The opinions expressed in these academic studies are those of the authors; they do not necessarily represent the views of the Commissioner.

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Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 Research Studies – Volume 3

Terrorism Prosecutions

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Introduction

Kent Roach

The Commission's Research Program

Shortly after the appointment of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, a decision was made by the Commissioner, commission counsel and the research directors to commission a number of research papers on matters relevant to the Commission's broad mandate.

Research studies have long been an important part of the commission of inquiry process in Canada. For example, the McDonald Commission of Inquiry that examined certain activities of the Royal Canadian Mounted Police (RCMP) and made recommendations that led to the creation of the Canadian Security Intelligence Service (CSIS) in 1984 issued a number of research papers and monographs as part of its process.[1] Other commissions of inquiry at both the federal and provincial levels have followed suit with, at times, ambitious research agendas.[2]

Research allows commissions of inquiry to be exposed to and informed by expert commentary. Research papers can be independently prepared by academics and other experts. The parties and the public are free to comment on these papers and the Commissioner is free to reject or to accept any advice provided in the research papers. The traditional disclaimer that the research paper does not necessarily represent the views of the Commission or the Commissioner is true.

The Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 faced the challenge of a particularly broad mandate that spanned the issues of the adequacy of threat assessment of terrorism both in 1985 and today, co-operation between governmental

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1 For example, see the research studies published by the McDonald Commission of Inquiry Concern ing Certain Activities of the Royal Canadian Mounted Police. J. Ll. J. Edwards *Ministerial responsibility for national security as it relates to the offices of Prime Minister, Attorney General and Solicitor General of Canada* (Ottawa: Supply and Services Canada, 1980); C.E.S. Franks *Parliament and Security Matters* (Ottawa: Supply and Services Canada, 1980); M.L. Friedland *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980).

2 The Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar published a series of background papers. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services, 2006).

departments including the RCMP and CSIS, the adequacy of restraints on terrorism financing including funding from charities, witness protection, aviation security and terrorism prosecutions. A broad range of expertise drawn from a variety of academic disciplines was needed to address this mandate.

A commission of inquiry's research program can help create or solidify a research foundation for continued thought and policy development in the area being examined. Canadian research into terrorism-related issues generally has been relatively sparse.[3] There is no dedicated governmental funding for research related to the study of terrorism and optimal counter-terrorism measures as there is in other fields such as military studies. One of my hopes is that the research program of this Commission will stimulate further investment in independent research related to terrorism.

The Commission of Inquiry was fortunate to be able to retain the majority of Canada's leading experts in many of these areas. The Commission was also able to retain a number of leading international experts to provide research of a more comparative nature. The comparative research was undertaken to determine if Canada could learn from the best practices of other democracies in many of the areas related to its mandate.

Researchers who conduct studies for a Commission of Inquiry do not have the luxury that an academic researcher normally has in conducting research and publishing his or her work. They must work under tight deadlines and strive to produce analysis and recommendations that are of use to the Commission of Inquiry.

A decision was made to ask our researchers to write using only information from public sources and indeed to write and complete papers long before the Commission's hearing process was completed. This means that the researchers may not always have had the full range of information and evidence that was available to the Commission. That said, the research papers, combined with the dossiers issued by commission counsel, provided the commissioner, the parties and the public with an efficient snapshot of the existing knowledge base.

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3 On some of the challenges see Martin Rudner "Towards a Proactive All-of-Government Approach to Intelligence-Led Counter-Terrorism" and Wesley Wark "The Intelligence-Law Enforcement Nexus" in Vol 1 of the Research Studies.

Because of the importance of public and party participation in this Commission of Inquiry, a decision was made early on that the researchers retained by the Commission would, whenever possible, present and defend the results of their research in the Commission's hearings. A deliberate decision was made to reject the dichotomy of part one hearings focused on the past and part two processes aimed at the future. This decision reflected the fact that much of the Commission's mandate required an examination of both the past and the future. There was also a concern that the Commissioner should be able to see the research produced for him challenged and defended in a public forum.

It is my hope that the research program will help inform the deliberations of the commission and also provide a solid academic foundation for the continued study in Canada of terrorism and the many policy instruments that are necessary to prevent and prosecute terrorism.

The Research Studies in this Volume

The research studies in this volume focus on terrorism prosecutions and related issues of witness protection. This focus is supported by various parts of the terms of reference which ask the commission to address 1) whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases[4]; whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation and, if not, the changes in practice or legislation that are required to address these challenges, including whether there is merit in having terrorism cases heard by a panel of three judges[5] and the manner in which the Canadian government should address the challenge, as revealed by the investigation and prosecutions in the Air India matter, of establishing a reliable and workable relationship between security intelligence and evidence that can be used in a criminal trial.[6] All of the essays in this volume have a comparative dimension as they search to identify best practices.

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4 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 *Terms of Reference* b (v).
5 Ibid b (vi).
6 Ibid b (iii).

Yvon Dandurand "Protecting Witnesses and Collaborators of Justice in Terrorism Cases"

Dean Yvon Dandurand of University College of the Fraser Valley and a Senior Associate of the International Centre for Criminal Law Reform and Criminal Justice Policy provides a comprehensive overview of the existing research and international standards with respect to witness protection and the protection of collaborators of justice. He argues that while informants and witnesses are necessary to convict terrorists, one of the defining characteristics of terrorist groups is their ability to intimidate witnesses. Intimidation can take a number of forms. Although intimidation can take the form of violence including murder, threats are often sufficient to frustrate the justice system. Intimidation can be directed at those close to the potential witness and the intimidation may not always come from the accused. In some cases, intimidation can be designed to promote a sense of fear and an attitude of non co-operation among an entire community. Most witnesses who suffer intimidation are not in any formal witness protection program.

Dean Dandurand pays specific attention to the challenges of witness protection in ethnic communities where threats may be made against those who are outside Canada. He notes that the use of investigative hearings may present dangers to reluctant witnesses in part because such hearings are subject to a rebutable presumption that they will be held in open court. He stresses the power that the state already has with respect to potential witnesses and the danger that such procedures could create even greater reluctance among some minority communities to come forth with information about terrorists.

Dean Dandurand calls for greater creativity with respect to witness protection including exploring the role of using the private sector to provide some forms of protection, special witness protection units in correctional facilities, delayed disclosure when necessary to protect witnesses and allowing witnesses to testify under a pseudonym, by video-link, subject to disguise or in a closed court. He notes that there is a growing international consensus that witness protection programs should be run by a well funded agency that is independent from police and prosecutors in order to help ensure the rights of vulnerable witnesses. It is also increasingly necessary for the agency to include when necessary informants recruited by security intelligence agencies as well as the police. Given the nature of international terrorism and other trans-

national forms of crime, the witness protection agency should engage in international co-operation.

Robert M. Chesney "Terrorism and Criminal Prosecutions in the United States"

Professor Robert Chesney of Wake Forest University provides an overview of terrorism prosecutions in the United States with attention to issues of substantive criminal law and the procedural context including the provisions that reconcile the accused's right to disclosure with the government's interests in protecting secrets. He outlines the prevention paradigm in terrorism prosecutions which ranges from attempt and conspiracy prosecutions to systemic enforcement of precursor crimes, most notably the federal offence that has existed since 1996 of providing material support or resources to terrorist groups. He distinguishes between material support prosecutions that only require proof of an intent to assist a designated international terrorist group and more difficult to prove offences that relate to intent or knowledge in relation to various terrorist crimes.

Professor Chesney also examines the role of pretextual charging in which a terrorist suspect is charged with a terrorism financing offence, a non-terrorism crime or an immigration law violation or detained as a material witness. He concludes that it is difficult to evaluate the success of such strategies while noting that they may often result in shorter sentences than successful terrorism prosecutions. One of the main motivations behind pretextual strategies is a desire by the government to keep secret the intelligence linking the suspect with terrorism. At the same time, Professor Chesney examines the *Classified Information Procedures Act* which provides a flexible and efficient framework that allows the trial judge to reconcile state interests in secrecy with the need to treat the accused fairly and to determine whether the government faces the disclose or dismiss dilemma on the facts of the particular case. He also examines other methods such as the ability of security agents to testify in closed court under pseudonyms and the evidentiary use of redacted and written summaries of otherwise classified information.

Bruce MacFarlane "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis"

Bruce MacFarlane Q.C., a former deputy Attorney General of Manitoba and a Professional Affiliate at the University of Manitoba, provides a detailed overview of various structural challenges faced by terrorism prosecutions as complex criminal cases. He outlines a number of important principles which should inform any reform recommendations including the need to determine the truth and avoid miscarriages of justice, promote public confidence and legitimacy, openness, fairness and efficiency. He then surveys the history of terrorism prosecutions and other complex prosecutions in the United Kingdom, the United States and Canada including the trial in the Lockerbie bombings and the use of special courts in Northern Ireland. He concludes that special laws and reliance on new tribunals can adversely affect public confidence and the accuracy of the result. They can also aggravate the existing challenges in maintaining the fairness of terrorist trials.

Mr. MacFarlane warns that terrorism prosecutions are becoming even more complex and there is a danger that they may collapse under their own weight. He proposes a number of reforms that could deal with the challenges of terrorism prosecutions as complex and lengthy criminal prosecutions. Given the increasing length of complex criminal prosecutions, he proposes that trial judges be allowed to empanel up to 16 jurors for the duration of the trial and that the jury be able to render a unanimous verdict even if only 9 or perhaps 8 jurors remain on the jury at the end of the trial. Jurors should be also be assisted by being allowed to take notes and by receiving instructions from the judge as necessary throughout the trial.

Mr. MacFarlane warns that requiring a three judge panel to hear terrorism cases would violate the right to trial by jury in s.11(f) of the Charter and require either justification under s.1 or the use of the s.33 override. He also concludes that a 3 judge panel would be impractical given the need for the three judges to be unanimous on essential issues of fact and law in order to respect the principle of proof of guilt beyond a reasonable doubt. This may well require the use of a fourth alternative judge. Mr. MacFarlane acknowledges, however, that there may be a tension between the accused's right to a trial by jury and the right of both the accused and society to a fair trial in very long and complex cases. He suggests that a judge alone trial could be required where a fair trial would be impossible with a jury.

He also concludes that the Criminal Code should be amended to make clear that a trial could be moved from one province to another if it is impossible for the accused to receive a fair trial in the province where the offence was committed or if that province does not have sufficient resources to complete the terrorism trial. He also warns that prosecutors should not unnecessarily overload the indictment with every potential accused and every potential charge. Prosecutors should also assemble disclosure package at the investigative stage which can be disclosed electronically to the accused.

Kent Roach "The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence" (Summary)

The final paper in this collection is a summary of a longer study by Professor Kent Roach of the University of Toronto that examines the relationship between intelligence and evidence. The longer study is published as volume 4 of the research studies. The summary examines the evolving distinction between intelligence and evidence. Although stark contrasts between secret intelligence and public evidence have frequently been drawn, the 1984 *CSIS Act* did not contemplate a wall between intelligence and evidence. The Air India bombing and 9/11 have underlined the need for intelligence to be passed on to the police and if necessary used as evidence. At the same time, intelligence agencies have legitimate concerns that such information sharing could result in the disclosure of secrets in open court and to the accused. The preservation of secrets needs to be reconciled with the accused's right to a fair trial and the presumption of open courts in a manner that is both fair and efficient.

The summary examines the possible use of intelligence including wiretaps collected by CSIS and CSE intercepts as evidence in criminal trials and the appropriate balance between the use of Criminal Code and CSIS wiretap warrants. It examines the challenges of admitting intelligence collected under less demanding standards than evidence as well as the disclosure implications of admitting intelligence as evidence.

The summary examines the disclosure and production obligations that can be placed on Canada's security intelligence agencies, as well as the methods available under the law to prevent the disclosure of such intelligence. These methods include reliance on evidentiary privileges such

as the police informer privilege and applications for non-disclosure orders under ss.37 and 38 of the *Canada Evidence Act*. The summary compares Canada's approach to determining national security confidentiality in the Federal Court while allowing the trial judge to determine whether a fair trial is still possible in light of any non-disclosure order, with the approaches used in Australia, Britain and the United States which all allow trial judges to make and revisit non-disclosure orders made to protect secrets.

Finally, the summary examines a number of reforms to improve the relationship between intelligence and evidence. It proposes a number of front end strategies that could make intelligence more useable in terrorism prosecutions including 1) culture change within security intelligence agencies that would make them pay greater attention to evidentiary standards when collecting information in counter-terrorism investigations; 2) seeking permission from originating agencies under the third party rule for the disclosure of intelligence; 3) greater use of *Criminal Code* wiretaps as opposed to CSIS wiretaps in terrorism investigations and use of judicially authorized CSIS intercepts as opposed to CSE intercepts when terrorist suspects are subject to electronic surveillance outside of Canada; and 4) greater use of effective source and witness protection programs. Some back end strategies to determine when intelligence must be disclosed in order to protect a fair trial in a fair and efficient manner are 1) clarifying disclosure and production standards in relation to intelligence; 2) clarifying the scope of evidentiary privileges; 3) providing for efficient means to allow defence counsel, perhaps with a security clearance and/or undertakings not to disclose or special advocates to inspect secret material; 4) focusing on the concrete harms of disclosure of secret information as opposed to dangers to the vague concepts of national security, national defence and international relations; 5) providing for a one court process that allows a trial judge to determine claims of national security confidentiality and 6) abolishing the ability to appeal decisions about national security confidentiality before a terrorism trial has started.

Conclusion

The research studies in this volume provide an overview of the many difficult challenges of terrorism prosecutions. One challenge is the need to provide protection for informants and witnesses from intimidation. Another challenge is the length and complexity of many terrorism

prosecutions and the many difficulties that arise either when attempts are made to admit intelligence as evidence or shield intelligence from disclosure to the accused and the public. The studies in this paper examine the comparative experience with terrorism prosecutions in their search for best practices with special attention to terrorism prosecutions in comparable democracies such as Australia, the United Kingdom and the United States. The essays also situate the challenges of terrorism prosecutions in the context of the need to maintain fundamental principles including the need to safeguard secret information; to treat the accused fairly; the need to avoid miscarriages of justice and the need to respect the presumption of open courts.