VOLUME THREE
THE RELATIONSHIP BETWEEN INTELLIGENCE AND EVIDENCE AND THE CHALLENGES OF TERRORISM PROSECUTIONS

CHAPTER X: RECOMMENDATIONS

Recommendations from Chapter II: Coordinating the Intelligence/ Evidence Relationship

Recommendation 1:

The role of the National Security Advisor in the Privy Council Office should be enhanced. The National Security Advisor's new responsibilities should be as follows:

- to participate in setting strategic national security policies and priorities;
- to supervise and, where necessary, to coordinate national security activities, including all aspects of the distribution of intelligence to the RCMP and to other government agencies;
- to provide regular briefings to the Prime Minister and, as required, to other ministers;
- to resolve, with finality, disputes among the agencies responsible for national security;
- to provide oversight of the effectiveness of national security activities; and
- to carry out the government's national security policy in the public interest.

In carrying our these new duties, the National Security Advisor should be assisted by a Deputy and by a staff of secondees from agencies which have national security responsibilities, such as CSIS, the RCMP, the CBSA, and DFAIT. The National Security Advisor should continue to support relevant Cabinet committees and serve as Deputy Minister for the CSE, but these duties could, if necessary, be delegated to the Deputy National Security Advisor or to another official within the office of the NSA.

Measures to enhance the role of the NSA should not be delayed until the enactment of legislation on a new national security privilege.

Recommendations from Chapter III: Coordinating Terrorism Prosecutions

Recommendation 2:

The role of the National Security Advisor should be exercised in a manner that is sensitive to the principles of police and prosecutorial independence and discretion, while recognizing the limits of these principles in the prosecution of terrorism offences. The principle of police independence should continue to be qualified by the requirement that an Attorney General consent to the laying of charges for a terrorism offence.

The Attorney General of Canada should continue to be able to receive relevant information from Cabinet colleagues, including the Prime Minister and the National Security Advisor, about the possible national security and foreign policy implications of the exercise of prosecutorial discretion.

Recommendation 3:

Terrorism prosecutions at the federal level should be supervised and conducted by a Director of Terrorism Prosecutions appointed by the Attorney General of Canada.

Recommendation 4:

The office of the Director should be located within the department of the Attorney General of Canada and not within the Public Prosecution Service of Canada. The placement of the proposed Director of Terrorism Prosecutions in the Attorney General's department is necessary to ensure that terrorism prosecutions are conducted in an integrated manner, given the critical role of the Attorney General of Canada under the national security confidentiality provisions of section 38 of the *Canada Evidence Act*.

Recommendation 5:

The Director of Terrorism Prosecutions should also provide relevant legal advice to Integrated National Security Enforcement Teams and to the RCMP and CSIS with respect to their counterterrorism work to ensure continuity and consistency of legal advice and representation in terrorism investigations and prosecutions.

Recommendation 6:

The Director of Terrorism Prosecutions should preferably not provide legal representation to the Government of Canada in any civil litigation that might arise from an ongoing terrorism investigation or prosecution, in order to avoid any possible conflict of interest.

Recommendation 7:

A lead federal role in terrorism prosecutions should be maintained because of their national importance and the key role that the Attorney General of Canada will play in most terrorism prosecutions under section 38 of the *Canada Evidence Act*. The Attorney General of Canada should be prepared to exercise the right under the *Security Offences Act* to pre-empt or take over provincial terrorism prosecutions if the difficulties of coordinating provincial and federal prosecutorial decision-making appear to be sufficiently great or if a federal prosecution is in the public interest.

Recommendation 8:

Provincial Attorneys General should notify the Attorney General of Canada through the proposed federal Director of Terrorism Prosecutions of any potential prosecution that may involve a terrorist group or a terrorist activity, whether or not the offence is prosecuted as a terrorism offence. The National Security Advisor should also be notified.

Recommendations from Chapter IV: The Collection and Retention of Intelligence: Modernizing the *CSIS Act*

Recommendation 9:

In compliance with the 2008 Supreme Court of Canada decision in *Charkaoui*, CSIS should retain intelligence that has been properly gathered during an investigation of threats to national security under section 12 of the *CSIS Act*. CSIS should destroy such intelligence after 25 years or a period determined by Parliament, but only if the Director of CSIS certifies that it is no longer relevant.

Recommendation 10:

The *CSIS Act* should be amended to reflect the enhanced role proposed for the National Security Advisor and to provide for greater sharing of information with other agencies.

Section 19(2)(a) of the *CSIS Act* should be amended to require CSIS to report information that may be used in an investigation or prosecution of an offence either to the relevant policing or prosecutorial authorities or to the National Security Advisor.

If the National Security Advisor receives security threat information from CSIS, he or she should have the authority, at any time, to provide the information to the relevant policing or prosecutorial authorities or to other relevant officials with a view to minimizing the terrorist threat. The National Security Advisor should make decisions about whether intelligence should be disclosed only after considering the competing demands for disclosure and secrecy. In every case, the decision should be made in the public interest, which may differ from the immediate interests of the agencies involved.

Intelligence prepared to assist the National Security Advisor in his or her deliberations, and the deliberations themselves, should be protected by a new national security privilege. The privilege would be a class privilege similar to that protecting information submitted to assist with Cabinet deliberations.

Recommendation 11:

To the extent that it is practicable to do so, CSIS should conform to the requirements of the laws relating to evidence and disclosure when conducting its counterterrorism investigations in order to facilitate the use of intelligence in the criminal justice process.

Recommendation 12:

In terrorism prosecutions, special advocates, given powers similar to those permitted under the *Immigration and Refugee Protection* Act, should be allowed to represent the accused in challenging warrants issued under section 21 of the *CSIS Act* or under Part VI of the *Criminal Code*. The special advocates should have access to all relevant information, including unedited affidavits used to justify the warrants, but should be prohibited from disclosing this information to anyone without a court order. Both the judges reviewing the validity of warrants and the special advocates should be provided with facilities to protect information that, if disclosed, might harm national security.

Recommendations from Chapter V: The Disclosure and Production of Intelligence

Recommendation 13:

Federal prosecutorial guidelines should be amended to make it clear to those who prosecute terrorism cases that only material that is relevant to the case and of possible assistance to the accused should be disclosed. Material of limited relevance – in the sense that it is not clearly irrelevant – should, in appropriate cases, be made available for inspection by the defence at a secure location.

Recommendation 14:

There is no need for further legislation governing the production for a criminal prosecution of intelligence held by CSIS. The procedures available under section 38 of the *Canada Evidence Act* provide an appropriate and workable framework for the trial court to determine whether production of such intelligence is warranted.

Recommendations from Chapter VI: The Role of Privileges in Preventing the Disclosure of Intelligence

Recommendation 15:

The RCMP and CSIS should each establish procedures to govern promises of anonymity made to informers. Such procedures should be designed to serve the public interest and should not be focused solely on the mandate of the particular agency.

Recommendation 16:

Section 19 of the *CSIS Act* should be amended to provide that information about an individual which is exchanged by CSIS with a police force or with the NSA does not prejudice claiming informer privilege.

Recommendation 17:

CSIS should not be permitted to grant police informer privilege. CSIS informers should be protected by the common law "Wigmore privilege," which requires the court to balance the public interest in disclosure against the public interest in confidentiality. If the handling of a CSIS source is transferred to the RCMP, the source should be eligible to benefit from police informer privilege.

Recommendation 18:

The *Canada Evidence Act* should be amended to create a new national security privilege, patterned on the provision for Cabinet confidences under section 39 of the Act. This new class privilege should apply to documents prepared for the National Security Advisor and to the deliberations of the office of the National Security Advisor.

Recommendations from Chapter VII: Judicial Procedures to Obtain Non-Disclosure Orders in Individual Cases

Recommendation 19:

The present two-court approach to resolving claims of national security confidentiality under section 38 of the *Canada Evidence Act* should be abandoned for criminal cases. Section 38 should be amended to allow the trial court where terrorism charges are tried to make decisions about national security confidentiality. Section 38 should be amended to include the criminal trial court in the definition of "judge" for the purposes of dealing with a section 38 application that is made during a criminal prosecution.

Recommendation 20:

In terrorism prosecutions, there should be no interim appeals or reviews of section 37 or 38 disclosure matters. Appeals of rulings under sections 37 or 38 should not be permitted until after a verdict has been reached. Appeals should be heard by provincial courts of appeal in accordance with the appeal provisions contained in the *Criminal Code*. If not already in place, arrangements should be made to ensure adequate protection of secret information that provincial courts of appeal may receive. Sections 37.1, 38.08 and 38.09 of the *Canada Evidence Act* should be amended or repealed accordingly.

Recommendation 21:

Security-cleared special advocates should be permitted to protect the accused's interests during section 38 applications, in the same manner as they are used under the *Immigration and Refugee Protection Act*. Either the accused or the presiding judge should be permitted to request the appointment of a special advocate.

Recommendation 22:

The Attorney General of Canada, through the proposed Director of Terrorism Prosecutions, should exercise restraint and independent judgment when making claims under section 38 of the *Canada Evidence Act* and avoid using overly broad claims of secrecy.

Recommendation 23:

The Federal Prosecution Service Deskbook and other policy documents that provide guidance about making secrecy claims should be updated to encourage the making of requests to foreign agencies to lift caveats that they may have placed on the further disclosure of information. These documents should also be updated to reflect the evolution of national security confidentiality jurisprudence. In particular, the Deskbook should direct prosecutors to be

prepared to identify the anticipated harms that disclosure would cause, including harms to ongoing investigations, breaches of caveats, jeopardy to sources and the disclosure of secret methods of investigations. The Deskbook should discourage reliance solely on the "mosaic effect" as the basis for making a claim of national security confidentiality.

Recommendations from Chapter VIII: Managing the Consequences of Disclosure: Witness and Source Protection

Recommendation 24:

A new position, the National Security Witness Protection Coordinator, should be created. The Coordinator would decide witness protection issues in terrorism investigations and prosecutions and administer witness protection in national security matters. The creation of such a position would require amendments to the *Witness Protection Program Act*.

The National Security Witness Protection Coordinator should be independent of the police and prosecution. He or she should be a person who inspires public confidence and who has experience with criminal justice, national security and witness protection matters.

Where appropriate and feasible, the Coordinator should consult any of the the following on matters affecting witness and source protection: the RCMP, CSIS, the National Security Advisor, the proposed Director of Terrorism Prosecutors, Public Safety Canada, Immigration Canada, the Department of Foreign Affairs and International Trade and the Correctional Service of Canada. The Coordinator would generally work closely with CSIS and the RCMP to ensure a satisfactory transfer of sources between the two agencies.

The National Security Witness Protection Coordinator's mandate would include:

- assessing the risks to potential protectees resulting from disclosure and prosecutions, as well as making decisions about accepting an individual into the witness protection program and the level of protection required;

- working with relevant federal, provincial, private sector and international partners in providing the form of protection that best satisfies the particular needs and circumstances of protectees;

- ensuring consistency in the handling of sources and resolving disputes between agencies that may arise when negotiating or implementing protection agreements (this function would be performed in consultation with the National Security Advisor);

- providing confidential support, including psychological and legal advice, for protectees as they decide whether to sign protection agreements;
- negotiating protection agreements, including the award of payments;
- providing strategic direction and policy advice on protection matters, including the adequacy of programs involving international cooperation or minors;
- providing for independent and confidential arbitration of disputes that may arise between the protectee and the witness protection program;
- making decisions about ending a person's participation in the program;
- acting as a resource for CSIS, the RCMP, the National Security Advisor and other agencies about the appropriate treatment of sources in terrorism investigations and management of their expectations;
- acting as an advocate for witnesses and sources on policy matters that may affect them and defending the need for witness protection agreements in individual cases.

The National Security Witness Protection Coordinator would not be responsible for providing the actual physical protection. That function would remain with the RCMP or other public or private bodies that provide protection services and that agree to submit to confidential arbitration of disputes by the Coordinator.

Recommendations from Chapter IX: Managing the Consequences of Disclosure: The Air India Trial and the Management of Other Complex Terrorism Prosecutions

Recommendation 25:

To make terrorism prosecutions workable, the federal government should share the cost of major trials to ensure proper project management, victim services and adequate funding to attract experienced trial counsel who can make appropriate admissions of fact and exercise their other duties as officers of the court;

Recommendation 26:

The trial judge should be appointed as early as possible to manage the trial process, hear most pre-trial motions and make rulings; these rulings should not be subject to appeal before trial;

Recommendation 27:

The *Criminal Code* should be amended to ensure that pre-trial rulings by the trial judge continue to apply in the event that the prosecution subsequently ends in a mistrial or is severed into separate prosecutions. The only case in which rulings should not bind both the accused and the Crown should be if there is a demonstration of a material change in circumstances;

Recommendation 28:

The *Criminal Code* should be amended to allow omnibus hearings of common pre-trial motions in related but severed prosecutions. This will facilitate severing terrorism prosecutions that have common legal issues where separate trials would be fairer or more manageable. All accused in the related prosecutions should be represented at the omnibus hearing. Decisions made at omnibus hearings should bind the Crown and accused in subsequent trials unless a material change in circumstances can be demonstrated. Such rulings should be subject to appeal only after a verdict.

Recommendation 29:

Electronic and staged disclosure should be used in terrorism prosecutions in order to make them more manageable. Disclosure should occur as follows:

Recommendation 30:

The Crown should be permitted to provide in electronic form any material on which it intends to rely and should have the discretion to provide paper copies of such material. If the Crown decides to use electronic disclosure, it must ensure that the defence has the necessary technical resources to use the resulting electronic database, including the appropriate software to allow annotation and searching;

Recommendation 31:

Material on which the Crown does not intend to rely but which is relevant should be produced in electronic format, and the necessary technical resources should be provided to allow the use of the resulting electronic database;

Recommendation 32:

The Crown should be able to disclose all other material that must be disclosed pursuant to *Stinchcombe* and *Charkaoui* by making it available to counsel for the accused for manual inspection. In cases where the disclosure involves sensitive material, the Crown should be able to require counsel for the accused to inspect the documents at a secure location with adequate provisions for maintaining the confidentiality of the lawyer's work. Defence counsel should have a right to copy information but subject to complying with conditions to safeguard the information and to ensure that it is not used for improper purposes not connected with the trial;

Recommendation 33:

The trial judge should have the discretion to order full or partial paper disclosure where the interests of justice require; and

Recommendation 34:

The authority and procedures for electronic disclosure should be set out in the *Criminal Code* in order to prevent disputes about electronic disclosure.

Recommendation 35:

It is recommended that:

a) the *Criminal Code* be amended to allow the judge in a jury trial to empanel up to 16 jurors to hear the case if the judge considers it to be in the interests of justice;

b) if more than 12 jurors remain at the start of jury deliberations, the 12 jurors who will deliberate be chosen by ballot of all the jurors who have heard the case;

c) the minimum number of jurors required to deliberate remain at 10;

d) the idea of having terrorism trials heard by a panel of three judges be rejected because it offers no demonstrable benefit; and

e) the call for mandatory jury trials in terrorism cases be rejected in view of the difficulties of long trials with juries and the accused's present ability to opt for trial by judge alone.