the prevailing attitude at the time CSIS was created in 1984 during the Cold War, even though a close reading of the *CSIS Act* and *Security Offences Act* reveals 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 in 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 with the demands of the collection of evidence. In this respect, it is noteworthy that MI5 accepts the need to collect some evidence (albeit not electronic surveillance which is still generally inadmissible in British courts) to an evidentiary standard. Requests may have to be made to foreign agencies to 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 the *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

The following four principles are broadly consistent with the seven principles identified by Bruce MacFarlane in his companion study on structural aspects of the criminal trial. In other words, the principles articulated here encompass the values of respect for the rule of the law

and the Charter including the rights of the accused and the right of the public to open trials and to the efficient and accurate pursuit of the truth in criminal trials, including the need to prevent wrongful convictions.[115] At the same time, the principle of the need to keep secrets is particularly important to the relation between intelligence and evidence which is the focus of this study.

A) 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 terrorism. Disclosure of secrets could also expose a confidential source to harm, including torture or death.

The Supreme Court, in upholding mandatory provisions for *ex parte* and *in camera* proceedings under the *Access to Information Act* in cases where foreign confidences or national security exemptions were claimed, stressed the need for Canada to maintain the confidences of its allies that information and intelligence that they shared with Canada would remain confidential. Arbour J. stated for the Court:

> The mandatory *ex parte in camera* provision is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J. reviewed five affidavits filed by the respondent from CSIS, the RCMP, the Department of National Defence ("DND"), and two from the Department of External Affairs ("DEA"). These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies. The affidavits further emphasize that the information providers are aware of Canada's access to information legislation. If the mandatory provisions were relaxed, all predict that this would negatively affect the flow and

115 The seven principles outlined by Bruce MacFarlane in "Structural Aspects of Terrorist Trials" are 1) the pursuit of truth 2) public confidence and perceived legitimacy of proceedings, 3) fairness and the rule of law, 4) efficiency, 5) openness and publicity of criminal proceedings, 6) balancing individual rights with the public interests and 7) minimizing the risks of convicting the innocent.

> quality of such information. This extract from one of the affidavits from the DEA is typical:
>
> Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity or quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less important source of information increases our vulnerability to having our access to sensitive information cut off. [116]

The Court's decision in *Ruby v. Canada* to uphold mandatory *ex parte* procedures under access to information legislation was undoubtedly influenced by the context of the case which did not involve a criminal prosecution or other deprivation of liberty.

In the different context of security certificates used to detain and deport non-citizens, the Supreme Court was more troubled by mandatory provisions giving the state the right to make *ex parte* submissions to the judge. Although it held that *ex parte* proceedings in security certificates under immigration law constituted an unjustified violation of s.7 of the Charter in *Charkaoui v. Canada*[117], the Supreme Court readily recognized under s.1 of the Charter that:

> The protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. Moreover, the *IRPA*'s provisions regarding the non-disclosure of evidence at certificate hearings are rationally connected to this objective. The facts on this point are undisputed. Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality: see *Ruby*. This leaves the question whether the means Parliament has chosen, i.e. a certificate procedure

116 ibid at para 44-45
117 2007 SCC 9

> leading to detention and deportation of non-citizens on the ground that they pose a threat to Canada's security, minimally impairs the rights of non-citizens. [118]

In both *Ruby* and *Charkaoui*, 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 upon expectations that the information that is shared will be kept secret.

The importance of protecting secret information that, if disclosed, might harm national security is also underlined in a number of other legal instruments. One is the *Security of Information Act* which provides for a series of serious crimes with respect to the divulging of secret information. One part of this Act has recently been struck down as unconstitutional, but the trial judge recognized that the purpose of punishing and deterring the release of certain government information was pressing and substantial, and had been "reinforced…in the uncertain national security climate after the terrorist attacks of 2001".[119]

Another relevant legal instrument, which will be examined more fully below, is s.38 of the *Canada Evidence Act* which places requirements on all participants in the justice system to notify the Attorney General with respect to the disclosure of information that could injure international relations, national defence or national security.[120] The importance of protecting national security information is also underlined by s.38.13 of the *Canada Evidence Act*, which enables the Attorney General of Canada to prohibit even court-ordered disclosure of information relating to national defence or security or obtained from a foreign entity.[121] This represents an ultimate vehicle to protect the state's interests and commitments to other states to keep secrets. At the same time, the value of secrecy is not absolute, as s.38.14 recognizes the right of the criminal trial judge to order whatever remedy is required in light of non-disclosure orders in order to protect the fairness of the accused's trial.

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118 ibid at para 68
119 *O'Neill v. Canada* (2006) 82 O.R.(3d) 241 at paras 95 -96 (Ont. Sup.Ct.)
120 CEA s.38.01
121 ibid s.38.13

Even outside the national security and international relations context, the Court has recognized the importance of protecting confidential sources, both in terms of ensuring their own safety and in terms of ensuring that people continue to provide information to the state. In *R. v. Leipert*[122], the Supreme Court held that the police need not disclose the identity of an informer who provided an anonymous crime stopper tip that led them to investigate a person for growing marijuana. It rejected the accused's argument that he was entitled, under the disclosure requirements of *Stinchcombe,* to the sheet used to collect the tip, albeit edited in a manner to protect the informer's identity. Noting both the need to protect the informer's safety and to encourage others to share information with the police, the Court concluded that "informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it."[123] The Court also held that the trial judge had erred in disclosing an edited tip sheet to the accused because of the dangers of inadvertently revealing information to the accused that could allow the informer to be identified. [124] The Court rejected the argument that the informer privilege was inconsistent with *Stinchcombe* disclosure obligations on the basis that the disclosure rules were themselves subject to evidentiary privileges, including the informer privilege. The informer privilege is a hallowed privilege that is subject only to an innocence at stake exception. Even if that limited exception applies, "the State then generally provides for the protection of the informer through various safety programs, again illustrating the public importance of that privilege."[125]

The importance of the informer privilege was recently affirmed in *Named Person v. Vancouver Sun* .[126] The Court stressed that the privilege applied to all information that might identify an informer and that it was a non-discretionary legal right that belonged to both the informer and the Crown.

> In conclusion, the general rationale for the informer privilege rule requires a privilege which is extremely broad and powerful. Once a trial judge is satisfied that

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122 [1997] 1 S.C.R. 287
123 Ibid at para 14.
124 "A detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them." Ibid at para 16.
125 *R. v. McClure* [2001] 1 S.C.R. 445 at para 45.
126 2007 SCC 43

> the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time.[127]

The Court indicated that when an informer seeks the benefit of the privilege the judge should hold *in camera* proceedings with only the informer and the Attorney General present to determine whether the privilege applies. Third parties such as the media have no role to play in determining whether the privilege exists, but they may have a role in determining the extent of the information that can be released.

The importance of protecting national security information and confidential informers is well recognized in Canadian law. The law provides the government with many strong tools to protect secret information from disclosure.

B) 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. The importance of adjudicative fairness was affirmed in *Charkaoui v. Canada,*[128] in the course of holding that mandatory *ex parte* provision of secret evidence which could be used against a detainee under an immigration security certificate was an unjustified violation of s.7 of the Charter. The Court made clear that while some 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. Chief Justice McLachlin explained:

> while administrative constraints associated with the context of national security may inform the analysis on whether a particular process is fundamentally unfair, security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7

127 ibid at para 30.
128 2007 SCC 9

> stage of the analysis. If the context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7. That is the bottom line.
>
> The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be. [129]

In *Charkaoui*, the Court affirmed that "a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case."[130] Although the Court held that designated judges reviewing security certificates remained independent and impartial, it concluded that the use of secret information not disclosed to the detainee or subject to adversarial cross examination was unconstitutional. It deprived the detainee of "an opportunity to meet the case put against him or her by being informed of that case and being allowed to question or counter it." The Court concluded that:

> Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.[131]

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129 ibid at paras 23 and 27.
130 Ibid at para 53.
131 Ibid at para 61.

Section 7 allows for a certain amount of flexibility and creativity to reconcile the demands of secrecy and fairness, but "the bottom line" is that the process must be fair.

Even after concluding that the procedures violated the basic requirements under s.7 of the Charter, the Court considered whether the government had justified the limitation of the detainee's rights under s.1 of the Charter. It examined a wide range of alternative mechanisms to reconcile fairness with secrecy. They included the use of security-cleared special advocates or security-cleared counsel, employed by SIRC and the Arar Commission, to test and challenge the intelligence presented to justify detention under a security certificate. The Court also noted:

> Crown and defence counsel in the recent Air India trial (*R. v. Malik*, [2005] B.C.J. No. 521 (QL), 2005 BCSC 350) were faced with the task of managing security and intelligence information and attempting to protect procedural fairness. The Crown was in possession of the fruits of a 17-year-long investigation into the terrorist bombing of a passenger aircraft and a related explosion in Narita, Japan. It withheld material on the basis of relevance, national security privilege and litigation privilege. Crown and defence counsel came to an agreement under which defence counsel obtained consents from their clients to conduct a preliminary review of the withheld material, on written undertakings not to disclose the material to anyone, including the client. Disclosure in a specific trial, to a select group of counsel on undertakings, may not provide a working model for general deportation legislation that must deal with a wide variety of counsel in a host of cases. Nevertheless, the procedures adopted in the Air India trial suggest that a search should be made for a less intrusive solution than the one found in the *IRPA*[132]

The Court's survey of less rights intrusive alternatives in *Charkaoui* demonstrates its willingness both under s.7 and s.1 of the Charter to make accommodations for the need to keep secrets while at the same time ensuring that basic fairness is achieved.[133]

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132 ibid at para 78.
133 ibid at para 139.

Although *Charkaoui* is a recent and important case on reconciling fairness and secrecy, and it involved long-term detention and restrictions of liberty under immigration law security certificates, allowance must also be made for the particular focus of criminal prosecutions. The Court's discussion of alternative methods of reconciling fairness and secrecy in *Charkaoui* implicitly acknowledges the distinctiveness of the criminal trial process in its discussion of s.38 of the CEA as an alternative. The Court commented:

> Under the recent amendments to the *CEA* set out in the *Anti-terrorism Act*, S.C. 2001, c. 41, a participant in a proceeding who is required to disclose or expects to disclose potentially injurious or sensitive information, or who believes that such information might be disclosed, must notify the Attorney General about the potential disclosure, and the Attorney General may then apply to the Federal Court for an order prohibiting the disclosure of the information: ss. 38.01, 38.02, 38.04. The judge enjoys considerable discretion in deciding whether the information should be disclosed. If the judge concludes that disclosure of the information would be injurious to international relations, national defence or national security, but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may order the disclosure of all or part of the information, on such conditions as he or she sees fit. No similar residual discretion exists under the *IRPA*, which requires judges not to disclose information the disclosure of which would be injurious to national security or to the safety of any person. Moreover, the *CEA* makes no provision for the use of information that has not been disclosed. While the *CEA* does not address the same problems as the *IRPA*, and hence is of limited assistance here, it illustrates Parliament's concern under other legislation for striking a sensitive balance between the need for protection of confidential information and the rights of the individual.

The criminal trial process is distinct from immigration law in several respects. One is that the criminal trial judge has an explicitly recognized discretion under s.38.14 of the CEA to order whatever remedy is appropriate, including a stay of proceedings, to protect the accused's

right to a fair trial. A second difference is that s.38.06 of the CEA allows the judge to order disclosure of information that would harm national security, but on the basis that the public interest in disclosure is greater. Finally, s.38 of the CEA only provides a means for the state to obtain non-disclosure orders; it does not contemplate the use of secret evidence in criminal trials.

Although secret evidence that is not disclosed to the accused will not be used in criminal trials, it would be a mistake to conclude that dilemmas in reconciling secrecy and fairness will not affect criminal trials. The Courts have in a number of criminal cases been sensitive to placing the accused in an impossible, or "catch 22", situation in which he or she has to establish the content or relevance of documents without having access to them. In *R. v. Garofoli*,[134] the Court affirmed the importance of opening sealed packages to allow the accused to exercise the right to full answer and defence in order to challenge the authorization for the warrant. In *R. v. Mills*,[135] the Court again stressed the importance of the accused's right to full answer and defence:

> Our jurisprudence has recognized on several occasions "the danger of placing the accused in a 'Catch-22' situation as a condition of making full answer and defence": *O'Connor*, *supra*, at para. 25; see also *Dersch*, *supra*, at pp. 1513-14; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at pp. 1463-64; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *R. v. Durette*, [1994] 1 S.C.R. 469. This is an important consideration in the context of records production as often the accused may be in the difficult position of making submissions regarding the importance to full answer and defence of records that he or she has not seen. Where the records are part of the case to meet, this concern is particularly acute as such a situation very directly implicates the accused's ability to raise a doubt concerning his or her innocence…. Where the records to which the accused seeks access are not part of the case to meet, however, privacy and equality considerations may require that it be more difficult for accused persons to gain access to therapeutic or other records…..

134 [1990] 2 S.C.R. 1421.
135 [1999] 3 S.C.R. 668.

> Several principles regarding the right to make full answer and defence emerge from the preceding discussion. First, the right to make full answer and defence is crucial to ensuring that the innocent are not convicted. To that end, courts must consider the danger of placing the accused in a Catch-22 situation as a condition of making full answer and defence, and will even override competing considerations in order to protect the right to make full answer and defence in certain circumstances, such as the "innocence at stake" exception to informer privilege. Second, the accused's right must be defined in a context that includes other principles of fundamental justice and *Charter* provisions. Third, full answer and defence does not include the right to evidence that would distort the search for truth inherent in the trial process. [136]

In the above case, the Supreme Court upheld legislative restrictions on both the disclosure of private documents held by the Crown and the production of private documents held by third parties in sexual assault cases. This indicates that the accused's right to production and disclosure is not absolute, but also that the courts will not readily accept non-disclosure or non-production of material that adversely affects the accused's ability to meet the case and his or her right to full answer and defence.

Not all of the dilemmas of reconciling fairness and secrecy in criminal trials will stem from requests by the accused for disclosure of documents that he or she has not seen. Questions of fairness may arise when non or partial disclosure orders are made under s.38 of the CEA, and the criminal trial judge has to decide whether a fair trial is possible in light of a non-disclosure order or a partial disclosure order, such as the use of summaries. Another possible dilemma is when the accused wants to call witnesses to give evidence in his or her defence, but the evidence and perhaps even the identity of the potential witness is subject to a national security confidentiality claim. All of these dilemmas can emerge at a criminal trial and they can place the fairness of the criminal trial in jeopardy.

In the last section, we examined the high priority that traditionally has been given to the protection of an informer's identity and how the Supreme

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136 ibid at paras 71, 76.

Court has exempted information subject to informer privilege from the *Stinchcombe* duty of disclosure. That said, however, the protection of informers is not absolute and is subject to the accused's right to full answer and defence in at least two respects. In *R. v. Leipert*, the Court held that the confidential informant to the crime stopper program could be protected but that, in fairness to the accused, the search warrant would have to be defended by the state without reliance on the informer's information.[137] Evidence that could not be disclosed to the accused could not be used against him. Fairness and secrecy could be reconciled by allowing the state to attempt to defend the warrant, minus the information that could not be disclosed to the accused. As will be seen, a similar approach has been taken in some important terrorism prosecutions.[138]

The informer's privilege is also subject to another exception that recognizes the overriding importance of not convicting the innocent. McLachlin J. stated that:

> To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial. The common law rule of informer privilege, however, does not offend this principle. From its earliest days, the rule has affirmed the priority of the policy of the law "that an innocent man is not to be condemned when his innocence can be proved" by permitting an exception to the privilege where innocence is at stake: *Marks v. Beyfus*, *supra*. It is therefore not surprising that this Court has repeatedly referred to informer privilege as an example of the policy of the law that the innocent should not be convicted, rather than as a deviation from it.[139]

Even when the limited innocence at stake exception applied, however, the court "should only reveal as much information as is essential to allow proof of innocence" and provide the Crown with an opportunity to stop or stay the case before ordering disclosure.[140]

The innocence at stake exception to police informer privilege has recently been affirmed and explained by the Supreme Court as follows:

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137 Ibid at para 40.
138 *R. v. Parmar* discussed infra part 3.
139 Ibid at para 24.
140 Ibid at para 33.

> …the only real exception to the informer privilege rule is the innocence at stake exception: *Leipert*. All other purported exceptions to the rule are either applications of the innocence at stake exception or else examples of situations in which the privilege does not actually apply. For example, situations in which the informer is a material witness to a crime fall within the innocence at stake exception: *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 996. The privilege does not apply to an individual whose role extends beyond that of an informer to being an *agent provocateur*: *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.); Hubbard, Magotiaux and Duncan, at p. 2-28. Similarly, situations in which s. 8 of the *Charter* is invoked to argue that a search was not undertaken on reasonable grounds may fall within the innocence at stake exception: *Scott*. Thus, as I noted, the only time that the privilege, once found, can be breached, is in the case of an accused raising the innocence at stake exception. All other so-called exceptions are simply applications of this one true exception: *Scott*, at p. 996; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (4th ed. 2005), at p. 254.[141]

The Court also suggested that a police informer privilege that made no allowance for an innocence at stake exception might violate the Charter.[142]

The risk of convicting the innocent and its counter-productivity in terrorism cases was eloquently affirmed in a speech given by Ken Macdonald Q.C., the Director of Public Prosecutions responsible for many terrorism prosecutions in Britain. While in no way discounting the real threat of terrorism or the need for vigourous prosecutions, Mr. Macdonald warned that:

> There is a real danger of measures for combating terrorism-related offences being counterproductive. Compromising the integrity of the trial process would blight the criminal justice system for decades. It would severely undermine public confidence. We should recall the impact the Birmingham Six case had on public

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141 *Named Person v. Vancouver Sun* 2007 SCC 43 at para 29.
142 Ibid at para 28; *R. v. Leipert* at para 24.

> confidence in the 1970s and 1980s. Nothing is more offensive to the Constitution of a country than men and women sitting for years in prison cells for offences they did not commit. What better way could there be to create disillusionment and alienation? We don't want to alienate the very sections of the community whose close cooperation and consent is required to bring successful cases.[143]

Similarly the Supreme Court in *R. v. Stinchcombe*[144] grounded the broad constitutional right of disclosure that it recognized in that case with the accused's right to full answer and defence and a concern for preventing miscarriages of justice when it stated:

> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238).

The Court in that case also added that "the principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material."

It serves neither the interests of society nor the interests of the victims of terrorism to convict the wrong person for an act of terrorism. Experience has shown that wrongful convictions bring the administration of justice into disrepute in many ways. They often make it impossible to apprehend, prosecute and punish the true perpetrators of heinous crimes. Terrorist

143 Ken MacDonald Q.C. "Security and Rights" January, 2007 at http://www.cps.gov.uk/news/nationalnews/security_rights.html

144 [1991] 3 S.C.R. 326

cases, in which the state may have legitimate claims to keep information secret about possible suspects, present a particular risk of producing wrongful convictions.[145]

This brief survey indicates the importance of treating those accused of terrorism fairly by allowing them to have access to information that is necessary for them to make full answer and defence. *Stinchcombe* recognizes the fundamental importance of disclosing information to the accused, especially when the information is necessary for the accused to make full answer and defence. Even the informer privilege must yield when innocence is at stake. At the same time, the principle that the accused must be treated fairly will be shaped by the context of the case, including both the nature of the criminal trial and the need to keep secrets.

C) Respect for the Presumption of Open Courts

Another principle that should be considered in resolving the tensions between secrecy in intelligence and fairness with respect to evidence is the presumption of open courts. The open court principle has long been recognized in Canadian law, and was given renewed vigour by the Charter guarantee of freedom of expression. In a case applying the presumption of open courts to investigative hearings under the *Anti-Terrorism Act*, the Supreme Court explained:

> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

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145 Bruce MacFarlane "Structural Aspects of Terrorist Trials" in Vol 3 of the Research Studies; Kent Roach and Gary Trotter "Miscarriages of Justice in the War Against Terrorism" (2005) 109 Penn. State Law Review 1001.

> The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein… The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions…Consequently, the open court principle, to put it mildly, is not to be lightly interfered with. [146]

The Court has related the open court principle to freedom of expression under the Charter and to public confidence in the administration of justice.

The open court principle is not absolute and limitations on it can be justified. In *Re Vancouver Sun*, the Court applied the existing jurisprudence on publication bans to restrictions on publicity on investigative hearings and held that restrictions on the open court principle could only be justified on the basis that: 1) they were "necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk"; and 2) "the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice."[147] This demanding test requires restrictions on the open court principle to be justified in light of proportionality concerns, including those based on least restrictive measures, and on an overall balance of the harms to the right to free expression against the benefits of the ban.

In *Re Vancouver Sun*, the Court recognized that some proceedings before the courts will by their nature be conducted *in camera*. The Court accepted that the *ex parte* application for an investigative hearing, like other *ex parte* applications such as an application for a search warrant, must be held *in camera*. The Court indicated that "It may very well be that by necessity large parts of judicial investigative hearings will be held in

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146 *Re Vancouver Sun* [2004] 2 S.C.R. 332 at paras 25-27
147 Ibid at para 29.

secret. It may also very well be that the very existence of these hearings will at times have to be kept secret."[148] On the facts of the case, however, the majority concluded that the application for an investigative hearing and the name of the witness to be compelled should have been secret, but that the existence of the order for an investigative hearing and the conduct of the Charter challenge to the investigative hearing should have been made in public. Even in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released.[149]

The Supreme Court has warned that "In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy."[150] High standards of justification for infringement on freedom of expression apply in the investigative as well as the trial stage. Justice Fish stated:

> In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation*.[151]

Although the presumption of openness was not absolute, it could not be discharged by the invocation of a generalized assertion that publicity would adversely affect investigations. The Supreme Court has affirmed the open court presumption in the context of a Crown application for a sealing order on materials used to obtain a search warrant. The Criminal Code allows a judge to prohibit access to information relating to warrants and production orders when required for justice, including in cases where disclosure would compromise the identity of confidential informants,

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148 Ibid at para 41

149 It should be noted that two judges dissented in that case, raising concerns that if "the police cannot investigate and collect information in a confidential environment, their investigation or attempt to prevent the terrorist offence would be undermined because suspects could be "tipped off"" and that witnesses could be intimidated. Ibid at para 75.

150 *Toronto Star Newspapers v. Ontario* [2005] 2 S.C.R. 188 at para 1.

151 ibid at para 39

harm innocent persons or ongoing investigations, or endanger a person engaged in particular intelligence gathering techniques and thereby prejudice future investigations.[152] This provision, however, must be administered in a manner that is consistent with the Charter. There is no presumption that the material should be closed because the case involves national security,[153]

In *Ruby v. Canada* [154], the Supreme Court held that mandatory publication bans could not be justified even with respect to proceedings that involved national security. Although the protection of information that could harm national security and the supply of information from foreign sources was an important objective and mandatory closed proceedings would "reduce the risk of an inadvertent disclosure of sensitive information", discretionary publication bans were more respectful of freedom of expression than mandatory ones. This approach has been followed by lower courts in invalidating mandatory publication restrictions under s.38 of the CEA. [155] At the same time, closed courts have been justified with respect to those parts of proceedings which discuss secret information.[156]

Restrictions on the open court principle may be easier to justify in cases where restrictions on publicity are necessary to ensure fairness towards the accused. In *Dagenais v. C.B.C.*[157], the Court rejected a hierarchical approach that automatically preferred fair trial rights to freedom of expression. Nevertheless, it recognized the accused's right to a fair trial as an objective that could in appropriate cases support a publication ban. In that case, a publication ban could not be justified because there were reasonable alternatives to reconcile expression and fairness. In the context of secret national security information, however, it is less obvious that there will be reasonable alternatives to a restriction on the open court process. The principles of keeping secrets and treating the accused fairly will both support restrictions on the open court principle if, for example, they allow the accused or a security-cleared counsel to challenge the state's case. The overall harm to freedom of expression may be minimal if parts of the proceedings, perhaps subject to some delays, can be made public. At the same time, publication bans may be quite effective in preventing harms to national security or international relations.

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152 Criminal Code s.487.3.
153 *O'Neill v. Canada (Attorney General)* (2005) 192 C.C.C.(3d) 255 at para 47 (Ont.Sup.Ct,)
154 [2002] 4 S.C.R. 3 at paras 54-55.
155 *Toronto Star v. Canada* 2007 FC 128 at para 2. See also *Ottawa Citizen Group v. Canada (Attorney General of Canada)*, 2004 FC 1052 at paragraphs 35-40.
156 *Ruby v. Canada* [2002] 4 S.C.R. 3. See also *Khawaja v. Canada* 2007 FC 469
157 [1994] 3 S.C.R. 200

There is also a procedural dimension to the open court principle. Since its decision in *Dagenais*, the Court has recognized the practical importance of giving the media notice and standing in court proceedings in order to ensure that full consideration is given to the open court principle. Insofar as terrorism prosecutions implicate the open court principle, the judge may be confronted with multiple parties representing multiple interests. These include provincial prosecutors; the Attorney General of Canada, who has special powers and responsibilities under s.38 of the Canada Evidence Act to protect confidences; media representatives and the accused. In addition, to the extent that witnesses have interests, either in terms of protection or in terms of their obligations not to disclose secret evidence, they may also require representation. The multiplicity of the competing interests and competing parties adds to the complexity of managing the relation between secret intelligence and public evidence. As discussed above, however, the media and other third parties do not have standing in proceedings to determine whether the informer privilege exists. Information covered by the informer privilege will remain secret, and is not subject to the balancing and justification process normally required, which justifies restrictions on the open court principle. That said, the Court has recognized a role for media representation and the open court principle in determining that only the minimum of information that is necessary to protect the identity of informer should be kept secret.[158]

The Criminal Code empowers judges, in appropriate cases, to exclude the public from the courtroom, if such orders are necessary to prevent injury to international relations, national defence or national security,[159] and to make orders prohibiting the broadcast of information that would identify any witness, victim or justice system participant.[160] Although the Supreme Court held that a publication ban on the identification of a witness should be overturned in the Air India investigative hearing case, in large part because the witness did not request such a ban, Justice Josephson issued two permanent publication bans on the identity of witnesses in the Malik and Bagri prosecution. In one case he concluded:

> The indictment here charges offences of extreme violence, motivated in large measure, the Crown alleges, by a desire for revenge and retaliation. There is evidence of threats and violence being directed towards those who have taken contrary positions to those of certain

158 *Named Person v. Vancouver Sun* 2007 SCC 43 at para 51.
159 Criminal Code s.486
160 ibid s.486.5

> extremist elements. There is also evidence of what the Witness not unreasonably interpreted to be a serious threat to the lives of herself and her family should she reveal certain information. Only upon receiving an assurance that her identity would remain confidential did she disclose this information to the authorities, maintaining throughout that she would never testify out of fear for the safety of herself and her family.
>
> In this context, the Witness's ongoing security concerns rise beyond the merely speculative. The risk also does not abate simply because she has completed her testimony, as retaliation is a strong element of the risk. [161]

Although respect for the presumption of open courts should be recognized in terrorism prosecutions, other important interests, including the need to treat the accused fairly, to protect witnesses and informers and to protect the state's interests in national security confidentiality, may justify proportionate restrictions on freedom of expression.

This brief survey has outlined the importance of the presumption of an open court. This principle applies even with respect to national security matters. Although the courts have been resistant to mandatory publication bans with respect to court proceedings where secret information is not discussed, they have generally accepted the importance of restrictions on publicity in cases where the state would be entitled to make *ex parte* representations to judges about the dangers of disclosing secret evidence. If the evidence is disclosed to the accused, courts can still, in appropriate cases, restrict publicity to the wider public. Nevertheless, they may only do so to prevent a serious risk to the proper administration of justice, and only in situations where there are no other reasonable alternatives and when the benefits to the objectives of the publication ban outweigh its harms.

D) The Need for Efficient Court Processes

The final principle that needs to be considered is the need for an efficient process that will allow terrorism prosecutions to reach a final verdict. There is a range of reasonable opinion about the role of the criminal law in counter-terrorism efforts. Some would argue that intelligence rather than

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161 *R. v. Malik and Bagri* 2004 BCSC 520 at paras 6 and 7.

the criminal law should be the prime instrument to prevent terrorism; others would argue that administrative regulation targeting sites and substances that can be used for terrorist purposes should be the prime instrument. A few commentators have urged that extra legal measures may be appropriate and necessary to stop terrorism. Regardless of these debates, few would dispute that punishment and incapacitation are the appropriate responses with respect to those who would prepare and plan to commit acts of terrorist violence and those who have committed such violence. Criminal trials also 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. The criminal trial that only punishes the guilty is the moral antithesis, and the moral superior, of the terrorist who punishes the innocent.

There is also a public interest in having terrorism prosecutions reach a verdict so that damning allegations against people are resolved on the basis of admissible evidence and proper application of the presumption of innocence and the standard of proof of guilt beyond a reasonable doubt. Public trials of terrorists have an important educational function and can, if conducted properly, rebut allegations that terrorists are being persecuted because of their politics or religion. Finally, various international instruments, including conventions in relation to terrorism, also obligate Canada to treat and prosecute terrorism as a serious crime.

One of the reasons why the relation between intelligence and evidence is a central focus in the terms of reference of the Air India inquiry is because the failure to manage this relationship can make it difficult, if not impossible, to use the criminal process as a response to terrorism. As will be seen, the Air India trial that concluded in acquittals in 2005 is something of an exception in the history of Canadian terrorism prosecutions because it went to verdict. It was not delayed and fragmented by national security confidentiality proceedings in the Federal Court of the type seen in the ongoing *Khawaja* prosecution. The trial judge avoided fashioning a remedy for the destruction of intelligence that should have been disclosed to the accused only because the accused were acquitted. The prosecution was not aborted because of a reluctance to disclose the identity of vulnerable informers, as was the case with respect to the *Parmar* and *Khela* cases to be discussed below. Many previous terrorism prosecutions in Canada have been unable to reach a final verdict, in large part because of disputes and unwillingness by the state to disclose secret information, including the identity of informers.

The current Canadian process of resolving claims of national security confidentiality involves litigation in the Federal Court, and this procedure has resulted in a mistrial being declared in one case because of the delay caused when such separate proceedings were launched in the middle of the jury trial.[162] Although a second trial in that case was able to reach verdict, and s.38 of the CEA was reformed in 2001 to encourage pre-trial adjudicative and non-adjudicative resolution of disputes over national security confidentiality, the threat of delays and disruptions of terrorism prosecutions remains. The ongoing Khawaja terrorism prosecution has been delayed by pre-trial proceedings, including the adjudication and appeals of matters under s.38 of the CEA. Khawaja was arrested in March, 2004, and the trial is now not scheduled to start till mid-2008. In contrast, a trial against Khawaja's alleged co-conspirators was completed in April, 2007, despite the fact that it was one of the longest trials in British history, involving 13 months of trial, 105 prosecution witnesses and 27 days of jury deliberation. [163] Other countries have more experience with terrorism prosecutions than Canada, and we should carefully examine their procedures to determine if they provide a more efficient means of reconciling the competing demands of fairness and disclosure.

Delays in terrorism prosecutions not only frustrate crime control interests, they raise potential due process problems as well. Section 11(b) of the Charter provides the accused with a right to a trial within a reasonable time. The Supreme Court has recognized that there are both social and individual interests at stake in the efficiency of the criminal process. As Justice Sopinka explained:

> The individual rights which the section seeks to protect are: (1) the right to security of the person; (2) the right to liberty; and (3) the right to a fair trial.
>
> The right to security of the person is protected in s. 11(*b*) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty, which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that

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162 See *R. v. Ribic* case study discussed infra Part 6.

163 "Five get life over London bomb plot" April 30, 2007 at http://news.bbc.co.uk/2/hi/uk_news/6195914.stm

> proceedings take place while evidence is available and fresh.
>
> The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect, trials held promptly enjoy the confidence of the public. As observed by Martin J.A: "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused ..." In some cases, however, the accused has no interest in an early trial, and society's interest will not parallel that of the accused.
>
> There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this Court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20). As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.[164]

It is often in both the accused's and society's interests to resolve criminal cases in an efficient manner. These interests are, if anything, intensified in the context of terrorism prosecutions where the accused may face stigma and/or denial of bail, and where public confidence in the administration of justice may be harmed by allegations that the state has acted improperly or has apprehended the wrong person, perhaps for discriminatory reasons related to their political or religious beliefs. Moreover, s. 11(b) remains a justiciable right. If violated, the minimal remedy is the entry of a stay of proceedings, and this has been used to stop some mega-trials.[165]

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164 *R. v. Morin* [1992] 1 S.C.R. 771

165 *R. v. Chan* (2003) 15 C.R.(6th) 53 (Alta Q.B.); *R. v. Callocchia* (2003) 39 C.R.(5th) 374 (Que.C.A.).

Although the accused can, in certain circumstances, be required to waive s.11 (b) to undertake some proceedings, and judges take a holistic and contextual approach to issues of trial delay, the accused, at the end of the day, has an enforceable right against trial delay. The spectre of a s.11 (b) violation adds constitutional force to the overall principle that terrorism prosecutions should be conducted efficiently for the good of both the accused and the public.

E) Summary

The demands for an efficient, yet 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 may 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

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 crimes created in 2001. There are several barriers to using intelligence as evidence in terrorism prosecutions. 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 in public trials. 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