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

CHAPTER III: COORDINATING TERRORISM PROSECUTIONS

3.0 Introduction

Unlike most criminal investigations, terrorism investigations involve the use of secret intelligence from domestic and foreign sources. The decision to commence a terrorism prosecution arising from such investigations must be sensitive to the need to protect secret intelligence. Terrorism prosecutions also present formidable coordination issues because they can involve multiple police forces and multiple prosecuting agencies. Because of these coordination issues and the national and international implications of terrorism prosecutions, locating and centralizing them at the federal level is desirable.

The Attorney General of Canada plays an important role under section 38 of the *Canada Evidence Act*[1] by seeking to prevent disclosure of sensitive information to protect national security, national defence or international relations. These powers are not available to provincial Attorneys General or to the new federal Director of Public Prosecutions. As a result, any terrorism prosecution that raises the issue of disclosing secret intelligence will involve the Attorney General of Canada as a key participant.

Either a provincial Attorney General or the Attorney General of Canada must consent to the commencement of a terrorism prosecution – another distinction from many other criminal prosecutions.[2] This qualifies the traditional doctrine of police independence, which generally gives individual police officers the discretion to commence a prosecution by laying charges. This limitation on police independence stems from the danger that a terrorism prosecution could result in the disclosure of secret intelligence and could also disrupt ongoing security intelligence investigations.

Prosecutorial discretion is also affected by the unique characteristics of terrorism prosecutions. Although prosecutors must independently exercise their discretion with respect to the laying and continuation of charges, they may also require information from others in government to help inform their

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1 R.S.C. 1985, c. C-5.
2 *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.24 [*Criminal Code*].

exercise of discretion. It would be permissible for a minister or for the National Security Advisor (NSA), with the enhanced powers recommended for the NSA in this volume, to provide prosecutors with information about how a particular terrorism prosecution may affect the operations of a foreign or domestic security intelligence agency.

Terrorism prosecutions differ from other prosecutions because of the Attorney General of Canada's ability to take over prosecutions commenced by a provincial Attorney General.[3] This extraordinary federal power is related to the national significance of terrorism prosecutions and concerns about the possible disclosure of sensitive intelligence that Canada has produced or that it has received from its allies. In addition, terrorism prosecutions of the magnitude of the Air India trial would strain the resources of many provinces. For this reason, the federal government was heavily involved in the Air India trial through cost-sharing arrangements with British Columbia.

The Attorney General of Canada's critical role in terrorism prosecutions raises the question of whether he or she should be made responsible for all such prosecutions. A centralized approach of this nature would ensure a more coordinated and integrated handling of terrorism prosecutions. This would to some extent mirror the coordination role proposed for the NSA in Chapter II.

3.1 Limits on Police Discretion in Terrorism Investigations and Prosecutions

It can be argued that officials such as the NSA should not be involved in discussions of individual prosecutions, since this creates a risk of interference with police independence. However, such arguments often fail to take into account the parameters of police independence in the context of terrorism offences.

Police independence from government is an important principle. In the *Campbell* case, the Supreme Court of Canada recognized that "…[a] police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes."[4] The Court stressed that it was dealing with an RCMP officer "…in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government." This principle "…underpins the rule of law."[5] The Court added that, "…[w]hile for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner

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3 *Security Offences Act*, R.S.C. 1985, c. S-7, s. 4 (ability of the Attorney General of Canada to prosecute offences that also constitute threats to the security of Canada); *Criminal Code*, s. 83.25(1) (ability of the Attorney General of Canada to prosecute terrorism offences).

4 *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 27.

5 [1999] 1 S.C.R. 565 at para. 29.

is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience."[6]
Justice Hughes, in his interim report on the 1997 APEC demonstrations in Vancouver, commented:

> In my view, there are compelling public policy reasons not to extend the concept of police independence beyond that set out in *Campbell*. The issue is one of balance. It is clearly unacceptable for the federal government to have the authority to direct the RCMP's law enforcement activities, telling it who to investigate, arrest and prosecute, whether for partisan or other purposes. At the same time, it is equally unacceptable for the RCMP to be completely independent and unaccountable, to become a law unto themselves.[7]

Commissioner O'Connor recognized the danger of government direction of police investigations:

> If the Government could order the police to investigate, or not to investigate, particular individuals, Canada would move towards becoming a police state in which the Government could use the police to hurt its enemies and protect its friends, rather than a free and democratic society that respects the rule of law.[8]

This understanding of police independence is consistent with that articulated in 1981 by the McDonald Commission, which stressed that ministers have no right to direct the RCMP in its use of powers of investigation, arrest and prosecution.[9] However, Commissioner O'Connor noted that police independence cannot be absolute. Otherwise, it "…would run the risk of creating another type of police state, one in which the police would not be answerable to anyone."[10]

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6 [1999] 1 S.C.R. 565 at para. 33.

7 Commission for Public Complaints Against the RCMP, RCMP Act-Part VII Subsection 45.45(14), Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, BC in November 1997 at the UBC Campus and at the UBC and Richmond detachments of the RCMP (Ottawa: RCMP Public Complaints Commission, 2001), pp. 83-84.

8 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 Canada, 2006), p. 458 [*A New Review Mechanism for the RCMP's National Security Activities*].

9 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report - vol. 2 (Ottawa: Supply and Services Canada, 1981), p. 1013 [*Freedom and Security under the Law]*.

10 *A New Review Mechanism for the RCMP's National Security Activities*, p. 460.

The principle of police independence has been qualified in the national security context:

> ….the RCMP and other police forces must have the Attorney General's consent before laying charges for a terrorism offence under the *Criminal Code* or the *Security of Information Act*, and before using the extraordinary police powers of investigative hearings or preventative arrests related to terrorism investigations. As this approval requirement relates directly to individual criminal investigations, it can be seen as a restraint on the doctrine of police independence.[11]

Although statutory provisions authorizing preventive arrests and investigative hearings have now been repealed, the requirement that the Attorney General of Canada or a provincial Attorney General consent to the laying of charges for a terrorism offence remains under section 83.24 of the *Criminal Code*.[12]

What is the rationale for limiting the independence of police officers to lay charges in terrorism cases? One is that the requirement for the Attorney General's prior consent will help to ensure that serious terrorism charges are laid only in appropriate cases. Certain other *Criminal Code* offences similarly require the consent of the Attorney General before charges are laid.[13] Another rationale, unique to the national security context, is that requiring the Attorney General's consent can assist in managing the relationship between intelligence and evidence. Normally, a police officer has full discretion to lay charges, which could subsequently be stayed by the Attorney General or his or her authorized delegate. The public act of laying charges in the national security context could, however, compromise the secrecy of ongoing intelligence investigations.

The requirement for the Attorney General to consent to the laying of charges gives the Attorney General the chance to prevent the laying of charges if, in his or her view, the public interest lies in continuing an intelligence investigation or in protecting intelligence, including the identities of providers of intelligence, such as human sources, from the risk of being disclosed in a terrorism prosecution. The ability of the Attorney General to prevent the laying of charges on such a basis also contemplates that the Attorney General will have access to relevant information about intelligence investigations and about the risks that could flow from the disclosure of intelligence.

The O'Connor Commission noted how, within the RCMP, the increased central oversight of national security investigations placed appropriate limits on individual police officers.

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11 *A New Review Mechanism for the RCMP's National Security Activities*, p. 460.

12 R.S.C. 1985, c. C-46. The consent of the Attorney General of Canada must be obtained to lay charges under the Security of Information Act: R.S.C. 1985, c. O-5, s. 24.

13 See, for example, ss. 318(3) and 319(6).

Central oversight within the RCMP does not raise the same constitutional concerns about limiting police discretion. It reflects the fact that national security policing may have broader implications than other forms of policing. Unlike other criminal investigations, national security investigations could affect security intelligence agencies and even Canada's relations with other countries. There are good reasons why individual police officers should not have the ability unilaterally to commence a complex terrorism prosecution that could have an impact on agencies both inside and outside Canada.

The mere fact that the additional powers proposed by the Commission for the NSA would enable it to compel CSIS to provide intelligence information to the RCMP would not compromise police independence. The expanded role of the NSA would not involve directing the police about the conduct of their terrorism investigations or about possible charges. It would simply permit the NSA to require that information be given to the RCMP, where appropriate. The police would remain free to do what they wished with information provided by the NSA.

Other authorities on police-government relations have recognized that the responsible minister can interact with the police without undermining police independence. For example, Commissioner O'Connor noted that, "… [w]hile direction of operational matters is more controversial, I agree with the McDonald Commission that, if it raises an important question of public policy…. [the Minister] may give guidance to the [RCMP] Commissioner and express to the Commissioner the government's view of the matter."[14] The McDonald Commission, in turn, drew a distinction between the impropriety of the responsible minister directing the RCMP about law enforcement powers of investigation, arrest and prosecution, and the legitimate ability of the minister to be "…informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, he may give guidance to the [RCMP] Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give *direction* to the Commissioner."[15]

The NSA should have the same powers as the responsible minister when it comes to informing the RCMP about policy matters that may arise in particular investigations. Indeed, the enhanced powers of the NSA proposed in this volume would allow the NSA to inform the RCMP about policy matters from the unique perspective of the NSA, situated at the centre of government.

Concerns about the NSA interfering with police independence are also lessened because the police do not have their traditional powers to lay charges when terrorism offences under the *Criminal Code* are involved. As discussed earlier, the police require the consent of an Attorney General to lay a terrorism charge.[16]

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14 *A New Review Mechanism for the RCMP's National Security Activities*, p. 463.
15 Freedom and Security under the Law, Second Report - vol. 2, p. 1013.
16 *Criminal Code*, s. 83.24.

Thus, the ultimate act of independence of the police, the ability of an individual police officer to lay charges, has already been reduced.

A second problem addressed by the principle of police independence is the risk of political interference through the placement of limitations on investigations and on decisions to lay charges to protect friends of the government. Such interference would undermine the rule of law, which requires that the law apply to all individuals. This dimension of police independence, however, can create some difficulties in national security matters because the NSA and others in government may have intelligence, including intelligence obtained from other governments, that may be relevant to an ongoing police investigation, but that cannot be disclosed to the police because of the risk that it will have to be made public.

The NSA could help to resolve disputes that may arise between CSIS and the RCMP about terrorism investigations. It may even be appropriate for the NSA to communicate to all relevant parties, including the RCMP, the Government's views about the merits of a prosecution instead of a measure that maintains the secrecy of intelligence and ongoing investigations.

The idea that the police should be informed about the Government's views on a criminal matter is not without critics. Ontario's Ipperwash Inquiry recommended that the responsible minister should "…not have the authority to offer 'guidance' as opposed to 'direction.'"[17] The reforms proposed by this Commission do not contemplate the NSA providing "guidance" or "direction" to the police, but merely information.

Preventing the government from making its views known to the police in national security cases would be unworkable. Police actions in the national security field can have unanticipated effects on Canada's relations with other states, on national defence and on multilateral security intelligence investigations. Police actions may also affect the information that must be disclosed in subsequent prosecutions and the actions that the Attorney General of Canada may have to take under section 38 of the *Canada Evidence Act* to protect information from disclosure. The need to take these issues into account suggests that police and prosecutors require relevant information from the Government of Canada.

3.2 The Role of Prosecutorial Discretion in Terrorism Cases

Managing the difficult relationship between intelligence and evidence is not only made more complicated by concerns about police discretion and independence, but also by concerns about the independence of the Attorney General and prosecutors. It is a constitutional principle that the Attorney General is independent from the Cabinet in which he or she sits when exercising prosecutorial discretion about bringing or continuing a prosecution. The

17 *Report of the Ipperwash Inquiry*, vol. 2 - Policy Analysis (Toronto: Ministry of the Attorney General, 2007), p. 358.

Supreme Court of Canada explained that "…[t]he gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government."[18]

However, independence has never meant that the Attorney General cannot receive relevant information from the Prime Minister and other Cabinet colleagues. Lord Shawcross, in a famous statement concerning the proper approach to the Attorney General's independence, drew an important distinction between the Attorney General's practical and proper need to seek information from Cabinet colleagues that may be relevant to exercising prosecutorial discretion, and the impropriety of taking instructions about the exercise of prosecutorial discretion.[19]

The ability of the Attorney General to engage in consultations with others, and to obtain relevant information from them, is of particular importance in the national security field where a terrorism prosecution may implicate intelligence and foreign policy considerations well beyond the Attorney General's traditional area of expertise. To paraphrase from the more colourful parts of the famous statement by Lord Shawcross, the Attorney General would "in some cases be a fool" if he or she did not to consult with Cabinet colleagues who have important information that will be relevant to the discharge of prosecutorial duties in national security matters.[20] Indeed, in exceptional cases, the Attorney General might need to receive information about the fate of hostages or about vital

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18 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 at para. 29.

19 "The true doctrine," according to Lord Shawcross, "is that it is the duty of the Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be": John Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984), pp. 318-319 [Edwards, *The Attorney General, Politics and the Public Interest*]. A Canadian Attorney General, Ron Basford, adopted this pronouncement in the context of explaining a decision whether to consent to a prosecution under the *Official Secrets Act* when he stated: "In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself.": Edwards, *The Attorney General, Politics and the Public Interest*, pp. 359-360.

20 Edwards, *The Attorney General, Politics and the Public Interest*, p. 319. Although he admits that the line between receiving factual information and opinions from other ministers about what action should be taken is difficult "…to sustain with the required degree of certainty that gives the appearance of stating a fundamental principle,," Edwards interprets Lord Shawcross' famous statements as making "constitutionally improper" "…the expression by the Prime Minister, another minister or the government of their individual or collective view on the question whether or not the Attorney General should prosecute.": Edwards, *The Attorney General, Politics and the Public Interest*, pp. 323-324.

information-sharing arrangements with foreign countries in order to be fully informed in exercising prosecutorial discretion.[21]

In most cases, the role of the NSA would be to inform the Attorney General of Canada or the relevant provincial Attorney General of the unforeseen consequences of proceeding with a terrorism prosecution. Information from the NSA might be equally important where a provincial Attorney General is considering whether to consent to a terrorism offence prosecution.

The exclusive authority of the Attorney General of Canada to seek non-disclosure orders and issue non-disclosure certificates under section 38 of the *Canada Evidence Act* as well as the national implications of terrorism prosecutions justify early federal involvement in terrorism prosecutions. It makes little sense for a provincial Attorney General to consent to a terrorism prosecution without knowing the position the Attorney General of Canada will take on section 38 national security confidentiality matters – matters which can have a critically important impact on a prosecution. In addition, the Attorney General of Canada can invoke powers under section 2 of the *Security Offences Act*[22] to assume control of terrorism prosecutions. This includes the power to stop such prosecutions. The ultimate decision and accountability for the laying of terrorism charges and terrorism prosecutions, however, depends on the independent judgment of the relevant provincial Attorney General or the Attorney General of Canada. Still, the Attorney General will often require information and even guidance from the Government of Canada.

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.

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21 Edwards describes as "clearly defensible" an instance in which the Attorney General in England met with the Lord Chancellor, the Prime Minister and other ministers in forming an opinion as to how charging and bringing to trial a hijacker would affect the lives of hostages: Edwards, *The Attorney General, Politics and the Public Interest*, pp. 324-325. This passage was quoted with approval in a recent case affirming the lawfulness of a decision not to prosecute bribery charges, in part because of information that a prosecution would lead to less information sharing by the government of Saudi Arabia and would put British lives at risk. *R (on the application of Corner House Research and Others) v. Director of the Serious Fraud Office*, [2008] UKHL 60 at para. 39.

22 R.S.C. 1985, c. S-7.

3.3 The Role of the Federal Director of Public Prosecutions in Terrorism Prosecutions

In 2006, Parliament enacted the *Director of Public Prosecutions Act* as part of the *Federal Accountability Act*.[23] The *Director of Public Prosecutions Act* provides for the appointment of a Director of Public Prosecutions (DPP) by the Attorney General of Canada.[24] The DPP holds office for seven years and can be dismissed with cause through a resolution of the House of Commons.[25]

The DPP is an entity separate from the Attorney General of Canada and is empowered to initiate and conduct prosecutions on behalf of the Attorney General. The Attorney General may issue directives in writing to the DPP under section 10 of the Act. Sections 13 and 14 contemplate that the DPP will inform the Attorney General of any prosecution that "…raises important issues of general interest" and that the Attorney General may make a separate intervention in such proceedings. In addition, the Attorney General of Canada has the authority, under section 15 of the Act, to assume conduct of a prosecution, but only after consulting the DPP and issuing a "...notice of intent to assume conduct of the prosecution" and publishing the notice in the *Canada Gazette*.

Whatever the merits of the *Director of Public Prosecutions Act* for other criminal prosecutions, it causes considerable coordination problems for terrorism prosecutions.

Terrorism prosecutions are more complex than other criminal prosecutions – in no small part because of the critical role of section 38 of the *Canada Evidence Act*. Under section 38, the Attorney General of Canada has exclusive jurisdiction to make decisions about the disclosure of information that, if disclosed, could cause harm to national security, national defence or international relations. Managing the relationship between intelligence and evidence is difficult enough without in addition dividing the prosecution process into two parts by having the DPP conduct the prosecution and the Attorney General of Canada make decisions under section 38. Like the process in which the Federal Court decides non-disclosure issues under section 38 and the criminal trial court decides whether a remedy is necessary to respond to non-disclosure, a prosecution process divided into two parts causes needless complexity in terrorism prosecutions. It makes it unclear who is in charge and it diffuses responsibility.

In particular, the division of prosecutorial responsibilities raises concerns that the Attorney General of Canada may seek a non-disclosure order under section 38 without sufficiently understanding the possible effect of the order on the viability of a prosecution. After all, the trial judge has an obligation to provide remedies in response to any non-disclosure order, possibly including a stay of

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23 S.C. 2006, c. 9, s. 121.
24 *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121, s. 4 [Director of Public Prosecutions Act].
25 *Director of Public Prosecutions Act*, s. 5(1).

proceedings, to protect the accused's right to a fair trial.[26] This division in turn causes problems for prosecutors. As the narrative contained in this report about the Reyat prosecution reveals, a provincial prosecutor, James Jardine, had difficulty anticipating the position that CSIS and the Attorney General of Canada would take about disclosing CSIS intelligence, even though this disclosure issue could be critical to the viability of the prosecution.

The typical justification for dividing functions is that it creates a form of checks and balances. However, the case for such checks and balances is unclear in the context of terrorism prosecutions. It cannot be argued that the Director of Public Prosecutions will be more attentive than the Attorney General of Canada to disclosure obligations; the Attorney General has a long-established role to ensure that justice is done.[27] It is important that the prosecutor who commences a terrorism prosecution be fully informed from the start about the disclosure implications of the prosecution. It should not be appropriate for a prosecutor to dismiss the issue of protecting secrets by arguing that protection is someone else's job. The idea that a particular issue was "someone else's job," unfortunately, ran through most of the Air India investigations and prosecutions.

While there may be other options, the preference of the Commission is to give the Attorney General of Canada the power to conduct terrorism prosecutions, in addition to exercising current powers under section 38 relating to the disclosure of intelligence. The most practical and efficient response would be for the Attorney General of Canada to publish a directive, setting out a new policy that the Attorney General, not the DPP, would conduct all future terrorism prosecutions. This could be done immediately without amending either the *Director of Public Prosecutions Act* or the *Department of Justice Act*,[28] although it may be desirable to amend those acts eventually to reflect this new arrangement.

Parliament's decision to give the Attorney General of Canada unique powers and responsibilities under section 38 should be respected. The Attorney General of Canada is in the best position to balance the competing demands for disclosure and secrecy.

3.3.1 The Need for a Specialized Director of Terrorism Prosecutions

There is a need for expertise in terrorism prosecutions. Terrorism prosecutions can involve multiple complex charges under the *Anti-terrorism Act*,[29] as well as complex issues under section 38 of the *Canada Evidence Act* about the appropriate balance between secrecy and disclosure. The 2007-08 Annual Report of the Public Prosecution Service of Canada indicates that only three per cent of in-house counsel time within the Service was devoted to terrorism

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26 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.14.

27 See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 333, referring to the statement of Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24.

28 R.S.C. 1985, c. J-2.

29 S.C. 2001, c. 41.

prosecutions.[30] It would be advisable to establish a position of Director of Terrorism Prosecutions, serving under the Attorney General of Canada, to create a pool of experienced counsel for terrorism prosecutions. This small team of counsel could also provide legal advice about the conduct of national security confidentiality proceedings under section 38 and give legal advice to agencies that collect intelligence and evidence in terrorism investigations.

The Attorney General of Canada should be able to communicate with the office of the Director of Terrorism Prosecutions without the need for public directives like those contemplated under the *Director of Public Prosecutions Act*. Directives are not advisable in terrorism prosecutions where issues, such as the decision about whether to prosecute or the choice of charge, may depend on the ability to protect intelligence from disclosure. Full, frank and confidential discussions are needed about the appropriate balance between secrecy and disclosure in terrorism cases.

The office of the Director of Terrorism Prosecutions should not be a large bureaucracy. The Director would be appointed by the Attorney General of Canada and, when appropriate, would work closely with the Attorney General and with the Deputy Attorney General. The Director of Terrorism Prosecutions should serve at the pleasure of the Attorney General of Canada. The office of the Director of Terrorism Prosecutions should, where appropriate, be able to draw on expertise from the provinces and the private sector, as well as from the Public Prosecution Service of Canada.

The lawyers in the office of the Director of Terrorism Prosecutions could provide advice both to CSIS and to the RCMP about terrorism investigations and they would conduct all aspects of terrorism prosecutions, including handling matters under section 38 of the *Canada Evidence Act*.

The Director of Terrorism Prosecutions would also meet with provincial Attorneys General to coordinate prosecutorial actions in terrorism matters. There is a danger that this coordination might not be given priority if terrorism prosecutions continue to be conducted by the Public Prosecution Service of Canada, where they would involve only a very small fraction of overall prosecutorial time. The placement of the Director of Terrorism Prosecutions within the Attorney General of Canada's department should also facilitate the necessary political cooperation and negotiations with the provinces about the division of responsibilities, cost-sharing and related matters.

The Director of Terrorism Prosecutions could assume responsibility for federal involvement in terrorism prosecutions, supplying related legal advice to Integrated National Security Enforcement Teams (INSETs) and legal advice about the counterterrorism work of the RCMP and CSIS. At present, the RCMP and CSIS

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30 Public Prosecution Service of Canada, Public Prosecution Service of Canada Annual Report 2007-2008, p. 8, online: Public Prosecution Service of Canada <http://www.ppsc-sppc.gc.ca/eng/pub/ar08-ra08/ar08-ra08.pdf> (accessed July 28, 2009).

receive inadequate legal advice on such matters from "in-house" counsel because of the limited number of lawyers dedicated to these issues. A lack of continuity and consistency in legal advice has contributed to misunderstandings about complex disclosure obligations, which in turn has hindered the relationship between the RCMP and CSIS.[31] There is a need for continuity of legal advice in terrorism investigations, from the initial collection of intelligence and evidence through to the completion of prosecutions. The agencies involved should have a single source of reliable legal advice.

The Director of Terrorism Prosecutions could provide legal advice from investigation to prosecution to ensure that the perspectives of CSIS and others about disclosure are fully understood by those involved. The overarching role of the Director would preclude the danger that lawyers representing CSIS and those representing the RCMP might simply pursue their client agency's interests about secrecy or disclosure, regardless of the broader public interest. The Director would seek to understand both CSIS and RCMP perspectives on disclosure, but would make a decision in the public interest.

The Director of Terrorism Prosecutions would also, of necessity, be involved in the pre-charge screening of terrorism cases because of the requirement that the Attorney General consent to prosecutions of terrorism offences. There may be concerns about prosecutorial involvement at both the investigative and charging stages. However, terrorism prosecutions can raise issues of such legal complexity that there is a need for continuity of expert legal advice from investigation through to prosecution.

One limit should be placed on the Director of Terrorism Prosecution's ability to provide legal services in terrorism matters. As the narrative of this report notes, counsel representing the Government of Canada in civil litigation arising from the Air India bombing was present at several critical meetings concerning the Air India prosecution. Although there was evidence that civil litigation counsel was instructed to place the interests of the prosecution before those of the civil lawsuit, considerations of civil liability do not easily mix with the need to exercise prosecutorial discretion in the public interest. Hence, to avoid a conflict of interest, or the appearance of a conflict, the Director should preferably not represent the Government of Canada in a civil lawsuit.

The Director of Terrorism Prosecutions, like all representatives of the Attorney General of Canada, should exercise prosecutorial functions in an objective, independent and even-handed manner consistent with the traditions of the office of the Attorney General.[32]

Establishing dedicated expertise in terrorism prosecutions accords with best practices in other countries. For example, the British Crown Prosecution Service has a dedicated Counter Terrorism Division, centralized in London, to conduct

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31 Security Intelligence Review Committee, *CSIS Cooperation with the RCMP - Part I* (SIRC Study 1998-04), October 16, 1998, p. 18 [SIRC Study 1998-04].

32 *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297.

terrorism prosecutions.[33] This Service handles both terrorism prosecutions and public interest immunity applications that attempt to shield intelligence from disclosure. In the United States, a National Security Division has been created in the Department of Justice to consolidate national security operations.[34] This Division assists intelligence agencies in many matters, including warrant applications, and helps during prosecutions with respect to the disclosure of intelligence. The Division also deals with international cooperation in terrorism prosecutions and with policy matters involving counterterrorism.

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.

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33 The Crown Prosecution Service (United Kingdom), "Prosecuting terrorists - Counter Terrorism Division," online: The Crown Prosecution Service (United Kingdom) <http://www.cps.gov.uk/your_cps/ctd.html> (accessed July 31, 2009).

34 United States Department of Justice, National Security Division, "Mission and Functions," online: United States Department of Justice <http://www.usdoj.gov/nsd/mission_functions.htm> (accessed July 28, 2009).

3.3.2 The Role of Provincial and Territorial Attorneys General in Terrorism Prosecutions

A logical solution to the difficulties of coordinating terrorism prosecutions would be to recommend that the Attorney General of Canada exercise his or her fiat under section 2 of the *Security Offences Act* to conduct all terrorism prosecutions on the basis that crimes of terrorism constitute threats to the security of Canada. This would keep the difficult coordination issues in the relationship between terrorism prosecutions and national security confidentiality proceedings under section 38 of the *Canada Evidence Act* within the federal government. It would also recognize that terrorism has the potential to affect the political, social and economic life of the entire nation.

However, Canada has never been a country governed solely by logic. The *Anti-terrorism Act* gave both federal and provincial Attorneys General the authority to prosecute terrorism offences. As the Air India prosecution revealed, there is considerable prosecutorial experience and talent at the provincial level. In addition, there has been cooperation between federal and provincial Attorneys General during a number of contemporary terrorism prosecutions. No evidence has been presented that the provincial role in terrorism prosecutions has presented a problem in any prosecution. For this reason, there is no justification at this time for ending the provincial role in terrorism prosecutions.

Still, evidence has been presented about the challenges, including costs, that a complex terrorism prosecution may present for many provinces. Many provinces might be willing to agree in advance to a significant, or even exclusive, federal role in terrorism prosecutions. No provincial Attorney General made submissions to the Commission about the provincial role in terrorism prosecutions. This absence of interest may suggest that most provinces would be prepared to cede their prosecutorial powers to a new federal Director of Terrorism Prosecutions. In any event, the Attorney General of Canada can exercise his or her fiat under section 2 of the *Security Offences Act* to pre-empt or to take over a provincial terrorism prosecution.

This Director of Terrorism Prosecutions should come to understandings with provincial Attorneys General about a coordinated approach to terrorism prosecutions, including possible advance agreements that the Attorney General of Canada will conduct terrorism prosecutions in a given province. There should also be advance discussions of other aspects of the federal role, including federal cost-sharing.

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.

3.3.3 The Need for Provincial Authorities to Notify Federal Authorities about Possible Terrorism Prosecutions

Provincial Attorneys General should notify the Director of Terrorism Prosecutions of any terrorism prosecution that they are considering. This is necessary to ensure advance notice to the Attorney General of Canada of any proceedings involving sensitive or potentially injurious information. In fact, section 38.02 of the *Canada Evidence Act* currently requires provincial Attorneys General to give notice of such proceedings to the Attorney General of Canada.

Notifying the Director of Terrorism Prosecutions in advance of any potential prosecution involving a terrorist group or a terrorist activity would also provide an opportunity for the Director to consider how the provincial prosecution accords with the overall strategy at the federal level about a particular threat to the security of Canada. The Director, in consultation with the NSA, would be able to advise whether a prosecution might be premature – for instance, if a provincial prosecution might disrupt an ongoing security intelligence investigation being conducted with foreign agencies.

The Director of Terrorism Prosecutions would also be in a good position to advise about the merits of prosecuting an offence under the terrorism provisions of the *Criminal Code*, or under other Code provisions not specifically related to terrorism. For example, a prosecution of a non-terrorist criminal offence might make it easier to protect sensitive intelligence from disclosure. The Director of Terrorist Prosecutions could also seek advice from the NSA about viable alternatives to prosecutions. As discussed in Chapter II, these alternatives could include immigration proceedings, the freezing or forfeiture of terrorist assets, the revocation of charitable status or simply the continued surveillance of a terrorist suspect to build a better case.

A requirement that the provinces consult with the federal authorities might have made a difference in the 1986 prosecution of Reyat and Parmar about the use of explosives in Duncan. This prosecution was commenced while the investigation of the Air India bombing was still at a preliminary stage. The failure to consult may have been the reason that no evidence was called against Parmar, the suspected ringleader of the bombing, and only a $2000 fine was levied against Reyat, who was subsequently convicted of manslaughter, first in relation to the Narita bombing and later in relation to the Flight 182 bombing. The Duncan Blast prosecution was, in the Commission's view, premature and not 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.