

Fighting the secrecy in holding CSIS to account

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The British Columbia Civil Liberties Association is in a decade-long fight for transparency on behalf of Indigenous land defenders and environmental groups

BY [Dale Smith](#) 26 Jul. 2024



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The British Columbia Civil Liberties Association's 10-year fight against secret hearings and the Canadian Security Intelligence Service for illegally spying on Indigenous land defenders and environmental groups continues.

The BCCLA is appealing [a recent Federal Court ruling](#) which found information can be withheld from them as part of a judicial review of a Security and Intelligence Review Committee (SIRC) review that concluded CSIS' activities in monitoring activists was above board.

The fight has been going on for a decade. SIRC no longer exists as an organization, with CSIS now reporting to the National Security and Intelligence Review Agency (NSIRA) for civilian oversight. However, the BCCLA believes that [its original complaint](#) needs sufficient transparency to hold CSIS and the government accountable, particularly if the spy agency's actions were illegal.

If the Court's ruling is upheld, CSIS would be allowed to use secret evidence to oppose the BCCLA's ongoing challenge of the SIRC's decision to dismiss its complaint.

"In a case like this, where the goal is to seek transparency and seek accountability for the government, all of this secrecy makes it impossible for us to achieve that goal," says Vibert Jack, the BCCLA's litigation director.

The BCCLA alleges that CSIS monitored groups such as Dogwood Initiative, ForestEthics (now called Stand.earth), Sierra Club BC and Leadnow.ca, along with members of the #Idlenomore movement, who were all opposed to the Northern Gateway pipeline proposal. The association says the information was shared with the National Energy Board and with oil and gas companies. Further, when the complaint was made with SIRC, several members of that oversight body had conflicts of interest because of ties to those same companies.

The BCCLA applied to the Federal Court for judicial review of the original SIRC decision, at which point the Attorney General of Canada applied under Section 38 of the *Canada Evidence Act* to have some of the certified record withheld from the association. The June decision of the Federal Court provided more evidence to the BCCLA but granted the request to withhold most of that record. Meanwhile, the judge hearing the judicial review will have full access to the record.

"In the order, there are no limitations as to how that can be used by the judge in the judicial review," Jack says.

"We're very concerned that CSIS is going to be able to rely on information that we don't have access to, and would make it for us to respond to in the judicial review. That really cuts

against some of the fundamental aspects of our judicial system.”

Jack says that in the criminal context in the Supreme Court of Canada’s decision in [R.v. Ahmad](#), the information withheld under Section 38 could be provided to a judge in a criminal trial, but the Court put limits on the reasons to provide the information and how the judge could use it.

“It was really just to evaluate whether keeping that information from the accused would render the criminal trial unfair,” Jack says.

“You couldn’t use that evidence to convict them, whereas, there are no such limitations in the decision in we’ve just received.”

The Federal Court decision is now being appealed, and Jack says that regardless of the outcome, they will be carrying on with the judicial review of the SIRC report.

“The information that we have been provided so far shows that CSIS was collecting information about these groups and sharing information with industry, and we say that is unlawful and a gross violation of the rights of those groups,” Jack says.

Iain MacKinnon, a partner at Linden & Associates in Toronto and past president of the Canadian Media Lawyers Association, worries that the open court principle will be chipped away over time with these kinds of situations happening more often.

“It’s always concerning and unsettling when you get a party like CSIS saying, ‘just trust us’ that these documents need to remain confidential for national security reasons or other reasons, and the judge just goes along with that and upholds’ CSIS’ position,” MacKinnon says.

MacKinnon points to [CBC v. Named Person](#), where the original case came to light because a journalist stumbled over the Court of Appeal process as an example of that erosion of the open court principle.

“This BCCLA case deserves some exposure because these kinds of rights and legal principles can get eroded over time when this stuff happens without the public knowing, and there is no accountability,” MacKinnon says.

“It’s definitely problematic with what’s going on in the courts and with government agencies like CSIS.”

Kevin Westell, principal at Pender Litigation in Vancouver and past president of the CBA’s criminal justice section, says there is a hard line between cases where there is a real potential

for people to suffer serious bodily harm as a result of matters that would otherwise be in open court, and this matter where CSIS' ability to do its work is measured against the ability of the accused to defend themselves.

"There is a real tension, and it's difficult to know the right answer here," he says.

"I certainly understand the BCCLA's position, where we're dealing with the intersection between legitimate environmental groups and the extreme end of that movement. It's a difficult thing to navigate."

Westell doesn't believe there is a widespread movement to have less transparency in the courts. However, he says there are complications in specific cases and the public should be able to know what is happening in court as often as possible.

Until there is a finding that CSIS acted inappropriately, he says there isn't a way of moving forward without giving them the benefit of the doubt while adjudicating the issue.

"You can't just, on the basis of an accusation, no matter how legitimate it is, say that all privacy, secrecy and tradecraft that goes into the work that spy agencies do by mandate goes out the window," Westell says.

"There needs to be a way to adjudicate this with as much transparency as possible, and in some cases, that's not much."

Dale Smith is a contributor based in Ottawa.