complaints.[7]

Moreover, the number of reports issued by SIRC per million dollars of CSIS spending belies the notion that SIRC has been busier in response to a larger CSIS. Overall, from the period 1985 to 2009, there is no statistical correlation between the number of reports issued by SIRC and the CSIS budget.[8] More recently, as Table 3 suggests, the number of reports issued by SIRC per million dollars of CSIS funding seems to have decreased since the 1990s. Put another way, SIRC activity – measured in reports – has been more or less static even while CSIS's budget and scale of operations has increased. In the result, the proportion of reports per unit of CSIS budget has fallen.

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7 The Excel CORREL function produces a figure of -0.32 for the period for which data were available – 1988-2009.

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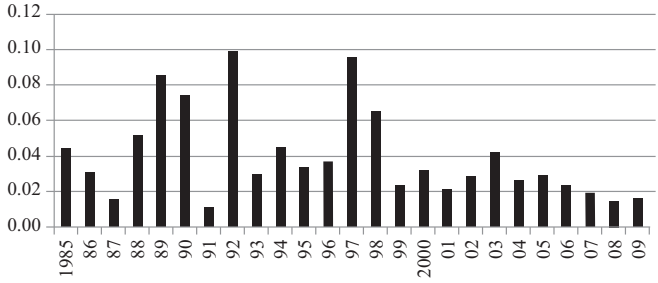
Table 3
No. of SIRC Reports per $M of CSIS Funding



Exactly what this means is unclear, of course. It could be that fewer reports are necessary because CSIS's own internal governance is more robust. Or it could mean that SIRC, under its current leadership, is just less productive now than in the past. Certainly, SIRC has experienced significant governance turmoil in recent years.[9]

Also of note is the fact that, in 2012, the government decided to abolish the second key accountability body for CSIS, the Office of the Inspector General. The move was unanticipated and, in fact, buried in the budget implementation bill.[10] It was characterized as a cost-cutting measure, saving the government a very modest $1 million per annum. The government asserted that there would be no net degradation in review, because the inspector general's functions would be assumed by SIRC. At the time of this writing, what this meant in practice – and whether SIRC's already modest budget and staff would be supplemented – was unclear. In SIRC's most recent annual report, the body was cagey in its discussion of this issue:

> SIRC will be responsible for evaluating and certifying the annual report provided to the Minister by the Director of CSIS, thereby helping to ensure ministerial

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[9] The resignation of SIRC Chair Arthur Porter in 2011 in the wake of controversy over his past history was followed by years of understaffing and turnover among SIRC members (understaffing that continues to the time of this writing). For reporting on the Porter resignation, see Kathryn Blaze Carlson and Brian Hutchinson, "Canada's top spy watchdog resigns following National Post revelations," *National Post* (November 10, 2011), online: National Post <http://news.nationalpost.com/2011/11/10/canadas-top-spy-watchdog-resigns/ >.

[10] Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012, and other measures*, 1st Sess, 41st Parl, 2012, clause 378 et seq.

> responsibility for CSIS, as well as the Service's accountability to the Minister. SIRC, therefore, has some important shoes to fill. We see this as an opportunity.[11]

More generally, SIRC clearly has a credibility problem in some quarters. Long-time CSIS critic and journalist Andrew Mitrovica has written that

> [i]t's time that SIRC stopped being a dumping ground for former politicians, and well-connected (and, no doubt, well meaning) business people, doctors and ex-bureaucrats with little or no experience in intelligence matters. It's time that SIRC be given the money, powers and experienced investigators it so desperately needs to do what on paper, at least, is an important job.[12]

In a 2000 story on SIRC, Mitrovica quoted critics of SIRC complaining that:

- SIRC was "too timid and too slow to investigate serious allegations of possible criminal wrongdoing and other disturbing revelations about CSIS" (opposition party national security affairs critics); and,
- SIRC's researchers and analysts were "easily intimidated and dismissed by CSIS senior managers" (anonymous "veteran CSIS agents").[13]

Academic critics have been less pointed, but have also raised doubts about SIRC. Wesley Wark, for example, noted in 2012 that SIRC

> is small and is promised no new resources to enhance its reporting. The degree to which the Conservative government takes SIRC seriously is placed in doubt by its failure to replace the SIRC chair, a part-time position, following the departure last year of Arthur Porter for alleged improprieties. Not only is SIRC headless for the moment, but the other Privy Councillors appointed to the committee do not have

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11 Canada, *SIRC Annual Report, 2011-2012* at 2 online: <http://www.sirc-csars.gc.ca/pdfs/ar_2011-2012-eng.pdf >.

12 Andrew Mitrovica, "Canada's spy watchers ring alarm many years too late," *Toronto Star* (1 Nov 2010) A17. Mitrovica is probably the single most prolific critic of SIRC in the popular press. Other items authored by him include "Toothless bark from spy watchdog," *Toronto Star* (01 Nov 2011) A19; "Casting light on our spies," *Toronto Star* (15 Nov 2011) A23; "Same old torture story," *Toronto Star* (13 Feb 2012) A15; "CSIS freed from final shreds of oversight," *Toronto Star* (1 Mar 2012) A19.

13 Andrew Mitrovica, "Spy watchdog timid and slow, critics assert," *Globe and Mail* (6 July 2000) A8.

> inspiring backgrounds in federal politics, decision making or in terms of their knowledge of intelligence and national security issues.[14]

Wark was earlier quoted as questioning the appointment process for SIRC, and notably the pattern of appointing those with political or other pedigrees but no subject-matter expertise. This pattern, Wark argued,

> perhaps allows for open minds, but also potentially for empty ones, or for SIRC to be prone to subscribe to CSIS interpretations of their actions. To a certain extent this tendency is meant to be kept in check by the permanent SIRC (staff), but that staff is small.[15]

Kent Roach has also commented on the composition of SIRC, noting that

> [t]he bi-or usually tri-partisan nature of SIRC, as well as the reputation of the often well known and respected former Premiers and Cabinet ministers appointed to it, provides some public confidence in its operation. It should be noted, however, that not all of the federal government's appointments to SIRC have been well received over the years and the credibility of review bodies can be quickly increased or diminished by the quality of appointments to them.[16]

Fair or not, these critiques seem to resonate in certain quarters. In my limited personal experience, members of the bar who might represent complainants before SIRC express doubts about the body. Part of this may flow from concerns of the sort identified above. Another part may stem from SIRC's anemic powers – Why go to SIRC when at best you obtain a recommendation? Still another aspect of this perception may be based on the opacity of SIRC's functions. SIRC does not have a tribunal record like those of other analogous administrative bodies. Its jurisprudence, such as it is, consists of anondyne descriptions of its activities in its annual report. That opacity is anathema to lawyers. On this point, I think SIRC would be well served by releasing (redacted if necessary) versions of its decisions, and not just unhelpful summaries in its annual report.

B) Federal Courts

The Federal Court of Canada has become the central court involved in national security matters, largely because of its traditional role in

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[14] Wesley Wark, "Don't cut off the minister's eyes and ears on CSIS," *Ottawa Citizen* (1 May 2012) A11.

[15] Wesley Wark, "We don't need foreign spy service," *Ottawa Citizen* (7 Feb 2011) A4.

[16] Kent Roach, "Review and Oversight of National Security Activities and some reflections on Canada's Arar Inquiry" (2007) 29 Cardozo L Rev 53 at 65-66.

authorizing (or not) CSIS warrants, the prolonged and groundbreaking litigation over immigration security certificates and the now fairly commonplace disputes over national security confidentiality under the *Canada Evidence Act*.[17]

The Court has a cadre of "designated judges" who are tasked with national security cases. Despite a substantial amount of expertise acquired over the years, my impression is that these judges have many of the same problems as any security outsider, but with more responsibility; they too struggle to peer through the glass darkly, but without an academic's peripatetic ability to wander about and ask questions, file access to information requests and initiate an examination of issues that interest them.

Instead, they are isolated by judicial independence and cabined by procedural rules that require them to focus only on what is before them, which may or may not be the full picture depending on the litigation strategy of parties.

And yet it falls to these courts to decide epic questions. Is this person really as dangerous as the government says? Will our intelligence relations really be impaired if I order this disclosure? Will someone end up floating face down in Lake Ontario if the named person gets this information and extrapolates the identity of an informer? Will something go boom?

These are not theoretical concerns. And so Federal Court judges (and in fact government lawyers) must be civil libertarians for the day after something goes seriously wrong. That is, they need to be the people who contemplate the full impact for our system of governance of "getting it wrong" today in a manner that precipitates a disaster tomorrow. And that is never easy.

For this reason, you see them struggling valiantly and conscientiously with issues such as the mosaic effect, and originator control and security service informer privilege – all of which can be principled concerns (although sometimes may not be on the facts) and involve important acts of balancing. These are close to universal concerns. Look, for instance, to the spectacular dispute in the UK Binyam Mohamed case.[18] That matter represented an unusually colourful dispute between the executive and judicial branch of government, over the universally difficult issue of disclosure of information supplied by an allied government.

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17 RSC 1985, c C-5.

18 *Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), aff'd [2010] EWCA Civ 65.

5. What Does this Mean for the Role of Civil Society in Accountability?

This lengthy invitation to understand context is no invitation for all of us to pull punches or to fail to criticize where critique is warranted. But when one critiques, it is important to appreciate the fog of uncertainty that veils most conclusions. And so every critic has to be intellectually nimble and prepared to be wrong, which is not fun.

So what about advocacy – what room for it? Well, without persons prepared to be more stridently persistent, moderates are not moderate. Instead, they are the new radicals.

All of us should commit to being uncommonly persistent in looking hard for the chinks in the system. Those chinks are there, and they are often different from the issues that seem to galvanize popular opinion and attract the scrutiny of advocates, parliamentarians and the media. I have, for example, doubted the doubters in their objections to the recently re-enacted provisions on terrorism-related investigative hearings and recognizance with conditions.[19]

On the other hand, I am mystified by the absence of attention to issues I believe much more deserving of closer scrutiny. Take one example. The SIRC annual report for 2006-2007 concluded that CSIS detained an individual transported by CSIS from the Middle East and handed over to the United States. It wrote:

> Jabarah could not be prosecuted for any crime in Canada, since his terrorist activities pre-dated Canada's Anti-Terrorism Act. Neither CSIS nor the police had any right to detain him. Based on these and other circumstances, the Committee concluded that Jabarah was "arbitrarily detained" by CSIS in violation of Section 9 of the Charter. Because he was detained, his right to silence as protected by Sections 7 and 11(c) was violated, as was his right to counsel under Section 10. Furthermore, his right to remain in Canada as protected by Section 6 of the Charter (mobility rights) was breached.[20]

This is an absolutely staggering and unusually definite finding. There is much reported generally on Jabarah in the press, but this damning SIRC conclusion received a grand total of nine mentions in the major Canadian print dailies, and one of those references was an op-ed by Alan Borovoy,

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19 Craig Forcese, "The Politics of Anti-terrorism," Editorial, *The Globe and Mail* (24 April 2013), online: The Globe and Mail < http://www.theglobeandmail.com/globe-debate/the-politics-of-anti-terrorism/article11509669/ >.

20 Canada, SIRC, *2006-2007 Annual Report*, online: Security Intelligence Review Committee <http://www.sirc-csars.gc.ca/anrran/2006-2007/sc01b-eng.html >.

then head of the Canadian Civil Liberties Association. The rest were mostly stories by the best reporters on the national security beat: Jim Bronskill, Colin Freeze, Michelle Shephard, Stewart Bell.[21]

But nine stories? Where was the outcry, where was the more pronounced media coverage? This was a definitive finding by the chief national security accountability body of acts that were *ultra vires* CSIS's mandate and, by the way, unconstitutional.

I suspect that SIRC itself must be puzzled when there is so little take-up from its reports. It must be discouraging to have such modest response, and this impact will hardly encourage persistently strong reporting by SIRC. SIRC reports should be read, and deployed.

A second puzzling issue involves what are known colloquially as the torture directives – the ministerial directives on the use of information procured by torture or the sharing of information where torture may result.[22] I know there are differences of opinion on some of the aspects of these directives. I, for instance, have taken the view that there is a limited use to which "inbound" information may be put, even if it may be the product of torture.[23] But indisputably, many of the instructions contained in these directives on "outbound" sharing of information would, if applied, put the user in non-compliance with international law, the Canadian *Charter of Rights and Freedoms* [24] and probably the *Criminal Code*.[25] This is the sort of thing that deserves close scrutiny. The directives are unconscionable, and more than that, unlawful.

And yet, years after the existence of these measures were disclosed no one has mounted a court challenge.

Let me end with this thought. For all that I have said about the good, behind the scenes work of many talented people, accountability works best when prodded by the occasional high profile issue. When I see documents

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[21] These results were produced by a keyword search of the Canada Newsstand database, using "Jabarah" and "SIRC."

[22] For news reporting on this issue, see Jim Bronskill, "CSIS can share info despite 'substantial' torture risk", *Toronto Star* (2 March 2012) online: Toronto Star <http://www.thestar.com/news/canada/2012/03/02/csis_can_share_info_despite_substantial_torture_risk.html >.

[23] See Craig Forcese, "Torture Redux: Drinking Too Deeply of the Coolaid" (2012) online: <http://craigforcese.squarespace.com/national-security-law-blog/2012/3/2/torture-redux-drinking-too-deeply-of-the-coolaid.html >.

[24] Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

[25] RSC 1985, c C-46.

like the torture directives, I think we may be getting a little too comfortable. It is time for some prodding.