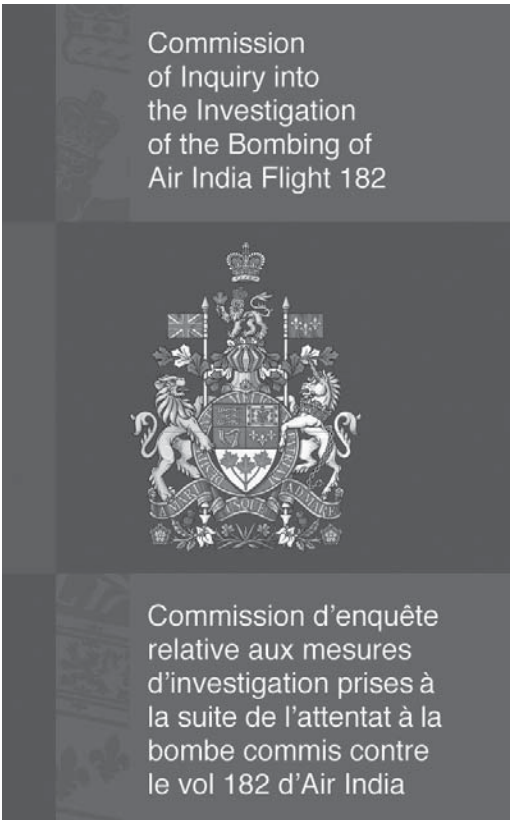

The opinions expressed in these academic studies are those of the authors; they do not necessarily represent the views of the Commissioner.

Cat. No: CP32-89/5-2010E
ISBN: 978-0-660-19984-9

Available through your local bookseller or through
Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario
KIA OS5

Telephone: (613) 941-5995 or 1 800 635-7943
Fax: (613) 954-5779 or 1 800 565-7757
publications@pwgsc.gc.ca
Internet: www.publications.gc.ca

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

Terrorism Prosecutions

Table of Contents

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

---

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.

---

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.

---

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.

Protecting Witnesses and Collaborators of Justice in Terrorism Cases

Yvon Dandurand[1]

Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

---

[1] Criminologist, Dean of Research, University College of the Fraser Valley and Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy. The author gratefully acknowledges the assistance in preparing this paper of Mr. Mark Lalonde, Managing Partner, Canpro Training Resources Inc. Opinions expressed are those of the author and do not necessarily represent those of the Commission.

Contents

Introduction

This paper identifies the main challenges faced by the criminal justice system in attempting to secure the cooperation of witnesses in the investigation and prosecution of terrorism cases. It also examines the nature and efficiency of various procedural and security measures that can be taken to ensure the protection of witnesses who are at risk of intimidation or retaliation. Part of the mandate of the Commissioner involves considering whether existing practices or legislation provide adequate protection for witnesses against intimidation over the course of the investigation or prosecution of terrorism. This paper reviews various protection issues and identifies some best practices and international trends against which the Canadian situation can be assessed. It does not directly attempt to evaluate the adequacy of existing Canadian legislation, programs, or practices.

In the fight against terrorism, it is crucial for the State to be able to provide effective protection for witnesses. The intimidation of informants and potential witnesses is one of the defining characteristics of criminal organizations and terrorist groups. They function and perpetuate themselves through the manipulation of public fear and they go to great lengths to avoid detection and prosecution. In the interest of a fair and effective criminal justice response to terrorism and other serious crimes, governments must find ways to handle the problem of witnesses at risk and protect them from intimidation.

Witness protection is especially important in the fight against organized crime and terrorism because the closed character of the groups involved makes it very difficult to use traditional investigative methods successfully.[2] In contrast with other forms of serious crimes, victims of terrorism may themselves have little if any relevant evidence to provide.

---

2 Adamoli, S., Di Nicola, A., Savona, E., and P. Zoffi. *Organized Crime Around the World*. (Finland: European Institute for Crime Prevention and Control 1998), p. 174. Council of Europe. *Report on Witness Protection (Best Practice Survey)*. European Committee on Crime Problems, Committee of Experts on Criminal Law and Criminological Aspects of Organized Crime. (Strasbourg, 24 March 1999). Council of Europe. European Committee on Crime Problems (CDPC). *Draft Recommendation Rec(2005) on the Protection of Witnesses and Collaborators of Justice. Explanatory Memorandum*. (Strasbourg: Council of Europe 2005). Council of Europe. Protecting Witnesses of Serious Crime – Training Manual for Law Enforcement and Judiciary. (Strasbourg: Council of Europe Publishing 2006). Finn, P. and Healey, K. M.. *Preventing Gang- and Drug- Related Witness Intimidation*. (Washington: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 1996, p.4). Fyfe, N. *Protecting Intimidated Witnesses*. (Hampshire: Ashgate Publishing Limited, 2001, p. 18). Manning, P. K., Redinger, L.J., and J. Williams. "Recruter, cibler et gérer les informateurs. Lutte antidrogue et crime organisé sur le continent américain", in Brodeur, J.P. and F. Jobard (Eds.), *Citoyens et délateurs – La délation peut-elle être civique?* (Paris: Éditions Autrement, 2005, pp. 155-173, p. 172).

Other physical or material evidence is often also very limited. In that context, the testimonies of some witnesses, by virtue of their personal proximity to the planning or commission of the crime, can greatly assist the authorities in investigation or prosecution.[3] The protection of such individuals therefore takes on a great significance, even as it raises a number of practical, ethical and legal issues. It should not come as a surprise then to learn that many of the early programs for the protection of witnesses in Europe and North America were initially developed to respond to specific threats posed by terrorist groups or organized crime syndicates.

1.1 Definitions

A few definitions should be introduced here before proceeding with our discussion of the issues. The terminology often varies from one country to another, but for the most part the basic concepts are the same.

Starting with the concepts of "***witness***", "***witness at risk***", and "***protected witness***", we note that the term "witness" itself covers several categories of actors: a "victim" who can testify and provide evidence, an "informer" who brings some evidence to the authorities, an "observer of a crime" who was not otherwise involved in the crime, an "undercover agent" who may or may not be a police officer, an "informant" who has special access to a criminal or terrorist organization, an "accomplice" in a crime, or a "repenti" who is willing to give evidence in return for certain considerations.

The Council of Europe, which has given a lot of attention to witness protection issues in the last several years, defines the term "witness" to mean "any person, irrespective of his/her status under national procedural law, who possesses information relevant to criminal proceedings, including experts and interpreters".[4–5] The "witness at risk", or "endangered witness", is a witness who is liable to endanger himself or herself by cooperating with the authorities, or a witness who has reasons to fear for his or her life or safety or has already been threatened or intimidated.[6] A "protected witness" could mean any witness who is offered some form

3 Council of Europe. *Combating Organised Crime – Best Practices Survey of the Council of Europe*. (Strasbourg: Council of Europe Publishing, p. 20, 2004)

4 Council of Europe. *Combating Organised Crime*,p.16.

5 "Witness" in the Witness Protection Program Act (S.C. 1996, c. 15, s.2) is defined as "someone who gives or agrees to give information or evidence or who participates or agrees to participate in matters relating to an investigation or the prosecution of an offence".

6 ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation - Final proposal of the ISISC-OPCO-Europol working group on minimum requirements for potential legislation at European Union level, Explanatory Report*. (Italy: Siracusa: International Institute of Higher Studies in Criminal Sciences, 2005). Council of Europe. *Combating Organised Crime,* p. 16.

of protection against intimidation or retaliation. In practice, however, this term is generally reserved for witnesses who receive protection from a formalized witness protection program. In Canada, the *Witness Protection Program Act* refers to these witnesses as "protectees"[7], a term not typically used in other jurisdictions. For the purpose of that program, the term "witness" may also refer to other persons who, because of their relationship to the witness, may also require protection. Most witness protection legislation and programs recognize the fact that a witness can be intimidated indirectly, such as when his or her family, relatives, or friends are targeted. The expression "people close to witnesses and collaborators of justice", frequently used in legislation, usually refers to relatives and other persons who are in close relation with the witnesses and find themselves at risk and in need of protection because of that association.

As mentioned before, in cases involving terrorist or organized crime groups, the most significant witnesses are often those who have the opportunity to get close to these groups, either because they belong to them or they have successfully infiltrated them. They include individuals variously characterized as "***pentitis***", "***repentis***"[8], "***crown witnesses***", or "***informants***"[9]. The expression "***collaborator of justice***" is increasingly used internationally to represent all of these categories. It then refers to any person, whatever his/her legal status, who is or was associated with a criminal organization and who agrees to cooperate with competent authorities by providing information and evidence in criminal proceedings concerning that organization or its activities.[10] Informants can become witnesses or protected witnesses, but in practice their role is often limited to providing intelligence as opposed to evidence, thus allowing them sometimes to continue to act as a covert source of information.

---

7 S.C. 1996, c. 15, s.2, *Witness Protection Program Act*.

8 A report of the Quebec Ministry of Justice defines the word repentis in the same way that the Council of Europe has used the word pentitis: une personne qui a commis, a participé à la commission d'une infraction, ou a fait partie d'une organisation s'adonnant à des activités illégales et qui, moyennant certains avantages, accepte de témoigner pour la poursuite, relativement à l'infraction commise ou contre l'organisation criminelle à laquelle elle appartient ou à laquelle elle a appartenue (Ministère de la Justice du Québec et Ministère de la Sécurité publique du Québec (2000). Rapport sur l'utilisation des témoins repentis en 1998. Québec: juin 2000, p. 1).

9 In French, the word à "délateur" is often used to translate the word "informant". Its meaning, however, is perhaps more restrictive as it refers more specifically to collaborators of justice who are acting on the basis of their personal interest: une pratique dictée par l'intérêt (Brodeur and Jobard, 2005: 8).

10 ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*.

In many instances, collaborators of justice have themselves been accomplices in the commission of the crime being investigated or in other related criminal activities. Some of them may be undercover agents who may or may not be police officers. As we shall see later, it would seem that the use of such informants is perhaps as necessary to the successful investigation of terrorist and organized crime activities as it is problematic.

Intimidation can, of course, take many forms even if its fundamental purpose remains the same: to interfere unduly with the willingness of a person to testify freely or to react and retaliate against someone who has given a testimony. The Council of Europe has been defining "***intimidation"*** as "any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting from the mere existence of a criminal organization having a strong reputation for violence and reprisal, or from the mere fact that the witness belongs to a closed social group and is a position of weakness therein".[11]

Intimidation can be perpetrated in a number of ways: physical violence, explicit threats of physical violence against the witnesses or someone close to them, direct or indirect implicit threats, property damage, and courtroom intimidation. Intimidation may take the form of an escalating set of threats and actions. It may also involve retaliation after the fact, as a signal to others and a means to deter anyone else from cooperating with authorities.

1.2 Research on Witnesses of Terrorism or Organized Crime

Protecting witnesses and collaborators of justice who are providing evidence and intelligence in terrorism-related cases is crucial to the prevention and control of the activities of terrorist organizations. However, systemic efforts to protect informants and witnesses are relatively recent. In the past, many countries relied on more informal means, often based on the use of the discretionary authority of law enforcement and prosecution officials. Growing concerns with the deficiencies and limitations of existing protection measures in many countries, the cost of existing programs, as well as the legal and ethical issues associated with

11 Council of Europe. *Combating Organised Crime,* p. 16.

some of their more controversial aspects have brought these questions to the forefront.

The United Nations, the Council of Europe and other multilateral organizations have increasingly focused their attention over the last decade on the transnational nature of many serious crimes and terrorist activities. States have recognized the need to engage with each other in a number of exercises to harmonize their legislation and criminal justice practices and to enhance their capacity to cooperate with each other in the fight against international terrorism and organized crime. Conventions and bi-lateral treaties have been ratified to reflect this new commitment. International cooperation initiatives with respect to the identification and use of informants and witnesses, the sharing of intelligence and evidence, and the protection of witnesses, are just a few of the many facets of this trend.

Empirical research on witness intimidation and protection is still very limited and most of the existing literature focuses on witnesses of serious crimes in general. In recent years, a number of comparative reviews of existing programs and measures have been undertaken, usually as a basis for further policy development.[12] Most of them have been content to compare and contrast existing programs and legislations. They usually deplore the lack of empirical evidence on the effectiveness of any of these measures.

When analyzing the possible specificities of acts of terrorism with respect to witness protection, one cannot identify particular features that would justify dealing with witnesses of terrorist crimes differently than witnesses of other serious crimes, particularly those committed by gangs and criminal organizations.[13] Furthermore, the effective prosecution of terrorist activities frequently involves the prosecution of individuals for serious offences (kidnapping, possession of explosive, assaults, murder, money laundering, etc.) without an explicit reference to their ultimate terrorist design.

---

12 See for example: Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice*. (Strasbourg: Council of Europe Publishing, 2006). Law Commission of India *Consultation Paper on Witness Protection*. (New Delhi, August 2004). Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases: An International Review* (Home Office Online Report 27/05). (London: Home Office, 2005). Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", *European Journal of Criminology* 2006, Vol. 3 (3), pp. 319-355.

13 That is a conclusion that was also reached by the European Committee on Crime Problems (Council of Europe (2005). European Committee on Crime Problems (CDPC). *Draft Recommendation Rec(2005) on the Protection of Witnesses and Collaborators of Justice*, p. 6.

Because of the very serious consequences of terrorist activities, it makes sense for a society to attach particular importance to the protection of witnesses and others who can help prevent terrorist acts. One should note, however, that many of the strategies to combat organized crime are also relevant to the fight against terrorism. This makes sense because: (1) the intent and purposes of terrorist groups are criminal; (2) terrorist acts are crimes; (3) terrorist groups frequently engage in criminal activities that are not in themselves "terrorist" in nature but are nevertheless essential to the success of their enterprises; and, (4) the methods that they use to intimidate witnesses and others are practically indistinguishable from the methods used by other criminal groups.

Terrorist groups and criminal organizations are not engaged in single criminal acts. These groups are typically involved in numerous and ongoing criminal activities. When it comes to preventing terrorist activities, relying on the mainly reactive nature of the criminal justice system response is not only shortsighted, but also dangerous. Ultimately, the efforts of the justice system must focus not only on responding, through investigations and prosecutions, to crimes already committed, but also on preventing future crimes.[14] It is therefore in the context of proactive, intelligence-based efforts to counter terrorism that the issue of witness protection must be examined.

Since the 2001 terrorist attacks in the United States and the subsequent resolutions of the United Nations Security Council, several anti-terrorism laws were hastily adopted around the world and, in the prevailing atmosphere of panic and international pressure, several law enforcement practices have emerged that have then proved detrimental to human rights, the rule of law and democracy. They have reemphasized the need to ensure that, in adopting measures aimed at preventing and controlling acts of terrorism, governments adhere to the rule of law, including the basic principles, standards and obligations of criminal and international law that define the boundaries of permissible and legitimate action against terrorist groups.

---

14 For a discussion of the limitation of the deterrence approach and the need to focus on preventive measures, see: Laborde, J.-P. and M. DeFeo. "Problems and Prospects of Implementing UN Acton against Terrorism", *Journal of International Criminal Justice,* Vol. 4 (2006), pp. 1087-1103. Also: UNODC. *Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-terrorism Instruments.* Terrorism Prevention Branch, United Nations Office on Drugs and Crime, New York, 2006.

Terrorism and extremism of all kinds threaten both the rule of law and the fundamental freedoms of citizens and entire societies. At the same time, the manner in which counter-terrorism efforts are conducted can have serious implications for the rule of law.[15] The high moral ground that State actors enjoy might be lost when their methods are (or are widely perceived as) arbitrary, baseless, discriminatory, or illegal. In 2005, the Council of Europe adopted a set of *Guidelines on Human Rights and the Fight against Terrorism*. They reaffirmed that: "all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision".[16] All this must be kept in mind, as it is directly relevant to our policies and practices concerning the use of informants and the protection of witnesses and collaborators of justice in the fight against terrorism.

1.3 The Rights of Witnesses

The position of witnesses in most criminal justice systems around the world revolves around responsibilities rather than rights.[17] When it comes to collaborators of justice and informants, their rights are often limited to what they can negotiate with the authorities, obviously from a disadvantaged position. A recent training manual published by the Council of Europe reminds its readers that the criminal law must be sensitive to the specific needs of persons who are subject to the civic duty of providing testimony:

"Prescribing the duty of a witness to give a statement implies that the government has to take responsibility for making the fulfillment of such obligation free from any threat to the witness' own values – his life, bodily integrity, family or property. Therefore, this responsibility to the state may be seen as the right of the witness to fulfill his obligation to testify freely,

---

15 See also: Dandurand, Y. "The Role of the Prosecutors in Promoting and Strengthening the Rule of Law - Working Paper III", in *Report of the Second Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, Doha, Qatar, November 14-16, 2005.

16 Council of Europe. *Human Rights and the Fight against Terrorism – The Council of Europe Guidelines*. (Strasbourg: March 2005).

17 Moody, S. "Vulnerable Witnesses Rights and Responsibilities". A paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, June 2005, Edinburgh.

meaning without any influence on his statement, without damage and without risk for the witness." [18]

> It can be argued that there is a fundamental imbalance between the "rights" of witnesses, who can be compelled to testify, and the "rights" of the state to demand that witnesses respond to summons and subpoenas, testify under oath, and tell the truth. The imbalance is particularly troubling when one considers that most of the decisions made about witnesses, the information or evidence they bring forward, or whether they are compelled to testify depend on police and prosecutorial discretion and are therefore not generally open to public scrutiny. This is why guidelines concerning these practices are important and why the careful monitoring of this somewhat obscure part of the criminal justice process is required. In brief, notwithstanding the legitimate legal, public safety, security, confidentiality, and privacy considerations that must equally be addressed, it is imperative that some greater transparency be introduced with respect to decisions that are made concerning witness protection, the denial of protection in certain cases, as well as the general use of informants and collaborators of justice. It is also important to ensure that witnesses have access to legal advice and representation with respect to these decisions and the processes that lead to them.

2. Witness Intimidation and Obstruction of Justice

Obstruction of justice includes many different offences, including witness tampering and intimidation[19], jury tampering, and intimidation of justice officials[20]. There is very little systematic research on witness or jury tampering, in part because it is difficult to establish when and how frequently it occurs. Knowing the details and prevalence of such incidents could certainly contribute to our understanding of what kinds of measures could be taken to protect witnesses and jurors (including the cost-effectiveness of witness protection programs).

---

18 Council of Europe. *Protecting Witnesses of Serious Crime*, p. 16.
19 Roadcap, S. "Obstruction of Justice", *American Criminal Law Review*, 2004, Vol. 41 (2), pp. 911-945.
20 Laborde, J. *État de droit et crime organisé.* (Paris: Dalloz, 2005, p. 33).

There is a lack of empirical data on the nature, scope and consequences of witness intimidation. Estimating the extent of the intimidation that occurs in order to prevent the reporting of a crime to the authorities or to deter witness cooperation with the police is plagued with difficulties.[21] As the main purpose of intimidation is to prevent people from going to the authorities, it is not surprising that there is so little empirical evidence on the nature and scope of witness intimidation taking place in Canada or elsewhere.

Official data are being gathered on individuals who are charged with or convicted of various offences of witness intimidation or causing harm to a witness, but the usefulness of that data is severely limited. Witnesses who are successfully intimidated do not inform the police and, if they are already cooperating with the authorities, they withdraw their cooperation and usually hide the fact that they have been pressured to do so. Even when witness intimidation is suspected, it is often difficult to prove that it took place.[22] Also, it is common practice in the compilation of most police-based crime statistics to only include the most serious offence in what is considered a reportable "incident" and, as a result, incidents of witness intimidation are not counted as such when they are accompanied by or also constitute a more serious offence (as in the case of aggravated assaults, use of explosives, or murder).

Nevertheless, we know from accounts given by police and prosecutors that threats to witnesses are common when organized criminal groups are involved and that they often have a serious impact on the prosecution of crime.[23] In fact, as was recently reported by Dedel, a number of small-scale studies and surveys of police and prosecutors suggest that witness intimidation is pervasive and increasing[24] and, clearly, a number of experts are convinced that there is increasing violence and intimidation by organized criminal groups.[25] In the British Crime Survey of 1998, 15 percent of respondents who had been victimized and had some knowledge of the offender, reported that they had later been victims of intimidation, and in the majority of these cases (85%) the intimidator

---

21 Fyfe, N. *Protecting Intimidated Witnesses* , p. 30. Maynard, W. *Witness Intimidation: Strategies for Prevention* (Crime Detection and Prevention Series: Paper No. 55). (London: Home Office, Police Research Group, 1994, p. 4).

22 Council of Europe. *Combating Organised Crime*, p. 21.

23 Council of Europe. *Combating Organised Crime*, p. 15. Fyfe, N. *Protecting Intimidated Witnesses*. Finn, P. and K. M. Healey. *Preventing Gang- and Drug- Related Witness Intimidation*, p. 1.

24 Dedel, K. *Witness Protection.* Problem-Oriented Guides for Police Series, No. 42. (Washington (D.C.): United States Department of Justice, Office of Community Oriented Policing Services, July 2006, p. 5).

25 Council of Europe. *Combating Organised Crime*, p. 21.

was the original offender.[26] In the survey of the impact of intimidation on crime reporting in the U.K, it appeared that fear of intimidation or retaliation deters a greater number of witnesses than victims from reporting, whereas actual intimidation is reported more often by crime victims than by crime witnesses.[27]

2.1 Patterns of Intimidation

Intimidation can be overt or implicit (when there is a real but unexpressed threat of harm).[28] Witnesses can also experience fear and feel intimidated when they are in no actual danger. Just as it is well known that there is no perfect correlation between fear of crime and risk of criminal victimization, neither is there a perfect correlation between the fear experienced by witnesses and the real risk of their victimization as a result of collaboration with the authorities.

The risk of collaborating with the justice system is heightened by the power wielded by those involved in the commission of the crime, their ability to intimidate or suppress the witnesses and informants, and the relative inability of the justice system to offer full protection to those witnesses.[29]

Many researchers now distinguish between "case-specific" and "community-wide" intimidation[30], although it is also clear that case-specific intimidation can also reinforce community-wide intimidation. Community-wide intimidation involves "acts that are intended to create a general sense of fear and an attitude of non-cooperation with police and prosecutors within a particular community".[31] This can become particularly important for some communities when terrorist supporters

---

26 Tarling, R., Dowds, L., and T. Budd. *Victim and Witness Intimidation: Findings from the British Crime Survey*. (London: Home Office, Research, Development and Statistics Directorate, 2000).

27 Maynard, W. *Witness Intimidation: Strategies for Prevention*, p. 12.

28 Finn, P. and K. M. Healey. *Preventing Gang- and Drug- Related Witness Intimidation*, p.1.

29 Boisvert, Anne-Marie. *La protection des collaborateurs de la justice: éléments de mise à jour de la politique québécoise* – Rapport final présenté au ministre de la Sécurité publique. (Québec, Juin 2005, p. 8).

30 E.g., Healey, K.M. *Victim and Witness Intimidation: New developments and Emerging Responses*. (Washington (D.C.): U.S. Department of Justice, National Institute of Justice, October 1995). Fyfe. N. and H. McKay. "Desperately Seeking Safety: Witnesses' Experiences of Intimidation, Protection and Relocation", *British Journal of Criminology*, 2000, Vol. 40, pp. 675-691. Fyfe, N. *Protecting Intimidated Witnesses*.

31 Dedel, K. *Witness Protection,* p. 4.

attempt to compromise potential witnesses and expose them to potential prosecution for associating with terrorist elements. Fear of discriminating against one's own ethnic group because of its alleged sympathy for a cause is also a factor. Fear, however, is not the only factor contributing to the reluctance of witnesses to step forward; strong community ties and a deep-seated distrust of law enforcement may also be strong deterrents to cooperation.[32] Community-wide intimidation is especially frustrating for the police and prosecutors because, while no actionable threat is ever made in a given case, witnesses and victims are still effectively discouraged from testifying.[33]

To further complicate matters, witness intimidation can occur indirectly in at least two other ways: it can be committed by a third party, someone who was not directly involved in the crime being investigated or prosecuted; and, it can target someone close to the witnesses instead of the witnesses themselves (e.g. intimidating the spouse of a witness or other family members). In fact, it is often sufficient for the intimidators to display their knowledge of the witnesses' families, their whereabouts, or life habits to increase pressure on the witnesses.[34] In the case of serious offences, witnesses typically have a strong sense of fear stemming from what they know of the accused and their associates.[35] This feeling, in turn, can easily be reinforced by subtle or veiled threats.

Experts also distinguish between "low-level" intimidation and the very serious and often life-threatening experience of other witnesses and their families often in relation to organized criminal or terrorist groups. The number of witnesses who fall in the latter category is relatively small in comparison to the number of witnesses who face low-level intimidation, but the former group is the one who tends to receive the most attention from law enforcement and justice officials. Both forms are encountered in the way in which terrorist and criminal groups typically maintain entire groups or communities in fear of reprisals and retaliation.

Low-level community-wide intimidation frequently takes place within vulnerable, disenfranchised, or segregated communities that have fallen

---

32 Healey, K. M. *Victim and Witness Intimidation*, p. 1.
33 Finn, P. and K.M. Healey . *Preventing Gang- and Drug- Related Witness Intimidation*, p. 2.
34 Fyfe, N. *Protecting Intimidated Witnesses*, p. 84.
35 Fyfe, N. *Protecting Intimidated Witnesses*, p. 45.

prey to the influence of radical groups or criminal organizations. The widespread intimidation of potential witnesses and informers within a community as a whole can take place when it is infiltrated and eventually controlled by radical elements or criminal gangs. One must understand that that kind of intimidation is particularly hard to detect and especially difficult to combat. For example, Bolan described how the intimidation of the Indo-Canadian community was a factor in defeating the efforts of investigators and prosecutors in the Air India case: "For fifteen years, intimidation had been a successful tactic to silence potential witnesses".[36] The Report of the Honourable Bob Rae on Outstanding Questions with Respect to the Bombing of Air India Flight 182 refers to "evidence of a culture of fear within communities that has stopped people telling the truth about what happened".[37] In that case, various forms of low-level intimidation and ostracism were reinforced by violent retaliation and even murder.

Generally speaking, threats are much more common than actual physical violence.[38] Most intimidation is neither violent nor life-threatening, but even a perception that reprisals are likely can be distressing and disruptive to witnesses and potential witnesses.[39] It is not unusual for innocent bystander eyewitnesses to have knowledge of crucial incriminating evidence that could put them at risk of intimidation or retaliation. Low-level intimidation may be quite effective in preventing them from coming forward to assist law enforcement. In fact, some studies of witnesses' experience of intimidation suggest that there is a greater incidence of "low-level" intimidation than is generally assumed.[40] Unfortunately, there is no reliable Canadian data on either type of intimidation.

During their evaluation of the Strathclyde Police witness protection program, Fyfe and McKay interviewed 14 protected witnesses. Witnesses described how, before they received police protection, they had their house "petrol-bombed", had a shotgun put to their head, were run over by a car, or received threats that their children would be kidnapped or

---

36 Bolan, K. *Loss of Faith – How the Air-India Bombers Got Away with Murder*. (Toronto: McClelland & Steward ltd., 2005, p. 239).

37 Rae, Bob. Lessons to be Learned. The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182. (Ottawa: Air India Review Secretariat, 2005, p. 3).

38 Dedel, K. *Witness Protection*, p. 3.

39 Dedel, K. *Witness Protection*, p. 6.

40 Bruce, D. "Danger, Threats or Just Fear: Witness intimidation in three Gauteng courts". *South African Crime Quarterly, 13*, 2005, 23-28.

injured.[41] Although such incidents were occasionally isolated attempts at intimidation, they were more frequently part of a sequence of escalating threats that became more violent and dangerous over time. In most incidents, fortunately, the threat against the witnesses was not realized.[42]

In terms of where intimidation tends to take place, it is clear that it is not confined to the courtroom or court building. In terms of the timing of intimidation, it is apparent that witnesses are vulnerable at all stages of the legal process, from the moment they witness a crime or report it to the police to when they give evidence in court.[43] Some research indicates that intimidation begins immediately after the police's initial contact with the victim or witness.[44] In fact, even after they have testified, witnesses can remain vulnerable to retaliation for a long time, as the retaliation is often intended to send a message to other witnesses or community members who may be considering cooperation with the authorities. One often hears of home-grown law enforcement theories about when witnesses are presumed to be most vulnerable, e.g. at the time of disclosure, or when a witness is getting close to testifying. In truth, we still know far too little about patterns of intimidation, particularly when they involve organized crime groups or terrorists, to say anything about them with any certainty.

Intimidation can have a profound impact on the witnesses themselves. For those who were also victims of the crimes being investigated or prosecuted, it comes as a second wave of victimization, distress and fear. Using material from in-depth interviews with witnesses, Fyfe and McKay also observed how difficult the experience of intimidation is as, and also the experience of relocation, when this becomes necessary to protect a witness. The latter seriously affects the physical and psychological health of witnesses.[45]

---

41 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses: A Study of the Strathclyde Police Witness Protection Programme", *Policing and Society*, 2000, No. 10, pp. 277-299.

42 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses", p. 292. Fyfe, N. *Protecting Intimidated Witnesses*, p. 35.

43 Fyfe, N. *Protecting Intimidated Witnesses*, p. 45.

44 Fyfe, N. *Protecting Intimidated Witnesses*, p. 35. Maynard, W. *Witness Intimidation: Strategies for Prevention*.

45 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses".

2.2 Identifying Witness Intimidation

Identifying the witnesses who are at risk can be an issue. The police play a critical role in the early identification of these witnesses and the number of intimidated witnesses is perhaps underestimated because of the lack of attention given to identifying incidents.[46] One should obviously not assume that witnesses who are being intimidated come forward and ask the police or the prosecutors for protection. Divulging to the authorities that they are victims of threats or violence is itself something that they are being dissuaded to do. Identifying witness intimidation is therefore very important and must occur at the earliest time possible, both in order to protect the victim or in order to protect the integrity and viability of an investigation or prosecution. All agencies involved in dealing with a witness or potential witness (or their relatives and friends) must know what to do in such circumstances and be prepared to do their part. They all share a responsibility in this regard.[47] We shall also refer later to the importance of having a reliable threat or risk assessment process as the cornerstone of an effective witness protection system.

2.3 Preventing Intimidation

Intimidation is difficult to prevent, particularly when the suspect, who knows the identity of the victim or a witness, has not yet been apprehended.[48] Some research indicates that intimidation begins immediately after police contact with the victim or witness.[49] In addition to the obvious role of the police in preventing intimidation and harm to witnesses, the courts, prosecution services, witness and victim assistance services, and prison authorities all have important roles to play in reducing incidents of intimidation. Working relationships between these agencies and the police must be strengthened and good practices must be identified, disseminated, and adopted. Using the example of the Salford Witness Support Service, which is based on strong inter-agency cooperation, Fyfe argues that it is possible for law enforcement agencies and their partners to produce a clear message to both witnesses and

---

46 Burton, M., Evans, R., and Sanders, A. "Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification". *The Criminal Law Review* (March), 2006, pp. 229-240, p. 232).

47 Whitehead, E. *Witness Satisfaction: Findings from the Witness Satisfaction Survey 2000*. Home Office Research Study 230. (London: Home Office Research, October 2001, p. ix).

48 Maynard, W. *Witness Intimidation: Strategies for Prevention*.

49 Maynard, W. *Witness Intimidation: Strategies for Prevention*.

potential intimidators that action is being taken to ensure that witnesses can speak up, knowing that help and support are available if they fear or are subject to intimidation.[50]

The focus of current protection measures tends to be on the very important witnesses who are at high risk of victimization. Some witnesses or potential witnesses may have small but important elements of evidence to contribute to an investigation or prosecution. Neglecting the potential for the intimidation of these other witnesses who can assist the police or prosecutors in many small but significant ways can be detrimental to the success of an investigation or prosecution. Since a successful prosecution is often the result of a case carefully built, piece by piece, on the basis of various elements of proof, one cannot always discern at the outset which evidence will be crucial and which will eventually prove trivial. It is important not only to understand the lower levels of intimidation that affect witnesses and prevent them from aiding the police, but also to identify police procedures and practices that might reduce the incidence of intimidation.[51]

The sheer complexity of witness intimidation means that a range of measures is required to tackle the problem.[52] Reducing the risk of intimidation is possible by minimizing the risk of witnesses being identified when they are reporting a crime or offering a statement, and by protecting their anonymity and privacy. Protection programs and measures often exist for witnesses who are exposed to serious threats and danger, but there is far less attention given to measures to address low-level threats or community-wide forms of intimidation.[53] A second tier of protection measures must exist also. This can include practical means such as offering witnesses the use of alarms, calling devices and other crime prevention devices; offering quick access to police assistance and other services; conducting a security audit of an individual's home; giving witnesses the option of visiting the police station instead of being interviewed where they live or work and other means of reducing the likelihood of contact between them and offenders; transporting them to and from work, school, or the court; keeping witnesses separately from offenders whenever they must be at the police station or in the court

---

50 Fyfe, N. *Protecting Intimidated Witnesses*, p. 48.
51 Maynard, W. *Witness Intimidation: Strategies for Prevention*, p. 3.
52 Fyfe, N. *Protecting Intimidated Witnesses*, p. 47
53 Brouwer, G. E. *Review of the Victoria Police Witness Protection Program*. Report of the Director of the Office of Police Integrity. (Victoria (Australia): Victorian Government Printer, P.O.P. No. 145, July 2005, p. 8).

house; offering them emergency or short-term relocation as required; or seeking "no-contact" court orders on their behalf.[54] In any given case, a combination of several of these measures is usually required. As the witness' situation evolves, the risk may change and must be reassessed and a different set of measures may become necessary.

We should also add that a number of approaches to witness protection do not involve direct police protection. They include greater police emphasis on investigation of reports of witness intimidation; the use of police officers from the relevant ethnic groups to serve identifiable cultural communities; and developing closer, deeper, and long-term ties within diverse communities and within community groups and organizations. When individuals and communities know, trust and respect their local police, they are more likely to come forward. If it is known and believed that police will take effective action to protect victims and witnesses, then this too will encourage greater reporting. Not surprisingly when police are remote, detached from the community, and appear unwilling or unable to offer meaningful protection to victims and witnesses, then community cooperation dissipates.

Finally, responding firmly to any incident of witness intimidation is also necessary in order to prevent future intimidation. The frequency with which offenders are charged with intimidation or obstruction of justice varies widely from one jurisdiction to another. Yet, it is necessary to prosecute vigorously offenders who harass, threaten, injure, or otherwise intimidate witnesses and potential witnesses. Severe sentences for witness intimidation and the revocation of probation or parole may help stop intimidation. However, it is often hard to find out whether intimidation is taking place and, even when it is known that it is taking place, it is often difficult for prosecutors to file charges of intimidation or obstruction of justice because the perpetrator is not identifiable or sufficient evidence cannot be gathered.[55]

3. The Use of Informants and Collaborators of Justice

Law enforcement authorities increasingly need to rely on the testimonies of co-defendants and accomplices willing to cooperate and provide

---

54 Dedel, K. *Witness Protection.*

55 United States Department of Justice . *New Directions from the Field: Victims' Rights and Services for the 21st Century*. (U.S.A: Office for Victims of Crime, 1998, p.8).

evidence against their former associates.[56] Although some may argue that there is insufficient evidence to verify the effectiveness of that particular approach[57], the use of criminal informants and accomplices is often depicted as essential to the successful detection and prosecution of terrorism and organized crime.[58] This is why various international agreements and conventions actively promote the development of a capacity to utilize these methods.[59] In civil-law countries in particular, many of these procedural changes to criminal law have been difficult and have therefore been implemented cautiously. Laborde describes these changes necessitated by the fight against organized crime as "une révision déchirante des principes procéduraux classiques".[60]

Quite a few observers of this recent willingness to encourage the use of informants and collaborators of justice have noted that the practice is not without important issues, whether it is on the basis of moral or ethical concerns, criminal law principles, the integrity of the police agency itself, or the question of the poor reliability of the information and evidence the informants provide.[61]

Because of the importance of "accomplice testimony" in cases involving organized crime and terrorism, plea-bargaining and offers of immunity or leniency often play a crucial role in the gathering of evidence and the

---

56 Council of Europe. *Combating Organised Crime*, p. 22. Schreiber, A.J. "Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants". *Columbia Journal of Law and Social Problems*, 2001, vol. 34(4), pp. 301-368.

57 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*. Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases".

58 E.g., Laborde, J. *État de droit et crime organisé.* (Paris: Dalloz, 2005).

59 E.g., *United Nations Convention Transnational Organized Crime*, 2000. Also, Council of Europe, *Recommendation REC(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organized crime. Strasbourg*, September 2001.

60 Laborde, J. *État de droit et crime organisé.*.

61 Beernaert, M.-A. "De l'irrésistible ascension des 'repentis' et 'collaborateurs de Justice' dans le système pénal", *Déviance et Société*, 2003, No. 27(1), pp. 77-91. Cohen, H. and R. Dudai. «Human Rights Dilemmas in Using Informers to Combat Terrorism: The Israeli-Palestinian Case», *Terrorism and Political Violence*, 2005, No. 17, pp.229-243. Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*. Harris, G.C. "Testimony for Sale: The Law and Ethics of Snitches and Experts", *Pepperdine Law Review*, 2000, Vol. 28 (1), pp. 1-74. Norris, C. and C. Dunnigham. "Subterranean Blues: Conflict as an Unintended Consequence of the Police Use of Informers", *Policing and Society*, 2001, Vol. 9, pp. 385-412. Montanino, F. "Unintended Victims of Organized Crime Witness Protection", *Criminal Justice Policy Review*, 1987, Vol. 2 (4), pp. 392-408.

successful prosecution of these cases.[62] Therefore, in practice, witness-protection measures, as a means to elicit cooperation from criminal informants, are intertwined with other measures such as plea-bargaining, immunity from prosecution, and reduced sentences. Legislation creating the "pentiti" appeared in Italy in the 1970s to help in the fight against the Red Brigades and, later, the Mafia.[63], It recognized the possibility of exempting a criminal/accomplice from punishment when the information he provided to the authorities prevented an infraction that could have resulted in human death or serious injuries or granting leniency (reduction of punishment) to help identify the criminals responsible for an offence. Other countries imitated the example, often because they themselves were facing some serious terrorist threats (e.g. France in 1986).[64] In Europe (e.g. Italy, Germany, Ireland), many of these measures were first developed in response to terrorism and political violence (as a response partly to the difficulty of getting evidence and intelligence concerning tightly knit groups and the need therefore to obtain the collaboration of insiders/accomplices). The use of these measures varies from country to country. However, not all countries (e.g. France and Japan)[65] have provisions in their systems for plea-bargaining and offers of immunity In some countries these practices are not allowed while in others they do not have a statutory basis. Authorities must therefore rely on the use of discretion at various levels of the system.[66]

Informants have progressively become the property of the police agency, as opposed to the individual investigator.[67] Formal agreements are often

---

62 In the USA, it is possible for the prosecution to decide not to prosecute a witness for a crime he/she has committed. In practice, this is rarely offered. In the rare cases where immunity is offered, it is only granted after the collaborator had rendered his/her collaboration. In a number of European states (Germany – with the consent of the court – Hungary, Greece, Moldova, Belgium, and Latvia), it is possible for the prosecutors to dismiss charges against an offender who has collaborated or stay the proceedings against him (see: Piancete, N. "Analytical Report", in Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice*, (Strasbourg: Council of Europe, 2006, pp. 7-65, p. 15). Because of the wide discretion they offer to prosecutors, witness immunity statutes in the USA often raise issues regarding their perceived and actual legitimacy (Fyfe, N. and J. Sheptycki . *Facilitating Witness Co-operation in Organised Crime Cases: An International Review*, p. iv).

63 La Spina, A. "The Paradox of Effectiveness: Growth, Institutionalisation and Evaluation of Anti-Mafia Policies in Italy", in Fijnaut, C. and L. Paoli (eds.) (2004). *Organized Crime in Europe -Concepts, Patterns and Control Policies in the European Union and Beyond.* (Dordrecht: Springer, 2004, pp. 641-676, p. 645).

64 Lameyre, X. and M. Cardoso, "La délation en droit pénal francais, une pratique qui ne dit pas son nom", in Brodeur, J.P. and F. Jobard (eds.). *Citoyens et délateurs – La délation peut-elle être civique?* (Paris: Éditions Autrement, 2005, pp. 144-154, p. 147).

65 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*, p. 3.

66 Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases, pp. 335-337.

67 Brodeur, J.P. and F. Jobard (Eds.). *Citoyens et délateurs,* p. 10.

struck between the informant and the police clarifying the obligations of both parties. One problematic aspect of these arrangements concerns the future criminal activities of informants.[68] In recent months, the matter has become a matter of public attention in the case of Richard Young, an R.C.M.P. informant who became a protected witness and then committed homicide, leading to calls for greater public scrutiny of the R.C.M.P. witness protection program.[69] The House of Commons' Public Safety Committee has since instigated a review of the existing program and legislation.[70]

There remains a need to provide a tight framework for the management of informants, in the form of guidelines, statutory regulations, or increased independent oversight.[71] Clark argues that, because of the high-risk nature of the relationship between informants and their handlers, such a relationship should always be the subject of intrusive and intelligence-led supervision and surveillance.[72] In cases potentially involving matters of national security, where public scrutiny of law enforcement activities is more difficult, there is an even greater need for independent oversight of practices relating to the use of informants and collaborators of justice.

Brodeur and Jobard, using the example of the Air India case, noted that police agencies and intelligence services tend to have different attitudes towards informants and protected witnesses.[73] The police use both, but often have a preference for witnesses who can help produce evidence (as opposed to only information or intelligence). Intelligence services, which must rely heavily on human intelligence (HUMINT) while dealing

---

68 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*. Also concerning exceptions for the criminal liability of informants, see: Dandurand, Y., Plecas, D., and D. C. Préfontaine. *Statutory Exemptions from Criminal Liability for Law Enforcement Officers.* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2001).

69 McArthur G. and G. Dimmock, "The secret agent who conned the Mounties: Richard Young's cruel charade", *Globe and Mail, and Ottawa Citizen*, March 22, 2007. Also: Editorial, "The Excessive Secrecy of Witness Protection", *Globe and Mail*, April 7, 2007.

70 Also: Dimmock, G., "MPs launch probe into R.C.M.P.'s witness protection program", *Ottawa Citizen*, March 30, 2007.

71 Clark, R. "Informers and Corruption", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 38-49, p. 49). Harris, G.C. "Testimony for Sale". Williamson, T. and P. Bagshaw. "The Ethics of Informer Handling", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 50-66, p. 63). Schreiber, A.J. "Dealing with the Devil", p. 360, Tak, P.J.P. "Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti". *European Journal of Crime, Criminal Law and Criminal Justice*, 1997, Vol. 5 (1), pp. 2-26, p. 25.

72 Clark, R. "Informers and Corruption", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 38-49, p. 49).

73 Brodeur, J.P. and F. Jobard (Eds.) *Citoyens et délateurs,* p. 15.

with closed criminal or terrorist organizations, tend to have reservations about their informants becoming protected witnesses, in part because their testimony may reveal too much about the services' own practices. When protection must be extended, intelligence agencies may have to rely on other agencies in order to offer effective protection to their informants. Such practices are obviously shrouded under a thick veil of secrecy and it is therefore quite difficult to ascertain how effective or fair they really are.

One must remember that the reputation of an investigative agency or an investigator to protect their informants directly impacts their ability to recruit them. Failure to protect them can result in a lack of trust in law enforcement, thus resulting in fewer informants.[74] The need to protect informants often presupposes protecting their identity and taking measures to ensure the non-disclosure of informant information. The recruitment and handling of informants and collaborators is often problematic.[75] So are some of the controversial methods that are sometimes used by law enforcement to compel criminals to cooperate (e.g., various forms of blackmail, entrapment, and techniques to compromise them in relation to criminal organizations or their own accomplices and put them at risk or place them in precarious positions[76]). There are also difficulties also with cases involving an agent who is infiltrating an organization and to whom various deceitful or empty promises may have been made explicitly and implicitly during the investigation. For these reasons and many others, several experts insist that "investigation practices" and "prosecution practices" must be kept totally separate from "witness protection practices".[77]

4. The Vulnerability of Certain Individuals and Groups

In England, a lot of work has been done in recent years to respond to the needs of "vulnerable and intimidated witnesses". Most of this work has been focused on facilitating the testimony of children and adults with mental or physical disabilities, but it also addresses the concerns of witnesses who feel intimidated either by the justice system itself or

74 Mallory, S.L. *Informants: Development and Management*. (Nevada: Copperhouse Publishing, 2000, p. 73).
75 Boisvert, Anne-Marie. *La protection des collaborateurs de la justice*, p. 22.
76 In French, one refers to the "précarisation des contrevenants"
77 Boisvert, Anne-Marie. *La protection des collaborateurs de la justice*, p. 23.

by some individuals.[78] Groups identified as "vulnerable" share many common experiences and a number of factors may prevent them from becoming effective witnesses, including factors that make the experience particularly traumatic because of the nature of the crime or the character of the accused, problems with the nature of the criminal justice process and the various procedural requirements, and sometimes, an imbalance of power between the witness and the defendant, particularly when the latter belongs to a dangerous organization.[79] Criminal groups often go to great lengths to maintain their victims in a constant state of vulnerability and powerlessness. This is often the case, for example, with illegal immigrants illegally smuggled into the country and potentially subject to deportation. Their vulnerability to deportation can be purposefully manipulated and exploited by terrorist groups.

As an international phenomenon, terrorism has undergone many mutations. One of them is the growing reliance of terrorist organizations on their ability to obtain support through deception, coercion, and other means from diasporas, recent immigrants, and other religious or minority groups found in democratic and tolerant countries such as Canada. Canadians have become much more aware of how the vulnerability of certain minority groups in Canada increases the vulnerability of the country as a whole and that of its allies. The Canadian Security Intelligence Service Public Report for 1999 pointed out that Canadians mirror the population of the globe, therefore when violence grips some region torn by conflict, it often resonates in Canada[80].

It is useless to deny the significance of the support that is sometimes provided to a terrorist organization by mobilized segments of a diaspora or a network of immigrants. Terrorist groups are known to rely on overseas-based communities both for support and for managing

---

78 Kitchen, S. and R. Elliott. *Key Findings from the Vulnerable Witness Survey*. (London: Home Office, 2001). Home Office. *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System.* (London: Home Office, 1998). Home Office. *Consultation Paper: Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children.* (London: Home Office, 2000, Communication Directorate. Home Office. *Key Findings from the Vulnerable Witness Survey*. Findings 147. (London: Home Office, Research Development and Statistics Directorate, 2001). Home Office. *Vulnerable Witnesses: A Police Service Guide*. (London: Home Office, 2002).

79 Reid-Howie Associates. *Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions*. Central Research Unit Crime and Criminal Justice Research Findings No. 60. (Edinburgh: Scottish Executive, 2002, p. 2).

80 CSIS, 1999 Public Report.

their insurgent infrastructure. A typical infrastructure disseminates propaganda, raises funds, recruits, trains, and procures and ships technologies and weapons to its theatre of conflict. While some members of communities voluntarily contribute economically and participate politically in the activities of terrorist groups, many others are coerced into collaboration through the use of threats and violence either against themselves or against others in their home country.

It is apparently often the case that ethnic communities living in ethnic enclaves are less inclined to integrate with their host societies and thus become more susceptible to insurgent indoctrination and vulnerable to intimidation by terrorists and other criminals. Anything that contributes to the isolation or ghettoization of these groups increases the likelihood that they could be intimidated, victimized, recruited or exploited by criminal or terrorist organizations.

The tightening of counter-terrorism measures, in particular border control measures to prevent the movement of terrorists and other criminals, has also had an impact on the lives of illegal migrants and residents. Refugees and illegal immigrants are often automatically assumed to be security threats[81]. Although there may often be little official sympathy for the situation of these illegal immigrants, they constitute nevertheless a very vulnerable group. Anything that contributes to the further alienation and isolation of these individuals can indirectly facilitate their exploitation by terrorist groups. Furthermore, these illegal residents/immigrants normally have strong and immediate ties to other members of the same immigrant community. What happens to them and how they are treated can also contribute to feelings of alienation, exclusion and vulnerability within the community as a whole. Criminal and terrorist groups are of course known to blackmail illegal residents and their relatives (even if they are themselves legal residents) by threatening to denounce them to the authorities.

Within the last few years, the Canadian Parliament has adopted a new immigration and citizenship law, as well as major changes to the *Criminal Code* and other federal statutes to combat organized crime[82], and a comprehensive *Anti-Terrorism Act* [83]. Various aspects of these

---

81 Huysmans, J. "The European Union and Securization of Migration", *Journal of Common Market Studies,* 2000, *38* (5).

82 Bill C-24, December 18, 2001.

83 Bill C-36, December 18, 2001.

laws have raised issues for many vulnerable groups which have expressed their concerns.[84] They have asked for greater protection, especially from discriminatory stereotypes that associate minority groups and religions with terrorism. They have also argued that their own vulnerability has been directly increased by some specific counter-terrorism measures. As was acknowledged by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Because terrorism investigations today are focused on specific communities there is an understandable concern that individuals and groups as a whole may feel unfairly targeted".[85]

Many measures adopted to combat terrorism can have detrimental effects on the situation of vulnerable groups. Their precise impact is an empirical question that has yet to receive some attention. However, it can be readily acknowledged that measures such as those adopted to authorize preventive arrests and short-term preventive detention introduce some real apprehensions within vulnerable communities. The same is true, for example, of the ability of the authorities to compel individuals to be examined in court during an investigation of a terrorist crime or conspiracy, possibly without providing for their effective protection after they have produced evidence. In the Air India case, R.C.M.P. Deputy-Commissioner Gary Bass suggested that resorting to the use of investigative hearings would allow those reluctant to come forward the protection they needed to tell the truth. He is quoted as saying: "The investigative hearing process offered the potential for individuals inclined to cooperate, but afraid of retribution, a vehicle to explain their cooperation within their community, by being able to explain that they had no choice but to testify truthfully."[86] However, that view is hard to defend since compelled witnesses are still exposed to potential retaliation by terrorists who would certainly continue to expect them to withhold the truth during their testimony. Furthermore, any investigative hearing would have been subject to a rebutable open court principle.[87]

Several of these measures clearly add to the already existing feelings of vulnerability and insecurity of members of vulnerable groups. They also

---

84 For example: Canadian Islamic Congress. *Canada's Relations with Countries of the Muslim World*, A Position Paper presented to the House of Commons Standing Committee on Foreign Affairs and International Trade by the Canadian Islamic Congress, May 6, 2003.

85 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report on the Events Relating to Maher Arar,* Ottawa: Public Works and Government Services Canada, 2006, p. 357.

86 Quoted by Bolan, K., "R.C.M.P. official meets Air India families", *Vancouver Sun*, March 05, 2007.

87 In *Re Vancouver Sun* [2004] 2 S.C.R. 332, two judges dissented and raised concerns that openness might result in risk to the safety of witnesses and other third parties.

convey a conflicting message by suggesting to those with information about potential terrorists that volunteering it to the authorities could result in their finding themselves subject to an investigative hearing, a preventive arrest or a charge under a broad array of new terrorism offences.

Nikos Passas[88] observed that the discourse of a "war on crime" or a "war against terrorism" "paves the ground for the acceptance of 'collateral damage'". The hardship imposed on vulnerable groups by criminal/terrorist organizations as well as by our collective response to these activities is just too easily dismissed as part of that necessary "collateral damage". One of many forms of collateral damage may be a distrust of law enforcement and security officials by those within the affected communities that may have information that would be useful either to preventing or prosecuting terrorism.

Counter-terrorism strategies do not typically address the need to offer active protection to these vulnerable groups. A legalistic/instrumentalist approach to this question tends to prevail. As a result, the services of State protection programs are extended to victims of intimidation and exploitation in their capacity as witnesses and informants, but only to the limited extent that their participation is required by the justice system itself. Otherwise, intimidated individuals tend to be left to their own devices. One must therefore ask whether or not it is fair to expect members of these vulnerable groups to stand up alone against terrorist and criminal organizations without any assistance from the State.

In the fight against terrorism, recent immigrants and other minority groups that have potential ties with insurgent groups in foreign countries often find themselves on the front line of the struggle. Unfortunately, they are too easily labelled as part of the problem, as opposed to part of the solution i.e. as potential informants or witnesses. Their intimidation and exploitation by transnational terrorists and other criminal organizations is a pressing issue that does not receive enough attention. According to some observers, what policy makers have failed to grasp is that in a country such as Canada, several minority ethnic communities can find themselves on the front lines of a dangerous struggle, the victims of terrorists seeking money and support for their cause. Critics of current

---

88 Passas, N. "Cross-Border Crime and the Interface Between Legal and Illegal Actors", *Security Journal,* 2003, 16 (1), pp. 19-37.

policies contend that Canada welcomes refugees from war-torn lands, and then abandons them once they have arrived[89].

Vulnerable groups frequently fear, not without cause, that sufficient protection will not be extended to them by law enforcement agencies if they request it or if they decide to denounce their oppressor or collaborate with law enforcement. In any case, they tend to entertain serious doubts about the amount of protection that can be offered to their relatives still in their country of origin.

We must find ways to strengthen the resiliency of these vulnerable groups and help them resist the pressure and intimidation to which they are often subjected by terrorists and criminals.

5. Protection Measures

Physical, economic and psychological intimidation of witnesses and their relatives can and does take place in a variety of contexts. The successful prosecution of organized crime activities and acts of terrorism usually requires that effective measures be taken for the protection of witnesses, victims, and collaborators of justice. Effective protection of witnesses and collaborators of justice includes legislative and practical measures to ensure that witnesses can testify freely and without intimidation. These measures include the criminalization of acts of intimidation, procedural measures, the use of alternative methods of providing evidence, physical protection, relocation programs, permitting limitations on the disclosure of information concerning witness identity or whereabouts, and in exceptional circumstances, protecting the anonymity of the person giving evidence.

5.1 Assessing the Threat and the Need for Protection

Authorities are often powerless to prevent witness intimidation. For one thing, ensuring proper protection for witnesses implies that the risk is identified and properly assessed. The level of risk faced by the witness dictates the nature and extent of the protective measures that must be

---

89 Bell, S., "A Conduit for Terrorists", *National Post,* September 13, 2001. On the Tamil, for example, the Tamil community has been intimidated in Canada, see also: Bell, S. *Cold Terror: How Canada Nurtures and Exports Terrorism Around the World, 2nd Edition*. (Toronto: Wiley, 2006).

taken. For instance, most witness protection programs have a requirement that a serious risk to the witness be established before protection services are offered. Risk assessment can be useful for allocating limited protection resources, but that presupposes that a reliable method exists to assess the nature of that risk.

A threat assessment is a set of investigative and operational activities designed to identify, assess, and manage persons who may pose a threat of violence to identifiable targets. One can distinguish among three major functions of a threat assessment: the identification of a potential perpetrator, the assessment of the risk of violence posed by a given perpetrator at a given time, and the management of both the subject and the threat that he or she poses to a given target.[90] There are situations, such as when there has been a failed attempt on the life of a witness, where the evaluation is relatively straightforward. However, risk assessment is not always that simple. In fact, assessing a threat is by no means a simple or exact process.

While a group that makes or poses a threat may be identified, not all potential aggressors are, or can be, identified. Assessment of the risk may be based on information whose validity and reliability is questionable. Management of the aggressors or potential aggressors may be difficult if they are individually unknown, cannot be located, or are operating in another country. The predictive capacity of threat assessment models is not absolute. The secretive nature of the groups involved, contextual vagaries, and the often ambiguous and unconfirmed nature of the intelligence gathered by security agencies make it extremely difficult to arrive at reliable conclusions.

In theory, the risk assessment is based on a number of factors: the potential vulnerability of the witness (age, gender, physical and mental condition); the proximity of the witness to the offender; the nature of the crime or crimes that were committed; the characteristics of the accused, including his/her criminal history, whether or not he/she has access to weapons, whether he/she is known to belong to a terrorist or criminal organization; whether his/her alleged accomplices are still at large; evidence of past attempts at intimidating witnesses or justice officials;

---

90 Fein, R., Vossekuil, B. & Holden, G. *Threat Assessment: An Approach to Prevent Targeted Violence*. (Washington (D.C.): National Institute of Justice, 1995, p. 3).

and the presence and nature of any direct threat that might have been made by the suspect or his/her known associates.[91] In many instances, the nature of the potential risk is subject to change and too complex to be readily assessed by such a simple method.[92]

If the potential exists for a witness to be threatened or harmed, then there is a level of risk. The challenge is in identifying, analyzing, validating, evaluating, and quantifying the risk(s). Risk is contextual, dynamic, and exists along a continuum of probability.[93] Assessments should therefore be conducted periodically and their results should be shared with the witnesses so that they have a realistic understanding of the dangers they potentially face, without invalidating their feelings of fear and anxiety.[94]

It appears that current methods for assessing threats to witness are not particularly effective when the threat comes from a terrorist group. Organized criminal groups and terrorist groups use violence and the threat of violence differently as a strategy to achieve their goals. While both may use violence to send a message, make a statement, or instill fear, they do so in different ways. Also complicating the assessment of threats made by terrorist groups is the nature of the agency assessing the threat. Police agencies are traditionally oriented towards a focus on crime and criminals. Their efforts are not typically focused on collecting intelligence on political groups and their progressive radicalization. National intelligence agencies may have a greater capacity and expertise to assess threats made by terrorist groups against witnesses and potential informants. Police, when attempting to conduct an assessment of a threat posed by a terrorist group, can find themselves lacking some vital information, and thus draw incomplete or inaccurate conclusions.

5.2 Basic Witness Protection Measures

Each year, only a few witnesses are offered the opportunity to participate in a formal witness protection program. Of these, some decide not to

---

91 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses: A Study of the Strathclyde Police Witness Protection Programme". Fyfe, N. *Protecting Intimidated Witnesses*.

92 Dedel, K. *Witness Protection*, p. 21.

93 Borum, R., Fein, R. A., Vossekuil, B., and J. Berglund, J. "Threat Assessment: Defining an Approach for Evaluating Risk of Targeted Violence". *Behavioral Sciences and the Law,* 1999, *17*, 323-337.

94 Council of Europe. *Protecting Witnesses of Serious Crime*. Dedel, K. *Witness Protection*, p. 20

accept the protection. In fact, the overwhelming majority of witnesses who are intimidated do not participate in a witness protection program, choosing to remain under the responsibility of local police services. Many of them decide to move and relocate somewhere not very far from where they used to live, sometimes because they think that this is the only effective way to protect themselves and their family.[95] They may also change jobs, move their children to another school, stop frequenting certain places (places of worship, restaurants, etc.), and change their mode of transportation (e.g. avoid public transportation, drive different routes, etc.). Many of them rely temporarily on friends and relatives to help them and provide temporary accommodation, even though they may hesitate to ask for that kind of assistance for fear of compromising someone else's safety.

The police can take a number of basic measures to protect witnesses against intimidation. They can minimize the information given over the radio identifying the witnesses; perform house-to-house calls on neighbours; interview witnesses in safe places, where they will not be recognized; enquire from witnesses whether they feel intimidated or whether they have been threatened; engage in surveillance of the witness at crucial times; escort the witness to work, court, etc; lend a personal alarm device; assist with emergency relocation; increase police patrols in the area where the witness lives; or even offer 24-hour police protection. For the police, this is often a question of resources and cost and they should be provided with clear guidelines on the provision of such protection to witnesses, including witnesses for the defence.

When witness protection resources become an issue, the private sector can and already does provide varying levels of witness protection. Alternate models of providing protection services can include specially trained private providers working with the police. Knowing that the police are often unable to protect them, many witnesses and collaborators of justice in Canada contract privately for their personal security. Some report that advantages of private protection include a customer service orientation featuring round-the-clock, immediate access to a known and trusted contact, flexible "on–demand" services, and a clear articulation and agreement of services to be provided**.**

---

95 Fyfe, N. *Protecting Intimidated Witnesses*, p. 104.

The police also resort in some cases to protective custody, even if the method is not one that will necessarily encourage witnesses to collaborate with the authorities. Many countries have provisions in their laws to permit the detention of a material witness (someone who has unique information about a crime). In the USA, there is a federal statute on material witnesses[96] and there are statutes in most individual states as well. The material witness statute permits the detention of any person who may have information pertaining to a criminal investigation for the purpose of testifying before a grand jury or during a criminal proceeding. Under the federal statute, it is possible to obtain a warrant for the arrest of a material witness if: (1) the testimony of the individual is material, and (2) it is impracticable to secure the person's presence by subpoena. Some witnesses can be detained for their own protection. There is, however, a clear possibility of abuse of the provisions concerning the detention of material witnesses, in particular those who are being detained as a form of "investigative detention" while the investigation is ongoing.[97] Most experts in witness protection would probably argue that compelling material witnesses to testify (by arresting and/or detaining them) is among the least effective measures for obtaining useful evidence from a threatened witness. Since there is no proof that compelling witnesses to testify is effective (e.g., via arrest, investigative hearings), it should really only be used as a last resort.[98]

Protective measures can also be taken at the level of the courts. Some witnesses may be unable to testify freely if they are required to testify in open court in the usual manner. In these circumstances, according to the International Defence Attorneys' Association, "the interests of justice may require that steps be taken to limit public access to the testimony or identity of the witness, and to give the witness some protection from the accused in the courtroom."[99] The court may restrict public access to the witness's identity or testimony through a number of measures, including having a witness testify under a pseudonym; expunging names and identifying information from the Court's public records; or having all members of the public, including members of the media, excluded from the courtroom during the testimony of a witness. The use of screens, closed-circuit television and video links are the main methods by which a witness, while testifying, can be protected from the accused.

---

96 18 U.S.C. s 3144 (2000).

97 Studnicki, S. M. and J.P. Apol. "Witness Detention and Intimidation: The History and Future of Material Witness Law". *St. John's Law Review*, 2002, No. 76, pp. 483-533, p. 520.

98 Dedel, K. *Witness Protection,* p. 32.

99 International Criminal Defence Attorneys Association. *Protection of Witnesses.* Position Paper presented during the United Nations Preparatory Conference on ICC Rules of Procedure and Evidence, 26 July - 13 August 1999, July 15, 1999, p. 3.

The Supreme Court of Canada has recognized that limitations on public access to the identity or testimony of a witness can assist the administration of justice in a number of ways, including:

- maximizing the chances that witnesses will testify because they will not be fearful of the consequences of publicity;
- protecting vulnerable witnesses (e.g., child witnesses, police informants, and victims of offences allegedly committed by organized groups);
- encouraging the reporting of sexual offences; and,
- protecting national security.[100]

The use of practical measures such as videoconferencing, teleconferencing, voice and face distortion, and other similar techniques is encouraged.[101]

Allowing witnesses to conceal their address or occupation may also assist in their protection. In France, for example, some witnesses (those who can contribute an important element of evidence and were not involved in the offence) can be allowed to testify without having to reveal their address. They are allowed to give the address of the police instead of their own.[102]

Some protection measures are also necessary when a witness is being detained. Witnesses who are incarcerated can be particularly vulnerable. Their protection poses some distinct challenges to the authorities.[103] In a review of current practices with respect to "jailhouse witnesses", a report prepared for the Los Angeles County District Attorney's Office refers to a number of challenges that can be encountered in trying to ensure the safety of incarcerated witnesses and prevent their intimidation by criminal elements.[104] Some of the most frequent ones come from the presence in the institution of other inmates who want to prevent them from testifying or who may themselves intimidate or harm the witnesses. Co-mingling

---

100 C.B.C. v. Dagenais 94 C.C.C. (3d) 289 (S.C.C.), 1994, at 320-321.

101 ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*, p. 10. Also, Nijboer, J. "Children and Young Persons in the Criminal Justice System: The Council of Europe Recommendation on Witness Protection and Rights of the Defence", *Criminal Law Forum,* 1999, No. 10, pp. 443-465.

102 Laborde, J. *État de droit et crime organisé*. Lameyre, X. and M. Cardoso, "La délation en droit pénal francais, une pratique qui ne dit pas son nom", p. 150.

103 Boisvert, Anne-Marie. *La protection des collaborateurs de la justice*, p. 16.

104 Cooley, S. *Jailhouse Witness Protection Task Force: Final Report*. (Los Angeles: District Attorney's Office, August 2004).

of protected witnesses with the general population inmate is generally inadvisable. Co-mingling of protected witnesses with other inmates cannot only during incarceration but also during their transportation to court or in the court lockups. This can of course create opportunities for violence, threats, and intimidation. Witness-safety issues around communication with the outside world (telephone, letters) and visits must be examined carefully. Weaknesses in information management systems, either at the institution or at the court level, can significantly add to the risks faced by the protected witness. Dangerous mistakes can also occur because of poor communication between prison authorities and professionals from other agencies who share a responsibility for the protection of the witnesses.[105]

Intimidation of protected witnesses who are detained can be very hard to detect, particularly when it occurs indirectly. There is often a need to take measures to protect the families of custodial witnesses.[106] In some instances, the corruption or the intimidation of prison personnel can introduce a huge element of risk for the witnesses who are being detained. It is therefore often necessary to limit the circle of individual staff members who have access to the protected inmates and to information about them. In some instances, detained witnesses may be transferred to another province/state or country for their protection, provided that the necessary agreements exist between the jurisdictions.

In some jurisdictions, correctional authorities have established a special "witness protection unit" with special security measures and better quality of accommodation for inmates. It is also possible to have alternative housing and transportation options for endangered witnesses. No matter where these protected witnesses are being held, it is usually necessary to limit their mobility within the institution and to minimize contact between them and other inmates. However, having a separate detention facility for protected witnesses may not always be practical, although it greatly simplifies a number of protection issues. Furthermore, having a separate facility does not address all issues relating to the witnesses' temporary detention near or at the court facilities where they are expected to testify. Wherever the witnesses are being detained there are some challenges relating to their transportation to and from the place where the hearings/trials are conducted.

---

105 Cooley, S. *Jailhouse Witness Protection Task Force.*

106 Parliamentary Joint Committee on the National Crime Authority. *Witness Protection*. (Canberra: Australian Government Publishing Service, 1998, p. xii).

It is often recognized that, because protected witnesses must serve their sentence under harsher circumstances than would otherwise be the case, their situation should receive special consideration at the time of making parole or release decisions.[107] Sometimes, special arrangements concerning their supervision on probation or parole must be made. Protected witnesses serving a prison sentence must be given clear assurance as to the arrangements proposed for their protection upon release.[108]

All of the practical measures mentioned so far require that the professionals from law enforcement, court services, sheriff's office or detention facilities who become involved with the witness be made aware of the risks faced by witnesses and be properly trained to deal with the risks involved. Sufficient training is very seldom offered in Canada. Within the R.C.M.P., training is offered to the witness protection coordinators who also have access to a handbook on witness protection. The R.C.M.P. also has a national program on human sources development and human sources handling. However, there are no nationally recognized training program or standards for witness protection.

5.3 Procedural Measures

In addition to the measures mentioned above, other procedural measures have been considered and sometimes introduced in national legislation and practices in order to protect witnesses. These measures must ensure an appropriate balance between the need to protect the safety of witnesses and the obligation to safeguard the defendants' right to a fair trial.

One of these measures revolves around procedural means of recognizing pre-trial statements**.** In most European countries, pre-trial statements given by witnesses and collaborators of justice are recognized as valid evidence in court, provided that the parties have the opportunity to participate in the examination of witnesses.[109] A report by a Council of Europe Group of Experts suggests that one may assume that, in a system where pre-trial statements of witnesses or testimonies of anonymous witnesses are generally regarded as valid evidence during proceedings, these procedures can provide effective protection of witnesses. The need

---

107 Parliamentary Joint Committee on the National Crime authority, 1988, *Witness Protection,* p. xv.
108 Parliamentary Joint Committee on the National Crime Authority, 1988, *Witness Protection*, p. xv
109 Piancete, N. "Analytical Report", p. 22.

for actual witness protection, it was argued, was probably lower under those circumstances, than when these procedures do not exist in the justice system.[110]

Another promising procedural approach to witness protection consists of better managing the disclosure process and the risks that it represents to witnesses and potential witnesses.[111] Defense lawyers have a right to obtain witness statements at the time of disclosure, but these statements can eventually be used against witnesses and increase their vulnerability. For example, Kim Bolan, a journalist who followed the Air India trial very closely, reported that photocopies of statements by some Sikh witnesses were made and circulated in the Sikh community and family members and friends of the witnesses were approached about the statements: "Some were given copies of confidential disclosure material to keep"[112].

However, disclosure may be more of a problem in some cases than in others. For instance, a survey in the United Kingdom of crime witnesses found on high-crime estates facing non-life-threatening forms of intimidation found no evidence to support the commonly held view that disclosure is the cause of "low-level" witness intimidation.[113] In none of the cases in which in-depth interviews were conducted was the timing of the intimidation linked to the disclosure of case material to the defense.

Another form of procedural protection for witnesses is sometimes available in other countries, even if quite controversial. "In light of growing concerns over witness intimidation and national security, courts and legislatures throughout the world have recently been called upon to curtail the right of confrontation by withholding the true identities of prosecution witnesses from the accused, permitting them to testify anonymously and prohibiting cross-examination that could reveal their true identity".[114] In some countries, it is possible to use statements of anonymous witnesses as evidence in court although, generally speaking, convictions may not be based on anonymous testimonies alone. This is usually limited to cases where there is reason to believe that the witness would be seriously endangered.

---

110 Council of Europe. *Combating Organised Crime,* p. 22.

111 For instance, the ICTY considers delaying the disclosure of witness identity prior to trial as a measure that can be taken by the court to achieve the appropriate level of protection for a particular witness.

112 Bolan, K. *Loss of Faith*, p. 242

113 Maynard, W. *Witness Intimidation: Strategies for Prevention.*

114 Lusty, D. "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials". *The Sydney Law Review*, 2002, No. 24, pp. 361-426, p. 362.

In many European countries, in exceptional circumstances and in accordance with European Human Rights law, anonymity of persons who provide evidence in criminal proceedings may be granted, in order to prevent their identification. Resulting decisions have been controversial, involving fundamental issues for criminal justice. In many civil law countries, the decision to grant the status of anonymous witness rests with the "judge of instruction", who must ascertain the risk to the witness as well as the identity, credibility, and reliability of the witness.[115] This is done in an interview from which the accused, his/her attorney, and the public prosecutor can be excluded. When excluded, the latter may follow the interview through an audio-link with a voice transformer (or other secure means) and the defense must have an opportunity to ask questions (whether through the audio-link or by putting the questions before the investigation judge before the interview).[116] It is also often possible to grant partial anonymity to witnesses at risk. The defendant is given an opportunity to question the witnesses directly, but the witnesses do not have to state their name and address (only the trial judge is informed of their identity). Some disguise preventing the accused from recognizing the witness - a measure primarily used to protect the identity of under-cover police officers - is sometimes used to protect witnesses.

The European Court of Human Rights has often agreed to the legality of the use of anonymous informants during preliminary investigations, but it has also emphasized that the use of the information thus obtained at the trial presents a problem with respect to fairness.[117] Even when permitted by law, the procedure for granting partial or full anonymity to a witness tends to be rarely used because of how, in practice, it can limit the admissibility of various elements of their testimony.[118] In some cases, if the examination of a witness in the presence of a defendant poses imminent danger to the health of the witness, then he/she can be heard in the absence of the defendant, in order to prevent both direct verbal or physical threats to the witness as well as more subtitle intimidation by the defendant, such as ominous looks or gestures.[119]

---

115 For an examination of the rich body of case law from which is emerging some important principles of international human rights law on witness anonymity: Lusty, D. "Anonymous Accusers: 363.

116 Council of Europe. *Combating Organised Crime,* p. 19.

117 Council of Europe. *Terrorism: Special Investigation Techniques*. p. 31.

118 Council of Europe. *Combating Organised Crime,* p. 20.

119 Council of Europe. *Combating Organised Crime,* p. 20.

Anonymous testimonies raise obvious issues about the rights of the defendants to a fair trial. The European Court on Human Rights has set some limits on the use of anonymous testimony[120]. The judge must know the identity of the witness and have heard under oath the testimony and determined that it is credible, and must have considered the reasons for the request of anonymity; the interests of the defense must be weighed against those of the witnesses and the defendants and their counsel must have an opportunity to ask questions of the witness; a condemnation cannot be based on the strength of the testimony of that witness alone.[121] The admissibility of such anonymous testimony depends, according to the European Court on Human Rights, on the circumstances of the case and three principles that emerge from case-law. [122] [123] Is anonymity justified by compelling reasons? Have the resulting limitations on the effective exercise of the rights of the defense been adequately compensated for? Was the conviction exclusively or substantially based on such an anonymous testimony? Special rules on anonymity have been legislated in Belgium, France, Germany, the Netherlands, Moldova, and Finland.[124] In some of this legislation (e.g. Moldova), the testimony of an anonymous witness must be corroborated to be considered valid.

As mentioned previously, witness anonymity during criminal proceedings is very controversial. There are significant issues surrounding the legitimacy and legality of the use of such measures[125] and, in the word of one vocal critic of this approach: "Arguments in favour of witness anonymity are based on the contention that prejudice to the accused can be minimized and that which remains can be justified through a purported 'balancing' of competing interests in the administration of justice. The problem with this approach, despite its superficial appeal, is that it is unfairly balanced against the accused from the very outset".[126]

---

120 European Court on Human Rights, *Visser vs. The Netherlands,* 14 February, 2002

121 Lameyre, X. and M. Cardoso, "La délation en droit pénal francais, une pratique qui ne dit pas son nom", p. 152.

122 Council of Europe. *Terrorism: Special Investigation Techniques*, p. 31

123 The European Court of Human Rights, through its judgments, has played an important role by "establishing legal limits within which the battle against organized crime in Europe must be waged", in particular with respect to the use of undercover agents and anonymous witnesses. (Fijnaut, C. and L. Paoli (eds.) *Organized Crime in Europe -Concepts, Patterns and Control Policies in the European Union and Beyond.* (Dordrecht: Springer, 2004, p. 628).

124 Piancete, N. "Analytical Report", p. 19.

125 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Case.* Spencer, J. and M. Spencer. *Witness Protection and the Integrity of the Criminal Trial.* Paper presented at the Conference on Modern Criminal Investigation, Organized Crime and Human Rights, Durban, South Africa, December 3 - 7, 2001.

126 Lusty, D. "Anonymous Accusers, p. 423

The International Criminal Defence Attorneys' Association, in its submission to the United Nations Preparatory Conference on the International Criminal Court Rules of Procedure and Evidence, stated that: "complete witness anonymity is only appropriate in instances where the individual is an informant who aided in the discovery of admissible evidence, but is not testifying against the accused in the proceeding".[127]

6.0 Witness Protection Programs

Witness protection programs offer a way to safeguard the investigation, the criminal trial, and the security of the witnesses. Their main objective is to safeguard the lives and personal security of witnesses and collaborators of justice, and people close to them. The programs include procedures for the physical protection of witnesses and collaborators of justice such as, to the extent necessary and feasible, relocating and re-documenting them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the new identity and whereabouts of such persons. Even if it is not uncommon for a witness to be rewarded for cooperation with law enforcement authorities (financially, by charge reduction as a result of plea bargaining, or leniency at the time of sentencing), witness protection programs are not some kind of reward for the witness for cooperating with the authorities.[128]

The Council of Europe recently published a review of witness protection programs in 27 European countries based on a questionnaire sent to Member States.[129] That review revealed that the rules governing the protection of witnesses and others who participate in criminal proceedings are fairly recent, except in a few countries like Belgium and Italy, which pioneered the use of these measures.[130] However, at this time most European countries have legislation that offers the possibility of protective measures for victims, witnesses, and collaborators of justice. Across Europe, there are attempts to harmonize various aspects of

---

127 International Criminal Defence Attorneys Association. *Protection of Witnesses,* p. 2,

128 Although it is not hard to understand how it may be necessary for the authorities to provide an incentive for cooperation, this must be done cautiously. The presence of certain incentives can in fact compromise the value of the testimony or its credibility.

129 Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice*.

130 Piacente, N. "Analytical Report", p. 11.

witness protection programs as part of larger efforts to improve internal cooperation in criminal matters.[131]

Existing protection programs do not differ widely in terms of the kind of protection they offer, although there are some differences among them in terms of eligibility criteria, the administrative process, and the modalities of the programs. There are also some significant differences in terms of who is responsible for their operation. In many countries, witness protection is largely seen as a police function[132], whereas in others the judiciary and various government departments play a key role. In Canada, the national witness protection program is seen primarily as a police program.

Protection in existing programs tends to be extended to witnesses only in cases involving the most serious crimes, and not necessarily always in cases involving the most serious threats. This is because the logic behind such programs, given their cost and the need to establish priorities, is based primarily on the desire to facilitate the cooperation of the witness and not on the premise that the State has an obligation to protect all witnesses or that witnesses have a right to be protected.

6.1 Characteristics of Programs

Programs styled after the US witness protection program have been developed throughout Europe and in various other parts of the world. Most have a legislative basis[133], but a few, like the one in the United Kingdom do not. In the absence of a legislative basis, these are treated as a police activity.

In Canada, there are varying approaches to the protection of witnesses in criminal trials. The most sophisticated is the federal witness protection program, which is operated by the Royal Canadian Mounted Police, and which accepts witnesses from various municipal and provincial police

---

131 Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice*. Dandurand, Y., Colombo, G., and N. Passas. Measures and mechanisms to strengthen International Cooperation among Prosecution Services, Working Paper IV. In *Report of the Second Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, Doha, Qatar, November 14-16, 2005.

132 Fyfe, N. *Protecting Intimidated Witnesses*. Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", p. 333.

133 The United Nations Office on Drugs and crime has developed a *Model Witness Protection Bill* to facilitate the development of legislation at the national level. United Nations Drug Control Programme . *Model Witness Protection Bill* 2000. (Vienna: UNDCP, 2002).

agencies across the country. In this program, witnesses are given entirely new identities and relocated to new homes. Depending on the unique nature of the case at hand, these witnesses may be relocated to another part of the province, a different province, or in some instances, moved to entirely different countries. In Canada, each year, approximately 40 percent of new admissions into the witness protection program are relocated outside of the province of origin.[134] In the case of relocation to a new country, loosely formalized arrangements exist with cooperating countries, and amongst country-level witness protection agents, to accept protected witnesses from other parts of the world. For instance, witnesses from the EU may find themselves relocated to Australia, Canada, South Africa, or the United States. In all instances of relocation, in or out of Canada, the originating province or local police authority pays for the costs of the relocation.

Where relocation is used to protect the witness, police witness protection agents accompany the witness and help them get settled for the first few days in their new home. Often, but not always, local police are informed that a protected witness has been placed within their jurisdiction.

Protection measures should be proportional to the seriousness of the risk faced by the individual. In situations where the facts do not warrant a full identity change and relocation, or where it is determined that the individual is not suited to the federal program by virtue of such variables as a substance abuse problem, or long-term immersion in a criminal lifestyle, it may be decided to offer a lower level of protection. In these instances, provinces will provide a local police authority with a modest sum of money, usually in the range of $500 to $2,000, and an open plane ticket for delivery to the witness. The witness is told to find their own place to hide until the time of trial, and to provide for their own income. Police will transport the witness back for trial, but will not provide any form of support once the witness has provided their testimony and the trial is concluded. In some instances, police and government will provide some form of minimal support past the time of trial, up until the end of the appeal period for the charge.

The third, and least sophisticated form of protection, is to place the witness in a hotel either in town, or within the region, sometimes with or without police physical protection, and support them until time of trial. Once the witnesses have given their evidence at trial, all support is removed.

---

134 Lacko, G. *The Protection of Witnesses*.

Procedures for admission into a protection program: The initiative to consider placing an individual in a protection program usually comes from the individual or from the police. In countries where that decision does not belong to the police, another procedure is in place to review applications/requests for admission into the program. In such cases, the request for protection must include information on the nature of the investigation, the role of the candidate in the criminal activity, and the danger or threat faced by the individual. Some countries have established central "assessment boards" while others rely on senior prosecutors or various prosecution authorities. In some countries, the prosecution service is hardly, if ever, involved in the decision. Often, the protection service is not represented officially in the decision-making body, but gives information and advice to it. When an individual is accepted, a certain amount of planning is required, which results in some kind of "protection plan" commensurate with the level of threat.

In most countries that have a formal approval process, there are also provisions for a simplified process for authorizing temporary protection measures in urgent circumstances. Issues of cost often come up in relation to decisions concerning these temporary measures.

Most witness protection programs consider the suitability of the witness to "fit" in the program, whether the witness is stable or has significant emotional, psychological and chemical dependency/abuse issues, or whether they will compromise the protection program.

Prior to acceptance into the witness protection program, the police typically conduct a biographical review of the witness to identify and assess both the level of threat to the person, and any encumbrances that may hinder their entry into the program. Often times, an in-depth interview of the witness forms part of that assessment. The interview serves to help determine the suitability of the candidate for entry into the program, assess the likelihood that they will succeed in the program, and identify who else might be at risk of harm should the witness testify. In the case of individuals who are involved in a criminal lifestyle, the interview is also used to debrief the witness on crimes they may have knowledge of or involvement in.

Generally, the suitability of a witness for admission into a protection program is determined on the basis of these factors:

- The seriousness of the offence being tried (must be a serious indictable offence)
- The importance of the evidence the witness has to offer at trial, and that the witness's testimony is credible, significant, and certain in coming
- How essential the witness is to the success of the trial, or if the evidence can be presented by other means or other witnesses
- Availability and suitability of options other than full protection
- Whether the witness has agreed, in writing, to testify at trial
- Whether there is a direct, overt or significant potential threat to the life and safety of the witness, or their family if the witness testifies
- The level of risk that this threat may materialize or be carried out
- Whether the management and protection of the witness is beyond the normal scope of local police ability/capacity
- Whether there is a substantial likelihood of conviction if this witness testifies.[135]

Witnesses must voluntarily agree to enter the program. The voluntary aspect is important because protected witnesses must play an active role in ensuring their own safety and preventing harm to themselves and persons close to them.[136] This does not mean that the individual is completely free; in fact, the candidate may already be in detention.
One barrier to entry into the program relates to child custody and access for the non-custodial parent. In the situation of a single parent attempting entry into the program, written permission from the other parent must first be obtained. Police report instances where a parent has multiple children from different partners. These instances pose significant challenges for all involved.

Relatives that may join the protected witness: The risk for relatives of endangered witnesses can also be high. If family members must also protected, each individual must freely choose to enter the program and must be suitable for the program. The more relatives are involved, the

---

135 The United States Witness Security Program, administered by the US Marshals Service, uses very similar criteria for admission to their "WITSEC Program", and the European Union has proposed similar admission criteria in their draft European programme for the protection of witnesses in terrorist and transnational organized crime cases.

136 Council of Europe. *Combating Organised Crime,* p. 26.

more difficult it is to make them comply with the code of conduct and the conditions of the program.[137]

Foreign nationals: The protection and relocation of foreign nationals can offer some special challenges[138], but in the case of terrorism and transnational crime, the role of these foreign witnesses and informants is often crucial. In at least one country, Italy, since July 2005, foreigners who cooperate with the police and prosecutors to prevent terrorist organizations from committing crimes may be eligible for special residential status.[139]

Protection agreements: In the Canadian federal program, witnesses sign a formal contract with the government. Each contract is individually negotiated and articulates what the government will do by way of support and protection of the witness in return for the witness testifying at trial. An agreement should specify the obligation of the protection service to protect the individual and his/her relatives, as well as the duration of the protection measures. The duration of the protection measures may depend upon risks as evaluated by the protection service. The agreement should also outline the obligation of the witness to keep secret their former identity, old address, role in criminal proceedings, etc.; refrain from activities that would increase the risk against them; cooperate fully in the criminal proceedings; try to find employment quickly; and make arrangements for outstanding accounts, contracts and financial obligations. The agreement should explain clearly the conditions under which the protection will be ended.

The European Union draft program for the protection of witnesses in terrorist and transnational organized crime cases proposes that protection of a witness may be terminated if he/she compromises themselves by:

- Committing a crime
- Refusing to give evidence in court
- Failing to satisfy legal or just debts
- Behaving in a manner that may compromise his/her security and/or the integrity of the program

---

137 Council of Europe. *Combating Organised Crime*, p. 27.

138 Abdel-Monem, T. "Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?", *The American Criminal Law Review,* 2003, Vol. 40 (3), pp. 1235-1269.

139 Piancete, N. "Analytical Report".

- Stepping outside the guidelines/rules laid down as part of the protection program or by contravening the terms set out in the written agreement (protection pre-entry agreement).

In addition, protection may be terminated if it is determined that the threat no longer exists.[140]

Measures can be taken to prevent a protected witness from getting involved in crime while under protection: (a) relocation to areas not affected by criminal organizations that might recruit the witness; (b) if in prison, relocation to special detention facilities where other collaborators are held; (c) assistance with job search; temporary support measures; change of personal data; special attention to the grievances of the witness and his/her family; and (d) strict surveillance and control of the witness, family members and associates.[141]

The protection agreement must be drafted in language that the individual can read and understand.[142] Ideally, the agreement should be discussed with the witnesses and it should be possible for them to elect to retain the services of legal counsel.

Duration: The duration of one's participation in the program is in large part determined by the length of the investigation and the criminal proceedings. On average, the minimum length of the witness participation in a protection program is two years.[143] The average duration was two to five years in the three programs reviewed in the best practices document prepared for the Council of Europe[144]. "The general principle is that a protected witness should be enabled to live a normal life as much as possible and as soon as possible".[145] After that, the witness protection agency will let participants leave the program and take care of themselves completely again, the moment this can be done safely.

---

140 ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*.
141 Piancete, N. "Analytical Report", p. 37.
142 Council of Europe. *Combating Organised Crime,* p. 30-31.
143 Heijden, T. van der. *Witness Protection Programmes Compared*, a paper presented at the Second World Conference on the Investigation of Crime: Modern Criminal Investigation, Organized Crime and Human Rights, Durban (S.A.), Dec. 3-7, 2001.
144 Council of Europe. *Combating Organised Crime.*
145 Council of Europe. *Combating Organised Crime,* p. 39.

Protection of identity: It is often necessary to take measures that are in conflict with privacy and access-to-information regulations in order to prevent people from locating the protected witnesses. Essentially, these measures will circumvent the usual measures in place to provide transparency, reliability, and continuity of information about individuals.[146] Many countries are hesitant to provide witnesses with a new identity and use this kind of measure sparingly. In some countries, a change of identity may deprive the individuals of their constitutional right to vote or to run for public office. Problems may also occur also in relation to family law (divorce, child custody) and the law of succession. Some observers refer to the "unintended victims" of witness relocation: communities that may suffer from the threat represented by the relocated criminals; people and organizations unable to recover unpaid debts from witnesses and their dependants; parents and relatives unable to access children taken into protection with a relocated partner.[147]

Termination: Protected witness can typically withdraw from a protection program voluntarily or their participation may be terminated by the agency. Typically, an involuntary termination occurs when the protected individual commits a new offence or is otherwise not in compliance with the protection agreement, including for having compromised his/her new identity. Proper notification of a decision to terminate the protection must be communicated to the individual in question and he or she should be provided with an opportunity to challenge or appeal the decision. Legal representation should ideally be available in such circumstances, but this is not always the case.

Appeals and complaints: Theoretically, the rights of protected witnesses to challenge or appeal decisions made by the witness protection agency that affect them are not limited and can include internal appeals and reviews, civil action, judicial review of decisions, and complaints to mechanisms of civilian oversight of the police. In practice, protected witnesses are rarely in a good position to affirm these rights.

6.2 Interagency Collaboration

Interagency competition and conflicts frequently create difficulties with the use of informants and the operation of witness protection programs.[148]

---

146 Boisvert, A-M. *La protection des collaborateurs de la justice,* p. 12.

147 Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", p. 322.

148 Norris, C. and C. Dunnigham. "Subterranean Blues".

Inter-agency cooperation is essential to the success of prosecutions based on the testimony of protected witnesses.[149] Cooperation is required in identifying cases of intimidation. Cooperation is crucial in cases involving witness relocation. It is essential to have efficient, prompt, and secure communication among the agencies involved and safety precautions within each agency to protect the confidentiality of the information that must be exchanged. Careful attention must therefore be given to mechanisms that foster effective inter-agency cooperation. This is as true at the inter-jurisdictional level (within a country) as it is at the international level.

Several protection measures (e.g. identity protection) require the collaboration of several agencies throughout the government, often at different levels of government. Mechanisms are required to help mobilize these various agencies and ensure that they collaborate towards the common justice objective. All those involved must share the objective of victim protection.[150] In Canada, federal-provincial cooperation is often required in creating a new identity for a protected witness (health insurance, vital statistics, and driver's licenses are the responsibility of the provincial governments, while social insurance numbers, criminal records, and passports fall within the responsibilities of federal government departments). In her review of the Québec system, Anne-Marie Boisvert recommended new federal-provincial discussions for greater collaboration between the two levels of government, particularly about federal detention and changes of identity.[151]

The flow of information among the various agencies involved tends to be problematic. The police and intelligence agencies are notoriously reluctant to share information about their own informants. Intelligence agencies may not necessarily entrust the police with the protection of agency informants.

---

149 Brouwer, G.E.. *Review of the Victoria Police Witness Protection Program*; Dedel, K. *Witness Protection,* p. 33. Fyfe, N. *Protecting Intimidated Witnesses*, p. 67; Greer, S. "Where the Grass is Greener? Supergrasses in Comparative Perspective", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp.123-140, p. 136). Maynard, W. *Witness Intimidation: Strategies for Prevention*.

150 Boisvert, A.-M. *La protection des collaborateurs de la justice,* p. 12.

151 Boisvert, A.-M. *La protection des collaborateurs de la justice,* p. 17.

6.3 Management of Witness Protection Programs

At the federal level, the law gives the responsibility of managing the federal witness protection program to the Commissioner of the R.C.M.P. At the provincial level, the situation varies. In Ontario, the Ministry of the Attorney General has a special team of police officers seconded from police forces or retired police officers. The province of Quebec operates its own program. In British Columbia, since 2003, Police Services, the R.C.M.P. and the municipal police departments of the province have established a Integrated Witness Protection Unit in order to provide a consistent approach to witness protection based on highly trained resources in witness management and a process and a system to designed to reduce both the risk to the police department and the protected witnesses. The unit includes a few officers from municipal police departments and operates under R.C.M.P. policies as part of the Source Witness Protection Unit.

In the US, at the federal level, it is the Office of Enforcement Administration, at the Department of Justice, that makes the decision concerning entry into the witness protection program, in consultation with the US Marshals' Service. The latter evaluates the risks and ensures the protection of witnesses. There is a growing consensus internationally that it is preferable for witness protection to be kept separate from the agency conducting the investigation or prosecution. Following her review of the witness protection system in the province of Québec, Marie-Anne Boisvert also recommended the creation of a bureau within the Ministry of the Attorney General.[152]

A Council of Europe study of best practices in witness protection concluded that it is important to separate witness protection agencies from investigative and prosecutorial units, with respect to personnel and organization. This is necessary in order to ensure the objectivity of witness protection measures and protect the rights of witnesses. The independent agency is responsible for admission into the protection program, protective measures, as well as continued support. Since the investigative agency is usually most knowledgeable about the criminal background of the applicant, the nature of the investigation, and the crime involved, it often assists the protection service in the assessment of the threat to the applicant and their immediate relatives".[153]

---

152 She also suggested the broad terms of the mandate of the proposed bureau. Boisvert, A.-M. *La protection des collaborateurs de la justice: éléments de mise à jour de la politique québécoise*, p. 21.

153 Council of Europe. *Combating Organised Crime*, p. 38.

A review of existing programs in Europe identified three main necessary characteristics of agencies charged with implementing witness protection: (1) they must cooperate very closely with law enforcement agencies, presumably on the basis of well defined protocols; (2) the agency (or the part of the law enforcement agency) responsible for witness protection should operate independently of the other elements of the organization to protect the confidentiality of the measures taken to protect a witness; (3) the staff dealing with the implementation of the protective measures should not be involved either in the investigation or in the preparation of the case where the witness is to give evidence.[154]

The ISIC-OPCO- Europol Working Group recommended that specialized witness protection units be established with adequate administrative, operational, budgetary, and informational technology autonomy.[155] The group of experts emphasized that such units should not be involved in the investigation or in the preparation of the cases where the witness/ collaborator of justice is to give evidence.[156]

In our view, serious consideration should be given to creating a national and autonomous witness protection program in Canada and providing it with adequate resources. A program that would be kept separate from normal police functions would offer greater protection to witnesses and would hopefully be more credible than the current program in the eyes of witnesses and potential witnesses. The establishment of such a program would require addressing a number of practical, logistical and communication issues, as well as the collaboration and participation of the provinces, the R.C.M.P. and other Canadian police forces.

6.4 Costs of Programs

Witness protection is expensive. The costs are made up for the most part by the following: the protection service (especially staff salaries), removals and temporary residences, economic subsistence, housing, and medical costs.[157] The study of best practices conducted on behalf of the Council of Europe examined the cost of programs in three countries. In one, the costs were between 80,000 and 160,000 US$ per year (occasionally as much as $250,000). In another country, the average witness with a family

---

154 Piancete, N. "Analytical Report", pp. 46-49.
155 ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation, p. 7.*
156 ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation, p. 8.*
157 Heijden, T. van der. *Witness Protection Programmes Compared.*

of three people cost 80,000 US$. The costs fell mainly in the following categories: the protection services – salary of staff; removals and temporary residences; economic subsistence; housing; medial costs; legal assistance. The same study concluded that: "Although witness protection is not cheap, the costs are reasonable compared to labour-intensive investigative measures such as infiltration or long-term surveillance. The strong impression is that witness protection is more effective and efficient than those other methods, especially in the case of organized crime".[158]

Factors that influence the costs of witness protection programs include: whether the witness has a family that also needs protection, the length of time the witness spends in temporary accommodation, the witness' standard of living, the changing nature of the threat against the witness, and the entitlement of the witness to financial assistance.[159]

The high costs of protection measures explain in part why the use of available measures is most limited to serious crimes and strategically important cases. It is not always sufficient to fund these protection programs out of regular police budgets. Such a practice may lead to poor decisions about whether or not to protect certain individuals or whether or not to proceed with certain investigations. Speaking on behalf of the Canadian Association of Police Chiefs (CAPC), Superintendent Schumaker of the Winnipeg Police Service complained that the current national witness protection program is "simply unaffordable", particularly for smaller police services. "The message from the CAPC", he added, "is that we need a restructured, more inclusive witness protection program with federal funding, from which all police agencies in this country, big or small can draw".[160] A clear government commitment is therefore required, with an allocation of adequate resources.[161]

6.5 Accountability

There are many seemingly intractable accountability issues associated with the use of informants and witness protection programs.[162] Because

---

158 Council of Europe. *Combating Organised Crime*, p. 41.

159 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses", p. 287.

160 Schumaker, G.B., Appearing on behalf of the Canadian Association of Police Chiefs, Testimony before the House of Commons Standing Committee on Public Safety and National Security, May 8, 2007, p. 2.

161 Boisvert, A.-M. *La protection des collaborateurs de la justice*, p.12.

162 Fyfe, N. *Protecting Intimidated Witnesses*, p. 65. South, N. "Informers, Agents and Accountability", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 67-80).

of the secrecy that must surround these activities, there is very little room left for proper accountability or oversight mechanisms. Even the financial accountability of the police-based programs tends to be problematic as it is hard to obtain information on the cost of the programs, the amount spent on particular cases, and the compensation offered to informants and witnesses. Countries vary in terms of the measures that they have in place to hold to account those responsible for these programs. In some countries, including Canada, an annual report must be submitted to Parliament (or another public authority). Several countries require their programs to publish a report on their activities.[163] However, none of these arrangements is particularly satisfying from the point of view of accountability.

Witnesses and informants who are very vulnerable, particularly those who are up against terrorist organizations, are typically not in a position to negotiate the terms of their cooperation with the authorities. The authorities may or may not always honour these terms and when they do not, there is very little recourse available to the witnesses. There is even less recourse available to witnesses who are denied protection when the police are not able or prepared to proceed with a given case or when they decide that they no longer need a particular witness. As many of the decisions concerning witness protection and the use of informants are still left to the discretion of the police or the prosecutors, it is important to balance these discretionary decision making powers with adequate protection for the rights of the witnesses and informants.

Regular police oversight mechanisms seem to be insufficient for dealing with some of the complex accountability issues that arise out of various witness protection practices or the use of informants and agents.[164] Police complaint mechanisms are available to witnesses and some of them have used these mechanisms. However, in practice, because these witnesses are still dependent on the police for their protection, the mechanisms do not offer a satisfactory and practical redress mechanism for them. Furthermore, witnesses who have entered a protection program usually have limited means of complaining about how they are treated without jeopardizing their new identity or exposing themselves to more danger.

---

163 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases,* p. 33.

164 In his testimony before the House of Commons Standing Committee on Public Safety and National Security the Chair of the Commission for Public Complaints Against the Royal Canadian Mounted Police, Mr. Paul Kennedy, noted the limitations of the current complaint process for protected witnesses, and the statutory obstacles to the Commission's access to the relevant information, Tuesday, May 29, 2007.

6.6 Effectiveness of Programs

Ineffective protection measures can affect the outcome of prosecutions and trials, and affect public confidence in the efficacy and fairness of the courts.[165] There is very little research on the effectiveness of these programs, and the evidence relating to the cost effectiveness of these programs is very weak. However, anecdotal evidence of their success in obtaining convictions in cases where protected witnesses are used is generally positive.[166]

The three national programs reviewed in the Council of Europe survey of best practices[167] were apparently very effective: not a single participant or relative of protected witnesses has become the victim of an attack by the source of the threat. According to the study: "The effectiveness is underlined by the fact that there have been attacks, some of them fatal, on relatives not participating in a protection programme and on witnesses who chose to leave the programme at a moment when the responsible protection agency did not consider the situation safe".[168] In all three cases, serious attempts by criminals to trace protected witnesses were documented. In some instances, it became necessary to relocate the participants and their relatives a second time. Exact figures on the number of convictions gained on the basis of statements made by protected witnesses were not available in any of the countries studied. As the study cautioned, "successes in the combating of organized crime should not be attributed to witness protection measures alone but to the combination of a witness protection programme and a system of regulations concerning the collaboration of co-defendants with the justice authorities".[169]

In the rare cases where it was possible to interview protected witnesses after their relocation, they usually indicated that, without protection measures, they would not have agreed to or have been able to testify.[170] Then again, witnesses seldom regard giving evidence as a positive or satisfying experience.

---

165 Brouwer, G.E. *Review of the Victoria Police Witness Protection Program*, p. 3.
166 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*, p. 27.
167 Council of Europe. *Combating Organised Crime*, p. 40.
168 Council of Europe. *Combating Organised Crime*, p. 40.
169 Council of Europe. *Combating Organised Crime*, p. 41.
170 Parliamentary Joint Committee on the National Crime Authority. *Witness Protection*, p. 18.

Satisfaction of participants in a protection program is rarely measured systematically. A rare exception to this is the survey of 300 witness security program participants in the US by the Office of the Inspector General, which apparently revealed that the great majority of respondents agreed that adequate measures had been taken to ensure their protection.[171]

Fyfe and McKay conducted an evaluation of the Strathclyde Police witness protection program, including interviews with 14 protected witnesses. It is the only police force in the U.K. to have a formal witness protection program.[172] The witnesses complained of mental distress and there was evidence that their experience had seriously affected their mental health.[173] In terms of witness intimidation, it was unclear what signals relocation sends to intimidators. Witness relocation "may reinforce the problem of intimidation by demonstrating the power of intimidators to 'purify' communities of those viewed as 'grasses' because of their cooperation with the criminal justice system".[174]

The few attempts made to assess the effectiveness of existing witness protection programs have assessed the outcomes of the programs mainly in terms of the physical security of witness (whether or not they were injured or attacked while in the program) and their participation in the legal process (including whether their participation led to a conviction of the accused). However, as Fyfe and Sheptycki[175] convincingly argued, evaluations of witness protection programs should look not only at conviction data and witness safety/satisfaction data but also at other aspects of the programs and their potential impact, intended or unintended.

Having reviewed existing data, Fyfe and Sheptycki concluded that, in spite of claims that are frequently made about the cost-effectiveness of witness protection programs or, more generally, the use of criminal

---

171 United States Department of Justice, Office of the Inspector General. *United States Marshals Service – Administration of the Witness Security Program. Executive Summary.* (Washington: Office of the Inspector General, U.S. Department of Justice, 2005).

172 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses", p. 292.

173 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses", p. 296

174 Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses", p. 298.

175 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases,* p. 28.

informants in criminal investigations and prosecutions, the evidence is far from conclusive. Expediency, they added, should not be confused with cost-effectiveness, particularly where some of the many negative effects of the use of criminal informants are weighed against the benefits of some current practices.[176]

7. International Cooperation for Witness Protection

As many terrorist groups operate across borders, the threat they represent to witnesses and collaborators of justice is not confined within national borders. Physical and psychological intimidation of witnesses and their relatives can take place in a variety of contexts. Furthermore, at times, witnesses may need to move to another country or return to their own country during lengthy criminal proceedings. Finally, there are cases where a State, because of its size, means or other circumstances, may not be able on its own to ensure the safety of witnesses.

For all these reasons, cooperation in the protection of witnesses and their relatives has become a necessary component of normal cooperation between prosecution services. Furthermore, international cooperation may also be required at times in order to protect interpreters, the prosecutors themselves, and/or other judicial and correctional personnel.

Because of the dynamic nature of transnational crime and terrorism, countries must constantly refine and perfect their strategies. The different modalities and tools of cooperation are meant to be complementary and, as cooperative relationships are being built, they can lead to integrated approaches to cooperation and to strategic approaches to the investigation and prosecution of crimes across international borders. More proactive, intelligence-led approaches are required to detect and disrupt criminal and terrorist conspiracies, dismantle terrorist networks, and apprehend and punish criminals.[177] Intelligence-led approaches, however, must depend on reliable information from informants and witnesses and, to a large extent, on the effective communication and analysis of that information both within a country and across borders.

---

176 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Case,* p. 29.

177 See, for example, Council of Europe. "Crime Analysis", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe.* (Strasbourg, Council of Europe Publishing, 2005, pp. 105-144).

That sharing of information, of course, introduces a whole new set of challenges for the protection of these sources of information.

The importance of operational cooperation across borders among law enforcement agencies investigating and prosecuting crimes with a transnational dimension must be acknowledged, and it is now specified in a number of international instruments[178]. The development of joint operational activities offers one of the most promising new forms of international cooperation against terrorism and organized crime. Nevertheless, several outstanding issues remain in making that kind of cooperation fully functional on a broader scale. Practical problems in the organization of joint investigations include the lack of common standards and accepted practices, the actual supervision of the investigation, the prevention of intelligence leaks, and the absence of mechanisms for quickly solving these problems.[179]

To ensure greater international cooperation in offering effective witness protection at home or across borders, law enforcement and prosecution agencies often need to develop arrangements with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation.

Developing a capacity to protect witnesses and even relocate them across borders must often be considered. Article 24 (para. 3) of the UN Convention against Transnational Organized Crime and article 32 (para. 3) of the UN Convention against Corruption require States Parties to consider entering into agreements or arrangements with other States for the relocation of witnesses.

Proactive law enforcement strategies and complex investigations frequently involve resorting to special investigative techniques.[180] In fact, the relevance and effectiveness of techniques such as electronic surveillance, undercover operations, the use of agents and informants, and controlled deliveries can probably not be overemphasized. These techniques are especially useful in monitoring/documenting the activities

---

178 Article 19, of the *United Nations Convention against Transnational Organized Crime* requires States Parties to consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. See also similar language in article 49 of the *UN Convention against Corruption*.

179 See Schalken, T. and M. Pronk. "On Joint Investigation Teams, Europol and Supervision of their Joint Actions", *European Journal of Crime, Criminal Law and Criminal Justice,* 2002, Vol. 10/1, 70-82.

180 See: Council of Europe. *Terrorism: Special Investigation Techniques*. (Strasbourg: Council of Europe Publishing, 2005).

of sophisticated criminal groups because of the inherent difficulties and dangers involved in gaining access to information and gathering evidence and intelligence on their operations.

When a case requires international cooperation, differences in the law regulating the use of these investigation techniques or the use of collaborators of justice can hinder the efforts of the prosecution. Major efforts have been devoted to the implementation of the United Nations Convention against Transnational Organized Crime and other international cooperation initiatives to identify these obstacles and remedy the situation. These efforts are also relevant to the prevention of terrorist acts, and their use by law enforcement and intelligence agencies within the framework of their ongoing cooperation has drawn some close attention.[181] [182]

With a few regional exceptions, international cooperation in the field of covert investigations tends to take place in a juridical vacuum. Member States increasingly seek to provide a legal basis for judicial cooperation in criminal matters involving officers acting under cover or false identity[183] or with agents and informants. The International Bar Association's Task Force on International Terrorism has recognized the importance of law enforcement cooperation and recommended that States develop a multilateral convention on cooperation among law enforcement and intelligence agencies setting forth the means, methods, and limitations of such cooperation, including the protection of fundamental human rights.[184]

---

181 The European Court of Human Rights has endorsed the use of such techniques in the fight against terrorism (Klass and Others v. Germany) and, within the Council of Europe, a draft Recommendation of the Committee of Ministers to Member States that seeks to promote the use of special investigative techniques in relation to serious crime, including terrorism, is being drafted. See: De Koster, P. "Part 1 – Analytical Report", in Council of Europe, *Terrorism: Special Investigation Techniques*. in particular, Chapter 5: *Special Investigation Techniques in the Framework of International Co-operation*", pp. 35-38. (Strasbourg, Council of Europe Publishing, April 2005, pp. 7-43)

182 A survey of best practices as they relate to the interception of communications and intrusive surveillance led to the observation that "Although, in principle, the increasing co-operation between law-enforcement and national security services can be fruitful in the combating of criminal organizations, extra precautions should be taken to prevent the potential illegitimate gathering of evidence by security services", Council of Europe. "Interception of Communication and Intrusive Surveillance", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe,* (Strasbourg: Council of Europe Publishing, 2004, pp. 77-104, p. 102).

183 For instance, the matter is dealt with in the new European Union's new convention on mutual legal assistance.

184 International Bar Association. *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association's Task Force on International Terrorism. (London: I.B.A., 2003, p. 140).

In Europe a major effort has been made to develop European legal instruments to set common criteria for the design and implementation of a set of effective legal and practical protection measures and assistance programs for different categories of witnesses, victims and collaborators of justice. The objective is to develop them while preserving an acceptable balance between the protection measures and the human rights and fundamental freedoms of all parties involved. There is no legally binding European legal instrument that specifically and comprehensively deals with witness protection.[185] However, a number of significant Recommendations of the Committee of Ministers of the Council of Europe have been adopted to deal specifically with witness protection and the rights of witnesses[186].

The following measures have been found to support international collaboration in witness protection:

- Cooperation in evaluating the threat against a witness or victim.
- Prompt communication of information concerning potential threats and risks.
- Mutual assistance in relocating witnesses and ensuring their ongoing protection.[187]
- Protection of witnesses who are returning to a foreign country in order to testify, and collaboration in the safe repatriation of these witnesses.
- Use of modern means of telecommunications to facilitate simultaneous examination of protected witnesses while safeguarding the rights of the defence.
- Establishing regular communication channels between witness protection program managers.

---

185 For a summary of the various European legal instruments developed, see: Council of Europe. *Protecting Witnesses of Serious Crimes – Training Manual for Law Enforcement and Judiciary*. (Strasbourg: Council of Europe Publishing, 2006, pp. 38-48). See also: Council of Europe. *The Fight Against Terrorism – Council of Europe Standards*. (Strasbourg: Council of Europe Publishing, 2004). Council of Europe. Committee of Experts on the Protection of Witnesses and Collaborators of Justice (Specific Terms of Reference of the PC-PW), 1st Meeting, Strasbourg, 12-14 October 2004.

186 For example: Council of Europe (2005). Committee of Ministers Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe. See also: Council of Europe (2005b). Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Explanatory Report. Strasbourg: Council of Europe.

187 International cooperation in this area, as noted by a best practice survey conducted by the Council of Europe, "is highly important, since many Member States are too small to guarantee safety for witnesses at risk who are relocated within their borders" (p. 15). Council of Europe (2004). "Witness Protection", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe,* Strasbourg, Council of Europe Publishing, pp. 15-42.

- Providing technical assistance and encouraging the exchange of trainers and training programs for victim protection officials.
- Developing cost-sharing agreements for joint victim protection initiatives.
- Developing agreements and protocols for the exchange of witnesses who are prisoners.

The cost of protecting a foreign witness abroad is usually borne by the authorities of the sending country. Cooperation among national protection services at the international level is considered to be quite good. Nevertheless, there are still very few countries that have entered into international (bilateral or multilateral) agreements for the protection of witnesses and collaborators of justice. In Canada, the Solicitor General of Canada may enter into a reciprocal agreement with another State to admit foreign nationals into the witness protection program. [188] In Europe, a European Liaison Network under the aegis of Europol has existed since 2000 to facilitate cooperation in witness protection. Non-European countries, such as Canada, Australia, New Zealand, South Africa, and the USA have also joined the initiative.[189]

Europol has developed two documents: "Basic principles of European Union police co-operation in the field of witness protection", and "Common Criteria for taking a witness into a Protection Programme". It also offers training annually on "witness protection" and the "handling of informants".

Small states often face some special difficulties in offering effective protection to witnesses. Member States of the Caribbean Community, for example, have established a "Regional Justice Protection Agreement" (CARICOM, 1999) outlining the need to prevent any interference in the administration of justice by the intimidation or elimination of witnesses, jurors, judicial and legal officers, and law enforcement personnel and their associates. The agreement also provides for the establishment of a regional centre to administer the cooperation program.

International cooperation in witness protection is clearly improving. In recent years, however, a major shadow has been cast over some international cooperation initiatives in relation to the prevention of

188 *Witness Protection Program Act* (S.C. 1996, c. 15, s. 14 (2)). See: Lacko, G. *The Protection of Witnesses*. (Ottawa: The International Cooperation Group - Department of Justice Canada, 2004).

189 Di Legami, R. "Witness Protection - Europol". Presented at the 10th Annual Conference of the International Association of Prosecutors, Copenhagen, August 2005, p. 2.

terrorism, when suspects and informants were subjected to "extraordinary rendition" or became "ghost detainees", as they were secretly held and interrogated by the United States or its allies in undisclosed locations, outside the protection of domestic or international law[190].

8. Conclusions

The fight against terrorism cannot be carried out effectively without the assistance of informants and collaborators of justice. These collaborators are typically under significant pressure not to collaborate with the authorities and they are aware of the personal danger and harm that may result from their collaboration. Even if the research on witness protection measures and programs, their operation, costs, and impact is still quite limited, most countries are coming to the realization that existing measures are not only problematic, but also quite insufficient.

The need to better protect the rights of witnesses and collaborators of justice is one that is too easily neglected. The very nature of the problem of witness protection makes it quite resistant to public scrutiny and research. Researchers, journalists, and others who may have an interest in the question face special difficulties in gaining access to the relevant information. In some cases, their enquiries may even constitute an additional risk for the vulnerable witnesses or collaborators of justice. There is still far too little systematic and critical research on the practical and ethical issues that surface in relation to current witness protection practices. What is particularly lacking is evaluative research on the efficacy of these measures.[191] Independent research in the related areas of witness intimidation, the use of criminal informants, plea-bargaining, and accomplice testimony is also lacking.

We have emphasized the particular situation of vulnerable groups and communities that can become subject to community-wide intimidation and the importance of addressing that kind of intimidation to prevent terrorism. We have argued in favour of designing some broader strategies

---

190 Parry, J.T. "The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees", *Melbourne Journal of International Law,* 2005, Vol. 6, pp. 517-533. Also: Marty, D. *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States - Draft report – Part II* (Explanatory memorandum). (Strasbourg: Council of Europe, Committee on Legal Affairs and Human Rights, 7 June 2006). Council of Europe. Parliamentary Assembly *Resolution 1433 (2005) Lawfulness of detentions by the United States in Guantánamo Bay*.

191 Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", p. 321.

to protect whole communities against intimidation and retaliation by terrorist organizations and their sympathizers. Perhaps we should have placed even more emphasis on the need to respond to all incidents of intimidation and violence, whether specific or community-wide, to take them seriously and to vigorously prosecute them whenever possible. The communities that are targeted, intimidated and exploited by terrorist groups must feel safe to cooperate with authorities. Members of these communities must believe that they will not be left on their own should they muster the courage to inform the authorities. Above all, we must ensure that our counter-terrorism practices do not render these communities even more vulnerable to intimidation and coercion by radical or terrorist groups.

The issue of community intimidation, itself often related to various forms of discrimination, must be approached from a broader perspective. It should be of grave concern to all Canadians to know that some of their communities can at times be terrified and become incapable of acting for their own protection against radicalized elements that intimidate and coerce them.

With respect to the use of informants, we have acknowledged that their role in fighting terrorism is as problematic as it is essential. Practices relating to the recruitment and use of informants by the police and by security agencies are not only poorly documented, they are also largely unregulated and unmonitored. Given the increased reliance on human intelligence in the prevention of terrorism and the many issues that exist with respect to current practices, it would seem that the time has come for the adoption of a clear regulatory framework for the use of informants and agents and the development of an independent oversight function to monitor compliance.

We would also argue that whether or not Canada eventually decides to create a separate agency to manage witness protection programs across the country, there is an urgent need to elaborate and perhaps also legislate some clear national guidelines concerning the protection of witnesses and collaborators of justice. The role, responsibilities and obligations of the police in that area need to be clearly defined. It is time to address the need for an effective complaint and redress mechanism for protected witnesses who are endangered or whose rights are abused as a result of poor witness protection practices.

We have also emphasized the need to address, in the face of growing transnational terrorism threats, the intimidation that occurs across borders and the resulting need for international cooperation in that area. Finally, we have suggested that effective means must be developed to make the agencies involved in witness protection more accountable for their decisions and practices. There is an urgent need to provide some effective independent oversight of their operations. The credibility of existing witness protection measures in Canada is often very low, particularly in the minds of individuals and groups whose collaboration will continue to be essential for preventing terrorism. This is particularly alarming, because that poor credibility eventually affects the very ability of the authorities to convince informants and witnesses to take the risk of coming forward and offering their collaboration.

Yvon Dandurand

Yvon Dandurand is a criminologist at the University of the Fraser Valley, Abbotsford, British Columbia, where he is currently the Associate Vice-President of Research and Graduate Studies. Dandurand is also a senior associate of the International Centre for Criminal Law Reform and Criminal Justice Policy, a research institute based in Vancouver and affiliated with the United Nations Crime Prevention and Criminal Justice Program.

Dandurand's long career of teaching, research and policy development in the fields of crime prevention and criminal justice has allowed him to specialize in comparative research. He has been involved in numerous criminal justice reform projects in Canada and abroad, including several projects and studies in the area of policing and crime prevention. A lot of his work has focussed on the issue of victim and witness assistance and protection; in particular, the challenges of offering effective protection to witnesses and victims of crime, victims of human trafficking and other transnational organized crime, as well as victims and witnesses of crime against humanity.

In recent years, he has been involved in several United Nations projects to facilitate the implementation of the *UN Convention against Transnational Organized Crime*, the *UN Protocol on Trafficking in Persons Especially Women and Children*, the *UN Declaration on Justice for Victims of Crime and Abuse of Power*, and the twelve global instruments against terrorism. All of these instruments include important international dispositions for the protection of witnesses and victims of crime. He has served on various United Nations Experts Groups and he has produced numerous legislative guides, manuals and other resources to facilitate the implementation of these important international instruments. He is frequently called upon to provide advice to policy makers in various countries and to assist them in planning complex criminal justice reforms. His comparative analyses often focus on identifying and disseminating good practices for implementing international conventions through legislation, training and other programs that are consistent with human rights and the rule of law.

Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

Research Paper: Terrorism and Criminal Prosecutions in the United States

Robert M. Chesney[1]
Associate Professor of Law
Wake Forest University School of Law

---

1 Associate Professor of Law, Wake Forest University School of Law. J.D., *magna cum laude*, Harvard University. B.S., *magna cum laude*, Texas Christian University. Opinions expressed are those of the author and do not necessarily represent those of the Commission or the Commissioner. Portions of this report are drawn with permission from articles and book chapters that I previously have published or that are forthcoming with the State University of New York Press, the Harvard Journal on Legislation, the Southern California Law Review, and the Lewis & Clark Law Review. *See* Robert M. Chesney, "Anticipatory Prosecution in Terrorism-Related Cases," *in* The Changing Role of the American Prosecutor (State University of New York Press: forthcoming 2007) (Worrall & Nugent, eds.); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harvard Journal on Legislation 1 (2005); Robert M. Chesney, *Beyond Conspiracy?Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 Southern California Law Review 426 (2007); Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft Sentence" and "Data Reliability" Critiques*, Lewis & Clark Law Review (forthcoming 2007). The author may be contacted at robert.chesney@wfu.edu.

I. Introduction

I have been asked by the Commission to summarize the manner in which the federal criminal justice system in the United States deals with the problem of terrorism, with an emphasis on matters that might provide a useful comparative perspective on issues within the scope of the Commission's terms of reference. For present purposes, those issues include:

- substantive criminal laws associated with terrorism, with a particular focus on those that contribute to the goal of suppressing support for terrorism (including financial support); and

- procedural issues raised by terrorism prosecutions, including the rules governing the evidentiary use of intelligence information.[2]

II. Substantive Criminal Law

In this section I will discuss recent trends and developments in U.S. substantive criminal law relating to terrorism. I begin by noting the post-9/11 decision to make the prevention of future terrorist attacks a strategic priority for the Department of Justice (and hence for federal prosecutors and the Federal Bureau of Investigation). I then describe the various methods by which prosecutors have implemented that priority. These methods range from relatively traditional prosecutions of defendants linked to particular acts of violence, to the uncharged detention of potential terrorists on the ground that they may have information material to an ongoing grand jury investigation, to the criminalization of terrorism finance and other forms of terrorism support. Because terrorism-support

---

2 Since the fall of 2001, the U.S. has elected to categorize at least some acts of terrorism as rising to the level of armed hostilities, and on that basis has at times employed military modes of response in lieu of a domestic criminal justice approach. Nonetheless, the U.S. government has continued to rely on criminal prosecution in at least some cases involving alleged terrorists or their supporters, even where the defendant may be linked to al Qaeda. As a result, both the substantive and procedural aspects of criminal law relating to terrorism have evolved considerably in recent years despite the emphasis the U.S. has also placed on the military model. For a discussion of the nature and scope of the post-9/11 Congressional authorization for the use of military force to prevent terrorism, see Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harvard Law Review 2047 (2005).

crimes are of particular relevance to the Commission's terms of reference, I follow the general overview with a section providing extensive data on charging decisions and case outcomes in terrorism-support prosecutions in the years since the 9/11 attacks. I then conclude with a discussion of the limits of the current framework for prosecuting terrorism supporters.

A. The Prevention Paradigm

Terrorism prevention has been a significant goal of federal criminal prosecution in the U.S. since well before the 9/11 attacks, but it is clear that in the aftermath of those attacks prevention was elevated to the highest possible priority. Speaking just one week after the attacks, Attorney General John Ashcroft declared that "[w]e must all recognize that our mission has changed" and that the Justice Department would have to pursue a more "preventive approach to doing business in the U.S. Attorney's Offices together with the FBI than, perhaps, has been the case in the past."[3] In similar fashion, the Justice Department's Performance and Accountability Report for Fiscal Year 2004 stated that its "foremost focus is protecting the homeland from future terrorist attacks,"[4] and one federal prosecutor has observed that "[i]n the post-9/11 context . . . law enforcement has been given a mission by the president and the attorney general to prevent deadly acts before they occur. That is the new paradigm for law enforcement."[5]

More recent policy statements by senior Justice Department officials have reinforced this perspective. Speaking in May 2006, for example, Deputy Attorney General Paul McNulty explained that "we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention."[6] Under this paradigm, the Justice Department does not "wait for an attack or an imminent threat of attack to investigate or prosecute," but instead does "everything in its power to identify risks to our Nation's security at the earliest stage possible and to respond with forward-leaning – preventative – prosecutions."[7] Attorney General Alberto Gonzales

---

3 Attorney General John Ashcroft, Press Briefing (September 18, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/0918pressbriefing.htm.

4 Office of the Attorney General, Fiscal Year 2004 Performance and Accountability Report.

5 Tempest, R., "In Lodi Terror Case, Intent Was the Clincher," Los Angeles Times (May 1, 2006), at B1.

6 Dep. Atty. Gen. Paul McNulty, Prepared Remarks to the American Enterprise Institute (May 24, 2006), *available at* http://justice.gov/dag/speech/2006/dag_speech_060524.html.

7 *Id.*

echoed this point in August 2006, adding that the decision of when to intervene "must be made on a case-by-case basis by career professionals using their best judgment – keeping in mind that we need to protect sensitive intelligence sources and methods and sometimes rely upon foreign evidence in making a case."[8]

B. A Review of Post-9/11 Prevention Strategies

In practical terms, the Justice Department's emphasis on prevention has resulted in the adoption of a multi-tiered approach that blends both targeted and untargeted prevention strategies.

1. Conventional Targeted Prevention

The first such tier, which I will refer to as "conventional targeted prevention," is the most familiar. Under this heading, alleged terrorists are prosecuted on grounds directly related to particular violent acts (whether completed or merely anticipated). Such prosecutions have long been the bread-and-butter of federal criminal law enforcement related to terrorism, with examples including *United States v. Salemeh*, 152 F.3d 88 (2d Cir. 1988) (affirming convictions in connection with 1993 bombing of the World Trade Center); *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1989) (affirming convictions in connection with the 1993 World Trade Center bombing and a variety of other plots); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (affirming conviction in connection with the 1995 Oklahoma City bombing). This approach has continued to be significant since 9/11, with prominent examples – all resulting in convictions – including the prosecution of Richard Reid in connection with his attempt to destroy a transatlantic flight using a "shoe bomb," *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004); Zacarias Moussoui for his role in connection with the 9/11 attacks themselves, *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); Gale Nettles for his involvement in a plot to blow up a federal courthouse in Chicago, *United States v. Nettles*, No. 06-1304 (7th Cir. Feb. 12, 2007); and Shahawar Martin Siraj and James Elshafay for their plan to attack a subway station in New York City, *United States v. Siraj*, No. 05-cr-104 (E.D.N.Y. Jan. 4, 2007).

---

8 Attorney General Alberto Gonzales, Remarks to the World Affairs Council of Pittsburgh, "Stopping Terrorists Before They Strike: the Justice Department's Power of Prevention" (Aug. 16, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html.

2. Untargeted Prevention

Considerable efforts have been made since the 9/11 attacks to improve the capacity of the Federal Bureau of Investigation to carry out its current role as the chief domestic intelligence agency in the U.S., as well as to improve the sharing of intelligence information among the FBI, the Department of Homeland Security, and other government agencies composing the Intelligence Community.[9] According to recent Congressional testimony from John S. Pistole, the FBI's Deputy Director, these efforts have produced considerable changes, including: the integration of the FBI's national security-related programs (including intelligence, counterintelligence, counterterrorism, and weapons of mass destruction) under a single branch (the "National Security Branch"); the creation of "Field Intelligence Groups" in each of the FBI's 56 field offices; a shift from generating intelligence merely as a by-product of case investigations to a focus on needs-driven collection priorities; and new human-resource management policies designed to increase the prestige and attractiveness of intelligence-focused career paths.[10] The creation of the Office of the Director of National Intelligence (with responsibility for management of the entire Intelligence Community) and intelligence-fusion centers such as the National Counterterrorism Center also should be noted in this regard, as should the provisions in the USA PATRIOT Act that clarify the capacity of intelligence and criminal investigators to share information. These efforts have met with considerable skepticism in some quarters,[11] but it does at least appear that the flow of domestic intelligence information has improved since the pre-9/11 era.

Notwithstanding these improvements, however, the government can never be certain that it is aware of—and, hence, able to target—all terrorist threats. Accordingly, the Justice Department continues to employ "untargeted" prevention strategies in addition to pursuing prevention through prosecutions of suspected terrorists based on their completed or anticipated conduct.

The most fundamental form of untargeted prevention, of course, involves passive-defense and target-hardening measures such as the installation

---

9 *See, e.g.,* The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. 108-458, *available at* www.nctc.gov/docs/pl108_458.pdf; U.S. Senate Select Committee on Intelligence, "Open Hearing: Intelligence Reform - - FBI and Homeland Security," Jan. 25, 2007, *prepared remarks available at* http://intelligence.senate.gov/hearings.cfm?hearingId=2480.

10 *See* Statement of John S. Pistole, "Open Hearing," *supra*.

11 *See, e.g.,* Richard A. Posner, Uncertain Shield: The U.S. Intelligence System in the Throes of Reform (2006)

of surveillance and access-restriction equipment at likely targets.[12] But untargeted prevention can be carried out through prosecution as well, and prosecution-oriented methods of untargeted prevention have been particularly significant in the U.S. since 9/11.

a. Systematic Enforcement of Precursor Crimes

The first method of untargeted prevention employed by the Justice Department involves the allocation of investigative and prosecutorial resources in a manner designed to generate a system-wide increase in the enforcement of certain laws. In particular, this approach seeks increased enforcement of laws governing conduct that may be significant to the preparatory activities of potential terrorists, such as the laws relating to immigration fraud, identity fraud, and money laundering.

Such efforts may advance the goal of prevention in several ways. First, the increased difficulty of engaging in necessary precursor conduct without detection or arrest may delay or even render unworkable a particular plot. Second, systematically-increased enforcement of precursor crimes may generate information that in turn can be used to engage in targeted prevention. Third, this approach may result in the unwitting arrest and incapacitation of potential terrorists.

b. Material Support Prosecutions

The second method of untargeted prevention involves enforcement of 18 U.S.C. § 2339B, a federal statute enacted in 1996 which makes it a felony to provide "material support or resources" to any entity that has been formally designated as a "foreign terrorist organization" ("FTO") by the Secretary of State. For purposes of this statute, "material support or resources" is defined to include a vast array of services and items, to wit:

> "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities,

---

12 *See* Philip B. Heymann, Terrorism, Freedom, and Security: Winning without War (Cambridge, MA: The MIT Press 2003).

> weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials".[13]

Violation of § 2339B can result in a sentence of up to 15 years in most instances; in the event that prosecutors can demonstrate that the support resulted in a death, however, the maximum sentence rises to life.

Significantly, § 2339B on its face does not actually require the government to prove that a defendant intended to facilitate any unlawful conduct by providing such support, let alone that the support resulted in any particular harm. Rather, the statute requires only that the defendant act "knowingly." Courts have debated the proper interpretation of this term, but all seem to agree that it at least requires proof that the defendant knew the actual identity of the recipient of the support (thus protecting from liability a person who provides donations to a charity without knowledge that the money would in fact inure to the benefit of an FTO) and that the defendant knew either that the recipient had been designated as an FTO or at least that the recipient had engaged in conduct that would warrant such a designation.[14] In short, § 2339B is designed to impose a form of strict criminal liability (in the sense that the defendant's particular intentions in providing the support are not relevant in any way) on those who provide resources or assistance to designated groups, thus making the statute analogous to an embargo provision.

In that respect, the impact of § 2339B is similar to that associated with the sanctions that the President is authorized to impose under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq*. IEEPA is a 1970s-era statute that delegates embargo and asset-freeze authority to the President upon the declaration of a national emergency involving threats to U.S. national security, U.S. foreign policy, or the U.S. economy. Presidents since 1995 have used IEEPA authority to impose such penalties on foreign entities and individuals associated

---

13 Section 2339B incorporates by reference the definition of "material support or resources" contained in 18 U.S.C. § 2339A(b)(1), a statute that I discuss in more detail in the text that follows.

14 A few trial courts have gone further, insisting that the statute be construed to require proof that the defendant intended to facilitate unlawful conduct. *See, e.g.,* United States v. al-Arian, 329 F. Supp.2d 1294 (M.D. Fla. 2004) (construing § 2339B to require proof that defendant specifically intended to facilitate unlawful conduct). For the contrary view, see Humanitarian Law Project v. Gonzales, 380 F. Supp.2d 1134 (C.D. Cal. 2005) (rejecting *al-Arian*).

with terrorism.[15] Under 50 U.S.C. § 1705, willful[16] violation of an IEEPA order, including most forms of economic exchange or service,[17] subjects the violator to a potential sentence of up to 20 years' imprisonment.

The combination of "material support" prosecutions under § 2339B and IEEPA prosecutions under § 1705 serves the goal of untargeted prevention by reducing the capacity of foreign entities and individuals associated with terrorism to draw resources from the U.S. In theory, this limits (at least marginally) the capacity of such entities to cause harm even without any understanding on the part of the U.S. government as to the individuals or targets that might be involved in a future attack. Thus the defendant in a paradigmatic material support or services case is not actually someone whom the government views as potentially dangerous in their own right, but rather someone whose conduct enhances the capacity of others to cause harm. As I will discuss in more detail below, however, the support laws since 9/11 also have come to be used as tools to pursue the incarceration of persons who may be personally dangerous.

Prior to the 9/11 attacks, prosecutions under § 2339B and § 1705 were relatively rare.[18] Since 9/11, however, they have become commonplace. In the pages that follow, I will provide data regarding the frequency with which such charges have been brought, as well as the pattern of outcomes in such cases.

3. Unconventional Targeted Prevention

The third tier of the Justice Department's prevention strategy, like the first one, focuses on particular individuals thought to be potentially

---

15 The first such order was issued by President Clinton in 1995 in connection with threats to the Middle East Peace Process, and included HAMAS, Palestinian Islamic Jihad, and Hezbollah among its designations. *See* Exec. Order No. 12,947 (Jan. 23, 1995).

16 The use of the "willful" standard in § 1705 arguably contrasts with the *mens rea* required by § 2339B (which premises liability on mere knowledge that the recipient group has been designated or engages in the type of conduct that might warrant a designation). If "willful" is construed as requiring only that the defendant purposefully engaged in the "support" conduct at issue, then the scope of liability appears equally strict as between the two statutory regimes. If instead "willful" requires proof of the defendant's specific awareness of the IEEPA restraint, then § 1705 arguably would be somewhat narrower than § 2339B. So far as I know, however, no court has considered or adopted the narrower construction.

17 A handful of exceptions—most notably for the exchange of personal communications not involving the transfer of any thing of value—are described in 50 U.S.C. § 1702(b).

18 Section 2339B, for example, appears to have been charged in just four cases during the five year period following its enactment in 1996 (prior to 9/11). *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, 42 Harvard Journal on Legislation 1, 19 (2005).

dangerous in their own right, and in that sense can be described as "targeted." But this tier differs from the first in that it involves strategies pursuant to which the government seeks to incapacitate the potentially dangerous person on grounds that may have little or no relationship to terrorism concerns.

a. Preventive Charging in General

Preventive charging – also described by some as pretextual charging or the "Al Capone" method – is a strategy in which prosecutors pursue whatever criminal charge happens to be available to incapacitate a suspected terrorist, however unrelated to terrorism the charge may be.[19] Put another way, prosecutors in this context are motivated to target an individual primarily if not entirely out of concerns relating to terrorism, but base the prosecution on loosely-related or even entirely unrelated grounds – *e.g.*, obstruction of justice; making false statements to federal investigators; credit card fraud; identity theft – that may just happen to be available as to the suspect (by the same token, enforcement of the immigration laws by the Department of Homeland Security may in some instances be motivated by an underlying concern relating to terrorism, even where the official grounds for removing an alien are not so related).

Whether carried out via criminal prosecution or immigration enforcement, the prevalence and impact of the preventive charging strategy is inherently difficult to assess. By definition, it is not possible in most instances for outsiders to determine that a particular non-terrorism prosecution or immigration proceeding was in fact motivated by terrorism concerns. Even if such a linkage should come to light through leaks or other informal disclosures, moreover, nothing in the resulting prosecution or proceeding would actually test the linkage. Accordingly, it is not possible to quantify this practice, nor to determine its effectiveness. The most we can say in most instances is that, according to statements of Justice Department officials, the preventive charging method does play a significant role in the new prevention paradigm.[20]

---

19 *See* Dan Richman & William J. Stuntz, *Al Capone's Revenge, An Essay on the Political Economy of Pretextual Prosecution*, 105 Columbia Law Review 583 (2005).

20 *See, e.g.,* Assistant Attorney General Viet Dinh, *Life After 9/11: Issues Affecting the Courts and the Nation*, 51 University of Kansas Law Review 219, 224 (2003) ("If we suspect you of terrorism, beware. We will stick on you like white on rice. And if you do anything wrong, we will arrest you and remove you from the streets.").

Notwithstanding the difficulties of measurement and assessment, it is possible to understand the reasons why prosecutors might choose to pursue a preventive charge. In some circumstances—perhaps quite frequently—the government's information linking the defendant to terrorism may be intelligence information that cannot be introduced in court because (i) it is not in a form that would be admissible under the Federal Rules of Evidence (*e.g.,* some hearsay scenarios), (ii) revelation of the information would expose (or run an undue risk of exposing) a sensitive source or method of intelligence collection (human, technical, or otherwise), or (iii) the information was provided by a cooperating foreign intelligence service that will not consent to prosecutorial use. In such cases, prosecutors may be unable to obtain a conviction (or perhaps even an indictment) on terrorism-related charges, and yet be sufficiently concerned about the danger posed by the individual to bring unrelated charges for which more substantial and admissible evidence happens to be available.

b. Preventive Charging Based on Terrorism Support

Having said that, there is one context in which the preventive charging approach to terrorism prevention can more readily be identified: terrorism-support prosecutions in which the allegations imply that the government views the defendant not just as a facilitator of terrorism, but perhaps as a potential terrorist in his or her own right. As noted above, § 2339B (the material support statute) and § 1705 (the IEEPA statute) provide ample grounds for prosecution of those who provide aid or assistance to designated foreign terrorist organizations and individuals. In the nature of things, a person whom the government suspects may be personally involved in terrorism may also have committed acts that implicate these anti-support statutes. Thus, even if the government has insufficient evidence to prosecute the suspect for a past act of violence or, more to the point, for an anticipated act of violence, it may yet have the option of pursuing a support charge in the spirit of preventive charging.

How does one distinguish a run-of-the-mill support prosecution from one that may have been motivated in part or entirely by a desire to incapacitate a potentially-dangerous defendant? One possibility – by no means foolproof – is to examine the allegations in terrorism-support cases to identify the subset in which the government claims that the defendant received military-style training or otherwise has past experience with the use of weapons, explosives, and the like. As described in more detail in

Part II.C., below, there are several such cases, and they have resulted in higher median sentences than have what might be described as "pure" support prosecutions. Before turning to that discussion, however, it is necessary to highlight one final preventive strategy.

c. Material Witness Detention

In some circumstances, the government will lack even the preventive charging option. Where the government suspects that an individual is personally dangerous (or otherwise linked to terrorism) but cannot plausibly indict the person, what options remain (aside from the polar alternatives of military detention or taking no action beyond the traditional approach of maintaining surveillance)? One somewhat controversial solution to this dilemma involves the "material witness" detention statute, 18 U.S.C. § 3144.

Section 3144 provides that a warrant may be issued for the arrest and detention of a person upon proof by affidavit that the person's testimony is "material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena." The statute adds that "[r]elease of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure." To enforce these limitations, Federal Rule of Criminal Procedure 46(h) authorizes federal district judges to supervise the detention of material witnesses within their district and requires the government to make biweekly reports to the supervising judge justifying the continued detention of the individual.

Section 3144 thus aims to preserve testimony, not to provide a mechanism for incapacitating potentially-dangerous persons without charge. Nonetheless, it quickly became apparent after 9/11 that some persons whom the government wished to incapacitate could plausibly be described as potential witnesses who were likely not to honor a subpoena. This suggested that § 3144 could be used pretextually, or at least in dual-fashion, to achieve incapacitation while also preserving evidence. Significantly, moreover, the government interpreted § 3144 as applying not just in connection with pending criminal trials, but also with grand jury investigations. In the U.S. federal criminal justice system, grand juries are bodies of between 16 and 23 citizens whose responsibility is to review the government's evidence to determine whether an indictment should issue. They sit for an extended period (up to 18 months, with

the possibility of a court-ordered extension), and though they typically perform their screening function for a large number of potential cases during their term, they can and do engage in protracted inquiries into particular cases.

Consider, in light of all this, the impact of § 3144 with respect to an al Qaeda suspect. The chances are excellent that at least one al Qaeda-related grand jury investigation will be underway at any given time, and prosecutors thus could plausibly detain the suspect under § 3144 in connection with that investigation. In practical terms, the government thereby achieves temporary incapacitation via the testimony-preservation mechanism.

Precise figures regarding such pretextual uses of § 3144 are not available, though Human Rights Watch and the American Civil Liberties Union estimated in 2005 that it had been used in this manner with respect to at least 70 suspects during the post-9/11 period.[21] Public awareness of this use of the statute also increased in connection with the mistaken arrest and detention of Brandon Mayfield, a Muslim-American who was incorrectly identified as a suspect in connection with the Madrid train bombing and detained pursuant to § 3144.[22] In any event, the Justice Department has been candid about its use of the statute to achieve prevention, with then-Attorney General Ashcroft stating shortly after the 9/11 attacks that "[a]ggressive detention of . . . material witnesses is vital to preventing, disrupting, or delaying new attacks."[23]

C. Charging Decisions and Case Outcomes in Terrorism Support Prosecutions

The aspects of the Justice Department's multi-tiered strategy that seem to bear most directly on the Commission's terms of reference are those involving terrorism-support crimes. Accordingly, a more thorough exploration of the actual application of the support laws since 9/11 is in order.

---

21 Human Rights Watch and the American Civil Liberties Union, Witness to Abuse: Human Rights Abuses under the Material Witness Law Since September 11 (2005), *available at* http://hrw.org/reports/2005/us0605/index.htm.

22 *See*, *e.g.*, Office of the Inspector General, United States Department of Justice, "A Review of the FBI's Handling of the Brandon Mayfield Case" 260-62 (March 2006), *available at* http://www.usdoj.gov/oig/special/s0601/PDF_list.htm.

23 Attorney General John Ashcroft, Press Briefing (October 31, 2005), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.

I have identified all prosecutions initiated and made public during the period from September 2001 through July 2007 in which there is at least one charge under either § 2339B or § 1705 (for the § 1705 cases, I have included only those prosecutions involving terrorism-specific sanctions, not those pertaining to other foreign policy issues such as embargoes of Iraq or Libya).[24] To accomplish this, I reviewed a wide variety of databases and media sources to identify possible instances of support prosecutions. For each candidate case, I then used the PACER system (an online docket-access system operated by the Administrative Office of the U.S. Courts) to review docket reports, indictments, and other documents in order to confirm the presence, nature, and current disposition of the support charge(s). The full results are summarized in detail in appendices A and B at the end of this report.

1. Section 1705 Prosecutions: A Closer Look

Consider first the results in cases involving charges under § 1705. The data show that federal prosecutors brought § 1705 charges in terrorism-related cases against 44 individual defendants during the period from September 2001 through July 2007. Including conspiracies and attempts as well as counts involving direct violations of the support laws, these 44 defendants face a total of 220 separate § 1705-related charges.[25] At the time of this writing, 87 of these individual counts have proceeded to disposition, with 54 of these resulting in conviction (41 by jury conviction, 1 by bench trial conviction, and 12 by guilty plea). Twenty of the 33 remaining counts were dismissed in connection with guilty pleas on other charges, while 11 resulted in acquittal by jury, one resulted in a bench trial acquittal, and one resulted in dismissal on the government's own motion after the death of the defendant.

---

24 Because IEEPA regulations enforced by § 1705's criminal penalties can include matters unrelated to terrorism, it was necessary to exclude from the data set some § 1705 prosecutions initiated during this period. The same problem does not arise, however, with respect to § 2339B.

25 It should be noted that a full 172 of these counts arise in just a pair of related cases in the Dallas area involving approximately a dozen defendants linked to the fundraising activities of HAMAS within the United States. *See* United States v. Holy Land Foundation, No.04-cr-240 (N.D. Tex.) (superseding indictment); United States v. Elashi, No. 02-cr-52 (N.D. Tex.) (superseding indictment).

Mean and median sentencing data is available for 41 of the § 1705 counts that have resulted in conviction. Table 1 illustrates:

Table 1
Sentencing Data for IEEPA Convictions on a Per-Count Basis, by Type of Offense and Type of Conviction (9/01-7/07)

	Mean	Median
Direct Violation Jury Trial (n=24)	86.67	**84**
Direct Violation Guilty Plea (n=3)	84	**84**
Section 371 Conspiracy[26] Jury Trial (n=3)	60	**60**
Section 371 Conspiracy Guilty Plea (n=1)	57	**57**
OFAC Conspiracy [27] Jury Trial (n=1)	120	**120**
OFAC Conspiracy Guilty Plea (n=4)	81	**90**
OFAC Conspiracy Bench Trial (n=1)	120	**120**
Attempt Jury Trial (n=2)	120	**120**
Attempt Guilty Plea (n=2)	**34.25**	**34.25**

Most of the § 1705 charges described above fall under the heading of "pure" support in the sense that the indictments do not suggest that the government views the defendant as a personal threat to commit a violent act. Military-training allegations or their equivalent appear with respect to 15 of the 44 defendants, however, and for the reasons discussed above it may be useful to distinguish such "training" cases from pure support prosecutions.

The "military training" defendants in § 1705 cases are identified in Table 2, below, along with the identity of the foreign terrorist organization involved in each case, the nature of the § 1705 charge(s) against each such defendant, and the disposition of those charges as of July 2007.

---

26 Section 1705 on its face does not provide for conspiracy liability, but prosecutors may charge a conspiracy to violate § 1705 nonetheless by invoking 18 U.S.C. § 371, the general purpose federal conspiracy statute. The maximum sentence under § 371, however, is five years.

27 Prosecutors in some cases have charged a § 1705 conspiracy by referring to regulations issued by the Treasury Department's Office of Foreign Assets Control (OFAC), rather than by referring to § 371. In such cases, prosecutors have obtained sentences in excess of the five-year ceiling imposed by § 371.

Table 2 – Section 1705 Defendants Alleged to Have Sought or Received Military-Style Training or Experience

Defendant	Charge	Recipient	Disposition	Sentence
John Walker Lindh	1705	Al-Qaeda	Dismissed as part of plea	n/a
	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed as part of plea	n/a
	1705	Taliban	Guilty Plea	120 months
	1705 (Conspiracy, via 31 CFR 595.205)	Taliban	Dismissed as part of plea	n/a
Earnest James Ujaama	1705 (Conspiracy, via 31 CFR 545.206(b))	Taliban	Guilty Plea	24 months
Jeffrey Leon Battle	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed as part of plea	n/a
Patrice Lumumba Ford	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed as part of plea	n/a
Ahmed Ibrahim Bilal	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Guilty Plea	120 months
Muhammad Ibrahim Bilal	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Guilty Plea	96 months
Habis Abdulla Al Saoub	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a
Maher Mofeid Hawash	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Guilty Plea	84 months
Faysal Galab	1705	Al-Qaeda Usama bin Laden	Guilty Plea	84 months
Randall Todd Royer	1705 (Conspiracy, via CFR)	Taliban	Dismissed as part of plea	n/a
Masoud Ahmad Khan	1705 (Conspiracy, via CFR)	Taliban	Convicted by bench trial	120 months
Sabri Benkhala	1705 (Conspiracy, via CFR)	Taliban	Acquitted by bench trial	n/a
Ahmed Omar Abu Ali	1705 (**2 counts**)	Al-Qaeda	Convicted by jury	120 months
Kobie Diallo Williams	1705 (Conspiracy, via 18 USC 371)	Taliban	Guilty Plea	Pending
Adnan Mirza	1705 (Conspiracy, via 18 USC 371)	Taliban	Pending	n/a

Perhaps not surprisingly, the subset of support prosecutions involving allegations of training focus exclusively on persons alleged to be involved with al Qaeda or the Taliban (with 9 of the 15 defendants alleged to have provided support to al Qaeda and 7 alleged to have provided support to the Taliban). In contrast, "pure" support prosecutions (*i.e.*, the remainder of support cases) involve a diverse array of groups in addition to al Qaeda

and the Taliban, with a particular emphasis on Palestinian entities such as Palestinian Islamic Jihad and HAMAS.

With respect to charge disposition, the government has had considerable success in the training cases under § 1705. Eighteen of the 19 individual counts in these cases have proceeded to disposition. Ten of the 18 have resulted in convictions (7 guilty pleas, 2 jury convictions, and 1 bench trial conviction), and 6 more were dismissed in connection with guilty pleas on other charges. One count was dismissed in connection with a bench trial, and one other was dismissed upon the death of the defendant. Of the ten counts that resulted in conviction, nine have proceeded to sentencing at this time. The median sentence in those cases is 120 months, and the mean is 98.67. Pure support cases under § 1705 have produced slightly shorter typical sentences. Thirty-two counts have proceeded from conviction to sentencing in those cases, with a median sentence of 80 months, and a mean of 79.8 months.

2. Section 2339B Prosecutions: A Closer Look

The results in § 2339B prosecutions over the past several years are comparable to those seen under § 1705, with the exceptions that this category is larger as a whole and that sentences under § 2339B tend to be longer.

The data show that federal prosecutors brought § 2339B charges against 108 individual defendants during the period from September 2001 through July 2007. Including conspiracies and attempts in addition to direct violations, these defendants face a total of 330 separate § 2339B counts.[28] At the time of this writing, 129 of these charges have proceeded to disposition, with 66 resulting in convictions (33 guilty by jury verdict and 33 guilty by plea agreement). Twenty-five other § 2339B counts have been dismissed in connection with pleas of guilty on other charges. Of the 38 other counts, six were dismissed on the defendant's motion, 31 resulted in acquittals, and one resulted in dismissal after the death of the defendant). Sentences are available for 54 of the 66 charges resulting in conviction thusfar. Table 3, below, illustrates the resulting median and mean sentences:

---

28 As with the § 1705 data, a substantial percentage of the § 2339B counts (including most of the still-pending counts) stem from the ongoing Holy Land Foundation trial (involving allegations of financial support to HAMAS).

Table 3
Sentencing Data for §2339B Convictions on a Per-Count Basis, by Type of Offense and Type of Conviction (9/01-7/07)

	Mean	Median
Direct Violation Jury Trial (n=4)	165	**150**
Direct Violation Guilty Plea (n=10)	131.10	**120**
Conspiracy Jury Trial (n=9)	173.33	**180**
Conspiracy Guilty Plea (n=12)	82.83	**60.50**
Attempt Jury Trial (n=17)	180	**180**
Attempt Guilty Plea (n=2)	**118.50**	**118.50**

As was the case with the § 1705 data, the § 2339B cases can be divided into cases involving pure support and those involving allegations of military-style training or experience suggestive of personal dangerousness. Such allegations appear with respect to 31 of the 108 individual defendants. Including conspiracies and attempts as well as counts involving direct violations of § 2339B, these 31 defendants face a total of 56 separate § 2339B charges. At the time of this writing, 36 of these individual counts have proceeded to disposition, with 14 of these resulting in conviction (2 by jury conviction and 12 by guilty plea). Twenty of the 22 remaining counts were dismissed in connection with guilty pleas on other charges, while one of the remaining charges resulted in acquittal by bench trial and the other resulted in dismissal on the government's own motion after the death of the defendant. Table 4 illustrates.

Table 4
Section 2339B Defendants Alleged to Have Sought or Received Military-Style Training or Experience

Defendant	Charge	Recipient	Disposition	Sentence
John Walker Lindh	2339B	Al-Qaeda	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
	2339B	Harakat ul-Mujahideen	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Harakat ul-Mujahideen	Dismissed as part of plea	n/a
Earnest James Ujaama	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Jaber Elbaneh	2339B	Al-Qaeda	Pending (not in custody)	n/a
Jeffrey Leon Battle	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Patrice Lumumba Ford	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Ahmed Ibrahim Bilal	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Muhammad Ibrahim Bilal	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Habis Abdulla Al Saoub	2339B (Conspiracy)	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a
Maher Mofeid Hawash	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a

Defendent	Charge	Recipient	Disposition	Sentence
Yahya Goba	2339B	Al-Qaeda	Guilty Plea	120 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Yasein Taher	2339B	Al-Qaeda	Guilty Plea	96 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Faysal Galab	2339B	Al-Qaeda	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Mukhtar al-Bakri	2339B	Al-Qaeda	Guilty Plea	120 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Sahim Alwan	2339B	Al-Qaeda	Guilty Plea	114 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Cesar Lopez (aka Elkin Alberto Arroyav Ruiz)	2339B	AUC	Guilty Plea	180 months
Tomas Molina Caracas	2339B (Conspiracy)	FARC	Pending (not in custody)	n/a
	2339B (**5 counts**)	FARC	Pending (not in custody)	n/a
Iyman Faris	2339B	Al-Qaeda	Guilty Plea	180 months

Defendent	Charge	Recipient	Disposition	Sentence
	2339B (Conspiracy)	Al-Qaeda	Guilty Plea	60 months
Masoud Ahmad Khan	2339B (Conspiracy)	Al-Qaeda	Acquitted by bench trial	n/a
Mahmoud Youssef Kourani	2339B (Conspiracy)	Hezbollah	Guilty Plea	54 months
Mohammed Abdullah Warsame	2339B	Al-Qaeda	Pending	n/a
	2339B (Conspiracy)	Al-Qaeda	Pending	n/a
Nuradin Abdi	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea to other charges	n/a
Ahmed Omar Abu Ali	2339B (Conspiracy)	Al-Qaeda	Convicted by jury	120 months
	2339B	Al-Qaeda	Convicted by jury	120 months
Tarik Ibn Osman Shah	2339B (Conspiracy)	Al-Qaeda	Guilty Plea	Pending
	2339B (Attempt)	Al-Qaeda	Guilty Plea	Pending
Mahmud Faruq Brent	2339B (Conspiracy)	Lashkar-e-Taiba	Guilty Plea	180 months
	2339B (Attempt)	Lashkar-e-Taiba	Dismissed as part of plea to Other Charges	n/a
Oussama Kassir	2339B (Attempt)	Al-Qaeda	Pending (not in custody)	n/a
	2339B (Attempt	Al-Qaeda	Pending (not in custody)	n/a
Defendent	**Charge**	**Recipient**	**Disposition**	**Sentence**

Defendent	Charge	Recipient	Disposition	Sentence
	2339B (Conspiracy)	Al-Qaeda	Pending (not in custody)	n/a
Defendent	**Charge**	**Recipient**	**Disposition**	**Sentence**
	2339B (Conspiracy)	Al-Qaeda	Pending (not in custody)	n/a
Haroon Rashid Aswat	2339B (Conspiracy)	Al-Qaeda	Pending (not in custody)	n/a
	2339B (Attempt)	Al-Qaeda	Pending (not in custody)	n/a
Syed Haris Ahmed	2339B (Conspiracy)	Lashkar-e-Tayyiba	Pending	n/a
	2339B (Attempt)	Lashkar-e-Tayyiba	Pending	n/a
Ehsanul Islam Sadequee	2339B (Conspiracy)	Lashkar-e-Tayyiba	Pending	n/a
	2339B (Attempt)	Lashkar-e-Tayyiba	Pending	n/a
Erick Wotulo	2339B (Conspiracy)	LTTE	Guilty Plea	Pending

Like the training defendants in the § 1705 data set, the § 2339B training defendants (some of whom are in both sets) primarily are alleged to have provided support to extremist groups associated with al Qaeda. There are exceptions to that rule, however, in light of the inclusion in the § 2339B data of a few defendants linked to entities such as FARC, AUC, and LTTE. In any event, the pure-support sub-category under § 2339B also parallels that under § 1705 in its inclusion of a broader base of designated groups (including militant Palestinian groups).

Of the fourteen counts under § 2339B resulting in convictions in training cases, twelve have proceeded to sentencing at this time. When direct violations of § 2339B are considered together with conspiracy convictions, both the median and mean sentences in training cases under § 2339B equal 120 months. When direct violations are considered standing alone, the mean is 128.25 months and the median is 120 months. When conspiracy violations are considered standing alone, the mean is 103.5 months and the median is 90 months.

In contrast to the 14 counts resulting in conviction in training cases, 42 counts have proceeded to conviction in pure-support cases, and each of these has proceeded to sentencing as well. When direct violations, conspiracies, and attempts are considered together, the median sentence is 180 months and the mean is 151.95 months. When these various forms of liability are distinguished, the median remains 180 months in each instance, but the mean varies in an interesting way: 157.5 months for direct violations, 125.88 months for conspiracies, and 173.53 months for attempts. Why the higher mean for attempts, as opposed to direct violations?

The answer lies in the manner in which those convictions were obtained. In brief, all but two of the attempt convictions resulted from jury verdicts rather than guilty pleas. It is well-established that pleading guilty rather than proceeding to trial can have sentencing benefits, and a broader look at the sentencing data tends to reinforce that view. The total set of § 2339B pure support convictions can be divided between 14 counts resulting in guilty pleas, and 28 resulting in jury verdicts. Every single jury verdict resulted in the maximum sentence of 180 months, regardless of whether the § 2339B charge at issue involved direct, conspiracy, or attempt liability. The guilty pleas, in contrast, varied considerably. Some produced 180 month sentences, but others resulted in sentences as low as 29 months. The median sentence for pure support counts resulting in a guilty plea is 64.5 months, while the mean is 95.86 months.

D. The Limits of the Terrorism-Support Criminal Law Framework

The data described above provide evidence for two propositions. First, they are consistent with the claim that the Justice Department has relied on the support statutes not just to reduce the resources available to terrorist groups but also to incapacitate persons whom the government suspects might pose a personal threat of participation in a violent act. Second, they suggest that Justice Department has been relatively successful in this strategy, at least insofar as conviction rates and sentence lengths are concerned, notwithstanding frequent assertions in the media suggesting the contrary.

All that said, the framework of laws facilitating criminal prosecution of terrorism-support has inherent limitations. As described above, § 2339B and § 1705 each depend on the existence of an underlying "designation" that has the effect of imposing an embargo on the designated group or individual. For § 2339B, the predicate designation is supplied by the Secretary of State through a formal bureaucratic process resulting in the designation of "foreign terrorist organizations," and for § 1705 the designation typically is supplied by the Treasury Department (acting in conjunction with other agencies and pursuant to authority delegated from the President) in a somewhat similar process that results in the placement of both foreign groups and individuals on one of several lists.

The first flaw, common to both processes, has to do with the lag between the designation process and either the emergence of new terrorist entities and individuals, or the renaming (or reorganization) of old ones. Simply put, bureaucratic processes cannot be expected to keep up with the pace of change with respect to the groups and individuals that are of most pressing concern from a counterterrorism perspective, despite the best of intentions and efforts. Because the provision of support to an entity is not criminalized until those processes run their course – and because criminalization cannot be made retroactive to past conduct – the support laws can never provide an entirely sufficient ground for suppressing the full range of conduct that may be at issue.

The second flaw is at least as significant. Though the IEEPA designation process enforced via § 1705 does permit the designation of specific individuals, the fact remains that the bulk of the work done by both § 2339B and § 1705 turns on the designation of particular organizations. This approach is consistent with traditional notions of the terrorist

"organization," a rubric that contemplates a relatively discrete and definable set of associations. That model may be a poor fit with current trends, however. The threat of terrorist violence to a growing extent emerges from loosely-defined networks of relatively like-minded individuals and groups sharing common ideological or theological commitments and drawing inspiration and advice from common sources (facilitated by the anonymity and ease provided by the Internet), but lacking relatively concrete institutional affiliations to one another. The more prevalent that model, the less relevance the support laws (being predicated on the identification and designation of discrete entities) will have.

In the U.S., the Justice Department appears to be responding to this prospect through increased reliance on inchoate crime concepts. In particular, the concept of criminal conspiracy has proven particularly useful in permitting preventive prosecution in circumstances that cannot clearly be linked to a designated foreign terrorist organization. In addition, prosecutors have also begun to make extensive use of a second "material support" statute, found in 18 U.S.C. § 2339A. Section 2339A, unlike § 2339B, does not require proof that the defendant rendered support to a designated entity; on the contrary, the identity of the recipient of the support is irrelevant. But § 2339A *does* require that prosecutors prove that the defendant knew or intended that his or her actions would facilitate the commission of one of several dozen violent crimes listed as predicates in that statute (in contrast to § 2339B, which does not require any such linkage). The upshot is that § 2339A charges are more difficult to prove (because of the subjective *mens rea* requirement, which is akin to what one might see with an aiding-and-abetting charge), but at least are available in connection with suspected plots that cannot be attributed to groups or individuals that have already been designated by the executive.[29]

III. Criminal Procedure and Evidentiary Considerations

In this section I discuss a variety of procedural and evidentiary issues that have arisen in terrorism-related cases in the U.S. in recent years, with a particular focus on the issues raised by the litigation use of intelligence information and other forms of classified or secret information. I begin

---

29 For a thorough discussion of the rise of conspiracy and § 2339A liability in response to the "network" issue described above, see Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 Southern California Law Review 425 (2007).

with a discussion of the tension between the government's interest in preserving the secrecy of such protected information and the interests of a criminal defendant in being able to present a defense (and, of course, the government and society's interest in fair trial procedures). I then examine the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 (1980), which is the primary statutory device for managing that tension in U.S. courts. After discussing the requirements, advantages, and limitations of CIPA, I then take up a series of related issues, including questions as to: (i) closing trials to the public; (ii) limiting disclosure of classified information to the defendant's counsel; (iii) the obligation of federal prosecutors to search intelligence agency sources for exculpatory information to be disclosed to the defendant; and (iv) the problems that arise when the defendant's right to compulsory process clashes with the government's interest in maintaining exclusive custody over detainees in military custody.

A. The Tension Between Secrecy and Fairness

The question of how sensitive, protected information can or should be used in connection with criminal prosecutions implicates several competing values and interests. The government, as custodian of the national security, has a compelling interest in preserving the secrecy of at least some information pertinent to that task (*e.g.,* weapon schematics, or information as to the sources or methods by which intelligence agencies covertly obtain intelligence). On the other hand, defendants in criminal prosecutions have a compelling interest in procedural and evidentiary rules that permit them to mount a proper defense, which in some cases may raise questions either as to their right to acquire protected information from the government or as to the government's right to proceed against them with the assistance of such information. At a more general level, society – and, hence, the government – has strong stakes in both the fairness (real *and* perceived) of the criminal justice system and the prevention and punishment of political violence. These tensions are not easily reconciled, but terrorism prosecutions frequently present them nonetheless.

1. The Defendant's (and Society's) Interest in Fair Process

The U.S. Constitution confers a number of procedural and evidentiary rights upon criminal defendants, in recognition of the need to ensure fair process when the state seeks to deprive individuals of their liberty (or,

with the most egregious offenses, of their lives). The Fifth Amendment, for example, provides that no one shall be "deprived of life, liberty, or property, without due process of law." That assurance has been interpreted to include, among other things, an obligation on the party of the government to disclose exculpatory evidence to the accused, and also a right on the part of the accused to a meaningful opportunity to present a complete defense. The Sixth Amendment confers several additional rights on the accused which are pertinent here, including (i) the right "to be confronted with the witnesses against him," (ii) the right "to have compulsory process for obtaining witnesses in his favor," and (iii) the right "to have the Assistance of Counsel for his defence."

2. The Government's (and Society's) Interest in Secrecy

The constitutional status of the government's countervailing interest in secrecy is less certain, but that interest is protected nonetheless.

American scholars have endlessly debated the question of whether there are constitutional grounds for shielding at least some amount of information held by the executive branch from disclosure in various contexts. Whatever the answer to that question may be – whether protection of sensitive information is a matter of constitutional right, statutory grace, or common law tradition – the fact remains that U.S. courts typically are reluctant to compel such disclosures, and even when considering the possibility of doing so will adopt a deferential stance that frequently results in non-disclosure.

This is most apparent in the context of the "state secrets" privilege, which provides that the government cannot be forced in litigation to disclose otherwise-secret information when the judge concludes that such a disclosure would pose a reasonable danger of harming national security.[30] The state secrets privilege is most often discussed in connection with civil litigation against the U.S. government (or in civil suits between private parties in which the government intervenes). When properly invoked in that context, its effect can be draconian from the private party's perspective; plaintiffs at the very least will be unable to discover

30 The leading Supreme Court decision on the topic is *United States v. Reynolds*, 345 U.S. 1 (1953). For the relevant history, see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, George Washington Law Review (forthcoming 2007), manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676.

or use the information at issue, and frequently find that their suit must be dismissed as a result.[31] In criminal prosecutions, in contrast, the cost of preserving secrecy is placed on the government. As the Supreme Court of the United States held in *Jencks v. United States*, 353 U.S. 657, 672 (1957), the "burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the government's possession."

The disclose-or-dismiss dynamic presents the government with a Hobson's Choice, one that over time came to be perceived as problematic. By the late 1970s, there was growing concern that enforcement of the laws relating to espionage and to leaks of classified information was unduly hindered by the prospect of "graymail." Graymail refers to the disclose-or-dismiss scenario described above, which may arise because of the strategic maneuvering of the defendant (thus the pejorative nature of the term "graymail") or simply because the dilemma is inherent in the nature of the charge. In any event, concerns about the impact of graymail on the enforceability of various laws led Congress to investigate the issue. The result, described in detail below, was the Classified Information Procedures Act ("CIPA").

B. The Classified Information Procedures Act ("CIPA")

CIPA does not eliminate or substantially modify the balance between secrecy and fairness that is reflected in the disclose-or-dismiss dilemma, though it is often described as if it does. Rather, it is best understood as a mechanism for regulating the process by which judges determine whether the dilemma truly has arisen in a particular case.

1. Seeking Discovery of Classified Information

Consider first the problems that arise when a criminal defendant may be entitled to discover information in the government's possession that happens to be classified. This situation is governed by CIPA § 4. When the government determines that its discovery obligations to the defendant encompass classified information that the government is unwilling to

---

31 *See, e.g.,* El-Masri v. Tenet, 437 F. Supp.2d 530 (E.D. Va. 2006) (invoking state secrets privilege to dismiss civil suit arising out of extraordinary rendition of German citizen from Macedonia to Afghanistan).

provide,[32] § 4 authorizes it to submit a written request to the court on an *in camera, ex parte*[33] basis (*i.e.,* without disclosure to the public or the defendant) seeking permission to employ an alternative to outright disclosure. Section 4 describes three such alternatives: (i) disclose only a redacted version of the information (i.e., a version that "delete[s] specified items of classified information"); (ii) provide an unclassified "summary" of the contents of the requested document in lieu of the document itself; or (iii) provide a "statement admitting relevant facts that the classified information would tend to prove."

The task of the court at this point is to determine whether any of these alternatives would suffice to satisfy the defendant's right to discover the protected information. If so, the government pursues the relevant alternative and the issue is resolved. If not, however, the court's options are limited. As a threshold matter, it can offer the government another opportunity to craft a suitable substitution.[34] Failing that, at least some variation of the disclose-or-dismiss dilemma arises. Section 4 does not specify the options that a court has at this stage, but as discussed below, CIPA § 6 does just that. The court may, of course, order dismissal of the indictment. Section 6 adds, however, that the court also should consider whether it might be sufficient to (i) dismiss only specified counts within the indictment; (ii) find "against the United States on any issue as to which the excluded classified information relates"; or (iii) "strik[e] or preclud[e] all or part of the testimony of a witness." Section 6 thus modifies the disclose or dismiss dilemma by providing for the less drastic alternatives of finding against the government or precluding it from offering certain evidence (an option that may have been available to the trial judge even in the absence of CIPA, but that clearly is acknowledged in the statutory framework).[35]

---

32 The District of Columbia Circuit—which in the nature of things is more likely than other courts to hear CIPA-related matters—has explained "that classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information . . . [demonstrate] that [it] is at least 'helpful to the defense.'" United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (citation omitted).

33 The *ex parte* nature of the proceeding by definition precludes use of an adversarial process, a failing that has generated criticism. *See, e.g.,* Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 American Journal of Criminal Law 277, 306-15 (1986).

34 *Cf.* United States v. Libby, No. 05-394 (RBW), 2006 WL 3262446 (D.D.C. Nov. 13, 2006) (finding, under a related CIPA provision, that proposed substitutions were inadequate in connection with the prosecution of Lewis Libby, and ordering that "the government must go back to the drawing board and come forth with a more balanced proposal"), *vacated on other grounds*, 2006 WL 3333059 (Nov. 16, 2006).

35 *Cf.* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) (affirming remedy developed by trial judge, by analogy to CIPA, pursuant to which charges would not be dismissed but government would be precluded from seeking death penalty or attempting to prove that defendant was linked to the 9/11 attacks).

2. Anticipating Disclosure of Classified Information

A second CIPA scenario concerns the defendant who already possesses classified information and reasonably expects to disclose it in his or her own defense (a situation that is likely to arise in the case of government employees accused of espionage or leaks of classified information, for example), or who simply has a reasonable expectation that he or she will elicit such information from others during the trial or pretrial processes.

In those circumstances, CIPA § 5 requires the defendant to provide advance, written notice of this prospect both to the government and to the court. The government must then be given a "reasonable opportunity" to make a motion to the court under CIPA § 6. As a threshold matter, the court first must determine whether the information in question would be admissible even in the absence of the classification issue.[36] Assuming that it would be, the § 6 process is quite similar the § 4 process described above.

Again, the primary task of the court is to determine whether substitutions for the classified information – including in particular the use of unclassified summaries or of stipulated admissions of fact – would suffice to satisfy the defendant's rights. Section 6 expressly states that such substitutions should be employed only upon a finding "that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." If the court finds that a substitution would not satisfy this standard,[37] the disclose-or-dismiss dilemma again may arise (though as noted above, the court likely will first provide additional opportunities for the government to craft an appropriate substitution).

Section 6 addresses this prospect as follows. If the government accompanied its aforementioned substitution motion with an *in camera, ex parte* affidavit "certifying that disclosure of classified information would

---

36 For an example of an opinion finding that the information would not be admissible in any event under the Federal Rules of Evidence, see United States v. Mohamed, 410 F. Supp.2d 913 (S.D. Cal. 2005) (holding that defendant charged with immigration violations would not be permitted to elicit classified information relating to the arresting agent's alleged bias against him on the ground that the probative value of that information would in any event be substantially outweighed by its prejudicial effect and the risk that it would confuse the jury, in violation of Federal Rule of Evidence 403).

37 For examples of opinions finding substitutions to be adequate to satisfy a defendant's constitutional rights, see United States v. Salah, 462 F. Supp.2d 915 (N.D. Ill. Nov. 16, 2006); United States v. Scarfo, 180 F. Supp.2d 572 (D.N.J. 2001).

cause identifiable damage to the national security of the United States, and explaining the basis for the classification of such information," the court now will expressly order the defendant not to disclose the information. The court may then dismiss the indictment outright, however, unless the court finds that one of the aforementioned alternatives – (i) dismissing only specified counts within the indictment; (ii) "finding against the United States on any issue as to which the excluded classified information relates"; and (iii) "striking or precluding all or part of the testimony of a witness" – would be more appropriate.

C. Limiting the Scope of Classified Disclosures

The government's interest in secrecy and the defendant's interest in fair trial procedures also comes into play in a number of other contexts, some of which have relatively little to do with CIPA. Even where the government proves willing to disclose classified information to the defense, for example, there is the further question of whether the government can still keep the information from the larger public. Also, when if ever may the government provide disclosure to the defendant's counsel, but not the defendant?

1. Closing the Court to the Public

As a threshold matter, there is the question of whether disclosure of information to the accused or to defense counsel automatically has the effect of requiring public disclosure as well. The answer is no. Section 8 of CIPA expressly states that various forms of classified information "may be admitted into evidence without change in their classification status," and § 3 further provides for the issuance of protective orders barring defendants from disclosing "any classified information disclosed [to them] by the United States."

United States v. Marzook provides a recent example of this principle in practice. *See* 412 F. Supp.2d 913 (N.D. Ill. 2006). Defendant Muhammad Hamid Khalil Salah was indicted on charges including the provision of material support to HAMAS (it should be noted that Salah was acquitted of this charge in February 2007 after a jury trial). In support, the government intended to elicit evidence of oral and written statements that Salah had made while in Israeli custody in 1993. Salah moved to suppress that evidence, arguing that his statements had been coerced by his interrogators. In response, the government sought to have two

members of the Israel Security Agency ("ISA") testify at the suppression hearing. To make that possible, however, the government requested that the hearing be closed to the public and that the agents be permitted to testify under pseudonyms (*i.e.*, without disclosure of their true identities to anyone, including Salah), in order both to preserve their safety and "the sanctity of the ISA's intelligence gathering methods."

As to the use of pseudonyms, the court noted that the same approach had been approved in other cases for security reasons (citing *United States v. Abu Ali*, 395 F. Supp.2d 338, 344 (E.D. Va. 2005)).[38] The court also emphasized that the agents had always used these particular pseudonyms in their work (including with respect to their contact with Salah in 1993) and hence that Salah as a practical matter would not actually be inhibited in his capacity to conduct cross-examination of them. Accordingly, they were permitted to testify on those terms.

As to the closure of the court to the public during the hearing, the court found ample authority for the proposition that the right of public access "may give way in certain cases to other rights or interests such as . . . the government's interest in inhibiting disclosure of sensitive information." 412 F. Supp.2d at 925 (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984). *See also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (holding that the presumption in favor of public proceedings can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). In this instance, the need to prevent unnecessary disclosure of classified information as well as the need to protect the safety of the Israeli agents both sufficed to warrant closure of the court.[39]

2. Disclosure to Defense Counsel Only?

May the prosecution disclose information only to a criminal defendant's *attorney*, and not the accused as well? As one court has observed in a terrorism-related case, the "legislative history of the Act suggests that CIPA was primarily drafted to manage the disclosure of classified information in cases in which the defendant was previously in possession of classified

---

38 The practice nonetheless appears rare, and remains the subject of controversy. *See* Greg Krikorian, *Anoymous Testimony Pushes Limits: Defense Lawyers Say Justice Isn't Served If They Can't Know the IDs of Israeli Agents*, Los Angeles Times (Dec. 26, 2006), at A1 (discussing objections—ultimately unsuccessful—to the use of anonymous witness procedures in a terrorism finance trial in Dallas, and noting rarity of the procedure).

39 For a similar result, see United States v. Ressam, 221 F. Supp.2d 1252 (W.D. Wash. 2002).

information."[40] That is, the drafters of CIPA had in mind espionage and leak prosecutions in which the primary concern was to avoid disclosure of classified information to the public, not to the defendant (who already would be privy to the information). Terrorism cases, insofar as they derive from foreign intelligence investigations and information obtained from cooperating agencies of other states, tend to implicate information that the government would like to withhold not only from the public but also from the defendant. Insofar as the government is obliged to disclose such information to the defense in light of the considerations described above, the question arises whether it can discharge this obligation by limiting disclosure to defense counsel, excluding the accused himself.

This issue arose in connection with *United States v. bin Laden*, the prosecution of al Qaeda members linked to the 1998 bombings of the U.S. embassies in Kenya and Tanzania. In that case, classified information was made available to the defense during the pretrial discovery process subject to a protective order that required that anyone reviewing the information have a security clearance. At least some of the defense *attorneys* had the requisite clearance, but not surprisingly none of the defendants did. The defendants argued that by denying them the ability to assist their attorneys in assessing the information, their right to the effective assistance of counsel had been violated. The district judge acknowledged that in the ordinary course the defendant should have full access to all information produced in discovery, but observed that this right was subject to exceptions. Citing an array of other contexts in which information is withheld from the defendant but made available to defendant's counsel, often for safety-related reasons, the court rejected the challenge and approved the protective order.

The *bin Laden* decision thus establishes that disclosure to the defense may be limited to defense counsel at least with respect to the discovery process. It does not follow, however, that the defendant could equally be excluded in the context of the presentation of evidence during the trial itself. The *bin Laden* court found it proper to exclude the defendants from the CIPA hearings in that case, not the trial itself.[41]

---

40 United States v. bin Laden, No. 98 cr. 1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001).

41 *Cf.* U.S. Department of Justice, Criminal Resource Manual § 2054, part I.C, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm. ("The requirement of security clearances [in connection with protective orders that may be issued by the court in cases involving classified information] does not extend to the judge or to the defendant (who would likely be ineligible, anyway)").

D. Exculpatory Information in the Hands of the Intelligence Community

In the 1960s and 1970s, the Supreme Court of the United States determined that the defendant's Fifth Amendment right to a fair trial included a right to complete disclosure of evidence in the possession of the government that would tend to exculpate the accused (*Brady v. Maryland*, 373 U.S. 83, 87 (1963)) or impeach the government's witnesses (*Giglio v. United States*, 405 U.S. 150, 154 (1972)). According to the United States Attorneys' Manual, a Justice Department policy handbook, these obligations extend to "all members of the prosecution team," which is defined to include "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." U.S. Attorneys' Manual, § 9-5.001(B)(2).[42] But does this obligation also include the various components of the intelligence community, such as the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency?

That question has obvious significance in terrorism-related cases, as counterterrorism policy in the United States has always been an interagency affair to at least some degree, and has become much more so since 9/11.[43] As one scholar has recently observed, "the circuits are split on whether a prosecutor's duty to search for *Brady* material extends to agencies that have no interest in the prosecution, extends only to law enforcement entities, extends only to persons acting under the direction or control of a prosecutor, or extends to *Brady* material outside a prosecutor's jurisdiction."[44]

---

42 This section of the U.S. Attorneys' Manual is available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001.

43 CIPA does not address the question of how far the duty to identify and disclose exculpatory information runs beyond prosecutors. It does provide, in § 9A, that prosecutors must brief intelligence agencies when they determine that classified information from such an agency may result in prosecution, and also at subsequent points when necessary to keep that agency fully informed with respect to the prosecution.

44 For an overview, see Mark D. Villaverde, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 Cornell Law Review 1471, 1524 (2003). Cases illustrating the uncertainty surrounding this issue include: United States v. Antone, 603 F.2d 566 (5th Cir. 1979) (illustrating the "prosecution team" standard, interpreting the scope of the disclosure duty to extent to agencies under direction of prosecutors or that acted in cooperation with prosecutors in investigating the defendant); United States ex rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985) (same); United States v. Wood, 57 F.3d 733 (9th Cir. 1995) (interpreting "prosecution team" standard so as not to be limited to law enforcement agencies); Smith v. Secretary of New Mexico Department of Corrections, 50 F.3d 801 (10th Cir. 1995) (broad approach to prosecution team standard); United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991) (duty extends to all information that is available to prosecutors, so long as held by some arm of the state); United States v. Romo, 914 F.2d 889 (7th Cir. 1990) (no duty if information not actually in prosecutors' possession).

The policy guidance contained in the U.S. Attorneys' Manual reflects that complexity. Prosecutors are instructed that "[a]s a general rule, a prosecutor should not seek access to IC [*i.e.,* Intelligence Community] files except when, because of the facts of the case, there is an affirmative obligation to do so."[45] According to the Manual, the best reading of the caselaw under *Brady* and *Giglio* is that such an obligation may arise when:

- Alignment: The Intelligence Community component is "aligned" with the prosecution in that it "actively participates" in the criminal investigation or prosecution (by, for example, actions that go beyond the mere provision of leads or tips);

- Specific Requests: Where the defendant specifically requests a search for such material with respect to a particular agency, the prosecution may have an obligation to comply depending on the relationship between the burden of compliance and the basis for suspecting that relevant material would in fact be discovered;

- Defense Contact with the Intelligence Community: Where it appears that the defendant claims to have had contact with a component of the Intelligence Community, a search most likely would be required.

Even in the absence of an affirmative obligation, moreover, the Manual recommends that a search be conducted on prudential grounds in "certain types of cases . . . in which issues relating to national security and/or classified information are likely to be present." Among other things, the Manual suggests that searches should be undertaken on prudential grounds in cases involving "international terrorism."[46]

E. Defendant's Right to Compulsory Process and Overseas Detainees

It is one thing to recognize an obligation (legal or prudential) on the part of prosecutors to search for exculpatory information in the hands of some component of the Intelligence Community. Actually obtaining

---

45 U.S. Department of Justice, Criminal Resource Manual § 2052, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

46 *See id.*

meaningful cooperation from such agencies may prove difficult in practice, however, depending on the particular circumstances. The reality is that such agencies may perceive potential disclosures as a threat to their highest institutional priority (i.e., intelligence collection) over both the short and long terms, particularly insofar as the information in issue relates to collection sources and methods.

This tension generated significant litigation in the prosecution of Zacarias Moussaoui (charged with involvement in the 9/11 attacks). *See United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Did Mouassaoui have the right to take discovery from al Qaeda members who had been captured by the U.S. in connection with an ongoing armed conflict[47] and who were being held incommunicado in military or intelligence community custody outside the U.S.?

Moussaoui originally sought to depose at least one such detainee, with an eye toward eliciting exculpatory evidence concerning Moussaoui's role (or lack thereof) in the 9/11 attacks. The trial court initially agreed that he could do so, reasoning that the detainee in question appeared to have knowledge of the 9/11 plot that might tend to exculpate Moussaoui, or at least mitigate his involvement. In light of the security concerns involved, however, the court did not order unrestrained access. Instead, the court ordered that a deposition take place via remote videolink that would not disclose the detainee's location.

The government appealed to the Fourth Circuit Court of Appeals, which vacated the order and remanded with instructions for the trial court to first consider a CIPA-like compromise: the creation of written substitutes for the detainee's testimony. In response to that instruction, the government on remand proposed to produce relevant excerpts from the written reports that had been generated by the ongoing interrogation of the detainee. The district court rejected that approach (reasoning that interrogation summaries were not necessarily reliable), and then reinstated its earlier order requiring a remote, but live, deposition.

---

47 I appreciate that there is a body of opinion that contests the claim that an armed conflict can or does exist between the United States and al Qaeda. This report is concerned only with the questions that arise in connection with criminal prosecutions in terrorism-related cases in the United States, however, and for purposes of U.S. law the existence of an armed conflict of at least some description, and in at least some contexts, is conclusively established by the determinations to that effect by both the President and the Congress. *See, e.g.,* Authorization for Use of Military Force (September 18, 2001), available at http://thomas.loc.gov/cgi-bin/query/z?c107:S.J.RES.23.ENR:.

The government indicated in response that it did not intend to comply with that order, leading the court to determine whether and how the government should be sanctioned for refusing to produce the detainees (by this point, the request concerned not one but three detainees) for remote depositions. Ultimately, the district court declined to dismiss the indictment. Instead, it denied the government the ability to seek the death penalty against Moussaoui and, further, precluded the government from introducing any evidence at trial linking Moussaoui to the 9/11 attacks.
The government again appealed to the Fourth Circuit. The resulting opinion began by considering whether a federal court has jurisdiction to compel the production of testimony from a noncitizen held outside the U.S. by the military (the court assumed military rather than intelligence community custody). The court concluded that it would, reasoning that such jurisdiction would depend on the location of the detainee's custodian rather than the detainee himself (and that where the immediate custodian of a detainee is unknown, the inquiry instead would turn on the location of the ultimate custodian, such as the Secretary of Defense). Accordingly, the only question concerned whether Moussaoui in fact had a constitutional right to compel this particular testimony.

On one hand, the Fourth Circuit concluded that Moussaoui's right to compulsory process is fundamental, and that he had made a sufficient showing that the particular testimony sought here would be relevant to his defense. On the other hand, the court noted, that right is not absolute, but in theory could give way to competing considerations. Here, the competing consideration was the possibility of undue interference with the government's warfighting authority. The court observed that the deposition might impose substantial burdens on that authority, on the theory that the deposition might (a) disrupt the interrogation effort, (b) cause other states to doubt U.S. assurances of confidentiality in connection with international cooperation in the counterterrorism effort, and (c) provide comfort to the enemy.

Faced with a clash of compelling interests, the court observed that "the Supreme Court has addressed similar matters on numerous occasions," and that

> "[i]n all cases of this type . . . the Supreme Court has held that the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails over the governmental privilege. Ultimately, as these cases make clear, the appropriate procedure is for the district court

> to order production of the evidence or witness and leave to the Government the choice of whether to comply with that order." 382 F.3d at 474.

The court then cited CIPA as evidence of Congress' judgment that the Executive interest in protecting classified information ultimately cannot overcome the right of a defendant to present his or her case.

Despite this conclusion, however, the court did not agree with the district court that it was appropriate to put the government to the choice of providing access to the detainees or else face a sanction. On the contrary, the Fourth Circuit concluded that the district court had not been flexible enough in considering the proposed substitutions that the government had offered, and that its concern about reliability of interrogation reports was misplaced (because, the court said, of the interrogators' "profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives"). The Fourth Circuit did agree that the existing version of the substitutions were insufficient,[48] but its bottom line was that these insufficiencies could be cured, and that every effort had to be made to fix them before putting the government to the disclose-or-sanction choice. The Fourth Circuit accordingly remanded the case to the district court with specific instructions to the effect that (a) the exact language found in the interrogation summaries should be used in the substitutions (as opposed to paraphrasing); (b) the process should begin with the defense identifying quotations from the reports that it wished to use, with the prosecution responding either with objections or suggestions for additional language that ought to be included in the interests of completeness; and (c) the district court should exercise discretion to determine when security concerns warrant "non-substantive" changes such as the use of pseudonyms for places or persons mentioned in the statements.

Ultimately, Moussaoui pled guilty, mooting the substitution issue before the parties could act upon these instructions. Nonetheless, the

---

48 The court noted, for example, that some exculpatory information may have been missing from one of the substitutions, and that the same document may have contained an inculpatory statement that did not in fact derive from that detainee's interrogation.

extensive litigation on this subject amply demonstrated the difficulty of reconciling the defendant's interest in fairness and the government's interest in secrecy and security. While the particular fact pattern at issue in Moussaoui – involving access to detainees held overseas and subject to long-term interrogation – is not one that necessarily will arise with great frequency, the underlying tensions are much the same as will arise in any case in which classified information and its like are at stake.

IV. Observations and Conclusions

The foregoing discussion provides the basis for a number of observations and conclusions. With respect to the substantive scope of U.S. federal criminal law, the most important point to appreciate is that the Justice Department has multiple strategies for preventive intervention in scenarios involving potential terrorists. These range from the relatively traditional (*e.g.*, conspiracy or attempt prosecutions brought in connection with particular plots) to the relatively unorthodox (*e.g.,* preventive charging and material support prosecutions). And while the traditional approach continues to play an important role, the available data demonstrates fairly clearly that material support prosecutions in particular have become a central and relatively effective part of the overall strategy. The evolving nature of terrorism—in particular, the shift from relatively well-defined membership organizations to looser networks of like-minded individuals—tends to undermine some aspects of the support-law framework, but other aspects of the framework remain capable of addressing the issue.

In light of the tension between the benefit of prosecuting in the preventive context and the costs of undesirable exposure of classified information, the most important of these strategies may be the preventive-charging method. By definition that approach involves prosecution on grounds unrelated to suspicion of terrorism, and hence preventive charging tends to avoid the disclose-or-dismiss dilemma that otherwise might arise insofar as the government's concerns arise out of classified information. It is not possible to say how effective this approach actually has been in practice, because it is not possible to identify with certainty which cases fall under the preventive charging rubric. That said, it is possible to identify the results in cases that were classified by the FBI or other investigating agencies as terrorism-related at the investigative stage, cases that often end up as prosecutions for relatively minor offenses such as social security or immigration fraud; some of these cases no

doubt represent episodes of preventive charging. Notably, though not surprisingly, the average sentence in such cases is much shorter than the average sentences associated with terrorism-related convictions (as seen, for example, in the material support data provided above). This disparity has led to considerable criticism of the Justice Department in some quarters, but may reflect in part the price that must be paid to permit intervention without risking exposure of classified information.[49]

The government does not always prosecute on such unrelated grounds, of course. What happens when the government proceeds on a terrorism-related theory that does make classified information relevant—i.e., when the litigation necessarily takes place in the shadow of the disclose-or-dismiss/sanction dilemma? The CIPA statute creates a useful and efficient framework for litigants and the court to determine when that dilemma has actually arisen in a particular case. It also serves an important function in that it provides statutory endorsement for compromise solutions such as the use of redactions or unclassified summaries in lieu of relevant-but-classified information. Even with CIPA, however, situations will continue to arise when redactions or substitutions will not be sufficient to ensure the fairness of the trial, and thus the dilemma will continue to have bite in at least some cases. Whether this prospect may provide leverage in plea negotiations to defendants in terrorism-related cases is not clear, though it is a factor that should be considered. In any event, as the *Moussaoui* litigation illustrates, courts in that scenario must proceed with considerable caution, taking every opportunity to exhaust the opportunities for compromise before concluding that the disclose-or-dismiss dilemma is truly unavoidable.

---

49 Much of the criticism suggests an alternative explanation: that cases have been miscategorized as terrorism-related at the investigative stage. For a review of the data, see United States Department of Justice, Office of the Inspector General, Audit Division, "The Department of Justice's Internal Controls Over Terrorism Reporting," Audit Report 07-20, February 2007, *available at* http://www.usdoj.gov/oig/reports/plus/a0720/final.pdf; Transactional Records Access Clearinghouse, Syracuse University, "Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11 Attacks," (2006), *available at* http://trac.syr.edu/tracreports/terrorism/169/.

Appendix A
50 U.S.C. § 1705 Prosecutions (9/01-7/07)

Defendant	Docket #	Court	Charge	Support Type	Recipient		Sentence	Training Allegations?	Total Sentence
Ihsan Elashyi	02-CR-33	N.D. Tex.	1705 (**13 counts**)	Computers	Unspecified	Guilty Plea (1 count); Dismissed as part of plea to Other Charges (12 counts)	48 months	no	n/a
Bayan Elashi	02-CR-052	N.D. Tex.	1705 (**10 Counts**)	Money	Mousa Abu Marzook	Convicted by jury	84 months	no	**84 months** - 50:1705 (Conspiracy, via 18:371) (2 counts, though only one relating to terrorism as noted in the "charge" column), 60 months on each count; 50:1705 (17 counts), 84 months on each count; 18:1001(a)(3) (2 counts), 60 months on each count; 18:1957, 84 months; 18:1956 (Conspiracy), 84 months; 18:1956 (9 counts), 84 months on each count; to run concurrently
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	60 months		
Ghassan Elashi			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Convicted by jury	80 months	no	**80 months** - 50:1705 (Conspiracy, via 18:371) (2 counts, though only one relating to terrorism as noted in the "charge" column), 60 months each count; 50:1705 (11 counts), 80 months each count; 18:1001(a)(3)(Conspiracy), 60 months; 18:1001(a)(3) (2 counts), 80 months and 60 months; 18:1957, 80 months; 18:1956(h), 80 months; 18:1956(a) (9 counts), 80 months each count; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient		Sentence	Training Allegations?	Total Sentence
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	60 months		
Basman Elashi			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Acquitted by jury (**9 counts**); Convicted by jury (**1 count**)	80 months	no	**80 months** - 50:1705 (Conspiracy, via 18:371) (2 counts, though only one relating to terrorism as noted in the "charge" column), 60 months each count; 50:1705 (8 counts) 80 months each count; 18:1001(a)(3) (12 counts), 60 months each count; 18:1001(a)(3) (Conspiracy), 60 months; 18:1957, 80 months; 18:1956 (Conspiracy), 80 months; to run concurrently
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	60 months		
Nadia Elashi			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a	no	n/a
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a		
Mousa Abu Marzook			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a	no	n/a
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a		
Infocom Corporation			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Convicted by jury	n/a	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	n/a		
John Walker Lindh	02-CR-37	E.D. Va.	1705	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**240 months** - 18:844(h)(2), 120 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; to run consecutively
			1705 (Conspiracy, via 31 CFR 595.205)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
			1705	Personnel	Taliban	Guilty Plea	120 months		
			1705 (Conspiracy, via 31 CFR 595.205)	Personnel	Taliban	Dismissed as part of plea	n/a		
Earnest James Ujaama	02-CR-283	W.D. Wash.	1705 (Conspiracy, via 31 CFR 545.206(b))	Fundraising Currency Computer Services	Taliban	Guilty Plea	24 months	yes (military training)	**24 months** - 50:1705 (Conspiracy, via 31 CFR 545.206(b)), 24 months
Jeffrey Leon Battle	02-CR-399	D. Or.	1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Patrice Lumumba Ford			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Ahmed Ibrahim Bilal			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Guilty Plea	120 months	yes (military training and attempt to fight)	**120 months** - 50:1705 (Conspiracy, via 31 CFR 595.205, 120 months; 18:924(c), (o), 120 months; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Muhammad Ibrahim Bilal			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Guilty Plea	96 months	yes (military training and attempt to fight)	**96 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 96 months; 18:924(c), (o), 96 months; to run concurrently
Habis Abdulla Al Saoub			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a	yes (military training and attempt to fight)	n/a
October Martinique Lewis			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed as part of plea	n/a	no	**36 months** - 18:1956 (6 counts), 36 months each count; to run concurrently
Maher Mofeid Hawash			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Guilty Plea	84 months	yes (military training and attempt to fight)	**84 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 84 months
Faysal Galab	02-CR-214	W.D.N.Y.	1705	Purchasing Uniforms Attending Training Camps	Al-Qaeda Usama bin Laden	Guilty Plea	84 months	yes (military training)	**84 months** - 50:1705, 84 months
Sami Amin al-Arian	03-CR-77	M.D. Fla.	1705 (Conspiracy, via 18 USC 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Hung Jury; guilty plea	57 months	no	**57 months** - 50:1705 (Conspiracy, via 18: 371), 57 months

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ramadan Abdullah Shallah			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Pending (not in custody)	n/a	no	n/a
Bashir Musa Mohammed Nafi			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Pending (not in custody)	n/a	no	n/a
Sameeh Hammoudeh			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Acquitted by jury	n/a	no	n/a
Ghassan Zayed Ballut			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Acquitted by jury	n/a	no	n/a
Mazen Al-Najjar			1705 (Conspiracy, via 18 USC 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Pending (not in custody)	n/a	no	n/a
Randall Todd Royer	03-CR-296	E.D. Va.	1705 (Conspiracy, via CFR)	Personnel	Taliban	Dismissed as part of plea	n/a	yes (military training)	**240 months** - 18:924(c)(2) and 18:3238, 120 months; 18:844(h)(2) and 18:3238, 120 months; to run consecutively

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Masoud Ahmad Khan			1705 (Conspiracy, via CFR)	Personnel	Taliban	Convicted by bench trial	120 months	yes (military training)	**Life** - 18:371 (Conspiracy to violate inter alia, 18:960, 18:2390), 60 months; 18:2384, 120 months; 50:1705, 120 months, 18:2339A (Conspiracy), 120 months; 18:924(o), 120 months; 18:924(c) (three counts), 120 months, 300 months, and life in prison; first five counts concurrent, other counts to follow consecutively
Sabri Benkhala			1705 (Conspiracy, via CFR)	Personnel	Taliban	Acquitted by bench trial	n/a	yes (military training)	n/a
Uzair Paracha	03-CR-1197	S.D.N.Y.	1705	Financial Services Document Fraud	Al-Qaeda	Convicted by jury	120 months	no	**360 months** - 18:2339B (Conspiracy), 180 months; 18:2339B, 180 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; 50:1705, 120 months; 18:1028(a)(7), (b)(4), 300 months; last ten years of first four counts to run concurrently with 18:1028 count, final 15 years of 18:1028 count to run consecutively to that
			1705 (Conspiracy, via 31 CFR 595.205)	Financial Services Document Fraud	Al-Qaeda	Convicted by jury	120 months		
Mohammed Junaid Babar	04-CR-528	S.D.N.Y.	1705	Night-Vision Equipment	Al-Qaeda	Guilty Plea	Unknown	no	Unknown

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Holy Land Found'n for Relief and Development	04-CR-240	N.D. Tex.	1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Shukri Abu Baker			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Mohammed El-Mezain			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Ghassan Elashi			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Haitham Maghawri			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		
Akram Mishal			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Mufid Abdulqader			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Abdulrahman Odeh			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Ali al-Timimi	04-CR-385	E.D. Va.	1705 (Attempt)	Personnel	Taliban	Convicted by jury	120 months	no	**Life** - 18:924(n), 121 months; 18:373, 121 months; 18:2384, 121 months; 50:1705, 120 months; 50:1705 and 18:2, 120 months; 18:371, 60 months; 18:924(c), 360 months; 18:924(c), Life; 18:844(h)(2) (2 counts), 120 months and 240 months; first 6 counts concurrent, all other counts to be served consecutively after 121 months
			1705 and 2 (Inducing attempt)	Personnel	Taliban	Convicted by jury	120 months		
Mark Robert Walker	04-CR-2701	W.D. Tex.	1705 (attempt) (**2 counts**)	Night-Vision Equipment Bullet-Proof Vests	Al-Ittihad Al-Islamiya	Guilty Plea; other count dismissed as part of plea	8 1/2 months (**1 count**)	no	**8.5 months** - 50:1705, 8.5 months

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ahmed Omar Abu Ali	05-CR-53	E.D. Va.	1705 (**2 counts**)	Personnel Money	Al-Qaeda	Convicted by jury	120 months	yes (military and explosives training)	**360 months** - 18:2339B (Conspiracy), 120 months; 18:2339B, 120 months; 18:2339A (Conspiracy), 120 months; 18:2339A, 120 months; 50:1705 (2 counts), 120 months each count; 18:1752(d), 120 months; 49:46502, 240 months; 18:32, 240 months; first seven counts concurrent, followed by the final two counts concurrent to each other
Naji Antoine Abi Khalil	05-CR-200 04-CR-573	E.D. Ark. S.D.N.Y	1705 (Attempt)	Night-Vision Equipment	Hezbollah	Guilty Plea	60 months	no	**60 months** - 18:2339B, 57 months; 50:1705 (all types, all counts) 60 months on each; to run concurrently
Mustafa Kamel Mustafa	04-CR-356	S.D.N.Y.	1705 (Conspiracy, via 31 CFR 545.206(b))	Fundraising Personnel Computer Services Money	Taliban	Pending (not in custody)	n/a	no	n/a
Syed Hashmi	06-CR-442	S.D.N.Y.	1705 (Conspiracy, via 31 CFR 595.205)	Military Equipment	Al-Qaeda	Pending	n/a	no	n/a
			1705	Military Equipment	Al-Qaeda	Pending	n/a		
Kobie Diallo Williams	06-CR-421	S.D. Tex.	1705 (Conspiracy, via 18 USC 371)	Money Personnel	Taliban	Guilty Plea	Pending	yes (firearms training)	n/a
Adnan Mirza			1705 (Conspiracy, via 18 USC 371)	Money Personnel	Taliban	Pending	n/a	yes (firearms training)	n/a

Appendix B
18 U.S.C. § 2339B Prosecutions (9/01-7/07)

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ahmed Abdel Sattar	02-CR-395	S.D.N.Y.	2339B	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a	no	**288 months** - 18:371, 60 months; 18:956(a)(1), (a)(2)(A), 288 months; 18:373, 240 months; to run concurrently
			2339B (Conspiracy)	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a		
Yassir Al-Sirri			2339B	Personnel, Communications, Expertise	Egyptian Islamic Group	Pending (not in custody)	n/a		n/a
			2339B (Conspiracy)	Personnel, Communications, Expertise	Egyptian Islamic Group	Pending (not in custody)	n/a		
Lynne Stewart			2339B	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a	no	**28 months** - 18:2339A (Conspiracy, via 18:371), 28 months; 18:2339A, 28 months; 18:1001 (2 counts), 28 months each count; to run concurrently
			2339B (Conspiracy)	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a		
Mohammed Yousry			2339B	Personnel	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a	no	**20 months** - 18:371, 20 months; 18:2339A (Conspiracy, via 18:371), 20 months; 18:2339A, 20 months; to run concurrently
			23339B (Conspiracy)	Personnel	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
John Walker Lindh	02-CR-37	E.D. Va.	2339B	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**240 months** - 18:844(h)(2), 120 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; to run consecutively
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
			2339B	Personnel	Harakat ul-Mujahideen	Dismissed as part of plea	n/a		
			2339B (Conspiracy)	Personnel	Harakat ul-Mujahideen	Dismissed as part of plea	n/a		
Earnest James Ujaama	02-CR-283	W.D. Wash.	2339B (Conspiracy)	Training, Facilities, Computer Services, Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training)	**24 months** - 50:1705 (Conspiracy, via 31 CFR 545.206(b)), 24 months
Jaber Elbaneh	02-MJ-111	W.D.N.Y.	2339B	Personnel	Al-Qaeda	Pending (not in custody)	n/a	yes (military training)	n/a
Jeffrey Leon Battle	02-CR-399	D. Or.	2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Patrice Lumumba Ford			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Ahmed Ibrahim Bilal			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**120 months** - 50:1705 (Conspiracy, via 31 CFR 595.205, 120 months; 18:924(c), (o), 120 months; to run concurrently
Muhammad Ibrahim Bilal			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**96 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 96 months; 18:924(c), (o), 96 months; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Habis Abdulla Al Saoub			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a	yes (military training and attempt to fight)	n/a
October Martinique Lewis			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	no	**36 months** - 18:1956 (6 counts), 36 months each count; to run concurrently
Maher Mofeid Hawash			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**84 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 84 months
Yahya Goba	02-CR-214	W.D.N.Y.	2339B	Personnel	Al-Qaeda	Guilty Plea	120 months	yes (military training)	**120 months** - 18:2339B, 120 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Shafal Mosed			2339B	Personnel	Al-Qaeda	Guilty Plea	96 months	yes (military training)	**96 months** - 18:2339B, 96 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Yasein Taher			2339B	Personnel	Al-Qaeda	Guilty Plea	96 months	yes (military training)	**96 months** - 18:2339B, 96 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Faysal Galab			2339B	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training)	**84 months** - 50:1705, 84 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Mukhtar al-Bakri			2339B	Personnel	Al-Qaeda	Guilty Plea	120 months	yes (military training)	120 months - 18:2339B, 120 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Sahim Alwan			2339B	Personnel	Al-Qaeda	Guilty Plea	114 months	yes (military training)	**114 months** - 18:2339B, 114 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Syed Mustajab Shah	02-CR-2912	S.D. Cal.	2339B (Conspiracy)	Missiles	Al-Qaeda	Guilty Plea	180 months	no	**225 months** - 21:846, 841(a), 225 months; 18:2339B, 180 months; to run concurrently
Muhammed Abid Afridi			2339B (Conspiracy)	Missiles	Al-Qaeda	Guilty Plea	57 months	no	**57 months** - 21:846, 841(a), 57 months; 18:2339B, 57 months; to run concurrently
Ilyas Ali			2339B (Conspiracy)	Missiles	Al-Qaeda	Guilty Plea	57 months	no	**57 months** - 21:846, 841(a), 57 months; 18:2339B, 57 months; to run concurrently
Carlos Ali Romero Varela	02-CR-714	S.D. Tex.	2339B	Weapons	AUC	Guilty Plea	Pending	no	Pending
Uwe Jensen			2339B	Weapons	AUC	Guilty Plea	168 months	no	**168 months** - 18:2339B, 168 months; 21:846 (Conspiracy), 168 months; to run concurrently
Cesar Lopez (aka Elkin Alberto Arroyav Ruiz)			2339B	Weapons	AUC	Guilty Plea	180 months	yes (military training)	**180 months** - 18:2339B, 180 months
"Commandante Emilio" (aka Edgar Fernando Blanco Puerta)			2339B	Weapons	AUC	Guilty Plea	180 months	no	**Life** - 18:2339B, 180 months; 21:846 (Conspiracy), Life; to run concurrently
Javier Conrado Alvarez Correa			2339B	Weapons	AUC	Pending (not in custody)	n/a	no	n/a
Diego Alberto Ruiz Arroyave			2339B	Weapons	AUC	Pending (not in custody)	n/a	no	n/a
Hassan Moussa Makki	03-CR-80079	E.D. Mich.	2339B	Money	Hezbollah	Guilty Plea	57 months	no	**57 months** - 18:2339B, 57 months; 18:1962, 57 months; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Sami Omar al-Hussayen	03-CR-48	D. Idaho	2339B (Conspiracy)	Expertise, Comm Equip, Money, Recruitment	HAMAS	Acquitted by jury	n/a	no	n/a
Sami Amin al-Arian	03-CR-77	M.D. Fla.	2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Hung Jury; Dismissed as part of plea	n/a	no	**57 months** - 50:1705 (Conspiracy, via 18: 371), 57 months
			2339B (**3 counts**)	Money	PIJ	Acquitted by jury	n/a	no	
Ramadan Abdullah Shallah			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a
Bashir Musa Mohammed Nafi			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a
Sameeh Hammoudeh			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Acquitted by jury	n/a	no	n/a
Abd al Aziz Awda			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a
Ghassan Zayed Ballut			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Acquitted by jury	n/a	no	n/a
			2339B (**9 counts**)	Money	PIJ	Acquitted by jury (9 counts)	n/a		
Hatim Naji Fariz			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Hung Jury; Dismissed as part of plea	n/a	no	**37 months** - 50:1705 (Conspiracy, via 18:371), 37 months
			2339B (**11 counts**)	Money	PIJ	Acquitted by Jury (11 counts)	n/a		
Mazen Al-Najjar			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Tomas Molina Caracas	03-CR-20261	S.D. Fla.	2339B (Conspiracy)	Weapons	FARC	Pending (not in custody)	n/a	yes (FARC Commander)	n/a
			2339B (**5 counts**)	Weapons	FARC	Pending (not in custody)	n/a		
Jose Luis Aybar-Cancho			2339B (Conspiracy)	Weapons	FARC	Pending (not in custody)	n/a	no	n/a
			2339B (**5 counts**)	Weapons	FARC	Pending (not in custody)	n/a		
Luis Frank Aybar-Cancho			2339B (Conspiracy)	Weapons	FARC	Pending (not in custody)	n/a	no	n/a
			2339B (**5 counts**)	Weapons	FARC	Pending (not in custody)	n/a		
Iyman Faris	03-CR-189	E.D. Va.	2339B	Personnel, Expertise	Al-Qaeda	Guilty Plea	180 months	yes (military training)	**240 months** - 18:2339B (Conspiracy), 60 months; 18:2339B, 120 months; to run consecutively
			2339B (Conspiracy)	Personnel, Expertise	Al-Qaeda	Guilty Plea	60 months		
Fanny Cecilia Barrera-De Amaris	03-CR-182	S.D. Tex.	2339B (Conspiracy)	Weapons	AUC	Guilty Plea	61 months	no	**61 months** - 18:2339B (Conspiracy), 61 months
Carlos Adolfo Romero Panchano			2339B (Conspiracy)	Weapons	AUC	Guilty Plea	36 months	no	**36 months** - 18:2339B (Conspiracy), 36 months)
Randall Todd Royer	03-CR-296	E.D. Va.	2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training)	**240 months** - 18:924(c)(2) and 18:3238, 120 months; 18:844(h)(2) and 18:3238, 120 months; to run consecutively

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Masoud Ahmad Khan			2339B (Conspiracy)	Personnel	Al-Qaeda	Acquitted by bench trial	n/a	yes (military training)	**Life** - 18:371 (Conspiracy to violate inter alia, 18:960, 18:2390), 60 months; 18:2384, 120 months; 50:1705, 120 months, 18:2339A (Conspiracy), 120 months; 18:924(o), 120 months; 18:924(c) (three counts), 120 months, 300 months, and life in prison; first five counts concurrent, other counts to follow consecutively
Adriana Gladys Mora	03-CR-352	S.D. Tex.	2339B (Conspiracy)	Weapons	AUC	Guilty Plea	120 months	no	**120 months** - 18:2339B (Conspiracy), 120 months; 21:841 (Conspiracy), 120 months; to run concurrently
Uzair Paracha	03-CR-1197	S.D.N.Y.	2339B (Conspiracy)	Financial Services, Document Fraud	Al-Qaeda	Convicted by jury	180 months	no	**360 months** - 18:2339B (Conspiracy), 180 months; 18:2339B, 180 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; 50:1705, 120 months; 18:1028(a)(7), (b)(4), 300 months; last ten years of first four counts to run concurrently with 18:1028 count, final 15 years of 18:1028 count to run consecutively to that
			2339B	Financial Services, Document Fraud	Al-Qaeda	Convicted by jury	180 months		
Muhammad Hamid Khalil Salah	03-CR-978	N.D. Ill.	2339B	Money, Personnel	HAMAS	Acquitted by jury	n/a	no	**21 months** - 18:1503, 21 months

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Mohammed Ali Hasan al-Moayad	03-CR-1322	E.D.N.Y.	2339B	Money	Al-Qaeda	Acquitted by jury	n/a	no	**900 months** - 18:2339B (all types, all counts), 180 months on each count; to run consecutively
			2339B (Attempt)	Money	Al-Qaeda	Convicted by jury	180 months		
			2339B (Conspiracy)	Money	Al-Qaeda	Convicted by jury	180 months		
			2339B	Money	HAMAS	Convicted by jury	180 months		
			2339B (Attempt)	Money	HAMAS	Convicted by jury	180 months		
			2339B (Conspiracy)	Money	HAMAS	Convicted by jury	180 months		
Mohammed Moshen Yahya Zayed			2339B (Attempt)	Money	Al-Qaeda	Acquitted by jury	n/a	no	**540 months** - 18:2339B (all types, all counts), 180 months on each count; to run consecutively
			2339B (Conspiracy)	Money	Al-Qaeda	Convicted by jury	180 months		
			2339B (Attempt)	Money	HAMAS	Convicted by jury	180 months		
			2339B (Conspiracy)	Money	HAMAS	Convicted by jury	180 months		
Mahmoud Youssef Kourani	03-CR-81030	E.D. Mich.	2339B (Conspiracy)	Money, Personnel	Hezbollah	Guilty Plea	54 months	yes (military training)	**54 months** - 18:2339B (Conspiracy), 54 months
Mohammed Abdullah Warsame	04-CR-029	D. Minn.	2339B	Unknown	Al-Qaeda	Pending	n/a	yes (military training)	n/a
			2339B (Conspiracy)	Unknown	Al-Qaeda	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Mohammed Junaid Babar	04-CR-528	S.D.N.Y.	2339B (**2 counts**)	Night-Vision Equipment	Al-Qaeda	Guilty Plea	Unknown	no	Unknown
Nuradin Abdi	04-CR-88	S.D. Ohio	2339B (Conspiracy)	Training	Al-Qaeda	Dismissed as part of plea to other charges	n/a	yes (military training)	n/a
Holy Land Found'n for Relief and Development	04-CR-240	N.D. Tex.	2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**11 Counts**)	Money	HAMAS	Pending	n/a		
Shukri Abu Baker			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Mohammed El-Mezain			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Ghassan Elashi			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Haitham Maghawri			2339B (Conspiracy)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		
Akram Mishal			2339B (Conspiracy)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		
Mufid Abdulqader			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Abdulrahman Odeh			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Yassin Muhiddin Aref	04-CR-402	N.D.N.Y.	2339B (Conspiracy)	Missiles	Jaish-e-Mohammed	Convicted by jury	180 months	no	**180 months** - 18:1956(a)(3)(B) (2 counts) and 18:1956(h), 151 months; 18:2339A and B (Conspiracy), 180 months; 18:2339A and 18:2339B (2 counts of each), 180 months; 18:1001, 6 months; all counts to run concurrent
			2339B (Attempt) (**7 counts**)	Financial Services	Jaish-e-Mohammed	Convicted by jury	180 months		
Mohammed Mosharref Hossain			2339B (Conspiracy)	Missiles	Jaish-e-Mohammed	Convicted by jury	180 months	no	**180 months** - 18:1956(h) and 18:1956(a)(3)(B) (11 counts), 151 months each count; 18:2339A (all types all counts), 180 months each count; 18:2339B (all types, all counts), 180 months each count); all counts to run concurrent
			2339B (Attempt) (**7 counts**)	Financial Services	Jaish-e-Mohammed	Convicted by jury	180 months		
Carlos E. Gamarra-Murillo	04-CR-349	M.D. Fla.	2339B (Attempt)	Weapons	FARC	Guilty Plea	180 months	no	**300 months** - 22:2778(a), (b)(1)(A)(ii)(I)-(III), (c) and 22 CFR 121.1, 123.1, 127.1, 127.3, 129.1-129.3, 120 months; 18:2339B(Attempt), 180 months; to run consecutively

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ahmed Omar Abu Ali	05-CR-53	E.D. Va.	2339B (Conspiracy)	Personnel	Al-Qaeda	Convicted by jury	120 months	yes (military and explosives training)	**360 months** - 18:2339B (Conspiracy), 120 months; 18:2339B, 120 months; 18:2339A (Conspiracy), 120 months; 18:2339A, 120 months; 50:1705 (2 counts), 120 months each count; 18:1752(d), 120 months; 49:46502, 240 months; 18:32, 240 months; first seven counts concurrent, followed by the final two counts concurrent to each other
			2339B	Personnel	Al-Qaeda	Convicted by jury	120 months		
Lamont Ranson	05-CR-16	S.D. Miss.	2339B (Conspiracy)	Fake ID's	Abu Sayyaf	Guilty Plea	29 months	no	**29 months** - 18:2339B (Conspiracy), 29 months
			2339B (Attempt)	Fake ID's	Abu Sayyaf	Dismissed as part of plea to Other Charges	n/a		
Cedric Carpenter			2339B (Conspiracy)	Fake ID's	Abu Sayyaf	Guilty Plea	68 months	no	**68 months** - 18:2339B, 68 months; 18:922(g)(1), 60 months; to run concurrently
			2339B (Attempt)	Fake ID's	Abu Sayyaf	Dismissed as part of plea to Other Charges	n/a		
Tarik Ibn Osman Shah	05-CR-673	S.D.N.Y.	2339B (Conspiracy)	Training, Medical Expertise, Personnel	Al-Qaeda	Guilty Plea	Pending	yes (jihad camp trainer)	Pending
			2339B (Attempt)	Training, Medical Expertise, Personnel	Al-Qaeda	Guilty Plea	Pending		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Rafiq Sabir			2339B (Conspiracy)	Training, Medical Expertise, Personnel	Al-Qaeda	Convicted by jury	Pending	no	Pending
			2339B (Attempt)	Training, Medical Expertise, Personnel	Al-Qaeda	Convicted by jury	Pending		
Mahmud Faruq Brent			2339B (Conspiracy)	Personnel	Lashkar-e-Taiba	Guilty Plea	180 months	yes (military training)	180 months - 18:2339B (Conspiracy), 180 months
			2339B (Attempt)	Personnel	Lashkar-e-Taiba	Dismissed as part of plea to Other Charges	n/a		
Naji Antoine Abi Khalil	05-CR-200 04-CR-573	E.D. Ark. S.D.N.Y	2339B (Attempt)	Night-Vision Equipment	Hezbollah	Guilty Plea	57 months	no	**60 months** - 18:2339B, 57 months; 50:1705(all types, all counts) 60 months on each; to run concurrently
Arwah Jaber	05-CR-50030	W.D. Ark.	2339B (Attempt)	Personnel	PIJ	Acquitted by jury	n/a	no	**15 months** - 42:408(a)(7)(B) (2 counts), 15 months; 18:1015(a), 15 months; 18:1542, 15 months; 18:1425, 15 months; all to run concurrently
Mustafa Kamel Mustafa	04-CR-356	S.D.N.Y.	2339B	Training	Al-Qaeda	Pending (not in custody)	n/a	no	n/a
			2339B (Conspiracy)	Training	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Attempt)	Unspecified	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Conspiracy)	Money	Al-Qaeda	Pending (not in custody)	n/a		
Oussama Kassir			2339B (Attempt)	Training	Al-Qaeda	Pending (not in custody)	n/a	yes (military training)	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
			2339B (Attempt	Computer Services	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Conspiracy)	Training, Personnel	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Conspiracy)	Computer Services	Al-Qaeda	Pending (not in custody)	n/a		
Haroon Rashid Aswat			2339B (Conspiracy)	Training, Personnel	Al-Qaeda	Pending (not in custody)	n/a	yes (military training)	n/a
			2339B (Attempt)	Training, Personnel	Al-Qaeda	Pending (not in custody)	n/a		
Ali Asad Chandia	05-CR-401	E.D. Va.	2339B (Conspiracy)	Equipment, Computer Services	Lashkar-e-Taiba	Convicted by jury	180 months	no	**180 months** - 18:2339A (Conspiracy), 60 months; 18:2339B (Conspiracy), 180 months; 18:2339B, 180 months; all concurrent
			2339B	Equipment, Computer Services	Lashkar-e-Taiba	Convicted by jury	180 months		
Mohammed Ajmal Khan			2339B (Conspiracy)	Equipment	Lashkar-e-Taiba	Pending (not in custody)	n/a	no	n/a
			2339B	Equipment	Lashkar-e-Taiba	Pending (not in custody)	n/a		
Adam Gadahn	05-CR-254	C.D. Cal.	2339B	Personnel, Services	Al-Qaeda	Pending (not in Custody)	n/a	no	n/a
Michael Curtis Reynolds	05-CR-493	M.D. Pa.	2339B (Attempt)	Property, Services, Personnel, Training, Expert Advice	Al-Qaeda	Convicted by jury	Pending	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Victor Daniel Salamanca	06-CR-20001	S.D. Fla.	2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (not in custody)	n/a	no	n/a
			2339B (Attempt) (**5 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (not in custody)	n/a		
Luis Alfredo Daza Morales			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Jalal Sadaat Moheisen			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Jose Tito Libio Ulloa Melo			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Julio Cesar Lopez			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Bernardo Valdes Londono			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (Not in Custody)	n/a	no	n/a
			2339B (Attempt)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (Not in Custody)	n/a		
Carmen Maria Ponton Caro			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Syed Haris Ahmed	06-CR-147	N.D. Ga.	2339B (Conspiracy)	Personnel	Lashkar-e-Tayyiba	Pending	n/a	yes (military training)	n/a
			2339B (Attempt)	Personnel	Lashkar-e-Tayyiba	Pending	n/a		
Ehsanul Islam Sadequee			2339B (Conspiracy)	Personnel	Lashkar-e-Tayyiba	Pending	n/a	yes (military training)	n/a
			2339B (Attempt)	Personnel	Lashkar-e-Tayyiba	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Syed Hashmi	06-CR-442	S.D.N.Y.	2339B (Conspiracy)	Military Equipment, Currency	Al-Qaeda	Pending	n/a	no	n/a
			2339B	Military Equipment, Currency	Al-Qaeda	Pending	n/a		
Mohamed Shorbagi	06-CR-62	N.D. Ga.	2339B (Conspiracy)	Money	HAMAS	Guilty Plea	92 months	no	**92 months** - 18:2339B (Conspiracy, 92 months)
Sathajhan Sarachandran	06-CR-615	E.D.N.Y.	2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Piratheepan Nadarajah			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending (Not in Custody)	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending (Not in Custody)	n/a		
Sahilal Sabaratnam			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Thiruthanikan Thanigasalam			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Nadarasa Yogarasa			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Haniffa bin Osman	06-CR-416	D. Md.	2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	no	Pending
Haji Subandi			2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	no	Pending
Erick Wotulo			2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	yes (former military officer in Indonesian armed forces)	Pending
			2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	no	Pending
Zeinab Taleb-Jedi	06-CR-652	E.D.N.Y.	2339B	Personnel	Mujahedin-e Khalq	Pending	n/a	no	n/a
Javed Iqbal	06-CR-1054	S.D.N.Y.	2339B (Conspiracy) (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a	no	n/a
			2339B (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a		
Saleh Elahwal			2339B (Conspiracy) (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a	no	n/a
			2339B (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Maria Corredor Ibague (aka Boyaco)	06-CR-344	D.D.C.	2339B (Conspiracy)	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a	no	n/a
			2339B	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a		
Edilma Morales Loaiza (aka La Negra)			2339B (Conspiracy)	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a	no	n/a
			2339B	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a		
Karunakaran Kandasamy	07-MJ-507	E.D.N.Y.	2339B	Fundraising, Property, Personnel	LTTE	Pending	n/a	no	n/a

Robert Chesney

Bobby Chesney is an associate professor at Wake Forest University School of Law specializing in national security law. His scholarship focuses on the difficulty of calibrating a reasonable and effective legal response to the threat posed by terrorism, with reference both to international and domestic legal frameworks. He has published articles on topics including the post-9/11 application of federal criminal laws relating to terrorism, the detention and repatriation of Guantanamo detainees, and the impact of the state secrets privilege on national security litigation. His latest article (co-authored with Jack Goldsmith and forthcoming in Stanford Law Review) compares post-9/11 developments in the criminal justice system to related developments in the military detention system, and discusses prospects for reform of the latter. In the classroom, Professor Chesney teaches constitutional law, national security law, evidence, and civil procedure, as well as a seminar examining legal issues associated with terrorism.

Professor Chesney is a past chair of the Section on National Security Law of the Association of American Law Schools; an associate member of the Intelligence Science Board (an advisory body serving the Office of the Director of National Intelligence); the book review editor of the Journal of National Security Law and Policy; the founder and moderator of "nationalsecuritylaw," (a listserv for professors and professionals); and the former editor of the American Bar Association Standing Committee on Law and National Security's *National Security Law Report*. He has received law of war training as a civilian guest of the Judge Advocate General's Legal Center and School, and has visited the detention facility at Guantanamo on two occasions. Professor Chesney is a member of the American Law Institute.

Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis

Bruce A. MacFarlane, Q.C.
Professional Affiliate
Faculty of Law University of Manitoba

Table of Contents

PART I

Introduction and Issue Definition

The proliferation of global terror has prompted many countries to re-evaluate the means by which they should respond to specific and often horrific terrorist acts committed within their jurisdiction. The tools available to government in the development of a counterterrorism strategy are multidimensional: military and diplomatic action, intelligence gathering, economic retaliation and law enforcement through domestic criminal justice systems.

In recent years, some authorities have argued, forcefully, that the intersection of international terrorism with Anglo-based criminal justice systems develops a pressure point on the legal landscape that is simply unacceptable and not in the overall public interest.[1] They argue that a focused criminal law response leaves too many militants in place, and encourages the notion that a nation can be attacked with relative impunity.[2] They also argue that fair trial requirements such as disclosure of information to the defence actually feeds into the agenda of militant groups intent on overthrowing democratic regimes, and in this sense "(criminal) trials don't work for terrorism. They work for terrorists".[3]

---

*Bruce A. MacFarlane, Q.C., presently a Professional Affiliate at the Faculty of Law, University of Manitoba and formerly the Deputy Attorney General for the Province of Manitoba (1993-2005). I wish to thank Professors Michael Code and Kent Roach of the University of Toronto for the comments they provided to me in relation to an earlier draft of this paper. I have also benefited from a discussion of the issue amongst Directors of Public Prosecution at the bi-annual meeting of Heads of Prosecution Agencies in the Commonwealth at Montreal, Quebec in July, 2007. I wish as well to extend my appreciation to Christina Szurlej, a student at the University of Winnipeg, for the research and assistance she provided to me. In the result, of course, I alone am responsible for the views expressed in this paper. Those views may or may not represent those of the Commission or the Commissioner.

1 Andrew C. McCarthy, "Terrorism on Trial: the Trial of Al Qaeda", 36 Case W. Res. J. Int'l L.513 (2005); Amos Guiora, "Targeted Killing as Active Self-Defence", Case W. Res. J. Int'l L.319 (2005); see as well Mark A. Drumbl, "'Lesser Evils' on the War on Terrorism", Case W. Res. J. Int'l L.335 (2005); The use of law as a weapon against terrorism in the future was examined in considerable detail at a day-long symposium involving a group of high-level United Nations officers, former US government officials, noted prosecutors and defence counsel, and prominent journalists and scholars. It was held at the Case Western Reserve University School of Law on October 8, 2004, and was entitled "Terrorism on Trial". For an excellent summary of the issues and the symposium, see Michael P. Scharf, "Terrorism on Trial, 36 Case Res. J. Int'l 287 (2005).

2 McCarthy, *ibid*, at page 518 and see Sharf, *ibid,* at page 289, where he notes that the 9/11 attack "triggered a seismic shift in the US approach to dealing with terrorists".

3 McCarthy, *ibid*, at page 521

The contrary view is equally compelling. While resort to the criminal law is not as blunt a form of violence as the use of military force, the law and the criminal justice system in Canada represent the institutionalization and legitimization of coercive power by the state. As Mark A. Drumbl, associate professor of law at the Washington and Lee University noted in 2004:[4]

> Let us not underestimate the force of the criminal law to neutralize, deter, punish and stigmatize. Terrorism is an illegitimate use of force, but it also is a crime, and there are many compelling reasons for casting it as such in full complement to availing ourselves of military means to combat it when these are necessary in self-defence, or authorized by the United Nations Security Counsel, or required to track down and incapacitate terrorist war criminals.

Conceptualizing the use of force and resort to the court system as mutually exclusive response mechanisms is clearly based on a false premise. Both can be pursued separately, or in tandem.

In Canada, the hydraulic pressure of public opinion[5] in the wake of the 9/11 attack on the United States prompted the federal government to enact the *Anti-Terrorism Act*.[6] That legislation provides for a number of terrorism-related offences such as financing terrorist activity,[7] using or possessing property for terrorist purposes,[8] knowingly participating in a terrorist group to facilitate terrorist activities,[9] and knowingly facilitating a terrorist activity[10]. Terrorism, however, is multifaceted in nature and a "terrorist trial" could, as in the case of Air India, involve charges of murder, as well as allegations of treason, genocide, kidnapping, high jacking, offences relating to explosives or even other offences related to common criminal activities.

---

4 Mark A. Drumbl, *supra*, at page 335-6
5 To use that wonderful phrase coined by Justice Holmes, dissenting, in *Northern Securities Co. v US*, 193 US, 197 (1904) at page 400-1, more recently referred to in *Payne v Tennessee* 501 US 808 (1991), per Stevens J., Blackman J. concurring, both in dissent.
6 Part II.1 of the *Criminal Code*, enacted by SC 2001, c.41 sec. 4
7 *Ibid* sec.83.2
8 *Ibid* sec 83.4
9 *Ibid* sec 83.18
10 *Ibid* sec 83.19

The tension between terrorism and the criminal law process has also prompted some to suggest that the structure of traditional Anglo-Canadian trials—including the role of the trial judge and jury— ought to be changed to reflect the reality of often lengthy and complex proceedings.[11]

That is the issue with which this paper is concerned. Should the institutional underpinning or "structural" elements of the trial process in Canada be changed to meet the tremendous challenges posed by terrorist trials? Can we provide trials for accused terrorists that comport with Canadian standards of justice, notwithstanding the complex challenges inherent when national security is at risk?[12] For instance, should juries as we presently know them continue in these types of cases? Or should their structure be changed? Should the jury reduce in size, or be augmented through "alternates"? Should we empanel "special juries" with expertise in the area, or continue with a random selection of jurors based on neutral criteria?

Trial by judge and jury or judge alone traditionally sees a single judge hearing the case. Should that change? Should we look at a panel of judges, with no jury, or should we consider an alternate judge sitting with the judge and jury?

Some have argued that the real problem here is the emergence of mega-trials—and complex proceedings— with multiple defendants, many counts, and a witness list that almost guarantees that the trial will last for many months, if not years. Are we conceivably looking at some cases that may never reach a verdict because they collapse under their own weight?

Before considering these issues, I propose to set the stage by analyzing a number of underlying considerations: if we are considering critical changes to our criminal justice system, what are the fundamental principles against which such changes should be measured? What types of terrorist trials have arisen in the past decade or two, and what structural issues have they had in common, if any? What trial structures have existed in

---

11 In additional to lengthy and complex proceedings in court, the criminal investigation by police, intelligence agencies and forensic scientists is often very lengthy and equally complex As Scharf, *supra* noted at page 287 the Lockerbie investigation lasted three years. The Air India investigation spanned 20 years.

12 For a helpful discussion of this issue, see McCarthy, *supra*, and Scharf, *supra*

the Anglo-Canadian tradition since this country's adoption of the British adversarial model during the 18th and 19th centuries, and what variations have been accepted in law or in practice since then? Moreover, are we raising an increased risk of wrongful conviction if we alter fundamental structures that have been in place for centuries?

PART II

Fundamental Principles Underlying This Study

The issues raised in this study have been examined against a background of certain principles or values which I regard as fundamental. These principles have, in particular, been taken into account when deciding whether there is a need for change, and in evaluating the merit of various proposals for reform. As these values have played an important part in this study, I thought it critical to articulate them at the outset so that the views and opinions later expressed can be better understood and assessed.[13]

Seven Principles Underlying this Study

The Pursuit of Truth

At an earlier stage in Canada's history, appellate courts emphasized that a criminal prosecution is not a contest between individuals, "but is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth".[14] In recent years, this "single view" has been nuanced to reflect the need for a fair trial.

Justice L'Heureux-Dube, in dissent in 1989, observed that a jury is involved in a "fact-finding mission". She continued: "once the evidence has been allowed, it is then incumbent upon the jury to attach weight or probative value to the various elements adduced at trial. The judge assists the jury by determining the extent to which the evidence can be confronted by the opposing party, which, in the case of testimonial evidence, often takes the form of cross-examination as to credibility". She concluded by observing that "a delicate balance must be struck between the fundamental interests at stake given that arriving at the truth remains a central premise of the administration of criminal justice. Such interests include, among others, the extent to which the credibility of witnesses

---

13 These principles have been drawn largely from the excellent work of the Law Reform Commission of New South Wales in Australia: Report 48 (1986) "Criminal Procedure, the Jury in a Criminal Trial", cited at http://www.lawlink.nsw.gov.au/lrc.msf/pages/r48toc

14 *R v Chamandy* (1934), 61 CCC 224 (Ont.C.A.) at 227

may be impeached as against the possible risks of encroachment upon of the fairness of the trial, including the accused person's right to present a full defence, and the degree of prejudice suffered by the accused."[15]

The Supreme Court of Canada spoke more authoritatively on the purpose of a criminal trial in the case of *R v Handy*.[16] There, at paragraph 44, Justice Binnie noted that "the criminal trial is, after all, about the search for truth as well as fairness to an accused". That sentiment was reflected in a decision of the Court of Appeal in Ontario delivered just a few weeks before the decision in *Handy*. In that case, Doherty J.A., in the context of the proposed exclusion of evidence under the *Charter*, questioned whether the *Charter* violation in issue and the resulting exclusion of evidence "extracted too great a toll on the truth-seeking goal of the criminal law.[17]

While the pursuit of truth is clearly a desirable goal of criminal procedure, it is not to be sought at any cost. As the Australian Law Reform Commission has said:[18]

> The serious consequences of conviction, fear of error, a concern for individual rights and a fear of abuse of governmental power have limited the search for truth in criminal matters.

Recent appellate decisions in Canada likewise have emphasized that while the pursuit of truth is an important objective, it must comport with fair trial requirements.[19]

Public Confidence and Perceived Legitimacy of Proceedings

Ultimately, the criminal justice system must be accountable to the community it serves. Public confidence in the criminal justice system is

---

15 *R v Howard* (1989), 48CCC (3d) 38 (SCC) at pages 52-53

16 (2002), 164 CCC (3d) 481, per Binnie J. on behalf of a unanimous nine-person court (including Justice L'Heureux-Dube).

17 *R v Kitaitchik* (2002), 166 CCC (3d) 14 (Ont.C.A.), at par.47. The truth-seeking goal of the criminal law has been emphasized by senior appellate courts in Canada, the United States and in the Commonwealth: *R v Noel*, 2002 SCC 67; *R v Darrach*, 2000 SCC 46; *R v Mills* (1999), 139 CCC (3d) 321 (SCC); *Portuondo v Agard*, 529 U.S. 61 (2000); *James v Illinois*, 493 US 307 (1990); *R v Apostilides* (1984), 53 ALR 445 (HC); *Police v L*, 1996 NSDCR LEXIS 28

18 Australian Law Reform Commission, Evidence (ALRC) 26 Interim 1985 par. 58

19 *R v Hart* (1999) W.C.B. Lexis 8435 at par. 4; *R v Ludacka* (1996) W.C.B. Lexis 11926 at par.2; *R v Hodgson* (1998), 127 CCC (3d) 449 (SCC), per L'Heureux-Dube, J.

a prerequisite to its effectiveness, and ultimately to its moral authority to decide disputes. Over time, the criminal law must be capable of absorbing and reflecting community standards, and the process by which guilt is determined should be consistent with contemporary standards within the general community.

Community participation in the criminal justice system provides one means to engender public confidence and a perception of legitimacy. Participation as jurors should be available to all members of the community except those who are clearly disqualified by law. It should be noted that in a wide variety of contexts, the Supreme Court of Canada has consistently underscored the importance of public confidence in the administration of criminal justice in this country.[20]

The principle of public confidence in terrorism cases raises unique challenges. It is especially important that the public in the broadest possible sense—the international community—not only have confidence in the process but also see it as a legitimate proceeding with the moral authority to adjudicate fairly.

Fairness and the Rule of Law

The fundamental feature of any criminal justice system is that it be fair. In this context, fairness has a number of dimensions. It requires an element of certainty and consistency in the application of the law and procedure, although there should be sufficient flexibility to cope with variations between cases as well as different and changing circumstances. In general, the occasions upon which flexibility is justifiable are properly determined by reference to contemporary community standards. In achieving the goal of fairness, the principle that justice should not only be done, but be seen to be done is important.[21] The appearance of justice is therefore a necessary part of the substance of justice.

---

20 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49; *Provincial Court Judges Association of New Brunswick v New Brunswick et al*, 2005 SCC 44; *R v Mapara*, [2005] 1 S.C.R. 358 at par. 63; Application under Section 83.28 of *Criminal Code*, [2004] 2 S.C.R. 248; *Ell v Alberta*, [2003] 1 S.C.R. 857 at pars 23, 24, 29 and 50.

21 The Supreme Court of Canada has noted that this is one of the most fundamental principles in our case law, the formulation for which is best found in *R v Sussex Justices*, [1924] 1KB 256, per Lord Chief Justice Hewart: *Chatel v R* [1985] 1 S.C.R. 39 at par. 13. It is interesting to note that three years after the formulation of this principle in *Sussex Justices,* the same court expressed the view that a typographical error had been made in this famous quotation. Justice Avory contended that the word "seen" should have read "seem": *R v Essex Justices; ex parte Perkins,* [1927] 2 KB 475

Efficiency

The administration of criminal justice must be efficient. That noted, there is little agreement on the criteria by which efficiency should be measured. Certainly, efficiency can and no doubt should be measured primarily by reference to the standard and quality of justice. There is also a strong argument that efficiency should be assessed by reference to the cost and duration of criminal proceedings. It is probably fair to say that the efficient use of available resources involves those resources being applied to obtain a fair result in a reasonable manner for the least possible cost and in the shortest possible period of time. Error, duplication, waste, unfairness, delay, uncertainty and a lack of public confidence are all indicators of inefficiency.[22]

Openness and the Publicity of Criminal Proceedings

The freedom of the individual to discuss the institutions of the state, and its policies and practices, is pivotal to any notion of democratic rule. The liberty to criticize and express contrary views has long been thought to be a safeguard against government tyranny and corruption.[23]

It is clear that the courts, especially the criminal courts, play a pivotal role in any democracy. It is only through the courts that the individual can challenge government and obtain a decision binding on the state.

The courts, too, must therefore be open to public scrutiny and public criticism of their operations. This point was made powerfully by Jeremy Benthem, in a way that has been approved by the Supreme Court of Canada, the House of Lords, the United States Supreme Court, appellate courts in Australia as well as the High Court of New Zealand:[24]

---

22 Law Reform Commission (New South Wales), *supra*

23 *Liberty of the Press* by James Mill (New York: Augustus M. Kelly, 1825 at page 18)

24 *Re Vancouver Sun*, [2004] 2SCR 332; *CBC v New Brunswick* (1996), 110 C.C.C. (3d) 193 (SCC) at page 202-3; *Scott v Scott* [1913] A.C.417 (H.L.); *Richmond Newspapers v Virginia*, 448 US 555; In *Re Oliver*, 333 U.S. 257; *R v Tait* (1979) 24 A.L.R. 473 (F.C.A.); *John Fairfax Publications v Ryde Local Court*, 2005 NSWCA 101; Newton v Coroner's Court [2005] NZAR 118.

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

In recent times, the Supreme Court of Canada and other Commonwealth courts have observed that the principle of open courts is anchored on three main grounds. First, and primarily, public accessibility to our court system is an important ingredient of judicial accountability.[25] It fosters public confidence in the court system as well as the public's understanding of the administration of justice.[26] As well, the open court principle, as the very soul of justice, acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law.[27]

The second broad rationale concerning the openness principle concerns the deterrence and public denunciation functions of the sentencing process. In criminal cases, the sentencing process serves the critically important function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality.[28]

The third rationale concerns the ability of the openness principle to support other democratic values such as the right of free expression. The reasoning is this: the right of the public to information concerning court proceedings depends upon the ability of the media to transmit this information to the public. Debate in the public domain is therefore predicated on an informed public, which in turn is reliant upon a free and vigorous media. Essential to the freedom of the media to provide information to the public is their ability to have access to the courts and their process.[29]

---

25 *CBC v New Brunswick*, *supra*, at page 202-3, per La Forest J. on behalf of all nine members of the court.
26 *CBC v New Brunswick*, *supra*, at page 203d
27 *CBC v New Brunswick*, *supra*, at page 203d
28 *CBC v New Brunswick*, *supra*, at page 222
29 *CBC v New Brunswick*, *supra*, at page 222. Generally, concerning the role of the media, see: Bruce A. MacFarlane, Q.C. and Heather Keating, "Horrific Video Tapes as Evidence: Balancing Open Court and Victim's Privacy" (1999), 41 CLQ 413.

Balancing Individual Rights With the Public Interest

Terrorist trials inevitably involve a clash between individual rights and the broader public interest. For the individual accused, there are a range of rights and freedoms that are guaranteed in the *Charter of Rights and Freedoms*, and much of the procedure set out in the *Criminal Code* is intended to assure the accused of a fair trial.

Most 21st Century terrorist acts are intended to strike a broad blow at government or the public at large. There is, therefore, a need to protect the security of society as a whole. This issue is brought in sharp relief where national security information sought to be shielded by government is thought to be important in making full answer and defence in a specific case. The issue is also raised in the context of attempts to eliminate or reduce the involvement of juries in terrorist cases. As will be discussed later on in this paper, citizen participation in the criminal justice process allows the public to understand the machinery of the criminal justice system, and also assures a greater acceptance of both the process used and the result of a trial.[30]

Minimizing the Risk of Convicting the Innocent

For centuries, the criminal justice system has developed, relied upon and incrementally refined a body of rules and procedures to ensure that guilty persons charged with a criminal offence are convicted, and the innocent are acquitted. Key elements of the criminal justice system are intended to achieve that objective. The burden of proof on the Crown—proof beyond a reasonable doubt—is the highest known to the law. Additionally, the presumption of innocence and the rules concerning hearsay and character evidence, the right to disclosure of the prosecutions case and the entitlement to be tried by one's peers are all intended to safeguard the accused against wrongful conviction.

As long as guilt or innocence remains in human hands—as inevitably they must—wrongful convictions will continue to occur. Realistically, therefore, the challenge to those involved in the criminal justice system is to *minimize* the number of miscarriages of justice that occur.[31]

---

30 See Part VII, *infra*, entitled "Terrorist Trials in the Future—Reform Options".

31 See *Convicting the Innocent: A Triple Failure of the Justice System,* by Bruce A. MacFarlane, Q.C., a paper presented at the Heads of Prosecution Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003. (now published at: (2006) 31 Manitoba Law Journal 403)

There are often a number of immediate causes leading to wrongful conviction, such as eyewitness misidentification, inadequate disclosure by the prosecution, false confessions and police mishandling of the investigation. There are, however, four critical environmental or "predisposing circumstances" that foster wrongful convictions to occur in the first place. Three are directly relevant[32] to the present discussion: public pressure to convict in serious, high profile cases; an unpopular defendant, often an outsider and member of a minority group; and what is often referred to as "noble cause corruption"—the belief that the end justifies the means because the suspect committed the crime and improper practices are justifiable to ensure a conviction.

Against this backdrop, it is important to consider whether and to what extent changes in fundamental structures that have been in place in the criminal justice system for centuries may exacerbate the situation and raise the risk of miscarriages of justice to an unacceptable level. This issue will be dealt with later on in this paper, but at this stage it will be sufficient to note that a risk analysis is especially important when assessing any potential changes to the process of trial by jury.[33] Convictions entered in the UK during the ten year IRA bombing campaign— later shown in several instances to involve terrible miscarriages of justice—provide clear reminders to everyone in Anglo-based criminal justice systems how these environmental or "predisposing circumstances" can combine together and fuel each other into a wrongful conviction. Tragedies of this sort serve no one's interests, and can only lead to a reduction of public confidence in the justice system.

---

32 The fourth predisposing circumstance involves the conversion of the adversarial process into a "game", with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost. This predisposing circumstance could also be brought into play in terrorist cases in certain circumstances.

33 See part VII, "Terrorist Trials in the Future—Reform Options".

PART III

Previous Terrorist and Mega-trials

In this Part, I propose to situate the issue of future terrorist trial structures into the larger picture of previous trial experiences, in Canada and elsewhere. Some of the cases that follow involve terrorism in its "classic" form, such as the Lockerbie airline bombing. I also intend to review three Canadian gang mega-trials, as there are some parallels between those types of cases and terrorist trials.

I do not intend to embark on a lengthy dissertation on any of these cases. Rather, the discussion on each will involve a rather tight comment on the charge, some context on why charges were laid, the nature of the tribunal hearing the case, issues that arose, and the result. In Part IV, I will draw together the common elements that arise from this 57-year, five nation journey.

The Albert Guay Affair

Canada's first, and one of the world's first, in-flight airplane bombings took place in the province of Quebec on the 9th of September 1949, killing all 23 passengers and crew.[34] This incident has a number of disquieting parallels with the bombing of Air India flight 182, although, as I will show, the result in court was quite different.

During World War II, Albert Guay of Quebec City met and married Rita Morel. The marriage was a happy until the Guay's had their first baby, and debts started to accumulate. Mr. Guay met a seventeen-year-old waitress, started dating her, then, under an assumed name, gave her an engagement ring. This relationship fell apart when Ms. Guay found out about the affair. Albert Guay decided that the best strategy to get his girlfriend back was to get rid of his wife.

---

34 Some have argued that the Canadian incident was the first in-flight airplane bombing in history. In fact, there had been at least two earlier incidents, including one (apparently with a similar motive) in the Philippines in May of the same year: "Albert Guay Affair" Aviation Safety Network, http://www.aviation/safety.net/database/record.php?id=19490507/o&lang=nl

Guay enlisted the assistance of an employee of his, a clockmaker named Genereux Ruest, and together they made a bomb consisting of dynamite, blasting caps, a battery and an alarm clock. The device was fitted with a delay mechanism. The dynamite had been purchased by Ruest's sister, Marguerite Pitre, at a local hardware store.

Guay then purchased an airline ticket for his wife (as well as $10,000.00 life insurance, a common practice at the time), and convinced her to go to Baie Comeau, Quebec to pick up some things for him. The bomb, hidden in a parcel, was picked up by Pitre from Guay and delivered to the airport by her. Just before takeoff, it was checked onto the flight for which Ms. Guay had been booked. An airport clerk later reported that all of the cargo on that flight had been paid for by well-known shippers—except one parcel. The "exception" was nonetheless accepted at the last minute, and was quickly placed into the forward baggage compartment of the aircraft. Pitre, the deliverer, did not board the plane. Nor did Albert Guay or Genereux Ruest. The parcel delivered by Pitre was addressed to a fictitious person in Baie Comeau.

The plane crashed twenty minutes after take off. Four witnesses in the area, all on the ground and in different places, heard an explosion just before the plane started to descend. Courts later found that Mrs. Guay "was murdered by the explosion of a time bomb which was taken to the aeroplane and caused to be put on board of it by Mme. Pitre, the sister of the appellant (Ruest) who did this on the express instructions of Guay".[35] The crash attracted worldwide attention. It was, at the time, the largest mass murder that had taken place in North America. A trial judge would later say to the jury that the disaster was "a hideous crime, without precedent in our legal annals, a crime that is revolting to the soul and conscience of an honest population.[36] Pitre attempted suicide ten days after the bombing and, while in hospital, confessed to her involvement in the crime.

Guay immediately sought to collect on the insurance bought on his wife's life, but was quickly arrested by police and charged with the murder of his wife.

The case proceeded in the normal courts and, in due course, Guay, Ruest and Pitre all faced charges of capital murder—which, at the time, carried a mandatory punishment of death by hanging.

---

35 *Ruest v R* (1952), 104 CCC 1 (S.C.C.)
36 *Ibid* at 7.

For tactical reasons, the Crown proceeded separately against the three accused.[37] It was thought that one or more of the defendants could be called as prosecution witnesses against Guay and, potentially against each other. Guay's trial proceeded first. In February 1950, he was convicted before a jury, sentenced to hang, and at the age of 33 was executed on January 12, 1951. Bombmaker Ruest likewise was tried before a judge and jury, and, despite an appeal to the Supreme Court of Canada that resulted in a split decision, was executed on July 25, 1952. Marguerite Pitre was tried for murder before a judge and jury, convicted, and executed on January 9, 1953. She was the last woman to hang in Canada.[38]

While the case against Guay was strong, the evidence adduced against Pitre and Ruest was less clear. It raised issues about whether, and to what extent, both knew of Guay's nefarious plot. Did Ruest know that the bomb was destined for an airplane or, as he contended, was he led to believe that the dynamite was intended to blow up tree stumps? And did Pitre know she was delivering a bomb to the airport—or, as she contended, did she think she was delivering a statue? *Mens rea* was therefore a pivotal issue, and the trial judge's charge to the jury on the burden of proof resting on the Crown formed the key issue on appeal.

The judicial record of Ruest's trial is better known, as the case went to the Supreme Court of Canada. His trial lasted sixteen days. Seventy-seven witnesses were called by the Crown, and eleven for the defence. More than 100 exhibits were filed in court. The case for the Crown was largely circumstantial, and amounted to the classic evidentiary jigsaw puzzle.

In a split decision (7-2), Fauteux, J. (Rinfret, C.J.C., Kerwin, Taschereau, Rand, Estey and Kellock, JJ. concurring) held that while the trial judge may have misspoken when he suggested that the evidence needed to demonstrate innocence before an acquittal was justified, the totality of the evidence inevitably pointed to the guilt of the accused. Cartwright, J. (Locke, J. concurring) would have ordered a new trial on the basis that the error may have misled the jury in reaching its verdict.

---

37 Pitre was called to testify against Ruest

38 The facts of this terrible tragedy have been drawn from the following sources: *Ruest v R* (1952), 104 CCC 1 (S.C.C.); Bruce Ricketts, "The Worst Mass Murder in North America", http://www.mysteriesofcanada.com/quebec/mass_murder.thm; Time Magazine, "Flight to Baie Comeau", published October 3, 1949; Time Magazine, "Fame, of a Sort", published January 21, 1951; Time Magazine, "Judgement of Death", published August 4, 1952; "The Clockwork Bomb Affair", http://www.everything2.com/index.pl?node_id=1522582; "Timeline: The Albert Guay Affair", http://www.virtualmuseum.ca/exhibitions/myst/en/timeline/mcq/guay.html; "Albert Guay: Mass Murderer: http://www.famouscanadians.net/name/g/guayalbert.php

Despite the imposition of the ultimate penalty on the three defendants, I have not been able to find any criticism of the proceedings undertaken or the conclusions reached by the various judges or juries in this trilogy of very difficult cases. If anything, both the judges and the juries seem to have done a good job sorting out who did what—although it is always a bit unsettling when the highest court in the land arrives at a split decision in a death penalty case.

The IRA Terrorist Campaign

On January 30, 1972 "Bloody Sunday," British paratroopers killed 13 unarmed Catholics during a peaceful civil rights march in Londonderry, Northern Ireland. On July 21, 1972, the IRA rocked Belfast with 22 bombs in 75 minutes, leaving 9 dead and 130 injured. A politically fuelled bombing campaign ensued during the next decade, with 3637 lives lost in what the Irish now refer to as "The Troubles."[39]

Most of those killed were civilians: mothers, fathers, shoppers, pub-goers, and children. The public was outraged and frightened. In many minds, the IRA had become "Public Enemy Number One". It was from this pool of citizens that police investigators would be selected to investigate IRA bombings over the next several years. And it was from precisely this same pool that judges and jurors would hear cases that, regrettably, led to terrible miscarriages of justice in Britain during the 1980s. I will deal with the miscarriages point later in this paper; for the moment, I will focus sharply on the court structures that were used to hear these cases in England and in Northern Ireland.

One of the most frightening aspects of the IRA miscarriages of justice is that they occurred with the full range of Anglo criminal justice system safeguards in place: they were tried in the normal courts, not special ones, before experienced judges and properly empanelled juries, based on well established criminal law that was applicable to everyone in England. All of the defendants were represented by competent counsel, and had access to an appellate process that was available to everyone in England.

---

39 For an account of these events, reference can be made to "Convicting the Innocent: A Triple Failure of the Justice System", by Bruce A. MacFarlane, Q.C., a paper presented at the Heads of Prosecutions Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003 (now published at: (2006) 31 Manitoba Law Journal 403)

The Birmingham Six were convicted by the unanimous verdict of a jury, on 21 counts of murder. In 1991, the Court of Appeal quashed the convictions, freeing the defendants.[40] What, then, went wrong? On behalf of the court, Lloyd L.J. noted that on the basis of the evidence led at trial, the case was convincing. The jury fulfilled its task. Nonetheless, two parts of the evidence were suspect: scientific evidence concerning bomb traces, and the police interviews. The forensic evidence was in doubt, the court concluded, and several of the police investigators "were at least guilty of deceiving the court."[41] Concerning the role of the jury, the Court of Appeal made the following comments:[42]

> Rightly or wrongly (we think rightly) trial by jury is the foundation of our criminal justice system. Under jury trial, juries not only find the facts, they also apply the law. Since they are experts in the law, they are directed on the relevant law by the judge. But the task of applying the law to the facts, and so reaching a verdict, belongs to the jury, and the jury alone. The primacy of the jury in the English criminal justice system explains why, historically, the Court of Appeal has so limited a function.
>
> ********
>
> No system is better than its human input. Like any other system of justice, the adversarial system may be abused. The evidence adduced may be inadequate. Expert evidence may not have been properly researched or there may have been a deliberate attempt to undermine the system by giving false evidence. If there is a conflict of evidence, there is no way of ensuring the jury will always get it right. This is particularly so where there is a conflict of expert evidence, such as there was here. No human system can expect to be perfect.

40 (1991) 93 Cr. App. R. 287 (CA).
41 *Ibid* at page 318.
42 *Ibid* at page 311.

The Guildford Four were convicted of murder in 1975 by a court composed of a judge and jury for pub bombings by the IRA that killed seven people. An appeal taken three years later failed. In 1989, the Home Secretary referred the case back to the Court of Appeal after new evidence was found. In 1989, the convictions were quashed after the Director of Public Prosecutions decided not to support the convictions of the four defendants. A public inquiry was called into the case.[43]

Further miscarriages of justice concerning IRA bombings emerged in England. They followed the same pattern. The Maguire Seven were convicted in 1976 for possessing explosives. The defendants had been accused of running an IRA bomb factory in North London during the mid-1970s. Unlike the Guildford Four Trial, scientific evidence played a pivotal role in the trial of the Maguire Seven. New evidence arose; the Home Secretary referred the case to the Court of Appeal, where the Director of Public Prosecutions conceded that the convictions were unsafe. It should be noted that the Court of Appeal acted on the very narrow ground "that the possibility of innocent contamination cannot be excluded."[44]

Others, however, thought differently. Brian Ford, a leading expert, openly questioned whether there had been a closing of ranks, and expressed concern that the Crown scientists had been operating a state-run service to get convictions, rather than offering independent scientific expertise.[45] He appears to have been right, and the IRA saga got even worse.

Judith Ward was charged with 12 counts of murder and 3 counts relating to explosions. She was tried at the Wakefield Crown Court before a judge and jury. She pleaded not guilty to all counts, but was convicted on all—through a majority vote on one count and unanimously on all others. She was sentenced to a total of 30 years imprisonment. The case for the Crown rested on confessions that were allegedly made to the police and expert evidence from government scientists that traces of nitro-glycerine had been found on her. She appealed neither conviction nor sentence.

Seventeen years later, the Home Secretary referred her case to the Court of Appeal for a reassessment. It was said that she suffered from a mental disorder that explained her statements to police. It was also contended

---

43 Sir John May, Report of the Inquiry into the Circumstances Surrounding the Convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974, Final Report (1993-94 H.C.449)

44 *R v Maguire* (1992) 94 Cr. App. R. 133 at 152-3.

45 Laboratorynewshttp://www.sciences.demon.co.uk/aforensc.htm.

that both the police and prosecution had failed to disclose evidence that would have affected the course of the trial. The most serious contention concerned the scientific evidence. Glidewell, J. on behalf of the unanimous court, concluded that three senior government scientists called as Crown witnesses at trial had deliberately misled the court; that they had done so in concert; and that they had taken "the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial".[46]

What lessons can be learned as a result of the IRA miscarriages in England? For present purposes, the first and most important lesson is that the court and trial structures in place in England at the time seemed to work reasonably well. For the most part, juries appeared to have acted reasonably based on the evidence that was provided to them.[47] The miscarriages occurred for reasons quite separate and apart from structural considerations. First, it became evident that the "hydraulic pressure" of public opinion created an atmosphere in which state authorities sought to convict someone despite the existence of ambiguous or contradictory evidence. Second, scientists working in government-operated laboratories tended to feel "aligned" with the prosecution, resulting in the perception that their function was to support the theory of the police rather than to provide an impartial, scientifically-based analysis.[48]

Northern Ireland

In 1973, the right to a jury trial for terrorist offences was suspended in Northern Ireland.[49]

When the United Kingdom government imposed direct rule on Northern Ireland in 1972 following Bloody Sunday, it tried to steer towards a policy, known as "criminalization", of dealing with political violence through the

---

46 *R v Ward*, [1993] 2 All E.R. 577 (C.A.)

47 There may well be one caveat here. In the case of the Birmingham Six, the defendants applied for leave to appeal their convictions on the basis that the judge, Bridge, J., as he then was, had displayed excessive hostility to the appellant's case, and had given so clear an indication of his view of the facts and the witnesses as to deprive the jury of the chance to form an independent opinion. This application was, however, dismissed by the Court of Appeal: *R v McIlkenny* (1991) 93 Cr. App. R. 287 at 288

48 It should be observed that this issue was raised in the Driskell Public Inquiry in Canada. Former Chief Justice LeSage delivered his report on the issue to the Government of Manitoba in January, 2007..

49 The Northern Ireland (Emergency Provisions) Act 1973 provides the basic framework for all emergency provisions legislation in Northern Ireland from that time forward.

criminal courts.[50] It set up a commission chaired by Lord Diplock, a British law lord, to review criminal procedure, which recommended a number of security measures, including the introduction of single judge trials known as "Diplock" trials in place of the jury in cases of political violence.[51]

The rationale for trial by judge alone was two fold. First, violence on the part of paramilitary organizations meant there was a persistent threat of intimidation, which extended to jurors as well as to witnesses, and a "frightened juror is a bad juror."[52] Second, the Diplock commission pointed to the danger of perverse verdicts by partisan jurors.[53]

One of the fundamental assumptions underlying the introduction of Diplock courts was that the jury could be taken out of the criminal justice system in certain types of cases without disrupting the essential adversarial quality of those trials. The legislation has been controversial, with support on both sides of the equation. Some have argued that Diplock courts may have provided a reasonable approach to an extreme situation;[54] others have argued that trial by judge alone increased the rate of conviction, and that less than five years into the use of Diplock courts, 82% of the population of Northern Ireland advocated a return to jury trials.[55]

The widespread perception of illegitimacy was fed by the use of "supergrass" informants and coerced confessions, which played a role in so many Diplock court convictions.[56] Whether the sense of illegitimacy flowed from the use of Diplock courts, or arose from the use of supergrass informants and apparently coerced confessions continues to be a source of controversy in the UK.[57]

---

50 "Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland", by Anthony Jennings (1988)

51 "The Restoration of Jury Trial in Northern Ireland: Can We Learn from the Professional Alternative?", by John D. Jackson, 2001 St. Louis- Warsaw Trans'l 15

52 John D. Jackson, *ibid* at page 16

53 *Ibid*

54 John D. Jackson, *supra*. Professor Jackson noted that "there has been less evidence in Diplock trials of specific miscarriages of justice as compared with England and Wales where jury trial remains in all serious criminal cases…" and concluded that "it has been argued that in the rightful haste to restore a jury trial to Northern Ireland it would be wrong to ignore entirely the Diplock experience of the last thirty years".

55 Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland" by Michael P. O'Connor and Celia M. Rumann, 24 Cardozo L.Rev. 1657 (2003) at page 1697-1699

56 David Bonner, "Combating Terrorism: Supergrass Trials in Northern Ireland", 51 The Modern Law Review 23 (1988).

57 *Ibid*

Two assistant professors of law at the University of St. Thomas School of Law conducted an examination of the experience in Northern Ireland, and concluded that there was no evidence to support the two-fold rationale for resort to Diplock courts in the first place; there was no evidence demonstrating that this strategy had done anything to diminish political violence in Northern Ireland; and that some have contended that these anti-terror tactics have been described as "the best recruiting tools the IRA ever had".[58] In the result, the authors arrived at the following conclusion:[59]

> The elimination of jury trials, coupled with the systemic use of informants and coerced confessions undermined confidence in the justice system without reducing violence. Ultimately, these policies were a dramatic failure.

In the intervening years, the number of cases tried by judge alone in Ireland have declined from a high of over 300 cases a year to about 60 a year. In 2006, the government announced plans to legislate a presumption of jury trial in Northern Ireland while still retaining the option of having trial by judge alone in cases where the DPP can satisfy a statutory test yet to be developed but likely including concerns about interferences or perversion of the administration of justice. Under the program of "security normalization" announced in 2005, the legislation underpinning the Diplock system is scheduled to be repealed on July 31, 2007.[60]

World Trade Centre Bombing (1993)

On February 26, 1993, a massive bomb exploded in the parking garage of the north tower of the World Trade Centre building in New York City. It killed six people, and left a crater six stories deep in the building's basement floors. The goal of the attack was to devastate the foundation of the north tower in such a way that it would collapse onto its twin tower.[61]

The mastermind behind the bombing was Ramzi Yousef, who had been born in Kuwait and was likely raised in Kuwait. In 1992, Yousef entered

58 *Ibid* at 1662
59 *Ibid* at 1699
60 "Replacement Arrangements for the Diplock Court System: A Consultation Paper", issued by the Northern Ireland Office in August, 2006.
61 *The New Jackals: Ramzi Yousef, Osama Bin Laden and the Future of Terrorism*, by Simon Reeve, 1999 (Northeastern University Press); "The World Trade Centre Bomb: Who is Ramzi Yousef? And Why it Matters", by Laurie Mylroie, *The National Interest*, Winter, 1995/96, http://www.fas.org/irp/world/iraq/956-tni.htm

the United States with a false Iraqi passport, and over the next several months developed the plan to make a bomb. Along with several others, Yousef, operating from his home in Jersey City, began assembling the 1500-pound urea nitrate fuel oil device for delivery to the WTC. He fled to Pakistan within hours of the explosion.

Yousef then became an international terrorist along the lines of The Jackal. He assisted in plans to assassinate the Prime Minister of Pakistan, Benazir Bhutto. The plot failed when Yousef and another were interrupted by police outside Bhutto's residence as they were planting the bomb. In 1994, Yousef travelled to Southeast Asia and attempted to bomb the Israeli Embassy in Bangkok. He then made assassination plans to kill Pope John Paul the 2nd and United States President Bill Clinton. The plan was never implemented. In Manila, he placed a bomb in a mall, which detonated several hours later. No one was hurt. In 1994, he masterminded the bombing of the Miss Universe Pageant. Later that year, he masterminded the bombing of a Wendy's hamburger stand. Two weeks later, on the 1st of December 1994 Yousef and a friend bombed the Greenbelt Theatre in Manila. Eleven days later, Yousef assembled a bomb and arranged for it to explode on an airplane bound from Manila to Tokyo. One passenger was killed.

During this time, the US government offered a $2,000,000.00 reward for the capture of Yousef. A friend betrayed Yousef and on the 7th of February 1995, he was arrested by US and Pakistani officials in Pakistan. He was returned to the United States and charged under the criminal laws of New York. He was held in custody pending trial in the normal courts.

On November 12, 1997, Yousef was found guilty of masterminding the 1993 bombing, and in 1998 he and a number of others were sentenced to 240 years each in relation to charges of conspiracy, bombing a building used in interstate commerce, bombing property and vehicles owned by an agency of the United States, transporting a bomb in interstate commerce, bombing or destroying a vehicle used in interstate commerce, assaulting federal officers and two counts of using and carrying a destructive device in relation to a crime of violence. During the sentencing hearing, US district court Judge Kevin Duffy (sitting with a jury, including alternate jurors) referred to Yousef as "an apostle of evil" before recommending that the entire sentence be served in solitary confinement. In the result, ten militant Islamist conspirators—including Yousef—were convicted for their part in the bombing. An 11th had earlier been deported to Jordan by

the US government. He was charged, but acquitted by a Jordanian court and now lives in Saudi Arabia.[62]

On April 4, 2003 a three judge panel of the Federal Appeals Court in New York upheld Yousef's conviction for the 1993 bombing as well as a 1994 plot to blow up a dozen American airliners as they flew across the Pacific (the unsuccessful "Bojinka" plot, the evident forerunner to the conspiracy alleged to have taken place in the UK during August, 2006).[63]

In affirming conviction, the United States Court of Appeals for the 2nd Circuit said as follows:

> Judge Duffy carefully, impartially and commendably conducted the two lengthy and extraordinarily complex trials from which these appeals were taken. The fairness of the proceedings over which he presided is beyond doubt.[64]

Yousef is now held in the high-security Super Max Prison ADX in Florence, Colorado. Other terrorists held there include the Unibomber, Terry Nichols and, prior to his execution, Timothy McVeigh.

There is an interesting postscript to the World Trade Centre bombing. The 1993 bombing was simply one overt act in an indictment or series of indictments obtained against various al Qaeda members during the 1900s. There was an over-arching indictment that named Osama Bin Laden, which alleged that the defendants were members of an international terrorist organization that was involved in the bombing of several United States embassies. Although Bin Laden was never arrested, authorities were actively searching for him with a view to having him tried in the United States. The filing of this indictment, and the attempt to locate Bin Laden is significant in the sense that it illustrates quite coldly both the advantages and disadvantages of relying upon the criminal justice system to counter the threat of international terrorism.

---

62 Ramzi Yousef, http://www.reference.com.browse.wiki/ramzi_yousef
63 *US v Yousef*, 327F. 3d 56, cert. den. 540 U.S. 933
64 327F 3d 56 at 291

The advantage is obvious. If efforts to locate had been successful, and Bin Laden had been tried and sentenced in the United States, 9/11 may never have occurred. However, the lack of success points to the clear disadvantages in relying upon the criminal justice system. The US law reports are replete with judicial decisions on the various motions brought by Bin Laden and his co-conspirators. Amongst other things, Bin Laden sought dismissal of the indictment without appearance, dismissal of particular counts from the indictment, the striking of alleged surplusage from the indictment, disqualification of certain attorneys from serving as advocates for the government, disqualification of US citizens from serving on the jury, dismissal of counts due to lack of jurisdiction and dismissal of counts on the basis that they failed to state an offence known to law.[65] In a word, the attempt to prosecute Bin Laden ended in gridlock, and bogged down in the US justice system at precisely the same time that Bin Laden and others were planning the 2001 attack on the United States.

Oklahoma City Bombing

On April 19, 1995 a massive explosion tore apart the Murrah Building in Oklahoma City, Oklahoma, killing a total of 168 people and injuring hundreds more. In the moments after the explosion, national media distributed sketches of mid-eastern men. Numerous terrorist groups were mentioned. This all made sense at the time, as two years prior, the World Trade Centre in New York had been bombed by Islamic terrorists. It took several days before these initial reports were proven wrong. Nineteen minutes after the explosion, Timothy McVeigh was arrested travelling north out of Oklahoma City, after being pulled over for driving without a license plate on his vehicle.

On August 10, 1995 a federal grand jury returned an 11-count indictment against McVeigh and Terry Lynn Nichols, charging one count of conspiracy to use a weapon of mass destruction, eight counts of first degree murder and other violations of US law. The government filed a notice of intention to seek the death penalty.[66]

---

65 For instance, see *US v Usama Bin Laden et al*, 91 F. Supp. 2d 600; *US v Usama Bin Laden*, 92 F. Supp. 2d 189; *US v Usama Bin Laden,* 93 F. Supp. 2d 484 (2000)

66 *United States v Timothy James McVeigh*, 153 F.3d 1166 (1998), cert. den. 1999 US lexis 1780

From that point on, a number of criminal justice system safeguards were triggered. On February 19, 1996 the District Court granted McVeigh's motions for a change of venue, transferring the case from Oklahoma to Denver, Colorado. On October 25, 1996 the District Court granted a motion for severance between McVeigh and Nichols, and ordered that McVeigh's trial proceed first. McVeigh's trial began with a voir dire of prospective jurors on March 31, 1997. A jury of 12 with 6 alternates was sworn by the District Court on April 24, 1997, and opening statements commenced that same day.

At this stage, I should comment briefly on the concept of "alternate jurors" in US law, as six were appointed in both the Yousef and McVeigh cases. In lengthy criminal proceedings, the federal rules of criminal procedure[67] permit the trial court to empanel up to six alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. The court may retain alternate jurors after the jury retires to deliberate. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations over again. It should be noted that prior to a 2002 amendment to this rule, the trial judge could not substitute an alternate after deliberations had begun, evidently on the basis that it was not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion.[68]

The evidence in the Oklahoma City bombing case was horrific. The Murrah Building was destroyed by a 3000 to 6000 pound bomb composed of an ammonium nitrate-based explosive carried inside a rented truck. In the fall of 1994, McVeigh and Nichols sought, bought and stole all of the materials needed to construct the bomb. They then rented a number of storage lockers in Kansas where they stored the bomb components. During the guilt phase of the trial, which encompassed 23 days of testimony, the evidence demonstrated that the bomb had killed 163 people in the building and 5 people outside. Fifteen children in a daycare centre, visible from the front of the building, and four children visiting the building, were included among the victims. Eight federal law enforcement officials also lost their lives. The explosion was felt and heard six miles

67 Federal Rules of Criminal Procedure, Title VI. Trial, USCS Fed Rules Crim. Proc. Rule 24
68 *US v Lamb*, 529 F. 2d 1153 (9th Cir. 1975); and see my discussion of this point in Part VII "D", *infra*

away. McVeigh later said that he wanted to cause a general uprising in America, and that the bombing would occur on the anniversary of the end of the Waco siege. McVeigh rationalized the inevitable loss of life by concluding that anyone who worked in the federal building was guilty by association with those responsible for Waco.[69]

The effect of the bombing on the city and the United States was immense. The bomb injured over 800 people and destroyed or damaged more than 300 buildings in the surrounding area, leaving several hundred people homeless and shutting offices in downtown Oklahoma City. Over 12,000 people participated in relief and rescue operations in the days following the blast, many of whom developed post-traumatic stress disorder as a result.

The national focus climaxed on April 23, 1995 when President Bill Clinton spoke in Oklahoma City. He criticized radio talk show hosts for alleging that federal officials were acting illegally. Schools across the country were dismissed early and ordered closed in the wake of the bombing. The fact that 19 of the victims had been children, most of them in the building's daycare centre, was seized upon by the national media.

Until the September 11, 2001 attacks, the Oklahoma City bombing was the worst act of terrorism within US borders. It was the largest criminal case in US history. FBI agents conducted 28,000 interviews, collected 3.5 tons of evidence and almost one billion pieces of information on the case.

Timothy McVeigh was sentenced to death for the bombing after being convicted of murdering federal law enforcement officials, amongst other offences. He was executed by lethal injection at a US penitentiary on June 11, 2001. Terry Nichols was convicted of 160 counts of first degree murder plus other felony charges, but avoided the death penalty because of a jury deadlock. He was sentenced to life without parole by Judge Steven Taylor.

The Lockerbie Disaster

On December 21, 1988 Pan Am Flight 103, originating in Frankfurt, West Germany, made a routine stop at Heathrow International Airport in London

69 *United States v Timothy James McVeigh*, supra at page 1177

to take on more passengers destined for Kennedy Airport in New York. Thirty-nine minutes after departure from Heathrow, the plane exploded over the small Scottish town of Lockerbie.[70] In a matter of minutes, 243 passengers from 21 countries, 16 crew members and 11 towns-people died. Exploding aviation fuel threw a 300-foot fireball skyward that left a crater on the earth 20 feet deep, and covered a vast area of the Scottish countryside with wreckage and human body parts.[71] Much of the town of Lockerbie was destroyed. The explosion and resulting crash remains Britain's largest mass murder.

The ensuing criminal investigation was massive. More than 4 million pieces of wreckage were spread over an area spanning 845 square miles of northern England and southern Scotland. The scientific investigation involved 22 separate organizations, and the police inquiry involved 70 law enforcement agencies in four continents. Fifteen thousand people were interviewed in 20 counties, 35,000 photographs were taken, and 180,000 pieces of evidence were gathered, secured and stored for use in court.[72] After two years of painstaking investigation, a picture began to emerge.

A fragment of a circuit board, smaller than a fingernail, was discovered in debris scattered across the county of Cumbria in the northwest region in England.[73] Prosecutors maintained that this fragment came from the electronics that detonated the bomb, hidden inside a Toshiba radio in the cargo hold. Other evidence pointed to two alleged Libyan government security agents who had worked for Libyan Airlines in Malta. On November 13, 1991 a Scottish judge issued a warrant for the arrest of Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, and the next day a US Grand Jury in Washington, D.C. handed down an indictment for murder against both.[74]

---

70 There is considerable literature on the terrible tragedy that occurred at Lockerbie. Some of the more helpful commentaries are: Caryn L. Daum, "The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Flight Pan Am 103 bombing over Lockerbie, Scotland", 23 Suffolk Transnat'l L. Rev. 131 (1999); The Lockerbie Trial and Appeal judgments can be found on the internet: http://www.scotcourts.gov.uk/library/lockerbie/index.asp; Michael P. Scharf, "Terrorism on Trial: The Lockerbie Criminal Proceedings", ILSA J. Int'l and Comp. L. 355 (2000); Robert Black, "Lockerbie: A Satisfactory Process but a Flawed Result", 36 Case W. Res. J. Int'l L. 443 (2004); David R. Andrews, "A Thorn on the Tulip—A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial", 36 Case W. Res. J. Int'l L. 307 (2004); Julian B. Knowles, "The Lockerbie Judgments: A Short Analysis", 36 Case W. Res. J. Int'l L. 473 (2004)

71 *Ibid*

72 David R. Andrews, *supra*, at page 308

73 Michael P. Scharf, *supra*, at page 359; Robert Black, *supra*, at page 444

74 David R. Andrews, *supra*, at page 308

The United States and the United Kingdom both demanded that Libya immediately surrender both accused for trial, even though neither country had an extradition treaty with Libya. Citing the "lynch mob atmosphere" prevailing in the United States and United Kingdom concerning this case, Libya refused to comply with the demands for surrender.[75] In the weeks that followed, Libya showed no willingness to make the accused available for trial or to acknowledge its involvement in the terrorist acts. The UN Security Council subsequently passed two resolutions tending to place pressure on Libya: surrender the suspects, accept responsibility for Libyan officials, disclose all it knew of the crimes, and pay appropriate compensation. The resolutions also provided for significant economic sanctions against Libya.[76]

The case went into gridlock. In November 1994, President Nelson Mandela offered South Africa as a neutral venue for the trial, but this was rejected by former British Prime Minister John Major. Mandela's offer was repeated to Major's successor, Tony Blair, twice in 1997. On the second occasion, Mandela is alleged to have warned that "no one nation should be complainant, prosecutor and judge" in the Lockerbie case.[77]

A compromise was eventually worked out as a result of diplomatic efforts undertaken by the United Nations, United States, United Kingdom and Libya. Under this arrangement, the Libyans would be tried in a neutral venue, the Netherlands, before a panel of Scottish judges (with no jury) under Scots criminal law and procedure. This would be the first Scottish criminal trial involving serious charges that proceeded without a jury.[78] Under Scottish law, special legislation was necessary to permit a Scottish court to sit outside Scotland. The necessary legislation provided that, for the purpose of conducting criminal proceedings against the two accused, the Scottish High Court of Judiciary could sit in the Netherlands in accordance with its provisions[79]; I will deal with the specifics of this extraordinary instrument, below.[80] This arrangement was engineered by

---

75 Michael P. Sharf, supra, at page 356

76 David R. Andrews, supra, at page 810

77 Pan Am Flight 103 Bombing Trial, http://www.en.wikipedia.org/wiki/pan_am_flight_103_bombing_trial (Note: I have not been able to find any other source attributing this quotation to Mandela); Generally, see "Strategic Moral Diplomacy: Mandela, Qaddafi, and the Lockerbie Negotiations" by Lyn Boyd-Judson, Volume 1 Foreign Policy Analysis (March 2005)

78 "Scots Law Under the Microscope" by Professor John P. Grant, School of Law, University of Glasgow, *The Journal*, May 1999, page 18: http://www.journalonline.co.uk/article/1001112.aspx

79 Julian B. Knowles, *supra*, at page 473

80 Statutory Instrument 1998 no. 2251, "The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) order 1998

legal academic Professor Robert Black of Edinburgh University, supported by the then Foreign Secretary, Robin Cook.[81]

At an early stage, it was recognized that Scottish rules of evidence and procedure that governed the trial differed in several material respects from the rules in place in the United States. Under Scottish rules, for example, probable cause need not be confirmed at a preliminary hearing prior to trial. As well, it is a peculiarity of the Scottish system that no one may be convicted of a crime without corroboration. Under Scottish criminal procedure, out of court statements may be introduced when a witness is dead, has disappeared or refuses to appear at trial. Perhaps the greatest difference includes the range of verdicts that can be rendered: "proven", "not proven", and "not guilty". If convicted, defendants in Scotland cannot be exposed to the death penalty and Scottish prosecutors can appeal an acquittal on a legal point.[82]

It is important to note some of the structures that were put in place for the Lockerbie trial. Rather than being heard by a regular 15-member Scottish jury, the case was tried before a panel of 3 judges. There are differing versions on how this came about. Michael P. Scharf, a Professor of Law and Director of the Centre for International Law and Policy and former Attorney-Advisor for United Nations affairs, has written that the case was heard by a panel of judges rather than a jury "at the request of the defence".[83] David R. Andrews, who in his capacity as Legal Advisor to the US Department of State was an American "insider" in setting up the trial, has written that the Lord Advocate of Scotland was prepared to dispense with the jury on the basis that it would "not be practical to absent a group of Scottish citizens for the better of a year". Andrews continued that aside from opting for a panel of three judges rather than a normal Scottish jury, the Lord Advocate "was adamant that there should be no divergence from Scots criminal law and procedure. This required legislation in the form of an "Order in Council" that was prepared by the Lord Advocate without requiring a vote by Parliament.[84]

---

81 "Pan Am Flight 103 Bombing Trial", *supra*, at page 2; Robert Black, *supra* at "FN d1"; and see "Scots Law Under the Microscope", *supra*

82 Michael P. Scharf, "Terrorism on Trial: The Lockerbie Criminal Proceedings", 6 ILSA J. Int'l and Comp. L. 355 (2000)

83 Michael P. Scharf, *supra*, at page 358

84 David R. Andrews, *supra*, at page 313; and see "Scots Law Under the Microscope", *supra*

Under the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (the so-called Order in Council), the criminal proceedings against Al-Megrahi and Fhimah were specifically to be conducted in accordance with the law relating to proceedings on indictment before the High Court of Justiciary in Scotland.[85] The Lord Justice Clerk was required to appoint three judges to constitute a court, and was further required to nominate one of them to preside. Questions of law were to be determined on a majority vote. At the conclusion of the case, the verdict was to be determined on the basis of a unanimous or majority decision, and was required to be delivered in court by the presiding judge.[86]

The Lord Justice Clerk was also required to appoint an "additional judge" to sit with the court. That judge could participate in all of their deliberations, but could not vote in any decision which was required to be taken. In the event that one of the originally appointed judges died or was absent, the additional judge would assume the functions of the deceased or absent judge.[87] Any appeal against the verdict could be heard either in the Netherlands or in Scotland, and would be heard by five Scottish judges.[88] An explanatory note at the conclusion of this order, noted *not* to be part of the order, said this: "This order, made under *The United Nations Act* 1946 pursuant to a resolution of the Security Council of the United Nations.[89]

I have dealt with the background to the Lockerbie case in considerable detail for a couple of reasons. First, the obstacles to even getting the case going were immense. Second, as I will be noting later on, there is a sense amongst some scholars and other involved in the case that trial in an neutral third party country should generally *not* be seen as a viable option in terrorist cases, and should essentially be seen as a "one-off". Finally, the decision to dispense with a jury did not flow from issues of intimidation or the prospects of empanelling a partisan jury, as in the case of the Diplock courts; rather, the third party venue was an outgrowth of the reality that the trial was being held thousands of miles away from where the offence had occurred.

85 Statutory Instrument, *supra*, par. 3
86 *Ibid*
87 *Ibid* at par. 7
88 *Ibid* at par. 14
89 *Ibid*

The trial commenced on the 3rd of May, 2000 before Lords Sutherland, Coulsfield and McLean. On January 31, 2001, after 130 court days, the court returned a unanimous verdict of guilty of murder in respect of the first accused, Al-Megrahi, and a unanimous verdict of not guilty of murder in respect of the second accused, Fhimah. Al-Megrahi was sentenced to life imprisonment, with a recommendation that he serve at least 20 years.[90] It is interesting to note, as well, that a number of websites provided streaming video live, and that the proceedings were broadcast live in both English and Arabic over the internet by the BBC.[91]

An appeal against conviction was immediately brought by Al-Megrahi. The appeal court consisted of five Lords Commissioners of Justiciary who sat in the Scottish court in the Netherlands. It was led by Lord Cullen, a distinguished jurist who was Scotland's most senior judge. The hearing extended from January 23 to February 14, 2002. The court unanimously dismissed the appeal on March 14, 2002 in a judgment that exceeds 200 pages.[92]

For reasons that are not entirely clear, an appeal against the sentence imposed was severed away from the appeal against conviction, and was still pending at the time of the writing of this essay.[93]

In a news release issued after the appeal court dismissed the appeal against conviction, Lord Advocate Colin Boyd said, amongst other things, "Today's decision has brought to an end the judicial proceedings at the Scottish court in the Netherlands". After thanking all of the agencies of the United States government that assisted Scotland as well as the Scottish police, the Scottish court service, the Scottish prison service and the Dutch government, the Lord Advocate said that: "the Scottish justice system has been placed under unprecedented international scrutiny over the past two years. Scottish justice has stood up well to that scrutiny".

With the passage of time, the Lord Advocate's tone of optimism and praise has been dampened somewhat. The verdicts reached by both the trial courts and the court of appeal have been severely criticized,

---

90 The full transcript of the judgment at trial (and on appeal) can be found at: http://www.scotscourts.gov.uk/library/lockerbie/index/asp

91 *Ibid*

92 The appeal judgment can be found on the internet: see footnote 90, *supra*. For an interesting critique on this judgment, see Robert Black, *supra*, at page 447

93 BBC News, June 8, 2006: http://www.news.bbc.co.uk/1/hi/scotland/5061170.stm

and the proceedings were not in fact brought to a conclusion. On the 23rd of September, 2003 the Scottish Criminal Cases Review Commission received an application from solicitors acting on behalf of Al-Magrahi requesting that the Commission review his conviction. Under Scots' law, if the Criminal Cases Review Commission believes, after thorough investigation, that a miscarriage of justice may have occurred, and that it is in the interests of justice that a reference should be made to the courts, it may refer the case to the High Court. Once referred, the High Court determines the case as if it were a normal appeal.[94] Given the enormity of the trial and appeal proceedings, the Commission sought and received significant resources to conduct the investigation.

I do not propose to undertake an analysis of the results of the case, nor to analyze the various commentaries that have been published. Suffice it to say that the critics have been quite vocal and the criticisms searing. Robert Black, Professor of Scots law at Edinburgh Law School since 1981 who, by his own admission, "is sometimes described as the architect of the scheme whereby a Scottish court sat in the Netherlands to try the Libyans accused of the Lockerbie bombing" contended and "will continue to maintain that a shameful miscarriage of justice has been perpetrated and that the Scottish criminal justice system has been gravely sullied".[95] In 2005 a former Scottish Police Chief signed a statement claiming that key evidence in the Lockerbie trial had been fabricated. The officer, now retired, contended that the tiny fragment of circuit board crucial in convicting Al-Megrahi was planted by US agents.[96]

Political intervention took place in late 2005. Lord Fraser of Carmyllie, the former Lord Advocate who issued the arrest warrant for the sole Libyan convicted of the Lockerbie bombing, cast doubt on the reliability of the main witness in the trial. The former conservative minister described Tony Gauci, whose testimony was central in the case, as "not quite the full shilling" and "an apple short of a picnic". While making clear that this does not mean that he believes Al-Megrahi was innocent, Fraser said that he should be free to leave Scotland to serve the remainder of his sentence in Libya.[97] Following Fraser's comments on October 23, 2005 *The Times*, in

---

94 Scottish Criminal Cases Review Commission: News Release found at: http://www.sccrc.org.uk/news

95 Robert Black, *supra*, at page 451

96 "Police Chief- Lockerbie Evidence was Faked", http://www.news.scotsman.com/index.cfm?id=1855852005 (August 28, 2005, *Scotland on Sunday* by Marcello Mega)

97 http://www.timesonline.co.uk/article/0,,2090-1839307,00.html

a lead editorial, took the position that the case ought to be re-examined carefully, to determine whether there is strong enough evidence to reopen the case.[98]

During the proceedings, the UN Secretary-General appointed Professor H. Koechler as an International UN Observer at the Lockerbie trial. He subsequently characterized the proceedings as a classic "show-trial" reminiscent of the Cold War era, and has described the result as "a spectacular miscarriage of justice".[99]

On June 28, 2007 the Scottish Criminal Cases Review Commission delivered its decision on the application filed by Al-Megrahi to re-open his case. It allowed the application on a very limited ground – that the evidence did not support the finding of key facts in the case, and that therefore a miscarriage of justice may have occurred, and in the interests of justice the case should be referred back to the High Court. The Commission, however, rejected the "conspiracy theories" that had been circling around the case for years. On that point, the Commission said:[100]

> Many of the press reports published during the review have simply involved a repetition of certain of the original defence submissions received by the Commission at the beginning of its review, and which have formed the basis of a large part of the Commission's investigation. As indicated in this release, the Commission has concluded after full and proper investigation that these submissions are unsubstantiated and without merit. In particular the Commission has found no basis for concluding that evidence in the case was fabricated by the police, the Crown, forensic scientists or any other representatives of official bodies or government agencies.

Are there any lessons that can be learned as a result of the Lockerbie trial? David R. Andrews, the US "insider" who was intimately involved in the case, has offered the following interesting observations:[101]

---

98 "It is time to look again at Lockerbie", by Magnus Linklater, *The Times*, October 26, 2005: http://www.timesonline.co.uk/article/0,,1062-1843063,00.html

99 I.P.O. Information Service, statement of Dr. Hans Koechler, International Observer at the Lockerbie trial, issued on October 14, 2005: http://www.i-p-o.org/nr-lockerbie-14oct05.htm

100 News Release, "Abdelbaset Ali Mohmed Al Megrahi", issued by the Scottish Criminal Cases Review Commission on June28, 2007, at par. 7.2

101 David R. Andrews, *supra* at page 318

a) measured against the goal of conducting a Scottish trial in a third country, the effort was a stunning success;
b) the cost, however, was immense—the trial alone cost more than $150,000,000 and involved virtually every level in the UK, US and Dutch governments;
c) for some of the victims' families, it brought closure although for some it brought further anguish, as the real culprit, Muammar Gaddafi, was not held accountable;
d) the initiative provided a means for Libya to take steps to make amends for its terrorist behaviour: in the aftermath of the trial, Libya paid each family approximately $10,000,000;
e) a third country trial is not a model that ought to be considered lightly, if ever again. "The process of setting up such a specialized tribunal is cumbersome and enormously time consuming. Given the political and practical situation we faced with Libya this solution was appropriate, and it worked. But it is hard to imagine a situation in the future that would lend itself to a similar solution".

Finally, and most importantly, resort to special structures or proceedings made the case particularly vulnerable to unfair (and unfounded) criticism that it was a "show trial" cobbled together on the basis of a political agenda. Distressingly, this argument can, it seems, be advanced despite the eminence and independence of the jurists hearing the case.

7. The Air India Bombing

In the early morning hours of June 23, 1985, Air India flight 182, carrying 329 people, was destroyed mid-flight by a bomb located in its rear cargo hold. Remnants of the plane and bodies of some of the victims were recovered from the Atlantic Ocean off the coast of Ireland. There were no survivors.[102]

As a result of a multinational police investigation that followed, it was determined that two suitcases had been checked at the Vancouver International Airport on the morning of June 22, 1985 and loaded onto two aircraft without any accompanying passengers.

---

102 The account of the facts in this case is drawn heavily from the decision of Josephson, J. reported at R v *Malik and Bagri,* 2005 BCSC 350 (Canlii)

In October, 2000 Ripudaman Singh Malik and Ajaib Singh Bagri were charged with a series of offences under the *Criminal Code* alleging their involvement in a conspiracy to commit murder and place bombs on an aircraft. The trial commenced in April, 2003 and continued for approximately 16 months involving approximately 230 court days. In his reasons for judgment, the trial judge made it clear that despite the length and complexity of the case, as well as the passage of time, "there can be no lowering of the standard of proof from that required in any criminal trial (proof beyond a reasonable doubt)".

The trial judge had a clear understanding of the horrendous nature of the crimes involved. He said this:[103]

> Words are incapable of adequately conveying the senseless horror of these crimes. These hundreds of men, women and children were entirely innocent victims of a diabolical act of terrorism unparalleled until recently in aviation history and finding its routes in fanaticism at its basest and most inhumane level.

Two others were implicated in the same crime. Inderjit Singh Reyat was convicted after trial for two counts of manslaughter with respect to a parallel bombing incident in Japan.[104] Talwinder Singh Parmar, an unindicted co-conspirator in the case, was believed to be the leader in the conspiracy to commit the crimes. He was killed in India on October 14, 1992.[105] At the conclusion of the trial, both Malik and Bagri were acquitted on the basis that the Crown had failed to establish the crimes beyond a reasonable doubt.

A couple of points ought to be underscored at this stage. First, the case proceeded on the basis of the normal criminal laws and procedure, in the usual courts having jurisdiction. Even with the admissions of fact, the trial lasted almost one and a half years. Without the admissions, it was widely believed that the trial would have lasted approximately three years. While the trial proceeded before a judge sitting alone, it was open to the accused to have elected trial by judge and jury. Whether a jury trial of such magnitude would have been fair for either the Crown or the defence is a matter of much debate.

---

103 *Ibid* at par. 1254
104 *Ibid* at par. 1277
105 *Ibid* at par. 1256 and 1275

At the conclusion of the trial, the lead prosecutor and one of the leading defence lawyers joined forces to discuss the case, with emphasis on the lessons learned from a complex mega-trial.

Robert Wright, Q.C. and Michael Code presented a lengthy document entitled "Air India Trial: Lessons Learned" to the 2005 Justice Summit at Toronto, Ontario on the 22nd of November, 2005. The document is unparalleled in Canada, and is extremely helpful in understanding the challenges posed by a terrorist mega-trial. Messrs Wright and Code are to be commended for this extraordinary document.

This "Lessons Learned" Report is divided into two basic parts. First, prosecutorial administration and management issues. Second, litigation issues.

The prosecutorial administration and management issues concerned the following: project management, personnel, facilities, communications, Crown disclosure to defence, victim services, witness services, technology, security and external relations. I do not propose to deal with this part at any great length, but wish to make a couple of observations. First, the Report underscores the importance of gaining prosecutorial support at the highest levels "for a special administrative management approach to a mega-case". A second lesson learned is this: "use a project management approach to managing a mega-case, including a project manager, project team, project management planning, budgeting, risk assessment, implementation, monitoring and evaluation."

The "litigation issues" portion of this Report is more directly related to the issues under consideration in this paper. Wright/ Code immediately identified an issue that is critical in terrorist mega-trials: should it proceed before a jury, or a judge alone. The authors noted that "there are considerable advantages to negotiating a re-election to trial by judge alone", and recommended that the Chief Justice of the court be drawn into the pre-trial discussions. The authors recommend a re-election on the basis that the selection of the trial judge emerge as a consensus issue, not simply the result of the direction of the Chief Justice. The authors note that the mutual advantages to both the Crown and the defence, in negotiating a re-election to trial by judge alone, can provide the

beginnings to a more cohesive relationship between the parties:

> The intangible or long term advantages to the administration of justice are that the Crown and the defence get used to working together from the beginning, in a collaborative fashion, in trying to achieve a successful trial. Making the mega-trial work for both sides becomes a shared goal and both parties take ownership of their chosen judge.
>
> Second, the lead prosecutor must have a resilient, pragmatic and flexible personality. The authors note that there will inevitably be disagreements in the course of a long trial, and some of those disagreements will be significant. However, the lead prosecutor must remain above these adversarial disputes and continually initiate discussions that lead to resolution of the many issues on which the parties should be able to agree. *If every little point has to be fought out in trial, the "mega-trial" will never end.* (emp. added)

From a purely practical standpoint, the authors emphasize that the level of resources available inevitably affects the litigation behaviour of Crown counsel and defence counsel, so a delicate balance must be attained between too little and too much time and money. The following is sage advice:

> When Crown counsel have no other responsibilities and have dedicated police officers available to investigate the most minor and insignificant points, the trial can be delayed for no good purpose. Similarly, defence counsel who are guaranteed generous levels of "cash for life" from the public purse will not be eager to return to the challenges of their ordinary practice where retainers are almost always limited. In conclusion, a delicate balance is required for too little resources for the Crown and the defence and too much resources.

Further advice includes:

f) the importance of admissions, and their relationship with the Crown's approach to disclosure;

g) the importance of assigning one person on both the Crown and defence teams to deal with the issue of disclosure;
h) electronic disclosure must play a substantial role in the disclosure process;
i) creative solutions must be found to the problem of withheld material—including, for instance, permitting defence counsel an opportunity to review the withheld material or a summary of it upon the giving of an undertaking of confidentiality

The Air India trial was clearly blessed with competent and reasonable counsel who were prepared to work towards a reasonable solution within an adversarial framework. That will not always be the case. The Air India experience places into sharp relief a number of difficult and critical issues:

- Will some terrorist mega-trials reach the point of being unmanageable, and incapable of leading to a fair result?
- How much should we expect of jurors? Can we, instance, expect them to set their lives aside, and dedicate themselves entirely to a trial for three years? How do we guard against the prospect that health issues on the part of jurors, the judge or counsel could effectively derail a terrorist mega-trial?
- In a multi-year complex trial, what resources and supports can be provided to jurors to ensure that they can take all of the evidence into account when rendering a verdict?
- What legal and practical framework is required to ensure that a multi-year trial will actually *reach a verdict*, particularly trials involving a judge and jury?

8. Gang Mega-trials

Terrorist trials are in many ways quite unlike gang mega-trials, but there are some similarities. For that reason, I thought it useful to quickly review some of the more recent gang mega-trials in Canada. Some have been successful; others have been spectacular and highly visible failures.

The Manitoba Warriors Case

One of the first gang mega-trials was *R v Pangman et al*, generally referred to as the "Manitoba Warriors case".[106] On November 4, 1998 35 accused were directly indicted following a police undercover operation called "Operation Northern Snow". The accused were charged with over 100 counts of trafficking in cocaine, conspiracy to traffic and *Criminal Code* offences including criminal organization counts. In essence, the Crown alleged that the accused formed the backbone to a well-established Aboriginal street gang in Winnipeg that controlled much of the cocaine traffic in the city. The case was jointly prosecuted by a team of federal and provincial prosecutors,[107] and, at various stages, ten defence counsel were at the table. No facilities existed to hear such a case, and the province was forced to build a new courthouse to allow the case to proceed. The trial was expected to last two years before a judge and jury. The case was a logistical nightmare.

The case became derailed for two basic reasons. First, the defence team immediately established a "motions committee" and for the next 15 months brought a series of pre-trial motions designed to defeat the prosecution on issues quite apart from the merits of the case. One motion, to sever the accused into more manageable trials, was successful[108], but the rest of the motions were dismissed.

The second reason for derailment involved the politicization of the case. On national television, an opposition (Aboriginal) Manitoba MLA contended the charges were racially motivated, and labelled the newly-minted court facility an "Indian Courthouse". Within days of the airing of the program, a general election was held in the province, government was defeated, the opposition formed the new government, and the MLA in question found himself in Cabinet. The lead prosecutor shot back, threatening to sue the new Cabinet Minister for defamation. A cloud floated over the case. Once again, political intervention in a case already choked with public controversy made fair trial requirements even more difficult to meet, especially before a jury.

---

106 There are many reported decisions on this case, but the two leading ones are *R v Pangman* (2000), 144 Man. R. (2d) 204 (C.A.); *R v Pangman* (2001), 154 CCC (3d) 193 (Man.C.A.).

107 Under a direct indictment signed by both the Deputy Attorney General of Canada and the Deputy Attorney General of Manitoba.

108 *R v Pangman* (2000), 149 Man. R. (2d) 68 (Q.B.)

Once the motions were completed, and the new courthouse was ready to hear the case, a few of the accused broke ranks and entered pleas of guilty to some of the counts. They were at the lower end of the criminal organization structure, and, with the benefit of pre-sentence detention credits, their sentences expired shortly after disposing of the charges. The defence strategy quickly shifted, and the rest of the accused entered guilty pleas and were sentenced to imprisonment for periods that ranged from six to nine years.[109]

The media and the public saw the case as a mega-trial that failed—despite the fact that 34 of the 35 accused were found or admitted guilt, and went to jail. However, from the public's perception: a new courthouse was constructed specifically for a trial that never happened. The Crown plea-bargained the case away including the criminal organization counts, and there was a lingering odour that the charges had been politically fuelled.[110] Total cost of the case was 8.9 million dollars, of which 3.2 million was set aside for legal aid to represent the accused at a trial that never proceeded.

The Zig Zag Conspiracy Case

The Zig Zag Crew were (and are) a puppet gang of the Hells Angels in Manitoba. They are street level criminals involved in extortion, gun-running and drug debt collection.

In May, 2002 police laid an information charging eight members of the Zig Zag Crew with 60 counts under the *Criminal Code*, including conspiracy to murder. Essentially, the case concerned a gang war on the streets of Winnipeg two years earlier. To avoid the prospects of a mega-trial, the Crown endeavoured to reduce the scope of the case by reducing the number of accused to five (from 8) and the number of counts to 36 (from 60). The accused were held in custody pending trial, either because no application was made or because bail was refused. The case for the Crown was based largely on the proposed testimony of a police informant, together with tens of thousands of intercepted private communications.

During the next two years, the case went into gridlock. Defence counsel made repeated motions on various issues, including their client's

109 *R v Pangman* (2001) 154 CCC (3d) 193 (Man.C.A.). For a critique of the case, see Don Stuart, *Canadian Criminal Law*, 4th ed (Toronto : Carswell, 2001), at p. 649

110 *Ibid* at par. 6

purported right to choose private defence lawyers through the provincial legal aid scheme, as well as the lawyer's purported right to charge fees well in excess of the legal aid tariff. The case provoked a legal aid crisis in the province, with most lawyers in Manitoba withdrawing their services until more money was provided by the province.

Crown disclosure proved difficult. It was provided in pieces once received from the police, and continued for two years. Crown counsel advised of her intention to request a direct indictment, but that request was not made for many months so the case was simply adjourned from time to time in the Provincial Court.

The case started to unravel in early 2004. The evidentiary collapse of the case started to crystallize in the spring of 2004, when the Crown's star witness, who was not in witness protection, started to withdraw his cooperation. He said he would change his testimony if certain demands he was making were not met. After a review of the case, the Crown concluded that the prosecution could not be sustained, and proceedings were stayed in June, 2004. The accused, who had been held in custody awaiting their trial for over two years, were immediately released from jail to a throng of supporters, media photographers and a stretch limo. The case did not come close to reaching a verdict. Total costs of the case were in the region of 2.5 to 3 million dollars, of which 1.5 million dollars had been earmarked for legal aid representation at a trial that, once again, did not occur.

Chan Mega-Trial in Alberta

In 2003 a drug conspiracy mega-trial of immense proportions collapsed under its own weight in Alberta.[111] On September 8, 2003 Justice Sulyma stayed proceedings before a jury was even empanelled on the basis that the police and Crown had failed to understand their disclosure obligations, and as a result late and failed disclosure had prejudiced the accused's right to a fair trial[112]. Although the indictment was not tried, and no verdict was reached, the cost to the pubic was huge: $20,000,000 in defence fees, and $2,000,000 to build a new high security courthouse.[113]

---

111 The case generated many rulings, including the following: *R v Chan* (2001) 160 CCC (3d) 207 (ABQB); *R v Chan* (2002) 164 CCC (3d) 24 (ABQB); *R v Chan* (2002) 168 CCC (3d) 396 (ABQB); *R v Chan* (2002) 169 CCC (3d) 419 (ABQB); *R v Chan* (2003) 172 CCC (3d) 349 (ABQB); *R v Chan* (2003) ABQB 759

112 *R v Chan*, 2003 ABQB 759

113 Globe and Mail, September 10, 2003

The Crown had elected to frame the case as a mega-trial from the outset: 36 persons were charged on a single information with a total of 21 drug related offences. A new information was laid charging 37 individuals with a total of 34 offences. Two months later, a new information was sworn against the 37 accused, charging them with a total of 41 offences. A direct indictment against 35 of the accused was then preferred, charging them with 39 counts. Guilty pleas, stays of proceedings and a severance order reduced the number of accused to 11[114].

Disclosure to the defence proved to be a daunting exercise. Given the volume of disclosure, a decision was taken early to provide disclosure in electronic format. A 39 CD set was prepared. However, on June 8, 2000 Judge Maher ordered that disclosure be provided in hard copy. The Police Disclosure Unit had difficulty keeping up with the volume of copies to be made and as of April 2003, 153,651 pages of disclosure had been entered into the software system. It was estimated that the hard copy disclosure would be in the neighbourhood of 180,000 pages.

After the commencement of the trial, 36 boxes of material were found at RCMP Headquarters and two further boxes were found in one of the investigator's basement. This material started to be disclosed well after the start of the trial, and continued as of the date of the motion[115].

Noting that the accused had been imprisoned pending trial for around a year, and that the discovery of the huge amount of material almost a year after the proceedings had begun was "nothing short of shocking",[116] a stay was entered in respect of each of the accused on the basis that their rights under section 11(b) of the *Charter of Rights and Freedoms* to be tried within a reasonable time had been breached. Media coverage at the time forecasted the demise of mega-trials, and one of the defence lawyers, a former Crown Attorney, said: "I've said from the beginning that too many people were charged with too many charges, and put all together it becomes unwieldy".[117]

---

114 *R v Chan, supra*
115 *Ibid* at par. 612, 619
116 *Ibid* at par. 636
117 Globe and Mail, *supra*, quoting Hersh Wolch

Lessons Learned from the Gang Mega-Trials

There are at least four key lessons to be learned from these and other recent gang mega-trials.

First, and most importantly, the Crown bears responsibility for framing the case in such a way that it is manageable and can reasonably be considered by a judge and jury. In general, there should be no more than eight accused or so, fewer if possible. This may mean identifying the principal players, and proceeding against them first.[118] This may also mean that separate trials may be required for lesser players. Equally important, the number of counts should be reasonable in number, and describe the core allegations of the Crown. Where possible, substantive and conspiracy counts ought not to be mixed on the same indictment to avoid having to instruct the jury that the three-pronged test in *Carter* concerning the co-conspirator exception to the hearsay rule applies to conspiracy counts, but not necessarily to substantive charges such as drug trafficking.[119] Finally, it is not generally in the public interest to frame a case in such a way that its size, length and complexity outstrips the court facilities available in the judicial centre where the trial will take place.

Second wherever possible, the disclosure package should be ready or largely ready to be provided to the defence at the time the charges are laid. This can be accomplished more often in cases where the police have been investigating for an extended period of time and can control the timing of the charges. It will be more difficult where a terrorist act occurs, and charges need to be laid immediately.

Third, the Government of Canada ought to consider amending the *Criminal Code* to empower the Crown to provide disclosure in an electronic format, subject to judicial oversight. Surely as we move well into the 21st century familiarity with computers and software forms a part of the core competency of a practicing lawyer.[120]

---

118 There is no obligation to proceed against every person against whom there is evidence : R v Catagas [1978] 1 W.W.R. 282 (Man.C.A.) at 287

119 *R v Carter* (1982), 67 CCC (2d) 568 (S.C.C.); *R v Mapara* (2005), 195 CCC (3d) 225 (S.C.C.)

120 Of interest, the Alberta Court of Appeal has issued a Notice to the Profession with respect to electronic appeals in that court. Facta and supporting materials where the trial was ten days or longer must now be filed in an electronic format unless otherwise ordered. In shorter cases, e-filing is available with leave of the Court. Electronic versions of facta must be hyperlinked to authorities and the appeal book. https://www.albertacourts.ca/ca/efiling/

Finally, the gang mega-trials illustrate the critical importance of judicially controlled case management, and the need for new powers in the *Criminal Code* to enforce directions from the trial court. I will deal with this point in a bit more detail in Part VII, "Terrorist Trials in the Future—Reform Options, Some Non-Structural Considerations", as well as in Part VIII, "Summary and Concluding Observations".

9. Recent Cases

There are a significant number of terrorist cases that have arisen quite recently which are still pending before the courts. Some arose during preparation of this paper. I will review them quite briefly, with particular emphasis on the structural aspects of the proceedings—where that is known. If nothing else, they provide a flavour for 21st century terrorist cases, and the new challenges posed by them.

Momin Khawaja: The Alleged Canadian Detonator

In March 2004, Canadian and UK police arrested eight men in connection with an alleged bomb conspiracy. The targets included Europe's largest shopping mall, the Bluewater Centre east of London, as well as a popular London nightclub and British trains.[121] It was alleged that the defendants planned bombings in Britain in retaliation for British support of US policy. The prosecution contended that the defendants were fully prepared and had acquired all of the necessary materials to execute their plans. Police had seized over 600 kilograms of ammonium nitrate fertilizer from a west London storage depot—the same bombing ingredients used in the Oklahoma bombing.[122] Seven of those charged were tried in the Old Bailey for planning the bombing with two unindicted co-conspirators—one in Canada, the other in the United States. The Canadian, Mohamed Momin Khawaja, is alleged to have constructed 30 remote-controlled detonators, with a range of around two kilometres, to trigger the bombs around the London area.[123] While not charged in the UK, Khawaja is the

---

121 The Fifth Estate, "The Canadian", http://www.cbc.ca/fifth/thecanadian.html ("The Fifth Estate"); "Ottawa Man Built 30 Detonators, UK Terror Trial Hears", Ian McLeod and Sarah Knapton, CanWest News Service, Ottawa Citizen, Friday, July 21, 2006 ("Ottawa Citizen"); "Accused Ottawa Terrorist Reveres bin Laden, UK Court Hears", Ian McLeod et al, CanWest News Service, Thursday, July 20, 2006 ("Canada Com"); "Guns, Jihad Books Found in Ottawa Home of Accused Terrorist", Ian McLeod et al, CanWest News Service, Ottawa Citizen, Wednesday, July 19, 2006 ("Ottawa Citizen 2"); "Northeast Intelligence Network, UK Terror Suspects", March 25, 2006 ("Northeast Intelligence Network")

122 "Ottawa Citizen", *supra*; "Northeast Intelligence Network", *supra*

123 "Ottawa Citizen", *supra*

first person in Canada to be charged under the new *Anti-terrorism Act* proclaimed in 2001.[124]

All three countries involved in this case laid charges under their normal domestic criminal laws applicable to everyone, and have proceeded in the normal criminal courts. The UK trial, described as the largest since 9/11[125] commenced before a judge and a twelve- member jury in February, 2006, and resulted in a finding of guilt respecting five of the defendants.[126] For the most part, the case for the prosecution consisted of police surveillance, seizures, intercepted e-mail, information found on computer hard drives and the proposed evidence of an unindicted co-conspirator.

The sole Canadian charged has elected trial by judge alone in the Ontario Superior Court of Justice. A pre-trial motion to have certain provisions of the *Anti-Terrorism Act* declared unconstitutional was partially successful, deferring a trial originally scheduled for January, 2007 Interlocutory appeals on various issues by both the Crown and the accused have further delayed the trial, now expected to proceed in the fall of 2007 at the earliest.[127]

July 2005 London Bombings

On July 7, 2005 four bombs exploded in rapid succession in London, England, three of them in London Underground trains and one on a double-decker bus.[128] Fifty-six persons were killed, including the four suicide bombers, and around 700 people were injured. A subsequent Home Office report on the attack described it as "an act of indiscriminate terror", which killed or maimed "the old and the young, Britons and non-Britons, Christians, Muslims, Jews, those of other religions and none.[129] It was the deadliest single act of terrorism in the UK since the Lockerbie

---

124 Sections 83.18 and section 83.19 of the *Criminal Code,* S.C. 2001, c.41, s.4; and see "The Fifth Estate", *supra;* and "Ottawa Citizen", *supra*

125 "Northeast Intelligence Network", *supra*

126 "Canada Com", *supra*; "Ottawa Citizen 2", *supra; BBC news, "Five get life over UK bomb plot", April 30, 2007*

127 *R v Khawaja,* (Court File No: 04-G30282); Ottawa Citizen, May 30, 2007

128 In a subsequent Home Office report on the attack, it was concluded that the three train bombs exploded "almost simultaneously", with the fourth, on the bus, exploding 57 minutes later: "Report of the Official Account of the Bombing in London on 7th July 2005", May 11, 2006 (London: The Stationery Office), available online at: http://www.homeoffice.gov.uk/documents/7-July-report.pdf?view=Binary

129 *Ibid* at page 4

disaster in 1988, and the deadliest bomb attack in London since the Second World War.[130]

Precisely two weeks later, on July 21, 2005, a number of persons tried—but failed—to set off explosive devices at three London underground stations and one double-decker bus. The detonators of all four bombs exploded, but none of the main explosives detonated. There were no casualties, and no one was injured.[131]

The resulting police investigation was massive. Over one thousand London detectives were assigned to prevent further attacks. Scotland Yard interviewed 12,500 potential witnesses, seized over 26,000 exhibits including 142 computers, and examined over 6,000 hours of CCTV footage.[132]

In March and May, 2007 a total of 7 persons were arrested and charged with "commissioning, preparing or instigating acts of terrorism" in connection with the July 7th bombings, and 17 were arrested and indicted in connection with the second, failed attempt.[133] The cases are proceeding in the normal courts, and what has been described as a "terrorist trial log jam" has caused the first trial to be deferred from September, 2006 until sometime in 2007. Authorities recently advised that there is "now a record 90 terror suspects awaiting trial in Britain's severely overcrowded prisons".[134]

---

130 "Home Office Report", supra; FoxNews.com "Report: Fifth Man Planned to Take Part in London Train Bombings", Sunday, July 23, 2006: http://www.foxnews.com/story/0,2933,205159,00.html ("Fox News"); Guardian Unlimited, "One Year On, A London Bomber Issues a Threat From the Dead", Friday July 7. 2006, The Guardian: http://www.guardian.co.uk/attackonlondon/story/0,,1814654,00.html ("Guardian"); Guardian Unlimited, "Police Anti-terror Efforts at All-time High", Monday, July 3, 2006, The Guardian: http://www.guardian.co.uk/attackonlondon/story/0,,1811828,00.html ("Guardian 2")

131 Jurist: Legal News and Research, "UK Police Charge 17th Person for Failed London Bombings", Friday, January 27, 2006: http://www.jurist.law.pitt.edu/paperchase/2006/01/uk-police-charge-17th-person-4.php ("Jurist"); CNN.Com, "UK Police: Latest Bombers Failed", Friday, July 22, 2005: http://www.cnn.com/2005/WORLD/europe/07/21/london.tube/ ("CNN.Com")

132 "Home Office Report", *supra* at page 26

133 "Home Office Report", *supra*; Guardian Unlimited, July 3, 2006, *supra*; It should also be observed that on the 1st anniversary of the fatal attack, July 7, 2006, al-Qaeda's Deputy Leader, Ayman al-Zawahiri claimed that two of the suicide bombers had been trained in the manufacture of explosives at al-Qaeda camps: "Guardian", *supra*

134 "Crisis as Terrorist Trials Hit Log Jam", http://www.timesonline.co.uk/article/0,,2-2392704,00.html

The Ontario Terrorism Arrests

On June 2, 2006 Canadian authorities arrested 17 persons (12 adults and 5 youth) and charged them with a series of terrorist and firearms offences. Police alleged they were supporters of al-Qaeda who had received or provided terrorist training in rural areas of Ontario near Toronto.[135] An 18th defendant was arrested and charged August 3rd, 2006 at his home in Mississauga, Ontario.[136]

Police and Crown authorities have been very careful about the pre-trial information that is being released about the case. Evidently, however, it is alleged that many of the accused had been trained together, and were planning a series of attacks against unspecified targets in southern Ontario.[137] Authorities have excluded the CN Tower and the Toronto Transit Commission as targets, but have not ruled out the Parliament building in Ottawa.[138] Early reports suggest that the group acquired what they believed to be three tons of ammonium nitrate during an RCMP sting operation--three times the amount of bomb-making material that killed 168 persons in Oklahoma City 11 years earlier.[139]

All of the accused have been charged under normal statutes (*Criminal Code, Youth Criminal Justice Act*) in the usual courts. The prosecution team consists of six lawyers from the Ministry of the Attorney General in Ontario as well as Justice Canada. The adult defendants have elected trial by judge and jury, and early indications suggest that pre-trial motions will last many months, perhaps up to a year or so, with the trial lasting around two months after that. Disclosure issues loom heavily in the balance, and, consistent with previous terrorist trials, it can reasonably be assumed that an inherent tension will develop between the prosecutor's obligation to disclose all relevant evidence and security agency's equally pressing need to maintain confidentiality over certain information respecting national security.

---

135 CBC News, "Plot Suspects Appear in Court", June 3, 2006, http://www.cbc.ca/stories/canada/national/2006/06/03/terror-suspects.html

136 CTV.ca, "Police Charge 18th Terror Suspect in Ontario", August 4, 2006: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060803/ansad_asari_060803/200...

137 "CTV.ca", *supra*; Canada.com, "First Adult Terror Suspect Accused of Planning Attacks in Ontario Gets Bail", Canadian Press, July 20, 2006; "Plot Suspects Appear in Court", *supra*

138 The Australian, "Canada Plot Probe Goes Global", June 7, 2006: http://www.theaustralian.news.com.au/story/0,20867,19387232-2703,00.html

139 BBC News, June 4, 2006, "Canada Charges 17 Terror Suspects", http://news.bbc.co.uk/2/hi/americas/5044560.stm; *The Globe and Mail*, "The Making of a Terrorist Mole", Friday, July 14, 2006 at page one.

UK Airplane Conspiracy (2006)

Twenty-four young and well-educated British men were arrested in the UK on August 10, 2006 in relation to an alleged plot to conduct suicide bombing aboard at least ten transatlantic air flights.[140] British and US authorities believed that liquid or gel explosives were to be smuggled on board in carry-on luggage, then assembled in-flight with detonators disguised as common electronic devices, such as camera flashes.[141] Authorities said the suspects planned to inflict a maximum loss of life by blowing up the aircraft in simultaneous waves over the Atlantic, or possibly over major US cities.[142]

US Homeland Security Secretary Michael Chertoff said the plan bore some of the hallmarks of Al-Qaeda, and Paul Stephenson, Scotland Yard's Deputy Commissioner said that "this was intended to be mass murder on an unimaginable scale".[143]

While police and security officials had been monitoring the activities of the group for some time,[144] execution of the plot obviously became imminent when it was learned that some members of the group were about to make a "dry run".[145] In this sense, timing of the arrests, and, to a lesser extent, the laying of any charges, was not entirely in the control of police. This will place authorities in the position of playing "catch up" in terms of trial preparation, disclosure packages, assessments of withheld material due to national security concerns, etc.

At the time of writing, a total of 25 persons have been detained pursuant to the *Terrorism Act* (2006), which permits detention for up to 28 days, subject to extensions on application to the courts.[146] Fifteen of those arrested were charged with criminal offences—primarily conspiracy to

---

140 The Globe and Mail, August 11, 2006 at page 1; National Post, August 11, 2006 at page 1; Winnipeg Free Press, August 11, 2006 at page 1

141 The most common liquid explosive is nitroglycerin, the key ingredient in dynamite. As little as a few ounces is sufficient to blow a hole in the fuselage wall of an aircraft. At high altitudes, with pressurized cabins, a hole of this nature can cause a plane to blow apart in seconds. This is what occurred in 1994, when, with the use of a watch and a nine volt battery, al-Qaeda blew up a Japanese airline bound for Narita Airport: Winnipeg Free Press, *ibid*, at pages A-6 and A-7.

142 The Globe and Mail, National Post and Winnipeg Free Press, *supra*

143 Winnipeg Free Press, *supra*

144 In early reports, police indicated that those arrested were "predominantly British-born, and of Pakistani descent", and that the arrests "came as a result of surveillance of a suspect Islamist extremist network that began last year (2005)": National Post, *supra*, at page 1

145 The Globe and Mail, National Post and Winnipeg Free Press, *supra*

146 Terrorism Act 2006, Ch.11 (Eng.) [Royal Assent given March 30, 2006]. Section 23 of the legislation provides for the extension of the period of detention.

commit murder, preparing acts of terrorism, possession of articles useful to a person preparing an act of terrorism and failing to disclose information of material assistance in preventing an act of terrorism. Nineteen of the suspects had their assets frozen by the Bank of England.[147] In September, 2006 the prosecutor advised the Central Criminal Court that the trial would likely commence during the spring of 2008.[148]

The UK conspiracy case bears several important parallels to the conspiracy case in Ontario. The suspects in both are young, generally well-educated, middle-class, born and educated in the west, integrated into their local society, and, in essence, alleged to be "home grown extremists" inspired—but not necessarily commanded—by al-Qaeda. In contrast to the Air India and Lockerbie tragedies, the perpetrators are prepared to commit suicide for their cause, and achieve martyrdom. Where the plot is thwarted before it goes forward, the suspects can be arrested locally and do not require extradition from another country. This may mean that resulting trials will, in the absence of a significant number of pre-trial motions, proceed with dispatch. More often, however, they will be subject to the same mega-trial pressures of multiple joinder of counts and accused, pre-trial motions, disclosure issues, electronic surveillance and national security confidentiality claims, thus triggering a significant compression factor.

The Pickton Case

Around five years ago, Robert Pickton was arrested and charged with several counts of murder. Since then, he has been indicted on twenty-six counts of first-degree murder in the deaths of women, many of whom were prostitutes from Vancouver's Downtown Eastside. Nearly all of the lengthy and complex preliminary proceedings after Pickton's arrest took place under a publication ban.[149]

---

147 Jurist Legal News and Research, August 29, 2006 "UK Police Charge Three More Suspects in Airplane Bomb Plot": http://www.jurist.law.pitt.edu/paperchase/2006/08/uk/police/charge/three/more/suspects.php; Jurist Legal News and Research, August 23, 2006 "British Judge Allows Second Extension of Detentions for Uncharged Terror Suspects": http://www.jurist.law.pitt.edu/paperchase/2006/08/british/judge/allows/second/extension.php; CBC News, "Bank of England Releases Names of Bomb Plot Suspects", August 10, 2006: http://www.cbc.ca/story/world/national/2006/08/10/bombing-aircraft.html

148 Foxnews.com, September 4, 2006 "Trials in British Airplane Bomb Plot Unlikely until 2008: Prosecutor Says"

149 *R v Pickton*, [2002] B.C.J. No. 2830 (P.C.)

British Columbia courts severed the counts, placing the accused on trial for six charges of first-degree murder, leaving twenty to be tried at a later stage.

The accused elected to be tried by judge and jury, and the trial commenced in January, 2007.

For several reasons, the trial will test whether Canada's laws can cope with a lengthy, complex and high-profile trial such as this. First, there was a concern that, despite the publication ban, individuals and organizations may publish the evidence from the preliminary inquiry on the internet. Indeed, a review of the most powerful search engine confirms that there are hundreds of thousands of hits for this case. However, the vast majority simply track progress in the case, and even the most avid researcher would be hard-pressed to find any detailed publication of the evidence led at the preliminary inquiry.

Empanelling the jury commenced in December, 2006. It was widely expected to be an extraordinarily difficult task to find twelve persons who could approach the case without bias. In fact, the full jury panel, including two alternates, was empanelled within two days. The trial judge warned the jurors that the evidence they hear may be "graphic".

It is significant to note that at the start of the case, the trial judge ruled that the defence would have about fifteen minutes to provide opening comments immediately after the prosecution provided its opening address to the jury. The accused would not, however, be required to indicate at that time whether he would testify during the trial in his own defence. Defence counsel advised the court that the defence would prefer to address the jury before the evidence was called to provide an alternative context for the testimony of the Crown witnesses. In Part VIII of this paper, I note that research in cognitive psychology suggests that advising a person on how to frame information he or she is about to receive enhances later recollection, aids in the interpretation of complex material, and leads to a greater level of satisfaction in processing the information. The trial judge's ruling on this point appears to accept this philosophy.

Two major challenges face the court in this case. First, the trial is expected to last one year. Only two jurors can be discharged during the trial, following which a mistrial must be ordered. Even before the trial

started, one juror candidate dropped out on the second day of selection for financial reasons. At the time that the jury was empanelled, defence counsel expressed concern that jurors may have to be discharged during the trial, requiring the case to start all over again. He added: "that's a potentially very poor and inefficient system".[150] Second, if the evidence during the first trial is, in fact, "graphic", fair trial requirements will be even more difficult to meet in the event of a second trial dealing with the twenty counts of murder that remain. At the time of writing, the trial continues before the courts in British Columbia.

Sauve and Trudel: Collapse of a First Degree Murder Mega-trial

One of the longest and mostly costly criminal trials in Canadian history was terminated by a judge of the Superior Court of Ontario on the 12th of January, 2007 on the basis that the proceedings on an indictment charging first degree murder breached the accused's right to trial within a reasonable time guaranteed under section 11(b) of *The Charter of Rights and Freedoms.*

The indictment focused on two underworld killings that took place in Ottawa during 1990. Both accused had previous, serious criminal records, as did the key Crown witnesses. The Crown's case depended heavily on the evidence of one D.G., a dealer and user in drugs. D.G. was on the witness stand for 30 days, mostly in cross-examination. He admitted he had lied to police, fabricated evidence and lied at the preliminary inquiry. Two other Crown witnesses, similarly members of the underworld, were on the stand for 16 and 7 days respectively, mostly in cross-examination.

The trial was a very difficult one, involving accused who were criminals, witnesses who were criminals, jailhouse informants, retracted testimony and post-trial recantations. On this state of affairs, the Court of Appeal later said this: "many of the witnesses were deeply involved in the Ottawa criminal underground and the fair presentation of their evidence posed serious problems…. We have attempted to approach this case bearing in mind the many difficulties faced by the trial judge and counsel at the trial. This court does, however, have an obligation to ensure that the law is properly applied so that the appellants obtained a trial that does not produce a substantial wrong or miscarriage of justice. That obligation

150 ctv.ca, "Eleven Jurors Chosen for Pickton Murder Trial in January", December 11, 2006.

does not disappear because a trial, like this one, was unusually long and complex, or because a retrial may be taxing to the administration of justice."

Sauve and Trudel were convicted on both counts of first degree murder by a court composed of a judge and jury. In 2004, the Ontario Court of Appeal unanimously ordered a new trial, largely on the basis of the frailties associated with the Crown's evidence and the failure on the part of the judge to provide a clear and explicit direction to the jury that is was dangerous to act on some aspects of the Crown's evidence. However, in granting a new trial, the Court of Appeal did observe that it was "a close case". Nonetheless, the case went back to the trial court for a new hearing.

The decision by the new trial judge to enter a judicial stay revolved almost entirely around the length of time that it took to bring the case to a final verdict: during the passage of time, two unreliable underworld informants had been dropped from the Crown's case; the extraordinarily lengthy preliminary inquiry, which lasted two and a half years, was caused "almost entirely" by problems related to Crown disclosure; in total, the case had cost almost $30,000,000.00 to prosecute and defend, and had taken a "crippling" toll on the Ontario Legal Aid Plan; court transcripts had taken four years to prepare; with allegedly corroborating evidence no longer available, the case relied heavily on an informant who was completely unreliable; and some witnesses had remained in the witness protection program, receiving payments to testify. The total of unreasonable delay attributable to the Crown was three and half years, the trial judge ruled. As a consequence, the memories of the key witnesses had been "ravaged" through the passage of time, and the prejudice to the accused was "manifest". No appeal against this decision was taken by the Crown.

This case represents the most recent illustration of a mega-trial involving serious charges that has simply collapsed under its own weight – in this case through the passage of an extraordinary amount of time required to hear the case fully and fairly.

PART IV

Structural Issues Arising in Terrorist Trials

In this Part, I will examine the structural issues and patterns that emerge from the cases outlined in Part III. The case sample is relatively small, so one must be careful not to infer too much; nonetheless, as I will show, some useful issues and patterns do seem to emerge. While I have divided this Part into six patterns or themes, they are not watertight compartments, so some overlap does occur.

Normal Courts and Laws Are Preferred

In general, governments have relied upon their normal courts and criminal law to deal with acts of terrorism. Northern Ireland and Lockerbie are exceptions, and in those cases there were compelling reasons to depart from the norm. Northern Ireland found itself in the midst of a two-decade long terrorist campaign and acted in accordance with a judicial recommendation to move away from trial by jury; Lockerbie departed significantly from the norm, but significant legitimacy questions have resulted and continue to be debated.

Horrific Cases Often Generate Anxiety Concerning Court Structure and the Ability to Have a Fair Trial

The "hydraulic pressure" of public opinion in exceptionally horrific cases can infect and distort the normal decision-making process by jurors, police, prosecutors, scientists, and, perhaps, even judges. Citizens can become enraged for a variety of reasons—although usually it is because of the horrific nature of the crime, the victim or victims involved or the unpopularity of the defendant. An enraged citizenry can make a fair trial very difficult. Departures from the norm—but within the overall, established legal framework—may become necessary to ensure that a miscarriage of justice does not occur. Fair trial screens include: a venue change (McVeigh; Lockerbie), severance of accused and counts (the gang Mega-trials), disallowing "supergrass" evidence (Northern Ireland), and banning juries (Northern Ireland; Lockerbie). But it is critical to remember that the distortion can and often does occur outside of the courtroom,

well before the trial even starts.[151] And, as I note later, appellate courts in England and the United States have emphasized the importance of respecting the rule of law, including the role of the jury, even in times of chaos and terrorism.

Terrorism in the 21st Century Has Changed, and Requires New Approaches to the Trial Process

Suicide bombers and decentralized conspiracies based on ideology or political agendas, whose genesis lies thousands of miles from the acts of terrorism, have changed the face of terrorist trials. As evidenced by 9/11, the UK conspiracy (2006) and the Ontario conspiracy (2006), an attempt to make perpetrators accountable through the criminal justice system is lengthy and extremely expensive, if it can be done at all. Generally, the case against the accused is circumstantial, based heavily on documents, intercepted private communications, long-term surveillance, e-mail traffic, data on computers, and, sometimes, the testimony of someone involved in the conspiracy. Length and complexity raise significant questions about whether the traditional Canadian trial structure (one judge and twelve jurors) is appropriate, or whether we need a new approach that ensures a verdict will be reached based on a fair consideration of the evidence. Reliance on the criminal process also raises questions about whether those truly responsible are held to account, or whether, as alleged in Lockerbie, "bit players" end up being the ones in the prisoners' box.[152] In many cases, this is the result of reliance by the criminal justice system on evidence that is both admissible and available to the court system.

Structural Considerations

Appellate judges in both the UK and the US have emphasized the need to respect the Rule of Law and the role of the jury, even in the face of horrific acts of terrorism or treason. That noted, the UK, US, Northern Ireland

151 As I argue below, there is a basis to believe that jurors in the cases that I have reviewed, and perhaps more broadly throughout the Commonwealth, have generally done a pretty good job of assessing cases. Failures, where they occurred, more commonly were occasioned by other elements of the criminal justice system, such as deception by witnesses, prosecutorial misconduct or a failure to disclose. In a recent article, Bennett Gershman contends that juries generally get it right, but verdicts can be wrong through extrinsic factors that corrupted the integrity of the trial: Bennett L. Gershman, "How Juries Get It Wrong—Anatomy of the Detroit Terror Case", 44 Washburn L J 327 (2005). Two Members of the International Society for the Reform of Criminal Law, from Canada and England, reached a similar conclusion in: "Juries: How Do They Work? Do We Want Them?", by Michael Hill, Q.C. and David Winkler, Q.C. (December 2000), at page 3.

152 David R. Andrews, "A Thorn on the Tulip—A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial", 36 Case W. Res. J. Int'l L. 307 at 318 (2004)

and Scotland have made some adjustments to the structure of the trial system to meet the demands of lengthy and complex cases and, in the case of Northern Ireland, to the immediate challenges posed by terrorist trials. Amongst others, this has permitted: alternate judges, alternate jurors, an expansion in the number of jurors hearing the case, the use of judge alone trials to replace what would otherwise be trial by judge and jury, and changes in venue. Some of these structural innovations such as the change of venue or the use of alternative jurors do not seem to have affected the perceived integrity of the trial process, but others such as the use of judge alone may have had that effect.

Mega-trials of Any Sort Require Special Attention

The first "mega-trial" in Canada[153] was probably the so-called "Dredging conspiracy", heard in the Ontario courts during the late 1970s.[154] In that case, twenty personal and corporate defendants were charged in a seven-count conspiracy indictment arising out of an alleged bid-rigging scheme extending over a period of eight years.

The trial lasted 197 court days spanning a period of 15 months. At the conclusion of the evidence, defence counsel addressed the jury for seven days, the Crown address extended over eleven days, the charge to the jury lasted seven days, objections to the charge lasted eleven days, and the jury deliberated for fourteen days.

To put the matter into context: the jury began its deliberations fully *three months* after the last defence lawyer finished his closing address to the jury.

The twenty accused were charged with a total of fifty-three offences. The jury brought in forty guilty verdicts against thirteen of the accused.

---

153 The definition of what amounts a "mega-trial" is somewhat elusive, and I recognize that there are different perspectives on the issue. A significant number of factors can drive a mega-trial, either singly or in combination—especially the number of accused, number of counts, the complexity of the evidence and the amount of time that will be required for the trial, including defence evidence. In this paper, when speaking of a "mega-trial" I am generally referring to a trial that will take many months, usually nine or more, or years, to complete.

154 *R v McNamera et al* (no.1) (1981), 56 CCC (2d) 193 (Ont.C.A.), affirmed 19 CCC (3d) 1 (S.C.C.); This was discussed as recently as the 2006 Report of the Advisory Committee on Criminal Trials in the Superior Court of Justice of Ontario, dated May, 2006 and released October, 2006 at par. 308: http://www.ontariocourts.on.ca/superior_court_justice/reports/ctr/ctreport.htm

It found various accused not guilty of nine offences and was unable to reach a verdict on four counts.

In a unanimous judgment that occupies 320 pages in the law reports, the Ontario Court of Appeal affirmed the jury's verdict on all but seven counts, for which it ordered new trials. That decision was affirmed by the Supreme Court four years later.

The jury in the Dredging case did a good job sorting out who did what, with whom, and in relation to what counts. Today, however, it would likely have been seen as an "overloaded indictment", requiring severance of accused and counts.[155]Mega-trials since then have had mixed success. Some have collapsed under their own weight. In the post-Charter era, they provide a goldmine of motions for defence counsel. Competent, and reasonable counsel can make a mega-trial work, but is it reasonable to assume that mega-trials will usually be blessed with such a sense of cooperation within an adversarial framework? And how often can the state ask citizens to set aside a year or two, or more, of their lives to hear a single case?

The length of a mega-trial seems directly proportional to the risk of not reaching a verdict at all: the presiding judge, jurors, and witnesses may die or become ill; formerly cooperating co-conspirators scheduled to testify for the Crown may disappear or withdraw their cooperation. Defence witnesses may move away and become unreachable.

On the subject of mega-trials, I have deliberately focused on non-terrorist trials because it seems to me that the risk of mistrials or not reaching a verdict arises not from the existence of terrorism charges, but from the risks inherent in increasingly lengthy and complex criminal proceedings. The observations and thoughts that I will be making in Part VIII of this Report will therefore not be directed at terrorism trials *per se*, but to terrorism proceedings that are at risk due to their extreme length and complexity.

---

155 In Part VII ("Some Non-Structural Considerations"), I deal with the duty on the Crown not to overload an indictment, anchored on the proposition that it is in the interests of justice that a trial be fair and manageable, and within the comprehension of a lay jury: *R v Ng* (1999), 138 CCC (3d) 188 (BCCA) at par. 34. See, especially, the helpful decision in *R v Pangman* (2000), 149 Man. R. (2d) 68 (QB), which examines the leading decision on the issue in the United States: *US v Casamento*, 887 F. 2d 1141 (2d cir.N.Y., 1989), cert. den. 493 U.S. 1081

Politicians Sometimes "Wade into" Criminal Trials

The intersection of partisan politics and the criminal justice system is not a happy one. On occasion, though fortunately quite rarely, Attorneys General have had to resign as a result of political interference in criminal cases.[156] Political commentary before or during a criminal trial can have the effect of derailing the case, as occurred in an earlier Canadian prosecution. There, the accused was an Inspector with the RCMP who was charged with theft of computer tapes containing the list of members of the Parti Quebecois. The defence called a former RCMP officer who had been in charge of operations relating to separatists/ terrorists in Quebec at the time of the alleged offence. In the National Assembly, the Premier denounced not only the actions of the witness, whose credibility he attacked in colourful and abusive language, but also those of the defence lawyers, the federal government and the RCMP. The diatribe lasted twenty minutes, and received exceptional publicity in the media. The trial judge stayed proceedings on the basis that a fair trial could not be held, and that decision was upheld by the Court of Appeal, but was reversed by the Supreme Court on the basis that a stay was premature because there was no evidence indicating that it would be impossible to select an impartial jury.[157]

That case aside, Canada has had little experience with political interference in criminal cases. Some authorities have argued that this comes as a result of the integrity of the office-holders in Canada.[158]

Politicians are most likely to "wade into" a criminal case involving some political considerations, or a case in which the politician has been personally involved. That is evidently what has occurred in the Lockerbie case. A former Lord Advocate (roughly the equivalent of the Attorney General), who had authorized proceedings at a very early stage, is now said to have made remarks that cast some doubt on the correctness of the verdict. That state of affairs is presently being examined by the Scottish Criminal Cases Review Commission.

---

156 Bruce A. MacFarlane, Q.C. "Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency", (2002), 45 C.L.Q. 272 at 278 (Footnote 15) and 283-4

157 *R v Vermette* (1998), 41 CCC (3d) 523 (S.C.C.)

158 MacFarlane, supra, at page 278 (footnote 15) quoting Professor Edwards, widely regarded as one of the Commonwealth's leading experts on the Office of the Attorney General.

More recently, UK Prime Minister Tony Blair indicated that he opposed the death penalty in the case of Saddam Hussein, placing him at odds with the position of the United States. Blair's view was widely shared by European leaders, many of whom noted their opposition to capital punishment but welcomed Saddam's trial and conviction, as did the Prime Ministers of Australia and New Zealand.[159]

The point, however, is this: terrorist cases are highly visible, often emotionally charged proceedings that capture the attention of the public. They raise substantial public safety issues and elected officials run the risk of compromising the case in a misguided attempt to satisfy the public that such an incident will not occur again or that matters have been taken care of. Despite the legal risks, the political imperative to step in and satisfy the public sometimes seems irresistible.

159 Winnipeg Free Press, November 7, 2006, "Blair Opposes Death Penalty". The former Iraqi dictator was executed on the 29th of December, 2006 following his trial, sentencing hearing and a resulting appeal to Iraq's highest court.

PART V

Trial Structure from an Anglo-Canadian Historical Perspective

In this Part, I will review the structural elements of a criminal trial in Canada from an historical perspective—with particular emphasis on the judge and jury.

Anglo Roots

Sir William Blackstone, in his classic treatise on English law,[160] said that "… the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." He argued that the jury acted as the "grand bulwark" of the liberty of all Englishmen", by acting as a barrier between the liberty of the people and the prerogative of the Crown, and by acting as a check against judges that have been appointed by the government.[161] Presumptively, therefore, a jury consisted of twelve "of his equals and neighbours, indifferently chosen".

Transition to Canada

In Canada's first criminal law textbook, published in 1835, W.C. Keele, an attorney in Toronto, observed that the criminal law of England was statutorily adopted in Canada in 1774 and, in Upper Canada specifically, as the law of England stood on September 17, 1792.[162] Keele noted, however, that a "*special jury*" could be obtained for the trial of any indictment or civil action, without any motion in court. The Clerk of the

---

160 *Commentaries on the Laws of England* (London: 1765, First Edition, 4th Volume) at page 349 (Blackstone's *Commentaries* proceeded through 23 editions in the UK, 13 in the US, with the last emerging in 1897)

161 *Ibid*

162 *The Provincial Justice or Magistrates Manual, Being a Complete Digest of the Criminal Law, and a Compendious and General View of the Provincial Law; With Practical Forms, for the Use of the Magistracy of Upper Canada,* by W. C. Keele, an attorney of the Supreme Courts of Law at Westminster (Toronto: the U.C. Gazette Office, 1835) at 254. Keele was born in England in 1798 and emigrated to Canada, settling near Toronto. He practiced law in southern Ontario and published books on several aspects of the law, although he is best known for his study of the criminal law. His text proceeded through five editions, the last emerging in 1864.

Peace was required to deliver to the Sheriff "a list of the persons assessed 200 pounds and upwards". Forty names were then drawn by the Sheriff and each party could strike out the names of twelve. The remaining 16 persons were then summoned as "special jurors" for the trial.[163]

What did a trial in early Canada actually look like? The earliest verbatim account that I was able to find involved the ongoing conflict between the Earl of Selkirk, later Lord Selkirk, and the NorthWest Company in the "Indian Territories" (later, western Canada, specifically the Red River (Winnipeg) area). The account is recorded in a relatively rare book entitled *Report of the Proceedings Connected with the Disputes Between the Earl of Selkirk and the North-west Company, at the Assizes, held at York, in Upper Canada, in October 1818 (from minutes taken in court).*[164]

Essentially, Governor Robert Semple was killed on June 19, 1816 near Red River. Under special legislation passed in 1803 for the purpose, the trial proceeded at York in Upper Canada rather than in the "Indian Territories".[165]A Grand Jury was convened to consider whether an indictment should be found in the matter. Chief Justice Powell, Mr. Justice Campbell and Mr. Justice Boulton, as well as two Justices of the Peace, presided. After hearing the evidence, the Grand Jury found an indictment against thirteen persons, and on October 23, 1818 returned "no bill" respecting three.[166]

The trial commenced on October 6, 1818. It resembled today's trial process in many respects, with a few notable differences. The Attorney General and Solicitor General appeared personally for the Crown. The accused were represented by three lawyers; twelve men were sworn in as jurors; but, notably, the resulting three separate trials were presided over *by a panel of three superior court judges*: the Chief Justice, and Justices Campbell and Boulton.

Both of the Law Officers of the Crown provided the opening address to the jury, followed by the usual examination and cross examination of witnesses, and submissions respecting the admission of evidence. At

163 *Ibid* at page 255. This procedure is said to have been based on English statutory law: 48 G.3, c.13
164 London: B. McMillan, Bow-Street, 1819
165 *Ibid*, appendix, page 46
166 *Ibid* at page six.

the conclusion of the case, responsibility for charging the jury rotated between the Chief Justice in the first trial, and Mr. Justice Boulton in the second and third. It is evident that the three judge panel was actively involved in the trial throughout: during Justice Boulton's charge to the jury in the second trial, the Solicitor General rose to object on a point of law, but it was the Chief Justice who responded, on behalf of the panel.[167]

Whether and to what extent a *panel* of judges heard all serious cases in early Canada is unclear from the transcript of this case: certainly, counsel did not raise the point, and the issue simply was not discussed. It should be remembered, however, that the case had been "transferred in" from the "Indian Territories", and did involve the murder of the local governor. It was, therefore, a case of considerable notoriety. As a postscript, it should be noted that in each of the three trials, the jury acquitted all of the accused after only about an hour of deliberation.

1892 Codification of the Criminal Law

When Canada proclaimed into force its *Criminal Code* in 1893, it became the first nation in the British Empire to enact a national code of criminal law. Codification was a revolutionary step, to say the least: it enabled law makers and practitioners to go beyond strict precedent and to identify weaknesses in existing laws more easily. It also simplified the task of understanding the law, as well as suggesting amendments. As Canada's first Minister of Justice, Sir John A. Macdonald saw the codification of criminal laws as a way to create a stronger bond between the provinces.[168]

The 1892 *Criminal Code* brought a sense of certainty to the structural underpinning of the criminal justice system. It also offered a degree of flexibility based on regional considerations and the reality that Canada was an emerging nation with a sparse population.

---

167 *Ibid* at page 140 ("Trial of the Accessories")

168 Generally, see *The Genesis of the Canadian Criminal Code of 1892*, by Desmond H. Brown. (Toronto: The Osgoode Society, 1989); *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995).

The *Code* contained a definition of a "Superior Court of Criminal Jurisdiction" in all of the provinces and territories.[169] Every court of criminal jurisdiction in Canada had jurisdiction to try all offences within the jurisdiction of the court, but could not try offences committed entirely in another province.[170] The court was empowered to order a change of venue, providing that the trial proceeded in another district or county *within the same province*.[171]

The 1892 *Criminal Code* preserved the role of the Grand Jury. No more than 23 grand jurors, and not less than 12, could be sworn in. The law was clear, however, that any number from 12 to 23 constituted a legal grand jury. However, at least 12 of them needed to agree to find a "true bill". If twelve did not agree, they were obliged to return "not a true bill".[172]

The traditional British model of 12 jurors[173] was retained for the trial. There were, however, certain variations. In Manitoba and Quebec, an accused was entitled to a "mixed jury" consisting of one-half English and one-half French speaking jurors.[174] Prior to the 1892 *Code*, an alien was entitled to be tried by a jury *de medietate linguoe*, which permitted trial by a jury composed of one-half citizens and one-half aliens or foreigners, if so many of them could be found. The new *Criminal Code* banned this practice.[175] Later, the *Criminal Code* provided that only six jurors needed to be sworn in Alberta, the Yukon and the Northwest Territories.[176] As well, later amendments to the *Criminal Code* uniquely provided that an accused may, with consent, be tried by a judge of the Superior Court of criminal jurisdiction in Alberta *without a jury*.[177]

Flexibility was also demonstrated in the structural underpinning for criminal appeals. Where no transcript or record of the original trial proceedings existed, the trial judge often sat with *en banc* criminal panels

---

169 *The Criminal Code, 1892* [55-56 Vict., c.29, s.3(y)]
170 *Ibid*, section 640
171 *Ibid* section 651
172 *The Criminal Code of Canada*, by Henri Elzear Taschereau, reprinted with a forward by the Honourable Fred Kaufman (Toronto: The Carswell Company, 1980) at page 734 ("Taschereau")
173 Section 667 (3) of the 1892 *Criminal Code*. It was part of section 419 of the English Draft Code of 1878 which, in turn, finds its roots in English statute: 39 and 40 Vict. C.78, s.19
174 *Ibid* at page 772 and 774.
175 *Ibid* at page 771
176 The rather colourful and somewhat checkered history to this provision can be found in the first edition of *Martin's Criminal Code* (Cartwright and Sons: 1955 at pages 688-670)
177 *Ibid*; and see *R v Bercov* (1949) 96 CCC 168 (Alta.C.A.)

in appeals *from their own judgments*. Not surprisingly, there were cases where the trial judges would dissent when appeals from their judgments were allowed, but this did not always follow. Frequently, the trial judge would concur in his own reversal. Evidently, this practice was adopted because of the smaller bench and the exigencies of travel between large judicial centres.[178] The point is, however, that since early times, Canada has demonstrated considerable flexibility in its approach to the structure of a criminal trial.

The Current Legal Framework

Under *The Canadian Charter of Rights and Freedoms*, any person charged with an offence has the right, except in the case of military offences, "to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment".[179] In this respect, it should be noted that almost all of the offences set out in Part II.1 of the *Criminal Code* concerning terrorism carry a maximum punishment of five years, ten years, fourteen years or life imprisonment, thus triggering this provision.[180] Additionally, traditional criminal law offences for which a terrorist may be charged, such as murder and hijacking of an aircraft, all carry maximums of five years or more.

In the post-Charter era, appellate courts in Canada have emphasized the importance of trial by jury. In one case,[181] Blair, J.A. traced the history of jury trials in England, the United States and Canada, and said the following:

> This history demonstrates that the right of trial by jury is not only an essential part of our criminal justice system, but is also an important constitutional guarantee of the rights of the individual in our democratic society. In all common law countries it has, for this reason, been treated as almost sacrosanct and has been interfered with only to a minimal extent.

---

178 McClung, J.A. describes this practice both in Ontario and Western Canada between 1868 and 1912 in *R v Robinson* (1989), 51 CCC (3d) 452 (Alta.C.A.), at page 473 (footnote 8)

179 Section 11 (f) of the *Canadian Charter of Rights and Freedoms*

180 There are a few exceptions: offences referring to the freezing of property and hoax terrorist activity can be proceeded on summary conviction.

181 *R v Bryant* (1984), 16 CCC (3d) 408 (Ont.C.A.) at page 423

The starting point in the *Criminal Code* is section 471, which provides that "except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury". However, Parliament has enacted a number of exceptions to this general rule, some of which are not always conditional on the accused's consent to another mode of trial. In recent years, the number of trials by jury has decreased to the point where in many parts of Canada trial by jury is the exception rather than the rule.

The majority of the indictable offences not listed in section 469 of the *Criminal Code* (which includes, for instance, murder, treason, piracy) permit the accused to elect the mode of trial as set out in section 536(2) of the *Code* and, within limits, the accused may change an election. The Attorney General is given a narrow discretion to override this section and require a trial by jury under section 568 of the *Code*.[182] In general, however, the intention of the various provisions in the *Code* is to give the accused the right to determine the manner of trial when charged with an indictable offence.

Under the current provisions of the *Criminal Code*, the presumptive size of a jury in Canada remains at twelve.[183] That number is not, however, constitutionally frozen based on the practice under the old common law in England and Canada.[184] Rather, it is a starting point which can be varied legislatively according to the circumstances.[185]

For instance, if the trial judge considers it advisable "in the interests of justice", one or two alternate jurors may be ordered for a trial.[186] If a full jury of twelve plus alternates cannot be empanelled despite compliance with the *Criminal Code*, the court may summons as many persons, whether qualified at law or not, to provide a full jury and complement of alternate jurors that were ordered.[187] Alternate jurors must attend the *start* of the trial. If there is not a full jury present, alternates are substituted in order until there are twelve jurors. Alternates not required are then excused

182 At least one trial court has concluded that this provision is constitutionally secure: *R v Hanneson* (1987), 31 CCC (3d) 560 (Ont.H.C.J.)
183 Section 643 (1) and section 631(5) *Criminal Code*
184 *R v Genest* (1990), 61 CCC (3d) 251 (Que.C.A.), at 260-61
185 For instance, Alberta moved from a jury of six to a jury of twelve in 1969: S.C. 1968-69, c.38, s.50
186 S.631 (2.1) *Criminal Code*
187 Section 642(1) *Criminal Code*

from further duty.[188] As discussed below, a criminal trial begins when an accused in put in charge of the jury:[189]

If a juror needs to be replaced because of illness or some other reasonable cause, before any evidence has been led before a jury, but after the alternates have been excused, the presiding judge may select a replacement juror from the panel summonsed, or by summonsing a talesman from the street.[190] After the trial has commenced, the trial judge is empowered to discharge a juror, without replacement or alternate, where the court is satisfied that the juror should not, by reason of illness or other reasonable cause, continue to act as a juror.[191] Where, in the course of the trial, a juror dies or is discharged under section 644(1), the jury remains properly constituted for all purposes, provided that the number of jurors does not drop below ten.[192]

The current federal criminal law policy is thus clearly evident: the trial must commence with twelve jurors, either selected in the normal way, or through alternates, or by seeking a talesman.[193] If, after the commencement of the trial, one or more of the twelve jurors "drops out" due to illness or death or other reasonable cause, the jury may continue providing that the number of jurors does not drop below ten. Once it drops to nine, *a mistrial is required*.

The implications for a terrorist mega-trial are serious. Under the current legislative framework, most of the legislative safeguards are built into the front end, before the trial starts. Once it commences, only two jurors can be discharged before a mistrial *must* be ordered. In an 18 month or two year trial, the risks of that happening are significant and disturbing.

A line is thus drawn in the sand: the trial does not commence until the accused is placed in the jury's charge, and the jury is advised of the charge and the plea, and of their duty to inquire whether the accused is guilty or not guilty of the offence charged.[194] The Supreme Court of Canada outlined the rationale for this rule in the following terms:[195]

---

188 Section 642.1 *Criminal Code*
189 *R v Basarabas* (1982), 2 CCC (3d) 257 (S.C.C.) at 266
190 Section 644(1.1) *Criminal Code*
191 This power to discharge, under section 644(1) of the *Criminal Code*, is discussed below.
192 Section 644(2) *Criminal Code*
193 *R v Wellman* (1996), 108 CCC (3d) 372 (BCCA) (Before the scheme of alternates was enacted); see, generally, sections 642 *et seq*
194 *R v Basarabas* (1982), 2 CCC (3d) 257 (S.C.C.) at 266 (7-0)
195 *Ibid* at 265-6

> …There is no good reason for denying an accused a full jury where no evidence has been led. An accused should not be lightly deprived of his or her right to be tried by a jury of twelve persons. It would be undesirable to start a trial with less than that number…to advance in time the stage when the trial is forced to proceed with one juror missing, beyond that required by common sense and the plain language of the *Code*, is to increase the likelihood, in a lengthy trial, should other jurors fall ill, that mistrials will have to be declared because the requisite number of jurors is lacking.

A few further points should be noted concerning the jury under the current legal framework. First, an accused who has absconded from his or her trial loses the right to trial by jury unless he or she can show a legitimate excuse for the failure to attend or remain in attendance.[196]

Second, the court can take steps to protect the privacy or safety of a juror or alternate juror. If it is in the best interests of the administration of justice, the court may direct the clerk to refer to the juror by number and, where such an order is made, may also make an order of non-publication concerning the identity or any information that could disclose the identity of a juror or alternate juror.[197] This provision will have particular application in cases of terrorism and organized crime.

Third, where a jury is unable to agree on its verdict, the trial judge may discharge the jury and either direct a new trial or adjourn the case on terms that seem appropriate.[198] Finally, a judgement may not be stayed or reversed after verdict only by reason of an irregularity in the empanelling of the jury.[199]

To this point, I have only examined the role of the *jury* within the current legal framework. A few points should be made about the role and continuation of the *trial judge* in the context of lengthy criminal trials.

---

196 Section 598 *Criminal Code*. The Supreme Court of Canada has ruled that this provision is constitutionally secure: *R v Lee* (1989), 52 CCC (3d) 289 (S.C.C.) (5:2)

197 Section 631(3.1) and (6) *Criminal Code.* And see *R v Jacobson*, (2004), 196 CCC (3d) 79 (Ont. S.C.J.)

198 Section 652(1) *Criminal Code*

199 Section 670 *Criminal Code*

Section 669.2 of the *Criminal Code* provides an exhaustive scheme of how to handle a trial when the original trial judge dies or, for whatever reason, cannot continue to hear the case to verdict.

The general rule is that another judge of the trial court may continue the trial.[200] If a decision has already been reached by the jury or the original trial judge, the substitute judge may sentence the defendant if he or she was found guilty.[201] Where the trial had commenced but no adjudication had been made, the substitute judge shall commence the trial as if no evidence had been taken.[202] In a jury trial, the substitute judge may either continue the trial or start all over again.[203] If continued, the evidence adduced is deemed to have been adduced before the substitute judge.[204]

The discretion to either continue the trial or start over again in a jury trial is the most problematic part of this scheme. In month 22 of an expected 24 month trial, the temptation to start again is, in one sense strong: it was the original trial judge who made all of the rulings and heard all of the witnesses.[205]

In another sense, however, the argument in favour of continuing is equally strong, although it may be seen as being anchored on issues of cost and convenience. The reality is that in some cases it may be difficult to recommence an extraordinarily long trial once it aborts on the eve of verdict: witnesses have dispersed, some may no longer be available and those formerly cooperating with authorities may no longer wish to have anything to do with the case. There is also provision for the prosecutor and the accused agreeing to adduce some but perhaps not all of the evidence before the new judge in a jury trial.[206] As discussed above, co-operation between the prosecutor and the defence lawyers may be crucial in the successful management and resolution of long trials. Once again, however, the issue is not so much the management of a terrorist trial, but the dangers associated with a mega-trial.

---

200 Section 669(1) *Criminal Code*

201 Section 669.2(2) *Criminal Code*

202 Section 669.2(3) *Criminal Code*

203 Section 669.2(4) *Criminal Code*

204 Section 699.2(5) *Criminal Code*

205 A trial judge is entitled to express a view on the factual issues in the case to assist the jury: *R v Steinberg*, [1931] S.C.R. 421; *R v Boulet*, [1978] 1 S.C.R. 332, including a "fair comment" on the credibility of a witness: *R v Buxbaum* (1989), 70 C.R. (3d) 20 (Ont.C.A.), lv. ref. 37 O.A.C. 318 n, as long as the summing up is not "fundamentally unbalanced": *R v Mears* (1993), 97 Cr. App. R. 239 (P.C.), and the trial judge makes it perfectly clear that they have the right and duty to form their own conclusions, and can reject the opinions expressed: *R v Broadhurst* [1964] A.C. 441 (P.C.) at 464; *R v Gunning*, [2005] 1 S.C.R. 627 at pars. 27 and 31.

206 *Criminal Code* section 669.2(5)

PART VI

The Function of Trial by Jury

In this paper, I have, at a few points, touched upon the role of the jury in criminal trials. In this Part, I will step back a bit, and examine the fundamental principles underlying the system of trial by jury in a democratic state.

I do this for two reasons: first, it is evident that some changes to the jury system need to be considered in relation to terrorist trials, particularly those of a "mega" nature. Second, if change is considered, it is important to have a clear understanding of what the central elements of trial by jury are, so that any reforms will be compatible with the guarantees described in s.11 (f) of the *Charter of Rights and Freedoms*. In other words, it is important to know where the constitutional boundaries lie, so that change can occur within them, and not outside.

The modern jury is intended to be a representative cross-section of society, honestly and fairly chosen.[207] Through its collective decision-making, the jury is an excellent fact-finder.[208] The process of deliberation is the genius of the jury system.[209] Due to its representative character, it acts as the conscience of the community.[210] The jury can, and does, act as the final bastion against oppressive laws or their enforcement.[211] Significantly, it also provides a means by which the public increases its knowledge of the criminal justice system—which, in turn, through the involvement of the public, increases societal trust in the justice system as a whole.[212] Put

---

207 *R v Sherratt* (1991), 63 CCC (3d) 193 (SCC) at 203 [5-0 on this point]; Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" (Ottawa: 1980) at page 5; Law Reform Commission (New South Wales), Report 48 (1986)- Criminal Procedure: The Jury in a Criminal Trial, par. 2.1; *Williams v Florida*, 399 U.S. 78 at 100.

208 *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra*; Law Reform Commission (New South Wales), *supra*; *Williams v Florida*, *supra*; *R v Pan* [2001] 2 SCR at par. 43

209 *R v Sims,* [1992] 2 SCR 858; *R v G* (RM), [1996] 3 SCR 362 at par. 17

210 *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra* at page 8; Law Reform Commission (New South Wales), *supra*; *Williams v Florida*, *supra*

211 *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra* at page 11; Law Reform Commission (New South Wales), *supra*. There is, however, an important nuance here: because the jury is asked for a general verdict of guilty or not guilty, it has the power to bring in a verdict of acquittal, which is perverse in the sense that it "flies in the teeth of the facts and the law". That does not mean, however, that defence counsel can ask the jury to nullify a law passed by Parliament, by refusing the apply the law that the trial judge has instructed them to apply: *R v Morgentaler* et al (1985), 22 CCC (3d) 353 (Ont. C.A.) at page 431 *et seq.* Quite recently, the Supreme Court of Canada confirmed that juries are not entitled *as a matter of right* to refuse to apply the law—but they do have the *power* to do so where their consciences permit no other course: *R v Krieger*, 2006 SCC 47 at par. 27

212 *R v Sherratt*, *supra*; Law Reform Commission of Canada, *supra* at pages 13-17; Law Reform Commission (New South Wales), *supra*; *Ng v The Queen* [2003] HCA 20, per Kirby J. at footnote 75; *Williams v Florida*, *supra*

simply, "12 members of the community have worked together to reach a unanimous verdict".[213]

The Supreme Court of Canada put the matter quite succinctly in 2001 in a unanimous (9-0) judgement:[214]

> In acting as fact-finders in a criminal trial, jurors, like judges, bring into the jury room the totality of their knowledge and personal experiences, and their deliberations benefit from the combined experiences and perspectives of all of the jurors. One juror may remember a detail of the evidence that another forgot, or may be able to answer a question that perplexes another juror. Through the group decision-making process, the evidence and its significance can be comprehensively discussed in the effort to reach a unanimous verdict.

Appellate courts in Canada, the US and Australia have emphasized that "the incidents" of jury trial are not immutable: they can change to meet contemporary needs and adapt to modern circumstances and conditions.[215]

That said, there is an emerging consensus that there are a number of irreducible minimum characteristics of a trial by jury. Among those characteristics which have been held to be "essential" and "irreducible elements" are:[216] the independence of the jury; its representativeness; the randomness of selection; measured group deliberation; challenges to jurors; and, at least in Australia, and possibly in Canada, a unanimous verdict.[217]

---

213 *R v G* (RM), *supra* at par. 13; *R v Pan, supra* at par. 41

214 *R v Pan, supra* at par. 43. There, the court observed at par. 99 that "the requirement of a unanimous verdict is a central feature of our jury system." The court fell short of concluding that the unanimity rule is constitutionally guaranteed although the implication may well be there. In Part VII, *infra*, my discussion of a possible movement to majority verdicts is predicated on the assumption that the issue is open for reform.

215 *R v Genest* (1990), 61 CCC (3d) 251 (Que.C.A); *Williams v Florida, supra*; *Ng v The Queen, supra*; "The Constitutional Jury- 'A Bulwark of Liberty'?" , by James Stellios, 27 Sydney L. Rev. 113 (2005).

216 *R v Sherratt*, *supra*; "The Constitutional Jury- 'A Bulwark of Liberty'?", *supra* at page 8; *Ng v The Queen, per Kirby, J. supra; Brownlee v The* Queen (2001) 207 CLR 278; *Williams v Florida, supra*; *Cheatle v The Queen* (1973) 177 CLR 541; *Colorado v Burnette*, 775 P. 2d 583 (1989); *R v Ronen et al*, 2004 NSWSC 1294 (2005); and some would add, with some force, the sanctity and privacy of jury deliberations: *Stokes v Maryland*, 843 A.2d 64 (2004)

217 *Cheatle v The Queen, supra; Brownlee v The Queen, supra; R v Pan, supra*

However, a number of characteristic features (as distinct from the essential attributes) of the jury have not been, and could not have intended to be, immutable. Such characteristics include, for instance: that only men can be jurors; more specifically, only male property holders can be empanelled; the jury needs to be sequestered throughout the course of the trial; and twelve jurors must remain throughout, failing which a mistrial must be ordered.[218]

Lengthy criminal trials run a clear risk of losing jurors for a variety of reasons. In Part V, I described Canada's relatively modest attempt to deal with trial by jury in a mega-trial context. It is, I think, helpful at this stage to examine the ways in which other jurisdictions ensure that a case will not collapse because the jury drops below an acceptable number of jurors.

United States

In the US, all federal criminal courts use a twelve-person jury model, [219] though some states, notably Florida, allow a jury of six. A twelve-person jury need not be unanimous, but if the jury consists of six persons, unanimity is required.[220] And in a landmark decision, the Supreme Court of the United States has, adopting a functional analysis, rejected the proposition that the quality of the decision-making and the results reached are not affected by the size of the jury (at least in a twelve v six context):[221]

---

218 *Ng v The Queen, supra*; Law Reform Commission Report (New South Wales), *supra*; *Brownlee v The Queen, supra; Williams v Florida*; "The Constitutional Jury- 'A Bulwark of Liberty'?", *supra; Cabberiza v Moore*, July 11, 2000, United States Court of Appeals, 11th circuit: http://laws-findlaw.com/11th/974592man.html

219 In USCS Fed. Rules Crim. Proc. R. 23 (b) (1), it is provided that "a jury consists of twelve persons unless this Rule provides otherwise".

220 American Judicature Society, "Juries in-Depth Jury Decision Making", http://www.ajs.org/jc/juries/jc_decision_alternate.asp; *Williams v Florida, supra*; "Six of One is not a Dozen of the Other: A Re-examination of Williams v Florida and the Size of State Criminal Juries", by Robert H. Miller, 146 U. PA. L. rev. 621 (1998)

221 *Williams v Florida, supra* at page 100

> …the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of layman, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve—particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact finder hardly seems likely to be a function of its size.
>
> **********
>
> What few experiments have occurred—usually in the civil area—indicate that there is no discernable difference between the results reached by the two different-sized juries. (footnotes eliminated)

The court's use (or misuse) of social science research to justify a departure from the twelve-person criminal jury sparked outrage in the social science community. One author was prompted to say that "the quality of social science scholarship displayed would not win a passing grade in a high school psychology class".[222]

Nonetheless, to ensure that a trial can continue despite the discharge of a juror, most state laws, and the Federal Rules governing federal courts, permit "alternate" jurors to be empanelled. At the federal level, up to six alternate jurors can be directed by the trial judge.

At the state level, three basic alternate juror models exist: in some jurisdictions, alternates are chosen at the beginning of the trial, and are

---

222 "Six of One is Not a Dozen of the Other", *supra*, at pages 621 and 678

told that they are "alternate jurors". In other jurisdictions, the alternates who are chosen at the beginning are known by the judge and counsel as "alternates", but the jurors themselves are not told on the theory that they may not be as fully engaged in the case if they knew their status. In the third model, the alternates are chosen by random selection before the jury retires to deliberate.[223]

One of the key issues that has arisen in the United States is this: is substitution by an alternate juror confined to the period before the jury commences its deliberation, or can a substitution take place after the case has been submitted to the jury?

Pre-submission substitutes generally raise no problems, as jurors are instructed not to discuss the case amongst themselves before the deliberation. There is, therefore, really no difference between regular and alternate jurors as they retire to deliberate.[224]

Post-submission substitution can raise difficulties, because at the point of substitution the regular juror has been a part of the deliberations while the alternate juror has not. The rationale underlying the principle that substitutions should only take place before deliberation—and, indeed, the prejudice that can arise with a post-submission substitution was best articulated by the Supreme Court of Colorado in a widely-followed decision:[225]

> The potential for prejudice occasioned by a deviation from the mandatory requirements of Crim. P. 24 (e) is great. Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger

---

223 American Judicature Society, "Use of Alternate Jurors", http://www.ajs.org/jc/juries/jc_decision_alternate.asp

224 A good example is the state of Maryland, where Rule 4-312 (b)(3) provides that: "a juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict": see *Stokes v Maryland*, 843 A.2d 64 (2004).

225 People v Burnette, 775 P.2d 583 (1989), followed in Carrillo v People, 974 P.2d 478 (1999); Plate v State, 925 P.2d 1057 (1996); Hayes v State, 720 A.2d 6 (1998), rev'd on other grounds: 355 Md. 615 (CA); Commonwealth v Saunders, 454 Pa. Super. 561 (1996)

> that the new juror will not have a realistic opportunity to express his views and to persuade others. Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to decision. Nor will the new juror have had the benefit of the available jurors' views. Finally, a lone juror who cannot in good conscience vote for conviction might be under great pressure to feign illness in order to place the burden of decision on an alternate. (citations omitted)

Federal Rules and the California Penal Code, for instance, both allow post-submission substitution, but state laws require the trial judge to "instruct the jury to begin its deliberations anew".[226] Quite apart from the use of alternates, however, the trial judge can permit a jury of eleven persons to return a verdict if *during deliberations* the court finds good cause to excuse a juror.[227]

Australia

In the first few decades after the arrival of the First Fleet in New South Wales, the only "juries" used in criminal trials consisted of six military officers chosen by the Governor.[228] By 1833, twelve member juries became the norm, and by the end of the 19th century each of the other four Australian colonies (Queensland, South Australia, Tasmania and Western Australia) had firmly established trial by a twelve person (male) jury.[229] Under s. 80 of the Australian Constitution, established at the time of Federation in 1901, the trial of an indictable offence under Commonwealth (i.e., federal) law must take place before a jury.[230] This

---

226 USCS Fed. Rules Crim. Proc. Rule 24 (c) (3); Cal. Pen. Code, section 1089 (2006). In the case of California, while the Rule expressly provides that an alternate may be substituted "before or after the final submission of the case to the jury", the requirement to begin deliberations anew flows from case law, not statute: *People v Odle*, (1998) 754 P.2d 184; *People v Burnette*, 775 P.2d 583 at note 7 (1989). New Jersey has crafted an instruction that is particularly helpful when an alternate has been empanelled after deliberations have begun*: State v Corsaro*, 107 N.J. 339 (1987), discussed in: "Substitute Jurors: The Weakest Link", by Christopher Johns, 38 Az Attorney 16 (2002).

227 USCS Fed. Rules Crim. Proc. Rule 23 (b) (3)

228 Michael Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy", 62 Law & Contemp. Prob. 69 (1999) at page 70 ("Chesterman")

229 Ibid at page 71

230 Ibid

provision has generally been read down by the High Court, to amount to little more than a procedural provision:[231]

However, the requirement is confined to Commonwealth offences. The bulk of criminal offences in Australia arise under the common law or under state or territorial statutes.[232]

All of the State and Territorial governments have empowered the courts to rely on supplementary jurors and to allow the number of jurors to fall below twelve during the course of the trial.[233] There are essentially two models for the use of "supplementary" jurors.[234] The first involves the use of *additional* jurors, and is best exemplified by legislation in the State of Victoria. There, up to fifteen persons can be sworn in for a long trial on the basis that a balloting process will take place to reduce the number to twelve immediately before the jury retires to deliberate. The trial judge can discharge jurors during the trial for good cause, providing that the numbers do not fall below ten.[235] There is, in my view, much to be said for this approach in lengthy trials.[236]

The second model involves the use of reserve jurors, and is best illustrated by legislation in the Northern Territory. There, twelve jurors are empanelled, but up to a maximum of three persons can be chosen and returned as reserve jurors.[237] The reserve jurors can be discharged at any point in the trial, and, commonly, one is held until the jury is about to retire, at which point, if the twelve-person jury has remained intact, the final reserve juror is discharged. This process allows twelve jurors to enter the jury room to commence deliberations. Under this approach, there is no provision for balloting out from amongst the whole body of jurors.[238]

---

231 *Spratt v Hermes*, (1965) 114 C.L.R. 226 (H.C.) at 244; Chesterman, supra at page 75

232 Chesterman, supra at page 72-3

233 James Stellios, "The Constitutional Jury—'A Bulwark of Liberty'?", 27 Sydney L. Rev. 113 (2005) at page 124

234 Stellios, *supra* at p.124

235 *Juries Act 2000* (Vic.), sections 22, 23 (additional jurors) and 48 (balloting to reduce); considered in *Ng v The Queen* (2003) HCA 20

236 I will have more to say on this issue in Part VII, *infra*.

237 The range is from 2-6 reserve jurors in the other jurisdictions in Australia: Chesterman, *supra* at page 78

238 Under this model, the "Reserve Juror" knows his or her status from the outset. (NT) *Juries Act 1962*, sections 6, 37 and 37a, considered in *Fittock v The Queen*, (2003) 197 A.L.R. 1 (HC)

These legislative schemes are, for the most part, constitutionally secure. Adopting a functional[239] rather than an historical analysis of the issue, the High Court of Australia has held that: while twelve persons may be the starting point for a jury, it may initially begin at a higher level, then reduce to twelve before deliberations commence;[240] and it may properly drop below twelve during the trial, as long as it does not go below ten at the time of verdict.[241] Noting that jury trials in Australia typically last longer than they did at the time of Federation (1901) or, indeed, until the latter part of the 20th century, Kirby, J. of the High Court said in 2001, repeated in 2003:[242]

> Contemporary trials, particularly of federal offences, can be extremely complex and lengthy. The inconvenience to the community, to jurors and the cost to parties should not needlessly be incurred by unnecessary termination and re-litigation of jury trials where (as will inevitably happen from time to time) jurors die, fall ill or are otherwise incapable of continuing to act. If it is acceptable to treat a jury of *fewer* than twelve as constitutionally valid in order to sustain the *system* of jury trial and the continued "involvement of the public" and "societal trust" implied in the mode of trial referred to section 80, it is also acceptable, exceptionally, for *supplementary* jurors to be introduced to the jury to guard against a failure of the trial caused by the death, illness or absence of jurors.

On this basis, he continued, the Victorian model of "additional" jurors was properly intended to guard against the complete failure of the criminal trial process:[243]

> Applying the test of functionality to the Victorian law, its purpose is clearly to protect and uphold the jury's function. Its design is intended to prevent the failure of a trial. Such failure can work hardship on the accused, on witnesses, on jurors and on the community. What is involved in a jury trial today is in some ways different from what was involved when the Constitution was written. The word

239 *Stellios, supra* at page 122 *et seq*
240 *Ng v The Queen* [2003] HCA 20, per Kirby, J.
241 *Ng v The Queen, supra; Brownlee v The Queen* (2001) 207 CLR 278; *Chesterman, supra* at 124; *Stellios, supra* at page 1-4
242 *Ng v The Queen, supra; Brownlee v The Queen, supra*
243 *Ng v The Queen, supra* at page 21; Chesterman, *supra* at page 125

> ("jury") remains the same. But the concept adapts to the contemporary features of jury trial.

The High Court has also emphasized the role that twelve jurors could play alongside *reserve* jurors. With the appropriate discharge of reserve jurors, a full jury of twelve can then retire to consider its verdict.[244]

For the sake of completeness, I should note a few further safeguards that exist under Australian law. First, like Canada, the venue of a trial may be moved to an area where the public has had less attention to the crimes alleged.[245] Most crimes in Australia are prosecuted by state or territorial prosecutors pursuant to a state or territorial criminal statute, so venue changes generally occur within the local jurisdiction. The Commonwealth has, however, enacted some penal statutes, and federal legislation does contemplate state-to-state venue changes, albeit in extremely limited circumstances.[246] Second, the court may order the severance of the trials of two or more co-accused.[247] Finally, state legislation permits jurors to be identified by numbers, rather than names, to prevent jury tampering and to instil greater confidence that the jury is going to receive the benefit of legal anonymity throughout the trial process.[248]

The United Kingdom

In England and Wales there is no constitutional (or indeed any) right to trial by judge and jury.[249] Indeed, in practice, only about 1% of criminal cases in the UK result in trial by jury.[250]

Over the years, a number of significant changes have been made to the jury trial process: in 1967, majority verdicts were introduced; in 1972 the

---

244 *Fittock v The Queen*, (2003) 197 A.L.R. 1 (HC)

245 *Chesterman, supra* at page 88, especially the authorities referred to in footnote 109; More recently, see *R v Gojanovic*, 2005 VSC 9.

246 For instance, under section 14 of the *War Crimes Act 1945* an accused can apply to the Court for an order that charges being prosecuted in one state be held in another state or territory.

247 *Chesterman, supra* at page 88, especially footnote 107; *Murphy v The Queen* (1989) 167 C.L.R. 94 at page 99 (HC)

248 *R v Ronen*, 2004 NSWSC 1294, revised on April 26, 2005. The result of this case seems to be at odds with section 631(3.1) of the *Criminal Code* of Canada

249 Review of the Criminal Courts of England and Wales, by the right Honourable Lord Justice Auld (September 2001), found at http://www.criminal-courts-review.org.uk/auldconts.htm, at par. 137 ("Auld Report")

250 *Ibid*

eligibility for jury service was greatly increased from certain landowners to everyone on the electoral roll; and in 1988 peremptory challenges were abolished.[251]

During the past decade, there has been some discussion about the size of the jury in the UK, particularly in the context of lengthy and complex fraud cases. The Roskill Fraud Trials Committee considered the matter in 1986, but felt that the issue was not sufficiently serious to warrant changes to the law.[252]

In 1998, the UK Court Services Agency conducted a survey and found that no case had failed because the number of jurors had fallen below the minimum number of nine.[253] It was, however, noted that during one fraud trial that had lasted ten months, the jury was reduced to nine *during the course of their deliberations*. That prompted Lord Justice Auld in his 2001 Report on the UK courts to say that such a state of affairs at a critical stage in a lengthy trial "must have caused much anxiety to all concerned, including the remaining jurors."[254]

The Auld Report recommended a system of trial without jury in long and complex frauds,[255] Auld further recommended adopting a more broadly-based system of alternate or reserve jurors in lengthy cases:[256]

> I recommend the introduction of a system enabling judges in long cases, where they consider it appropriate, to swear alternate or reserve jurors to meet the contingency of a jury otherwise being reduced in number by discharge for illness or any other reason of necessity.

These proposals have not yet been implemented in the UK. In the *Criminal Justice Act 2003*[257] Parliament made provision for judge-alone cases involving threats and intimidation of juries, and paved the way for

---

251 *Ibid* at page 135-6
252 Fraud Trials Committee Report (Chairman: Lord Roskill) (HMSO, 1986), at par. 7.41
253 Auld Report, *supra* at page 142
254 *Ibid* at page 142
255 *Ibid* at par.s 73-206
256 *Ibid* at page 143
257 Royal Assent was given on November 20, 2003

judge-alone trial in exceptionally long, complex serious fraud cases.[258] And despite growing opposition,[259] Lord Goldsmith, the Attorney General, announced on the 24th of July 2006 that "the government is pursuing a co-ordinated approach to tackling fraud… and will bring forward a standalone Bill to allow for non-jury trials in a limited range of serious and complex fraud cases.[260]

Against this backdrop, the judiciary in England has also taken steps to deal with the challenges posed by lengthy and complex jury trials. On March 22, 2005 the Lord Chief Justice of England and Wales issued a Practice Direction called "Control and Management of Heavy Fraud and Other Complex Criminal Cases".[261] It commences in the following way:

There is a broad consensus that the length of fraud and trials of other complex crimes must be controlled within proper bounds in order:

> (I) to enable the jury to retain and assess to evidence which they have heard. If the trial is so long that the jury cannot do this, then the trial is not fair either to the prosecution or the defence.
>
> (II) To make proper use of limited public resources: see *Jisl* [2004] EWCA Crim. 696 at [1313]- [121].
>
> There is also a consensus that no trial should be permitted to exceed a given period, save in exceptional circumstances; some favour three months, others an outer limit of six months. Whatever view is taken, it is essential that the current length of trials is brought back to an acceptable and proper duration.

---

258 *Criminal Justice Act* (2003), Chapter 44 (see the explanatory note to the original Bill, at pars. 3-5)

259 Most recently, see: "The Guardian Profile: Lord Goldsmith, Labourer's Attorney General is Preparing for Another Battle Over Fraud Trial Juries", November 10, 2006: http://politics.guardian.co.uk/print/0,,329623948-111381,00.html

260 News Release, July 24, 2006, "Package of Measures to Reduce Fraud Unveiled—Final Fraud Review Report Published", http://www.islo.gov.uk/pressreleases/final_fraud_review_release_24_07_06; and see the Law Society Gazette, July 27, 2006. The government's announcement also called for a public consultation, with responses requested by the 27th of October, 2006. By late 2006, Lord Goldsmith still intended "to launch a third attempt to push through a Bill providing for a judge alone, without a jury, to decide guilt or innocence in about a dozen of the most complex fraud trials each year": Guardian Unlimited, November 10, 2006, "The Guardian Profile: Lord Goldsmith", by Clare Dyer.

261 This direction can be found at: http://www.dca.gov.uk/criminal/procrules_fin/contents/pd_protcol/pd_protocol.htm; To the same effect, in Canada, see "The Report of the Chief Justices Advisory Committee on Criminal Trials in the Superior Court of Justice", located on the website on the Superior Court of Justice: http://www.ontariocourts.on.ca/scj.htm

Noting that "the best handling technique for a long case is continuous management by an experienced Judge nominated for the purpose", the Practice Direction requires the judge to "exert a substantial and beneficial influence by making it clear that, generally speaking, trials should be kept within manageable limits:"—three months is the target outer limit, though in extreme cases six months or more may be required.

The practice direction issued in the UK is similar in many respects to the Report recently prepared by the Advisory Committee on Criminal Trials in Ontario. In 2002, section 482.1 of the *Criminal Code* was amended to permit courts to establish rules for case management. As a result of the Advisory Committee's work, Criminal Proceedings Rules, effective October 16, 2006 are now in place in Ontario. Standardized, formal pre-trial conferences now form an important feature of these revised Rules.[262]

Whether the UK practice direction will work, or whether it amounts to nothing more than a pious hope, remains to be seen. A couple of points should, however, be made. The direction had, of course, to stay within the framework of the law. It attempts a strategy of "avoidance"—but if the policy does not in an individual case avoid a mega trial, jury problems will almost certainly arise. As well, the document focuses on fraud trials only, although that is understandable in light of the controversies in the UK at the time. In my view, however, there is a much broader issue, and energies would be much better spent dealing with the approach to all lengthy, complex trials rather than attempting to fix one type of proceeding that arises from a political controversy. Current UK terrorist proceedings, expected to be protracted in nature, may force this issue. Another benefit of dealing with the problems of mega-trials in a comprehensive fashion is that it diminishes the possible perception of unfairness to those accused of a particular category of offences, whether they be fraud or terrorist attacks.

---

262 Both the Report of the Advisory Committee as well as an executive summary of the Report can be found on the website maintained by the Superior Court of Justice in Ontario: http://www.ontariocourts.on.ca/superior.

PART VII
Terrorist Trials in The Future—Reform Options

a) General Observations

Future terrorist trials face three overarching challenges: first, they need to be manageable in terms of length and complexity. Second, the process and result need to be seen as fair and legitimate, both domestically and in the eyes of the international community. Finally, any new criminal trial process cannot increase the risk of convicting persons who are innocent of the crimes charged.

This trilogy of key challenges intersects at several levels and, in turn, engages the seven fundamental principles underlying this study which I described in Part II. A process that is seen to be fair, open and manageable will, through an international lens, be more likely to be viewed as legitimate and effective, and the political desire to "legitimize" a domestic criminal justice system process will more likely lead to a procedure that is manageable in size, easily understood, and consistent with internationally-recognized principles of fairness. Perceptions of legitimacy and fairness are further enhanced where reforms are anchored on existing and well established justice structures and processes. And a trial process that is fair, manageable in size and easily understood is less likely to result in wrongful convictions, and enhances the truth-seeking function of criminal trials.

It is important to recognize that these challenges, especially manageability, are not confined to terrorist trials. They extend to gang prosecutions, complex cases of fraud, criminal conspiracies and virtually any substantive offence involving multiple accused and multiple charges that are said to have occurred over an extended period of time. The problem is not, therefore, the new face of terrorism; it is, instead, the emergence in virtually all Anglo-based systems of criminal justice of the so-called mega-trial. It is important to observe, as well, that a strong response to mega-trials of this nature will not have the disadvantage of isolating out terrorist trials for special treatment.

For that reason, the reforms discussed in this Part are not "terrorism-specific". Rather, they focus on three broad objectives: rein in mega-trials; make sure that an appropriate trier of fact is in place to consider the case fairly and fully; and ensure that, even in protracted proceedings, the matter

can actually proceed to verdict in accordance with the laws and processes applicable to all criminal cases. In the pursuit of these objectives, it is critically important that proposed reforms respect individual rights and, at the same time, take into account the broader interests of the public.

Canadians are not known to be dogmatic or inflexible in their approach to problem-solving. We tend to be practical, drawing on successes elsewhere, often seeking a compromise or "middle ground" that recognizes the reality that we are a large country with a sparse population that is often dominated by our neighbour to the south. We also recognize that we are a product of two founding nations, but that our criminal justice system is derived, almost exclusively, from Great Britain.

We are, in a word, flexible, although we do recognize the need to place ourselves within our own, modern constitutional framework and within the broader community of nations. I note this for one simple reason: Canada has, at various times in its history, resorted to or at least flirted with, many of the structural forms now discussed at the international level: we have had a flexible jury size, down to six in sparsely-populated regions of Canada; we presently empower trial judges to empanel "alternate" jurors; pre-Victorian trials of serious crime are known to have used a panel of three judges sitting with a jury; "special juries" were available in the criminal courts pre-confederation, and Canada was one of the first Commonwealth countries to allow trial by judge alone on a widespread basis in cases of serious crime.

Despite this level of flexibility, we now face the prospect of trials collapsing under their own weight, and not reach any verdict on serious charges. Indeed, that has already occurred. The following recommendations are intended to avoid that prospect, and to instil a sense of confidence in Canada's criminal justice system, both domestically and internationally.

b) Trial by Judge and Jury: The Centre of the Reform Vortex

Of necessity, the jury is at the centre of just about all of the structural reforms proposed to deal with lengthy and complex trials. The reasons are not surprising.

In earlier days, when the traditional jury model was developed, trials were relatively short: as many as 25 cases could be heard by a single judge and jury in a twelve- hour period. Most would last 15 to 20 minutes; a

complex case may require a half an hour. Jurors were generally taken "as is", with few challenges; there were no *voir dires*; the accused was often unrepresented; instructions to the jury were mostly perfunctory, and the deliberations were brief.[263]

As a result, justice was "quick". Juror's memories of the evidence were fresh. There was almost no need for instruction on the facts of the case, and there was certainly no need to take notes. Mistrials due to the loss of a juror were virtually unheard of. The facts of the case were simple, the issues obvious, and juror reaction was almost instantaneous.[264]

All of that changed as we moved into the second half of the 20th century. Protracted proceedings now plague the criminal justice systems in Canada, the US, Australia and the UK.[265] Anglo-based criminal justice systems are facing the same basic question: is the traditional model of the jury the best mechanism to hear lengthy and complex cases, or are changes required? What follows are the main options available to government and the judiciary.

c) Jury Size: Twelve v Six

The criminal jury in Canada has traditionally had twelve members. But why twelve? Why not ten, or eight? Or even six? History affords little insight into the question. In 1970, the Supreme Court of the United States concluded that the empanelling of twelve jurors was an "historical accident", unnecessary to effect the purposes of the justice system and wholly without significance "except to mystics".[266] Over the years, Law Reform Commissions and scholars have reached similar conclusions.[267]

---

263 John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press: Oxford, 2003) at pages 16-23 [John Langbein is Sterling Professor of Law and Legal History at Yale Law School. He has written extensively on trials, juries, and their origins]; Douglas G. Smith: "The Historical and Constitutional Contexts of Jury Reform", 25 Hofstra L. Rev. 377 (1996) at page 405.

264 *Ibid*

265 On March 22, 2005 the Lord Chief Justice of England issued a Practice Direction entitled "Control and Management of Heavy Fraud and Other Complex Criminal Cases". It is a protocol intended to ensure "that the current length of trials is brought back to an acceptable and proper duration". As well, in 1997, the Director of Public Prosecutions for the Commonwealth of Australia noted that complex fraud trials have escalated litigation in Australia to the level of "mega-trials of unreasonable proportion": "The Adversarial Model in the Criminal Justice System: What Change is Happening?", B. Martin, delivered at the Heads of Prosecuting Agencies in the Commonwealth Conference, 23-26 September, 1997 at Wellington, New Zealand. In *Ng v The Queen* [2003] HCA 20, Kirby, J. noted that "jury trials typically last longer than was the case in 1900 or, indeed, until the latter part of the 20th century". As early as 1961 in the United States, it was noted that four alternate jurors may not be enough for certain lengthy criminal trials: USCS Fed. Rules Crim. Proc. R.24 (from the note of the Advisory Committee on the 1996 amendments).

In practice, the number of jurors varies widely between jurisdictions. In Canada, the norm is twelve. In Scotland, fifteen constitute a jury.[268] In the US and Australia, the norm at the federal level is twelve, although at the State level in both countries six-person juries are constitutionally permissible and are, in fact, used.[269]

The critical question is whether the size of the jury ought to be reduced in Canada—likely to six. Some argue that the costs of the criminal justice system are becoming increasingly burdensome, and that the reduction of the size of the jury is an essential step towards savings and efficiency. There are, however, relatively few jury trials and the available data tends to suggest that a reduction in size would not have a noticeable effect on provincial budgets. The Law Reform Commission of Canada concluded that 1% of the administration of justice budget goes to funding juries. And, as noted elsewhere in this paper, less than 1% of cases in both UK and Australia involve trial by judge and jury.

In 1980, the Law Reform Commission of Canada concluded that "the apparently haphazard, trial-and-error development of the jury may have led to a jury size that embodies more wisdom than after-the-fact explanations would suggest".[270]

The arguments on the issue tend to favour retaining a jury of twelve. Verdicts of twelve-member juries are more likely to reflect the opinion of a

---

266 *Williams v Florida*, 399 U.S. 78 at 102 (1970); For a contrary view, see Robert H. Miller, "Six of One is Not a Dozen of the Other: A Re-examination of *Williams v Florida* and the Size of State Criminal Juries", 46 U.P.A.L. Rev. 621 (1998) at page 632 *et seq*.

267 Douglas G. Smith, *supra,* at page 396; Sir Patrick Devlin, *Trial by Jury* (London: Stevens and Sons, 1956) at page 8-9; *Review of the Criminal Courts of England and Wales*, by the Right Honourable Lord Justice Auld (September 2001) at page 142; Law Reform Commission (New South Wales), "Report 48" (1986)—Criminal Procedure: The Jury in a Criminal Trial, "Avoiding the Diminution of the Jury", at par. 10.12

268 The Auld Report, *supra,* at page 142; Law Reform Commission (New South Wales), *supra*, "The Size of The Jury, footnote 27

269 Michael Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy", 62 Law and Contemp. Prob. 69 (1999) at 78; *Williams v Florida, supra; Cabberiza v Moore*, 217 F.3d 1329, cert. denied 531 US 1170; Law Reform Commission (New South Wales), *supra*, at par. 2.22; Law Reform Commission (Victoria), Final Report Volume 3, chapter 2—*Juries and Complex Trials* by Mark T. Cowie: http://www.parliament.vic.gov.au/lawreform/jury/jury5/chap2.html; *Ballaw v Georgia*, 435 US 223 (1978); Robert H. Miller, *supra,* at page 645 *et seq*.

270 Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" (Ottawa: 1980) at page 33.

representative cross-section of the community, since a random selection of twelve will clearly lead to a more representative group than a random selection of six.[271] Significantly, especially in a multicultural environment such as Canada, the views of minorities are more likely to be represented and woven into the deliberations in a twelve-member jury.[272]

As the Law Reform Commission for New South Wales put it in 1986:[273]

> A particular bias or prejudice is far less likely to gain prominence in a twelve member jury than it might have in a smaller group. It is improbable that the individual prejudices of such a large number of jurors will all point in the same direction. It is more likely that any existing prejudices will tend to cancel each other out.

A larger jury is also more likely to be a more accurate fact-finding body: it is more probable that someone in the jury will remember important pieces of information, and there is a greater likelihood that there will be a broader range of life and work experiences with which the jury can evaluate evidence and submissions.[274]

Put another way, there is a "preference for the collective common sense of the jury".[275] And a Law Reform Commission in Australia has concluded that, based on empirical evidence, "the verdicts of six member juries are less predictable than those of a full sized jury".[276]

It seems reasonable to assume, as well, that a twelve member jury is less likely to be influenced by an "oddball" or "rogue" juror.[277] Likewise, a larger jury will likely have more robust and searching discussions with a view to discovering the truth, thus reducing the risk of wrongful conviction.

---

271 Law Reform Commission of Canada, *supra* at page 35; Law Reform Commission (New South Wales), *supra*, at par. 2.23; Law Reform Commission (Victoria), *supra*, at par. 2.215; Robert H. Miller, *supra*, at page 664

272 *Ibid* (all)

273 Law Reform Commission (New South Wales), *supra*, at par. 2.23

274 Law Reform Commission of Canada, *supra*, at page 35; Law Reform Commission (Victoria), *supra*, at par. 2.212; Nonetheless, the Supreme Court of the United States seems to have arrived at a different conclusion: *Williams v Florida*, 399 US 78 (1970)

275 Law Reform Commission (Victoria), *supra*, at par. 2.220

276 Law Reform Commission (Victoria), *supra*, at par. 2.215; generally, see Robert H. Miller, *supra*

277 Probably for historical reasons, Australian literature tends to focus on the so-called "rogue" juror. In Canada, the bizarre case of Gillian Guess comes to mind: *R v Guess* (2000), 150 CCC (3d) 573 (BCCA)—although Ms. Guess is probably more accurately described as a corrupted juror rather than an oddball or rogue. In this context, reference can also be made to *Vezina and Cote v The Queen*, [1986] 1SCR 2.

On the other hand, extremely lengthy trials could cause great inconvenience and the disruption of lives for some jurors. That prospect can, however, be mitigated through the jury selection process in individual cases. Those who object or feel they could not cope with a lengthy trial may be culled administratively beforehand, or they could raise the issue in court once summonsed.[278] And, as I emphasize later in this Part, there should be no mega-trials in the first place: both counsel, the trial judge and the managing judge bear responsibility to ensure that the case is focused and manageable.

In my view, the case for reduction has not been made out. There is no basis to conclude that a reduction in size from twelve to six jurors would enhance the efficiency or effectiveness of jury trials. Indeed, there is an argument to be made that quite the contrary is true.[279] It seems to me that the criminal jury in Canada should continue to be composed of twelve persons.

d) Additional or Alternate Jurors: Managing the Diminution of the Jury

In Part V, I noted that in 2002 the *Criminal Code* was amended to provide for the selection of "alternate jurors".[280] It was a significant development in our criminal procedure, but was accompanied with little fanfare, and, surprisingly, has received little or no attention in Canadian literature since then.[281]

The Canadian alternate jury scheme is problematic and of little value for two basic reasons. First, only one or two alternate jurors are permitted. That will not likely suffice in the event of a terrorist mega-trial. Second,

---

278 Section 632 *Criminal Code; R v Walizadah*, [2003] O.J. No. 284 (S.C.J.)

279 I do not rest my view on a constitutional footing; rather, I am of the opinion that the case for reduction has not been demonstrated at this stage of history. Also, note that later in this Part I reach the conclusion that trial by judge alone may be preferable where the interests of justice, especially the right to a fair trial, are truly imperilled by a trial of immense proportions.

280 SC 2002, c.13, s.52; see *supra*, footnote 186 and accompanying text. The use of twelve person juries with two alternates can be traced back as far as the 1864 reforms in Russia: John C. Coughenour, "Canary in the Coalmine: The Importance of the Trial Jury", 26 Seattle Univ. L. R. 399 (2003) at 401.

281 This legislative scheme was, however, considered by Ewaschuk, J. in *R v Walizadah* [2003] O.J. No. 284 (SCJ) where the trial judge noted that the amendments were of limited value. Interestingly, the practice of selecting two alternate jurors was a part of the jury empanelment practice used for decades in Alberta well before these amendments came into place. The Court of Appeal in that province ruled that this practice did not result in jurisdictional error: *R v Cruickshank*, 2002 Alta. D. Crim. J. 2148.

the safeguards respecting jury numbers are built into the front-end of the trial process, *not during the course of the trial* where they are needed most. In other words, the 2002 amendments were intended to ensure that the trial *starts* with twelve jurors. The alternates are then immediately discharged. If the trial lasts 18 or 24 months, for example, only 2 jurors can be discharged throughout all of the tendering of the evidence, the submissions of counsel and the jury's deliberations. If, for whatever reason, three jurors need to be discharged, a trial judge has no alternative but to declare a mistrial. After 18 months of evidence or more, that is nothing short of catastrophic for all concerned, including the public.[282]

There should, I believe, be two objectives in this area of the law.[283] First, a new legislative scheme needs to ensure that the trial starts with at least twelve jurors. Second, legislation needs to ensure, or at least maximize the prospect, that twelve jurors will go into the jury room to deliberate on the fate of the accused at the end of the trial.[284]

As I noted earlier, legislation in the state of Victoria in Australia provides a sensible model that achieves both of these objectives.[285] There, a jury consists of twelve persons.[286] The trial judge has a broad discretion to order the empanelment of up to three additional jurors.[287] The trial can, therefore, proceed with up to fifteen jurors. There are no "second class" alternate jurors: all have full status, and they continue throughout the trial and hear all of the evidence. During the trial, the trial judge has authority to discharge a juror on the basis of illness, lack of impartiality, incapacity or other good reason.[288] The size of the jury, however, can not be reduced below ten.[289] If more than twelve jurors remain at the time the jury is about to retire, a ballot is conducted to select the twelve jurors who will actually begin deliberations. If the foreperson is selected on the balloting process for exclusion, it is disregarded, and the foreperson remains on the jury.[290]

---

282 In this respect, reference can be made to: Law Reform Commission (New South Wales), *supra*, at par. 10.24

283 *Ibid* at par. 10.15

284 *Ibid* at par. 10.12

285 *Juries Act* 2000 (Vic.), Act number 53/2000; also, reference can be made to the Law Reform Commission Report (Victoria), *supra*, at par. 2.212 *et seq*.

286 *Juries Act* 2000, *supra* at section 22

287 *Ibid* at section 23

288 *Ibid* at section 43

289 *Ibid* at section44

290 *Ibid* at section 48; the foreperson has, by this point, assumed a leadership role in the jury, and was picked by the enlarged jury at the beginning of the trial: see the discussion of this issue in the Law Reform Commission Report (New South Wales) at par. 10.20. Additionally, reference can be made to *Ng v The Queen* [2003] HCA 20 where, as it happened, the card of the foreperson was the first one drawn for exclusion, and the trial judge directed that the foreperson retire with the jury to consider its verdict.

There are several advantages to this model. The trial starts with twelve, probably more. It avoids the spectre of some persons being "real jurors" while others are "alternates". All are "jurors" until the end of the evidence.

The Law Reform Commission for the state of New South Wales considered the various models for additional jurors, and concluded as follows:[291]

> In our view the "additional juror" is the more desirable of the two alternatives. The American Bar Association makes this comment on the advantage of the "additional juror" system.
>
> A preference for the additional juror system has sometimes been stated on the ground that it is undesirable to give a juror who may be involved in deciding the case second class standing during some or all of the trial. That is, one who is labelled an alternate at the outset might not take his job as seriously as the regular jurors as the chances of substitution are not great. On the other hand, where one or two additional jurors are selected each member of the thirteen or fourteen man group knows that even if no juror is excused for cause he nonetheless has a very substantial chance of being involved in the deliberations.

The Right Honourable Lord Justice Auld expressed a similar view in his Report to the UK Government in 2001. To avoid a potential "lack of commitment" to the case, he expressed the view that all of the jurors should be sworn and treated in exactly the same way throughout the trial.[292]

The jury model in place in Victoria, as well as the ones recommended by the New South Wales Law Reform Commission and Lord Justice Auld maximize the prospect that a full jury of twelve will eventually retire to

---

291 Law Reform Commission (New South Wales), *supra*, at par. 10.18
292 Auld Report, *supra* at page 142

deliberate. Even then, the Victorian legislation provides a safeguard of two reductions post-submission to the jury. Even in the most protracted mega-trial, it is doubtful that the deliberations would last more than two weeks or so, so the "insurance" of two seems not unreasonable.

Even the Victorian model can be enhanced. Additional jurors may be required in a wide variety of circumstances—the Air India trial, for instance, could have lasted three years.[293] It may be preferable to empower a trial judge to allow more than just three additional jurors—perhaps four or even six, as in the United States, in circumstances where the trial is expected to last more than three months or so.[294] At the other end of the trial spectrum, it may be advisable to reaffirm that the numbers can drop to ten, but that there is a discretion on the part of the trial judge to allow a further diminution, if, in an individual case that has lasted more than six months, such an order seems necessary in the interests of justice.[295] Beyond a reduction to nine, or, arguably, to eight, however, it seems to me that the jury starts to lose its fundamental character as a representative and effective fact-finding body.[296]

The combination of these potential reforms— four additional jurors and a reduced minimum jury size— greatly reduces the risk that a lengthy trial will fail because the jury numbers dropped to an unacceptable level.[297] The trial can start with a significantly enhanced jury base; everyone is on an equal footing; the objective is to have twelve jurors retire to the jury room; the jury can drop to ten, and in extreme circumstances less than that. But that would require the discharge of a significant number of jurors—something that is highly unlikely, even in a lengthy trial.[298]

---

293 Michael Code and Robert Wright, Q.C., "Air India Trial: Lessons Learned", *supra*, page 3 .

294 The Law Reform Commission of New South Wales recommended that additional jurors be made available where the trial is estimated to take in excess of three months: see the Report, *supra* at the recommendation immediately following par. 10.15

295 Nine is the base minimum in the UK: see Auld Report at page 142

296 The Law Reform Commission for New South Wales recommended a base level of eight jurors, although the commissioners were split on the issue: Report, *supra*, at par. 10.24. It should also be noted that a Canadian Bill tabled in Parliament in 1984 proposed a base level of eight where the trial had continued for more than 30 days. The Bill was criticized, and did not pass: Law Reform Commission (New South Wales), *supra* at par. 10.26

297 See Law Reform Commission (Victoria), *supra*, at par. 2.218

298 A Canadian Bill tabled in Parliament in 1984 proposed a baseline of eight. It was significantly criticized. See Law Reform Commission (New South Wales) at par. 10.26; In 2005, a national Canadian group consisting of defence counsel, Crown attorneys and the judiciary prepared a Report entitled "Justice Efficiencies and Access to the Justice System", suggested that the number could drop to nine or eight, subject to further study on the constitutional framework: http://www.justice.gc.ca/en/esc-cde/mega_r.html

In summary, it seems to me that Canada needs new structural tools to manage the diminution of the jury. In my view, the trial judge should be empowered to empanel up to sixteen jurors, including four additional jurors, in cases expected to last a significant amount of time. The trial judge should continue to have authority to discharge jurors on the basis of section 644(1) of the *Criminal Code*. If more than twelve jurors remain at the end of the evidence, a balloting process ought to be undertaken to determine the twelve jurors that can enter the jury room to commence deliberations, with the balance discharged from further duty in the case. It also seems to me that we should retain the current scheme in the *Criminal Code* under which the jury can be reduced to ten—but confer on the trial judge a discretion to allow the numbers to reduce to nine or perhaps even eight if the trial has lasted an extended period of time and such an order is necessary in the interests of justice.

e) An Alternate Judge in Trial by Judge and Jury

In Part V, I noted that the *Criminal Code* provides for a substitute judge to be appointed where the original trial judge dies or cannot continue the trial. However, in a judge alone case the evidence needs to be tendered again, and in trial by judge and jury, the substitute judge may either continue the trial or start all over again.[299] In the context of a terrorist mega-trial, the financial cost, as well as the toll on the parties, witnesses and jurors, and the impact on the public could be immense if the trial has to commence anew.

In virtually all lengthy criminal trials, the Crown is represented by a team of Crown attorneys, one of whom is the "quarterback". The same usually applies to the defence. If a system of additional jurors is implemented, the trial judge clearly becomes the "weak link" in a process that could, without warning, result in the premature demise of a very lengthy trial.

---

299 See supra, footnote 200 *et seq* and accompanying text.

First, some legal context. Alternate judges were appointed in the post-World War Two Nuremberg Trials—but since then there have been few instances of legally-sanctioned judicial "back-ups". They are not used in the criminal justice systems in the US, UK, Australia or New Zealand. They have, however, been considered or used in international fora, and in tribunals specially set up to hear certain issues that are expected to be lengthy.

The Nuremberg trial model of alternate judges was adopted in the Statute of the International Court of Justice, established by the Charter of the United Nations.[300] The International Court of Justice is a body of independent judges that considers issues referred to it by parties to the International Statute, particularly the interpretation of a treaty, questions of international law and alleged breaches of international obligations.[301]

Likewise, alternate judges have been advocated for Circuit Courts of Appeal in the United States.[302] And they have been adopted in South Africa to implement The Rome Statute of the International Criminal Court[303] and in the Iraqi Special Tribunal established to adjudicate the crimes alleged against the former dictatorship in Baghdad.[304]

Facially, the appointment of alternate judges in a lengthy trial makes sense. However, what are the arguments against alternate judges, and why have so few legislative schemes embraced them?

Undoubtedly, the major impediment is resources. What government or judicial body has the capacity to appoint an alternate, "side" judge to sit in a two year trial, in the *off chance* that the principal judge dies or

---

300 Article 29, which provides that the court annually shall form a chamber composed of five judges, which may hear and determine cases by summary procedure, and two additional judges shall be selected for the purpose of replacing judges who find it impossible to sit: http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

301 *Ibid*, articles 2 and 36; and see Larry D. Johnson, "Ten Years Later: Reflections on the Drafting", 2004 Oxford University Press ICJ 2.2 (368)

302 R Mathew Pearson, Duck Duck Recuse? Foreign Common Law Guidance and Improving Recusal of Supreme Court Justices, 62 Wash. & Lee L. Rev. 1799 (2005)

303 Implementation of the Rome Statute of the International Criminal Court Act, 2002 SA Criminal Law 27, which provides in article 74 (1) that one or more alternate judges are to be present at each stage of the trial and may replace a member of the Trial Chamber if that member is unable to continue attending.

304 Salvatore Zappala, "The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence—Neither Fish nor Fowl?", 2004 Oxford University Press ICJ 2.3 (855)

cannot continue? And in a small jurisdiction, sidetracking a judge on a contingency basis is virtually impossible: for instance, Prince Edward Island, the Northwest Territories, Nunavut and the Yukon only have between two to five Superior Court Judges to begin with.[305] Some of these jurisdictions rely extensively on the use of "deputy" judges from southern Canada, but is it realistic to believe that even deputy judges could act as alternate judges in protracted proceedings?

Alternate judges make sense in lengthy, individual cases, but there are significant, practical issues that need to be addressed.

In the result, it seems to me that the Government of Canada should consider amending the *Criminal Code* to provide for alternate judges in trials by judge and jury that are expected to last more than one year and, in the consideration of that issue, government should first consult with the Canadian Judicial Council, the Canadian Bar Association and all Ministers responsible for justice in Canada

f) Trial by a Panel of Three Judges Without a Jury

Paragraph b (vi) of the Terms of Reference for the Air India Inquiry asked for advice on "whether there is merit in having terrorism cases heard by a panel of three judges". The question raises two separate and fundamental issues: is mandatory trial by a judge alone possible; if it is, can or should a panel of judges hear the case? I will deal with both issues.

At the outset, it should be recognized that terrorist trials will almost certainly involve offences which carry a maximum punishment of five years imprisonment or more. Section 11(f) of the *Charter of Rights and Freedoms* will therefore be engaged, requiring a jury trial unless the charges were laid under military law and are heard before a military tribunal.

There are, in my view, only two pathways that would allow a "bench trial" in a terrorist case that is being heard in the normal courts. First, Parliament could invoke the "notwithstanding clause" provided in section 33(1) of

---

305 PEI has five, the NWT and Nunavut have three, with the Yukon having two.

the *Charter of Rights and Freedoms,* to override the right to a jury trial in s.11(f). Under subsection 33(3) resort to the override power would only be valid for a maximum of five years, after which it would cease to have effect.

The second reform option is, in my opinion, more viable. The section 11(f) right to a jury trial is subject to limits *prescribed by law* that can be demonstrably justified in a free and democratic society.[306]

The Supreme Court of Canada has described the test to be applied on a section 1 analysis in a series of decisions, although the seminal statement can be found in *R v Oakes*:[307] to establish that a limit is justified under this section, two central criteria need to be satisfied. First, the objective which the measures responsible for a limit on a *Charter* right or freedom must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; secondly, the party invoking this section, in this instance likely the Crown, must show that the means chosen are reasonable and demonstrably justified. The first criterion requires, at a minimum, that the objective relates to concerns which are pressing and substantial in a free and democratic society. The second requirement requires a form of proportionality test and while the nature of the test can vary, depending on the circumstances, in each case the courts will be required to balance the interests of society with those of the individual and of groups.

There are three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations, but rather must be rationally connected to the objective. Second, the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question. Finally, there must be a proportionality between the effects of the measures, which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance.

---

306 Section 1 *Charter of Rights and Freedoms*

307 *R v Oakes*, [1986] 1 SCR 103; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713; *R v Lyons*, [1987] 2 SCR 309; *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927; *RJR-MacDonald Inc. v Canada*, [1995] 3 SCR 199

Disentitling an accused to trial by judge and jury in the *Charter* era is not without parallel in Canadian criminal law. Section 598 of the *Criminal Code* provides that an accused effectively forfeits that right where he or she fails to appear or remain in attendance at their trial. That provision was ruled constitutionally secure by the Supreme Court of Canada on the basis that it constituted a reasonable limit on the right to a jury trial. For the majority, Lamer, J. said this:[308]

> The rationale for this section lies in the "cost" to potential jurors and to the criminal justice system in terms of economic loss and of the disaffection created in the community for the system of criminal justice, especially through the first jury panel. The section was enacted, as Wilson J. notes in her reasons, to protect the administration of justice from delay, inconvenience, expense and abuse, and to *secure the respect of the public for the criminal trial process*. (Emphasis by Lamer, J.) The expense, it should be noted, is not only to the system. Persons summoned to serve on a jury panel have little choice but to obey the summons, and as such, individuals who are selected as potential jurors often forgo for a substantial time their daily livelihood… all of this leads to an erosion in public confidence and a frustration with the system when the accused fails to appear for his trial and the assembled jury panel has to be sent away. This is the mischief the section attempts to minimize.

Three points should be made in relation to this decision. First, it was the accused's *conduct*, itself an offence under section 145(2) *Criminal Code* [failure to appear], that caused the accused to lose the right to a jury trial. Second, where that right is lost, the accused is deemed to have elected trial by a judge alone in accordance with the election-deeming scheme in the *Criminal Code*.[309] The charges, therefore, stay within the framework

308 *R v Lee* (1989), 52 CCC (3d) 289 (SCC) at page 293d
309 Section 598 (2) *Criminal Code*

of the normal criminal laws and do not go to a newly-created tribunal set up for that purpose.

Finally, the principal issue in the analysis of s.598 involved balancing the restriction on the right to a jury trial against the "cost" to individuals and society because of the non-appearance of accused persons for their trials. That cost, the court continued, must be assessed "in the sense of economic loss and disruption to lives and in the sense of confidence and respect for the system, to the individual selected for jury duty and to society as a whole".[310]

Would any of these factors arise in support for the notion of a bench trial in the case of an extraordinarily long terrorist trial? The first one involves disentitling the right of an accused to a jury trial based on his or her own conduct. In my view, that would not serve as a proper basis given the presumption of innocence and the perception if not reality that this would take Canada into a policy of "Diplock courts" (i.e., if you are accused of being a terrorist, you can't have a jury trial). The second rationale (no new structures) flows from the first. The third rationale concerns costs to individuals, including jurors, and to society as a whole. Elements of this rationale may be relevant, although it seems to me that the question of costs to the jurors can best be addressed through less drastic means such as a more liberal exemption for jurors because of hardship, and increased compensation for serving on the jury. These are, I think, more proportional responses, rather than simply denying an accused the right to a jury trial. It seems to me that an entirely different rationale will need to be relied upon—if, indeed, any exists at all.

Two separate trial models seem to exist, assuming the existence of a compelling rationale for disposing with the need for a jury in terrorist cases. First, trial by a single judge, with or without an alternate judge. Second, trial by a panel of judges.

A trial by a panel of judges is not presently available under Canada's criminal law. They are not, however, unheard of. As I outlined in Part V, a panel of three judges and a twelve-man jury heard serious cases in early, pre-confederation Canada.[311] And References on issues of miscarriages of

310 *R v Lee*, supra at page 293-4
311 See *supra*, footnote 164 and accompanying text

justice that had some of the trappings of a normal criminal trial took place before a panel of judges in the Supreme Court of Canada in *Reference Re Regina v Truscott*[312] and *Reference Re Milgaard*.[313] These were not, however, criminal trials—nor were they intended to be. They involved the tendering of *viva voce* evidence before a panel of judges, but the similarity ends there: the issues were different, as was the burden of proof, procedural and evidentiary rules, and the order sought. They just *looked* like a trial.

Internationally, trial by a panel of judges is considered desirable on the basis that a panel sitting together (usually three) would reduce the strain on a single judge, and the resulting decision would have greater credibility than a judge sitting alone.[314] In the inquisitorial style of criminal justice in the Netherlands, the concept of a bench of three judges is considered both highly satisfactory and flexible.[315] A Special Criminal Court is activated and deactivated by proclamation of the government in the Republic of Ireland when it is satisfied that special measures are required (or no longer required) to ensure public safety. The court consists of three members: a High Court judge, a County Court judge and a magistrate, who sit without a jury.[316] In 1988, a scholar from the University of Leicester suggested that: "the most feasible suggestion for change in decision-maker is, it is submitted, that for trial by a multi-judge court, a common model where jury trial has been abandoned or temporarily put aside. The model could be a two-judge court, with unanimity required for conviction, or a three-judge court, where a majority verdict might suffice, although unanimity would be the preferable requirement."[317] Finally, it should be noted that the recently established International Criminal Court assigns three judges from the Trial Chamber to hear the case and, in the event of an appeal, five judges from the Appeals Chamber are assigned.[318]

In 1978, a Report tabled in the New South Wales Parliament recommended that trial by jury no longer be mandatory in certain types of commercial crime cases. Rather, it said that the Attorney General ought to be able to direct, in individual cases, that such offences be heard by a superior court judge without a jury. The proposal was not adopted.[319]

---

312 [1967] 2 CCC 285 (SCC) [nine judges heard a large body of evidence, including the *viva voce* evidence of the defendant].
313 [1992] 1 SCR 866 [five judges heard *viva voce* evidence over several weeks.]
314 Law Reform Commission (Victoria), *supra*, at par. 2.97
315 *Ibid* at par. 2.98
316 *Ibid* at par. 2.98
317 David Bonner, *ibid*
318 http://www.icc-cpi.int/about/ataglance/works.htm
319 Law Reform Commission (NSW), *supra*, at par. 8.29

Similar legislation was proposed for Hong Kong in 1984. Under this scheme, the jury would be replaced by a judge and two adjudicators in complex commercial prosecutions. The main justification for this legislation was said to be the inability of a lay jury to avoid being confused by the complex evidence presented in cases of this kind.[320]

In the United Kingdom, the Fraud Trials Committee chaired by Lord Roskill recommended in 1986 that trial by judge and jury be abolished on the basis that cases of this nature could not be prosecuted effectively because the random selection of a jury of lay persons was an inappropriate tribunal for the trial of complex and lengthy fraud cases. Later that year, the New South Wales Law Reform Commission called this recommendation "flawed", and the proposal ultimately was not implemented.[321]

The proposal to eliminate UK juries in complex fraud cases has recently been revived. Despite widespread and vocal opposition,[322] the Attorney General of England, Lord Goldsmith, announced on the 24th of July, 2006 that the UK government will bring in sweeping changes to deal with lengthy and complex fraud cases, including: a standalone Bill to allow non-jury trials in a limited range of serious and complex fraud cases; creation of a Financial Court with specialist judges to hear the cases; allow plea bargaining as an alternative to a full-scale trial; and extend sentencing options available to the court.[323]

There are strong arguments both for and against the elimination of juries in favour of a bench trial (or judge sitting alone) in certain types of cases.

Those favouring the elimination of juries argue that many jurors are out of their depth when trying to follow the evidence presented in complex

---

320 *Ibid*

321 *Ibid* at par. 8.25

322 "Outrage at Fraud Trial Plans", June 22, 2005, Financial Times: http://www.ft.com/cms/s/64f91aeo-e2bb-11d9-84c5-00000e2511c8.html; "It Should not be Lightly Swept Away: Should Judges be Left to Rule in Lengthy Fraud Cases?", June 23, 2005, The Guardian: http://www.guardian.co.uk/jury/article/0,,1512291,00.html; "Goldsmith Fights to Save Plans for No-Jury Fraud Trials", November 26, 2005, The Guardian: http://www.gaurdian.co.uk/print/0,,5342275-103556,00.html; "Enron Shows Why We Should Keep Fraud Juries", May 29, 2006, The Guardian: http://www.guardian.co.uk/jury/article/0,,1785045,00.html. It is widely believed that the British plans flow directly from the collapse of a fraud trial in 2006, said to have had jury problems, that cost 25,000,000 pounds: "25,000,000 Pounds Tube Trial Lacked Strategy", BBC News, June 27, 2006: http://news.bbc.co.uk/1/hi/england/5121626.stm

323 News Release, Attorney General's Office, 24 July 2006: http://www.islo.gov.uk/pressreleases/final-fraud-reviews-release-24-07-06.doc. At the time of writing, this initiative remains outstanding.

and lengthy cases. They contend that the verdict of the jury may not rest on a firm grasp of the evidence, but upon an "overall impression of guilt or innocence in the minds of jurors".[324] Most people, they add, do not usually discuss complex issues as a matter of daily life. Sometimes, they are doing it for the first time in the jury room, when the liberty of someone is at stake. "After a few days in that room, there is no logical discussion—it becomes psychological warfare, when people start thinking of tactics to change other people's minds".[325] It should be observed, however, that these criticisms tend to focus on the weaknesses of individual jurors, ignoring the strength of a twelve person jury—the "collective wisdom" of a group.

Some have argued, perhaps with more force, that in a lengthy and complex trial the jury must listen to, understand and remember details from extended presentations of information that may be complex, unfamiliar and sometimes conflicting. Are jurors capable of absorbing huge amounts of information over an extended period of time? In the US, it has been found through empirical study that "jurors in long trials find the evidence to be more difficult than did jurors in short trials".[326] And one Law Reform Commission in Australia has made this observation:[327]

> While not the first to do so, the Law Reform Commissioner of Tasmania raised the issue of juror memory and has suggested that the trial process is "a real test of memory for them [the jury] to recall and give proper weight to all the evidence. All things considered, it is not difficult to appreciate that jurors will have forgotten a significant amount of the evidence by the time they retire to consider their verdicts. This is supported by research findings in the United States, which indicate that protracted trials may interfere with retention and as the volume of exhibits and testimony increases, comprehension levels will drop. In other words, the more difficult it is to comprehend the information, the more rapid the rate of forgetting.

---

324 Law Reform Commission (NSW), *supra*, at par. 8.26; P.J. Meitl, "Blue Collar Jurors in White Collar Cases: The Competence of Juries in Complex Criminal Cases": http://law.bepress.com/expresso/eps/931

325 Law Reform Commission, (Victoria) at par. 2.17.

326 Law Reform Commission (Victoria) at par. 2.19

327 Law Reform Commission (Tasmania) quoted in Law Reform Commission (Victoria), supra at par. 2.21

The debate on jury capacity and comprehension raises two separate, but interrelated issues: the complexity of the trial, and its length.

The "complexity" issue is anchored on the notion that a randomly selected group of twelve persons will not be able to follow the evidence. The proposition is speculative and probably wrong. It means that a US jury that could follow the intricate commercial transactions and deception in the Enron and WorldCom cases, but a Canadian jury could not.

The case of Kenneth Lay and the collapse of Enron provides a compelling illustration of the dilemma that arises here.

Former Enron executive Ken Lay and Jeff Skilling faced an array of charges related to a massive fraud. After listening to 56 witnesses over 15 weeks of trial, 8 men and 4 women in a jury in Houston, Texas decided unanimously that the accused were guilty on a total of 25 charges. Lay, the former CEO and chairman, was convicted on all six counts he faced, including a charge of conspiracy. Former CEO Skilling was convicted on 19 of the 28 counts against him. On October 23, 2006 he was sentenced to 24 years in prison.

The fraud was massive. Three of Canada's six-largest banks suffered huge losses. CIBC lost $32,000,000.00 in 2005. It cut 900 jobs. The loss was the biggest in the banks 138-year history. The firm's auditor, Arthur Andersen, was forced out of business following the collapse of Enron, as it was seen as having colluded in the fraudulent accounting practices.

The jury spent nearly six days of deliberations to reach their verdicts, and followed it up with an extraordinary press conference to explain their reasons. Simply put, the jury contended that the Enron case was an example of a jury trial at its best. Jury members noted that even a complicated fraud can be reduced to a simple question, well within a juror's capacity to answer: "was the accused dishonest"?

The juror's press conference, which no doubt would be contrary to law in Canada, provides an interesting insight into how jurors react to a lengthy and complex case. First, the jurors spoke emotionally about the tremendous sacrifice made by themselves, their families and their co-workers to allow them to sit through the case for 15 weeks. Juror Wendy Vaughan, a business owner, said that they had been given "a puzzle with about 25,000 pieces dumped on the table". The jury rejected the notion that there was a conspiracy of government informants to lie in court. On

the contrary, jurors were satisfied that the defendants had lied on the witness stand. Jury forewoman Debra Smith, who worked in Human Resources at an Oil Services Company, said the jurors came with a variety of life experiences, but a mutually high level of endurance. "I think the balance we had on this jury was very effective. We got to know each other, respect each other and listen to each other", Smith said.[328]

Commentators that followed the case emphasized two things: a jury can follow a complex case; and it is important for the prosecution to outline the evidence in a straightforward manner. Ellen Podgor, a professor at Stetson University, College of Law, who has written books on white-collar crime, said the prosecution did a "wonderful job keeping it simple".[329] It is important to remember, however, that this was a 15 week trial, not a three year trial as was possible in the Air India tragedy, and twelve months as is expected in the Pickton trial.

The complexity argument to support eliminating juries has been criticized by many,[330] and the following passages from a 1986 Report of the Law Reform Commission (New South Wales) best captures the consensus of most authorities:[331]

> We consider that the argument which has been put forward in support of the abolition of trial by jury in complex cases, particularly commercial and "white collar" crimes is not compelling. It is invariably based on the assertion that jurors are incapable of understanding the evidence upon which prosecutions of this kind depend. We question the validity of that assertion. There is, in fact, very little evidence to show that jurors, or more accurately juries, do not have an adequate grasp of the relevant material on which their verdicts should be based. There is a strong body of opinion which holds that juries generally reach acceptable verdicts in these cases.

****

328 Ex-Enron Bosses Closer to Prison, Houston Chronical, May 26, 2006: http://www.Chron.com/cs/CDA/printstory.mpl/special/enron/3898754

329 *Ibid*

330 For example, see Lord Patrick Devlin, "Trial by Jury for Fraud", (1986) 6 Oxford Journal of Legal Studies 3, 311; Law Reform Commission (Victoria) at par.s 2.0 and 2.219; The Honourable Hugh H. Bownes (a judge of the US Court of Appeals for the First Circuit), "Should Trial by Jury be Eliminated in Complex Cases?": http://www.piercelaw.edu/RISK/voll/winter/bownes.htm

331 Law Reform Commission (New South Wales), *supra*, at par.s 8.30 and 8.32

> The arguments in favour of retaining trial by jury in these cases are based on preserving the traditional role of the jury in the criminal justice system. In our view, the fundamental principles of criminal justice are best served by the jury system. Community participation, the determination of guilt by reference to the standards of the general community, accountability and public acceptance of the criminal justice system are all features which would be lost if the jury were to be abandoned. Accordingly, we are not satisfied that the case against the jury system in complex cases has been made out.

A recent empirical study tends to support these conclusions. Six researchers in the United States, two from university law schools and four from the National Centre for States' Courts undertook an analysis of the voting behaviour of over 3000 jurors in felony cases in several states. Although the focus of the study was to assess whether and to what extent the "first vote" of the jury was affected by race, this 2004 study concluded that the "primary determinant" of the jury's conclusions related to the strength of the evidence against the accused:[332]

> …the "primary determinant" of jury verdicts in criminal trials is neither the attitudes of the jurors, nor their demographic profile, but the strength of the evidence against the defendant.
>
> **********
>
> Overall, we find, consistent with prior research, that the strength of the evidence against a defendant is strongly and consistently related to how a juror casts his or her first vote. The stronger the evidentiary case against the defendant, the more likely the juror is to convict.
>
> **********

---

332 Stephen P. Garvey et al, "Juror First Votes in Criminal Trials", Journal of Empirical Legal Studies, Volume 1, no. 2, 372, 2004. Available at SSRN: http://ssrn.com/abstract=558163, at page 372, 373 and 396

> First, we find that in criminal jury trials, the evidence matters. Prior studies have reached the same conclusion… in virtually all the models reported here, the trial judge's assessment of the strength of the evidence against the defendant is powerfully associated with a juror's first vote. We emphasize this link to highlight the fact that despite many differences between them, *judge and jury tend to agree on the strength of the evidence*. [emp. added]

A study by the Federal Judicial Centre in 1987 provided a unique look at juror performance in a number of complex trials in comparison with shorter and less complex cases. While the trials were civil in nature, parallels can be drawn. "The survey showed that jurors in both long and short trials took their task extremely seriously and, for the most part, found the material interesting. The academics who conducted the study concluded that their findings negate "the image of bewildered, inattentive juries overwhelmed with complex evidence."[333] The Centre's Report concluded:[334]

> Not surprisingly, jurors in lengthy civil trials reported the evidence to be more difficult than did jurors in short trials. 46% of jurors in long trials rated the evidence as difficult or very difficult, as opposed to 29% of jurors in short trials. Two aspects of this finding require emphasis. First, in the shorter, more typical cases where few question juror competence, a sizable minority of the jurors reported encountering difficult evidence. Second, a majority of jurors in the lengthy trials believed that the evidence fell within their ability to comprehend it. This finding suggests that, at least from the juror's perspective, more overlap than divergence exists in their reactions to simple and complex trials.

In Canada, an appellate court acts on the assumption that juries are capable of following the instructions of the trial judge, even complex ones. For that reason, an appellant may not call into question the capacity of juries to complete the task assigned to them by law.[335]

---

333 P.J. Meitl, *supra*, at page 14
334 *Ibid*
335 *R v Eng* (1999), 138 CCC (3d) 188 (BCCA); *R v Corbett*, [1988] 1 SCR 670 at page 692-3

The issue of the length of the trial raises further, difficult considerations. Even an attentive, dedicated and focused jury can still be expected to forget details, perhaps important ones, after the passage of an extended period of time. As one writer put it:[336]

> Doubtless to say...the complexity of massive detail of some cases must throw an intolerable burden onto the powers of concentration of any jury. As a former justice of the Victorian Supreme Court concluded: "no judge, sitting alone, is required to perform the feats of memory and comprehension required of a jury in a long trial involving complex issues".

Longer trials obviously involve more testimony and more evidence—in short, more facts for the jury to consider, sort out, and evaluate. The Chief Justice of the United States made the following observations at a meeting of the conference of federal chief district judges in 1979:[337]

> It borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp… even Jefferson would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in trials lasting many weeks or months.

Trials of six, nine, and twelve months, and more, have emerged in Canada during the past decade. Many were heard by a judge alone, but some proceeded before a jury. At some point in the "length continuum", the right to a fair trial in a jury trial may be placed in jeopardy. By "fair trial" I mean that both the Crown and defence are able to have the trial considered fairly and fully, and that the length of the process does not place an unacceptable burden on the community, including the jury. A jury trial lasting two years or more, with any degree of complexity (as most of them will) is, in my view, overloaded and presumptively unfair to the parties and to the community.

---

336 Law Reform Commission (Victoria), *supra*, at page 2.28
337 *Ibid* at page 6

Legislation precluding trial by jury based primarily on the length of the trial breaches section 11(f) of the *Charter of Rights and Freedoms*, and, absent resort to the "notwithstanding" clause, will need to be saved, if at all, by section 1 of the *Charter*. As I noted earlier, the *Oakes* test will cause a reviewing court to consider whether the objective is sufficiently important to warrant overriding a constitutionally protected right. In this instance, the objective is a right guaranteed by sections 7 and 11(d) of the *Charter*—namely, the right to a fair trial. The court will also need to consider whether the means are reasonably, proportionately and demonstrably justified.

It seems to me that where the right to a jury and the right to a fair trial are on a collision course, and cannot be reconciled in a particular case, the need for a fair trial becomes the overriding objective. The accused, it seems to me, cannot implicitly "waive" the right to a fair trial by electing trial by judge and jury and then strategically plan, in essence, to raise "reasonable confusion" in the minds of the jurors based on the protracted nature of the proceedings, rather than arguing that a reasonable doubt arises upon a fair consideration of all of the evidence.

In my view, the case has been made to dispense with the jury in extraordinarily lengthy proceedings where, due to length (primarily) and complexity (secondarily), the trial court is satisfied that a fair trial cannot be held before a court composed of a judge and jury.

There is one final—but important—issue. If a case can be made to dispense with the jury in a particular case, should the matter proceed before a judge alone, or before a panel of three judges?

In a long trial, an alternate judge could be appointed to sit alongside the trial judge, without a jury. That will provide a reasonable level of assurance that the trial will proceed to verdict. A panel of three judges sitting without a jury, however, raises considerably more difficult issues.

Is unanimity required amongst the three judges? Or would a majority of two suffice? What happens if one of the three judges has to drop out? And if one drops out, what happens if the other two are split 1-1 on the issue of guilt? Should a fourth "alternate" judge be appointed to cover that possibility? What about the resource implications of four trial judges hearing a trial?

More fundamentally, on what basis do the individual judges in a panel decide the case? Through a deliberation process, as juries do? Or through individual research and consideration, resulting in the equivalent of a "vote", as appellate judges do? How are the facts in the case determined?

In my view, replacement of a judge and jury with a panel of three judges in a terrorist case is not a good policy choice for three reasons. While these factors are analytically separate, they are closely linked.

First, it seems to me that the conclusions of a panel would have to be unanimous on all essential issues of fact and law. Otherwise, almost by definition, a reasonable doubt exists in the case and an acquittal must be entered. The reasonable doubt standard at trial is so ingrained in our system of criminal justice that nothing more need be said of it in this paper. I simply note that while Canada has considerable experience in the assessment of reasonable doubt through the lens of a judge alone or a court composed of a judge and a jury, we have absolutely no experience in the determination of that issue through a panel of three trial judges sitting alone. In addition, the "reasonable doubt" filter is unique to the trial stage in our criminal justice system, when we are attempting to find out what the facts are and, to use the vernacular, we are "trying to get to the bottom of what occurred". We only rely on a panel of judges when appeals are taken from those trial decisions—but by that point, the issues for consideration have shifted significantly.[338] Put simply, while a judicial panel may work well when it comes to assessing issues of law, and in the determination of questions of mixed fact and law on appeal, it is far from clear to me that a panel would enhance the quality of justice in Canada in the assessment of the basic facts of the case at trial.

In this context, one factor is critical: at trial, when reasonable doubt is the key issue, twelve persons resolve the issue through a unique process of group deliberation. As the Supreme Court put it in 2001, "Through the group decision-making process, the evidence and its significance can be comprehensively discussed in the effort to reach a unanimous verdict."[339] The Court put a finer point on the issue when it said that "…an essential part of (the) process is listening to and considering the views of others.

---

338 On appeal, the issues typically relate to whether the trial judge erred in law, whether the trial judge misdirected the jury on an issue of law and whether, despite errors at trial, a substantial miscarriage of justice occurred.

339 *R v Pan*, [2001] 2 SCR 344 at par. 43

As a result of this process, individual views are modified, so that the verdict represents more than a mere vote; it represents the considered view of the jurors after having listened to and reflected upon each other's thoughts".[340] Judges, on the other hand, have no such mandate. While appellate panels in Canada are entitled to confer in individual cases, they are not required to do so, and individual judges can feel secure in their independence from the views of the other judges on the panel.[341] As a result, the group deliberation and dynamic that is so important in jury fact-finding may be absent in trial by a panel of professional judges. There is reason to believe, therefore, that a panel of three trial judges will actually be a less effective fact-finding body than a jury of 12 randomly-selected jurors drawn from the general population.

There is a second reason why the substitution of a three judge panel for trial by judge and jury is not a good policy choice. Quite simply, it is not responsive to the problem that exists. As I have argued throughout this paper, the real challenge with terrorist trials is to ensure that they proceed fully to verdict after a complete and fair assessment of all the evidence. The twin demons, as Justice Moldaver recently said, are prolixity and complexity. Creation of a three-judge bench trial will not solve that problem. In fact, it may create more problems. In a lengthy trial, a judicial panel could lose one of the judges just as easily as a jury could lose one of its jurors. What then? Do you proceed with just two judges? And what happens if your panel is reduced to one? At what stage do you declare a mistrial? Or do you "load up" at the front end with three judges and an alternate? Facially, that seems like a good solution, but it seems plain to me that few if any jurisdictions in Canada could afford the resource burden of routinely assigning four judges to hear lengthy terrorist trials.

The third factor tending to point to the conclusion that a panel is not appropriate concerns the issue of legitimacy—both domestically and internationally. Even assuming that the "fair trial" criterion is met in an individual case, and that a panel is available to all cases meeting this criterion—not just terrorist trials, Canadian law would divert the case out of the mainstream and into a tribunal that is unique, unparalleled in Anglo criminal justice systems and without precedent in Canadian history. The temptation to ascribe a political agenda to the proceedings

---

340 *R v Sims*, [1992] 2 SCR 858

341 Concerning the breadth of judicial independence, see *Valente v The Queen* (1985), 23 CCC (3d) 193 (SCC) at pages 202-3

is almost overwhelming. At the international level, proceedings would be vulnerable to even meritless allegations of "show trial", as occurred in Lockerbie. In my view, Canada ought not to be placed in the position of saying internationally: "oh, we expect that this will be a lengthy terrorist trial. We have a special court for those". For a multitude of reasons, there is much to be said for keeping even protracted proceedings within the mainstream of Canadian criminal law and procedure, and to avoid the creation of a unique and unprecedented tribunal that could immediately become a lightening rod for partisan political attacks.

In the result, it seems to me that the *Criminal Code* should be amended along the following lines:

- where the trial is expected to be lengthy—perhaps 18 months or more—the Crown or the accused may apply to the court for an order that the matter proceed without a jury;
- an order dispensing with the need for a jury should be available where the court is satisfied that because of the length (primarily) and complexity (secondarily) of the case, it is clear that the right to a fair trial is in jeopardy if heard by a court composed of a judge and jury;
- in determining the issue, the court may take into account the full circumstances of the case, including the expected length of the trial, the nature of the charges, the nature of the evidence, the proposed manner of its presentation before the jury and whether the trial can be managed in such a way that the right to a fair trial will not be jeopardized;
- where the court is satisfied that the trial ought to proceed without a jury, it should additionally be able to order that the case proceed before a judge sitting alone, with or without an alternate judge; and
- it seems to me, for the reasons outlined above, that a panel of three judges, sitting without a jury, is inadvisable.

g) Trial by Judge and Lay Assessors or a Special Jury

Increasingly complex and lengthy trials have spawned calls for the use of two or three "lay assessors" who have expertise in the area under consideration, or a "special jury" that draws from segments of society having specific qualifications, education or expertise. Both groups, it is contended, will be able to follow the evidence more easily than twelve randomly-selected jurors coming from the general community.

For two reasons, I will deal with these two options together, rather summarily. First, neither really addresses the real challenge in terrorist trials—length, not technical complexity. Second, both options seem, for the same reasons, to be at odds with basic democratic values, and neither has really taken root in Anglo-based jurisdictions, at least in modern times.

Lay Assessors

Lay assessors find their origins in very early times when it was felt that the community was not sufficiently developed to support a jury.[342] Trial judges, often on their own initiative, retained specially qualified persons such as fishmongers, merchants or physicians to sit with them and assess the case.

In England, Lord Hailsham suggested in 1974 that complicated financial frauds would be more fairly tried before a commission consisting of a High Court judge and two distinguished lay persons who, together, could give well-reasoned written judgements.[343] Later, the Roskill Committee recommended that the jury be replaced by two experts versed in forensic science, financial transactions and corporate structures.[344] Neither recommendation was implemented.

Two to four lay assessors presently sit with a judge of the Crown Court in appeals against decisions of the magistrates' court. Recent commentators have observed that "their participation at Crown court level is a remnant of their earlier role at the abolished Quarter Sessions, where, apart from hearing summary trials, in all but the most serious indictable cases, benches of two to nine magistrates presided over trials by jury".[345]

Lay assessors also raise serious constitutional questions. Depending on the model chosen, they would not necessarily have security of tenure. And in terrorist cases accused persons could reasonably be expected to object to proceeding on the basis of a reasonable apprehension of bias where national security experts were asked to assist the judge to determine critical facts in issue.

---

342 Law Reform Commission (Victoria) at par. 2.101
343 *Ibid* at par. 2.105
344 *Ibid*
345 Michael Bohlander, "Take It From Me…--The Roles of the Judge and Lay Assessors in Deciding Questions of Law in Appeals to the Crown Court", 2005 Jo CL 69.

Special Juries

"Special" or "blue ribbon" juries are in some respects similar to the lay assessor model. They draw on the collective wisdom and judgement of a small group of people having a certain qualification, education or experience which, it is argued, makes it more likely that they will better understand the evidence to be presented. "Special juries", however, have a lengthy and established pedigree in Anglo-based criminal justice systems.

In 1768, Blackstone noted that "special juries were originally introduced at trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders".[346] The UK special jury transformed into a social elite, moving from persons of a particular trade or technical qualification to jurors holding a high social status, in the belief that they were people of intelligence who would have the most knowledge and expertise of the matter in dispute.[347] The right to be tried before a special jury was confirmed in legislation by the *Special Juries Act 1898*.[348] Their popularity waned in the 20th century, and were finally abolished in 1949.[349]

In pre-confederation Canada, a Special Jury of 16 could be empanelled on the basis of a list of persons assessed at 20 pounds sterling and upwards.[350] In the US, "blue ribbon" juries were often used in the early 20th century[351] and their use was approved by the Supreme Court of the United States in 1947.[352] In New Zealand, Special Juries were common in civil cases where the court was of the opinion that difficult questions concerning science, technology, business or professional matters were likely to arise in the case,[353] and Special Juries were used in both criminal and civil cases in Australia until their abolition in the mid 20th century.[354]

---

346 William Blackstone, Solicitor General to Her Majesty, *Commentaries on the Laws of England*, Volume 3 (Oxford: Clarendon Press, 1768) at page 357-8

347 Law Reform Commission (Victoria) at par. 2.116

348 J. C. Oldham, "The Origins of the Special Jury", (1983) 50 The University of Chicago Law Review 137.

349 *Juries Act 1949* (UK), s.18(1)

350 For a discussion of this, see, *supra*, footnote 163 and accompanying text.

351 P.J. Mitl, Blue Collar Jurors in White Collar Cases—The Competence of Juries in Complex Criminal Cases (2006): http://law.bepress.com/expresso/eps/931

352 *Fay v New York*, 332 US 261 (1947); and see J. C. Oldham, *supra*

353 P.T. Burns, "A Profile of the Jury System in New Zealand" (1973) 11 Western Australia Law Review 110; Michele Powles, "A Legal History of the New Zealand Jury Service—Introduction, Evolution and Equality?", Victoria University of Wellington Law Review [1999] VUWL Rev. 19

354 Law Reform Commission (Victoria) at par. 2.118; Law Reform Commission (New South Wales) at par. 8.34 *et seq*

Analysis

The lay assessor and Special Jury models both have the advantage of a professional bench of jurists: shared responsibility, a collective-decision making process, and expertise in respect of the issues under consideration. However, in my view, the arguments against these options are strong, and ought to prevail. There are four of them.

The Case Has not Been Made that Juries Cannot Comprehend Difficult Cases

In "Trial by a Panel of Three Judges Without a Jury", *supra*, I traced the arguments for and against elimination of the jury in lengthy and complex cases, and concluded that, subject to fair trial considerations based primarily on the length of proceedings, there is an insufficient basis to believe that juries are performing poorly in their role.

I would simply add two points. First, the Supreme Court of the United States said this in a leading decision in 1968:[355]

> The most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Second, counsel bears a special responsibility to ensure that the case is presented in an organized and intelligible way, with the key issues clearly identified for the assistance of the jury. A lengthy and complex case cannot simply be thrown at the jury. Indeed, the Criminal Bar Association of the UK has itself argued that adequate preparation by counsel and effective presentation of the evidence in court are the best ways to secure the comprehension of the jury in complex cases. I would add, as well, that careful preparation and streamlined presentation are important in the avoidance of wrongful convictions.[356]

---

355 *Duncan v Louisiana*, 391 US 145 (1968) at 157

356 Law Reform Commission (New South Wales), *supra*, at par. 8.33; P.J. Mitl, *supra,* at page 16

There may be a touch of irony here. Some may argue—with force, but only intuitively—that competent counsel in a *jury* trial may take pains to sharpen the focus of the evidence, and collapse the evidence into a manageable and organized body of information to ensure that the jury sees the case through the parties' lens. With a professional judge hearing the case alone, there may be more of a tendency—perhaps unconscious—to "load up" the evidence before the court, on the basis that the judge does nothing but hear cases, has lots of time available, and in any event counsel can sort out the real issues during final argument.

Assessors and Special Juries May not Even Meet the Test of Being a Constitutional "Jury"

There are several essential characteristics of a jury.[357] Central amongst them are the randomness of selection and the representative nature of a jury. Special Juries, on the other hand, involve persons who have been specifically selected because of their background or expertise. This amounts to deliberately "loading the dice" in the selection process, as well as being somewhat elitist, and runs, in my view, the clear risk of not amounting to a "jury" as contemplated by section 11(f) of the *Charter of Rights and Freedoms*[358] and failing to meet the standard of an "independent and impartial tribunal" as guaranteed in section 11(d) of the *Charter*.[359]

The Role of the Expert is to Testify in the Witness Box, not Decide the Case

The main purpose of a jury is to sort out the true testimony from the false, the accurate from the inaccurate, the important matters from the unimportant, the linkages between various parts of the evidence and, when faced with the issue, to assess the weight to be given to "duelling experts".[360] In a word, the main task is fact-finding.

---

357 I have discussed this at some length in Part VI.

358 A committee set up in Australia four decades ago rejected the notion of a Special Jury, "maintaining that a jury should represent a cross-section drawn at random from the community and that any other procedure is inconsistent with this principle: Law Reform Commission (Victoria) at par. 2.123

359 *R v Genereux*, [1992] 1 SCR 259

360 *Barefoot v Estelle*, 463 US 880, 902 (1983)

Expert witnesses are expected[361] to help the jury in resolving the case. Jurors are not expected to have a command of every technical aspect of the case. In fact, the fundamental role of expert testimony is to help jurors assess information about which they lack sufficient knowledge or experience.[362]

There are four serious problems that arise when, in this context, experts are placed into the role of decision-makers in a specific case.

First, there will be a concern that assessors, or a special jury, will act on or provide the judge with hidden and untested theories which have neither been the subject of cross-examination nor even been drawn to the attention of the accused. [363] Second, in the case of assessors in particular, it has been said that "it would be virtually impossible to ascertain the extent of formal and informal input to a judgement".[364] Third, because the expert has moved from witness to decision-maker, the key issues will be analyzed and decided upon through the lens of an expert rather than being evaluated against the backdrop of community life experiences. This runs the risk of imprisoning someone for ten or fifteen years, or life, for reasons that could not be made clear to the average citizen. The point was made powerfully in a recent report on the jury system in Australia:[365]

> The jury not only represents the public at the trial, its presence ensures a publicly comprehensible exposition of the case. There is the danger in trial by experts that the public dimension will be lost. I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.

---

361 Expert witnesses are expected, and may become *necessary* due to their technical expertise, to form a correct judgement on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge: *R v D*, [2000] 2 SCR 275

362 *R v D*, supra; *R v Mohan*, [1994] 2SCR 9; *R v McMillan* (1975), 23 CCC (2d) 170, affd. [1977] 2SCR 824; *R v K* (a) (1999) 137 CCC (3d) 225 (Ont.C.A.); M. Neil Brown et al, "The Epistemological Role of Expert Witnesses and Toxic Torts", 36 Am. Bus. L. J. 1, 49 (1998)

363 Law Reform Commission (Victoria) at par. 2.112 and par. 2.128

364 *Ibid* at par. 2.112

365 Law Reform Commission (New South Wales), *supra*, at par. 8.27 [Quoting a Commissioner reporting in dissent]; Lord Devlin made precisely the same point: Law Reform Commission (Victoria), *supra*, at par. 2.129.

Finally, there is the issue of the legitimacy of the proceedings. Should the liberty of an individual be debated and decided in secret by a group of "experts", or should that fall to a group of peers representative of the community? Michael Hill, Q.C. and David Winkler, Q.C. considered the issue in a paper on juries prepared for the International Society for the Reform of Criminal Law in 2000. With reference to the proposed Fraud Trials Tribunal which would have consisted of a judge and qualified experts, they said this:[366]

> In the end it came to this: "experts" are not infallible, their views may be contentious and, in any event, only trial by jury, with all its imperfections, would satisfy the public's proper insistence that the administration of criminal justice in fraud cases, like all other major offences calling for trial on indictment, should be fair, transparent and independent.

Assessors and Special Juries May Increase the Risk of Wrongful Conviction

This is really an extension of the previous points. The risk of wrongful conviction may increase with: the loss of a randomly-selected body that has a clear track record for solid fact finding; trial by experts in secret; and decisions where reasons for conviction are not necessarily intelligible to the average person.

The risk of wrongful conviction may increase even more when the expert moves directly into a decision-making position.[367] Recent experiences in the UK illustrate the dangers with over-reliance on experts in court, especially when their views are conflicting and changeable. In a startling series of cases, experts strayed from witness to advocate on the witness stand, and ended up being the direct cause of terrible miscarriages of justice in that country.

---

366 Michael Hill, Q.C. and David Winkler, Q.C., "Juries: How Do They Work? Do We Want Them?" [December 2000, unpublished].

367 *R v Clark*, [2003] EWCA Crim. 1020; *R v Cannings*, [2004] EWCA Crim. 1; *R v Kai-Whitewind*, [2005] EWCA Crim. 1092; *R v Harris*, [2005] EWCA Crim. 1980.

Reforms that May Assist

Quite apart from the issue of lay assessors and special juries, there is much that can be done to assist the jury in understanding the evidence in a lengthy and complex case. I have dealt with some, *infra*, "Containing Lengthy Trials" and "Assisting the Jury to Consider the Case" so I will not repeat them here.

There is one initiative that could assist in evaluating the evidence of expert witnesses. It involves the tendering of a *panel* of experts to give group evidence. Each witness would be sworn separately, and counsel would be able to question the expert individually, or pose a question to the group as a whole. This approach would allow areas of agreement or disagreement to emerge and become clear, and would allow experts to comment on the views of the others. It would, I believe, allow the issues to be crystallized in a relatively focused environment. In Canada, this approach has been used, with considerable success, in public inquiries, and was tried in 1985 in Australia:[368]

> … an initiative utilized in New South Wales of using a group of expert witnesses requires some further evaluation. In 1985, the New South Wales Supreme Court allowed five experts to provide expert evidence. Each witness was sworn and by consent questions were asked of the witnesses by both parties and by the presiding judge. The witnesses were able to comment on and dissent from each other's testimony, enabling the issues to be drawn out and explored. The judgement noted that the technical problems were successfully addressed by these techniques and the hearing was substantially reduced because of this method. In the end, it is argued that this style of approach to hearing expert testimony can only make the task of the jury easier.

368 Law Reform Commission (Victoria), *supra*, at par. 2.127

> This initiative, although it intrudes at the edges of the traditional approach to the adversary system, is to be commended because its informality makes it much more likely that the courts' and the experts' time will be spent on the issues that are genuinely in dispute. As well, it makes it more likely that the experts' testimony will be less stilted and inhibited by the unwanted atmosphere of the courtroom.

In the result, I have reached two conclusions. First, neither lay assessors nor special juries ought to be adopted in Canada. Second, trial judges should permit expert panels to testify at trial in the form of group evidence.

Change of Venue

Terrorist attacks are intended to strike fear into the hearts of the persons targeted. In some instances, the target group is small and can be defined with precision. In others, an entire community is devastated—as in the 1995 Okalahoma City Bombing.[369] Some scholars have argued, with force, that the planning of 9/11 and its subsequent devastation victimized an entire nation—including all potential jurors and everyone else associated with the case.[370]

In this section, I will consider whether and to what extent the location of a terrorist trial can be moved to another part of Canada to ensure that an accused faced with allegations of an horrific terrorist act can receive a fair trial.

At the outset, I should observe that in 2001 the *Criminal Code* was amended to empower a court in one province to hear a terrorist case originating in another. The provision is, however, narrow in scope, and not really a "change of venue" provision in its normal sense. Section 83.25 provides that the federal government can commence proceedings involving a terrorist offence "in any territorial division in Canada." However: the provision is limited to federal proceedings, not those brought at the

---

369 For a discussion of this point, see Part III, section 5.

370 Neil Vidmar, "When All of Us Are Victims: Juror Prejudice and 'Terrorist' Trials", 78 Chi-Kent L. Rev. 1143 (2003); James Curry Woods, "The Third Tower: The Effect of the September 11th Attacks on the American Jury System", 55 Ala. L. Rev. 209 (2003); Bennett L. Gershman, "How Juries Get It Wrong—Anatomy of the Detroit Terror Case", 44 Washburn L. J. 327 (2005).

instance of a province; its operation is confined to a "terrorism offence" (defined under s.2) or an offence under s. 83.12 (various terrorism-related offences) and not other types of crime that may have been committed by a terrorist group; it is unclear whether the provision is triggered at all if the indictment contains a "mix" of terrorist and other offences; and the accused has no standing to bring an application to move the case.

Generally, under the common law, the trial of a criminal offence is heard in the neighbourhood where the crime took place. In this context, "neighbourhood" means the county or district where a court ordinarily sits.[371]

The *Criminal Code* has extended the jurisdiction of the courts to other territorial divisions in a variety of circumstances.[372]

Under section 599 (1) *Criminal Code* the Crown or the accused can apply for a change of venue from the territorial division in which the accused is scheduled to be tried, on the ground that the accused cannot get a fair trial in that territorial division.

The burden rests on the applicant to show that a full and impartial trial cannot be held in the area where the offence was committed.[373] If there exists a fair and reasonable probability of prejudice against the accused to the point that challenges will not assure an impartial trial, a change of venue is supportable.[374] Indeed, there is authority supporting the proposition that the interests of justice *require* a change of venue where the trial judge concludes that, despite the protective mechanisms available under the law, the accused cannot receive a fair trial in the location where the offence occurred.[375]

---

371 *R v Spintlum* (1913), 15 DLR 778 (BCCA) at 786

372 For instance, see sections 465, 470, 476 and 599 (1). As well, note the section 2 definition of "territorial division".

373 *R v Adams* (1946) 86 CCC 425 (Ont.HCJ); *R v Boucher* (1955), 113 CCC 221 (Que.SC); *R v Collins* (1989), 48 CCC (3d) 343 (Ont.C.A.); *R v Charest* (1990) 57 CCC (3d) 312 (Que.C.A.); *R v Suzack* (2000) 141 CCC (3d) 449 (Ont.C.A.), at par. 43, lv. ref. 152 CCC (3d) v1

374 *R v Beaudry* [1966] 3 CCC 51 (BCSC); *R v Alward* (1976), 32 CCC (2d) 416 (NBCA); and to the same effect: *Sheppard v Maxwell*, 384 US 333 (1966)

375 *R v Suzac, supra*, at par. 42

However, on the basis of existing law, there is no power to change the trial venue in respect of an offence committed entirely in one province to another province, regardless of how great the prejudice against the accused may be in the "originating province".[376]

The principal issue is this: where a terrorist act was so horrific that it effectively victimizes an entire region of Canada, and the trial judge is satisfied that the accused cannot have a fair trial in that area, can the trial be moved to another province or territory? Facially, the answer is "no", although two pathways to resolution may presently exist.

First, if a conspiracy is alleged, any Canadian court has jurisdiction if: an overt act in furtherance of the conspiracy took place within its jurisdiction; the effects of the conspiracy were felt within its jurisdiction; or one of the objects of the conspiracy was to produce harm within the jurisdiction of the court.[377]

Second, a superior court trial judge may be able to craft a section 24 (1) *Charter* remedy, by removing the case to another province on the basis that confining the trial to an area where the accused cannot have a fair trial violates the accused's rights under section 7 and 11(d) of the *Charter*.[378]

There are two potential problems with the last option. First, the "receiving" jurisdiction may be completely overwhelmed by the case, and lack the resources necessary to handle it fairly and fully. Second, it is quite doubtful that a superior court in one province could direct officials in another province, over their objections, to assume responsibility for a case for which they have no constitutional responsibility simply by reliance on section 24(1) of the *Charter,* although such remedial powers could be given to the court under the *Criminal Code*.[379]

---

376 *Criminal Code* s.478 (1); *R v Threinen* (1976), 30 CCC (2d) 42 (Sask.Q.B.) [a pre-Charter attempt to move a trial from Saskatoon, Saskatchewan to Winnipeg, Manitoba on the basis of intensive pre-trial publicity].

377 Section 465 *Criminal Code*; *R v Libman* (1985), 21 CCC (3d) 206 (SCC); *DPP v Doot* [1973] AC 807 (HL); *R v Sanders* [1984] 1 NZLR 636 (CA); *R v Latif* [1996] 1 All ER 353 (HL); *R v Smith* [2004] 2 Cr. App. R. 17

378 *Doucet-Boudreau v Nova Scotia*, [2003] 3 SCR 3; and, in the context of bail in wrongful conviction cases, see*: R v Phillion*, [2003] O.J. No. 3422; *R v Driskell*, 2004 MBQB 3

379 Of course, under s.91 (27) of the *Constitution Act, 1867*, the federal government has responsibility for the criminal law and procedure on a national basis. Provinces have responsibility for the administration of justice *in the province* pursuant to s.92 (14) of the *Constitution Act, 1867*. In *Doucet-Boudreau v Nova Scotia,* [2003] 3 SCR 3 at par. 33 and 34, supra, the Supreme Court of Canada discussed the circumstances in which a section 24 (1) remedy is appropriate, but cautioned that the courts must be sensitive to their role as judicial arbiters and avoid remedies that usurp the role of the other branches of governance.

One last, practical issue. One ought not to underestimate the resource implications of a removal order, especially if the case is a large one. Costs for the "receiving" jurisdiction and, potentially, the Government of Canada, will include huge travel and accommodation costs for all witnesses, counsel and the court party.

In conclusion, I am of the opinion that the *Criminal Code* should be amended to permit a superior court of criminal jurisdiction hearing an indictable offence to direct that the trial be heard in another, specified province or territory where: a) the court is satisfied that the accused cannot receive a fair trial in the originating jurisdiction; and b) the Attorney General in the proposed receiving jurisdiction has been consulted, and has been provided with an opportunity to provide submissions to the court on the issue.

I am also of the view that the Attorney General of Canada ought to assume a leadership role in the development of a network of Memoranda of Understanding to deal with various administrative and resource implications flowing from the removal of cases from one jurisdiction to another—including appropriate funding arrangements between Canada and the provinces, having regard to the constitutional responsibility of the Government of Canada for criminal law and procedure, and the provinces for the administration of justice in the provinces.

There is one further possibility. Most modern anti-terrorism laws assert universal jurisdiction. For instance, a case similar to the Air India prosecution could be prosecuted in the UK and the Lockerbie tragedy, which occurred in the region of the UK, could be prosecuted in Canada.[380]

380 Section 7 (3.73-3.75) *Criminal Code*

Majority Verdicts in Jury Cases

i) The Current Legal Framework

In Canada, all members of a jury hearing a criminal case must be unanimous in the decision to either acquit or convict the accused.[381] Where there are a number of charges, the "unanimity rule" applies to each count individually. If the jury is unable to reach a unanimous verdict (usually referred to as a "hung jury"), a mistrial is declared,[382] the jury is discharged, and the matter is put over for re-trial before another judge and jury. Alternatively, the Crown may decide not to proceed further, and can enter a stay of proceedings.[383]

Origins of the "Unanimity Rule"

The rule requiring unanimity can be traced back to at least the 14th century.[384] In earlier days, the judiciary exerted a degree of pressure on the jury to reach a unanimous verdict. Lord Devlin, in his classic book entitled *Trial by Jury*[385] notes that at one time the non-conformist jurors were imprisoned; later, for centuries, the entire jury was confined until they reached a verdict. If the assize was over, but the jury had not yet reached a verdict, the judge would "take the jury with him to the next town in a cart". And from early days well into the 20th century, jurors were "kept without meat, drink, fire or candle" until they reached an agreement.[386]

---

381 *R v Sims*, [1992] 2 SCR 858; *R v G* (R.M.) [1996] 3 SCR 362; *R v Pan*, [2001] 2 SCR 344

382 Section 653 (1) *Criminal Code*; and see *R v Pan*, supra, at par. 28

383 Alternatively, the Crown may decide to technically commence the trial, offer no evidence, then invite an acquittal. This issue was before Commissioner LeSage in the Driskell Public Inquiry in Winnipeg, Manitoba, at least in the context of cases where the Minister of Justice for Canada has concluded that a miscarriage of justice may have occurred in a case: Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Winnipeg, 2007) at pp.123-145.

384 *Anonymous Case,* [1367] 41 LIB, referred to in *Cheatle v The Queen* (1993), 177 CLR 541 at 550 (HC)

385 London: Stevens and Sons, (1956, reprinted 1971) at 51

386 Devlin, supra at 50; and see *R v G* (RM), *supra* at par. 18, and most recently see *R v Krieger*, 2006 SCC 47. Section 647(5) of the *Criminal Code* makes it clear that the judge shall direct the sheriff to provide the jurors with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict. United States Courts have the same understanding: *US v Piancone*, 506 F. 2d 748 (1974)

Times, fortunately, have changed considerably and the Supreme Court of Canada has recently confirmed that "it is beyond question that no measure of coercion will be acceptable".[387]

The International Picture

Majority verdicts (10 to 2) were introduced into the United Kingdom in 1967,[388] and a "true" majority verdict (8 to 7) has been allowed to support a verdict of guilty in Scotland for decades.[389]

The situation in the US and Australia is virtually identical. Unanimity is constitutionally guaranteed at the federal level in the US[390] and at the national (Commonwealth) level in Australia,[391] but state legislatures—the level at which most prosecutions are brought in the US and Australia—are free to provide for majority verdicts in both countries, and several have in fact done so.[392] New Zealand law continues to require a jury to return a unanimous verdict in criminal cases.[393]

The Arguments for and Against Retaining a Unanimous Verdict

There are good arguments both for and against keeping the unanimity rule. The arguments in favour of its retention are, in my view, principled in nature, and more persuasive. The contrary view, which favours a majority verdict, tends to be speculative in nature, and has a slight *in terrorem* flavour to it.

---

387 *R v G (RM)* at par. 18. For an excellent review of this issue, reference can be made to a law reform paper prepared by the Law Reform Commission for New South Wales (Report 111-2005), which recommended maintaining the unanimity rule. Despite this, majority verdicts were authorized in that State in 2006. The President of the Law Society of New South Wales immediately said that "the introduction of majority verdicts in criminal trials would be remembered as a sad day for justice in New South Wales". She continued that "innocent people now run the risk of being convicted with the introduction of 11-1 juries in criminal jury trials": http://www.lawsociety.com.au/page.asp?Partid=18228. In the US, the Arizona Supreme Court established a committee on juries in 1993. In 1996 the committee decided, by a fourteen to one vote, that there should be no change in the unanimity rule: http://www.supreme.state.az.us/jury/Jury2/jury20.htm.

388 *Criminal Justice Act 1967*, 1967 (U.K.), c. 80, s.1; in this respect, see *R v G* (RM), *supra*, at par. 22

389 Devlin, *supra* at 56; Law Reform Commission of Canada, "Criminal Law: the Jury in Criminal Trials" (working paper 27) (Ottawa: 1980) at page 155 (footnote 35); Law Reform Commission (New South Wales), *supra* at par. 2.16 and 2.17

390 The US Supreme Court has consistently ruled that the US Constitution guaranteeing trial by jury carries with it the requirement of unanimity in federal courts: *Thompson v Utah*, 170 US 343 at 351 (1898); *Hawaii v Mankichi*, 190 US 197 at 211 (1903); Patton v US, 281 US 276 at 287 to 290 (1930); *Andres v US*, 333 US 740 at 748-9 (1948); *Swain v Alabama*, 380 US 202 at 211 (1965)

391 *Cheatle v The Queen, supra*

392 In this respect, reference can be made to the authorities set out in footnote 387, *supra.*

393 *Siloata v R*, [2004] NZSC 28

I. The Arguments in Favour of Majority Verdicts

There are four main arguments in support for majority verdicts.[394]

a) Hung Juries

First, it is argued that majority verdicts will result in fewer hung juries than unanimous verdicts, and will therefore save the time and expense of retrials. But how often do hung juries actually occur? In an early Law Reform Commission of Canada study, only 14 of 1,370 jury cases, or about 1.02%, resulted in a hung jury. In the same study, it was found that only 8% of trial judges surveyed felt that hung juries posed a serious problem in Canada.[395] These figures can usefully be compared to the situation in other countries. In the US, roughly 5% of jury cases result in a hung jury, and in England, before the move to majority verdicts, about 3.5-4% of jury cases resulted in disagreement.[396] A recent study in Australia led to the same conclusion: roughly .4% of all cases were prosecuted before a jury and, of that, around 8% of juries could not agree.[397]

Two further points should be made in relation to the "hung jury" argument. First, one ought not to conclude that a deadlocked jury is necessarily bad. Often, that is a sign of a real and legitimate concern about the case.[398] Second, the adoption of majority verdicts will not eliminate hung juries. There will always be cases where, for good reason, a jury cannot agree.

b) The Problem of the Unreasonable or "Rogue Juror"

On occasion, a juror who has pre-judged the case will stubbornly refuse to participate in the deliberations of the jury or listen to the evidence or the views of the other jurors. This can range from unreasonableness through to eccentricity and, sometimes, corruption. The "rogue" juror argument is clearly one of the strongest of those advanced by those in favour of majority verdicts.[399]

---

394 These are the arguments that have been developed and distilled over the past several decades: Lord Devlin, *Trial by Jury, supra*; Law Reform Commission of Canada, *supra*; Law Reform Commission (New South Wales), Report 111 (2005) "Majority Verdicts"; *Cheatle v The Queen* (1993), 177 CLR 541 (HC)

395 Law Reform Commission of Canada, *supra* at pages 21-2 and page 156

396 Law Reform Commission of Canada, *supra* at page 21 *et seq*

397 Law Reform Commission (New South Wales 2005), *supra* at par. 3.10

398 Law Reform Commission (New South Wales 2005), *supra* at par. 3.44 and 3.48; Law Reform Commission of Canada, *supra* at pages 23-4

399 The spectre of the "rogue juror" looms heavily in the debate in Australia: Law Reform Commission (New South Wales 2005) at par. 1.22

Once again, however, the available statistics and studies tend to suggest that while in theory this could be a problem, in practice it is not.[400] And as the Law Reform Commission for New South Wales (Australia) observed in 2005: "even if majority verdicts were to be introduced, there is no guarantee the "rogue" juror element would be eradicated completely".[401]

c) The Unanimity Rule Actually Leads to Compromise Verdicts

Some argue that the unanimity rule is a sham: while seeming to have full concurrence, the verdict either represents a compromise, or a decision reached because a minority "caved in" due to pressure or the formulation of a coalition within the jury.[402]

There are two separate aspects to this argument: a "compromise" or "negotiated" verdict, to avoid a mistrial; or, alternatively, the "yielding" by a minority to the predominant views of the majority.

On the first point, the existence of "compromise" or "negotiated" verdicts does not lead logically to the conclusion that one should have majority verdicts. One of the strengths of the jury system arises from the fact that the verdict is the product of the interaction of twelve individuals. As the Supreme Court of Canada has consistently noted, "it is the process of deliberation which is the genius of the jury system".[403] As the High Court of Australia observed in a unanimous (7-0) judgment delivered in 1993, "the necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed".[404]

Studies have confirmed that a degree of "bartering" or "horse trading" does occur in the jury room, particularly where all jurors agree that the

---

400 Law Reform Commission of Canada at pages 24-26; University of Chicago Jury Project—Law Reform Commission of Canada at page 24; Law Reform Commission (New South Wales 2005), *supra* at par. 1.12-1.23. And, in this context, reference should be made to the bizarre and quite disturbing case of Gillian Guess, who as a juror in a murder case entered into a sexual relationship with the accused during the trial: *R v Guess* (2000) 148 CCC (3d) 321 (BCCA); *R v Guess* (2000) 150 CCC (3d) 573 (BCCA). Even there, however, Guess was convicted of attempted obstruction of justice, and was sentenced to 18 months in jail. The accused charged with murder was acquitted at his trial, but was directed on appeal to go through a second trial once the relationship with the juror was uncovered: *R v Budai* (2001) 154 CCC (3d) 289, lv. ref. 160 CCC (3d) vi

401 Law Reform Commission (New South Wales 2005), *supra* at par. 2.23. The Supreme Court of Canada has observed, as well, that the unanimity rule may actually reduce the effect that a biased juror may have ina case: *R v Pan* at par. 99

402 In saying this, I use the word "minority" in a generic way, and am mindful of the caution expressed by the Supreme Court of Canada in terms of the use of this word during a charge to the jury: *R v G (RM), supra* at par.16

403 *R v Sims*, [1992] 2 SCR 858; *R v G (RM), supra* at par. 17

404 *Cheatle v The Queen, supra*, at page 553

accused is guilty of *something*, but disagree on what the "something" is.[405] A study in New Zealand involving post-trial interviews of jurors showed that some jurors:[406]

> …felt uneasy about the unprincipled nature of the decision, but most simply saw it as a pragmatic and sensible solution to the problem they confronted: they all thought that the accused was guilty of something; they differed as to the nature and extent of that guilt; and they therefore decided that "guilty" verdicts on some of the charges would dispense justice, albeit perhaps rough justice, and avoid the expense of a re-trial.

On the second point, intuitively, one suspects that on occasion the minority does yield to the majority. Once again, however, this does not lead to the conclusion that the unanimity rule ought to be abandoned. As the Law Reform Commission of Canada has pointed out: "this phenomenon (yielding) would also be present in majority verdicts".[407]

d) Unanimous Verdicts are Inconsistent with Democratic Principles

It is often argued that the requirement of unanimity is inconsistent with decision-making in almost any other area of public life: legislative bodies, appellate courts and administrative tribunals all decide on the basis of some form of majority vote. Why are juries different?

There are several fallacies underlying this argument. First, the jury decision-making bears no resemblance to the role played by other decision-making bodies.[408] The differences are obvious: as I will discuss shortly, the unanimity rule in the criminal justice system is inextricably linked to the principle that the Crown must prove guilt beyond a reasonable doubt. Additionally, the jury must confine its consideration of the issues to the evidence presented, and make findings of fact without straying into areas of law or public policy. This role is quite different from that played by other public sector decision-making bodies.

The argument misunderstands the role of the jury in a second important way. The jurors do not simply listen to the evidence, then vote. Their

405 Law Reform Commission (New South Wales 2005), *supra* at par. 3.24
406 The Law Reform Commission (New South Wales 2005), *supra* at par. 3.25
407 Law Reform Commission of Canada, *supra* at page 28
408 Law Reform Commission of Canada, *supra* at page 26

deliberation, and the discussions in the jury room form a critical part of the jury system. The Supreme Court of Canada put it this way in the context of the purpose of an exhortation to the jury:[409]

> …the focus of the exhortation is the process of deliberation which is the genius of the jury system. An essential part of that process is listening to and considering the views of others. As a result of this process, individual views are modified, *so that the verdict represents more than a mere vote*; it represents the considered view of the jurors after having listened to and reflected upon each other's thoughts. (emp. added)

II The Arguments in Favour of Maintaining the Unanimity Rule

There are six basic arguments in favour of maintaining the unanimity rule.

a) The Unanimity Rule is Inextricably Linked to the Burden of Proof on the Crown

The criminal verdict is based on the absence of reasonable doubt. If a jury, acting reasonably, has a dissenting view on the issue of guilt, that, in itself, tends to suggest the existence of a reasonable doubt.[410]

Sir James Fitzjames Stephen put the matter this way in 1883:[411]

> …no one is to be convicted of a crime, unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt?

b) The Unanimity Rule Protects Against Wrongful Conviction

The burden of proof beyond a reasonable doubt performs at least two

---

409 *R v Sims*, [1992] 2 SCR 858

410 Law Reform Commission of Canada, *supra* at page 28; Law Reform Commission (New South Wales) at par. 3.3; *Cheatle v The Queen, supra* at pages 553-4; Lord Devlin, "Trial by Jury", *supra* at page 56; Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London: 1883), vol. I, at page 304-5

411 *Ibid* at pages 304-5, quoted with approval by Lord Devlin, *supra*

critical functions in the criminal justice system: it greatly reduces the risk of convicting the innocent; and it promotes the moral acceptability and legitimacy of the verdict. The unanimity verdict furthers both of these important goals.[412] It follows, therefore, that the acceptance of majority verdicts in jury trials may increase the risk of wrongful conviction and, at the same time, may decrease public confidence in the verdicts reached by a majority only.[413]

c) Unanimous Verdicts Based on a Process of Deliberation in a Collective Decision-Making Process Are the Genius of the Jury System

A jury is effective[414] because it builds into the decision-making process two critical features: the collective experience and recollection of twelve persons; and a process of deliberation that encourages a give-and-take by which ideas and arguments are tested, refined, confirmed and rejected.[415]

The unanimity requirement is necessary to ensure that these decision-making features are present. As the Law Reform Commission of Canada noted:[416]

> Empirical research relating to the jury's deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule, and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.

d) The Unanimity Rule Promotes Public Confidence in the Criminal Justice System

The strength of a jury's verdict lies not in the evaluation of the evidence by each juror individually, but rather in the unanimity of the conclusion reached by the jury as a group.[417] Studies have shown that jurors,

---

412 *R v Pan, supra* at par. 99; *Cheatle v The Queen* at page 551; Law Reform Commission of Canada, *supra* at page 28-29

413 *Cheatle v The Queen, supra* at page 553; Law Reform Commission (New South Wales 2005), *supra* at par. 3.15 and 3.16; Lord Devlin, *supra* at page 56

414 It may be more accurate to say that a jury is *believed* to be effective, because of the lack of research on the subject.

415 Law Reform Commission of Canada, *supra* at page 29

416 Law Reform Commission of Canada, *supra* at page 29

417 *R v Pan, supra* at par. 99

themselves, prefer the unanimity requirement[418] and that the public in Canada supports the unanimity requirement, at least for serious charges.[419] The few available studies do suggest as well that the public feels that verdicts based on unanimity are "safe ones" – important because juries are not required to outline reasons for their verdict.[420]

Some argue that while unanimity promotes public confidence, hung juries flowing from the unanimity requirement tend to undermine public confidence. There are two responses to this argument. First, as I noted earlier, there is no evidence to support the notion that hung juries are widespread in Canada or indeed elsewhere throughout the Commonwealth with the possible exception of Australia. Second, hung juries will occur whether the rule requiring unanimity or a majority verdict scheme is in place.

e) There May Be Good Reasons for Jurors to Disagree

The simple fact that from time to time juries hang, is not, in itself, sufficient reason to think that the system of trial by jury is not working, or that it is in need of reform. Sometimes, perhaps often, disagreements occur because the case is a difficult one, not because one or two of the jurors are perverse.

A study of an admittedly small number of hung juries in New Zealand (5) is helpful if not instructive.[421] In three of the cases, the jurors "provided a clearly articulated and reasoned basis for their dissent".[422] In the other two, the dissent was seen as well-founded: in one, the researchers concluded that the *majority* position would have actually led to a perverse verdict; and in the second, the merits were balanced, and the judge shared the view of the minority.[423] In these types of cases, a hung jury seems not unreasonable.

418 Law Reform Commission of Canada, *supra* at page 30
419 *Ibid* at page 31
420 Law Reform Commission (New South Wales 2005), *supra* at par. 3.15 and 3.16
421 Law Reform Commission (New South Wales 2005), *supra* at par. 3.14
422 Law Reform Commission (New South Wales 2005), *supra* at par. 3.14
423 *Ibid*

Parenthetically, it should be noted that this type of data is not available in Canada due to the secrecy provisions in s.649 of the *Criminal Code*. In a rare move, the Supreme Court of Canada recommended in 2001 that the *Criminal Code* be amended to permit the scientific community to conduct empirical research respecting the work of juries in the Canadian judicial environment. This would avoid relying on assumptions and extrapolations based on studies in other countries.[424] Thus far, the Government of Canada has not acted upon this recommendation.[425]

f) Majority Verdicts May Not Be Constitutionally Secure in Canada

Quite apart from the policy rationale for maintaining the unanimity rule, or moving to majority verdicts, there is, in my view, a significant constitutional issue here: does the "jury" requirement in s.11(f) in the *Charter of Rights and Freedoms*, include, as a core element, a unanimous verdict? Not surprisingly, there are no authorities directly on point in Canada.[426] In my view, there is a significant risk that, if the Government of Canada moved to majority verdicts in respect of, at least, "serious offences"[427] such as murder, the Supreme Court of Canada would strike the legislation down pursuant to s.52 (1) of the *Constitution Act, 1982*.

---

424 *R v Pan, supra* at par. 100 *et seq*. At an early stage, some work was done in Canada with simulated juries: Valerie Hans and Anthony Doob, "Section 12 of the *Canada Evidence Act* and the Deliberations of Simulated Juries", (1975), 18 C.L.Q. 235. Internationally, some research has been done, but it seems apparent that the efforts thus far have been insufficient: "A Future for Jury Research?", by Dr. Paul Robertshaw, Cardiff Law School, UK, in an article first published under another title in *The Times* on the 23rd of October, 2001.

425 I have been advised that the "Justice Efficiencies and Access to the Justice System" Steering Committee, composed of Canadian judges, Crown and defence lawyers, is presently considering this issue: www.doj.ca/en/est-cde-rep.html. As well, retired Chief Justice Lamer commented on the issue in his report on Newfoundland miscarriages of justice (http://www.justice.gov.nl.ca/just/lamer/lamercontent page 3-9, recommendation 16); and see: "A Future for Jury Research?", by Dr. Paul Robertshaw: http://www.isrcl.org/otherpapers/robertshaw.pdf. Michael Hill, Q.C. (of England) and David Winkler, Q.C. (of Canada) made similar recommendations in a paper that they prepared for the International Society for the Reform of Criminal Law in 2000: "Juries: How Do They Work? Do We Want Them?" at pages 31 and 35-6. Despite these entreaties, the law remains unchanged.

426 Reference can, however, be made to *R v Bryant* (1984), 16 CCC (3d) 408 (Ont.CA); *R v Brown* (1995) 26 CRR (2d) 325 (CMAC); *R v Pan, supra*

427 As defined in s. 2 of the *Criminal Code*

In *R v Pan* the Supreme Court of Canada (9-0) said this:[428] "the requirement of a unanimous verdict is a central feature of our jury system".[429] While the language of the Supreme Court falls short of characterizing unanimous verdicts as constitutionally required, it is clear that unanimity is an important feature of the current Canadian jury system.

In summary, I have reached the conclusion that: there are strong policy reasons for keeping unanimous verdicts; no convincing reasons have been shown for changing the law; the "weaknesses" that are attributed to unanimous verdicts would still exist in a majority verdict system, and there is a significant risk that if the Government of Canada moved to majority verdicts, the legislation would be ruled unconstitutional. For all of these reasons, I am of the view that the unanimity requirement in jury trials should be maintained and that the *Criminal Code* ought not to be amended to permit majority verdicts.

However, it seems to me that the Government of Canada ought to amend s. 649 of the *Criminal Code* to permit empirical research into the decision-making process of juries in Canada to assist in future law reform. This change should only occur after consultation with the social science community, the judiciary and the bar, to ensure that there is clarity on the principles and methods by which jury deliberation research might be conducted, including the safeguards that will be necessary

.

Some Non-Structural Considerations

Certain structural issues, especially those involving the jury, currently increase the risk that lengthy terrorist trials will not reach verdict. Earlier in this Part, I outlined a series of reform options which, individually or cumulatively, will reduce that risk.

While structural reforms can reduce the risk, it has become clear to me that a number of *non-structural* reforms are also necessary to ensure that even a lengthy and complex terrorist trial is heard fairly, in a timely way, and that it does proceed to verdict.

---

428 *R v Pan, supra* at par.99

429 *R v Pan, supra* at par. 99

Non-structural reforms, however, fall outside the scope of this paper. For that reason, but to ensure completeness, I will refer to them briefly and, hopefully, with sufficient clarity to ensure that their importance is understood.

There are two principal non-structural reforms: the containment of lengthy trials, and the assistance that can be provided to the jury to fully consider the case. In combination, these two elements will go a long way toward ensuring that proceedings are manageable in length, with well defined issues that can be considered fully and fairly by the trier of fact.

A) Containing Lengthy Trials

The Crown Should not Overload the Indictment

While many factors contribute to the length and complexity of a criminal trial, the indictment tends to define the overall "shape" of the proceedings. The Crown should avoid overloading the indictment with dozens of accused and dozens (or hundreds) of counts, as occurred in some of the failed gang mega-trials. As the Advisory Committee to the Chief Justice of the Ontario Superior Court of Justice noted in its 2006 Report: "why proceed on a sixteen-count indictment if a four-count indictment, covering the most serious allegations, would better focus the trial?"[430]

Concerning the number of accused, authority exists in both Canada and the US supporting the proposition that, in general, at least in trials expected to be lengthy, the number of accused on a single indictment ought not to exceed around eight.[431] This can usually be accomplished by: grouping the principal defendants together; proceeding against peripheral players in separate, shorter proceedings, and exercising a discretion *not* to proceed against those whose role was very limited.[432]

---

430 New Approaches to Criminal Trials: the Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice (Ontario), dated May, 2006 but released October, 2006: http://www.ontariocourts.on.ca/superior_court_justice/reports/ctr/ctreport.htm (at par 239)

431 *R v Pangman* (2000) 149 Man. R. (2d) 68 (QB) at par. 30; *US v Casamento*, 887 F2d 1141 (2nd Circuit Court of Appeal), cert. den. 493 US 1081 (1990); *US v Gambino*, 729 F. Suppl. 954 (SDNY); Ewaschuk, *Criminal Pleadings and Practice in Canada*, 3rd ed. (2006) at par. 9.13015 and 9.13230

432 There is, of course, always a prosecutorial discretion to decline prosecution despite evidence demonstrating the commission of an offence: *R v Catagas* (1977), 38 CCC (2d) 296 (Man.C.A.)

Concerning the counts, it must be remembered that separate verdicts are required on each count. That involves sorting out which accused are charged on which counts, what evidence applies to which count, and to which defendant. In *R v Pangman*,[433] the case, as originally framed, would have required the jury to deliver *240 discreet verdicts.*[434]

I wish to comment in particular on conspiracy counts. There is a longstanding and persistent myth that by charging conspiracy the rules of evidence are widened. That is not accurate. The so-called co-conspirator exception to the hearsay rule applies to *both conspiracy and substantive counts* where the evidence establishes that the accused were acting in concert and in furtherance of the common design.[435] This is important for two reasons. First, the mixing of conspiracy counts is often unnecessary, and has the effect of lengthening the trial and making the charge to the jury incredibly complex if not incomprehensible.[436]

Second, the strategy of charging conspiracy to "widen" the rules of evidence is questionable, given the reality that substantive counts can usually be proven more easily and in a shorter period of time. Indeed, the practice of charging conspiracy where the underlying substantive offence can be proven has been criticized by the highest courts in the US, UK and Australia.[437]

---

433 *R v Pangman, supra*
434 *Ibid* at par. 3
435 *R v Koufis* (1941), 76 CCC 161 (SCC) at page 168; and see MacFarlane, Frater and Proulx, *Drug Offences in Canada*, 3rd ed. (Toronto: 2006) at par. 8.920 *et seq* for a discussion of the principles and cases in this area.
436 MacFarlane , Frater and Proulx, *ibid* at par. 8.1000
437 *Krulewitch v US*, 69 S. Ct. 716 (1949); *Verrier v DPP*, [1967] 2AC 195 (HL); *R v Hoar* (1981), 56 ALJR 43 (HC).

(i) Judicial Control Over and Management of Lengthy Trials

Virtually every study on the problem of lengthy criminal trials has emphasized the need for judicial leadership and control of the process within an adversarial framework.[438]

Two issues, in particular, have arisen: pre-trial applications, and *voir dires*. Concerning the former, Mr. Justice Moldaver of the Ontario Court of Appeal has recently observed that "pre-trial motions regularly last 2-3 times longer than the trial itself".[439] An Advisory Committee on criminal trials in Ontario, consisting of experienced judges, Crown and defence lawyers agreed with Justice Moldaver when he said that, "the growth in pre-trial applications is the greatest cause of trials being longer".[440]

During the past few years, the bench, bar and government in both Canada and the UK have undertaken a number of studies with a view to regaining control over increasingly protracted criminal trials. They include: a January, 2004 Federal/Provincial/Territorial Heads of Prosecution Report; a February, 2004 Report of the Barreau du Quebec; a 2004 Steering Committee on Justice Efficiencies Report; the March 2005 UK Rules and Practice Direction issued by the Lord Chief Justice of England and Wales; and, finally, the May, 2006 Ontario Advisory Committee Report and Recommendations.

A common theme emerges from these Reports: the need for a greatly enhanced pre-trial case management system. In my view, the need for a stronger pre-trial management process has clearly been made in Canada. Indeed, several mega-trials have already broken down at the pre-trial stage because of a lack of effective case management. In this context, it seems to me that two mechanisms are critical to rein in protracted proceedings:

---

438 *New Approaches to Criminal Trials*, *The Report of the Chief Justices Advisory Committee on Criminal Trials in the Superior Court of Justice*, *supra*; *Review of the Criminal Courts of England and Wales,* by the Right Honourable Lord Justice Auld (London: 2001), especially chapter 6; *Control and Management of Heavy Fraud and Other Complex Criminal Cases* (A protocol issued by the Lord Chief Justice of England and Wales- 22 March, 2005, *supra*; David Kirk, "Fraud Trials: A Brave New World", Jo CL 69 6 (2005); Jury Service in Victoria (Australia), Victoria Parliament Law Reform Commission, Final Report- Volume 3 (1997), at par. 2.211; *Justice Efficiencies and Access to the Justice System*, A Final Report on Mega-Trials of the Steering Committee on Justice Efficiencies and Access to the Justice System (Released by Canadian Ministers of Justice in 2005).

439 New Approaches to Criminal Trials, Ontario Advisory Committee Report, *supra* at par. 307; Justice Moldaver repeated his concerns one year later, urging the bench and bar to address "the twin demons of complexity and prolixity". His speech can be found on the Ontario Courts website: http://www.ontariocourts.on.ca/court_of_appeal/speeches/state.htm

440 *Ibid* at par. 307

a) The pre-trial judge needs to have clear statutory powers to case manage these cases. The various Reports referred to above tend to suggest that there is a degree of cynicism about pre-trial case management because there are no real enforcement mechanisms. Helpful enforcement models are discussed in detail in these Reports;

b) Where the trial court has severed an otherwise overloaded indictment with a view to better managing the trial, it strikes me that it would be in the interests of justice to ensure that rulings on pre-trial motions applied across all of the severed trials. For example, where the investigation yielded a significant number of intercepted private communications, it makes sense that the rulings on admissibility should apply to all of the trials. That would mean that a lengthy wiretap *voir dire* need only be undertaken once.

As Justice Moldaver said in his 2006 speech, the proliferation of pre-trial *Charter* motions is virtually out of control and is starting to have an impact on the public's faith and confidence in our criminal justice system. The twin demons of complexity and prolixity continue to plague the system and "pose a threat to its very existence". For these reasons, I am of the view that the Government of Canada ought to look carefully at the various recommendations that have been made in these Reports, and assess how best to ensure that they actually find expression in law and in practice.

Voir dires raise separate, but similar issues. The principal question focuses on the basis for the decision—should the evidence be *viva voce,* or should decisions be made on the basis of counsel's submission? The difference could amount to months of evidence and court time. On that point, the Supreme Court of Canada in 2005[441] quoted with approval the following comments from an earlier decision of the British Columbia Court of Appeal:[442]

---

441 *R v Pires*, [2005] 3 SCR 343 at par. 34 (7-0); whether and to what extent the judgement in *Pires* can withstand the decision in *R v Khelawon,* 2006 SCC 57 remains to be seen. *Khelawon* seems to emphasize the importance of calling evidence during a *voir dire* although Charron, J., who delivered the judgment for the court, did not refer to the earlier decision in *Pires*.

442 *R v Vukelich* (1996) 108 CCC (3d) 193 (BCCA)

> Generally speaking, I believe that both the reasons for having, and not having a *voir dire* and the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel.[443] I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kind of inquiries.

In my view, both the reasons for having, and not having, a *voir dire* and the conduct of such proceedings, ought to be based and determined upon the statements of counsel.

i) Effective Disclosure

Lengthy and complex cases often involve a large amount of documentary evidence. This can involve tens of thousands of pages and, on occasion, hundreds of thousands of pages. Management of the documents becomes critical at two levels: disclosure to the defence,[444] and efficient use in court. Both can be achieved through reliance on technology.

I am of the view that where the police and Crown are in a position to determine the timing of the laying of charges, disclosure in large cases ought to be organized and prepared during the investigative phase of the case, and be provided to the accused at the time charges are laid, or very shortly afterward. Additionally, in my view, the Government of Canada ought to consider amending the *Criminal Code* to specifically permit electronic disclosure, subject to oversight by the trial court.

---

443 This is the most expeditious way to resolve these problems: see *R v Dietrich* (1970), 1 CCC (2d) 49 (Ont.C.A.) at 62; *R v Hammill* (1984), 14 CCC (3d) 338 (BCCA); and *R v Kutynec* (1992), 70 CCC (3d) 289 (Ont.C.A.) at 301.

444 *R v Trang*, 2002 ABQB 744 at par. 397 (disclosure duty in the context of a massive investigation); *R v Rose*, 2002 Canlii 45358 (Q.C.S.C.) par. 13, 14 and 27 (surely we need to move from hard copy disclosure to electronic disclosure); *R v Lam*, 2004 ABQB 101 (electronic disclosure provided, defence application for another format dismissed); *R v Bigge*, (2004) SKQB 500 (hard copy disclosure ordered); and note that in the Final Report on Mega-trials of the Steering Committee on Justice Efficiencies and Access to the Justice System, released by Ministers of Justice in 2005, the Steering Committee which consisted of judges, Crown and defence counsel, recommended at par. 5.16 the use of electronic disclosure, if circumstances allow it.

B) Assisting the Jury to Consider the Case

There are a number of reforms that could assist the jury in understanding the case presented by the Crown, defence as well as the instructions provided by the trial judge on the law. Four, in particular, ought to be considered.

i) Mandatory Model Jury Instructions

Model instructions have been in place in the United States for several decades. They were adopted in that country for several reasons. First, trial judges, especially new ones, were spending too much time drafting individual instructions instead of concentrating on the evidence. Second, even when trial judges managed to produce legally correct instructions, they seldom possessed the time or the ability to explain the law in a simple, intelligible fashion. Finally, and most importantly, appeals alleging instruction errors were clogging that country's appellate court system. With the adoption of model instructions, these three problems subsequently abated.[445]

The benefit of model jury instructions has been debated in Canada since the Law Reform Commission first proposed them in 1980.[446] The Commission concluded that there are five major advantages to the use of jury instruction guidelines. They are: timesaving, promote accuracy, ensure uniform treatment, promote impartiality, and enhance intelligibility.[447]

Three sets of well-thought-out, albeit informal, model jury instructions exist in Canada. Despite the ease with which they are available, they have not yet played a significant role at the appellate level in Canada.[448]

The Supreme Court of Canada has also established model instructions in three separate areas of the law. However, the court noted that variations on the themes suggested by it may be acceptable. Rather than minimizing appeals, one author has argued forcefully that these non-mandatory court developed models have spawned a huge amount of appellate litigation. That author concludes as follows:[449]

---

445 Jordan Hauschildt, "Deadlocked: The Case for Mandatory Pattern Instructions in Criminal Jury Trials", (2005), 50 CLQ 453 at 459.
446 Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" (1980), pp. 78-87
447 *Ibid* at page 81
448 Jordan Hauschildt, *supra* at page 460
449 *Ibid* at page 480

> When a trial judge fails to incorporate the exact words of a model into their final charge, an automatic ground of appeal arises. Appellate litigation becomes necessary in order to determine whether the individually created charge satisfies the standards set out in the model. As a result, the current system of providing jury instruction requires trial judges to draft individual charges, which then require appellate review to confirm their sufficiency. This glaring inefficiency clearly illustrates the need for reform. Instituting a set of officially sanctioned mandatory jury charges would significantly reduce the frequency of jury charge challenges.

Mandatory model jury instructions will benefit the public in at least two ways. First, they use plain language and will be better understood by the jury. Second, they will reduce or eliminate the number of lengthy terrorist trials (and, in fact, any lengthy trial) where verdicts are reversed because of faulty instructions to the jury.

I am of the view that the Government of Canada ought to amend the *Criminal Code* to allow for the establishment of a Commission composed of judges, defence counsel, Crown attorneys, legal academics, lay persons and communication experts. The mandate of the Commission would be to develop model jury instructions that are mandatory in their use and in their terms. The project ought to be modest in its initial stages, focusing on areas of jury instructions that are particularly problematic—such as unsavoury witnesses, burden of proof, assessment of credibility, conspiracy law and terrorism offences. They ought to be placed in Regulations pursuant to the *Criminal Code*, to permit rapid response to evolving case law within these areas.

ii) Note-Taking by the Jury

As an aid to jury recollection in lengthy cases, trial judges ought to be encouraged to allow jurors to take notes of important points in the evidence. Note-taking is allowed in some provinces,[450] although the

---

450 In British Columbia: *R v Bengert* (No.3) (1979) 48 CCC (2d) 413 (BCCA); in Ontario: *R v Andrade* (1985), 18 CCC (3d) 41 (Ont.C.A.)

jury should be instructed that their task is not simply to "take notes".[451] Notes on important points will later assist the jury in its deliberation as a collective body.

iii) Providing Context on The Law Before the Charge to the Jury

Traditionally, the trial judge instructs the jury on the law at the end of the trial. That works well in short cases, but jurors' comprehension on the issues and facts for determination will be assisted greatly if the trial judge provides assistance on the legal framework throughout the course of the trial.

Current authorities support the proposition that basic law, even unannotated excerpts from the *Criminal Code,* can be provided before the charge so that later instruction will be better understood,[452] and where basic law such as the *Criminal Code* is replete with technical jargon, the trial judge should explain its meaning and significance to the jury in plain English.[453]

The orientation process should, however, start at the beginning of the process. Research in cognitive psychology suggests that advising a person on how to frame information he or she is about to receive enhances later recollection, aids in the interpretation of complex material, and leads to a greater level of juror satisfaction.[454]

In my view, *prospective jurors* ought to be provided with information on the adversarial system, their role as fact finders, and what is expected of them during deliberations. Jurors*, once empanelled*, should be instructed at an early stage on fundamental trial issues that will allow them to be "integrated into the fabric of the trial",[455] so that they can focus on the issues as they emerge in the evidence. That instruction can continue throughout the case, as the evidence may require.

---

451 *R v Codina* (1995), 95 CCC (3d) 311 (Ont.C.A.), at page 331
452 *R v Siu* (1992), 71 CCC (3d) 197 (BCCA)
453 *R v Coghlin* (1995), 32 Alta. L. R. (3d) 233 (CA)
454 V. L. Smith, *The Psychological and Legal Implications of Pre-Trial Instruction in the Law,* Stanford University Press, Stanford, 1987; Jury Service in Victoria, *supra* at par. 2.138
455 *Ibid* at par. 2.134

iv) Jurors Asking Questions of Witnesses

The present practices with respect to a juror asking a question of a witness varies widely from place to place and from judge to judge.[456]

In general, there has been a tendency not to allow questions to be asked. Several reasons have been cited: questions may disrupt the orderly flow of counsel's line of questioning; the questions may seek inadmissible evidence; counsel on the case are in the best position to determine what questions should be posed; questions will slow the case down; and questions of this sort will negatively impact the fairness of criminal trials.

It is arguable that, traditionally, the criminal justice system has treated juries as passive receptors of information, yet in a judge-alone trial the trier of fact (i.e. the trial judge) is clearly entitled to ask questions of a witness to clarify points of evidence. Why, then, is there a difference?

Studies in Canada, the United States and Australia have shown that the fears generally advanced by opponents have not materialized and lack foundation.[457] Field experiments in the US have shown that jurors do not abuse questioning privileges,[458] and 80% of jurors afforded the opportunity found it helpful to obtain relevant information which, in turn, allowed them to better understand the evidence in the case.[459] Despite initial scepticism, lawyers involved in the US cases were pleasantly surprised at how smoothly the procedure worked and how insightful most of the questions were.[460]

US judges, likewise, were pleased with the ease of procedure and the questions from jurors. Sixteen judges in New York state "generally agreed that permitting juror questions was helpful to jurors in paying attention, understanding the evidence, and reaching a decision. Most also felt that juror questions had a positive effect on the fairness of the trial".[461]

---

456 Law Reform Commission of Canada, *supra*, at page 1118; Law Reform Commission (Victoria), *supra* at par. 2.116; Elissa Krauss, "Jury Trial Innovations in New York State: Improving Jury Trials by Improving Jurors Comprehension and Participation", *Journal*, May 2005

457 *Ibid* (all authorities); in the US, jurors are permitted to submit written questions at the trial judge's discretion in 31 states. Only 5 states prohibit the practice; no Federal Circuit prohibits the practice; Elissa Krauss at page 24.

458 Law Reform Commission (Victoria) at par. 2.166

459 Elissa Krauss, *supra* at page 25

460 *Ibid* at page 24

461 *Ibid* at page 24

Other studies have likewise found that jurors permitted to ask questions had significantly higher levels of confidence in their role, greater ease in reaching a verdict, saw counsel in a more favourable light, and were more confident about the correctness of their verdict.[462]

Law reform bodies have generally favoured allowing jurors to ask questions of witnesses. The Law Reform Commission of Canada recommended it in 1980[463], as did an Australian Law Reform Committee in 1997.[464] A 2003 Standing Jury Committee in Colorado endorsed the practice in a majority report for that State,[465] and, following field experiments by 51 judges in New York State in which jurors were allowed to submit written questions for witnesses, the Jury Trial Project Committee of that State released a report in 2004 concluding that the experiment was, overall, quite positive.[466]

Despite the apparent advantages of juror questioning, criminal trials in Canada continue to rest within an adversarial framework, and safeguards are needed to ensure that the roles of counsel and juror are not blurred or confused.

A trial judge allowing questioning should advise the jury at the beginning of the trial that, in general, the questioning process rests in the hands of counsel, and that questions from the jury should be exceptional. The jury should also be told that they should wait until all questioning by counsel is complete before even considering whether a question is required. To avoid uncertainty, the question should be reduced to writing and given to the trial judge. It should then be provided to counsel, who can then make submissions on the propriety of asking the question. The final say on whether the question should be posed rests with the trial judge and, if the ruling is in the affirmative, the trial judge should pose the question to the witness.

---

462 L. Heuer, "Increasing Jurors' Participation in Trials", (1982) 20 *American Criminal Law Review* 1.
463 Law Reform Commission of Canada, *supra*, at p. 118
464 Law Reform Commission (Victoria), *supra* at par 2.170
465 Carrie Lynn Thompson, "Should Jurors Ask Questions in Criminal Cases? Minority Report" (unpublished)
466 Elissa Krauss, *supra*

PART VIII
Summary and Concluding Observations

a) The Realities

Terrorist trials have several important realities. They are usually lengthy and very complex. Crown disclosure obligations often raise difficult national security issues. Those accused of terrorism, at least in Canada, have the right to choose trial before a trial and jury, or a judge sitting alone. The acts charged are usually horrific in nature, enraging the public and placing extraordinary pressure on the police and prosecutors to convict those responsible. And politicians sometimes wade into the case, making fair trial requirements even more difficult to meet.

b) The Risks

These realities can place a terrorist trial at risk. For a variety of reasons, an unmanageably long trial may never reach verdict: a mistrial may be required where more than two jurors have to be discharged; the trial may abort where the trial judge cannot continue with the case; Crown mismanagement or the simple reality of its disclosure obligations may force a judicial stay; defence demands for disclosure of security-sensitive information may, if successful, force the Crown to terminate the case to protect the information; and, if the case reaches "mega" proportions, the simple passage of time can lead to the evidentiary collapse of the Crown's case, prompting a Crown stay with no determination on the merits of the evidence. Accused persons, as well, face the risk of not being able to have a fair trial where the acts alleged are so horrific that their simple allegation has had a direct impact on the fabric of society—potentially tainting the pool from which jurors are chosen, and altering normal decision-making by police, prosecutors, scientists and, some would argue, the judiciary.

c) The Challenges, and the Objectives

Future terrorist trials face three overarching challenges: first, they need to be manageable in terms of length and complexity. Second, the process and result need to be seen as fair and legitimate, both domestically and in the eyes of the international community. Finally, any new criminal trial process cannot increase the risk of convicting persons who are innocent of the crimes charged.

This trilogy of key challenges intersects at several levels and, in turn, engages the seven fundamental principles underlying this study which I described in Part II. A process that is seen to be fair, open and manageable will, through an international lens, be more likely to be viewed as legitimate and effective, and the political desire to "legitimize" a domestic criminal justice system process will be more likely lead to a procedure that is manageable in size, easily understood, and be consistent with internationally-recognized principles of fairness. Perceptions of legitimacy and fairness are further enhanced where reforms are anchored on existing and well established justice structures and processes. And a trial process that is fair, manageable in size and easily understood is less likely to result in wrongful convictions, and enhances the truth-seeking function of criminal trials.

It is important to recognize that these challenges, especially manageability, are not confined to terrorist trials. They extend to gang prosecutions, complex cases of fraud, criminal conspiracies and virtually any substantive offence involving multiple accused and multiple charges that are said to have occurred over an extended period of time. The problem is not, therefore, the new face of terrorism; it is, instead, the emergence in virtually all Anglo-based systems of criminal justice of the so-called mega-trial. It is important to observe, as well, that a strong response to mega-trials of this nature will not have the disadvantage of isolating out terrorist trials for special treatment.

For that reason, the reforms discussed in this Part are not "terrorism-specific". Rather, they focus on three broad objectives: rein in mega-trials; make sure that an appropriate trier of fact is in place to consider the case fairly and fully; and ensure that, even in protracted proceedings, the matter can actually proceed to verdict in accordance with the laws and processes applicable to all criminal cases. In the pursuit of these objectives, it is critically important that proposed reforms respect individual rights and, at the same time, take into account the broader interests of the public.

There are four further challenges to the reform of the structure for terrorist trials. They are really sub-sets of the overarching ones I just described.

First, we should not be afraid that under a new structural framework acquittals may occur in terrorist trials. This paper is not intended to develop a defence strategy to secure an acquittal any more than it is intended to assist the Crown in obtaining a conviction. It simply seeks to

ensure that lengthy and difficult cases, perhaps but hopefully not "mega" in nature, will proceed fully through to verdict, and be decided fairly on their merits. Professor Kent Roach made the point powerfully in a 2005 comment on the acquittals entered in the Air India prosecution.[467]

> As demanding as the criminal trial is, we should not be ashamed of acquittals of accused terrorists. Such acquittals are an affirmation of the very high price that democracies are willing to pay in their attempts to ensure that only the guilty are punished. This is one of the qualities that distinguishes the legitimate pain imposed by democracies on guilty criminals from the illegitimate, indiscriminate and terrible pain imposed on the innocent by terrorists.

Second, Canada has always demonstrated a richness in the flexibility of its criminal trial structures, but there is a need to ensure that any future reforms comport with constitutional requirements.

Canada has, in the past, used "special juries", a panel of three superior court judges sitting with a jury, six-person juries in sparsely population areas of the country, and presently permits judge alone trials, alternate jurors and a substitute judge where the original trial judge cannot continue.

Neither the judiciary nor parliament have unbridled authority to change our criminal trial structures, and the challenges to ensure that changes are constitutionally secure are especially important in view of the section 11(f) *Charter* right to trial by "jury". What amounts to a "jury" at law is left undefined in Canada, but decisions of the Supreme Court of Canada, the High Court of Australia and the Supreme Court of the United States are helpful in determining the core characteristics of a jury in criminal proceedings.

---

467 Kent Roach, "Editorial: The Air India Trial", (2005) 50 C.L.Q. 213 at 215

Third, to ensure acceptance and the perception of legitimacy, it is, I believe, important to reform the law in such a way that new structures become a part of the normal fabric of the criminal law applicable to all persons and charges meeting the criteria—regardless of whether the case is a drug conspiracy, gang trial, fraud case or terrorist conspiracy. This avoids the spectre of Canada having to say both domestically and internationally: "oh, this is a terrorist case. We have a special type of trial for that". The experience of the Diplock courts and even the Lockerbie prosecution suggests that special procedures for terrorist trials often raise more problems than they solve.

Finally, for the reasons outlined in Part VII, it seems clear to me that Canada's present alternate juror and substitute judge scheme is woefully inadequate in terms of the management of lengthy and complex criminal trials of any sort. The provisions of the *Criminal Code* with respect to alternate jurors certainly ensure that the trial starts with a full panel of twelve, but there is, in my view, an unacceptable risk that, at least in the context of a lengthy trial, the jury could be reduced below ten, necessitating a mistrial order. Likewise, the substitute judge scheme which invites starting all over again in the case of trial by jury needs to be seriously reconsidered. Again, a strength of such reforms is that they would apply to all lengthy and complex cases, not just terrorist trials.

d) The Reform Framework

When considering reforms to the criminal trial process in Canada, it is important to have some criteria or principles in mind. Sound law reform on fundamental issues cannot be developed on a napkin, over dinner.

In Part II, I outlined seven principles or values which I regard as critical in this area: reforms should enhance the truth-seeking objectives of criminal trials, and not frustrate them; reforms should also promote confidence in the trial process as well as its result, to ensure a sense of legitimacy, both domestically and abroad; structural changes should be fair to persons charged as well as to the prosecution, and respect the rule of law which underpins our entire legal system; that noted, reforms should also promote efficiency in the administration of our criminal justice system, and promote openness in our court system. Future laws also need to balance the rights of the individual with those of the public at large, especially where terrorists have struck a blow at the state or our democratic system of government. Finally, it is important to consider

whether and to what extent changes in fundamental trial structures may raise the risk of miscarriages of justice to an unacceptable level.

In Part III, I took a 57-year, 5 country journey through previous terrorist and mega-trials. In Part IV, I drew together the common elements and lessons learned from those cases. Those lessons are important to remember in the development of any new structures for the trial of terrorist offences. There are three key ones: first, resorting to normal laws applicable to all persons, in the usual courts, is clearly preferable as it promotes confidence and a sense of legitimacy; special laws, and reliance on new tribunals, on the other hand, breed cynicism and mistrust in both the trial process as well as the result.

Second, terrorist cases, because they invariably involve acts of incredible violence and brutality, often generate considerable anxiety amongst the public, government officials, police services and forensic professionals. As a result, trial fairness can be placed in jeopardy and new laws such as expanded changes of venue need to guard against this.

Third, suicide bombers and decentralized conspiracies based on ideological or political agendas have changed the face of terrorism. Trials now require immense amounts of time to plan and hear. Twenty-first century terrorist trials are exceptionally complex in nature, and there is a demonstrable need to ensure that they do not collapse under their own weight.

e) Potential Reforms

I will first deal with issues concerning the jury. The procedures respecting jury trials were developed hundreds of years ago, when trials typically lasted fifteen to twenty minutes. There was virtually no risk of losing jurors (or the trial judge) due to illness, incapacity or death.

The emergence of lengthy, complex cases forces a reconsideration of some of the most basic trial structures, and it is not surprising that the jury is at the heart of the reform options.

Twin objectives exist: ensure that the trial starts with twelve jurors, and maximize the likelihood that, even in lengthy proceedings, twelve jurors retire to deliberate at the conclusion of the evidence. The current *Criminal Code* scheme respecting alternate jurors achieves the first objective,

but fails to address the second. In my view, the law requires significant reform.

There are, in broad strokes, two models that have been developed in Anglo-based criminal justice systems to deal with juries that are required to hear lengthy trials. The first is a system of "alternate" or "reserve" jurors. A jury of twelve is empanelled in the usual way. They are then augmented by further, "alternate" jurors. From the outset, they know that they are alternates, so the scheme sets up a system of "real" jurors, and "potential" jurors. In my view, this is not a satisfactory arrangement as second class status may prompt some alternates to pay less attention to the evidence because they do not have a vested interest, nor a sense of responsibility for the case.

The second model is the preferable one. Best illustrated in the state of Victoria, Australia, the trial judge has a discretion to empanel additional jurors who have full status to hear the case from beginning to end. If more than twelve remain at the conclusion of the evidence, the jury is reduced to twelve through a balloting process. The jury then retires to consider the case.

This approach achieves the twin objectives. More than twelve jurors start the trial, and, almost certainly, twelve go into the jury room to deliberate. The trial judge retains a discretion to discharge jurors for good cause, but a significant number of jurors would have to be discharged before a mistrial was required. There may also be room to lower the current critical mass of ten to nine or, perhaps, even eight, based on the trial judge's assessment of the evidence, length of trial, prejudice to the accused, and the public interest. Much below that, however, I am concerned that the jury may start to lose its fundamental character as a representative and effective fact-finding body.

Given these considerations, it seems to me that the *Criminal Code* ought to be amended along the following lines: the trial judge should be empowered to empanel up to sixteen jurors, including four additional jurors, in cases expected to last several months or more; trial judges should continue to have authority to discharge jurors on the basis of section 644(1) of the *Criminal Code*; if more than twelve jurors remain at the end of the tendering of evidence, a balloting or drawing of lots ought to be undertaken to determine the twelve jurors that are entitled to enter the jury room for deliberations, with the balance discharged from further duty in the case; during deliberations, the trial judge should continue to

have authority to reduce the jury to ten as presently contemplated by section 644(2) of the *Criminal Code*, but should acquire the discretion to allow the numbers to drop to nine, or perhaps eight, if the trial has lasted, or is expected to last, more than six months or so, provided that such an order is necessary in the interests of justice.

Paragraph b (vi) of the Terms of Reference for the Air India Inquiry asks for advice on "whether there is merit in having terrorism cases heard by a panel of three judges". The question raises two separate and fundamental issues: is trial by a judge alone possible; if it is, can or should a panel of judges hear the case? I will deal with both issues.

Under section 11(f) of the *Charter of Rights and Freedoms*, an accused terrorist will be entitled, at his or her election, to trial by jury. There are, in my view, only two pathways that would mandate a judge alone or "bench trial" in a terrorist case that is being heard in the normal courts. First, if Parliament was prepared to invoke the "notwithstanding clause" provided in section 33(1) of the *Charter of Rights and Freedoms,* to override the right to a jury trial in s.11(f) and effectively set up the equivalent of "Diplock Courts" in Canada. Under subsection 33(3) resort to the override power would only be valid for a maximum of five years, after which it would cease to have effect. It is important to observe, however, that the available empirical evidence (which is scant) suggests that juries generally do a good job sorting out who did what, and who is guilty of what.

Trials of six, nine, and twelve months, and more, have emerged in Canada during the past decade. Many were heard by a judge alone, but some proceeded before a jury. At some point in the "length continuum", the right to a fair trial in a jury trial may be placed in jeopardy. By "fair trial" I mean that both the Crown and defence are able to have the matter considered fairly and fully, and that the length of the process does not place an unacceptable burden on the community, including the jury. A jury trial lasting two years or more, with any degree of complexity (as most of them will) is, in my view, overloaded and presumptively unfair to the parties and to the community.

Legislation precluding trial by jury based primarily on the length of the trial breaches section 11(f) of the *Charter of Rights and Freedoms*, and, absent reliance upon the "notwithstanding" clause, will need to be saved, if at all, by section 1 of the *Charter*. As I noted earlier, the *Oakes* test will cause a reviewing court to consider whether the objective is sufficiently

important to warrant overriding a constitutionally protected right. In this instance, the objective is a right guaranteed by sections 7 and 11(d) of the *Charter*—namely, the right to a fair trial. The court will also need to consider whether the means are reasonably, proportionately and demonstrably justified.

It seems to me that where the right to a jury and the right to a fair trial are on a collision course, and cannot be reconciled in a particular case, the need for a fair trial becomes the overriding objective. The accused, it seems to me, cannot implicitly "waive" the right to a fair trial by electing trial by judge and jury and then strategically plan, in essence, to raise "reasonable confusion" in the minds of the jurors based on the protracted nature of the proceedings, rather than arguing that a reasonable doubt arises upon a consideration of the evidence. It is very much in the public's interest and, ultimately, in the interest of accused persons to have a fair trial based on a full and fair consideration of the evidence and the issues as a whole.

That brings me to the second issue. If a case can be made to dispense with the jury in a particular case, should the matter proceed before a judge alone, or before a panel of three judges?

Several factors need to be considered. In a long trial, an alternate judge could be appointed (without a jury). That will provide a reasonable assurance that the case will proceed to verdict. A panel of three judges raises more difficult questions. Is unanimity amongst the three required? Or would a majority of two be sufficient? Would divided verdicts undermine public confidence and perhaps violate the presumption of innocence and the reasonable doubt standard? What happens if one of the three judges cannot continue and the remaining two judges are split evenly on the issue of guilt or innocence? Should a fourth, "alternate" judge be appointed to cover that eventuality? What about the resource implications for smaller jurisdictions or, indeed, any jurisdictions?

In my view, replacement of a judge and jury with a panel of three judges in a terrorist case would, from a policy perspective, be ill-advised for several reasons.

First, it seems to me that the conclusions of a panel would have to be unanimous on all essential issues of fact and law. Otherwise, almost by definition, a reasonable doubt exists in the case and an acquittal must be

entered. In a jury trial, the issue of reasonable doubt is resolved through a unique process of group deliberation. Judges, however, have no such mandate, and would be entitled, in essence, to "vote" on the issue. Because the group deliberation and dynamic that is so important in jury fact-finding will not necessarily be present in a trial by a panel of professional judges, it seems to me that a bench trial could actually be a less effective fact-finding body than a jury of twelve randomly-selected jurors drawn from the general population.

Second, the real challenge for future terrorist trials is, to use the language of Justice Moldaver, prolixity and complexity. Creation of a three judge bench trial is not responsive to that issue. Indeed, a bench trial simply raises new problems. As noted above, in a lengthy trial a judicial panel could lose one of the judges just as easily as a jury could lose one of the jurors. What happens then? Do you proceed with just two judges? What do you do if the panel is reduced to one? At what stage do you declare a mistrial? Or do you "load up" at the front end with three judges and an alternate? In my view, few if any jurisdictions in Canada could afford the resource burden of routinely assigning four judges to hear terrorist trials.

Finally, bench trials are ill-advised in Canada because they will raise significant issues of legitimacy. A panel of judges hearing a criminal case will be unique and without precedent in Canadian legal history. At the international level, terrorist cases would be seen as having been diverted out of the mainstream of Canadian trial procedure, and placed into the hands of a tribunal which has no parallel in Anglo-based criminal justice systems. Such a process would expose the tribunal to allegations of "show trial", as occurred in the Lockerbie experience, and may tend to diminish Canada's reputation for fair justice in the eyes of the international community.

In the result, it is my view that the *Criminal Code* ought to be amended along the following lines: where a jury trial is expected to be extremely protracted, the Crown or the accused may apply to the court for an order that the matter proceed without a jury; an order of this nature should be available where there is a substantial risk that because of the length (primarily) and complexity (secondarily), the accused cannot receive a fair trial; in determining the issue, the court should be able to take into account the full circumstances of the case, including its expected length, nature of the charges, nature of the evidence and the proposed manner

of its presentation, and whether the length and complexity of the trial can be managed in such a way that the right to a fair trial will not be jeopardized; where the court is satisfied that the trial ought to proceed without a jury, it may order that the case proceed before a judge sitting alone, with or without an alternate judge (subject to consultation on resources). But, for the reasons that I have outlined above, I am of the view that a panel of three judges, sitting without a jury, would be impractical and ill-advised in the context of Canada's legal framework, traditions and history.

In Part VII, I also considered the issue of *where* a terrorist trial should be held. Of course, the normal rule is that an offence is tried where it occurred. There are good reasons for that: the immediate community has the greatest interest in the outcome of the case, and the witnesses usually live in the community involved.

However, terrorist attacks are intended to strike fear into the hearts of community members, and in particularly horrific attacks—9/11, for example—it can be argued with considerable force that the entire community (or, indeed, the nation) was victimized—including potential jurors. Should this type of trial be moved to another location or even another province?

Under section 599(1) of the *Criminal Code*, the Crown or an accused can seek a change of venue where justice requires it. Some courts have ruled that the trial *must* be moved if the accused cannot receive a fair trial where the offence took place. In the case of the Oklahoma City bombing, for instance, the trial of Timothy McVeigh was moved from Oklahoma City to Denver, Colorado.

Although under s. 83.25 *Criminal Code* the Attorney General of Canada has authority to prefer an indictment alleging a terrorism offence in any territorial division in Canada, there is no general power to move a trial to another province, regardless of how great the prejudice may be. Even the innovative crafting of a *Charter* remedy would, in my view, be suspect on the basis that it is quite doubtful that a court in one province can, without legislative authority, direct another province, over its objections, to assume responsibility for the trial of a criminal case for which it has no constitutional responsibility.

In my view, it would be desirable to amend the *Criminal Code* to empower a superior court hearing an indictable offence to direct that the trial be heard in another province or territory where it is satisfied that the accused cannot receive a fair trial in the originating jurisdiction, and, because of the significant resource implications, after the proposed "receiving" Attorney General has been consulted and has had an opportunity to provide submissions to the court. I am also of the view that the Attorney General of Canada should assume a leadership role in the development of a network of agreements to deal with the various administrative, resource and funding implications of such changes of venue. These agreements may include the possibility of international changes of venue in cases where another country with similar standards of justice to Canada is willing to assert universal jurisdiction over a terrorism offence that has connections with Canada.

I have also considered several other structural reforms, but have concluded that change in those instances is neither required not desirable.

First, should the size of the jury be reduced from twelve to six? Will a smaller jury be more effective? There is no particular rationale for having twelve jurors, and some state courts in both the US and Australia regularly empanel six person juries to hear criminal cases. Over the years, law reform commissions in Canada and abroad have recommended against reduction, and it seems to me that the larger jury will inevitably be more representative of the community and will be a more accurate fact-finding body. Quite apart from whether a reduction to six would be constitutionally secure in Canada, it is my view that there is no basis to conclude that a smaller jury would enhance the efficiency or effectiveness of criminal trials, and that the case for reduction has not been made out.

I have also considered whether the unanimity rule in jury trials ought to be abolished in favour of majority verdicts. There are good arguments both for and against maintaining the unanimity rule and in Part VII, I analyzed the principal ones. In the result, I have reached the conclusion that: there are strong policy reasons for keeping unanimous verdicts; no convincing reasons have been shown for changing the law; the "weaknesses" that are often attributed to unanimous verdicts would still exist in a majority verdict system, and there is a significant risk that if the Government of Canada moved to majority verdicts, the legislation would be ruled unconstitutional.

The last structural issue I considered involves the proposed introduction of "special juries" or "lay assessors" in lengthy and complex cases. Proponents argue that expert triers of fact would be able to follow the evidence more easily than twelve randomly-selected jurors coming from the general community. I am of the view that changes of this nature are, for several reasons, both unnecessary and ill-advised: the case has not yet been made that juries are incapable of comprehending difficult cases; the role of experts is to provide assistance to jurors on issues for which they lack sufficient knowledge or experience—not to overtake the role as decision-makers in the case; trial by experts in secret may, I believe, increase the risk of wrongful conviction; and there is, in my view, a significant risk that special juries and lay advisors do not amount to a "jury" under section 11(f) of the *Charter of Rights and Freedoms* because they lack the core characteristics of random selection and representativeness, as well as the guarantees of independence and impartiality provided under section 11(d) of the *Charter*.

Although this paper has focused on potential structural changes to ensure that terrorist trials are heard fairly and fully, there are a number of non-structural reforms that can assist. Although these issues fall outside the intended scope of this paper, I thought that, for the sake of completeness, I ought to briefly highlight a few for consideration. Some seek to curb lengthy trials; others are intended to assist the jury's recollection and comprehension of the case.

i) The Crown Should not Overload the Indictment: The Crown need not include every potential accused and every potential charge on the indictment. To a large extent, the indictment will "shape" the length of the trial, and will start to define the facts in issue as well as the admissibility of evidence required to prove those facts.

Where possible, conspiracy counts should not be mixed with substantive counts, and Crown counsel should note that the practice of charging conspiracy where the underlying substantive offence can be proven has been widely criticized. Canadian and American authority has also urged prosecuting authorities to avoid charging more than around eight accused on indictments expected to result in protracted proceedings, by: grouping the principal defendants together; proceeding against peripheral players in separate, shorter proceedings, and exercising a discretion not to proceed against those whose role was very limited.

ii) Judicial Control Over and Management of Lengthy Trials: There is a growing sense that the judiciary needs to assume a leadership role in the control over and management of cases expected to be lengthy. The bench and bar would be well advised to read the cautions and the guidelines that have been issued in Canada and the UK in just the last few years.[468] Three mechanisms, in particular, seem critical: the reasons for having, or not having, a *voir dire,* and the conduct of such proceedings, ought to be based and determined upon the statements of counsel; trial courts needs to be provided with statutory authority to case-manage pre-trial applications; and rulings on pre-trial motions ought to be applied across all judicially-severed trials.

iii) **Effective Disclosure:** Where the police and Crown are in a position to determine the timing of the laying of charges, disclosure in large cases ought to be organized and prepared during the investigative phase of the case, and be provided to the accused at the time charges are laid, or very shortly afterward. Additionally, I think that the Government of Canada ought to consider amending the *Criminal Code* to specifically permit electronic disclosure by the Crown to the defence, subject to oversight by the trial court

iv) **Assisting Juror Comprehension (Mandatory Model Jury Instructions):** I am of the view that the Government of Canada ought to amend the *Criminal Code* to allow for the establishment of a Commission composed of judges, defence counsel, Crown attorneys, legal academics, lay persons and communication experts. The mandate of the commission would be to develop model jury instructions that are mandatory in their use and in their terms. The project ought to be modest in its initial stages, focusing on areas of jury instruction that are particularly problematic—such as unsavoury witnesses, burden of proof, assessment of credibility, conspiracy and anti-terrorism legislation. They ought to be placed in Regulations pursuant to the *Criminal Code*, to permit rapid change in response to new case law within these areas.

---

468 This material is discussed at footnote 438 *et seq*, together with the accompanying text.

v) Assisting Juror Comprehension (Note Taking): as an aid to jury recollection in lengthy cases, I am of the view that trial judges ought to be encouraged to allow jurors to take notes of important points in the evidence. The jury should, however, be instructed that their task is not simply to "take notes" in the case. Notes on important points will later assist the jury in its deliberation as a collective body.

vi) Assisting Juror Comprehension (Providing Contextual Instruction as the Trial Unfolds): research in cognitive psychology suggests that advising a person on how to frame information he or she is about to receive enhances later recollection, aids in the interpretation of complex material, and leads to a greater level of juror satisfaction. It seems to me that two initiatives would be of assistance: *prospective* jurors should be provided with information on the adversarial system, their role as fact finders, and what is expected of them during deliberations, before they are empanelled. Second, once the jury is empanelled, the trial judge should provide instructions on fundamental trial issues that will allow the jury to be "integrated into the fabric of the trial", so that they can focus on the issues as they emerge in the evidence.

vii) Assisting Juror Comprehension (Juror Questioning of Witnesses): law reform bodies have generally favoured allowing jurors to ask questions of witnesses. Studies in Canada, the US and Australia have demonstrated that juror's questions were helpful in understanding the evidence and reaching a fair decision. It seems to me that, on an *exceptional* basis, jurors ought to be permitted to pose a question or questions to a witness for the purpose of clarifying the evidence providing that the trial judge makes it clear that the primary responsibility for questioning witnesses rests with counsel and the issue of juror questions, if any, is not raised until all counsel have examined the witness. The questions should be reduced to writing, given to the trial judge and counsel, who then should have an opportunity to make submissions on whether the questions should be posed. If the question is ruled appropriate, it should be posed to the witness by the trial judge.

Two further non-structural reforms respecting the jury are important. First, section 649 of the *Criminal Code* ought to be amended to permit empirical research into the decision- making process of juries in Canada to assist in future law reform. Safeguards will be necessary, including a clear understanding of the principles and methods by which the research may be conducted. Second, trial judges ought to permit expert panels to

testify at trial in the form of group evidence. That will, I believe, permit juries to understand the different points of view in the expert's community and, more importantly, will ensure that the jury has a clear and more effective understanding of whether and to what extent a consensus on pivotal issues exists within that community.

In conclusion: at the beginning of this paper, I observed that the criminal justice system must be accountable to the community it serves, and that public confidence in the law and the courts is necessary for the courts to assume any sort of moral authority to decide on the liberty of people. The emergence of terribly protracted and complex trials now threatens that confidence.

There is, in my view, an unacceptable risk that future terrorist trials will collapse under their own weight and will not be drawn to a conclusion. Should that occur, the public can reasonably be expected to withdraw its confidence in a system of criminal justice that has served this country well for centuries.

In my opinion, the various reforms discussed in this paper will help avoid that risk, and will assist in ensuring that, both domestically and internationally, Canada is seen as having a criminal justice system that is fair, effective, and a model for all democratic states.

Bruce A. MacFarlane, Q.C. was from 1993 to 2005 the Deputy Minister of Justice and Deputy Attorney for the Province of Manitoba, in Canada. Prior to that, he was the Assistant Deputy Attorney General (Criminal Law) for Canada, and presently he is a Professional Affiliate, teaching criminal law in the Faculty of Law at the University of Manitoba.

In 1988, he was appointed Queen's Counsel by the Government of Canada. Called to the Manitoba Bar in 1974, he subsequently was called to the Saskatchewan Bar in 1979 and the Alberta Bar in 1987, and actively practiced before the criminal courts in all three provinces as well as in the Supreme Court of Canada. Mr. MacFarlane published a legal text in 1979 entitled "Drug Offences in Canada", which proceeded to a second edition in 1986 and a third edition in 1996. It is now updated annually along with co-authors Rob Frater and Chantal Proulx. This text is regularly cited by appellate courts in Canada, including the Supreme Court of Canada.

During the last several years he has undertaken several initiatives designed to prevent wrongful convictions, and to raise awareness within the legal profession of the circumstances that can lead to wrongful convictions:

- Keynote speech and paper on the subject delivered at an international criminal law conference in Darwin, Australia in May, 2003 (published 2006). The same paper was delivered to all Deputy Ministers of Justice in Canada at a meeting in June, 2003.

- Established an unprecedented review of homicide cases prosecuted in Manitoba during the past 15 years, to do a "double check" where doubtful evidence may have been led by the Crown.

- Chaired a major international conference on the causes of wrongful convictions and how to avoid them, in Winnipeg, October 20 – 22, 2005. The Conference website is http://www.wrongfulconviction.ca

- Testified as an expert witness on wrongful conviction issues at the Lamer Inquiry in Newfoundland (2005) and the Driskell Inquiry in Manitoba (2006), the Air India Inquiry in Ontario (2007) and the Goudge Inquiry in Ontario (2008).

- Established a new course on wrongful convictions at the Faculty of Law, University of Manitoba.

- Delivered a presentation on the role of the media in wrongful convictions, at a conference of more than 600 delegates from 30 countries, entitled the "Global Investigative Journalism Conference" (Toronto, May, 2007).

- Presented a paper on wrongful conviction avoidance at the International Society for the Reform of the Criminal Law in Vancouver (June, 2007).

Mr. MacFarlane is a regular contributor to the Criminal Law Quarterly, and has authored a number of articles on criminal law topics which have been published by the University of British Columbia, The University of Toronto, and the Canadian Bar Association. They, also, have been cited and relied upon by Canadian appellate courts and, in one instance, an article authored by Mr. MacFarlane was quoted with approval by the High Court of Australia.

Mr. MacFarlane presently resides in his native Winnipeg, Canada, practicing law and writing about it.

The Unique Challenges of Terrorism Prosecutions:

Towards a Workable Relation Between Intelligence and Evidence

Kent Roach

The Unique Challenges of Terrorism Prosecutions

Kent Roach*

Introduction

This is a summary of a longer study[1] which examines the unique challenges presented by terrorism prosecutions arising from the relationship between intelligence and evidence as opposed to the common challenges presented by all complex and long criminal trials, especially those with multiple accused, multiple charges, multiple pre-trial motions and voluminous disclosure. The longer study contains detailed case studies of terrorism prosecutions in Canada. These studies suggest that Canada has had a difficult experience with terrorism prosecutions. Many of these difficulties can be related to problems in managing the relationship between security intelligence and evidence.

In some cases, the state will want to use intelligence in court because it constitutes the best evidence of a terrorist crime. There are barriers to the admissibility of intelligence as evidence in part because intelligence may have been obtained under standards that are less onerous for the state than would normally apply to police efforts to discover evidence. Attempts to use intelligence as evidence may require disclosure of other secret information. In any event, accused will often seek access to intelligence in order to defend themselves from terrorism charges. They may seek not only exculpatory evidence but also intelligence that is relevant to the credibility of witnesses or the process through which evidence was obtained. A failure to disclose relevant evidence and information to the accused can threaten the fairness of the trial and can lead to wrongful convictions of innocent people. There have been wrongful convictions in the past in terrorism cases in other countries that have been related to the absence of full disclosure.[2]

At the same time, the interests of justice are not served if the government is forced to disclose secret intelligence and information that is not necessary for the conduct of a fair trial. In such cases, the government will

---

* Professor of Law and Prichard and Wilson Chair in Law and Public Policy, University of Toronto. Opinions expressed in this executive summary are those of the author and do not necessarily represent those of the Commission or Commissioner. I thank Birinder Singh and Robert Fairchild for providing excellent research assistance.

1 Kent Roach *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence* vol 4 of the Research Studies of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.

2 Bruce MacFarlane "Structural Aspects of Terrorist Trials" in this volume.; Kent Roach and Gary Trotter "Miscarriages of Justice in the War Against Terrorism" (2005) 109 Penn. State Law Review 1001.

be placed in the unnecessary position of choosing between disclosing information that should be kept secret to protect sources, investigations and foreign confidences or declining to bring terrorism prosecutions. Although this difficult choice of whether to disclose or dismiss[3] may be necessary in cases where a fair trial is not possible without disclosure, this choice should not be unnecessarily forced on the government.

Canada's Experience with Terrorism Prosecutions: The Case Studies

The choice between disclosure or failing to prosecute is not a matter of hypothetical theory. The longer study contains detailed case studies of terrorism prosecutions in Canada. In two prosecutions of alleged Sikh terrorists, the government essentially sacrificed criminal prosecutions rather than make full disclosure that would place informers at risk. One of these prosecutions involved Talwinder Singh Parmar widely believed to have been the mastermind of the bombing of Flight 182. The other involved a conspiracy to blow up another Air India plane in 1986.[4] Although the Air India trial of *R. v. Malik and Bagri* did go to verdict in 2005, it also could have collapsed over issues of whether secrets had to be disclosed had unprecedented steps not been taken to give the accused disclosure of secret material on conditional undertakings that the intelligence not be disclosed by the accuseds' lawyers to their clients.[5] In addition, the trial judge did not have to order a remedy for the destruction of intelligence including wiretaps and notes made by the Canadian Security Intelligence Service (CSIS) that he held should have been retained and disclosed to the accused only because he acquitted the accused.[6]

When the state attempts to introduce intelligence as evidence, it will have to make disclosure of some of the underlying information used to obtain the intelligence. Problems with affidavits used to obtain a CSIS wiretap lead to the collapse of a conspiracy to commit terrorism prosecution in *R. v. Atwal*.[7] In terrorism prosecutions, the accused may frequently seek disclosure of intelligence held by CSIS. The Federal Court can order that such intelligence should not be disclosed because of harms to national security, national defence or international relations under s.38 of the

---

3 Robert Chesney "The American Experience with Terrorism Prosecutions" in this volume.

4 *R. v. Parmar* (1987) 31 C.R.R. 256 and other related cases discussed in Part 3 of the full paper; *R. v. Khela* [1996] Q.J. no. 1940 and other related cases discussed in Part 5 of the full paper.

5 Robert Wright and Michael Code "The Air India Trial: Lessons Learned". See also Michael Code "Problems of Process in Litigating Privilege Claims" in A. Bryant et al eds. *Law Society of Upper Canada Special Lectures The Law of Evidence* (Toronto: Irwin Law, 2004).

6 *R. v. Malik and Bagri* 2005 BCSC 350

7 (1987) 36 C.C.C.(3d) 161 (Fed.C.A.) and other related cases discussed in the full paper.

Canada Evidence Act, but this requires separate litigation that may delay and fragment the prosecution. The *Kevork*[8] terrorism prosecution, the ongoing *Khawaja* [9] terrorism prosecution and the *Ribic*[10] hostage taking prosecution all reveal how the litigation of s.38 issues can delay and fragment prosecutions, although convictions were eventually obtained in both the *Kevork* and *Ribic* cases and the *Khawaja* trial is pending.

The Disclose or Dismiss Dilemma

Terrorism prosecutions may have to be abandoned unless the state is prepared to disclose information that is essential to a fair trial and unless there is a workable means to determine what information must be disclosed and what information can be protected from disclosure. Both intelligence agencies and the justice system need to adjust to the challenges presented by disclosure of intelligence in terrorism prosecutions. Intelligence agencies and the police can work on front-end strategies to make intelligence more usable in terrorism prosecutions. The courts and the legislature can work on back-end strategies that increase the efficiency and fairness of the process for protecting intelligence from disclosure and determining what intelligence must be disclosed to the accused.

Before the state is forced to abandon terrorism prosecutions in order to keep secrets or a trial judge is forced to stay proceedings as a result of a partial or non-disclosure order, the justice system should ensure that the secret information is truly necessary for a fair trial and that no other form of restricted disclosure will satisfy the demands of a fair trial. The public interest and the legitimate demands of the Charter will not be served by the unnecessary abandonment of criminal prosecutions in favour of preserving secrets that will not truly make a difference in the outcome or the fairness of the criminal trial. At the same time, the public interest and the legitimate demands of the Charter will not be served by unfair trials where information that should have been disclosed to or introduced by the accused is not available because of even legitimate concerns about national security confidentiality.

---

8 (1984) 17 C.C.C.(3d) 426 (F.C.T.D.) and other related cases discussed in the full paper

9 *Canada (AttorneyGeneral). v. Khawaja* 2007 FC 463; *Canada (Attorney General) v. Khawaja* 2007 FC 490; *Canada (Attorney General). v. Khawaja* 2007 FCA 342; *Canada (Attorney General) v. Khawaja* 2008 FC 560 discussed in Part 6 the full paper.

10 *Ribic v. Canada (Attorney General)* [2003] F.C.J. no. 1964 and other related cases discussed in Part 6 of the full paper

The search for reasonable alternatives that reconcile the demands of fairness and secrecy is not limited to the formal processes of justice system. Efforts must be made to convince confidential informants that their identity can be revealed through disclosure and testimony while at the same time preserving their safety through witness and source protection programs. Similarly, efforts must be made to persuade both domestic and foreign agencies to amend caveats that prohibit the use of their intelligence in court. The standard operating procedures of security intelligence agencies with respect to counter-terrorism investigations, including the use of warrants, the recording of surveillance and interviews and the treatment of confidential sources, should be reviewed in light of the disclosure and evidentiary demands of terrorism prosecutions. This does not mean that CSIS should become a police force.[11] It does, however, mean that CSIS should be aware of the evidentiary and disclosure demands of terrorism prosecutions. Reconciling the demands of fairness and secrecy is one of the most difficult tasks faced by the justice system. It is also one of the most important tasks if the criminal justice system is to be effectively deployed against terrorists.

Outline of the Paper

The first part of this paper will provide an introduction to 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 this could result in the disclosure of secrets in open court and to the accused.

The second part of this paper will outline the major principles at play in the relationship between intelligence and evidence. They are 1) the need to keep legitimate secrets 2) the need to treat the accused fairly 3) the need to respect the presumption of open courts and 4) the need for an efficient process for terrorism prosecutions. Ultimately, there is a need to reconcile the need for secrecy with the need for disclosure.

---

11 For warnings about CSIS becoming a "stalking horse" or "proxy for law enforcement" see Stanley Cohen *Privacy, Crime and Terror Legal Rights and Security in a Time of Peril* (Toronto: LexisNexis, 2005) at 407.

Both secrecy and disclosure are very important. The disclosure of information that should be kept secret can result in harm to confidential informants, damage to Canada's relations with allies, and damage to information gathering and sharing that could be used to prevent lethal acts of terrorism. The non-disclosure of information can result in unfair trials and even wrongful convictions. Even if the disclosure of secret information is found to be essential to a fair trial, the Attorney General of Canada can prevent disclosure by issuing a certificate under s.38.13 of the *Canada Evidence Act* that blocks a court order of disclosure. The trial judge in turn can stay or stop the prosecution under s.38.14 if a fair trial is not possible because of non-disclosure.

Although most of the concern expressed about the relation between intelligence and evidence has been about keeping intelligence secret and protecting it from disclosure, there may be times when intelligence will be used as evidence in trial. This raises the issue of whether information collected by CSIS, including information from CSIS wiretaps, as well as CSE intercepts, can be introduced into evidence. Intelligence is generally collected under less demanding standards than evidence and this presents challenges when the state seeks to use intelligence as evidence. In addition the use of intelligence as evidence may require increased disclosure of how the intelligence was gathered. There are, however, provisions that allow public interests in non-disclosure to be protected, but these may affect the admissibility of evidence. These issues, including the appropriate balance between CSIS and Criminal Code warrants, will be examined in the third part of this paper.

The fourth part of this paper will examine disclosure requirements as they may be applied to intelligence. In *R. v. Malik and Bagri*, CSIS material was held to be subject to disclosure by the Crown under *Stinchcombe*. *Stinchcombe* creates a broad constitutional duty for the state to disclose relevant and non-privileged information to the accused. Even if in other cases CSIS is held not to be directly subject to *Stinchcombe* disclosure requirements, intelligence could be ordered produced to the judge and disclosed to the accused under the *O'Connor* procedure that applies to records held by third parties. A significant amount of intelligence could be the subject of production and disclosure in a terrorism prosecution.

The fifth part of this paper will examine possible legislative restrictions on disclosure through the enactment of new legislation to restrict *Stinchcombe* and *O'Connor* and through the expansion or creation

of evidentiary privileges that shield information from disclosure. The precedents for such restrictions on disclosure will be examined and attention will be paid to their consistency with the Charter rights of the accused including the important role of innocence at stake exceptions to even the most important privileges. Attention will also be paid to the effects of restrictions on disclosure on the efficiency of the trial process. Disclosure restrictions may generate litigation over the precise scope of the restriction or the privilege concerned, as well as Charter challenges.

The sixth part of this paper will examine existing means to secure non-disclosure orders to protect the secrecy of intelligence in particular prosecutions. This will involve the procedures contemplated for claiming public interest immunity and national security confidentiality under ss.37 and 38 of the *Canada Evidence Act*. Section 38, like other comparable legislation, is designed to allow for the efficient and flexible resolution of competing interests in disclosure and non-disclosure. It provides for a flexible array of alternatives to full disclosure including agreements between the Attorney General and the accused, selective redactions, the use of summaries, and various remedial orders including admissions and findings of facts, as well as stays of proceedings with respect to parts or all of the prosecution. A singular feature of s.38, however, is that it requires the litigation of national security confidentiality claims not in the criminal trial and appeal courts, but in the Federal Court. As will be seen, Canada's two-court approach differs from that taken in other countries. It requires a trial judge to be bound by a Federal court judge's ruling with respect to disclosure while also reserving the right of the trial judge to order appropriate remedies, including stays of proceedings, to protect the accused's right to a fair trial. It will be argued that the s.38 process can be made both fairer and more efficient by allowing the trial judge to see the secret intelligence and in appropriate cases to order that it not be disclosed to the accused. Throughout the trial the trial judge would retain the ability to re-assess whether disclosure is required for a fair trial.

The seventh part of this paper will examine the processes used in the United States, the United Kingdom and Australia to decide whether intelligence should be disclosed to the accused. In all these jurisdictions, unlike in Canada, the trial judge decides whether it is necessary to disclose intelligence to the accused. In Canada, this decision is made by a Federal Court judge with the trial judge then having to accept any non-disclosure order, but also having to decide whether a fair trial is possible in light of the non-disclosure order.

The conclusion of this paper will assess strategies for making the relationship between intelligence and evidence workable. Both front-end strategies that address the practice of intelligence agencies and the police and back-end strategies that address disclosure obligations and the role of courts are needed.

Some of the front-end strategies that could make intelligence more useable in terrorism prosecutions include 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 Canada and the 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 of the back end strategies that could help protect intelligence from disclosure are 1) clarifying disclosure and production standards in relation to intelligence; 2) clarifying the scope of evidentiary privileges; 3) providing a means by which secret material used to support either a CSIS or a Criminal Code warrant can be used to support the warrant while subject to adversarial challenge by a security cleared special advocate; 4) providing for efficient means to allow defence counsel, perhaps with a security clearance and/or undertakings not to disclose, to inspect secret material; 5) 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; 6) providing for a one court process to determine claims of national security confidentiality that allows a trial judge to re-assess whether disclosure is required throughout the trial; and 7) abolishing the ability to appeal decisions about national security confidentiality before a terrorism trial has started.

I. The Evolving Distinction Between Security Intelligence and Evidence

Stated in the abstract, the differences between intelligence and evidence are stark with the former aimed at informing governments about risks to national security and the latter aimed at prosecuting crimes in a public trial. At the same time, the relation between intelligence and

evidence is dynamic.[12] Crimes related to terrorism often revolve around behaviour that may also be the legitimate object of the collection of security intelligence. Even before the enactment of the *Anti-Terrorism Act* (ATA), terrorism prosecutions could involve allegations of conspiracies or agreements to commit crimes or other forms of preparation and support for terrorism. The *Anti-Terrorism Act* now criminalizes support, preparation and facilitation of terrorism and participation in a terrorist group. The preventive nature of anti-terrorism law narrows the gap between intelligence about risks to national security and evidence about crimes.

Intelligence can be kept secret if it is only used to inform government of threats to national security. There is, however, a need to reconcile secrecy with fairness in cases where the intelligence becomes relevant in an accused's trial. At times, the Crown may want to introduce intelligence into evidence because it may constitute some of the best evidence of a terrorism crime. In many other cases, the accused may demand disclosure of intelligence on the basis that it will provide evidence that will assist the defence.

1) The Distinction Between Intelligence and Evidence at the Time that CSIS Was Created

In 1983, a Special Senate Committee chaired by Michael Pitfield stressed the differences between law enforcement and security intelligence:

> Law enforcement is essentially reactive. While there is an element of information-gathering and prevention in law enforcement, on the whole it takes place after the commission of a distinct criminal offence. The protection of security relies less on reaction to events; it seeks advance warning of security threats, and is not necessarily concerned with breaches of the law. Considerable publicity accompanies and is an essential part of the enforcement of the law. Security intelligence work requires secrecy. Law enforcement is 'result-oriented', emphasizing apprehension and adjudication, and the players in the system- police, prosecutors, defence counsel, and the judiciary- operate

12 Clive Walker "Intelligence and Anti-Terrorism Legislation in the United Kingdom" (2005) 44 Crime, Law and Social Change 387; Fred Manget "Intelligence and the Criminal Law System" (2006) 17 Stanford Law and Public Policy Review 415.

> with a high degree of autonomy. Security intelligence is, in contrast, 'information-oriented'. Participants have a much less clearly defined role, and direction and control within a hierarchical structure are vital. Finally, law enforcement is a virtually 'closed' system with finite limits- commission, detection, apprehension, adjudication. Security intelligence operations are much more open-ended. The emphasis is on investigation, analysis, and the formulation of intelligence.[13]

The distinctions between intelligence and evidence collection could not have been stated more starkly. The proactive role of the police in preventing crime and prosecuting attempts and conspiracies to commit acts of terrorism were ignored. Not surprisingly, the possibility that intelligence could have evidential value in a criminal trial was also ignored. The above observations of the Pitfield Committee represented influential but flawed thinking about the distinction between law enforcement and intelligence at the time of the creation of CSIS and during the initial Air India investigation.

CSIS was created in 1984 with a mandate to investigate a broad range of threats to the security of Canada. Although these threats to the security of Canada included threats and acts of serious violence directed at persons or property for political ends within Canada or a foreign state, they also included espionage, clandestine foreign-influenced activities and the undermining by covert unlawful acts of the constitutionally established government of Canada. The *CSIS Act* was created during the Cold War, a context symbolized by reports that CSIS surveillance on Parmar was interrupted for surveillance of a visiting Soviet diplomat.[14]

The *CSIS Act* placed an emphasis on secrecy. It made it an offence to disclose information relating to a person "who is or was a confidential source of information or assistance to the Service" or Service employees "engaged in covert operational activities of the Service"[15]. At the same time, the *CSIS Act* did not contemplate absolute secrecy or that intelligence would never be passed on to law enforcement. Section 19(2) provided that

---

13 *Report of the Special Committee of the Senate on the Canadian Security Intelligence, Delicate Balance: A Security Intelligence Service in a Democratic Society* (Ottawa: Supply and Services Canada, 1983) at p.6 para 14.

14 Kim Bolan *Loss of Faith How the Air India Bombers Got Away with Murder* (Toronto: McClelland and Stewart, 2005) at 63.

15 *CSIS Act* s.18.

CSIS may disclose information to relevant police and prosecutors "where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province…"[16]. Even in 1984, there was a recognition that CSIS could have intelligence that would be useful in both criminal investigations and prosecutions. The *CSIS Act* did not establish a wall between intelligence and relevant information that could be provided to the police. Its implicit understanding of the relation between the collection of intelligence and evidence was more complex and nuanced than the stark contrast articulated by the Pitfield committee.

The proactive role of the police in preventing and investigating crime in the national security area was also recognized in the *Security Offences Act*[17]. In that act, RCMP officers were given "the primary responsibility to perform the duties that are assigned to peace officers" in relation to offences that arise "out of conduct constituting a threat to the security of Canada" as defined in the *CSIS Act*. The duties of RCMP officers include the prevention of crime and the apprehension of offenders[18]. A broad range of offences including murder, attempted murder, other forms of violence or threatening behaviour, espionage, sabotage and treason could be involved in conduct that constitutes a threat to the security of Canada. In addition, the Criminal Code prohibits not only completed offences, but attempts beyond mere preparation to commit such offences, agreements or conspiracies between two or more people to commit offences and attempts to counsel, procure or instigate others to commit offences, as well as a broad range of assistance to criminal activity.

A close reading of the *CSIS Act* and the *Security Offences Act* suggests that the stark contrast that the Pitfield Committee made between reactive law enforcement and preventive intelligence gathering was simplistic. The foundational 1984 legislation contemplated the disclosure of intelligence to the police for use in criminal investigations and prosecutions. It established overlapping jurisdictions by giving CSIS a mandate to investigate threats of terrorism when such threats, both before and after completion, could constitute crimes that would be within the primary jurisdiction of the RCMP. The RCMP role was not solely reactive. They had a mandate to prevent crime and they could investigate and lay charges both before and after acts of terrorism.

---

16 Ibid s.19(2)(a).
17 R.S.C. 1985 c.S-7 s.6.
18 *RCMP Act* s.18

2) Disclosure Requirements and Tensions Between CSIS and the RCMP

In 1998 and 1999, SIRC conducted a study of RCMP/CSIS relations. It noted:

> At the root of the problems in the exchange of information between CSIS and the RCMP is the need for CSIS to protect information, the disclosure of which could reveal the identity of CSIS sources, expose its methods of operation or that could compromise ongoing CSIS investigations. On the other hand, some RCMP investigators see some CSIS information as evidence that is vital to a successful prosecution, but which can be denied to them by caveats placed on the information by CSIS or that even if used, will be subject to the Service invoking sections 37 and 38 of the Canada Evidence Act, an action that could seriously impede the RCMP's case. The Service view is that it does not collect evidence. This possible misunderstanding on the part of some RCMP investigators may result in certain CSIS information/intelligence being treated as though it were evidence but which might not stand up to Court scrutiny because it had not been collected to evidentiary standards. [19]

The SIRC report raised concerns that review of CSIS documents by the RCMP Air India task force "could potentially place an extensive amount of CSIS information at risk under the *Stinchcombe* ruling regardless of whether it was subsequently used as evidence."[20] This report turned out to be prescient as CSIS was found to be subject to *Stinchcombe* disclosure requirements at the Malik and Bagri trial.

SIRC noted that the concerns of both the RCMP and CSIS had been increased by the impact of the Supreme Court's 1991 decision in *Stinchcombe*. SIRC commented that:

> The impact of that decision is that all CSIS intelligence disclosures, regardless of whether they would be entered for evidentiary purposes by the Crown are subject to disclosure to the Courts. Any passage of information,

---

19 CSIS Co-operation with the RCMP Part 1 (SIRC Study 1998-04) 16 October, 1998 at 9.
20 ibid at 14-15.

> whether an oral disclosure or in a formal advisory letter, could expose CSIS investigations. This means that even information that is provided during joint discussions on investigations or that is provided as an investigative lead is at risk.[21]

Although *Stinchcombe* defined disclosure obligations broadly, it did not define them in an unlimited manner. Disclosure obligations were subject to qualifications based on relevance to the case, privilege, including police informer privilege, as well as with respect to the timing of disclosure. In addition, the Attorney General of Canada could assert public interest immunity to prevent disclosure. Indeed, this had already been successfully done in at least one terrorism prosecution. [22]

These reports affirmed that the traditional divide between intelligence and evidence was still present and that concerns about compromising intelligence had been significantly expanded as a result of *Stinchcombe*. Although SIRC may have overestimated some of the impact of *Stinchcombe*, it was clear that many within the RCMP and CSIS believed that *Stinchcombe* had aggravated the tensions arising from the different mandates of the two agencies.

3) The Post 9/11 Era

The need for sharing of information and the conversion of intelligence to evidence took on greater urgency after 9/11 In 2005, the Hon. Bob Rae stressed the need to establish a workable and reliable relationship between intelligence and evidence. He placed the relationship between intelligence and evidence into its larger political, historical and legal context by observing that:

> The splitting off of security intelligence functions from the RCMP, and the creation of the new agency, CSIS, came just at the time that terrorism was mounting as a source of international concern. At the time of the split, counter-intelligence (as opposed to counter-terrorism) took up 80% of the resources of CSIS. The Cold War was very much alive, and the world of counter-intelligence and counter-espionage in the period after 1945 had created a culture of

---

21 Ibid at 9

22 See the case study of the *Kevork* prosecution in Part 6 of the full paper.

> secrecy and only telling others on a "need to know" basis deeply pervaded the new agency.

He then went on to note some of the implications of 9/11:

> The 9/11 Commission Report in the United States is full of examples of the difficulties posed to effective counter-terrorist strategies by the persistence of "stovepipes and firewalls" between police and security officials. Agencies were notoriously reluctant to share information, and were not able to co-operate sufficiently to disrupt threats to national security. There is, unfortunately, little comfort in knowing that Canada has not been alone in its difficulties in this area. The issue to be faced here is whether anything was seriously wrong in the institutional relationship between CSIS and the RCMP, whether those issues have been correctly identified by both agencies, as well as the government, and whether the relationships today are such that we can say with confidence that our security and police operations can face any terrorist threats with a sense of confidence that co-operation and consultation are the order of the day.
>
> The intelligence-evidence debate is equally important. If an agency believes that its mission does not include law enforcement, it should hardly be surprising that its agents do not believe they are in the business of collecting evidence for use in a trial. But this misses the point that in an age where terrorism and its ancillary activities are clearly crimes, the surveillance of potentially violent behaviour may ultimately be connected to law enforcement. Similarly, police officers are inevitably implicated in the collecting of information and intelligence that relate to the commission of a violent crime in the furtherance of a terrorist objective.[23]

Rae commented that the failure to preserve CSIS tapes on Parmar could have harmed both the state's interest in crime control and the interest of the accused in due process. The tapes could have contained incriminating evidence that could be used in criminal prosecutions, but alternatively

---

23 Hon. Bob Rae *Lessons to be Learned* (2005) at 22-23.

they could have contained exculpatory evidence or other information of assistance to the accused. In any event, the destruction of the tapes, as well as CSIS interview notes, allowed the accused to argue that they were deprived of exculpatory evidence. Rae commented that:

> The erasure of the tapes is particularly problematic in light of the landmark decision of the Supreme Court of Canada in *R. v. Stinchcombe*, which held that the Crown has a responsibility to disclose all relevant evidence to the defence even if it has no plans to rely on such evidence at trial. Justice Josephson held that all remaining information in the possession of CSIS is subject to disclosure by the Crown in accordance with the standards set out in *Stinchcombe*. Accordingly, CSIS information should not have been withheld from the accused.[24]

The Rae report highlighted the need for further study of the relationship between evidence and intelligence in light of *Stinchcombe* and the new focus on counter-terrorism including the creation of many new crimes related to the preparation and support of terrorism.

4) Summary

The RCMP and CSIS retain and should respect their different mandates, but they operate in a dynamic legal and policy environment. The crime prevention and evidence collection mandate of the RCMP has increased with the enactment of the 2001 ATA providing many new terrorism offences. The RCMP has also recognized that terrorism investigations must be more centralized than other police investigations; that they must be informed by intelligence; and that they must involve more co-operation with a wide variety of other actors including CSIS.[25] Security intelligence agencies may more frequently possess information that could be useful in criminal investigations and prosecutions especially under the ATA.

The above developments suggest a need to re-think stark contrasts between reactive policing and proactive intelligence; between decentralized policing and centralized intelligence and between secret intelligence and public evidence. All of these contrasts are based on the

---

24 Ibid at 16.

25 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* (2006) ch.4.

conventional wisdom when CSIS was created in 1984 during the Cold War even though a close reading of the *CSIS Act* and the *Security Offences Act* suggests a recognition that intelligence may have to be passed onto to the police when relevant to a police investigation and prosecution. The 1985 Air India bombings producing 331 deaths should have shattered simplistic dichotomies between secret intelligence and public evidence. Nevertheless, they persisted for some time and played a role in tensions between the RCMP and CSIS. In any event, the events of 9/11, and the passage of the 2001 ATA, should result in a thorough re-evaluation of the relation between intelligence and evidence.

Intelligence about terrorism can be relevant to possible criminal investigations into a wide range of serious criminal offences involving various forms of support, association and participation in terrorism and terrorist groups. Many of these investigations focus on associations and activities of targets and persons of interest. Such intelligence can be valuable to accused persons when defending themselves against allegations of support for and participation in terrorism. Although the need to protect sources, methods, ongoing investigations and foreign intelligence remains important, these demands should be re-thought in light of the need to prosecute and punish terrorists. Security intelligence agencies may have to become better acquainted with witness protection programs that are used in the criminal justice system and the demands of the collection of evidence. In this respect, it is noteworthy that MI5 accepts the need to collect some evidence (albeit not concerning electronic surveillance which is still generally inadmissible in British

courts) to an evidentiary standard. .[26] Requests may have to be made to foreign agencies for their consent to the disclosure of some information for the purposes of criminal prosecutions. Foreign countries are also dealing with the demands of terrorism prosecutions and may be willing to consider reasonable requests to allow the disclosure of some intelligence that they have provided to Canada. The world has changed since the original creation of *CSIS Act*. There is a need for some new and creative thinking that challenges conventional wisdom in order to ensure a workable relationship between intelligence and evidence.

II. Fundamental Principles Concerning Intelligence and Evidence

There are four principles, all well grounded in law, that have to be reconciled in managing the relation between intelligence and evidence.

1) The Need to Keep Secrets

The disclosure of intelligence to the accused and the public can have serious adverse effects on ongoing investigations, security operations and ultimately to the ability of security agencies to help prevent acts of

---

26 Britain's domestic Security Service, better known as MI5, provides a relevant example of how a security intelligence service can adjust its activities to better accommodate the need for evidence that can be used against suspected terrorists. Its official web site contains a section entitled "evidence and disclosure" which explains "Security Service officers have been witnesses for the prosecution in a number of high profile criminal trials, and intelligence material has either been admitted in evidence or disclosed to the defence as "unused material" in a significant number of cases. This has occurred mostly in the context of our counter-terrorist and serious crime work. The increased involvement of the Service in criminal proceedings means that, when planning and carrying out intelligence investigations that may lead to a prosecution, we keep in mind the requirements of both the law of evidence and the duty of disclosure….where an investigation leads to a prosecution, prosecuting Counsel considers our records and advises which of them are disclosable to the defence. If disclosure would cause real damage to the public interest by, for example, compromising the identity of an agent or a sensitive investigative technique, the prosecutor may apply to the judge for authority to withhold the material. Such applications take the form of a claim for public interest immunity (PII)." MI5 "Evidence and Disclosure" at http://www.mi5.gov.uk/output/Page87.html (accessed Jan 21, 2007). The statutory mandate of MI5 contemplates the disclosure of information for the purpose of preventing or detecting serious crime and criminal proceedings and the co-ordination of its work with the police and other law enforcement agencies. *Security Services Act*, 1989 ss. 1.(4) 2(2).

terrorism. Disclosure of secrets could also expose a confidential source to harm, including torture or death. In both *Ruby*[27] and *Charkaoui* [28], the Supreme Court recognized the importance of the secrecy of the foreign intelligence that Canada receives from its allies and Canada's particular position as a net importer of intelligence. In addition both the 9/11 Commission and the Arar Commission have affirmed the importance of information sharing among and between governments. Such information sharing often depends on expectations that the information that is shared will be kept secret. Finally, the importance of protecting the identity of informers has been affirmed by the courts in a number of decisions.[29]

2) The Need to Treat the Accused Fairly

The need to treat the accused fairly and to ensure that there is a fair trial is the bedrock principle of fundamental justice. In *Charkaoui*[30], the Court made clear that while adjustments could be made because of the need to protect secrets and other national security concerns, at the end of the day any remaining procedure must be fundamentally fair. The Supreme Court in *R. v. Stinchcombe*[31] grounded the broad constitutional right of disclosure in the accused's right to full answer and defence and a concern with preventing miscarriages of justice. Even with respect to the production and disclosure of material held by third parties, the Court in *R. v. O'Connor*[32] stressed the importance of the accused's right to full answer and defence. Even the most zealously guarded privileges such as the police informer privilege are subject to an innocence at stake exception which can require disclosure to the accused in cases where an informer becomes a material witness or a participant.[33]

3) Respect for the Presumption of Open Courts

The presumption of an open court has long been recognized in Canadian law and was given renewed vigour by the Charter guarantee of freedom of expression. The open court presumption is not absolute and it does not apply to information protected by informer privilege. [34] More generally, limitations on the open court principle can be justified on a case-by-case basis as a proportionate restriction on freedom of expression. [35]

27 [2002] 4 S.C.R. 3.
28 2007 SCC 9.
29 *R. v. Leipert* [1997] 1 S.C.R. 287; *Named Person v. Vancouver Sun* 2007 SCC 43
30 2007 SCC 9
31 [1991] 3 S.C.R. 326
32 [1995] 4 S.C.R. 401
33 *R. v. Scott* [1990] 3 S.C.R. 979 at 996; *Named Person v. Vancouver Sun* 2007 SCC 43 at para 29.
34 *Named Person v. Vancouver Sun* 2007 SCC 43
35 *Re Vancouver Sun* [2004] 2 S.C.R. 332,

4) The Need for Efficient Court Processes

Few would dispute that punishment and incapacitation is the appropriate response for those who would prepare and plan to commit acts of terrorist violence and those who have committed such violence. Criminal trials can serve a valuable purpose in denouncing acts of terrorism and educating the public about the dangers of terrorism. They demonstrate a commitment to fairness and principles of individual responsibility in which only the guilty are punished, a quality that is the antithesis and the moral superior to terrorism which is designed to harm innocent people. Various international instruments including conventions in relation to terrorism also obligate Canada to treat and prosecute terrorism as a serious crime. Finally, the accused has a right to a trial within a reasonable time, a right that has social benefits as well as protections for the accused.[36]

5) Summary

The demands for an efficient, fair and public process for terrorism prosecutions all speak to the ability of Canada to use the criminal law to prosecute terrorism. The challenge is to ensure a process that provides an opportunity for the state to protect legitimate secrets while at the same time treating the accused fairly, respecting as much as possible the principle of open courts and resolving disputes about the reconciliation of these competing principles in an efficient and timely manner. A failure to resolve these difficulties will make it very difficult to bring terrorism prosecutions to verdict. A failure to prosecute terrorists and punish those whose guilt has been established beyond a reasonable doubt in a fair trial will erode public confidence in the administration of justice. It would also place Canada in breach of international obligations that require it to treat acts of terrorist violence as serious criminal offences.

III. The Use of Intelligence as Evidence: The Implications of the Different Standards for the Collection of Security Intelligence and Evidence

At times, intelligence may constitute some of the best evidence in terrorism prosecutions. Although security intelligence agencies target those who present a risk of involvement in terrorism, such targets may unexpectedly commit crimes including many of the new terrorist

36 *R. v. Morin* [1992] 1 S.C.R. 771.

crimes created in 2001. There are several barriers to using intelligence as evidence in terrorism prosecution. One barrier is that security intelligence agencies generally are subject to less demanding standards when they collect information than the police. The rationale for such an approach is that security intelligence is designed to provide governments with secret information to help prevent security threats while the police collect evidence that can be used to arrest and prosecute. Another barrier to using intelligence as evidence is that security intelligence agencies may have to disclose information surrounding the collection of intelligence as the price of using intelligence as evidence.

1) The Admission of Electronic Surveillance Obtained by CSIS

One of the case studies that raises the above issue is *R. v. Atwal*.[37] In that case, the Federal Court of Appeal held that the CSIS wiretap warrant scheme did not violate the right against unreasonable searches and seizures under the Charter, but that the affidavit used to obtain the warrant would have to be disclosed to the accused subject to editing and national security confidentiality claims. Inaccuracies discovered in the disclosed affidavit led to the resignation of the first director of CSIS. CSIS, like its peer agencies such as MI5, must be prepared for the possibility that intelligence gathered in its terrorism investigations may in some cases be used as evidence or disclosed to the accused.

Although it is 20 years old, the Federal Court of Appeal's decision in *Atwal* is still the leading precedent holding the CSIS warrant scheme to be constitutional. Such a conclusion would require courts to accept the distinct purpose of intelligence gathering as opposed to law enforcement either when interpreting s.8 of the Charter or in considering whether a departure from criminal law standards can be justified under s.1 of the Charter. Courts may be more inclined to find a Charter violation if they are persuaded that CSIS crossed the Rubicon by focusing on the penal liability of specific individuals. Even then, however, evidence obtained through a CSIS warrant might still be admitted under s.24(2) on the basis that the admission of unconstitutionally obtained evidence obtained in good faith reliance on legislation and a warrant would not bring the administration of justice into disrepute.

The Federal Court of Appeal's decision in *Atwal* also affirms that the disclosure of the affidavit used to obtain the CSIS warrant will be required

---

37 *R v. Atwal* (1987) 36 C.C.C.(3d) 161 (Fed.C.A.)

to allow the accused to challenge the warrant as part of the right to make full answer and defence. Disclosure is not absolute. The affidavit used to obtain the warrant can be edited to protect confidential sources and covert agents as required by s.18 of the *CSIS Act* . Material that is edited out of the affidavit could not be used to support the affidavit and in some cases this might result in the affidavit as edited being found insufficient to support the warrant. It is also possible for the Attorney General of Canada to make national security confidentiality claims to prevent disclosure of the affidavit.[38] Again, material that was subject to a non-disclosure order could not be used to support the warrant if challenged by the accused at trial.

2) The Admission of Electronic Surveillance Obtained under the Criminal Code

Although evidence obtained under a CSIS warrant can perhaps be admitted as evidence in a criminal trial, it may be better when possible to obtain a Criminal Code warrant. Such a conclusion, of course, assumes that there will be co-operation between the RCMP and CSIS in their terrorism investigations. The ATA has made Criminal Code electronic surveillance warrants more attractive from the state's perspective because now, like CSIS wiretap warrants, they can be issued for up to a year. [39] Unlike CSIS warrants[40], there is no longer a requirement of establishing that other investigative processes, including surveillance, informers, undercover agents and regular search warrants, would not be successful.[41] Although warrants under s.21 of the *CSIS Act* are granted when there are reasonable grounds to believe that a warrant is required to enable CSIS to investigate a threat to the security of Canada, Criminal Code warrants can now be granted on reasonable grounds related to a wide variety of terrorism offences, including financing of terrorism, participation in a terrorist group and the facilitation of terrorism.

The use of Criminal Code authorizations is, of course, not a panacea. Those warrants themselves will be challenged. The *Parmar* case study in the full paper underlines difficulties that may follow from disclosure of information used to obtain Criminal Code warrants. In that case, the prosecution collapsed because the warrant could not be sustained

---

38 ibid at 186.
39 Criminal Code s.186.1
40 CSIS Act s.21(5). CSIS warrants in relation to subversion under s.2(d) of the Act are limited to 60 days.
41 Criminal Code s.186 (1.1).

without disclosing the identity of an informant and the informant refused to go into witness protection. It is hoped that both warrant practice and witness protection have improved since that time. In any event, if *Parmar* was being decided today, it would be possible to argue that the wiretap evidence should be admitted under s.24(2) of the Charter even if the warrant was unconstitutional after the reference to the confidential informant or other intelligence gathering techniques was edited out.[42]

The Criminal Code now contemplates that the prosecutor can delete from the affidavit any material that the prosecutor believes would be prejudicial to the public interest including information that would compromise the identity of any confidential informant or ongoing investigations, prejudice the interests of innocent persons or prejudice future investigations by endangering "persons engaged in particular intelligence-gathering techniques."[43] There may, however, be a case for expanding s.187(4)(c) which seems to protect intelligence gathering only where disclosure would endanger the person engaged in the technique. Intelligence gathering techniques may have to be protected even when disclosure would not endanger those who collect the intelligence.

There is a price that is paid for editing out material in the affidavit and protecting it from disclosure. Material that is edited out cannot be used to support the validity of the warrant though it may be possible for an edited summary to provide the accused with sufficient information to be able to challenge the warrant. A trial judge can order the subsequent disclosure of deleted material only if it is required by the accused to make full answer and defence and a provision of a judicial summary would not be sufficient.[44] The Courts have recognized that full disclosure should be the rule and that cross-examination on the affidavits may be necessary in order to allow the accused to challenge the warrant.[45]

3) The Shifting Balance Between CSIS and Criminal Code Electronic Surveillance Warrants

In complex international terrorism investigations there may be overlapping electronic surveillance by CSIS, the CSE, foreign intelligence

---

42 At the time that *Parmar* was decided, an automatic statutory exclusionary rule applied to electronic surveillance obtained without a valid warrant. See case study in Part 3 of the full study.

43 Criminal Code s.187(4).

44 Criminal Code s.187(7).

45 *R. v. Garofoli* [1990] 2 S.C.R. 1421 at 1461; *Dersch v. Canada (Attorney General)* [1990] 2 S.C.R. 1505; *R. v. Durette* [1994] 1 S.C.R. 469. See also *R. v. Parmar* (1987), 34 C.C.C. (3d) 260 at 273.

agencies and the police. Suspects may be transferred to and from CSIS and the RCMP depending on whether there is sufficient evidence to justify a criminal investigation or a security intelligence investigation. The domains of intelligence and evidence collection are shifting because of the creation of new terrorism crimes and legislative changes that make it easier to obtain Criminal Code authorizations for electronic surveillance in terrorism prosecutions. The result may be that some counter-terrorism investigations in which a warrant under s.21 of the *CSIS Act* would have been used can now from the start be conducted under a Criminal Code authorization. This, of course, assumes full co-operation between CSIS and the police in terrorism investigations.

When intelligence is being collected, security intelligence agencies must ask themselves whether they have "crossed the Rubicon" into a predominant focus on criminal liability. If they have crossed this line, the courts may rule that a Criminal Code warrant should have been obtained.[46] If at all possible, the state should not rely on complex after the fact adjudications about whether a line has been crossed or the possibility that security intelligence obtained in violation of the Charter may nevertheless be found to be admissible in a criminal trial under s.24(2) of the Charter. Section 24(2) would be a finite resource when it comes to the admission of CSIS intelligence in criminal trials because it will become more difficult over time for the government to argue that it acted in good faith reliance on the CSIS warrant schemes if they have been found to violate the Charter.

In cases where there are sufficient grounds for a Criminal Code authorization, preference should be given to the collection of evidence under the Criminal Code as opposed to CSIS warrants. This will require a willingness of CSIS to allow the police to take the lead in the particular investigation. Intelligence that is used to obtain a CSIS or a Criminal Code warrant may have to be disclosed to allow the accused to challenge the warrant as part of the right to full answer and defence. The affidavit, however, will be edited before disclosure in order to protect broad public interests in non-disclosure. Information that is edited out cannot be used to support the warrant and the trial judge may order disclosure to the extent required by full answer and defence. The existing system generally allows a broad range of information to be protected from disclosure when a warrant is challenged, but at the price of the state not being able to rely

---

46 *R. v. Jarvis* [2002] 3 S.C.R. 708. See generally Stanley Cohen *Privacy, Crime and Terror* (Toronto: LexisNexus, 2005) at 399ff

on edited out and protected information in order to sustain the legality or constitutionally of a warrant.

4) The Collection and Retention of Intelligence under Section 12 of the CSIS Act

An issue that arose in *R. v. Malik and Bagri* is whether CSIS should retain intelligence for possible disclosure at a criminal trial. The judge ruled that in the circumstances of the investigation, CSIS was subject to *Stinchcombe* disclosure obligations and CSIS had violated the duty to preserve *Stinchcombe* material by destroying wiretap evidence and notes of an interview with a key witness.[47] No remedy was ordered for these violations only because a remedy was unnecessary in light of the acquittals.

The judge's ruling in *Malik and Bagri* indicated that CSIS should have retained intelligence because it had to be disclosed. At the same time, CSIS is bound by s.12 of the *CSIS Act*. It provides:

> The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report and advise the Government of Canada.

The words "strictly necessary" qualify the reference in the section to investigation as opposed to the reference to the analysis and retention of information. If information is collected to the standard of what is strictly necessary respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada, it should be analysed and retained without limiting either analysis or retention to that which is strictly necessary. The collection of the information and intelligence should be limited to what is "strictly necessary" for reasons related to privacy, but the analysis of the collected information should not be so limited. Retention of information can, however, implicate privacy interests.

---

47 *R. v. Malik* [2002] B.C.J. No. 3219; *R. v. Malik* [2004] B.C.J. no. 842

Care should be taken to ensure that only information that when collected was "strictly necessary" is retained. There were legitimate concerns, especially at the time that CSIS was created, that it not retain information that had not been collected under the rigorous standard of strict necessity. Even with respect to new information obtained from confidential and foreign sources, it may practically be difficult to separate collection and retention issues. For reasons of practical necessity, it may be necessary to destroy some material shortly after it was collected because it should not have been collected in the first place because its collection was not strictly necessary. After this initial period, however, properly collected information should be analysed and retained without reference to the strictly necessary standard.

Despite the above interpretation, it is undeniable that s.12 has caused a number of difficulties. This critical section is not drafted as clearly as it could have been with respect to the grammatical placement of the "strictly necessary" qualifier. Moreover the purposes that are to be served by the phrase "strictly necessary" in protecting privacy and its relation to the statutory mandate of CSIS are not clear. Section 12 could be amended so that the requirement of strict necessity applies only to the collection of intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada. Once collected information is determined to satisfy the statutory requirement that its collection was "strictly necessary", it should then be retained and subject to analysis as required to allow CSIS to conduct its lawful duties including the possible disclosure of CSIS information under s.19(2) (a) of the CSIS Act for criminal investigations and prosecutions of crimes that also constitute threats to the security of Canada. Such an amendment would clarify CSIS's obligations with respect to the retention of properly collected intelligence.

Another possibility is to make specific reference to the enhanced need to retain information in CSIS's counter-terrorism investigations. Although criminal prosecutions could arise out of CSIS investigations into espionage, sabotage or subversion[48], they are more likely to occur with respect to its terrorism investigations. It may become necessary for a CSIS counter-terrorism investigation quickly to be turned over to the police so that people can be arrested and prosecuted before they

48 This is implicitly recognized in the *Security Offences Act* R.S. 1985 c.S-7 which gives the RCMP and the Attorney General of Canada priority with respect to the investigation and prosecution of offences that also constitute a threat to the security of Canada as defined in the CSIS Act.

commit acts that could kill hundreds or thousands of people. Section 12 could be amended to specify that CSIS should retain information that may be relevant to the investigation or prosecution of a terrorism offence as defined in s.2 of the Criminal Code or a terrorist activity as defined in s.83.01 of the Criminal Code. A reference to terrorism offences would be broader than a reference to terrorist activities because it would include indictable offences committed for the benefit of, or at the direction of, or in association with, a terrorist group even if the offence itself would not constitute a terrorist activity. Information that is retained by CSIS because of its relevance in terrorism investigations or prosecutions could be of use to either the state or the accused in subsequent criminal prosecutions.[49]

Such an amendment would make clear that CSIS's mandate includes the retention of information and evidence that is relevant to terrorism investigations and prosecutions provided that the information was properly collected because its collection was strictly necessary for CSIS to investigate activities that may on reasonable grounds be suspected of constituting threats to the security of Canada. This would be consistent with amendments to Britain's *Security Service Act* which have made it clear that one of the functions of MI5 is to assist law enforcement agencies in the prevention and detection of serious crime and that information collected by MI5 in the proper discharge of its duties can be "disclosed for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceeding".[50] A similar provision about disclosure of information for criminal proceedings is also contained in the mandate of Britain's foreign intelligence agency.[51] The emphasis in the British legislation is on disclosure of information properly obtained by intelligence agencies whereas in Canada, there seems to be a need to emphasize that CSIS should both retain and disclose information that could assist in preventing or detecting serious crime or for the purpose of criminal proceedings.

Increased retention of information by CSIS presents some dangers to privacy. An important protection for privacy would be that the requirement to retain information would only apply to information that satisfied either at the time of its collection or immediately afterwards, the "strictly necessary" requirement in the present s.12 of the CSIS Act. The *Privacy Act*[52] would also provide additional protections, albeit subject

49 Hon Bob Rae *Lessons To Be Learned* (2005) at 15-17.
50 *Security Services Act*, 1989 s.2(2)
51 *Intelligence Services Act*, 1994 s.2(2).
52 R.S.C. 1985 c. P-21

to the ability to disclose information under its consistent use and law enforcement provisions.[53] In addition, CSIS's review agency, SIRC, as well as its Inspector General, could play an important role in ensuring that information retained by CSIS was retained for purposes related to its statutory mandate and that this information was not improperly distributed. Finally, the Office of the Privacy Commissioner may also audit and review even the exempt banks of data held by CSIS.[54] Retained information should generally be kept secret. If information that is retained by CSIS is shared with others, it should be screened for relevance, reliability and accuracy. Proper caveats to restrict its subsequent disclosure should be attached.[55] Retained information by CSIS could in appropriate cases be passed on to the police under s.19(2)(a) of the CSIS Act or could be subject to a court order of disclosure as was the case in *R. v. Malik and Bagri*.

5) The Use of CSIS Material under the Business Records Exception

Intelligence can often be based on hearsay in the sense that it will report what another person purportedly heard another person say. Courts have in recent years become more willing to admit hearsay in cases where the hearsay is necessary and reliable. One of many exceptions that can allow the admission of hearsay evidence is the business records exception. Section 30 of the *Canada Evidence Act* (CEA) contemplates the admissibility of records made "in the usual and ordinary course of business" with business defined to include "any activity or operation carried on or performed in Canada or elsewhere by any government…". This provision has been interpreted to allow the admission of evidence that would otherwise be hearsay. One restriction in s.30(10) of the Act which provides that nothing in the section renders admissible "a record made in the course of an investigation or inquiry". This exception has been held to cover notes and logs of police investigations[56], as well as computer print outs from military equipment used to assist law enforcement officials in a surveillance. It can be argued that investigations are important matters and that those conducting the investigation should have to testify and

---

53 Ibid s.8. For a discussion of these restrictions see Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *Analysis and Recommendations* (2006) at 337-338.

54 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* (2006) at pp. 286, 433-436. For a discussion of other restraints on information sharing by CSIS see Stanley Cohen *Privacy, Crime and* Terror (Toronto: Lexis Nexus, 2005) at 408.

55 See generally Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *Analysis and Recommendations* (2006) at 334-343 in the context of information sharing by the RCMP.

56 *R. v. Palma* (2000) 149 C.C.C.(3d) 169 (Ont.S.C.J.)

be subject to cross-examination. In the latter case, however, the records were admitted under the common law exception for business records made contemporaneously by a person under a duty to do so and with personal knowledge of the matters.[57]

Even if statutory or common law business records exceptions were used to introduce CSIS materials and the restrictions in s.30(10) of the CEA were repealed, CSIS officials could still be required to explain the significance of the material and the way it was obtained in order to explain why the material was reliable and why it was necessary to admit the material in a trial. Use or expansion of the business records may not necessarily prevent CSIS agents from having to testify in criminal trials.

6) Intelligence Collected Outside of Canada

The nature of international terrorism, including the terrorism behind the bombing of Air India Flight 182, suggests that a person identified by Canadian officials as a terrorist suspect may move between Canada and other countries. When a suspect moves away from Canada, Canadian officials may ask foreign officials to engage in surveillance of that person. Such international co-operation may be valuable, but there are dangers that a Canadian suspect may not necessarily be a high priority for a foreign agency or that a foreign agency might in some circumstances use methods that would be objectionable to Canadians and Canadian courts.

A recently released decision has concluded that the CSIS wiretap warrant scheme in s.21 of the CSIS Act cannot be used to obtain warrants to engage in electronic surveillance of Canadians outside of Canada. Blanchard J. of the Federal Court Trial Division found that s.21 of the CSIS failed to establish a clear legislative intent to violate principles of international law such as "sovereign equality, non-intervention and territoriality" that would be violated should Canadian officials conduct electronic surveillance in a foreign country.[58] The result of this decision is that CSIS appears unable to obtain a warrant to conduct electronic surveillance abroad. At the same time, the judgment suggests that such extra-territorial activities will not violate s.8 of the Charter or any provision of the Criminal Code nor necessarily CSIS's mandate to collect security intelligence relating to threats to the security of Canada.[59]

---

57 *R. v. Sunila* (1986) 26 C.C.C.(3d) 331 (N.S.S.C.) applying *Ares v. Venner* [1970] S.C.R. 608.
58 Dans l'affaire d'une demande de mandates Oct. 22, 2007. SCRS 10-07 at para 54.
59 Ibid at paras 62-63.

One possible alternative is to allow Canada's signals intelligence agency, the CSE, to attempt to collect intelligence and intercept communications of a suspect outside of Canada. The CSE is, however, restricted to the collection of foreign intelligence and there is a requirement that there be satisfactory measures in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security. [60]CSE intercepts are also authorized by the Minister of National Defence as opposed to a judge. The lack of prior judicial authorization will make intelligence gathered by the CSE more difficult to admit as evidence than electronic surveillance obtained by CSIS under a judicial warrant. It may be advisable to amend the CSIS Act to allow CSIS to obtain a judicial warrant to conduct electronic surveillance outside of Canada with the consent of the foreign country.

Another issue is whether a CSE or a foreign signals intelligence intercept might be used as evidence. Some might argue that it is fanciful to think that a signals intelligence intercept would ever be used in a terrorism prosecution, but such a view needs to be constantly re-evaluated in light of the nature of both international terrorism and communications. CSE intercepts will target foreign communications, but the *Anti-Terrorism Act* criminalizes various acts of terrorism outside of Canada. Another alternative to the possible use of CSE intercepts would be the use of intercepts obtained by foreign agencies. The current jurisprudence suggests that the Charter would not apply to the actions of foreign intelligence agencies even if they were acting in co-operation with Canadian officials and that it would not apply to Canadian actions abroad.[61] It is another matter whether a foreign country would consent to the use of its intelligence as evidence in a Canadian proceeding. Again the changing nature of international terrorism and communications suggests that it might be premature to conclude that signals intelligence would never be used as evidence in a terrorism prosecution.

7) Summary

One of the main themes of this study is that security intelligence agencies need to be aware of the possibility of prosecutions arising from their anti-terrorism work and the disclosure and evidentiary implications of such prosecutions. In all cases in which CSIS obtains an electronic surveillance

60 *National Defence Act* s.273.65
61 *R. v. Hape* 2007 SCC 26.

warrant in a counter-terrorism investigation, it should carefully consider whether there would be grounds for a Part VI Criminal Code warrant and whether the latter would be preferable. Affidavits used to obtained either CSIS or Criminal Code wiretap warrants may have to be disclosed to the accused, but they can be edited to protect public interests in non-disclosure. In addition, the Attorney General of Canada can also make applications under s.38 of the CEA for non-disclosure of information that would injure national security, national defence or international relations. Material that is edited out of the affidavit, as in *Parmar*, cannot be used to sustain the warrant. Unlike in that case, however, the state retains the ability to seek admission of evidence obtained under an invalid warrant under s.24(2) of the Charter. The *Parmar* case also suggests that considerations about the protection of sources and witnesses cannot be ignored even during early stages of terrorism investigation because it is possible that the case might have proceeded to trial had the informant consented to the disclosure of information in the affidavit that would had the likely effect of identifying him or her.

Given the enactment of many new terrorism offences, the elimination of the investigative necessity requirement and the extended one year time period available for Criminal Code wiretap warrants in terrorism investigations, it is not clear that Criminal Code warrants will always be much more difficult to obtain than CSIS warrants. Any extra effort spent in obtaining a Criminal Code warrant may pay off should there be a prosecution in which material obtained under the warrant is sought to be introduced. Use of the Criminal Code warrant will avoid litigation over whether the CSIS warrant scheme complies with the Charter. The Criminal Code regime also provides for editing of the material used to obtain the warrant before it is disclosed to the accused.

The different mandates of security intelligence agencies and the police, as well as the different constitutional standards used to obtain information, have often been cited as a reason why intelligence cannot be used as evidence. In this section, we have seen that the CSIS warrant scheme has been upheld under the Charter and that intercepts obtained by CSIS, if retained, could possibly be introduced as evidence in terrorism prosecutions. Even if courts find that CSIS intercepts were obtained in violation of s.8, there would be a strong case, at least in the absence of deliberate circumvention of the Criminal Code or Charter standards, inaccuracies in affidavits used to obtain the warrant or persistent reliance on unconstitutional laws or practices, that intelligence obtained under

a CSIS electronic surveillance warrant should be admitted under s.24(2). The evidentiary use of intelligence will, however, come with the price of retention and disclosure of the intelligence. The requirement of disclosure is not, however, absolute and the affidavit used to obtain either a CSIS or a Criminal Code wiretap can be edited to protect various public interests in non-disclosure. In addition, the Attorney General of Canada retains the right to seek non-disclosure orders under s.38 of the CEA. Finally, there is a possibility that courts might accept that the use of a security-cleared special advocate with full access to all relevant information would be an adequate substitute for disclosure to the accused for the limited purpose of challenging the admissibility of evidence obtained under a warrant.

IV. Obligations to Disclose Intelligence

Even if the state does not attempt to use intelligence as evidence, the accused in terrorism prosecutions may request production and disclosure of intelligence. The broad definition of terrorism offences may make it difficult for the Crown to argue that intelligence about the accused or his or her associates is clearly not relevant and not subject to disclosure. Intelligence may also relate to the credibility of informants and other witnesses and to the methods that were used to investigate the accused.

1) Disclosure under *Stinchcombe*

The Supreme Court's 1991 decision in *Stinchcombe* [62]recognized a broad right to disclosure of relevant and non-privileged information. Although the right to disclosure is broad, the prosecutor need not disclose material that is clearly irrelevant to the case and of no use to the accused. [63] There are some signs that prosecutors may have overestimated the requirements of their *Stinchcombe* disclosure obligations in the ongoing *Khawaja* terrorism prosecution with respect to the need to disclose general analytical intelligence and internal administrative materials that could not be useful to the accused in his defence.[64]

On the particular facts of the Air India investigation, CSIS was held subject to *Stinchcombe* disclosure obligations including the duty to preserve

---

62 [1991] 3 S.C.R. 326

63 *R. v. Egger* [1993] 2 S.C.R. 451; *R. v. Chaplin* [1995] 1 S.C.R. 727.

64 *Canada v. Khawaja* 2007 FC 490 revd on other grounds 2007 FCA 342; *Canada v. Khawaja* 2008 F.C. 560. See discussion in Part 6 of the full study.

evidence. This holding would likely not be applicable to all CSIS activity, but it may be applied to some CSIS counter-terrorism investigations that focus on suspected individuals who may well be charged with terrorism offences or on information that CSIS shares with police who are investigating terrorism offences. Questions may arise in individual cases whether the Crown as prosecutor has control of intelligence material that may have formed the backdrop for a referral of an investigation from CSIS to the police or whether a CSIS investigation constitutes fruits of an investigation for the purposes of disclosure.[65]

Stinchcombe has been interpreted to require the preservation of evidence. CSIS's destruction of tapes and notes were held in *Malik and Bagri* to have violated this right.[66] Some might argue that the destruction of the tapes and interview notes was supported by the "strictly necessary" restriction in s.12 of the *CSIS Act*. As discussed above, the better view is that the requirement of strict necessity in that section applies to the collection of information and not its subsequent retention or analysis. Properly obtained information that may become relevant to a terrorism prosecution should be retained subject to safeguards to protect privacy and to ensure the lawfulness and review of any distribution of the information held by CSIS.

A violation of the right to disclosure under *Stinchcombe* does not necessarily violate the accused's right to full answer and defence. The courts on appeal have been willing to accept that violations of the broad right to disclosure of relevant information do not necessarily violate the right to full answer and defence or require a new trial. There are arguments that the right to disclosure exists in order to allow the accused to make full answer and defence and that the right to full answer and defence is more important than the right to disclosure. At the same time, courts in deciding whether the right to full answer and defence has been violated will be concerned about the cumulative effects of non-disclosure and whether there is reasonable possibility that non-disclosure would affect the outcome of the trial or the fairness of the process.[67]

---

65 See *R. v. Gingras* (1992) 71 C.C.C.(3d) 53 (Alta.C.A.) rejecting a request to a provincial prosecutor for disclosure of correctional records held by federal agencies. Higher standards of relevance can be imposed with respect to information that is not possessed or controlled by prosecutors as fruits of investigation or if there is a privacy interest in the material. *R. v. McNeil* (2006) 215 C.C.C.(3d) 22 (Ont.C.A.). See generally David Paciocco "Filling the Seam Between *Stinchcombe* and *O'Connor: The McNeil* Disclosure Application" (2007) 53 C.L.Q. 230.

66 *R. v. Malik* [2002] B.C.J. No. 3219; *R. v. Malik* [2004] B.C.J. no. 842

67 *R. v. La* [1997] 2 S.C.R. 680; *R. v. Dixon* [1998] 1 S.C.R. 244; *R. v. Taillefer* [2003] 3 S.C.R. 307.

2) Production and Disclosure of Third Party Records under *O'Connor*

Even if intelligence is found not subject to *Stinchcombe* disclosure requirements, CSIS and perhaps even CSE would be liable to demands for production of relevant information under the procedure contemplated for records possessed by third parties in *R. v. O'Connor*.[68] In such a case, the accused would first have to establish that the information sought to be obtained is likely to be relevant to an issue at trial or the competence of a witness to testify. This standard is higher than the *Stinchcombe* standard of relevance, but is not designed to be an onerous burden on an accused who is not engaged in a speculative or disruptive request for production.

Once the intelligence records were produced before the judge, the judge might balance a number of factors in deciding whether they should be disclosed to the accused. Whether this balancing would occur may depend on whether the judge found that the state's interest in non-disclosure of intelligence was as weighty as the privacy interests of complainants in sexual assault cases. The factors that might be included in the balance could include the extent to which access to the intelligence was necessary for the accused to make full answer and defence, its probative value in any trial and the prejudice that disclosure could cause to state interests and privacy or other rights. Even if CSIS was held not to be subject to *Stinchcombe*, it would be subject to the *O'Connor* process for obtaining the production and disclosure of third party records.

V. Methods of Restricting the Disclosure of Intelligence

There are a variety of means through which Parliament or the courts could place restrictions on the production and disclosure of intelligence. Parliament's legislation in response to *O'Connor* provides some precedent both for placing legislative restrictions on *Stinchcombe* and on the process for obtaining the production of third party records. Such legislation might attempt to create categories of intelligence that could not be disclosed or establish new procedures and new barriers for accused who seek the disclosure of intelligence. *Mills* suggests that legislative restrictions on disclosure may be held to be consistent with the Charter even if they result in the Crown having some relevant information that is not disclosed to the accused. It also suggests that Parliament can provide legislative

68 [1995] 4 S.C.R. 411.

guidance and procedures to govern production from third parties. Finally, *Stinchcombe* disclosure does not apply to information covered by evidentiary privileges such as police informer privileges. Such privileges could possibly be expanded by legislation.

All of these strategies to restrict the production and disclosure of intelligence would be subject to challenge as violating the accused's rights under the Charter. Even the strongest privileges are subject to innocence at stake exceptions. Restrictions on production and disclosure must still respect the accused's right to full answer and defence. Legislation that restricts the Charter also must survive a test of proportionality. Although various restrictions on *Stinchcombe* and *O'Connor* would be rationally connected to the protection of secrets and the effective operation of security intelligence agencies, it is not clear that they would be the least restrictive or best tailored means to protect secrets.

1) Legislation Limiting *Stinchcombe* and *O'Connor*

Legislation restricting Stinchcombe or O'Connor applications to obtain production and disclosure of intelligence could be defended as a reasonable limit on the accused's Charter rights to disclosure and to full answer and defence. The legislation would likely be rationally connected to the important objective of protecting secrets, but it could be argued that there are more proportionate alternatives for protecting secrets such as the existing provisions of ss.37 and 38 of the CEA that allow judges to assess the competing interests in disclosure and non-disclosure on the facts of particular cases. (These procedures will be discussed in Part VI below)

Legislative restrictions on disclosure or production would serve a similar purpose to s.38 proceedings in the Federal Court. If conducted by a trial judge, however, they might have some benefits in not requiring litigation in a separate court and the possibility of appeals before a trial starts. Allowing the trial judge to decide whether the information should be disclosed to the accused would follow the practice of other countries. It might also allow initial non-disclosure decisions to be re-visited in light of how the accused's interests in making full answer and defence evolve during the trial. In some cases, the state's interest in non-disclosure may change during the trial because of the lifting of caveats on information or the completion of investigations.

2) Expansion of Police Informer Privilege

Another possible means to restrict disclosure and production requirements of sensitive security information is to expand and codify privileges. The police informer privilege, for example, could be expanded to include CSIS informers or informers for other foreign security intelligence agencies. Some might even argue that CSIS itself should be treated as a police informer, even though the privilege has traditionally been designed to protect individuals and not entire state organizations from reprisals. The police informer privilege could also be expanded to apply in cases like *Khela* where the informer lost the benefits of the common law privilege by acting as an active agent. Matters covered by a valid privilege are not subject to the *Stinchcombe* disclosure requirement.

Such an expansion of privilege would not, however, be absolute. Although the courts zealously guard police informer privilege, they also have always recognized an innocence at stake exception to the privilege. The Supreme Court in *R. v. Scott*, recognized that "if the informer is a material witness to the crime then his or her identity must be revealed….. An exception should also be made where the informer has acted as agent provocateur".[69] This exception, as well as the need to reveal the identity of the informer in some search contexts, has recently been affirmed as valid examples of the innocence at stake exception.[70] This would seem to militate against the expansion of police informer privilege to apply to an informer like Billy Joe who acted as an agent in the Khela case.71 Even if an expanded police informer privilege was accepted, it would still be subject to an innocence at stake exception. It is more likely that innocence may be at stake when the informer is a material witness or an agent provocateur. Similarly, innocence would be more likely to be at stake if an entire organization such as CSIS was protected by an evidentiary privilege. Attempts to expand privileges beyond their natural limits could result in the privilege ultimately becoming a weaker, albeit broader, form of protection against disclosure.

3) Creation of a New National Security Class Privilege for Intelligence

Another possibility would be to create by legislation a new form of privilege such as a national security confidentiality privilege that would

---

69 *R. v. Scott* [1990] 3 S.C.R. 979
70 *Unnamed Person v. Vancouver Sun* 2007 SCC 43 at para 29.
71 *R. v. Khela* [1996] Q.J. no. 1940 discussed in part 6 in the full paper.

apply to CSIS material or some subset of CSIS material obtained from foreign agencies or to material that was shared between CSIS and the RCMP for co-ordination purposes. The Courts have often been reluctant to recognize new class claims of privilege. The Court has rejected a class privilege with respect to private records in sexual assault cases on the basis that such records can in some instances be relevant in criminal proceedings and that a class privilege would conflict with the accused's right to full answer and defence.[72] Similar concerns would apply to any new class privilege claim based on concerns about the harms to national security and international relations in disclosing intelligence. Some leading commentators doubt whether any new class privilege will be created and argue that "the self-interest of Ministers of government in asserting a class claim is evident and warrants close scrutiny."[73]

Any new national security privilege would have to be subject to the innocence at stake exception to be consistent with the Charter. If a new privilege was held to be less weighty than police informer or solicitor client privilege, it could also be subject to a broader exception to recognize the accused's right to full answer and defence. Both the innocence at stake and full answer and defence exceptions to privilege may be particularly broad in terrorism investigations. Terrorism investigations may involve far-reaching questions about the nature of the accused's associations with others within and outside of Canada. In addition, they may rely on human sources who may have been paid or protected by the state or who may be implicated in crimes. Some of this information might have to be disclosed even if a new privilege was created. It will simply not be possible to return to the pre-1982 days of an absolute privilege on broad national security grounds. Any new privilege to protect intelligence from disclosure would likely have to be created by statute and carefully tailored to apply to material whose disclosure would be particularly damaging. A class privilege would, however, have the advantage of providing the greatest amount of *ex ante* security that information covered by the privilege would not be disclosed. Even with respect to such a new class privilege, however, there would be an innocence at stake exception.

4) Case by Case Privilege to Protect Intelligence

A less drastic alternative to a new class privilege to shelter intelligence from disclosure would be a case by case privilege. It is possible that such

---

72 *A (L.B) v. B(A)* [1995] 4 S.C.R. 536

73 John Sopinka et al *The Law of Evidence* (Toronto: Butterworths, 1999) at 15.39.

a privilege might apply to information obtained by Canadian security intelligence agencies from foreign agencies and confidential sources on the basis that they constitute 1) communications originating in a confidence that they not be disclosed 2) confidentiality is essential to the full and satisfactory maintenance of the relation between the parties 3) the relation must be fostered and 4) the injury caused to the relation must be greater than the benefit of the correct disposal of the litigation.[74]

The privilege would again have to be reconciled with the accused's right to full answer and defence. Even in the private law context, the Court has rejected an all or nothing approach to privilege and held that disclosure of private records may be necessary in some cases.[75] In the context of private records in sexual assault cases, the Supreme Court also recognized that a case by case privilege approach would not address the main policy concerns about assuring complainants that their private records would never be disclosed.[76] A similar conclusion could be applied in the national security context. Even under a privilege approach, it would not be possible to assure foreign agencies, CSIS or CSIS informers that a disclosure order would never be made. [77]As will be seen, in the next section, the Attorney General of Canada already maintains the ability to issue a certificate under s.38(13) of the *Canada Evidence Act* (CEA) and/or to drop a prosecution in cases where a court has found disclosure of national security material to be necessary. Ultimately, this may be the only absolutely certain means to prevent the disclosure of intelligence.

5) Summary

The expansion of existing privileges such as the police informer privilege or the creation of a new privilege could possibly address problems with the extent of disclosure because *Stinchcombe* disclosure obligations do not apply to information protected by evidentiary privileges. Nevertheless, the certainty produced by such reforms in protecting intelligence from disclosure may be overestimated. Any new privilege will present its own threshold issues and there may be litigation about whether particular pieces of intelligence are covered by any privilege. Courts have been

---

74 8 Wigmore *Evidence* (McNaughton Rev. 1961) s 2285

75 *M (A) v. Ryan* [1997] 1 S.C.R. 157 at para 33. The Court stressed that the case for disclosure would be easier to make in a criminal case where the accused's liberty was at stake. Ibid at para 36.

76 *A (L.B) v. B(A)* [1995] 4 S.C.R. 536 at para 77.

77 The prohibition on the disclosure of confidential sources or covert agents of CSIS in s.18(1) of the CSIS Act is subject to s.18(2) which contemplates disclosure as required by law and for enforcement and prosecution reasons.

hesitant to recognize any new class privilege. The assertion of a case by case privilege will require litigation and will not afford certainty to CSIS, its foreign partners or CSIS informers that disclosure will never occur. It may be difficult to determine whether a case by case privilege applies without knowing the value of the information in the criminal trial. Even if a class privilege applies, all privileges must allow an innocence at stake exception. The determination of whether innocence or full answer and defence is at stake is a matter best decided by the trial judge.

Although a broadened police informer or state secrets privilege would be rationally connected to important objectives with respect to the keeping of secrets, it could be found to be a disproportionate restriction on the accused's Charter rights to disclosure and full answer and defence. The courts have refused to allow even the most established and cherished privileges to be absolute. Any privilege must be subject to at least an innocence at stake exception to be consistent with the Charter. Courts could also find that the existing regime under s.38 of the CEA, including the Attorney's General ability to block disclosure under s.38.13, constitute a less rights restrictive approach to the creation of new privilege. The section 38 procedure allows for a balancing of competing interests in disclosure and secrecy on the facts of the particular case.

Legislative restrictions on disclosure or production or any attempt to create new privileges are not a panacea to resolving the tensions between secret intelligence and evidence and other relevant information that must be disclosed in court. They would be vulnerable to Charter challenge. It is not clear whether *Mills* [78]is applicable in the national security context because the Court upheld restrictions on disclosure and third party production in that case on the basis that Parliament had reasonably reconciled the competing Charter rights of the accused and the complainant in sexual assault cases. It is not clear that terrorism cases would involve competing rights in the same manner as in *Mills*.

Even if legislation restricting disclosure or production or creating a new privilege was upheld under the Charter, there could be much litigation about the precise meaning of the legislation and its relation to Charter standards. Although the state's interests in non-disclosure are particularly strong in the national security context, there is also a particular danger that non-disclosure could increase the risk of miscarriages of justice in terrorism prosecutions. The non-disclosure of even apparently innocuous

78 [1999] 3 S.C.R. 668.

information about a suspected terrorist cell could deprive the accused of important resources to challenge the manner in which the state investigated the case and its failure to consider alternative understandings of ambiguous events and associations that could point in the direction of the innocence of the accused. Intelligence could also be relevant to the credibility of human sources and informants.

The courts will be concerned about the cumulative effects of non-disclosure when deciding whether restrictions on disclosure or production or a new statutory privilege violates the accused's right to full answer and defence.[79] Even if legislative restrictions on *Stinchcombe* or new and expanded privileges were upheld, they could require the judge to examine information sought to be exempted from disclosure item by item. This process would create uncertainty and delay. Although intended to decrease the need for the Attorney General of Canada to seek non-disclosure orders under s.38 of the CEA, legislative restrictions on disclosure or production or the attempt to create new privileges could add another layer of complexity, delay and adversarial challenge to terrorism prosecutions. They may duplicate and overlap with procedures already available under s.38 of the CEA to obtain non-disclosure orders. It may be better to reform the s.38 process to make it more efficient and more fair than to attempt to construct new and potentially unconstitutional restrictions on disclosure.

VI. Judicial Procedures To Obtain Non-Disclosure Orders

Although it is possible to attempt to lay out categorical restrictions on the disclosure of intelligence through legislative restrictions and the expansion and creation of privileges, it is also possible to obtain court orders under section 37 or 38 of the CEA that the public interest in non-disclosure outweighs the public interest in disclosure on the facts of a particular case. The *ex ante* legislative approach discussed in the last section may at first appear to provide greater certainty that intelligence will not be disclosed, but as suggested above, even the most robust privileges and legislative restrictions will be subject to some exceptions to ensure fair treatment of the accused. The techniques examined in this section are tailored to the facts of specific cases.

The procedures used to obtain non-disclosure orders vary considerably depending on the nature of the public interest in non-disclosure that is

79 *R. v. Taillefer* [2003] 3 S.C.R. 307.

asserted. Specified public interests in non-disclosure, as well as common law privileges, can be determined by superior court criminal trial judges under s.37 of the CEA. In contrast, national security confidentiality (NSC) claims under s.38 that the disclosure of information would injure national security, national defence or international relations must be determined by specially designated Federal Court judges. The trial judge must accept any non-disclosure order by the Federal Court, but also retains the right to order whatever remedy is required to ensure the fairness of the trial. A number of case studies in the longer paper, the *Kevork* and ongoing *Khawaja* terrorism prosecutions and the *Ribic* hostage-taking prosecution reveal how separate s.38 litigation can delay and fragment prosecutions. By requiring non-disclosure issues to be decided by two different courts, the Canadian approach runs the risks that intelligence might be disclosed when such disclosure is not necessary for a fair trial or that it might not be disclosed when it is necessary for a fair trial. As will be the seen, the Canadian approach has not been followed in other democracies.

1) Section 37 of the CEA and Specified Public Interest Immunity

Section 37 of the CEA provides a procedure for a Minister of the federal Crown or another official to apply to a court for an order that a specified public interest justifies non-disclosure or modified disclosure of certain material. Such applications can, in criminal matters, be heard by the superior court trial judge and be subject to appeal to the provincial Court of Appeal and the Supreme Court, but there is some precedent for allowing a trial to proceed, if possible, while these separate appeal rights are exercised.[80] . This procedure has been used in some cases to protect the identity of police informers and ongoing investigations.

Section 37 allows superior court trial judges in terrorism prosecutions, to make case-by-case decisions about disclosure. The judge determines whether the disclosure of the information would encroach upon the specified public interest. If so, the judge then determines whether the public interest in disclosure nevertheless outweighs the public interest that will be harmed by disclosure. The judge can place conditions on

---

80 *R. v. McCullogh* (2001) 151 C.C.C.(3d) 281 (Alta.C.A.); *R. v. Archer* (1989) 47 C.C.C.(3d) 567 (Alta.C.A.)

the disclosure including redactions and summaries to limit the harm of disclosure or requiring the prosecution to make an admission of fact as the price for non-disclosure of information.[81]

Section 37.3 also allows trial judges to fashion whatever appropriate and just remedy is required to protect the accused's right to a fair trial. Section 37.3 requires the trial judge, when fashioning such remedies, to comply with a non, or partial, disclosure order previously made under s.37. This raises the possibility that trial judges may be unable to revise their own previous non-disclosure orders under s.37, even if they conclude later in the proceedings that non-disclosure would adversely affect the right to a fair trial. As will be seen in the next section, judges in other countries have the ability to revise non-disclosure orders in light of developments during the trial. The ability of trial judges to revisit and revise non-disclosure orders builds an important flexibility into the system that can benefit both the accused and the prosecution. The accused could gain disclosure to information that appears necessary for a fair trial because of developments in the criminal trial. The prosecution retains the right to halt the prosecution in order to protect the information from disclosure.

2) Section 38 of the CEA and National Security Confidentiality

Section 38 of the CEA provides a complex procedure to govern the protection of information that if disclosed would harm national security, national defence or international relations. Unlike s.37 which allows superior court trial judges to make decisions, all non-disclosure claims under s.38 must be decided by the Federal Court. The trial judge must accept this decision, but can order any remedy that is necessary to protect the fairness of the trial as a result of the non-disclosure.

Justice system participants, including the accused, have obligations under s.38.01 to notify the Attorney General of Canada if they plan to disclose "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security" or "information relating to international relations or national

---

81 Section 37(5) provides: "If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information."

defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard."[82] This notification requirement is designed to give the Attorney General advance notice and "to permit the government to take pro-active steps in the appropriate circumstances" and to minimize the need for "proceedings to come to a halt while the matter was transferred to the Federal Court for a determination."[83] Such a mid-trial invocation of s.38 is precisely what happened in the *Ribic* hostage taking trial, leading to the declaration of a mistrial. At the same time, however, "the scheme continues to permit the government to invoke the provisions of the CEA during the course of the hearing".[84] This means that s.38 issues could still arise during a criminal trial. For example, the Crown may make late disclosure accompanied by a s.38 claim. Another example is that the accused could, as in *Ribic*, propose to call a witness to testify about sensitive or potentially injurious information. Denying the accused the right to call a witness with relevant information could violate the accused's right to full answer and defence. As occurred in *Ribic*, extensive litigation might be necessary in the Federal Court during the middle of a criminal trial.

Under s.38.03, the Attorney General of Canada may "at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure" of information which is prohibited from disclosure under s.38.02 because a notice has been given under s.38.01. Section 38.031 contemplates disclosure agreements among the Attorney General and persons who have given notice under s.38.01. If no disclosure agreement is made between the Attorney General and the accused, a hearing will take place before a specially designated judge of the Federal Court to determine whether there should be disclosure, modified or partial disclosure or non-disclosure of the material in dispute.

i. Ex Parte Submissions, Special Advocates and Non-Disclosure Undertakings with Defence Counsel

Both the Attorney General of Canada and the accused can make *ex parte* submissions to the judge. The accused's own lawyer can make *ex parte* submissions to the Federal Court. [85] The accused could reveal their

---

82 CEA s.38.01
83 Department of Justice Fact Sheet "Amendments to the Canada Evidence Act"
84 ibid
85 *Canada (Attorney General) v. Khawaja* 2007 FCA 342 at paras 34, 35.

planned defences to the Federal Court without disclosing them to the prosecutor or the trial judge. Defence counsel may, however, be reluctant or unable to do so at the pre-trial stage and without having seen the undisclosed information.

The ability of the Attorney General to make *ex parte* submissions has been upheld from Charter challenge, but with an indication that security cleared lawyers could, if necessary, be appointed to provide adversarial challenge. [86] The appointment of such lawyers would not be governed by a new law providing for special advocates in security certificate cases.[87] A security cleared lawyer will require time to become familiar with the case and this will likely cause further delay in s.38 proceedings. At the end of the day, the security cleared lawyer may never be as familiar with the case as the accused's own lawyer. Special advocates may play an important role in providing adversarial challenge to the government's claim of secrecy, but they will have more difficulty protecting the accused's right to full answer and defence given limitations on the security cleared lawyer's familiarity with the case and perhaps his or her ability to consult the accused and take instructions about the secret information. [88] The special advocate in a s.38 proceeding, however, would only be representing the accused's interest in full disclosure and challenging the government's claim for secrecy. The special advocate would not be attempting to challenge secret evidence as is the case under immigration law security certificates.

In *R. v. Malik and Bagri,* the accuseds' defence lawyers were able to examine undisclosed material on an initial undertaking that the information would not be disclosed to their clients. This allowed the lawyers most familiar with the case to determine the relevance and usefulness of the information and then to present focused and informed demands for disclosure.[89] The present alternative under s.38 is that defence lawyers must make broad and un-informed demands for disclosure because they have not seen the information.

---

86 *Canada (Attorney General) . v. Khawaja* 2007 FC 463 aff'd without reference to the ability to appoint security-cleared lawyers 2007 FCA 388.

87 *An act to amend the Immigration and Refugee Protection Act* S.C. 2008 c.3. But see *Khadr v. The Attorney General of Canada* 2008 FC 46 and *Canada (Attorney General) v. Khawaja* 2008 FC 560 appointing a security cleared lawyer to assist in s.38 proceedings.

88 Under the immigration law amendments governing special advocates, any consultation by the security cleared lawyer with others about the case after the security cleared lawyer has seen the information would have to be authorized by the judge.

89 Michael Code "Problems of Process in Litigating Privilege Claims" in A. Bryant et al eds. *Law Society of Upper Canada Special Lectures The Law of Evidence* (Toronto: Irwin Law, 2004).

ii. Reconciling the Interests in Secrecy and Disclosure

Under s.38.06, the Federal Court judge determines first whether the disputed information would be injurious to international relations, national defence or national security. If not, the information can be disclosed. If the information is injurious, the judge considers the public interest in both disclosure and non-disclosure. The judge also has the option of placing conditions on disclosure including authorizing the release of only a part or a summary of the information or a written admission of fact relating to the information. The emphasis under this section is on a flexible reconciliation of competing interests in disclosure and secrecy.[90] As such it accords with the approaches taken in other democracies.

Section 38(6) defines the harms of disclosure broadly as material whose disclosure "would be injurious to international relations or national defence or national security." The Senate Committee that reviewed the *Anti-Terrorism Act* recommended that the precise harms to international relations be enumerated more precisely. Such a harms based approach could also be applied to the vague terms of national security and national defence.[91] For example, section 38 could be amended to specify the harms of disclosure to vulnerable sources and informers, ongoing operations, secret methods of operation and with respect to undertakings given to foreign partners or at least to list such harms as examples of harms to national security, national defence or international relations. Such a harm based approach might help prevent the overclaiming of national security confidentiality. It might also help restore public confidence about the legitimate uses of secrecy.

---

90 Section 38(6) provides: "If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information."

91 In his s.38 decision with respect to the Arar Commission, Justice Noël attempted the difficult task of defining the operative terms of s.38. He suggested that national security the "means at minimum the preservation in Canada of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms" *Canada v. Commission of Inquiry* 2007 FC 766 at para 68. National defence includes "all measures taken by a nation to protect itself against its enemies" and "a nation's military establishment". International relations "refers to information that if disclosed would be injurious to Canada's relations with foreign nations." Ibid at paras 61-62. The vagueness of the term national security is notorious. M.L. Friedland for example prefaced a study for the McDonald Commission with the following statement: "I start this study on the legal dimensions of national security with a confession: I do not know what national security means. But then, neither does the government." M.L. Friedland *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980) at 1.

iii. Appeals under Section 38

The accused or the Attorney General has the ability under s.38.09 to appeal a decision made under s.38.06 to the Federal Court of Appeal. Although an appeal must be brought within 10 days of the order, there are no time limits on when the appeal must be heard or decided. The Federal Court of Appeal's decision is not necessarily final as the parties have 10 days after its judgment to seek leave to appeal to the Supreme Court. These provisions create a potential for national security confidentiality issues to be litigated all the way to the Supreme Court before a terrorism trial even starts or during the middle of a criminal trial.

iv. Attorney General Certificates under Section 38.13

The Attorney General of Canada can personally issue a certificate under s.38.13 to prohibit the disclosure of information ordered disclosed by the court. This certificate is subject to judicial review, but only to determine if the information was received from a foreign entity or relates to national security or national defence.

v. The Role of the Trial Judge under Section 38.14

Under s.38.14, the trial judge must respect any non or partial disclosure order made by the Federal Court under s.38.06 or an Attorney's General certificate under s.38.13. At the same time, the trial judge can also issue any order that he or she considers appropriate to protect the accused's right to a fair trial including a stay of proceedings on all or part of an indictment or finding against a party.

vi. Changing Approaches to National Security Confidentiality

Attitudes towards national security confidentiality have evolved considerably over the last 25 years. Until 1982, a federal Minister could assert an unreviewable claim to protect information on national security grounds. In the early 1980's, courts were reluctant even to examine material when national security was invoked.[92] There was considerable concern that the disclosure of even innocuous information could harm national security, national defence and international relations through the mosaic effect because of the abilities of Cold War adversaries to put

---

92 *Re Goguen* (1984) 10 C.C.C.(3d) 492 at 500 (Fed.C.A.).

together the pieces of information.[93] In recent years, however, courts have rightly been more skeptical about claims of the mosaic effect and have indicated that Canada should seek permission from allies to allow the disclosure of information under the third party rule.[94] Concerns have been raised that the overclaiming of national security confidentiality causes delays and creates cynicism about legitimate secrets.[95] The third party rule remains a critical component of legitimate claims of national security confidentiality, but it should not be invoked in a mechanical manner. It only applies to information that has been received in confidence from a third party and should not be stretched to apply to information that either was in the public domain or was independently possessed by Canadian agencies. Canadian agencies should also generally seek the consent of the originating agency to the use of information covered by the third party rule. Seeking amendments to caveats to request permission for further disclosure is perfectly permissible. It demonstrates Canada's respect for the caveat process and the third party rule.

vii. Summary

The 2006 RCMP/CSIS MOU contemplates the use of s.38 of the CEA as a means to protect intelligence passed from CSIS to the RCMP from disclosure in criminal and other proceedings. Nevertheless, s.38 imposes a time consuming and awkward process for reconciling the need for disclosure with the need for secrecy. It places obligations on justice system participants including the accused to notify the Attorney General of Canada about a broad range of sensitive and potentially injurious information. Section 38 applies to a very broad range of information that if disclosed would be injurious to international relations, national defence or national security. Thought should be given to narrowing the range of information covered by s.38 and to specifying the precise and concrete harms of disclosure of information. Providing specific examples of harms to national security and international relations could help discipline the process of claiming national security confidentiality and respond to the problem of overclaiming secrecy. In addition, it appears from both the *Ribic* and *Khawaja* prosecutions that prosecutors need to be reminded that they need not seek s.38 non-disclosure orders if the information is clearly irrelevant to the case and of no assistance to the accused.

---

93 *Henrie v. Canada* (1988) 53 D.L.R.(4th) 568 at 580, 578 affd 88 D.L.R.(4th) 575 (Fed.C.A.).

94 *Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766; *Khawaja v. Canada* 2007 FC 490.

95 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at pp 302, 304.

The ability of the Attorney General to make *ex parte* representations to the s.38 judge is only partly compensated for by the ability of the accused to make *ex parte* representations. The value of the accused's *ex parte* representations will be attenuated by the fact that the accused has not seen the secret information that is the subject of the dispute. Several decisions by the Federal Court Trial Division [96]have opened up the possibility of appointing a security cleared lawyer who, unlike the accused's lawyer, will be able to see the information and provide adversarial challenge to the *ex parte* submissions made by the Attorney General for non-disclosure under s.38. The use of such security cleared lawyers has not yet been approved by the Federal Court of Appeal. [97] In any event, the appointment of such a person could delay the proceedings. Moreover, a special advocate or other security cleared lawyer will never be as familiar with the accused's case and the possible uses of the undisclosed information as the accused's own lawyers.

Although the Federal Court has been given explicit flexibility under s.38.06 in reconciling competing interests in secrecy and disclosure that include editing and summarizing information as was done in *Khawaja*, creating substitutes for classified information such as the edited transcript used in *Ribic* and making findings against the parties, the ultimate effect of these orders will depend on the judgment made by the criminal trial judge under s.38.14 about the effects of the non-disclosure order on the accused's right to a fair trial. There is a danger that the Federal Court judge may not be in the best position to know the value of information to the accused given that the accused will not have access to the information and the trial often will not have started. In turn, there is a danger that the criminal trial judge may not be in the best position to know the effects of non-disclosure of information on the fairness of the trial. There is no specific mention in either the Attorney General's powers under s.38.03 or the Federal Court judge's powers under s.38.06 of an ability to make an exception to a non-disclosure order that would allow a trial judge to

---

96 *Canada v. Khawaja* 2007 FC 463; *Khadr v. The Attorney General of Canada* 2008 FC 46; *Canada v. Khawaja* 2008 F.C. 560.

97 In upholding the constitutionality of s.38, the Federal Court of Appeal made no mention of the ability of appoint security cleared lawyers to assist in such proceedings. *Khawaja v. Attorney General of Canada* 2007 FCA 388 at para 135. In his concurring judgment, Pelletier J.A. cast doubt on the ability of the court to order that secret information be disclosed to even a security-cleared lawyer when he concluded that under s.38.02 that "the Court could not order and the Attorney General could not be compelled to provide, disclosure of the Secret Information to Mr. Khawaja, or anyone appointed on his behalf in any capacity." Ibid at para 134.

see the undisclosed information.[98] The blind spots of both the Federal Court judge and the trial judge run the risk of causing on the one hand, stays of proceedings that are not necessary to protect the fairness of the trial or, on the other hand, trials that are not fully fair because of the non-disclosure of information that the Federal Court and trial judge did not realize was necessary for the accused to make full answer and defence.

Although an innovative approach was devised between counsel in the Malik and Bagri prosecution in order to avoid Federal Court proceedings, the ultimate dispute resolution process where no agreement is reached involves separate proceedings in Federal Court. Section 38 proceedings will delay and fragment the criminal trial as seen in the *Kevork*, *Ribic* and *Khawaja* case studies discussed in the full paper. They will also not resolve all the disputes as the Attorney General can still claim common law privilege and invoke s.37 of the CEA. In turn, the accused can and will seek a remedy for partial or non-disclosure under s.38.14 of the CEA when the matter returns to the trial judge. As will be seen, other democracies have not duplicated Canada's cumbersome two court process for resolving national security confidentiality claims.

VII. Disclosure and Secrecy in other Jurisdictions
1) The United States

The *Classified Information Procedures Act*[99] was enacted in 1980. It has already influenced s.38 of the CEA in terms of early notification requirements and giving judges a flexible array of options in reconciling the interests in secrecy and disclosure through editing, summaries and substitutions. Nevertheless, it still differs from s.38 in a number of respects. CIPA allows questions of national security confidentiality to be decided by the Federal Court judge who tries terrorism offences. It contemplates that national security confidentiality issues will be factored into general case management questions whereas s.38 of the CEA delegates national security confidentiality issues to a separate court to decide. The trial judge under CIPA is able to revisit initial non-disclosure orders, whereas the trial judge in Canada must accept non or partial disclosure orders made by

98 Section 38.05 of the CEA seems to contemplate that a trial judge could make a report to a Federal Court hearing the matter, but does not on its face contemplate a Federal Court judge making a report to a criminal trial judge in order to inform the latter's decision under s.38.14. The Federal Court judge could require the Attorney General of Canada under s.38.07 to notify the trial judge about a non-disclosure order, but this section does not authorize the lifting of the non-disclosure order for the trial judge.

99 PL 96-456

the Federal Court before trial while being able to make necessary orders to protect the fairness of the trial in light of the non-disclosure order.

Another difference between CIPA and the CEA is that CIPA has been interpreted to allow the trial judge in appropriate cases to require defence lawyers to obtain security clearances as a condition of having access to classified information.[100] This procedure has, however, been challenged as restricting the ability of the defence lawyer to reveal the classified information to his or her client and affecting choice of counsel. Nevertheless, the defence lawyer can generally be expected to be in a better position to know the utility of the information to the defence than a special advocate.

Finally, CIPA attempts to manage the inevitable tensions within government between the demands by intelligence agencies for secrecy and the interests of prosecutors in disclosure. It provides several potentially valuable feedback mechanisms so that the government, including legislative committees, is aware of the consequences of overbroad claims of either secrecy or overbroad demands for disclosure. In one post 9/11 terrorism prosecution, the government decided to declassify intercepts 3 days before trials. In response, commentators have recommended that classification of relevant information be reviewed once a prosecution has been commenced in order to respond to chronic overclassification.[101]

2) The United Kingdom

The United Kingdom, like the United States, allows trial judges to make and revisit determinations of national security confidentiality or what they call public interest immunity. The British experience indicates that questions of public interest immunity cannot be divorced from the scope of disclosure obligations. Broad common law disclosure requirements, similar to *Stinchcombe*, have been replaced by narrower statutory disclosure requirements that do not require the disclosure of unused material that is not reasonably capable of undermining the Crown's case or assisting the case for the accused.[102] Unused incriminating intelligence does not have to be disclosed.

---

100 *United States v. Bin Laden* 58 F.Supp.2d 113. To the same effect see *United States v. Al-Arian* 267 F.Supp 2d 1258.

101 Serrin Turner and Stephen Schulhofer *The Secrecy Problem in Terrorism Trials* (New York: Brennan Centre, 2005) at 27, 80.

102 *R v Ward* [1993] 1 WLR 61; *Criminal Procedure and Investigations Act 1996* s.3 as amended by *Criminal Justice Act 2003; R. v. H and C* [2004] UKHL 3 at para 17.

Both the House of Lords in *R. v. H. and C*[103] and the European Court of Human Rights in *Edwards and Lewis*[104] have placed considerable emphasis on the ability of the trial judge to revisit initial decisions that the disclosure of sensitive information is not required in light of an evolving trial including the defence's case and defence cross-examination of witnesses. Although the courts have approached the trial judge's ability to revisit public interest immunity decisions mainly from the perspective of ensuring fairness to the accused, it also has an efficiency dimension because it allows the trial judge to make early non-disclosure orders knowing that, if necessary, they can be revisited. The trial judge can examine the undisclosed material and order non-disclosure, but revisit that order on his or her own motion as the trial evolves in order to ensure a fair trial. This approach is not an option under the two court structure of s.38 of the CEA.

The British have some experience with the use of special advocates in public interest immunity proceedings. At the same time, British courts have warned that the use of special advocates can cause delay and that the special advocate may be unable to take meaningful instructions from the accused after the special advocate has seen the secret and undisclosed information.[105]

3) Australia

Australia has extensive recent experience with claims of national security confidentiality. Its Law Reform Commission prepared an excellent report on the subject[106] and it enacted new legislation to govern national security confidentiality in 2004. The *National Security Information Act*[107] has been controversial and its constitutionality was unsuccessfully challenged.[108] Criticisms have revolved around the Attorney General's power with respect to the initial editing of evidence, the primacy given in the statute to national security over fair trial concerns and the Attorney General's power to require security clearances for defence lawyers. On all these issues, the Australian Law Reform Commission would have given the judiciary more power to make its own determinations of the appropriate means to reconcile secrecy with disclosure.

---

103 [2004] UKHL 3
104 Judgment of October 27, 2004.
105 *R v. H and C* [2004] UKHL 3 at para 22.
106 Australian Law Reform Commission *Keeping Secrets The Protection of Classified and Security Sensitive Information* (2004)
107 *National Security Information (Criminal and Civil Proceedings) Act, 2004*
108 *R. v. Lodhi* [2006] NSWSC 571 at para 85

The Australian Act, like s.38, encourages flexibility in reconciling disclosure with secrecy through the use of devices such as summaries and substitutions. The Law Reform Commission would have provided an even broader menu of alternatives including the ability of witnesses to give anonymous testimony, testimony by way of video or closed circuit television and testimony by written questions and answers. This latter alternative allows vetting for secret information and was used in Canada in the *Ribic* case discussed in the full paper.

The Australian *National Security Information Act* has a number of distinguishing features from the Canadian approach. It gives the trial judge the power to decide issues involving national security confidentiality. It allows for pre-trial conferences to manage the many problems arising from disclosure of national security information. It provides the opportunity for defence lawyers to obtain security clearances. Finally, it allows the trial judge to re-visit issues of disclosure as the trial evolves. The Australian act has already been tested in one completed terrorism prosecution.[109] The judge who presided at that trial has subsequently commented in an extra-judicial speech that:

> There is likely to be an increasing presence of ASIO agents in relation to the collection of evidence to be used in criminal trials involving terrorism. Yet our intelligence agency, for all its skill in intelligence gathering, is perhaps not well equipped to gather evidence for a criminal trial; and its individual agents are not well tutored in the intricacies of the criminal law relating to procedure and evidence. Moreover, the increasing presence of our intelligence agency in the investigating and trial processes brings with it an ever increasing appearance of secrecy which, if not suitably contained, may substantially entrench upon the principles of open justice and significantly dislocate the appearance and the reality of a fair trial.[110]

These comments affirm that establishing a workable relationship between intelligence and evidence is a critical priority for future terrorism trials. They also warn that the need to maintain the secrecy of intelligence will place strains on the criminal trial process.

---

109 See the *R. v. Lodhi* case study in the full paper.

110 Justice Whealy "Terrorism" prepared for a conference for Federal and Supreme Court Judges, Perth 2007.

4) Summary

The above foreign experience provides valuable information for reforming s.38 of the CEA so as to better manage the relationship between secret intelligence and evidence and information that should be disclosed to ensure a fair trial. All three foreign jurisdictions allow the trial judge to decide questions of non-disclosure. This allows issues of non-disclosure to be integrated with pre-trial case management. Even more importantly, it allows a trial judge who has seen the secret material to re-visit an initial non-disclosure order in light of the evolving issues at the criminal trial, a fact that has been emphasized by both the House of Lords and the European Court of Human Rights[111] as essential for the fair treatment of the accused. The ability to revisit non-disclosure decisions also has the potential of allowing the trial to proceed efficiently and not become bogged down in pre-trial disclosure battles.

The comparative experience also reveals some interesting procedural innovations. British courts have allowed the use of special advocates while also indicating some awareness that delay may be caused as the special advocate becomes familiar with the case and that ethical problems may emerge from restrictions on the special advocate's ability to take instructions from the accused after the special advocate has seen the secret information. Both the United States and Australia provide for the alternative of defence counsel being able to examine the sensitive material contingent on obtaining a security clearance and an undertaking that classified material will not be shared with the client. Although the process of obtaining a security clearance could cause delay, it also allows the person most familiar with the accused's case to have access to secret material in order to make arguments about whether its disclosure is necessary for a fair trial. Security clearance requirements adversely affect counsel of choice, but also encourage the use of experienced defence lawyers in terrorism trials. The Australian experience also suggests that the creative use of testimony by closed circuit television can help in reconciling competing interests in disclosure and fairness when members of foreign or domestic intelligence agencies testify in terrorism prosecutions.

---

111 *R v. H and C* [2004] UKHL 3; *Edwards and Lewis v. United Kingdom* Judgment of October 27, 2004.

Conclusions

A) The Evolving Relation Between Intelligence and Evidence

What might be seen as intelligence at one point in time, might be evidence at another point in time.[112] There is a need to re-examine traditional distinctions between intelligence and evidence in light of the particular threat and nature of terrorism and the expanded range of crime associated with terrorism. Terrorism constitutes both a threat to national security and a crime. Although espionage and treason are also crimes, the murder of civilians in acts of terrorism such as the bombing of Air India Flight 182 demands denunciation and punishment that can only be provided by the criminal law. The same is true with respect to intentional acts of planning and preparation to commit terrorist violence. Although attempts and conspiracies to commit terrorist violence have always been serious crimes, the 2001 *Anti-Terrorism Act* has changed the balance between intelligence and law enforcement matters by creating a wide range of terrorist offences that can be committed by acts of preparation and support for terrorism which will occur long before actual acts of terrorism. The prevention of terrorism must remain the first priority, but wherever possible, those who plan, prepare or commit acts of terrorism should be prosecuted and punished. Both Canada's domestic laws and its international obligations demand the prosecution and punishment of terrorism.

There is some concern that CSIS continues to resist the need to gather information in counter-terrorism investigations to evidentiary standards. In contrast, MI5 has the disclosure of information relating to the prevention of serious crime and for criminal proceedings as part of its statutory mandate and it has stated that it will gather some evidence relating to surveillance to evidential standards. With respect to Air India, CSIS information in the form of wiretaps and witness interviews could have been some of the most important evidence in the case, but, unfortunately, they were destroyed in part because of CSIS's understanding of its role as a security intelligence agency that does not collect or retain evidence. The failure to retain and disclose such material can harm both the state's interests and those of the accused.

Although CSIS is not mandated to be a law enforcement agency, s.19(2)(a) of the *CSIS Act* contemplates that it will collect information that will

112 Fred Manget "Intelligence and the Criminal Law System" (2006) 17 Stanford Law and Public Policy Review 415 at 421-422.

have significance for police and prosecutors for investigations and prosecutions and that it may disclose such information to police and prosecutors. There has never been a statutory wall between intelligence and evidence or between CSIS and the police in Canada. Section 18(2) of the *CSIS Act* also contemplates that the identity of confidential sources and covert agents may also be disclosed as required in criminal investigations and prosecutions. Section 12 of the *CSIS Act* should not be taken as authorization for the destruction of information that was collected in accordance with its requirement that information only be collected to the extent that it is strictly necessary. Stark contrasts between the reactive role of the police in collecting evidence and the proactive role of CSIS in collecting intelligence drawn by the Pitfield committee and others have not been helpful. The *CSIS Act* never contemplated an impenetrable wall between intelligence and law enforcement. Although this should have been clear in 1984, it should have been beyond doubt after the Air India bombing, let alone 9/11.

B) The Case Studies: Canada's Difficult Experience with Terrorism Prosecutions

The case studies examined in the full study[113] raise doubts about whether Canadian practices and laws are up to the demands of terrorism prosecutions, particularly as they relate to the relation between intelligence and evidence and the protection of informants. The Parmar prosecution in Hamilton, the Khela prosecution in Montreal and the Atwal prosecution in British Columbia all collapsed because of difficulties stemming from the requirements that the state make full disclosure of relevant information including the identity of confidential informants. The disclosure of the affidavit used to obtain the CSIS wiretap in Atwal disclosed inaccuracies and led to the resignation of the first director of CSIS. The disclosure of the affidavit in the Parmar prosecution also revealed inaccuracies that would have allowed the defence lawyers to cross-examine those who signed the affidavit. Both the Parmar and Atwal cases involved the then novel procedure of giving the accused access to affidavits used to obtain wiretaps and it is hoped that wiretap practice has improved and adjusted to the demands of disclosure. There is an ability to edit affidavits to protect public interests in non-disclosure, but the information that is edited-out cannot be used to support the validity of the warrant. Similarly, witness protection programs have become

113 Kent Roach "The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Bteween Intelligence and Evidence" in vol 4 of Research Studies.

more formalized and may have improved since the Parmar and Khela prosecutions collapsed in part because of a reluctance of informers to have their identities disclosed to the accused because of fears for their safety. Nevertheless, these cases underline the likelihood of disclosure when judged necessary for the accused to make full answer and defence and the importance of protecting informers when intelligence is used as evidence in terrorism prosecutions.

The Kevork and Khawaja terrorism prosecutions, as well as the Ribic hostage- taking prosecution, all demonstrate a different type of problem. They were all delayed and disrupted by separate national security confidentiality proceedings in the Federal Court. Section 38 places strains on the prosecution process because it requires the Federal Court to make decisions about non-disclosure without having heard the evidence in the criminal case. In turn, it places strains on a criminal trial judge who is in the difficult, if not impossible, position of deciding whether non or partial disclosure with respect to information that the accused and even the trial judge have not seen will nevertheless adversely affect the accused's right to a fair trial and full answer and defence.

The awkward s.38 procedure was only avoided in the Malik and Bagri prosecution because the experienced counsel on both sides were able to agree on an innovative approach that included inspection of CSIS material by the defence on initial undertakings that it not be shared with their clients. Without this procedure, one that may not be easily duplicated and could require defence lawyers to obtain security clearances, the Malik and Bagri prosecution could easily have been further delayed and perhaps even halted because of the litigation of s.38 issues. A stay of proceedings or another remedy might also have been entered as a response to CSIS's destruction of tapes and witness statements had the trial judge not decided to acquit the accused. In some respects, it was a minor miracle that the case reached verdict.

Attempts have been made to encourage pre-trial resolution of s.38 issues, but the *Ribic* case and the reality of late disclosure in complex cases including the *Khawaja* prosecution suggest that a terrorism prosecution could be beset by multiple s.38 applications and by multiple trips to the Federal Court and appeals to resolve these issues. The United Kingdom and the United States have much more experience with terrorism prosecutions than does Canada and it is noteworthy that they allow the trial judge to make non-disclosure decisions on the grounds of

national security confidentiality. This allows such issues to be integrated into overall trial-management issues and it allows the trial judge to revisit an initial non-disclosure issue should the evolving issues at trial suggest that fairness to the accused requires disclosure. At this point, the prosecution may face the difficult choice of whether to disclose the secret information or to halt the prosecution through a dismissal of charges or a stay of proceedings. This difficult decision, however, will not be made prematurely. It will only have to be made after a fully informed trial judge has decided that disclosure is necessary to ensure fairness towards the accused.

C) Front and Back-End Strategies for Achieving a Workable Relation Between Intelligence and Evidence

Intelligence can be protected from disclosure by not bringing prosecutions or by halting prosecutions, including through a non-disclosure order issued by the Attorney General of Canada under s.38.13 of the CEA. Nevertheless, such non-prosecution strategies are not attractive in the face of deadly terrorist plots that require prosecution and punishment. Leaving aside non-prosecution, there are two broad strategies available to deal with the challenges presented by the need to establish a workable relation between intelligence and evidence.

One broad strategy is front-end and involves changing the nature of secret intelligence to make it usable in criminal prosecutions. These changes would be directed at the practices of CSIS to ensure that where possible they collect intelligence to evidential standards in counter-terrorism investigations and that they consider source and witness protection should it become necessary to disclose the identity of confidential informants. It will also require co-operation between CSIS and the RCMP and other police forces involved in terrorism prosecutions so that Criminal Code procedures, especially with respect to wiretaps, are used when appropriate. The challenges of these front-end reforms, especially to CSIS and to foreign agencies that share information with Canada subject to caveats that the information not be disclosed, should not be underestimated.

The second strategy focuses on the back-end procedures that can be used in court to reconcile the need to keep secrets with the need to disclose material. They involve the rules governing disclosure and production obligations and evidentiary privileges. These reforms are

designed to shield intelligence and other material from disclosure in all cases. Such strategies may attract Charter challenges by limiting disclosure obligations across the board and they risk being held to be over-broad in a particular case. Fortunately, back-end strategies include better-tailored procedures to adjudicate claims of national security confidentiality on the facts of specific cases. It will be suggested that this process can be made more efficient and more fair by focusing on the concrete and specific harms of disclosure of secret information and by allowing trial judges to make, and when necessary to revise, non or modified disclosure decisions.

D) Front-End Strategies to Make Intelligence Useable in Terrorism Prosecutions

1. Collection and Retention of Intelligence With Regard to Evidential and Disclosure Standards

One important front-end strategy is for security intelligence agencies to have more regard for evidentiary and disclosure standards when they collect intelligence in counter-terrorism investigations. The likelihood of prosecution and the possible disclosure or use of some forms of intelligence as evidence has increased since CSIS was created in 1984. This is because the threat of terrorism has increased, disclosure and production standards have increased and many new crimes with respect to the support and financing of terrorism and preparation for terrorism have been created. It will be a rare counter-terrorism investigation where there is not some possibility of a crime being committed and a prosecution being appropriate. This may not necessarily be the case with counter-intelligence or counter-espionage investigations.

In some cases, intelligence agencies such as MI5 and ASIO consciously collect evidence to evidentiary standards in the expectation that their agents may be required to produce such material to the prosecution and to testify in court. The Malik and Bagri prosecutions, however, reveal that CSIS agents at that time did not collect or retain the fruits of their terrorism investigations to evidentiary standards or with a view to a prosecution. Although the acquittal avoided the need to fashion a remedy, the trial judge found that CSIS's failure to retain relevant material including not only the wiretaps but also notes of an interview with a key witness violated Malik and Bagri's rights under s.7 of the Charter. In terrorism investigations, CSIS and other intelligence agencies should constantly

evaluate the likelihood of a subsequent prosecution and the effect that a prosecution could have on secret intelligence. Where possible, they should collect and retain information to evidentiary standards.

Section 12 of the CSIS Act should not have prevented the retention of properly obtained information, but some clarification of s.12 is desirable to make clear that CSIS should retain properly obtained information when it may become relevant to criminal investigations and prosecutions. One option would be to abandon the requirement in s.12 that information and intelligence be collected with respect to activities that on reasonable grounds are suspected of constituting threats to the security of Canada only "to the extent that it is strictly necessary". Such an approach, however, would sacrifice values of restraint and privacy that are protected by the "strictly necessary" standard. A better approach is to make clear that if information is properly collected under the "strictly necessary" standard, it should be retained when it might be relevant to the investigation and prosecution of a criminal offence that also constitutes a threat to the security of Canada. Another option would be to require the retention of information that may be relevant to the investigation or prosecution of a terrorism offence as defined in s.2 of the Criminal Code.

Privacy concerns raised by any increased retention of information can be satisfied by adequate review of the legality of its collection, including the requirement that the collection be "strictly necessary" to investigate activities that may on reasonable grounds be suspected of being threats to the security of Canada. The Inspector General of CSIS, the Security Intelligence Review Committee and the Privacy Commissioner can all review not only the collection of the information but the manner in which it is retained and the manner in which is distributed to other agencies.

Information obtained under a warrant issued under s.21 of the CSIS Act could also be retained at least for the duration of the warrant albeit with restrictions on who has access to the information and with review of any information sharing. There may be a case for judicial authorization and control of information collected under a s.21 wiretap warrant. Retained intelligence should be distributed when required for a criminal investigation or prosecution as contemplated under s.19(2)(a) of the CSIS Act. There may be a case for amending s.19(2) (a) to require CSIS to disclose information that may be used in a criminal investigation or prosecution to the police and to the relevant Attorney General. The idea that CSIS could exercise their present residual discretion to refuse

to disclose such information in order to protect the information from disclosure is problematic. There is a danger that acts of terrorism that could have been prevented by arrests or other law enforcement activity will not be prevented if the information is not passed on to the police. Even a refusal to pass on the information does not guarantee that an accused will not seek disclosure or production if the information becomes truly relevant to a subsequent criminal prosecution. If CSIS does pass on the information, the Attorney General of Canada would still retain the option of seeking a non-disclosure order for the secret information or issuing a non-disclosure certificate under s.38 of the CEA in order to prevent the harms of disclosure.

Although the Air India investigation had unique features that led to CSIS being held to be subject to disclosure and retention of evidence obligations under *Stinchcombe,* it would be a mistake for CSIS to conclude that the fruits of its counter-terrorism investigations could be absolutely protected from disclosure or that CSIS has a discretionary veto on disclosure requirements. Even if CSIS is considered to be a third party for purposes of disclosure, the accused in a terrorism trial may be able to make demands for disclosure of some CSIS material. The courts will impose a slightly higher standard on the accused to obtain production from CSIS as a third party under *O' Connor* than as part of the Crown under *Stinchcombe*, but the courts will still require production when it is required to ensure fairness to the accused.

Some changes in the organizational culture of Canada's security intelligence agencies may be required to deal with the challenges of terrorism prosecutions. The need to protect secrets takes on a new dimension when the targets of intelligence are about to blow airplanes out of the sky. Intelligence agencies must adapt to the new threat environment and the increased possibility that their counter-terrorism investigations may reach a point where it is imperative that the police arrest and prosecute people. Security intelligence agencies must resist the temptation to engage in over-classification and unnecessary claims of secrecy. It is not good enough for security intelligence agencies which are increasingly focusing on counter-terrorism to rely on old mantras that they do not collect evidence.

Security intelligence agencies need to adjust their approaches to disclosure and secrecy to take into account that terrorism is now considered to be the greatest threat to national security and that they will often work

along side the police in trying to prevent terrorist violence. Mechanical and broad approaches to secrecy may have been appropriate during the Cold War when the greatest threat to national security came from Soviet spies, but they are not appropriate in counter-terrorism investigations where the prospect of arrest and prosecution looms large. Starting with the Air India investigation and the *Atwal* case, CSIS has not had a happy experience with disclosure of information to the courts and it must put this unhappy experience behind it. Because of Canada's status as a net importer of intelligence, there may be tendency to err on the side of secrecy over disclosure. Nevertheless, the courts have since *Atwal* placed demands on CSIS for disclosure. More recently, courts are re-examining Cold War concepts such as the fear that a hostile state will piece together various bits of innocuous information through the mosaic effect. They are also recognizing that Canada can ask its allies under the third party rule to consent to the disclosure of intelligence and that the third party rule does not apply to information that is already in the public domain.[114] All of these changes point in the direction of the increased disclosure of intelligence in the future.

Evidentiary standards and disclosure to the court and to the accused, however, will not be possible in all cases. Security intelligence agencies must respect their statutory mandate which is to provide secret intelligence to warn the government about security threats and not to collect evidence. In addition, they must also respect restrictions on the use of intelligence that is provided by foreign agencies and they must protect their confidential informers and their agents. The protection of such information will require back-end strategies to ensure non-disclosure. More effort needs to be made by security intelligence agencies to understand the ability of the legal system to protect secrets from disclosure and to educate other actors and the public about the legitimate needs for secrecy. Justice O'Connor has warned that overclaiming of national security confidentiality could create public suspicion and cynicism about secrecy claims.[115] There needs to be better understanding about the legitimate need to keep secrets with respect to intelligence from our allies, ongoing investigations, secret methods and vulnerable informants.

---

114 *Canada v. Commission of Inquiry* 2007 FC 766; *Canada v. Khawaja* 2007 FC 490.

115 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Public Works and Government Services) at pp 302, 304

2. Seeking Amendments of Caveats under the Third Party Rule

Canada's status as a net importer of intelligence will continue to present challenges for the management of the relation between intelligence and evidence. Canada must encourage foreign governments to share intelligence with Canada and it must respect caveats or restrictions that foreign states place on intelligence that they share with Canada. That said, the third party rule that honours caveats is not an absolute and static barrier to disclosure when required for terrorism prosecutions. The third party rule simply prohibits the use and disclosure of intelligence without the consent of the agency that originally provided the information.

A front-end strategy that can respond to the harmful effects of caveats on terrorism prosecutions is to work with foreign partners to obtain amendments to caveats that restrict the disclosure of information for purposes of prosecution. Much intelligence that the police receive from foreign and domestic intelligence agencies contains caveats that restrict the subsequent use of that intelligence in prosecutions. The Arar Commission has recently affirmed the importance of such caveats, as well as the need to ensure that intelligence is accurate and reliable. At the same time, it also made clear that amendments to caveats can be sought and obtained in appropriate cases.[116] The recent decision in *R. v. Khawaja*[117] has indicated that the third party rule should not be applied in a mechanical fashion to prevent disclosure of information that was already possessed by Canada or was in the public domain. Even when the third party rule applies, Canada should request permission from foreign agencies to allow the disclosure of information for the limited purposes of terrorism prosecutions. The idea that relationships with foreign agencies or that Canada's commitment to the third party rule will be shaken by even requesting amendments to caveats should be rejected. Foreign agencies who are also facing demands for disclosure in terrorism prosecutions in their own countries, should understand that a request to amend the caveats that they placed on information demonstrates respect for the caveat process. In some cases, foreign agencies may consent to the disclosure or partial disclosure of intelligence. The time lag between the initial collection of intelligence and its possible disclosure in a subsequent

---

116 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar Analysis and Recommendations* (Ottawa: Government Services, 2006) at 318-322, 331-332.

117 2007 FC 490 rev'd on other grounds 2007 FCA 342.

terrorism prosecution may allow caveats to be lifted or amended. In other cases, the foreign agencies will refuse to amend caveats that restrict the subsequent disclosure of information. In such cases, Canada has the tools necessary, including the use of a certificate under s.38.13 of the CEA, to honour its commitments to allies.

3. Greater Use of Criminal Code Wiretap Warrants

Another front-end strategy is to make greater use of Criminal Code authorizations for electronic surveillance in terrorism investigations where prosecutions are expected. The use of such warrants would avoid the questions of whether electronic surveillance conducted by CSIS, the CSE or foreign intelligence agencies would be admissible in Canadian criminal trials. The ATA has made it easier to obtain Criminal Code electronic surveillance warrants in terrorism investigations by eliminating a requirement to establish investigative necessity and extending the duration of the warrants. Such a strategy will, however, require close co-operation between CSIS and the police and a willingness to allow the police to take the lead in a terrorism investigation where grounds exist for obtaining a Criminal Code wiretap warrant.

Criminal Code authorizations present their own challenges relating to the need to disclose much of the information used to obtain the judicial authorization, but the rules relating to disclosure and admissibility are clearer than with respect to security intelligence. The Part VI scheme has been upheld as constitutional by the Supreme Court and the rules and procedures for editing the affidavit to protect public interests in non-disclosure are clear. The same cannot be said about the scheme for CSIS wiretaps which were held to be constitutional in a divided decision by the Federal Court of Appeal twenty years ago.[118] That said, the grounds for editing the affidavit used to obtain a wiretap warrant under s.187(4) of the Criminal Code could perhaps be expanded to allow the deletion of material that would reveal and prejudice intelligence gathering techniques even if disclosure would not endanger the persons engaged in those techniques. Other Criminal Code warrants may also be used in terrorism investigations and judges can order that information relating to such warrants not be disclosed for various reasons listed under s.487.3 of the Criminal Code. These grounds are open-ended and include protection for confidential informants and ongoing investigations, but could be expanded to include the need to protect intelligence gathering

118 *R. v. Atwal* (1987) 36 C.C.C.(3d) 161 (Fed.C.A.).

techniques. State interests in secrecy will have to be reconciled with competing concerns about open courts and fairness to the accused in the particular circumstances of each case. Criminal Code warrant procedures provide an established and constitutional basis for the reconciliation of the competing interests. Material that is edited out of the affidavit used to obtain the warrant and not disclosed to the accused cannot generally be used to sustain the warrant.As will be suggested below, security cleared special advocates could be given access to the unedited affidavit and other relevant material in order to represent the accused's interests in challenging both Criminal Code and CSIS warrants. Such an approach could help protect intelligence and other sensitive material from disclosure to the accused while allowing it to be subject to adversarial challenge.

In appropriate cases the state should continue, as it did in the *Atwal* case, to argue for the admissibility of security intelligence intercepts in criminal trials. These arguments will have a better chance of success in cases where the intelligence was gathered as a part of the intelligence mandate and "the Rubicon" had not been crossed into law enforcement activity. Although Criminal Code authorizations may be possible and helpful in some cases, intelligence agencies still have an important regulatory mandate to collect intelligence through their own special standards. In appropriate cases, intelligence intercepts could be admitted as evidence in criminal trials on the basis that the law authorizing the search is reasonable or that any departure from regular criminal law standards can be justified under s.1 of the Charter given the primary objective of collecting information to inform the government of threats to the security of Canada.

It may also be advisable to amend s.21 of the CSIS Act to make clear that a warrant can be issued to CSIS to conduct electronic surveillance outside Canada. It may be preferable to have CSIS conduct such operations with the consent of the foreign country than to rely on the foreign agencies to conduct such surveillance. The activities of the foreign agency will not be bound by the Charter and they may not have the same priorities or procedures as CSIS. An extra-territorial CSIS warrant can apply to the activities of Canadians who are terrorist suspects whereas CSE will be limited by its mandate to collect foreign intelligence. CSE intelligence gathered under a Ministerial authorization is less likely to be admitted as evidence than CSIS intelligence gathered under a judicial warrant.

Even if the use of an intelligence intercept or a Criminal Code wiretap was found by the courts to result in an unjustified violation of rights against

unreasonable search and seizure, the evidence obtained could in some cases still be admitted into a criminal trial under s.24(2) of the Charter. The *Parmar* prosecution might have continued had the state been able to rely on section 24(2). The state could have argued that it relied in good faith on the warrant even if the warrant could not be sustained and was invalid after the information in the affidavit that identified the informant was edited out. Section 24(2) will not, however, work in all cases and might not have worked in *Parmar* if the court had concluded that there was a serious violation of the Charter.

4. Greater Use of Source and Witness Protection Programs

A final front-end strategy to make intelligence more usable in criminal prosecutions is the use of enhanced witness protection programs by both security intelligence agencies and police forces. Such programs are designed to make it possible for confidential informants when necessary to have their identity disclosed and to testify in criminal prosecutions. They should also when necessary provide protection to informants who may not testify but whose identity might be revealed by disclosure requirements. The *Parmar* prosecution collapsed because of the unwillingness of a key informant to have his identity disclosed. Many of the disclosure problems in the *Khela* prosecution stemmed from the apparent agreement of the police that the key informant would not have to testify. Informants have many good reasons not to testify and there is no magic solution. Nevertheless, all reasonable efforts should be made to make it possible and attractive for them to testify.

Security intelligence agencies should be able to draw on the resources of witness protection programs. International relocation may be especially important in international terrorism prosecutions. Increased efforts should be made to ensure that the difficulties faced by witnesses are better understood by all. The importance of adequate and effective source and witness protection in managing the relation between evidence and intelligence cannot be easily overstated.[119]

---

119 The most recent annual report on the federal witness protection run by the RCMP indicates that $1.9 million was spent on it and while fifty-three people were in the program, fifteen witnesses refused to enter it, twenty-one voluntarily left the program and seven were involuntarily removed from the program. Witness Protection Program Annual Report 2005-2006 at http://securitepublique.gc.ca/abt/dpr/le/wppa2005-6-en.asp See also Yvon Dandurand "Protecting Witnesses and Collaborators of Justice in Terrorism Cases" in vol 3 of the Research Studies.

E) Back-End Strategies To Reconcile The Demands of Disclosure and Secrecy

Although front-end strategies to make intelligence more usable in criminal prosecutions need to be developed, there is also a need for back-end strategies that can prevent the disclosure of information that if disclosed will result in serious harm. The disclosure of secret intelligence that is not necessary to ensure a fair trial should not occur given the compelling need to protect informants, security intelligence investigations and operations and the vital free flow of secret information from our allies. Whereas the burden of devising and implementing front-end strategies to make intelligence more useable in terrorism prosecutions fall largely on intelligence agencies and the police, the burden of back-end strategies generally fall on prosecutors, defence counsel, courts and legislatures.

1. Clarifying Disclosure and Production Obligations

One back-end strategy is to clarify the extent of disclosure requirements on the Crown and to provide legislative guidance for requests for production from CSIS when it is determined to be a third party not subject to *Stinchcombe*. A number of the terrorism prosecutions examined in this study were undertaken before the Supreme Court's landmark decision in *Stinchcombe* which requires disclosure of relevant and non-privileged evidence or the Court's recognition in *O'Connor* of a procedure for producing and disclosing material from third parties when required for a criminal trial. Although disclosure standards existed under the common law before *Stinchcombe*, there is a need for as much clarity as possible about the extent of disclosure requirements. Some clarity has been achieved as a result of the amendments governing the opening of the sealed packet under Part VI of the Criminal Code, but more work remains to be done. In its late 1990's study of RCMP/CSIS co-operation, SIRC reported perceptions that any information that CSIS passed to the RCMP would be subject to *Stinchcombe* disclosure requirements. Although *Stinchcombe* imposes broad disclosure obligations, those obligations are not unlimited. The Crown need only disclose information that is relevant to the matters raised in the prosecution. The standard of relevance is higher with respect to *O'Connor* demands for production from third parties. In addition, some balancing of interests is allowed before disclosure of third party records. Information protected by privilege such as the informer privilege, is generally not subject to disclosure. Disclosure can be delayed for legitimate reasons relating to the safety of witnesses and sources and

ongoing investigations. Finally, the courts have distinguished between violations of rights to disclosure and more serious violations of the right to full answer and defence.

There is a need for better understanding and codification of disclosure principles. Given the breadth of terrorism offences and the value of having universal rules that apply to all crimes, it may be advisable to codify disclosure principles for all prosecutions. *Stinchcombe* was decided more than fifteen years ago and even at that time, the Court seemed to expect some subsequent codification of the details of disclosure. Greater certainty about the ambit of disclosure requirements and the legitimate reasons for not disclosing information would assist in terrorism prosecutions. The comparative experience of the United Kingdom suggests that there may be considerable advantage in codifying disclosure obligations. The courts in that country proclaimed broad common law standards of disclosure in part out of a recognition that a failure to make full disclosure had resulted in miscarriages of justice in a number of terrorism cases. Parliament, however, subsequently clarified disclosure obligations and the Crown now need not disclose material in any case, including secret intelligence in terrorism cases, unless it can reasonably be capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.[120] In short, it is not necessary in the United Kingdom to disclose unused but incriminating intelligence.

It will be more difficult to codify and restrict disclosure standards in Canada than in the United Kingdom because the courts have held that the accused has a constitutional right under s.7 of the Charter to disclosure of relevant and non-privileged information. The courts will accept the need to protect legitimate secrets as an objective that is important enough to justify restricting Charter rights, but the critical issue will be whether restrictions on disclosure are the most proportionate means of advancing this important objective. Courts may well look to the process under ss.37 and 38 of the CEA as a less drastic and more tailored means to secure non-disclosure of secrets by judicial order after a judge has examined the secret material in light of the facts of the particular case.

It is also possible for Parliament to legislate in relation to the procedure and standards to be applied when the accused seeks production and disclosure of records held by third parties. Although CSIS was held to

120 *R v Ward* [1993] 1 WLR 61; *Criminal Procedure and Investigations Act 1996* s.3 as amended by *Criminal Justice Act 2003; R. v. H and C* [2004] UKHL 3 at para 17.

be subject to *Stinchcombe* in the unique circumstances of the Air India investigation, it may be held to be a third party in other cases. Legislation to deem CSIS to be a third party not subject to *Stinchcombe* is also a possibility, but one that could be challenged under s.7 of the Charter on the facts of individual investigations. In cases where CSIS is a third party not subject to *Stinchcombe*, the Court in *Mills* made clear that Parliament can alter the common law procedure in *O'Connor* which requires the accused to show that material is likely relevant and that the interests in disclosure are greater than the interests in non-disclosure. For example, it might be possible to clarify that matters relating only to the internal workings of intelligence agencies are not relevant enough to require disclosure to the defence. It may also be possible to instruct courts to consider certain factors, such as the harmful effect of disclosure on informants, commitments made to foreign states and ongoing investigations before ordering production and disclosure. Nevertheless, any new scheme to govern the production of intelligence would have to comply with the accused's right to full answer and defence.

The courts have already accepted that not every violation of the accused's right to disclosure will violate the even more fundamental right of full answer and defence. The courts may be prepared to accept some legislative limits on disclosure rights, especially when disclosure would harm state interests in national security. That said, the courts are also attentive to the cumulative adverse effects on the accused's right to full answer and defence when the accused is denied access to relevant information and information that could open up avenues for the defence. It is important that independent judges be the ultimate decision-maker about the disclosure of information because state officials have an incentive to maximize secrecy. As a result of noble-cause corruption or tunnel vision, state officials may fail to disclose information that may be valuable to the accused. A failure to make full disclosure has been an important factor in wrongful convictions, including in terrorism cases.

Legislative restrictions on disclosure or production will be challenged under the Charter. Even if upheld under the Charter, the accused will frequently argue that the state has failed to satisfy disclosure or production obligations codified in new legislation. Such arguments could delay terrorism prosecutions. Courts will not and should not return to earlier practices of ordering non-disclosure of intelligence material without even examining the material to determine its value to the accused.

2. Clarifying and Expanding Evidentiary Privileges that Shield Information from Disclosure

A related strategy to reduce disclosure and production obligations is the codification and expansion of privileges like the police informer privilege or the creation of new privileges. There may be a case for some codification and perhaps expansion to make clear that CSIS informers also enjoy the benefit of police informer privilege, but there are limits to this strategy. Even the most zealously guarded privileges such as the police informer privilege are subject to innocence at stake exceptions.[121] There is an understandable reluctance to create new class privileges and case-by-case privileges may provide little advance certainty about what is not to be disclosed. There is also a danger that new privileges will encourage the non-disclosure of information that is necessary for full answer and defence. If privileges are dramatically expanded, courts will likely make increased use of innocence at stake or full answer and defence exceptions to the expanded privilege. The end result may be that an expanded privilege may be less certain and perhaps even less protective of the state's interest in non-disclosure.

Placing too much reliance on legislating narrower disclosure or production rights or expanding privileges may invite both Charter challenges and litigation over whether information fits into the new categories. Rather than attempting the difficult task of imposing abstract limits in advance of the particular case on what must be disclosed to the accused and risking that such limits may be declared unconstitutional or spawn more litigation, a more practical approach may be to improve the efficiency of the process that is used to determine what must be disclosed and what can be kept secret within the context of a particular criminal trial. That said, presumptive privileges could have the benefit of providing some certainty to the agencies, in particular CSIS, that information could be shared with the police without necessarily being disclosed. Any new privilege would have to be defined with as much precision as possible and it would be subject to litigation to determine its precise ambit. It should also be subject to an innocence at stake exception.

---

121 *R. v. Leipert* [1997] 1 S.C.R. 287; *Named Person v. Vancouver Sun* 2007 SCC 43.

3. Use of Special Advocates to Represent the Interests of the Accused in Challenging Warrants while Maintaining the Confidentiality of Information Used to Obtain the Warrant

Electronic surveillance can provide some of the most important evidence in terrorism prosecutions, especially in cases where it may be difficult and dangerous to use human sources. Both the *CSIS Act* and the *Criminal Code* provide means to obtain wiretap warrants. Both provisions have been sustained under the Charter, but courts have stressed that the general rule is that there should be full disclosure of the affidavits used to obtain the wiretap warrant. The affidavit can be edited to protect a broad range of public interests in non-disclosure including the protection of informants and ongoing investigations. This protection of information from disclosure, however, comes with a price. Any material that is edited out of the affidavit and not disclosed to the accused or perhaps summarized for the accused cannot be used to support the legality and constitutionality of the wiretap. Material that has been edited out and not known to the accused cannot be effectively challenged by the accused. In some cases, the editing may mean that the warrant is not sustainable and that the wiretap evidence can only be admitted if a judge determines that its admission would not bring the administration of justice into disrepute under s.24(2) of the Charter.

The use of security-cleared special advocates in proceedings to challenge wiretap warrants may make it possible to provide adequate protection for the accused's right to challenge the warrant as part of the accused's right to full answer and defence and right against unreasonable searches while not disclosing to the accused information that would compromise ongoing investigations, confidential informants or secret intelligence. Special advocates at present play a role under immigration law security certificates, but the role that they could play with respect to challenging warrants could be less problematic. Special advocates would be standing in for the accused only for the limited purpose of challenging the search and arguing that the evidence should be excluded. [122] A special advocate should be in a good position to make an effective adversarial challenge to the warrant. Indeed, the special advocate could be in a better position than the accused to challenge the warrant to the extent that the special

---

122 The Supreme Court has stressed the differences between proceedings where the basis for granting a warrant are challenged and a trial on the merits where the accused has full rights of cross-examination and the Crown must prove guilt beyond a reasonable doubt. *R. v. Pires; R. v. Lising* [2005] 3 S.C.R. 343 at paras 29-30.

advocate sees information that would normally be edited out. Finally, any evidence that the Crown would lead in a terrorism prosecution, including the results of a wiretap should it be found to be admissible, would still have to be disclosed to the accused to ensure a fair trial. Special advocates could act in the accused's interests in challenging the warrant, but they would not act for the accused during the actual trial.

A security-cleared special advocate could be given full access to the unedited affidavit used to obtain a warrant whereas now the accused only sees an edited version of the affidavit. The special advocate could also have access to other material that is relevant to challenging the wiretap warrant, including *Stinchcombe* material disclosed to the accused. The special advocate could in appropriate cases conduct cross-examinations on the affidavit. The special advocate's access to the full affidavit would respond to the concerns of the Supreme Court that the editing of the affidavit while necessary to protect important law enforcement interests, should be kept to a minimum.[123] The special advocate could be briefed by the accused's lawyer about the case before the challenge to the warrant started. The special advocate could also under existing practice seek the permission of the presiding judge to ask relevant questions of the accused or his counsel in order to challenge the warrant if this was necessary after the special advocate had seen the unedited affidavit. Such a process would have to be done with care particularly if the special advocate's questions could reveal the identity of an informant or an ongoing investigation. The use of a special advocate could allow the trial judge (who would also have to be authorized to see and hear the secret material) to hear full and informed adversarial challenges to the warrant without disclosing confidential information used to obtain the warrant to the accused or to the public. Information from the warrant that was admitted into evidence in the criminal trial would continue to be disclosed and challenged by the accused and not the special advocate.

4. Confidential Disclosure and Inspection of Relevant Intelligence

At present, lawyers for the accused are placed in the difficult position of making very broad claims for disclosure of intelligence that they have not seen. As will be seen in the next section, the accused's overbroad claims for disclosure are sometimes met with similarly overbroad claims of secrecy. The relation between intelligence and evidence may become more solid if both sides can be encouraged to make more informed and disciplined claims.

---

123 *R. v. Durette* [1994] 1 S.C.R. 469

In the *Malik and Bagri* prosecution, defence counsel were allowed to inspect CSIS material on an undertaking that they would not disclose the information to their clients unless there was agreement with the prosecutors or a court order for disclosure. Agreement about disclosure was reached in that case and it was not necessary to litigate these issues in the Federal Court under s.38 of the CEA. In future cases, it may be advisable to allow defence counsel to be able to inspect secret material subject to an undertaking that they will not share that information with their client until disclosure has been approved by the Attorney General of Canada or the court. In such cases, there will be a need to ensure the confidentiality of the material that is disclosed and this may require the defence counsel to be provided with access to secure locations and secure equipment.

There may also be a case for requiring defence counsel to obtain a security clearance before obtaining access to secret material. Such a process could delay prosecutions and adversely impact choice of counsel. These problems should not be insurmountable if there is an experienced cadre of defence lawyers with security clearances and with adequate facilities and funding to conduct a defence. Security clearances for defence lawyers are used in both Australia and the United States. Some of Canada's new special advocates also act as defence counsel.

In cases where a defence lawyer is not willing or able to obtain a security clearance, a security-cleared special advocate could be appointed to see the secret information and challenge the Attorney General's *ex parte* submissions for non-disclosure.[124] The appointment of a special advocate would also add further delay to s.38 proceedings, albeit delay related to becoming familiar with the case and not with respect to obtaining a security clearance. The special advocate may never be as familiar with the possible uses of the undisclosed secret information to the accused as the accused's own lawyer. A special advocate could, however, effectively challenge overbroad claims of national security confidentiality and in that way produce material that could be disclosed to the accused. A special advocate would not be used, as is the case under immigration law, to

124 *Canada . v. Khawaja* 2007 FC 463. See also *Khadr v. Canada* 2008 FC 46 and *Canada v. Khawaja* 2008 FC560 appointing a security cleared lawyer in s.38 proceedings.

challenge evidence that is not seen by the accused.[125] As the Supreme Court recognized in *Charkaoui*, s.38 of the CEA does not authorize the use of secret evidence not seen by the accused. Any extension of the use of secret evidence to criminal proceedings would violate the accused's right to a fair trial under ss.7 and 11(d) of the Charter. It would be difficult if not impossible to justify under s.1 given the more proportionate and more fair alternatives of obtaining selective non-disclosure orders on the basis of harms to national security or of prosecuting the accused for another terrorism or criminal offence that would not require the use of secret evidence.

Although special advocates may play a valuable role in s.38 proceedings before the Federal Court in challenging the government's case for secrecy and non-disclosure, it is not clear what, if any, role they would play when a criminal trial judge has to decide under s.38.14 whether a remedy is required to protect the accused's fair trial rights in light of the Federal Court's non-disclosure order. The security-cleared special advocate will have seen the secret information that was the subject of the non-disclosure order, but under the present law will not be able to inform the criminal trial judge about this information. The accused will not be subject to such restrictions, but will not have seen the information that was the subject of the non-disclosure order. The process would be simplified if the trial judge was allowed to see the secret information that was the subject of the non-disclosure order.

5. A Disciplined Harm-Based Approach to Secrecy Claims

There is a danger that overbroad demands for disclosure by the accused in terrorism prosecutions may be matched by overbroad demands for secrecy by the Attorney General of Canada. There have been a number of recent disputes over whether the Attorney General of Canada has engaged in overclaiming of national security confidentiality. The disputes between the Arar Commission and the Attorney General of Canada were resolved during the inquiry and by a decision of the Federal Court that authorized

---

125 The joint committee of the British House of Lords and House of Commons On Human Rights has been critical of the use of special advocates in other contexts, but has concluded that they are appropriate in the similar context of applications for public interest immunity. It has stated: "Public interest immunity decisions are not about whether the prosecution has to disclose the case on which it relies to the defence; rather, such decisions concern whether the prosecution is obliged to disclose material on which it does not rely, which might assist the defence. When deciding a public interest immunity claim, recourse can be had to court appointed special advocates." Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* July 24, 2006 at para 105.

the release of the greater part of the disputed information.[126] Over use of national security confidentiality claims can produce public cynicism and suspicion about even legitimate claims of secrecy. When there are legitimate secrets that must be kept to protect vulnerable informants, ongoing investigations and promises to allies, there is a danger that the wolf of national security confidentiality may have been cried too often.

One means of addressing concerns about the legitimacy of national security confidentiality claims would be to narrow the ambit of s.38 which requires justice system participants to invoke its processes over a wide range of material that the government is taking measures to safeguard even if there is not a potential for actual injury to a public interest. Another means would be to specify the precise harms of disclosure to the public interest. Section 38.06 at present requires that the disclosure of the material would be injurious to national security, or national defence or international relations. The courts have attempted to define these terms,[127] but they remain extremely broad and vague. More precise definition of the harms of disclosure, or even specific examples of harms to national security or international relations, might help prevent overclaiming. It could also educate actors about the legitimate needs for secrecy with respect to matters such as the protection of vulnerable sources, ongoing investigations and promises made to allies that intelligence would not be disclosed or used in legal proceedings. A harm-based approach could respond to the concerns articulated by the Arar commission and some judges that the government has invoked s.38 in situations where the injury that would be caused by disclosure has not been established.

Section 38 could also be amended to recognize the evolving distinction between intelligence and evidence. The third party rule should not apply if the information was already in the public domain or known to Canadian officials. Even when the third party rule applies, the government could be required to make reasonable efforts to obtain consent from the originating agency to the disclosure of the caveated material. Courts

---

126 *Canada v. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar* 2007 FC 766. See also *Canada v. Khawaja* 2007 FC 490 and *Canada v. Khawja* 2008 FC 560 for expression of concern that the government has made secrecy claims where injury to national security from disclosure has not been established.

127 National security has been defined the "means at minimum the preservation in Canada of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms" *Canada v. Commission of Inquiry* 2007 FC 766 at para 68. National defence includes "all measures taken by a nation to protect itself against its enemies" and "a nation's military establishment". International relations "refers to information that if disclosed would be injurious to Canada's relations with foreign nations." Ibid at paras 61-62.

have also recognized that claims that evidence should not be disclosed because of the "mosaic effect" should be approached with caution. [128] Concerns about the mosaic effect have their origins in the Cold War and may not be as applicable in prosecutions of loosely organized non-state actors such as terrorists. Finally, the harms of non-disclosure could be specified especially in relation to the right to full answer and defence. Attention should be paid to the cumulative effects of non-disclosure on the ability of the accused to undermine the Crown' case and advance defences, as well as on the fairness of the process.

A more restrained and harm-based approach to secrecy claims under s.38 of the CEA, perhaps accompanied by a willingness to allow defence counsel to inspect some secret material on condition of not disclosing the material to their clients without further agreement and perhaps after obtaining a security clearance, could decrease the need to litigate secrecy and disclosure issues under s.38 of the CEA. That said, the Attorney General of Canada will have to insist that some secret material not be disclosed and the competing interests in disclosure and non-disclosure will have to be determined under s.38. It is important that the process for reconciling the interests in disclosure and non-disclosure be both fair and efficient.

6. An Efficient and Fair One Court Process for Determining National Security Confidentiality Claims

In my view the most important back-end strategy in managing the relationship between intelligence and evidence is to make the process for seeking non or modified disclosure orders in individual case more efficient and more fair for all parties. Such a reform will respond to the limits of front-end strategies in making it easier to use intelligence as evidence as well as responding to the limits of attempts to reduce disclosure requirements through legislation or the creation of new privileges. The s.38 process should evolve to allow trial judges to decide on the facts of the particular case whether and when disclosure of secret material is necessary for a fair trial. Such an approach follows the best practices of other democracies with more experience with terrorism prosecutions than Canada.

Although public interest immunities can be asserted before superior court trial judges under s.37 of the CEA, national security, national defence and

128 ibid; *Canada v. Khawaja* 2007 FC 490

international relations claims can only be asserted before the Federal Court under s.38 of the CEA. Criminal trial judges must respect the orders made by the Federal Court with respect to disclosure, but they also retain the right to order whatever remedy is required, including a stay of proceedings, to protect the accused's right to a fair trial. The *Kevork*, *Ribic* and *Khawaja* case studies underline the difficulties of Canada's two court structure. Although the trial judge in *Kevork* ultimately held that a fair trial was possible after the Federal Court refused to order the disclosure of CSIS material, he expressed much uneasiness about the bifurcated process. It is inherently difficult to ask a trial judge to conclude that disclosure of information that he or she has not seen is not necessary to ensure the fairness of the trial. At a minimum some way must be found to ensure that the trial judge and perhaps a security cleared lawyer can examine relevant secret information that has not been disclosed to the accused.

The *Ribic* prosecution demonstrates that s.38 issues can arise in the middle of a trial. In that case, a mistrial was declared when the issues were litigated in Federal Court and an appeal heard by the Federal Court of Appeal. A new trial was held, but the entire process took six years to complete. Section 38 was amended in 2001 to require pre-trial notification of an intent to disclose or call classified information. Despite best efforts by all concerned, however, s.38 issues can emerge later in a criminal trial. For example, the Crown has a reviewable discretion to delay disclosure if required to protect witnesses. The accused may also wish to call evidence that might implicate s.38 of the CEA. A trial judge may have difficulty denying the accused the ability to call evidence that is necessary for full answer and defence. Although the Crown could be penalized for late disclosure, a refusal to allow the Crown to make a s.38 claim with respect to late-breaking disclosure could force it to abandon the prosecution in order to keep the information secret. The litigation of national security confidentiality claims in the Federal Court either before or during a criminal trial can threaten the viability of a terrorism prosecution. The accused has a right to a trial in a reasonable time and the public, including the jury, has an interest in having terrorism trials resolved in a timely manner. The delays in the *Khawaja* prosecution are a matter of concern especially when compared to completion of the trial of his alleged co-conspirators in Britain.

Even if delay problems can somehow be avoided through an expedited s.38 process, the two court approach places both the Federal Court and trial judges in difficult positions. The Federal court judge must attempt to determine the importance of non- disclosed information to the accused

when the accused's lawyer has not seen the information and at a pre-trial stage when the issues that will emerge at trial may not be clear. The ability of the defence to make *ex parte* submissions to the Federal Court judge cannot compensate for the fact that the defence has not seen the undisclosed evidence and the trial evidence has not yet taken shape. Even the possibility that a security cleared special advocate may be appointed to challenge the government's case for non-disclosure cannot guarantee the disclosure of all information that should be disclosed. Even if the Federal Court judge had the advantage of full adversarial arguments on non-disclosure motions, the judge would still have the burden of making final decisions about non-disclosure and partial disclosure without knowing how the criminal trial might evolve. Judges who make similar non-disclosure decisions in Australia, the United Kingdom and the United States all take great comfort in the fact that they can revisit their non-disclosure decisions in light of emerging evidence and issues at trial.

The criminal trial judge is in an equally difficult position under the unique two court structure of s.38 of the CEA. The trial judge must decide that a fair trial is possible without the disclosure of information that the accused, the accused's lawyers and likely the trial judge have not seen. Conversely, the trial judge must fashion a remedy, including perhaps a stay of proceedings, for non-disclosure of the secret information. Although the trial judge might be guided by a schedule that lists the information that was subject to the non-disclosure order, that schedule itself cannot contain identifying information that would cause injury to national security or national defence or international relations.[129] Although the trial judge can issue a report to the Federal Court judge under s.38.05 and the Federal Court can apparently remain seized of the s.38 matter during the trial, [130] the two court structure remains cumbersome and unprecedented outside Canada.

One possible argument in favour of the present two court system is that it provides a form of checks and balance between the two courts and ensures that the trial judge is not tainted by seeing the secret information that the Federal Court has ordered not be disclosed. No concerns have, however, been raised in other countries that judges will be influenced in their decisions by the information that they have seen, but ordered not to be disclosed. In many cases, the material will simply be intelligence that the Crown has found not to be necessary to be used as evidence.

---

129 *Canada. v. Khawaja* 2007 FCA 342 at para 12.
130 *Canada v. Khawaja* 2008 FC 560.

Judges are routinely trusted to disregard prejudicial but inadmissible information about the accused including coerced or unconstitutionally obtained confessions. In any event, the accused will also have the right to a trial by jury.

Canada's unique two court approach runs the risk of decisions in both the Federal Court and the trial court that either prematurely decide that disclosure is not necessary or alternatively that prematurely penalize the prosecution for failing to make disclosure that is not actually required in order to treat the accused fairly. In short, the bificurated court structure is a recipe for delay and disaster in terrorism prosecutions.

No other democracy of which I am aware uses a two court structure to resolve claims of national security confidentiality. Australia, the United Kingdom and the United States all allow the trial judge to decide whether sensitive information can be withheld from disclosure without compromising the accused's rights. This approach is attractive because it allows trial judges to make non-disclosure orders knowing that they can revise such orders if fairness to the accused demands it as the trial progresses.

A One Court Approach: Superior Trial Court or Federal Court?

Reforms of the two court Canadian approach could proceed in two directions. It is perhaps possible to give the Federal Court jurisdiction over all terrorism prosecutions. This approach, however, would require that the Federal Court be given jurisdiction to sit with a jury or it would attract challenge under s.11(f) of the Charter. The expansion of Federal Court jurisdiction or an attempt to create a new court to hear terrorism cases could also attract challenge under s.96 of the Constitution Act, 1867 as infringing the inherent core criminal jurisdiction of the provincial superior courts. The expansion of Federal Court jurisdiction to include criminal terrorism trials or the creation of a new terrorism court could be supported by an argument that terrorism, like youth justice, is a novel matter that did not exist in 1867. As such, it could be transferred away from the superior trial courts.[131] Nevertheless, there are stronger arguments that terrorism has been around for a long time and that terrorism prosecutions in essence involve attempts to punish murder including conspiracy and attempted murder. From 1867 to the present, only superior trial courts

131 *Reference re Young Offenders* [1991] 1 S.C.R. 252.

in the provinces have tried murder charges before juries.[132] Murder, like contempt of court and perhaps treason, sedition, and piracy, are matters within the core jurisdiction of the superior trial courts in the provinces. As such, they cannot be changed by Parliament or the provinces without a constitutional amendment. Removing jurisdiction from the provincial superior courts to try the most serious crimes, terrorist acts of murder or preparation or facilitation of such acts, could be held to violate s.96 of the Constitution Act, 1867.[133] The Federal Court or a new terrorism court would still be conducting terrorist trials for traditional purposes of determining guilt and punishment as opposed to distinct purposes such as developing a system of youth justice. Even if s. 96 did not prevent a transfer of core superior court jurisdiction to another federal court, the power to constitute courts of criminal jurisdiction to try terrorism crimes is arguably a matter of provincial jurisdiction.[134]

Even if constitutionally permissible, such an approach would also require the Federal Court to develop and maintain expertise in criminal law, criminal procedure and criminal evidence matters. This could be difficult if terrorism prosecutions remain infrequent. A former general counsel to the Central Intelligence Agency, Fred Manget, has rejected calls for the Foreign Intelligence Surveillance Court (which issues foreign intelligence wiretaps) to conduct criminal terrorism prosecutions. He has argued that although the special court "operates with admirable secrecy, it was not meant to conduct trials. Instead, it was designed to establish the existence of probable cause, based only upon the government's ex parte appearance. Mixing the probable cause determination with an adversarial trial could raise due process or impugn the impartiality of subsequent trials."[135] In other words, it is better to build national security expertise

---

132 See *Criminal Code* s.469.

133 *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725 at para 15 ("The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution). (emphasis added) The dissent rejected the idea of core jurisdiction in that case, but also found that jurisdiction being removed from the provincial superior court to punish young people for contempt of court was ancillary to special powers exercised by youth courts.

134 Peter Hogg has suggested that s.96 should not prevent the transfer of core superior court jurisdiction to another federal court. Peter Hogg *Constitutional Law of Canada* 4th ed at 7.2(e) But *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725 at para 15 indicates that the core jurisdiction of the superior courts "cannot be removed from the superior courts by either level of government, without amending the Constitution." In any event, Professor Hogg also indicates that the federal government does not have jurisdiction to constitute or establish courts of criminal jurisdiction, a matter expressly excluded from the federal power over criminal law and procedure under s.91(27) and included in the provincial power over the administration of justice under s.92(14). See ibid at 19.3. The only federal power that would support the creation of a new court to try terrorism cases would seem to be the somewhat uncertain residual power to make laws for peace, order and good government.

135 Fred Manget "Intelligence and the Criminal Law System" (2006) 17 Stanford Law and Public Policy Review 415 at 428.

into the existing criminal trial courts than to attempt to give a court with national security expertise but no criminal trial experience the difficult task of hearing terrorism trials.

Having terrorism prosecutions heard in the Federal Court or the creation of a new court would also raise concerns about special terrorism courts, concerns that have surrounded the Diplock courts in Northern Ireland and special courts in Ireland. One of the values of terrorism prosecutions is that they allow terrorist acts of violence to be denounced as crimes and terrorists to be punished and stigmatized as criminals. At this level, at least, terrorists should not be elevated to the status of a political challenge to the state that requires special solutions such as special courts.

A preferable approach would be to give designated judges of the superior trial court who have extensive experience with complex criminal trials the ability to determine national security confidentiality claims under s.38 of the CEA during a terrorism trial. This could be done by amending the definition of a judge under s.38 to include a judge of the provincial superior court when a national security confidentiality matter arises before or during a criminal trial. Because of the need for secure facilities and training with respect to national security confidentiality, not all provincial superior court judges would have to be designated as judges under s.38 of the CEA. The Chief Justice of each provincial superior court could designate a few judges who would be able to make decisions under s.38 of the CEA for the purposes of criminal trials. This could also have the effect of allowing such a trial judge to be assigned to a terrorist case at the earliest possibility in order to help case manage complex terrorism prosecutions.

Superior court trial judges can already decide public interest immunity claims under s.37 and they should be able to learn enough about national security matters to make s.38 decisions. The Attorney General of Canada would still have the opportunity to make ex parte arguments to these judges about the dangers of disclosing information. These judges could also be assisted by adversarial argument on s.38 issues provided by the accused and by security-cleared special advocates who had examined the secret material. Finally, the Attorney General of Canada would still have the power under s.38.13 of the CEA to block a court order of disclosure of material that relates to national security or national defence or was received from a foreign entity.

It could be argued that the Federal Court should retain responsibility in all s.38 matters because of its expertise and the need to reassure allies that secret information will be treated with appropriate care. If this argument was accepted, it would still be possible to appoint select provincial superior courts judges as deputy judges of the Federal Court with the consent of their Chief Justice, the Chief Justice of the Federal Court and the Governor in Council.[136] Such judges would have to acquire expertise with respect to matters affecting national security confidentiality.[137] In addition, it might be easier for provincial superior court trial judges who were designated as deputy judges of the Federal Court to use the secure facilities of the Federal Court.

Allowing provincial superior court trial judges designated by their Chief Justice to decide national security confidentiality or public interest immunity questions would be consistent with the approaches taken in Australia, the United Kingdom and the United States. Such an approach could develop specialized expertise among a small number of trial judges with respect to all aspects of the management of terrorism trials including s.38 issues.[138] Measures would have to be taken to ensure that superior court trial judges designated to decide s.38 issues that arise in a criminal trial would have the appropriate facilities and training for the storage of classified information and that they would have the opportunity to develop expertise on complex matters of national security confidentiality. If necessary, terrorism trials could under s.83.25 of the Criminal Code be prosecuted by the Attorney General of Canada in Ottawa, even if the offence is alleged to have been committed outside of Ontario.

This single court approach would allow trial judges to manage all disclosure aspects of complex terrorism prosecutions without artificial separations between s.38 matters that have to be decided in the Federal Court and other disclosure matters including those under s.37 that have to be decided by the trial judge. It would also stop the duplication of proceedings that may be caused by having preliminary disputes and appeals decided under s.38 only to have the same or similar issues potentially resurface before the trial judge under s.37 or s.38.14 of the CEA. A one court approach could help establish a solid institutional foundation

---

136 *Federal Court Act* s.10.1.

137 The designated judges could perhaps also consider CSIS warrant requests in order to maintain their experience should terrorism trials involving s.38 issues prove to be rare.

138 It could be argued that existing Federal Court judges with expertise in national security matters should also be allowed to conduct criminal trials. This, however, would require cross-appointing such judges to multiple provincial superior courts.

for managing the difficult and dynamic relationship between secret intelligence and information that must be disclosed to the accused.

7. Abolishing Pre-Trial Appeals

A final reform to make the national security confidentiality process more efficient would be to repeal s.38.09 of the CEA which allows for decisions about national security confidentiality to be appealed to the Federal Court of Appeal with the possibility of a further appeal to the Supreme Court of Canada under s.38.1. The criminal trial process has traditionally avoided appeals of issues before or during a criminal trial because of concerns about fragmenting and delaying criminal trials.

An accused would retain the ability to appeal a non or partial disclosure order as part of an appeal from a conviction to the provincial Court of Appeal as contemplated under the Criminal Code. It could be argued that the provincial Courts of Appeal do not have expertise in matters of national security confidentiality. Provincial Courts of Appeal already hear public interest immunity appeals under s.37 of the CEA. They could take guidance from the s.38 jurisprudence that has been developed and would continue to be developed in the Federal Court in non-criminal matters. Finally, the Supreme Court of Canada maintains the ultimate ability to interpret s.38 for all courts. If pre-trial appeals were abolished under s.38, most appeals would involve many matters of criminal law, procedure and evidence that are within the expertise of the provincial Courts of Appeal in addition to the s.38 issue.

The Attorney General of Canada would lose the right to appeal an order authorizing disclosure, a right that it exercised with partial success in *Khawaja*.[139] It could be argued that this might prematurely sacrifice prosecutions by not allowing the Attorney General an opportunity to establish that a judge had committed legal error and ordered too much information disclosed to the accused. Nevertheless, the Attorney General of Canada would retain the right to issue a certificate prohibiting disclosure under s.38.13 of the CEA or of taking over a terrorism prosecution and entering a stay of proceedings should it conclude that the public interest would be seriously harmed by disclosure. The abolition of pre-trial appeals may require closer co-ordination between the Attorney General of Canada and those who handle terrorism prosecutions either in the provinces or

139 2007 FCA 342. Note however that the error in that case might have been corrected by asking the judge to reconsider his original decision. ibid at paras 18, 52.

through the new federal Director of Public Prosecutions. In any event, there is a need to co-ordinate these processes and the Attorney General of Canada retains the ability to prosecute terrorism offences.[140]
If pre-trial appeals from a s.38 determination are to be retained, however, thought should be given to providing time-limits not only for the filing of appeals, but also for the hearing of arguments and the rendering of decisions.

F) Conclusion

There is an urgent need to reform the process through which national security confidentiality claims are decided. Most of Canada's past terrorism prosecutions have involved material supplied by Canadian and foreign security intelligence agencies and this trend will likely increase given the nature of international terrorism. Although some front-end reforms may make intelligence agencies more willing to disclose intelligence or even to use intelligence as evidence, some secrecy claims will be necessary to protect vulnerable informants, sources and methods and to respect restrictions on the subsequent disclosure of information.

Although there may be some benefits in codifying disclosure and production requirements, and in attempting to define material that clearly does not have to be disclosed or produced, there is a danger that restrictive disclosure and production requirements will generate Charter challenges and increased litigation over the adequacy of disclosure. It may be wiser to improve the efficiency of the process through which the government can seek orders to prohibit disclosure in specific instances. The 2006 MOU between the RCMP and CSIS contemplates the use of s.38 of the CEA to protect CSIS material. Unfortunately, the use of s.38 can threaten the viability of terrorism prosecutions through delay, pre-trial appeals and through non-disclosure orders by the Federal Court that may require a trial court to stay proceedings.

The parties to the Malik and Bagri prosecution took extraordinary and creative steps to avoid litigating issues under s.38. Such litigation in the Federal Court would have delayed and fractured a criminal trial which was already one of the longest and most expensive in Canadian history. If s.38 had been used in the Malik and Bagri prosecution, it is possible that the prosecution would have collapsed or that a stay of proceedings would have been entered under s.38.14. Proceedings also could have

140 *Security Offences Act* R.S. 1985 c.S-7, s.2; *Criminal Code* s.83.25.

been stayed because of CSIS's failure to retain information that was of potential disclosure and evidential value to the accused. Although Air India was a unique case that hopefully will never be repeated, accused will continue to seek disclosure or production of the work of Canada's security intelligence agencies and information collected by our intelligence agencies may in some cases constitute important evidence in terrorism prosecutions. Front-end reforms designed to make intelligence more usable in terrorism prosecutions and back-end reforms to determine in an efficient and fair manner whether intelligence must be disclosed to the accused are required to respond to the unique and difficult challenges of terrorism prosecutions.

The trial judge should be empowered to make decisions about whether secret information needs to be disclosed to the accused. Such an approach should allow the trial judge to make disclosure and national security confidentiality decisions without the inefficiencies and potential unfairness revealed by separate Federal Court proceedings in the *Kevork, Ribic* and *Khawaja* prosecutions. The judge could decide in cases where the intelligence would not assist the accused that disclosure of the secret information was not necessary while retaining the ability to re-visit that decision if necessary to protect the accused's right to make full answer and defence as the trial evolves. Combined with front-end reforms that prepare intelligence to the extent possible for disclosure and use as evidence, a one court approach would move Canada towards the approaches used in other democracies with more experience in terrorism prosecutions. It would provide a better foundation for management of the difficult and dynamic relationship between secret intelligence about terrorist threats and evidence and information that must be disclosed in terrorist trials.

Without significant reforms, there is a danger that terrorism prosecutions in Canada may collapse and become impossible under the weight of our unique two court approach to reconciling the need for secrecy and the need for disclosure and our old habits of ignoring the evidentiary implications of the gathering of intelligence. An inability to try terrorism prosecutions on their merits will fail both the accused and the victims of terrorism.

Kent Roach is a Professor of Law with cross appointments in criminology and political science. He holds the Prichard and Wilson Chair of Law and Public Policy at the University of Toronto. In 2002, he was elected a Fellow of the Royal Society of Canada by his fellow academics. He was a former clerk for the last Justice Bertha Wilson of the Supreme Court of Canada. He has been the editor in chief of the Criminal Law Quarterly since 1998 and has appeared frequently as counsel for various interveners in the Supreme Court and Courts of Appeal. He is the author of nine books including *Constitutional Remedies in Canada* winner of the 1997 Owen Prize for best Canadian law book and (with R.J. Sharpe) *Brian Dickson: A Judge's Journey* winner of the 2004 Dafoe Prize for a book that contributes most to the understanding of Canada. Two other of his books have been shortlisted for the Donner Prize for best public policy work.

In recent years, Professor Roach has focused much of his work on anti-terrorism law and policy. He is the co-editor of *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) and *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001). He is also the author of *September 11: Consequences for Canada* (Montreal: McGill-Queens Press, 2003) and numerous other articles on anti-terrorism law including the 2002 McGill Law Journal Lecture and the 2005 Viscount Bennett Lecture. These lectures were subsequently published in the McGill Law Journal and the Cardozo Law Review respectively. He has appeared before committees of the Canadian Parliament, Indonesia and the United States Congress on matters related to anti-terrorism law and policy. He was also part of a legal expert group for the United Nation's Office on Drug and Crime that examined penal provisions to implement the Convention for the Suppression of Nuclear Terrorism.

Professor Roach's articles on anti-terrorism laws have been published in Australia, Canada, Egypt, Hong Kong, the Netherlands, Italy, Singapore, South Africa, the United Kingdom and the United States and have also been translated into Arabic, Chinese and Russian. He has lectured on anti-terrorism law and policy at the University of Cape Town, the University of New South Wales, the National University of Singapore, Oxford and Yale. He was a member of the five person research advisory panel for the Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar and research director for Ontario's Inquiry into Forensic Pediatric Pathology. He served as Director of Research (Legal Studies) for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.