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

CHAPTER V: THE DISCLOSURE AND PRODUCTION OF INTELLIGENCE

5.0 Introduction

Most of the difficulties in managing the relationship between intelligence and evidence involve the need to reconcile broad disclosure requirements with the need for secrecy.

This chapter describes how intelligence can be subject to disclosure and production obligations in terrorism prosecutions. It also examines the possibility of placing limits on disclosure and production obligations, and whether such limits will help to produce a more reliable relationship between intelligence and evidence.

5.1 Disclosure of Information

The accused's right to disclosure is an important constitutional value. As the Supreme Court of Canada explained in *Stinchcombe*:

> [T]here is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s.7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice…. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.[1]

The concern for fairness and the intention to prevent miscarriages of justice that animated *Stinchcombe* apply with equal force in terrorism cases. A wrongful terrorism offence conviction stemming from a failure by the Crown to make full disclosure would constitute an injustice. Convicting the innocent would allow the guilty to go free. As well, miscarriages could undermine

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1 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336.

public confidence in the justice system, as the Director of Public Prosecutions for England and Wales states:

> Compromising the integrity of the trial process would blight the criminal justice system for decades. It would severely undermine public confidence. We should recall the impact the Birmingham Six case had on public confidence in the 1970s and 1980s. Nothing is more offensive to the Constitution of a country than men and women sitting for years in prison cells for offences they did not commit. What better way could there be to create disillusionment and alienation? We don't want to alienate the very sections of the community whose close cooperation and consent is required to bring successful cases.[2]

Disclosure rights in Canadian law are broad. Former RCMP Commissioner Zaccardelli testified that Canada has "the most liberal disclosure laws in the world."[3] Under *Stinchcombe*, the Crown is required to disclose all relevant information and non-privileged information in its possession to comply with section 7 of the *Charter*, whether the information is inculpatory or exculpatory, and whether or not it is going to be presented as evidence.

In *Stinchcombe*, the Supreme Court saw disclosure as being necessary to respect the rights of the accused to a fair trial and to make full answer and defence. This is consistent with the direction of Justice Rand of the same Court in *Boucher v. The Queen*,[4] where the role of the Crown was described as being to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime, and not to obtain a conviction.

Although *dicta* in some cases suggest that material should be disclosed under *Stinchcombe* if it is not clearly irrelevant, the constitutional principle is that the information must be disclosed only if it is relevant to the case. In *Stinchcombe*, Justice Sopinka wrote that it was not necessary to disclose what was "clearly irrelevant."[5] However, he referred to "…the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."[6]

More recent articulations of disclosure obligations stress the need to disclose all relevant information. For example, in the 2003 decision in *R. v. Taillefer; R v. Duguay*, the Supreme Court described disclosure obligations as follows:

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2 Ken MacDonald, Q.C., "Security and Rights" (Criminal Bar Association Speech delivered on January 23, 2007), online: Matrix <http://www.matrixlaw.co.uk/showDocument.aspx?documentId=14861> (accessed June 5, 2009).

3 Testimony of Giuliano Zaccardelli, vol. 86, November 30, 2007, p. 11036.

4 [1955] S.C.R. 16 at 23-24.

5 [1991] 3 S.C.R. 326 at 339.

6 [1991] 3 S.C.R. 326 at 340.

> 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 (p. 343). 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 (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
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> 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.
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> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in *Dixon*…"the threshold requirement for disclosure is set quite low.... 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"…. "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe, supra*, at p. 339).[7]

In 2009, in *R. v. McNeil*, the Court again described the breadth of *Stinchcombe* disclosure obligations:

> The Crown's obligation to disclose all relevant information in its possession relating to the investigation against an accused is well established. The duty is triggered upon request and does not require an application to the court. *Stinchcombe* made clear that relevant information in the first party production context includes not only information related

7 2003 SCC 70, [2003] 3 S.C.R. 307 at paras. 59-60.

> to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence (pp. 343-44). The Crown's obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.
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> While the *Stinchcombe* automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.[8]

A corollary of the Crown's disclosure obligations under *Stinchcombe* is "…the obligation of the police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused."[9] It is not clear whether or when CSIS will be considered to be an "investigating state authority" subject to disclosure duties under *Stinchcombe*. As discussed below, the trial judge in *Malik and Bagri* held that, on the particular facts of the Air India investigation, CSIS was subject to the *Stinchcombe* disclosure requirements. Although the Supreme Court has rejected the notion that "…all state authorities constitute a single indivisible Crown entity for the purposes of disclosure,"[10] it has also indicated that an "investigating state authority" other than the police may be subject to disclosure obligations under *Stinchcombe*. The Court called for the Crown to make reasonable inquiries to facilitate disclosure and to "…bridge much of the gap between first party disclosure and third party production" when the prosecutor knows that another Crown agency has been involved with the investigation.[11] For instance, the prosecutor will usually be aware of CSIS involvement in a terrorism investigation.

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8 2009 SCC 3 at paras. 17-18.

9 *R. v. McNeil*, 2009 SCC 3 at para. 14.

10 *R. v. McNeil*, 2009 SCC 3 at para. 13.

11 *R. v. McNeil*, 2009 SCC 3 at para. 51. See also para. 49, quoting with approval *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 at para. 15 (C.A.): "When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation. Relevancy cannot be left to be determined by the uninitiated. If Crown counsel is denied access to another agency's file, then this should be disclosed to the defence so that the defence may pursue whatever course is deemed to be in the best interests of the accused. This also applies to cases where the accused or defendant, as the case may be, is unrepresented…"

The right to disclosure under *Stinchcombe* is not absolute. The Supreme Court was cognizant of the danger that disclosure of information might "…put at risk the security and safety of persons who have provided the prosecution with information."[12] It held that the Crown would not have to disclose information that was covered by police informer privilege or by any other privilege. Thus, the Crown would not have to disclose the identities of informers who were promised anonymity by the police in exchange for information. The Crown would also have a reviewable discretion to withhold the identities of persons "… to protect them from harassment or injury, or to enforce the privilege relating to informers," and would have a reviewable discretion to delay disclosure "… in order to complete an investigation."[13] In addition, as discussed in depth in Chapter VII, the Crown could seek specific non-disclosure orders under sections 37 and 38 of the *Canada Evidence Act*.[14] The Court described the exceptions to the obligation to disclose as follows:

> [T]his 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. A 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.[15]

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12 [1991] 3 S.C.R. 326 at 335.
13 [1991] 3 S.C.R. 326 at 336.
14 R.S.C. 1985, c. C-5.
15 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 339-340.

5.2 Retention of Information

The right to disclosure has been interpreted by the Supreme Court to include a duty under section 7 of the *Charter* to retain relevant information that is subject to disclosure obligations.[16] In *Malik and Bagri*, Justice Josephson found a breach of section 7, as there was an unacceptable degree of negligence in the destruction by CSIS of the Parmar wiretaps and the notes of the interviews with Ms. E.

As the Hon. Bob Rae stated in his report:

> The erasure of the tapes is particularly problematic in light of the landmark decision of the Supreme Court of Canada in *R. v. Stinchcombe*, which held that the Crown has a responsibility to disclose all relevant evidence to the defence even if it has no plans to rely on such evidence at trial. Justice Josephson held that all remaining information in the possession of CSIS is subject to disclosure by the Crown in accordance with the standards set out in *Stinchcombe*. Accordingly, CSIS information should not have been withheld from the accused.[17]

The Supreme Court reasoned, in its 1997 decision in *R. v. La,* that "… [t]he right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant."[18] As discussed in Chapter IV, the Court recently reminded CSIS of the importance of retaining the intelligence that it collects about specific individuals and groups, in part because the intelligence may later be subject to disclosure obligations.[19] However, the duty to retain information that might subsequently have to be disclosed is not absolute. It would be unrealistic and impractical to expect every piece of material to be retained "…on the off-chance that it will be relevant in the future."[20]

The duty to retain relevant material for disclosure can benefit both the accused and the state. It is still not possible to determine whether the material that was destroyed in the Air India investigation would have assisted the accused or the prosecution, or whether it would have been of little value to either. This disturbing uncertainty underscores the importance of CSIS retaining intelligence that could become relevant in a terrorism prosecution, a topic already discussed at length in Chapter IV.

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16 *R. v. La*, [1997] 2 S.C.R. 680.

17 *Lessons to be Learned: The report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* (Ottawa: Air India Review Secretariat, 2005), p. 16.

18 [1997] 2 S.C.R. 680 at para. 20.

19 *Charkaoui v. Canada*, 2008 SCC 38, [2008] 2 S.C.R. 326.

20 *R. v. La*, [1997] 2 S.C.R. 680 at para. 21.

5.3 The "Relevance" Requirement

In its 1993 decision in *R. v. Egger*, the Court re-iterated that "… [o]ne 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…. 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."[21]

In 1995, the Court held in *R. v. Chaplin*[22] that the Crown did not need to disclose wiretaps that did not relate to the particular charges faced by the accused:

> 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.[23]

Chaplin could be germane to discussions about disclosing intelligence. The case contemplated that some investigative materials that do not relate to the charges faced by the accused may not be subject to disclosure. It also affirmed that the Crown does not have to disclose material that is beyond its control. In addition, once the Crown affirms that it has satisfied its disclosure obligations, 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."[24]

In a recent report on large and complex criminal case procedures, the Hon. Patrick Lesage and Professor (now Justice) Michael Code relied on *Chaplin* for the proposition that the defence can obtain disclosure of material that lies outside the core disclosure obligations, but the defence must first justify such

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21 [1993] 2 S.C.R. 451 at 467.

22 [1995] 1 S.C.R. 727. For further discussion of this case and its relevance to the disclosure of intelligence, see Kent Roach, "The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence" in Vol. 4 of Research Studies: The Unique Challenges of Terrorism Prosecutions, pp. 129-131 [Roach Paper on Terrorism Prosecutions].

23 [1995] 1 S.C.R. 727 at para. 32.

24 [1995] 1 S.C.R. 727 at para. 30.

disclosure.[25] Material that the defence demonstrates is not clearly irrelevant, or that is of potential relevance, can be made available to the defence for inspection at a secure location, if need be. This can avoid the need for the Crown to copy and produce, literally, truckloads of documents.

The Supreme Court has also repeatedly stated that not every violation of the accused's right to disclosure will impair the right to make full answer and defence or make a fair trial impossible.[26] A trial may be fair even if the accused does not receive all relevant material. The courts have also accepted that reasonable explanations about why relevant material has been destroyed and is not available for disclosure may lead to a finding that there was no violation of the right to disclosure.[27]

5.4 Applying *Stinchcombe* to Intelligence

Some concerns were expressed during the Commission hearings that the *Stinchcombe* disclosure requirements would be unworkably broad if applied to intelligence.[28] The extent of the disclosure obligations imposed by *Stinchcombe* should not be exaggerated. The basic rule that the state does not have to disclose irrelevant or privileged material can shield much intelligence from disclosure and prevent fishing expeditions by defence counsel. In several recent cases, courts have found that *Stinchcombe* disclosure obligations do not apply to material such as analytical intelligence, documents that were internal to the working of security intelligence agencies or that involved communications with foreign agencies, and intelligence relating to suspects and investigations that were unrelated to the accused. This was because these materials were not relevant to the charges faced by the accused and were of no possible use to the accused.[29]

The important role of prosecutors in managing the disclosure process is discussed in Chapter IX. That chapter also discusses the equally important role of the trial judge in supervising the disclosure process and in preventing frivolous motions for disclosure.

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25 Patrick Lesage and Michael Code, Report of the Review of Large and Complex Criminal Case Procedures (November 2008), pp. 45-55, online: Ontario Ministry of the Attorney General <http://www. attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf> (accessed December 5, 2008) [Lesage and Code Report on Large and Complex Criminal Case Procedures].

26 R. v. Dixon, [1998] 1 S.C.R. 244; R. v. Taillefer; R. v. Duguay, 2003 SCC 70, [2003] 3 S.C.R. 307.

27 R. v. Stinchcombe, [1995] 1 S.C.R. 754; R. v. La, [1997] 2 S.C.R. 680.

28 See generally the testimony given by members of the panel discussing the interaction between Stinchcombe and s. 38 of the Canada Evidence Act, vol. 86, November 30, 2007, pp. 11105-11124.

29 Nicholas Ribic and Her Majesty the Queen and Canadian Security Intelligence Service, 2002 FCT 290 at paras. 7-10; Canada (Attorney General) v. Ribic, 2003 FCA 246, 185 C.C.C. (3d) 129 at paras. 40-41; Canada (Attorney General) v. Khawaja, 2007 FC 490, 219 C.C.C. (3d) 305 at para. 116, reversed in part on other grounds 2007 FCA 342; Canada (Attorney General) v. Khawaja, 2008 FC 560 at para. 14; Khadr v. Canada (Attorney General), 2008 FC 807, 331 F.T.R. 1 at para. 68.

5.4.1 The Role of *Stinchcombe* in the Air India Prosecutions

Stinchcombe disclosure obligations presented serious challenges in the Malik and Bagri prosecution, both in relation to the logistics of disclosure and, more particularly, in relation to the retention and disclosure of CSIS intelligence.

CSIS was held to be subject to *Stinchcombe* disclosure requirements on the particular facts of the Air India investigation. In 2002, Justice Josephson observed that, "Mr. Code for Mr. Bagri persuasively submits that both law and logic lead to a conclusion that, in the circumstances of this case, C.S.I.S. is part of the Crown" [30] and, as a result, was subject to *Stinchcombe* disclosure obligations. The Crown 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 C.S.I.S." about the investigation.[31] This led Justice Josephson to conclude that "…all remaining information in the possession of C.S.I.S. is subject to disclosure by the Crown in accordance with the standards set out in *R. v. Stinchcombe*."[32] However, the acquittal of the accused made his conclusion academic.

In 2004, the Crown again conceded that *Stinchcombe* applied to CSIS as a result of the 1987 agreement between CSIS and the RCMP. Justice Josephson concluded that, even without the agreement, evidence obtained by CSIS that was relevant to the Air India investigation should have been passed on to the RCMP:

> 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 [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.[33]

The duty of CSIS to retain such intelligence was affirmed by the Supreme Court of Canada in its 2008 decision in *Charkaoui*.[34] Under an amended section 19 of the *CSIS Act*,[35] as recommended in Chapter IV, CSIS would be obliged to share relevant information with either the RCMP or the National Security Advisor (NSA). In this way, the amount of CSIS information that would be subject to disclosure would increase.

5.4.2 The Effect of *Stinchcombe* on CSIS/RCMP Cooperation

The Commission heard much testimony about *Stinchcombe*. RCMP Deputy Commissioner Gary Bass described *Stinchcombe* as having resulted in "…the

30 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864 at para. 9.
31 2002 BCSC 864 at para. 10.
32 2002 BCSC 864 at para. 14.
33 *R. v. Malik and Bagri*, 2004 BCSC 554, 119 C.R.R. (2d) 39 at para. 20.
34 *Charkaoui v. Canada* (Citizenship and Immigration), 2008 SCC 38, [2008] 2 S.C.R. 326.
35 *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.

single most draining set of processes to policing…in the history of policing."[36] The interpretation of *Stinchcombe* by Jack Hooper, a former Deputy Director of CSIS, differed from Bass's "fairly absolute interpretation." Hooper testified that the idea of full disclosure was a "worst-case scenario" that discounted the possibility that intelligence would either be found not to be relevant to the specific criminal charges or that it would be protected by national security privilege.[37]

Jim Judd, the Director of CSIS, testified that "…it would be useful to have some mechanism whereby the information in our holdings that was not relevant to the criminal prosecution…[was] protected and excluded because we have sources who report on multiple issues, multiple situations."[38]

The requirement of relevance under *Stinchcombe* can protect some intelligence from disclosure. Analyses about general security threats, intelligence or information about third parties who play no role in a prosecution, information about third parties who are not related to the accused,[39] and internal administrative matters within a police force or a security intelligence agency will generally not be relevant or helpful to the accused. As a result, they will not have to be disclosed to comply with *Stinchcombe*.

Nevertheless, some view *Stinchcombe* as a major impediment to cooperation between CSIS and the RCMP. In a 1998 report, the Security Intelligence Review Committee warned that, because of *Stinchcombe*, "…all CSIS intelligence disclosures, regardless of whether they would be entered for evidentiary purposes by the Crown, are subject to disclosure to the Courts. Any passing of information, whether an oral disclosure or in a formal advisory letter, could expose CSIS investigations. This means that even information that is provided during joint discussions on investigations or that is provided as an investigative lead is at risk."[40] It concluded that the disclosure problem represented by *Stinchcombe* seemed to be "insoluble" and that it "…carried the potential to disrupt CSIS-RCMP relationships and could potentially damage the operation of both agencies."[41] In their papers for the Commission, Professors Wark and Brodeur both commented that *Stinchcombe* has been interpreted as an impediment to RCMP/CSIS cooperation, particularly because of CSIS concerns about the disclosure of secret human sources and the possible use of intelligence as evidence.[42]

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36 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11279.
37 Testimony of Jack Hooper, vol. 50, September 21, 2007, pp. 6216-6217.
38 Testimony of Jim Judd, vol. 90, December 6, 2007, p. 11887.
39 *Khadr v. Canada* (Attorney General), 2008 FC 807, 331 F.T.R. 1 at para. 68.
40 Security Intelligence Review Committee, *CSIS Co-Operation with the RCMP - Part I* (SIRC Study 1998-04), October 16, 1998, p. 9 [SIRC Study 1998-04].
41 SIRC Study 1998-04, p. 18.
42 Wesley Wark, "The Intelligence-Law Enforcement Nexus: A study of co-operation between the Canadian Security Intelligence Service and the Royal Canadian Mounted Police, 1984-2006, in the Context of the Air India terrorist attack" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, pp. 164-165; Jean-Paul Brodeur, "The Royal Canadian Mounted Police and the Canadian Security Intelligence Service: A Comparison Between Occupational and Organizational Cultures" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, p. 204.

The extent to which, and when, CSIS is subject to *Stinchcombe* disclosure obligations continues to evolve. Courts of appeal are divided about when agencies other than the police are subject to *Stinchcombe* disclosure obligations. The New Brunswick Court of Appeal held that the Crown should include material held by another Crown agency involved in the investigation,[43] while the Alberta Court of Appeal held that provincial Crowns should not be required to disclose material held by federal agencies beyond their control.[44] The Supreme Court of Canada's 2009 decision in *McNeil* [45] did not resolve the issue for CSIS. The Court clearly dismissed as unworkable the idea that all state agencies are subject to *Stinchcombe*. The Court noted, however, that investigating authorities other than the police may be subject to *Stinchcombe* disclosure requirements and that, in any event, the Crown has an obligation to inquire about whether other investigating agencies have material that is likely relevant to the proceedings. Increased integration of the RCMP and CSIS may point to more frequent court findings that CSIS is subject to *Stinchcombe*.

5.5 Potential Changes to the Approach to Disclosure

Some intervenors, including the Canadian Bar Association and the Criminal Lawyers' Association, argued that the Air India case did not reveal a demonstrable need for change in the approach to disclosure and that it therefore could not provide a sound basis for making general recommendations in this area.[46]

In his Final Submissions, the Attorney General of Canada acknowledged the challenges presented by the requirement to disclose large amounts of material, but cautioned against a recommendation that legislation be enacted to clarify *Stinchcombe*. He warned about unforeseen consequences and about the complexity of legislating federally on a matter that affected provincial jurisdiction.[47]

No party or intervenor before the Commission proposed adopting legislation to attempt to abolish or limit *Stinchcombe* disclosure obligations. Some intervenors, including the Canadian Association of Chiefs of Police and the Air India Victims Families Association, called for clarification of, and guidelines about, the extent and particular obligations of *Stinchcombe*.[48] The Air India Victims Families Association asked that the guidelines be in the form of legislation. The Canadian

43 *R. v. Arsenault* (1994), 93 C.C.C. (3d) 111 (N.B.C.A.).
44 *R. v. Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.).
45 2009 SCC 3.
46 Canadian Bar Association, Submission to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, April 2007; Submissions of the Criminal Lawyers' Association, February 2008.
47 Final Submissions of the Attorney General of Canada, February 29, 2008, Vol. III, paras. 80-84 [Final Submissions of the Attorney General of Canada].
48 Canadian Association of Chiefs of Police Written Submissions, pp. 8-9; *Where is Justice?* AIVFA Final Written Submission, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, February 29, 2008, p. 131.

Association of Chiefs of Police called for a clarification of the roles and obligations of the Crown and police in relation to disclosure and for a move towards electronic disclosure.[49]

The reluctance of the parties and intervenors to ask for limitations on *Stinchcombe* is no doubt related to the status of *Stinchcombe* as a statement of the disclosure required by section 7 of the *Charter*. As the Attorney General of Canada submitted:

> It is a fundamental element of the fair and proper operation of the Canadian criminal justice system that an accused person has the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information….The right to proper disclosure is recognized in particular under principles of fundamental justice as necessary to the accused person's ability to defend himself or herself against the charges that have been laid.[50]

A variety of legislative measures to limit the scope of *Stinchcombe* could be enacted to protect intelligence from disclosure. However, the Commission does not recommend any of these measures for the reasons that follow.

One possible measure could be to deem CSIS to be a third party that is not subject to *Stinchcombe* disclosure obligations. Legislation could establish a procedure for requests for production from CSIS. The legislation would include a list of dangers flowing from disclosing secret intelligence that judges should consider before ordering that CSIS material be produced. Such provisions, by preventing judges from determining on the facts of the case whether CSIS material is subject to *Stinchcombe* or not, would inevitably be challenged under the *Charter* as violating the right of the accused to disclosure and the right to make full answer and defence. An accused could cite in his or her support the determination by Justice Josephson in the Malik and Bagri case that CSIS was subject to *Stinchcombe*. In addition, the Supreme Court of Canada held in 2008, in both the *Charkaoui*[51] and *Khadr*[52] cases, that section 7 of the *Charter* may require retention and disclosure of CSIS intelligence even for cases that are not prosecuted in Canada's criminal justice system. In short, deeming CSIS to be a third party (rather than part of the Crown) might not prevent CSIS from being obliged by section 7 to disclose at least some material.

Legislation could also limit *Stinchcombe* by reducing the Crown's disclosure obligations. Legislation could specify that only exculpatory information or information that would undermine the Crown's case be disclosed. However, the Supreme Court has already clearly rejected such a position in *Stinchcombe*

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49 Canadian Association of Chiefs of Police Written Submissions, p. 9.

50 Final Submissions of the Attorney General of Canada, Vol. III, paras. 31-32.

51 *Charkaoui v. Canada* (Citizenship and Immigration), 2008 SCC 38, [2008] 2 S.C.R. 326.

52 *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125.

and in subsequent judgments dealing with disclosure. Although the Court has not ruled out the possibility that a limit on a section 7 right could be justified as reasonable under section 1 of the *Charter*, it has repeatedly emphasized that the standards for any such limit would be extremely high.[53] Still, the Court has not completely discounted limitations.[54]

Protecting intelligence from disclosure is a sufficiently important goal to justify some limits on section 7 rights.[55] To justify the limits, the Crown should be obliged to demonstrate that there are no less drastic means to protect the intelligence. The Crown's ability to obtain judicial non-disclosure orders under sections 37 and 38 of the *Canada Evidence Act* could be cited as less drastic means. Even if a court concluded that other, less drastic, alternatives were not available, the court would still have to assess the overall balance between the need to protect intelligence from disclosure and the harm to the accused's rights that non-disclosure would cause.

Even under a statutory regime that purported to exempt CSIS from *Stinchcombe* disclosure requirements or to limit disclosure requirements to exculpatory material, the courts would still require CSIS to disclose information to the accused that was necessary for the accused to make full answer and defence and to have a fair trial.

Furthermore, even if legislation limiting *Stinchcombe* could be upheld under the *Charter*, limiting disclosure in advance through legislation would be awkward. It would be difficult for Parliament to predict, without knowing the facts of a particular case, what must and must not be disclosed. General guidelines would be of little use. The legislation might not prevent disclosure of material that is actually not needed to assist the accused but that could, by being disclosed, be very damaging to national security or to CSIS operations. A more practical and efficient means to address the constitutional obligations to disclose intelligence would be to improve the process that can be used to obtain non-disclosure orders on the facts of the particular case. Chapter VII discusses how to improve that process.

RCMP Commissioner William Elliott testified that he was unsure about how practical it would be to create a different procedural regime for terrorism cases, and about how such a regime would work without limiting the ability of the accused to make full answer and defence.[56] Even when protecting vital interests, such as solicitor and client confidences or the identities of informers, the courts have recognized that there must be disclosure when the accused's innocence

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53 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3.

54 The Court has recognized that *Stinchcombe* obligations can in some cases, without violating the *Charter*, be limited by statutes in relation to private records in the Crown's possession: R. v. McNeil, 2009 SCC 3 at para. 21, citing *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 59.

55 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at paras. 66-68.

56 Testimony of William Elliott, vol. 90, December 6, 2007, pp. 11809-11810.

is at stake.[57] In short, even aggressive legislative limits on *Stinchcombe* would not provide a reliable guarantee that CSIS material would never be disclosed to the accused. For many reasons, a legislative "quick fix" is not realistic and is not recommended.

5.6 The Need for Guidelines on the Proper Extent of Disclosure

Prosecutors must not overestimate the extent of *Stinchcombe* disclosure obligations in terrorism prosecutions. The practice that sometimes occurs – of producing all information except that which is clearly irrelevant – is of limited value to the accused and should not be the standard practice, although *obiter dicta* from the Supreme Court of Canada suggest otherwise.[58] There is a danger that the reasoning in *dicta* about disclosing material that is not clearly irrelevant has become the operational standard used by prosecutors for disclosure.

A standard of disclosing all material that is not clearly irrelevant could, if applied mechanically, result in disclosure of much material that is of no possible use to the accused. The correct principle, in the Commission's view, is that the Crown need disclose only relevant information to the accused. Information other than this, which is not clearly irrelevant, should be made available to the defence for inspection in a secure environment.[59]

Anne-Marie Boisvert of the University of Montreal expressed the view that:

> I think that Crown prosecutors are sometimes not forceful enough in their objections to some disclosures and the judiciary has sometimes also not been forceful enough, or could have imposed a number of conditions on the disclosure.
>
> Sometimes, I feel that we don't think enough about the consequences, but everyone has powers that they -- and while we are always trying to propose legislative solutions after the fact, I think that we could be more careful. The defendant is entitled to a fair trial, to a full and complete defence. He is not necessarily entitled to publish whatever he wants on the Internet.[60] [Translation]

Similarly, Bruce MacFarlane, a former Deputy Attorney General of Manitoba, agreed that *Stinchcombe* was never intended to require absolute, or all-encompassing, disclosure and observed that prosecutors "…are clearly erring on the side of disclosure." The result was an "absolutely daunting" amount of

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57 *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 252.
58 *R. v. Chaplin*, 1995 CanLII 126, [1995] 1 S.C.R. 727.
59 The procedure for inspection is discussed in Chapter IX.
60 Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, p. 8773.

disclosure.[61] This is arguably because it is easier to disclose everything than to select the materials that are relevant.

In the absence of judicial guidance, prosecutors should not be criticized for erring in the direction of more extensive disclosure to ensure fairness to the accused or for interpreting their disclosure obligations broadly. However, prosecutors should use their professional judgment in determining which material must be disclosed. The standard for disclosure should be the relevance standard as it has been articulated consistently by the Supreme Court of Canada in several cases. The Crown also has discretion about when to disclose material. Departures from the usual rule of early pre-trial disclosure may be justified if there are concerns about the safety of informers and witnesses or if there is a need to protect ongoing investigations from being exposed. Delays in disclosure could also be justified when attempts are being made to secure consent to disclosure from third parties, such as foreign intelligence agencies.[62]

The Federal Prosecution Service Deskbook usefully identifies categories of material that should and should not be disclosed. However, the Deskbook should be updated, especially about material that may be the subject of a national security confidentiality claim under section 38 of the *Canada Evidence Act*. The section on national security confidentiality in the current Deskbook has not been revised since 2000.[63] Since 2000, courts have found that time-consuming and disruptive section 38 claims have been made with respect to information that is not relevant to the case and that would not assist the accused.[64]

What must be disclosed can most appropriately and most efficiently be decided by the trial judge. Hence, the early appointment of a trial judge is important in terrorism prosecutions. A staged approach to disclosure, such as that used in the Malik and Bagri prosecution, is also useful, even if it results in some material of only minimal relevance being made available for inspection by the accused. Staged disclosure and the importance of electronic disclosure are discussed in greater depth in Chapter IX.

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

61 Testimony of Bruce MacFarlane, vol. 78, November 19, 2007, pp. 9931-9932.
62 See Chapter IX for further discussion of the need for staged disclosure in terrorism prosecutions.
63 As suggested by the Table of Contents for the Federal Prosecution Service Deskbook, online: Department of Justice Canada <http://canada.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/toc.html> (accessed July 30, 2009).
64 *Nicholas Ribic and Her Majesty the Queen and Canadian Security Intelligence Service*, 2002 FCT 290 at paras. 7-10; *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C. (3d) 129 at paras. 40-41; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, 291 C.C.C. (3d) 305 at para. 116, reversed on other grounds 2007 FCA 342; *Canada (Attorney General) v. Khawaja*, 2008 FC 560 at para. 14; *Khadr v. Canada (Attorney General)*, 2008 FC 807, 331 F.T.R. 1 at para. 68.

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.

5.7 Production of Intelligence under *R. v. O'Connor*

Apart from the obligation to disclose pursuant to *Stinchcombe*, CSIS may be the subject of an application to obtain information from a third party. The Supreme Court of Canada's 1995 decision in *R. v. O'Connor* recognizes that the accused can obtain information from third parties, including public and private agencies, where the information relates to an issue at trial, the reliability of evidence or the credibility of witnesses.[65] Still, the authority to obtain access to material from third parties is not absolute. The accused must show that the material held by the third party meets a higher standard of relevance than if that same material were held by the Crown.

The standard with respect to third party information is whether the information is "likely relevant," as opposed to the *Stinchcombe* standard of "relevant."[66] This "likely relevant" threshold is "a significant burden" on the accused, and is designed to stop fishing expectations, but "it should not be interpreted as an onerous burden," given the practical difficulty faced by the accused in trying to establish the relevance of material that he or she has not seen.[67] If the standard is met, a judicial weighing follows of the harms and benefits of producing the document to the accused.

In *McNeil*, the Supreme Court indicated that, if third party records have "true relevance" to the trial, they should generally be disclosed to the accused as they would be disclosed under *Stinchcombe,* although perhaps subject to some editing and restrictions on the use of the material to protect competing interests, such as residual privacy interests.[68] Claims of privilege, such as informer privilege[69] or national security privilege,[70] can be made and can "…bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process."[71]

Even though *O'Connor* establishes a higher threshold of relevance and limited balancing of the competing interests for and against disclosure of third party records, it could still result in information collected by CSIS in counterterrorism investigations being subject to production. CSIS surveillance material may be highly relevant to many issues in terrorism trials, such as the whereabouts of the accused or associates of the accused, or the credibility of a key witness who had previously provided information to CSIS.

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65 [1995] 4 S.C.R. 411 at para. 22.
66 *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 45-47; *R. v. McNeil*, 2009 SCC 3 at para. 33.
67 *R. v. McNeil*, 2009 SCC 3 at para. 29.
68 *R. v. McNeil*, 2009 SCC 3 at paras. 42-47.
69 See Chapter VI for discussion of this and other privileges.
70 See Chapter VII for a discussion of national security privilege under s. 38 of the *Canada Evidence Act*.
71 *R. v. McNeil*, 2009 SCC 3 at para. 27(4).

5.7.1 Legislating Requests for Production of Intelligence under *O'Connor*

There is some precedent for legislation that clarifies the *O'Connor* common law procedures for obtaining production of material from third parties as part of the criminal trial. In *R. v. Mills*,[72] the Supreme Court of Canada upheld legislation enacted in response to *O'Connor*. The legislation provided a procedure and a list of relevant factors for judges to consider before they ordered private information held by third parties or by the Crown about complainants in sexual cases to be produced to the trial judge or disclosed to the accused. The Court's decision was based on the notion that Parliament was reconciling the competing *Charter* rights of the complainant and the accused. Professor Roach, in his study for the Commission, suggested that courts should not apply the same approach if they conclude that the national security context "…pits an individual accused against the admittedly weighty interests of the state."[73]

A restrictive legislative regime governing requests for production from CSIS would not give CSIS any certainty that its intelligence would never be subject to a production or disclosure order. Any legislation would have to allow sufficient judicial discretion to ensure that the accused's right to make full answer and defence was not violated.[74]

There is little reason to conclude that the absence of legislation dealing with third party disclosure will lead judges to become insensitive to the harms that might be caused by producing and disclosing intelligence. Furthermore, legislation that attempted to deem CSIS to be a third party and that restricted the production and disclosure of intelligence could produce much unnecessary litigation. Such legislation would be challenged on the basis that the CSIS material was subject to *Stinchcombe*, as it was held to be in the Malik and Bagri prosecution. Related litigation issues could include whether CSIS was an "investigating state authority" subject to *Stinchcombe* or whether Crown counsel properly exercised their responsibilities as officers of the court to effectively "…bridge much of the gap between first party disclosure and third party production."[75] Litigation about the status of CSIS or the terms or constitutionality of restrictive legislation would lengthen terrorism prosecutions without necessarily resolving the ultimate issue of whether, and in what form, the accused should have access to CSIS material. Roach warned that "…[e]ven if legislation restricting disclosure or production… was upheld under the Charter, there could be much litigation about the precise meaning of the legislation and its relation to Charter standards….The apparent certainty produced by new legislation in protecting intelligence from disclosure may be more illusory than real." [76]

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72 [1999] 3 S.C.R. 668.
73 Roach Paper on Terrorism Prosecutions, p. 152.
74 *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307.
75 *R. v. McNeil*, 2009 SCC 3 at paras. 14, 51.
76 Roach Paper on Terrorism Prosecutions, p. 171.

5.8 Anticipating Disclosure

If CSIS information is not already included in the *Stinchcombe* material disclosed to an accused in a terrorism prosecution, the accused will almost inevitably seek production of information that CSIS may hold. This will require time-consuming litigation that may involve judges examining CSIS information in detail. In some cases, it may be appropriate for the Crown voluntarily to include relevant CSIS information as part of the *Stinchcombe* disclosure process, whether or not a court would hold CSIS to be subject to *Stinchcombe* in the particular case. This approach would also ensure that the Crown discharges its duties, articulated in the recent *McNeil* case, to make inquiries about relevant material that should be disclosed in cases where it knows that a CSIS investigation has taken place.[77] It may be more feasible for the Crown to include CSIS information that is not excluded by privilege as part of its *Stinchcombe* disclosure obligations if, as in the Air India trial, the CSIS information is made available for inspection by the defence at a secure location.

In some cases it may be appropriate for the Attorney General of Canada to move directly to obtain a non-disclosure order under section 38 of the *Canada Evidence Act* for information held by CSIS. A preliminary assertion of privilege could preclude the need to decide whether *Stinchcombe* or *O'Connor* procedures apply. Litigation under section 38 would determine whether, and in what form, CSIS material would be disclosed to the accused. Section 38 contemplates measures such as partial redaction or the use of summaries in order to reconcile the competing interests in disclosure and secrecy.

Litigating the disclosure of intelligence under section 38 will address the core issue: whether, and in what form, CSIS intelligence must be disclosed to the accused. It could avoid litigating the somewhat academic issues of whether CSIS is part of the Crown subject to *Stinchcombe* or only a third party in the prosecution, or whether the Crown has fulfilled its obligations to make reasonable inquiries about whether CSIS has material that should be disclosed to the accused.

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.

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77 2009 SCC 3 at para. 49.