and this may make it more difficult to have CSE intercepts admitted as evidence in court. CSE may also be even more reluctant than CSIS to go to court. Thought should be given to making it possible for Canadian security intelligence agencies to conduct electronic surveillance outside Canada, subject to judicial authorization and the consent of the foreign country where the surveillance will take place. This would keep in place the structure that governs the CSE, including the restrictions designed to ensure that the CSE only collects foreign intelligence and respects the privacy of Canadians.

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 Criminal Code standards, inaccuracies in affidavits used to obtain the warrant, or reliance on clearly unconstitutional laws or warrants, that they should be admitted under s.24(2). The evidentiary use of intelligence comes with the price of disclosure to the accused and judicial requirements that information that is shielded from disclosure to the accused cannot be used to support the legality or constitutionality of the warrant. There is, however, 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.

As discussed in the first part of this study, the Crown's obligation to disclose relevant information to the accused has played an important role in relations between CSIS and the RCMP. SIRC studies in 1998 and 1999 identified the Supreme Court's landmark 1991 *Stinchcombe* case, which constitutionalized the law of disclosure, as a major impediment to the CSIS and RCMP relationship. *Stinchcombe* created fears that any information that CSIS shared with the RCMP might be disclosed to the accused. The important role of *Stinchcombe* was affirmed again in the Malik and Bagri trial.[252] At the same time, it is a mistake to locate the disclosure, obligations that are inherent in a fair criminal process entirely in *Stinchcombe*. Both the *Atwal* and *Parmar* case studies discussed above pre-date *Stinchcombe*. They demonstrate that the criminal process can in some circumstances require the disclosure of secret information in order to ensure the fair treatment of the accused; one of the four animating principles that underlie this study. They also demonstrate that steps such as editing can be taken to reconcile the demands of disclosure with public interests that will be harmed by disclosure.

As will be seen, the somewhat unique circumstances of the Air India investigation led to findings that CSIS material was subject to *Stinchcombe* disclosure obligations. CSIS's destruction of intelligence, in the form of CSIS wiretaps and notes taken by CSIS agents who interviewed witnesses, was also held to violate obligations under *Stinchcombe* to retain information that should be disclosed. Even if, in other cases, intelligence is not subject to the disclosure and retention requirements of *Stinchcombe*, the accused could attempt to obtain the production and eventual disclosure of intelligence under the common law procedure in *O'Connor* that applies to third parties who may have material of relevance to a criminal trial.

A) Disclosure of Intelligence under *R. v. Stinchcombe*

Stinchcombe involved whether the Crown had an obligation to disclose notes of a police interview of a person who had been called as a Crown witness at a preliminary inquiry but who the Crown planned not to call at trial. Although the case did not involve terrorism or national security matters, it involved the question of whether the Crown had obligations to disclose information in its possession that it did not plan to use at the criminal trial. As such, *Stinchcombe* is very relevant to whether secret intelligence possessed by the Crown must be disclosed to the accused in a terrorism trial even if the Crown makes no attempt to use the secret

252 See part I of this study.

intelligence as evidence at trial. As the *Atwal* case study suggests, however, the Crown could still seek to obtain a judicial non-disclosure order for intelligence that would be subject to disclosure under *Stinchcombe*. As will be seen in part 6 of this study, however, such applications can delay and fragment terrorism trials.

Although *Stinchcombe* is often cited for the broad proposition that all relevant information in the Crown's possession must be disclosed to the accused, the decision itself is more nuanced. Sopinka J. stated for the unanimous Court that:

> In *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the Court ([1991] 1 S.C.R. 763). She went on to add: "This Court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 774).
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> As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. Discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant….

> The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be re-opened and the Crown must have some discretion to delay disclosure in these circumstances.[253]

Although all material evidence and information should be disclosed, the Crown has the ability, and indeed the obligation, not to disclose "what is clearly irrelevant." The Crown's discretion with respect to not disclosing irrelevant information, not disclosing information such as an informer's identity covered by the law of privilege, and delaying disclosure for reasons such as witness safety or an ongoing investigation is reviewable by the trial judge.

1. The Scope of the Right to Disclosure

As examined in the first part of this study, the Court's decision in *Stinchcombe* raised considerable concerns that any CSIS information that was given to the police might be subject to disclosure obligations. It is, however, important to recall that *Stinchcombe* contemplated that only evidence that was relevant to the case and the accused's right to full answer and defence would be subject to disclosure. The Crown has a reviewable discretion not to disclose irrelevant or privileged evidence and to delay disclosure for important reasons such as witness safety or ongoing investigations. It is important that the police and security intelligence agencies understand the precise demands of *Stinchcombe* and that they neither over-estimate nor under-estimate its requirements.[254] Misunderstandings of *Stinchcombe* may be in part related to the fact that its standards have yet to be codified in accessible legislation.

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253 [1991] 3 S.C.R. 326

254 For suggestions that the Attorney General of Canada may have overestimated *Stinchcombe* disclosure requirements see *Canada v. Khawaja* 2007 FC 490 revd on other grounds 2007 FCA 342 *Canada v. Khawaja* 2008 FC 560 holding that general analytic reports, administrative material and correspondence with foreign agencies held by the RCMP was not relevant to the accused under the *Stinchcombe* standard in the course of s.38 proceedings. These cases are discussed infra Part VI.

In the years immediately after *Stinchcombe*, the Court addressed, in a number of cases, the question of what evidence was relevant and would have to be disclosed. In a 1993 case, *R. v. Egger*,[255] Justice Sopinka stated:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

Evidence that cannot reasonably be used by the accused is not subject to *Stinchcombe* disclosure obligations.

In 1995, the Court returned to the issue of the breadth of Stinchcombe disclosure obligations in *R. v. Chaplin* [256]. This case is of particular relevance with respect to concerns that a wide range of intelligence in the hands of the police or prosecutor would have to be disclosed. The accused was subject to a Criminal Code wiretap that was disclosed to him, but further requested to know whether he had been named as a primary or second target in any other wiretaps between 1988 and 1992. The Crown replied that there were no wiretaps "pertaining to this particular investigation during the time period in question".[257] The Crown, however, refused to confirm or deny the existence of any other wiretap involving the accused during the time. The unanimous Court dismissed the accused's appeal on the basis that the accused had not established a sufficient basis for further disclosure. Sopinka J. concluded that "once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence."[258] He added that:

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255 [1993] 2 S.C.R. 451
256 [1995] 1 S.C.R. 727
257 ibid at para 5.
258 ibid at para 30.

> the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. In cases involving wiretaps, such as this appeal, this is particularly important. Fishing expeditions and conjecture must be separated from legitimate requests for disclosure. Routine disclosure of the existence of wiretaps in relation to a particular accused who has been charged, but who is the subject of wiretaps for ongoing criminal investigations in relation to other suspected offences, would impede the ability of the state to investigate a broad array of sophisticated crimes which are otherwise difficult to detect, such as drug-trafficking, extortion, fraud and insider trading: *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 44. Wiretaps are generally only effective if their existence is unknown to the persons under investigation. This is implicitly recognized in the secrecy provisions of Part VI of the *Code*, s. 187 and s. 193 which govern until the investigation expires, and the deferred notification of the existence of a wiretap by s. 196.[259]

The Court distinguished prior cases about the disclosure of wiretaps, such as the *Parmar* case discussed above, on the basis that "the critical fact here is that the Crown stated that no wiretaps had been authorized as part of the investigation leading to the charges." As such:

> Reference to the possible existence of other wiretaps and their connection to the issues in this appeal, however, is purely speculative and mere conjecture. In sum, it is at best, a fishing expedition, and worst, an attempt to determine whether the police have investigated the accused persons in relation to other suspected offences. The appellants provided no basis for believing that there were wiretap authorizations even in existence in relation to investigation of other charges, or that the Crown had relied upon such wiretaps or derivative evidence therefrom in preparing its case. In the circumstances, the Crown was not called upon to justify further the

259 ibid at para 32

> position it had taken and there was no need for further evidence.[260]

Chaplin was an early and important indication of the limits of *Stinchcombe,* especially with respect to confidential information that was not relevant to the accused's ability to make full answer and defence in relation to the particular charges faced by the accused. It demonstrated a willingness to shut down disclosure attempts by the accused in situations where the Crown was prepared to certify that all wiretaps in relation to the particular charge had been disclosed, but was not prepared to confirm or deny the existence of wiretaps or other confidential information that was not related to the particular charges.

Chaplin also raises the issue of whether intelligence possessed by CSIS or CSE would be subject to disclosure obligation as evidence that is in the control of the prosecutor. Sopinka J. in *Chaplin* stated that:

> This Court has clearly established that the Crown is under a general duty to disclose <u>all</u> information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged.[261]

This suggests that *Stinchcombe* might not apply if the prosecution cannot be said to control the information. Foreign intelligence that is not possessed by the prosecution would surely not be controlled by the prosecution. Courts have also been reluctant to hold that provincial prosecutors possess or control information that is held by federal agencies, at least in cases where the federal agency is not a police force and the information cannot be characterized as fruits of the police investigation.[262] Whether intelligence possessed by CSIS or CSE would be held to be in the possession of the prosecution would likely depend on the degree of integration of their activities with those of the police. From a functional perspective of preventing terrorism, a high degree of integration would be desirable. A price of this integration, however, may be that more intelligence is subject to disclosure requirements. That said, the Attorney General of Canada still can seek specific non-disclosure orders in particular cases.

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260 ibid at para 35
261 ibid at para 21
262 *R. v. Gingras* (1992) 71 C.C.C.(3d) 53 (Alta.C.A.) rejecting request to provincial prosecutor for the federal correctional records of Crown witnesses.

Chaplin suggests that the Crown does not have to disclose intelligence that is not relevant to the particular charges faced by the accused. That said, the breadth of some terrorism offences such as those relating to participation in a terrorist group or facilitation of terrorist activities,[263] or even conspiracy to commit murder charges, may mean that much of the intelligence collected about an accused and his or her associates over an extended period of time might nevertheless be relevant to the wide ranging charges. Nevertheless, *Chaplin* affirms that the choice of particular charges will also affect the breadth of disclosure obligations. Disclosure obligations may be narrowed if the accused faces a charge in relation to a particular act, but they will be broadened if the charge relates to a number of acts over an extended period of time.

The Court revisited the scope of the right to disclosure three years after *Chaplin* in *R. v. Dixon*. In that case, Cory J. commented:

> Clearly the threshold requirement for disclosure is set quite low. As a result, a broad range of material, whether exculpatory or inculpatory, is subject to disclosure. See *Stinchcombe*, *supra*, at p. 343. In particular, "all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses" (p. 345). The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. [264]

The Court suggested that material that must be disclosed under Stinchcombe "includes material which may have only marginal value to the ultimate issues at trial."[265] This articulation of *Stinchcombe* stresses the breadth of the disclosure obligations. In a terrorism prosecution, it could be argued that there is a reasonable possibility that much intelligence about an accused or his or her associates could be useful to the accused in making full answer and defence.

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263 Criminal Code ss.83.18 and 83.19.
264 *R. v. Dixon* [1998] 1 S.C.R. 244 at para 21.
265 ibid at para 23

2. The Relation Between the Right of Disclosure and the Right to Full Answer and Defence

Even broad understandings of disclosure obligations under *Stinchcombe* stress that the disclosure is a means to an end, and the end is the right of the accused to make full answer and defence and to have a fair trial.

The relation between the right of disclosure and the right to full answer and defence has been discussed in several cases. In *R. v. La*,[266] the Court distinguished between the right of disclosure and the right to full answer and defence. The right to disclosure would be violated if there was an inadequate explanation or "unacceptable negligence"[267] in making disclosure. In contrast, a violation of the right to full answer and defence required "actual prejudice"[268]. This latter right would not be violated if "an alternative source of information was available". [269] This opens the important possibility in terrorism prosecutions that there could be alternative sources of information instead of the disclosure of secret intelligence. As will be seen, the idea of adequate substitution of unclassified material for classified material plays an important role in American approaches to establishing a workable relation between intelligence and evidence.

In *R. v. Dixon* [270], an unanimous Court distinguished between a right to disclosure that would be violated where the "accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence" and a right to full answer and defence that would be violated "where an accused demonstrates that there is a reasonable possibility that the non-disclosure affected the outcome at trial or the overall fairness of the trial process. [271] Although the right to disclosure has an independent constitutional status under s.7 of the Charter, it is designed to facilitate the right to full answer and defence. The Court has also indicated that there is a temporal dimension to the relation between the two rights. The right to full answer and defence generally becomes relevant when appellate courts review trials, whereas the right to disclosure is concerned with disclosure issues before and during the trial.

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266 [1997] 2 S.C.R. 680
267 Ibid at para 20
268 Ibid at para 25
269 Ibid at para 32
270 [1998] 1 S.C.R. 244
271 ibid at para 34

The Supreme Court revisited the relation between the right to disclosure and the right to full answer and defence in *R. v. Taillefer; R. v. Duguay*[272]. This case involved a large amount of information relating to a murder investigation that was not disclosed to the accused, including inconsistent statements of some Crown witnesses and information that went contrary to the Crown's theory of the case. The Supreme Court affirmed that the accused's right to disclosure was broad and constitutional. LeBel J. stated:

> The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. … Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. [273]

As in *Dixon*, this case stressed the breadth of the disclosure obligation, albeit with relevance being determined in relation to the charge and reasonably possible defences.

The Court again noted that the violation of the accused's right to disclosure would not necessarily result in a violation of the right to full answer and defence.[274] In order to violate the right to full answer and defence, the accused must demonstrate that the failure to make disclosure affected the outcome of the trial or the overall fairness of the trial process. The accused does not have to show that a different verdict was probable, but only a reasonable possibility. This reasonable possibility is assessed in relation to the requirement that guilt be proven beyond a reasonable doubt. The Supreme Court overturned the Quebec Court of Appeal's decision that the right to full answer and defence had not been violated

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272 [2003] 3 S.C.R. 307
273 ibid at paras 59-60.
274 Ibid at para 71

in this case. The Court of Appeal erred in evaluating the evidence item by item and finding that no item in itself would have affected the verdict. Rather, the focus should be on all the circumstances, both with respect to the outcome of the trial and the overall fairness of the trial process. With respect to the fairness of the trial, courts should consider whether the failure to disclose "deprived the accused of certain evidential or investigative resources. That would be the case, for example, if the undisclosed statement of a witness could reasonably have been used to impeach the credibility of a prosecution witness. The conclusion would necessarily be the same if the prosecution fails to disclose to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence."[275] The focus should be on "possible and realistic uses of that evidence by the defence"[276].

The Court's approach in *Taillefer* affirms that the right to disclosure is broad and applies to relevant information including information about witnesses that the Crown does not propose to call. At the same time, the case also stands for the proposition that not every violation of the right to disclosure will violate the right to full answer and defence. The focus in determining whether this later right is violated is on realistic uses of the material by the defence that could affect the outcome or the fairness of the process. Cumulative non-disclosure could violate the right to full answer and defence even though each piece of undisclosed material on its own might not affect the outcome or the fairness of the process.

3. Stinchcombe and the Duty to Preserve Evidence

Soon after *Stinchcombe*, the Supreme Court indicated that a corollary of the right to disclosure of relevant information is a duty of the Crown to preserve such evidence. As will be seen, the destruction of relevant information by CSIS at the Malik and Bagri trial led to a holding that s.7 of the Charter had been violated. The trial judge only avoided fashioning a remedy for such a violation because he acquitted the accused on the merits.

As early as 1993, the Supreme Court indicated that the *Stinchcombe* disclosure obligation would require the Crown to preserve blood samples beyond a minimum period provided in the Criminal Code.[277] In 1995,

275 ibid at para 84
276 ibid at para 99
277 *R. v. Egger* [1993] 2 S.C.R 451 at 472

the *Stinchcombe* case returned to the Court because the original police notes in that case had been destroyed. In that second *Stinchcombe* case, the Court made clear that the obligation to preserve evidence was not absolute. A satisfactory explanation about why material was not retained might be sufficient to fulfill the Crown's *Stinchcombe* obligations.[278] In 1997, the Court elaborated on the proper approach to the preservation of evidence in *R. v. La*, a case in which a tape recorded conversation with a young girl taken in relation to child protection proceedings was not available even though it might have been relevant to the accused in a subsequent sexual assault prosecution in which the girl was the complainant. [279]Sopinka J. concluded for the majority of Court:

> The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost…. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.[280]

The Court also left open the possibility that even if the explanation for the loss of evidence was acceptable and the right to disclosure was not violated, "in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial"[281]. In such cases, a stay of proceedings may be the appropriate remedy. The Court also indicated that the Crown's failure to preserve the relevant evidence might also result in an abuse of process if, for example, material was deliberately destroyed in order to evade disclosure obligations or even, perhaps, if there was "an unacceptable degree of negligent conduct"[282] in failing to preserve the evidence.

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278 *R. v. Stinchcombe* [1995] 1 S.C.R. 754

279 On the merits the Court found no s.7 violation because of the destruction of the tape, but in large part because the police had recorded four other statements from the girl and she had testified at the preliminary inquiry. *R. v. La* [1997] 2 S.C.R. 680 at paras 32-33.

280 Ibid at paras 20-21.

281 Ibid at para 24

282 ibid at para 22

4. The Application of Stinchcombe Principles in the Air India Prosecution

La played an important role with respect to two separate concessions by the Crown in the Malik and Bagri trial that there had been an unacceptable degree of negligence in the failure to preserve CSIS wiretaps and notes. Without questioning that concession, however, it is important to recognize that the Court's holding in *La* makes some implicit accommodation for the different purposes of intelligence and evidence gathering by stressing that there was no s.7 violation because the destroyed tape recording in that case "was not tape-recorded for the purposes of a criminal investigation" and that the officer "did not turn it over to the police officer who investigated the charges in issue."[283] This suggests some willingness by the Court to accept that disclosure and preservation of evidence obligations do not extend to parallel and separate investigations for different purposes. That said, the Court's decision in *La* suggests that if security intelligence officials shared information with the police, this would be a factor suggesting that the duty to preserve the evidence would apply. It is also possible that the courts could find a violation of the right to full answer and defence, even if the explanation for not retaining intelligence was reasonable and did not violate the right to disclosure.

The *La* case raises the issues of whether some legislative restriction on the duty to preserve evidence is required in the national security context. It could be argued that the potential application of the principle could interfere with the intelligence gathering processes of security intelligence agencies and, especially, in their willingness to share information with police forces, who are clearly subject to the duty to preserve and disclose relevant information. It should be recognized that the duty to preserve evidence and information under *Stinchcombe* cuts both ways. As recognized by Bob Rae in his report, a failure to preserve relevant information can have adverse implications for both the state and the accused. The destruction of CSIS wiretaps and notes in the Air India investigation may have harmed the state's case. At the same time, the destruction of such material may also have deprived the accused of material that would have been helpful in their defence. Because the material has been destroyed, however, we will never know for sure what it may have revealed. This uncertainty suggests that the duty to preserve

283 *R v. La* at para 29

relevant evidence and information, even as it may apply to terrorism investigations by security intelligence agencies, should not be lightly limited or restricted. The information can be retained even though restrictions are placed on its subsequent distribution for reasons related to privacy or other interests.

An issue that arose at various junctures during the Malik and Bagri prosecution was whether CSIS information was subject to *Stinchcombe* disclosure and retention obligations. Justice Josephson considered the matter in a 2002 motion in relation to the erasure of the CSIS wiretaps. The Crown at first argued that CSIS should be treated as a third party for purposes of disclosure, but in the words of the trial judge "Mr. Code for Mr. Bagri persuasively submits that both law and logic lead to a conclusion that, in the circumstances of this case, CSIS is part of the Crown, and hence subject"[284] to *Stinchcombe* obligations. The Crown subsequently conceded that *Stinchcombe* applied to CSIS as a result of a 1987 agreement that the RCMP would have "unfettered access to all relevant information in the files of CSIS…" about the investigation.[285] This led Justice Josephson to conclude that "all remaining information in the possession of CSIS is subject to disclosure by the Crown in accordance with the standards set out in *R. v. Stinchcombe*."[286]

The 1987 agreement appears to be an exception to the 1986 MOU between CSIS and the RCMP which, as discussed in part 1 of this study, suggests that each agency will not have unfettered access to the files of the other agency. This statement is made not to criticize the 1987 agreement made in the unprecedented context of the Air India investigation, but rather to place Justice Josephson's conclusion about the applicability of *Stinchcombe* to CSIS in a broader context. Both the Crown's concession and Justice Josephson's statements take note of the particular circumstances of the Air India investigation, and leave open the possibility of distinguishing this precedent in future and more routine cases where CSIS carefully controls the information that it discloses to the RCMP.

The issue arose again in 2004 in relation to whether CSIS breached a disclosure obligation in relation to the destruction of the notes and tape recordings of interviews between a CSIS agent and a key Crown witness.

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284 *R. v. Malik* [2002] B.C.J. No 3219 at para 9
285 ibid at para 10.
286 Ibid at para 14

As in 2002, the Crown conceded that *Stinchcombe* applied to CSIS as a result of the 1987 agreement between CSIS and the RCMP. Even in the absence of such an agreement, Josephson J. concluded:

> Despite clear lines of demarcation between the roles of C.S.I.S. and the R.C.M.P., the information obtained from the Witness immediately struck Laurie [the CSIS agent] as being of extreme importance and relevance to the Air India criminal investigation. When, in the course of his information gathering role, he uncovered evidence relevant to that investigation, he was obliged by statute and policy to preserve and pass on that evidence to the R.C.M.P.[287]

This CSIS interview took place after the bombing of Air India Flight 182. As such, the interview had more obvious evidentiary value than interviews that might have been conducted before an act of terrorism had occurred. After the act of terrorism has occurred, it becomes more difficult to argue that CSIS is discharging its regulatory duties in relation to threats to the security of Canada, as opposed to the determination of some form of penal liability against specific individuals. The Air India investigation was in many ways unique, particularly in the post-bombing period. Justice Josephson's decisions should not stand for the general proposition that CSIS is always subject to *Stinchcombe* disclosure obligations.[288] That said, it does suggest that some information held by CSIS in some counter-terrorism investigations may be subject to Charter obligations to preserve and disclose evidence.

Courts of Appeal are divided on the issue of when another government agency becomes subject to *Stinchcombe*. Some Courts of Appeal have held that the Crown should include material held by another Crown agency involved in the investigation,[289] while others have held that provincial Crowns in particular cannot disclose material held by federal agencies beyond their control.[290] Although some terrorism prosecutions may be conducted by provincial prosecutors, the fact that the federal government can take over such prosecutions and that CSIS works closely

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287 *R. v. Malik* [2004] B.C.J. no. 842; 2004 BCSC 554 at para 20

288 A conclusion that CSIS information is subject to *Stinchcombe* disclosure obligations does not automatically require the disclosure of the secret intelligence. The Crown can claim national security confidentiality or other public interest immunities under ss.37 and 38 of the CEA that will be discussed in the next part of this study.

289 *R. v. Arsenault* (1994) 93 C.C.C.(3d) 111 (N.B.C.A.).

290 *R. v. Gingras* (1992) 71 C.C.C.(3d) 53 (Atla.C.A.)

with the police will be relevant factors in deciding whether Crown disclosure in terrorism prosecutions should include relevant CSIS material. Questions may arise in individual cases about whether the Crown has control of intelligence material that may have formed the backdrop for a referral of an investigation from CSIS to the police or about whether a CSIS investigation constitutes fruits of an investigation for the purposes of disclosure.[291] Nevertheless, information that is possessed in the RCMP's Secure Criminal Investigation System (SCIS), or otherwise possessed by an Integrated National Security Enforcement Team (INSET), composed of the RCMP, municipal, and provincial and other federal agencies including CSIS, would likely be subject to *Stinchcombe* disclosure obligations should the information be relevant in the particular case. [292] If the CSIS information is included in the RCMP's SCIS's data base, even if it is subject to restrictions on the use and disclosure of that information, it will be retained until the investigation is marked as concluded and a purge date is provided in accordance with a schedule provide by the Information Management Branch.[293] The public record suggests that the RCMP has taken steps to preserve data in its terrorism investigations in order to satisfy *Stinchcombe* disclosure and retention obligations. As will be seen, the same cannot be said about CSIS.

5. Subsequent Litigation Involving CSIS Destruction of Intelligence

The issue of CSIS's failure to retain and disclose interview notes is the subject of pending litigation in the Supreme Court. The issue arose in security certificate proceedings against Adil Charkaoui. He requested a stay of proceedings on the basis that CSIS did not retain interview notes,

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291 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.

292 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) at 102 ff. The Commission reported that information subject to caveats is included in the RCMP's SCIS data base and that the overall approach is of broad inclusion in the data base. This practice is explained in part because of the importance and fluidity of national security investigations and in part because "the RCMP is bound to ensure that all investigation files are complete, in accordance with the standards set by the Supreme Court in the *Stinchcombe* case. Complete files must include both inculpating and exculpating information concerning the accused. Information often includes some about individuals with whom the target of the investigation has come into contact. The RCMP has noted in this regard that seemingly benign information can provide a potential accused with alibi evidence." Ibid at 109-110.

293 The Arar commission reported that "given their nature, many national security investigations remain open and files are therefore not subject to purge for a considerable length of the time." Ibid at 111. Some major investigations of historical significance such as the Air India investigations are never subject to an automatic destruction of information. ibid.

but rather produced a summary of various interviews. Noël J. dismissed this application, largely on the basis that "the interview summaries are of no significance to the foundation of the facts and allegations on which the certificate and the detention are based."[294] He also stated that it was not:

> necessary to discuss the role of CSIS in the investigation, other than to say that CSIS is not a police agency and that it is not its role to lay charges. As such, it cannot be subject to the same obligations as those attributed to a police force. Moreover, we are dealing here with immigration law, not the criminal law. [295]

An appeal by Charkaoui was dismissed by the Federal Court of Appeal, primarily on the grounds that any harm from the destruction of the interview notes was speculative. At the same time, the Court of Appeal considered the government's defence of the destruction of the interview notes to be less than persuasive:

> According to the Ministers, the CSIS duty to confine itself to what is strictly necessary means that once a summary of an interview is written up, it is no longer strictly necessary to preserve notes of the interview and they are then destroyed. This policy, we are told, prevents the accumulation of information on individuals who are not the subject of any suspicion.
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> On its face, section 12 stipulates that the test of necessity, even strict necessity, applies to the collection of information by investigation or otherwise. If there is a necessity to preserve the information thus collected, it is a practical and not statutory necessity. If the information is not preserved, it cannot then be used for any useful purpose.[296]

Pelletier J. A. noted that he "must say in passing that I find the justification proffered by the Ministers for this CSIS policy rather unconvincing."[297] It was suggested in the last section, that the "strict necessity" standard in

294 *Re Charkaoui* 2005 FC 149 at para 16
295 ibid at para 17.
296 *Re Charkaoui* 2006 FCA 206 at paras 28-29
297 Ibid at para 27

s.12 of the CSIS Act should only apply to the collection of intelligence and the destruction of intelligence shortly after its collection because it was not strictly necessary that the intelligence be collected in the first place. It appears, however, that CSIS interprets the standard of "strict necessity" to apply to the retention of intelligence even when that intelligence may become relevant in legal proceedings.

It remains to be seen whether the Supreme Court will address whether and when CSIS has an obligation under s.7 of the Charter to preserve information for disclosure. A conclusion by the Supreme Court that CSIS is subject to retention obligations would likely depend on the fact that the interview was conducted in the context of adversarial proceedings against Charkaoui. In any event, this litigation indicates a continued reluctance by CSIS to take or retain information to evidentiary standards despite the fact that other intelligence agencies, most notably MI5, are prepared to collect to evidential standards in at least some cases.

As suggested above, security intelligence agencies should reconsider the conventional belief that they are unconcerned with evidence in the context of anti-terrorism investigations. The claims that *Stinchcombe* applies to security intelligence agencies become stronger the more their investigations focus on the potential liability of individuals as opposed to general threats to national security. Even if the Federal Court of Appeal's decision in *Charkaoui* is upheld on grounds related to the particular context of immigration law security certificates, it is clear that the duty to retain information subject to *Stinchcombe* has been recognized under the criminal law, including in the Malik and Bagri terrorism prosecution. As in the Air India investigation, the collection of intelligence to evidentiary standards and the retention of such information could benefit both the crime control interests of the state and the due process rights of the affected individuals.

B) Production and Disclosure of Intelligence as Third Party Records under R. v. O'Connor

Even if, on the facts of an individual case, CSIS records are not subject to broad *Stinchcombe* retention and disclosure obligations because they are not in the possession or control of the prosecution, or do not constitute the fruits of the investigation, the accused could still seek production and disclosure of CSIS material under the procedure provided in *R. v.*

O'Connor.[298] Although that common law procedure has been displaced by legislation that, as will be discussed in the next section, was held to be constitutional in *R. v. Mills*[299], the common law *O'Connor* test still applies to the accused's attempt to obtain access to third party records such as intelligence that do not constitute the private records of complainants in sexual offences.

The *O'Connor* scheme places a higher burden on the accused than *Stinchcombe*. The Court has recognized that:

> In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence (see *Egger*, *supra*, at p. 467, and *Chaplin*, *supra*, at p. 740). In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. [300]

Under this test, the accused would have to demonstrate that intelligence held by CSIS was relevant to the alleged facts in a terrorism prosecution or to the credibility of witnesses or the reliability of evidence used in the prosecution. Although this is a higher standard of relevance than *Stinchcombe*, it might often be easily satisfied in the context of a terrorism prosecution where CSIS had the accused or associates of the accused under surveillance. It could also be satisfied in cases where a witness in the prosecution had previously been a CSIS source.

The Court in *O'Connor* was sensitive to the danger of placing the accused in an impossible position of establishing the conclusive relevance of information that he or she had not seen. It also stressed the importance of the accused's right to full answer and defence, and the danger that miscarriages of justice might result from restricting the ability of the

298 *R. v. O'Connor* [1995] 4 S.C.R. 1411
299 *R. v. Mills* [1999] 3 S.C.R. 668
300 *R. v. O'Connor* [1995] 4 S.C.R. 1411 at para 22

accused to call evidence in his or her own defence. It noted that "so important is the societal interest in preventing a miscarriage of justice, that our law requires the state to disclose the identity of an informer in certain circumstances, despite the fact that the revelation may jeopardize the informer's safety."[301]

Once the relevance of the requested material to the trial has been established, the common law *O'Connor* procedure then requires the judge to examine the material and consider the case both for and against disclosing the material to the accused. Lamer C.J. and Sopinka J. stated:

> …the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In some cases, it may be possible for the presiding judge to provide a judicial summary of the records to counsel to enable them to assist in determining whether the material should be produced. This, of course, would depend on the specific facts of each particular case.[302]

In *O'Connor*, the Court was concerned about the competing rights of the accused to full answer and defence, but also the competing privacy rights of complainants in sexual assault cases. The Court would probably be similarly concerned with the rights of confidential informers who may find their safety threatened by disclosure to the accused. That said, the Court has recognized that even the informer privilege is subject to innocence at stake exceptions.

A court considering a demand for production and disclosure from CSIS under *O'Connor* might also be concerned with how the privacy of third parties might be adversely affected by disclosure of material held by CSIS. Nevertheless, courts have at times been reluctant to apply the full

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301 ibid at paras 18, 25.

302 Ibid at para 30. The Court elaborated that "in balancing the competing rights in question, the following factors should be considered: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question"" ibid at para 31 quoting and adopting from the judgment of L'Heureux-Dube J. at para. 156.

O'Connor balancing test to items such as police occurrence reports that were obtained in a manner that implicates the administration of justice as opposed to the private therapy at stake in *O'Connor*.[303] An open question would be whether a judge under *O'Connor* would also balance the state's interest in non-disclosure against the accused's interest in the record. In *O'Connor*, the Court expressed some reluctance to consider the societal interest in encouraging the report of sexual offences in the balancing process. It concluded: "the societal interest is not a paramount consideration in deciding whether the information should be provided. It is, however, a relevant factor which should be taken into account in weighing the competing interests."[304] This suggests that courts might consider societal interests in securing intelligence and sharing information that can be used to prevent terrorism when considering an *O'Connor* application for third party records from CSIS or another agency that holds intelligence. There may, however, be a need for Parliament to specify what interests should be considered at this second stage, as was done in the legislation enacted in response to *O'Connor*. If Parliament did so, it would be advisable to be as specific as possible about the harms that might be caused by disclosure and not simply reiterate the idea that disclosure could be injurious to national security, national defence and international relations. These concerns are already well represented in s.38 of the *Canada Evidence Act* which allows the Attorney General of Canada to seek non-disclosure orders.

The second stage of the *O'Connor* test also allows the judge to edit the material to be disclosed so as to preserve as much of the public interest in non-disclosure as possible. In many ways, this resembles and duplicates the process contemplated under ss.37 and 38 of the *Canada Evidence Act*.

C) Summary

Although it excludes information that is clearly not relevant or subject to informer or other privileges, *Stinchcombe* places broad disclosure obligations on the Crown. On the particular facts of the Air India investigation, CSIS was held subject to *Stinchcombe* disclosure obligations, including the duty to preserve evidence. This holding would likely not be applicable to all CSIS activity, but it may be applied to some CSIS counter-terrorism investigations which focus on suspected

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303 *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.

304 *R. v. O'Connor* [1995] 4 S.C.R. 401 at para 33.

individuals who may well be charged with terrorism offences, and which involve close co-operation with the police. Even when CSIS material is not subject to *Stinchcombe* disclosure requirements, the accused can demand production and disclosure from CSIS of third party records under *O'Connor*.

The broad definition of terrorism offences make it difficult for the Crown to argue that intelligence about the accused or his or her associates is clearly not relevant under *Stinchcombe* or not likely relevant under *O'Connor*. Intelligence that provides general threat assessment or material that deals with administrative matters may, however, not be relevant to the accused and applications by the accused for disclosure or production could be dismissed on that basis. Once the intelligence records were produced before the judge under *O'Connor*, 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. As will be seen in the next section, it could also be possible to enact legislation to govern and restrict applications for the disclosure and production of intelligence under *Stinchcombe* and *O'Connor*. It could also be possible to expand evidentiary privileges as a means of restricting disclosure obligations.

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