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

CHAPTER VII: JUDICIAL PROCEDURES TO OBTAIN NON-DISCLOSURE ORDERS IN INDIVIDUAL CASES

7.0 Introduction

The legislative limits on disclosure and the privileges discussed in the previous two chapters are general limits on disclosure, rather than limits based on the facts of a particular case. Although general limits provide the greatest advance certainty that information will be protected from disclosure, they also run the risk of shielding too much or too little information.

New legislative limits on disclosure, or the dramatic expansion of privileges, will attract litigation. This will include *Charter* challenges claiming that the measures deprive the accused of the right to make full answer and defence, as well as litigation to help define the scope of the new provisions. The litigation will be carried out through pre-trial motions that will prolong terrorism prosecutions. Yet, even then, the core issue – whether a particular item of intelligence must be disclosed to ensure a fair trial – may not be resolved. The apparent certainty that general legislative limits on disclosure and new privileges could provide for security intelligence agencies and informers would be eroded by such litigation.

A fairer and more efficient alternative would be to improve the mechanisms for judges to review secret intelligence and to decide *on the facts of the particular case* whether the intelligence needs to be disclosed to ensure a fair trial. Such reviews are a standard and important part of terrorism prosecutions throughout the world. They recognize that police forces and intelligence agencies must work more closely to prevent terrorism, but that the disclosure of secret intelligence to the accused in a subsequent prosecution may threaten ongoing investigations, secret sources and promises of confidentiality made to allies.

However, deciding on the facts of a particular case whether to allow disclosure will produce less certainty for CSIS about whether or not its intelligence will be disclosed. As suggested in Chapter II, CSIS should be permitted to disclose sensitive intelligence to the National Security Advisor (NSA) and then to try to convince the NSA that the risk of that intelligence being disclosed through a prosecution is not acceptable.

Intelligence that is shared with the police might not always need to be disclosed to the accused in a terrorism prosecution. 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 some cases, the intelligence may contain material that will be valuable and perhaps even vital to the accused's defence.

Two main vehicles allow judges to make non-disclosure orders on the facts of the particular case. Section 37 of the *Canada Evidence Act*[1] allows officials to obtain a judicial non-disclosure order on the basis that the disclosure would harm a specified public interest. The protection of confidential informants and ongoing investigations might qualify here. Section 38 allows the Attorney General of Canada to obtain a judicial non-disclosure order on the basis that disclosure of the material would harm national security, national defence or international relations. In both cases, the judge must consider the competing interests in disclosure and non-disclosure. In both cases, judges can place conditions on disclosure, including partial redaction (editing) and the use of summaries and admissions of facts, in order to reconcile the competing interests in disclosure and secrecy.

In 2001, the *Anti-terrorism Act*[2] amended sections 37 and 38 of the *Canada Evidence Act*. These amendments attempted to encourage the pre-trial resolution of disputes about disclosure of sensitive information. The amendments also allowed judges to be more creative in reconciling the competing interests in disclosure and non-disclosure. Finally, the amendments gave the Attorney General of Canada a new power to issue a certificate that would block court orders to disclose material from a foreign entity or material relating to national defence or national security.[3]

Even with these amendments to the *Canada Evidence Act*, concerns remain about the workability of the procedures used to determine which material must be disclosed in a terrorism prosecution, and the form of the disclosure. For example, section 38 issues must be decided in the Federal Court even when they arise in a criminal trial before a superior court. Early in 2009, a judge in the ongoing "Toronto 18" terrorism prosecution held that the exclusive jurisdiction of the Federal Court to make decisions under section 38 about the disclosure of national security information threatens the viability of the trial process and the rights of the accused.[4]

---

1 R.S.C. 1985, c. C-5.
2 S.C. 2001, c. 41.
3 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.13 [*Canada Evidence Act*].
4 Colin Freeze, "Ontario judge declares secrecy law unconstitutional," *The Globe and Mail* (January 16, 2009).

Proceedings under sections 37 and 38 occur separately from underlying criminal proceedings even if the section 37 and 38 proceedings involve questions about the information that must be disclosed to the accused. Both the accused and the Crown can appeal decisions made under sections 37 and 38 before, or even during, a terrorism trial. Such appeals have fragmented and prolonged terrorism prosecutions.

Sections 37 and 38 of the *Canada Evidence Act* are both likely to play critical roles in most terrorism prosecutions. They will be used to reconcile the competing demands for secrecy and disclosure and, as a result, the competing interests of security intelligence and law enforcement agencies. These procedures must be as efficient and fair as possible and should incorporate the best practices employed by other democracies that have had more extensive experience than Canada with terrorism prosecutions. The public needs to have confidence that Canada has sufficient competence to undertake the difficult task of prosecuting terrorism cases fairly and efficiently. As a recent report of the International Commission of Jurists stated, acts of terrorism "…are all very serious criminal offences under any legal system. If the criminal justice system is inadequate to the new challenges posed, it must be made adequate."[5]

7.1 Section 37 of the *Canada Evidence Act*

Section 37 of the *Canada Evidence Act* allows ministers or officials to ask the courts to prevent disclosure on the basis of a "specified public interest." Section 37 leaves the range of specified public interests open-ended. The interests have included the following: the protection of informers; ongoing investigations, including the location of watching posts and listening devices; the location of witnesses in witness protection programs; and investigative techniques.[6] Section 37 may be of particular importance in preventing the disclosure of information that might identify CSIS informers who are not otherwise protected by police informer privilege.

Hearings under section 37 can involve the Crown making submissions in the absence of the accused, the public, or both.[7] The Crown can also present material to the judge, even if it might not otherwise be admissible under Canadian law, as long as the material is reliable and appropriate.[8] Hearings under section 37 can consume considerable time, since they may often require submissions by the parties and judicial inspection of each disputed document.

---

5 *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, p. 123, online: International Commission of Jurists, Eminent Jurists Panel <http://ejp.icj.org/IMG/EJP-Report.pdf> (accesed July 30, 2009) [*Assessing Damage, Urging Action*].

6 Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, *The Law of Privilege in Canada* (Aurora: Canada Law Book, 2006), ch. 3.

7 *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.); *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Pearson* (2002), 170 C.C.C. (3d) 549 (Que. C.A.).

8 *Canada Evidence Act*, s. 37(6.l).

Section 37 applications can be decided by the Federal Court or by a provincial superior court.[9] If, as with most terrorism prosecutions, the trial is held in a provincial superior court, the trial judge hears the section 37 application.[10] Section 37(5) allows the superior court judge[11] to balance the competing public interests in disclosure and non-disclosure and to make various orders relating to disclosure. The orders can include placing conditions on disclosure, such as requiring the use of a part or a summary of the information or a written admission of facts relating to the information. This is done to limit the harm to the public interest that might flow from more extensive disclosure. The judge might order material to be admitted in a modified form, such as with passages deleted, even if material altered in this way would not be admissible under ordinary rules of evidence.[12]

Under section 37.3, the trial judge can make any order that he or she considers appropriate to protect the right of the accused to a fair trial, including a stay, or termination, of all or part of the proceedings. Although a superior court trial judge is allowed to make all the relevant decisions under section 37, the *Canada Evidence Act* does not clearly state that the judge may reconsider and revise a non-disclosure order as the trial evolves.

The ability of the trial judge to reconsider and re-evaluate non-disclosure orders is critical to the efficiency and fairness of terrorism trials. A non-disclosure order that appeared appropriate at the beginning of a trial may later cause unfairness to the accused. For example, evidence introduced as the trial progresses may make it clear that information that was initially not disclosed would now greatly assist the accused. Other democracies place considerable emphasis on permitting a trial judge to re-consider an initial non-disclosure order as the trial evolves. Where appropriate, judges in Canada should also revise decisions about disclosure, using their inherent powers over the trial process.

The Crown or the accused in a criminal case can appeal a decision made under section 37 of the *Canada Evidence Act* to the provincial court of appeal,[13] with the possibility of a further appeal to the Supreme Court of Canada.[14] The Government may decide to appeal if it loses an application for non-disclosure, and the accused may do so if not satisfied by the disclosure ordered by the judge.

---

9 *Canada Evidence Act*, s. 37(3).
10 *Canada Evidence Act*, s. 37(2).
11 Provincial court trial judges do not have jurisdiction to make determinations under s. 37, but may make evidentiary rulings: *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.); *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (Ont. C.A.); *Canada (Attorney General) v. Sander* (1994), 90 C.C.C. (3d) 41 (B.C.C.A.). The division of proceedings between the provincial and superior courts in criminal proceedings may cause problems, but these are not likely to arise in terrorism prosecutions, which will generally be conducted in superior courts.
12 *Canada Evidence Act*, s. 37(8).
13 *Canada Evidence Act*, s. 37.1.
14 *Canada Evidence Act*, s. 37.2.

Because section 37 proceedings are considered to be separate from trial proceedings, the appeal rights relating to section 37 are separate from other appeals relating to the trial. The normal practice in criminal trials is to allow appeals only at the conclusion of a trial. Courts have recognized that appeal rights relating to section 37, which may be exercised before the trial is completed, can disrupt and fragment the trial.[15] If the Crown appeals a determination relating to section 37, it is possible that delay will be charged against the Crown when determining whether the accused's *Charter* right to a trial within a reasonable time has been violated.[16]

Besides appealing a determination under section 37, the Crown has other options. The Crown can stay or abandon the proceedings. As well, if an order to disclose under section 37 relates to national security or national defence, or relates to information obtained in confidence or in relation to a foreign entity, the Attorney General of Canada may personally issue a non-disclosure certificate under section 38.13 of the *Canada Evidence Act*. This power is discussed in greater detail below.

7.2 Section 38 of the *Canada Evidence Act*

A non-disclosure order can also be obtained under section 38 of the *Canada Evidence Act*. That section requires participants in proceedings to notify the Attorney General of Canada if they are required, or expect, to cause the disclosure of information that the participant believes is "sensitive information" or "potentially injurious information."[17] Once notice is given, the information cannot be disclosed unless the Attorney General of Canada or the Federal Court authorizes disclosure.[18]

A Federal Court judge, not the trial judge, must hear the matter *ex parte* and give the Attorney General of Canada the opportunity to make submissions.[19] The judge may consider material that would not ordinarily be admissible under the laws of evidence, provided that the material is reliable and appropriate.[20]

The process to decide national security confidentiality matters under section 38 has three stages. The first stage determines whether the material is relevant information that must be disclosed under *Stinchcombe*.[21] If the information is not relevant, it need not be disclosed.

---

15 *R. v. McCullough*, 2000 SKCA 147, 151 C.C.C. (3d) 281.
16 *R. v. Sander* (1995), 98 C.C.C. (3d) 564 (B.C.C.A.).
17 *Canada Evidence Act*, s. 38.01.
18 *Canada Evidence Act*, s. 38.02.
19 *Canada Evidence Act*, s. 38.11.
20 *Canada Evidence Act*, s. 38.06(3.1).
21 "The first task of a judge hearing an application is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the Stinchcombe rule, that is to say in the case at bar information, whether inculpatory or exculpatory, that may reasonably be useful to the defence": *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C. (3d) 129 at para. 17.

If the information is relevant, a second stage involves determining whether the disclosure of relevant information would harm international relations, national defence or national security. In making this determination, the judge gives "considerable weight" to the submissions of the Attorney General of Canada "…because of his access to special information and expertise."[22] The judge may authorize disclosure of the information, unless he or she determines that disclosure would injure international relations, national defence or national security.[23]

If a determination is made that the disclosure of the relevant information would cause one of these harms, a third stage is involved, with the judge balancing the competing public interests in disclosure and non-disclosure.[24] The judge has a range of options. These include the authority to place conditions on disclosure, such as requiring the use of part, or a summary, of information, or a written admission of facts relating to the information, in order to limit the injury caused by the disclosure. Orders can be made to allow the admission of redacted (edited) documents, even though they would not normally be admissible under the laws of evidence.[25]

The parties may appeal a decision made under section 38 to the Federal Court of Appeal.[26] The Court is required to conduct a review if an affected party was not allowed to make representations at the section 38 hearing.[27] The Supreme Court of Canada may grant leave to appeal further.[28] These appeal and review rights treat section 38 proceedings as distinct from the trial proper, and fragment and delay criminal prosecutions.

The Attorney General of Canada may also personally issue a certificate under section 38.13 prohibiting disclosure of information that was obtained from a foreign entity or that relates to national security or national defence, even though the material is subject to a court order of disclosure. This is the ultimate protection against the disclosure of intelligence.

Section 38.131 gives a right to appeal the Attorney General's certificate, but the right is limited to determining whether the information that is the subject of the certificate in fact relates to national security or national defence or was received from, or relates to, a foreign agency.

The trial judge in any subsequent criminal trial must respect Federal Court non-disclosure orders and any non-disclosure certificate issued by the Attorney

---

22 *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C. (3d) 129 at paras. 18-19.
23 *Canada Evidence Act*, s. 38.06(1).
24 *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C. (3d) 129 at para. 21.
25 Canada Evidence Act, s. 38.06(4).
26 *Canada Evidence Act*, s. 38.09.
27 *Canada Evidence Act*, s. 38.08.
28 *Canada Evidence Act*, s. 38.1.

General of Canada. However, the trial judge has the discretion under section 38.14 to make any order that he or she considers appropriate to protect the right of the accused to a fair trial. This could include a stay of proceedings or an order dismissing specified counts of the indictment or information.

7.2.1 The Importance of Section 38 Proceedings in Terrorism Investigations and Prosecutions

Although formally characterized as separate from the criminal trial, section 38 proceedings are intimately connected to terrorism prosecutions. A 2006 Memorandum of Understanding (MOU) between the RCMP and CSIS implicitly recognizes the importance of section 38 in protecting intelligence from disclosure. It states:

The CSIS and the RCMP recognize that information and intelligence provided by the CSIS to the RCMP may have potential value as evidence in the investigation or prosecution of a criminal offence. In these cases, the parties will be guided by the following principles:

a. both parties recognize that the CSIS does not normally collect information or intelligence for evidentiary purposes;
b. both parties recognize that once information or intelligence has been disclosed by the CSIS to the RCMP, it may be deemed, for purposes of the prosecution process, to be in the control and possession of the RCMP and the Crown and thereby subject to the laws of disclosure whether or not the information is actually used by the Crown as evidence in court proceedings;
c. Sections of the *Canada Evidence Act* will be invoked as required to protect national security information and intelligence.[29]

The MOU incorrectly suggests that CSIS information and intelligence can be made subject to disclosure under *Stinchcombe* only when it is in the possession of the Crown. CSIS intelligence can, as in the Air India trial, be subject to disclosure under *Stinchcombe*. An accused can also seek production and disclosure of information from CSIS even if it is classified as a third party that is not subject to *Stinchcombe* disclosure requirements. Section 38 would be the main vehicle used to protect CSIS information, both where the accused relies on *O'Connor* to seek production and disclosure from CSIS as a third party and where the accused seeks disclosure under *Stinchcombe*.

Section 38 proceedings will be important in most terrorism prosecutions for protecting CSIS information from disclosure. Most terrorism prosecutions will feature attempts to obtain disclosure of CSIS material. Terrorism prosecutions for acts that have an international component may also see attempts to obtain

29 Public Production 1374: 2006 RCMP/CSIS MOU, Art. 21.

disclosure of material that CSIS and other Canadian agencies have obtained from foreign partners. The recently completed *Khawaja* prosecution featured multiple section 38 applications, as well as appeals to the Federal Court of Appeal and a leave application to the Supreme Court of Canada.[30]

Section 38 issues can arise at any point in a terrorism trial, with accompanying delays, especially if the accused attempts to call evidence that will involve secret intelligence, perhaps in the hope that the intelligence could exonerate the accused or cast doubt on the reliability or legality of the state's evidence. Section 38 proceedings and appeals in the middle of one criminal trial by jury led to a mistrial.[31] Concern has been expressed that mistrials could result if Federal Court proceedings become necessary in the ongoing "Toronto 18" terrorism prosecutions.[32]

7.2.2 Avoiding Section 38 Proceedings in the Air India Prosecutions

Although section 38 proceedings are likely to be a feature of contemporary terrorism prosecutions, they are not inevitable. The parties to the Air India prosecutions, for example, managed to avoid section 38 proceedings.

Reyat was convicted of manslaughter in 1991, and an appeal was dismissed in 1993.[33] Although some evidence of CSIS surveillance of Reyat and Parmar at the time of the Duncan Blast was introduced as evidence, it was not critical to the Crown's case because physical evidence was available linking Reyat to the bomb used in the Narita blast. Other incriminating evidence also existed, including admissions obtained from Reyat by the police. The Parmar Tapes that remained were disclosed to the accused without the Attorney General of Canada objecting under what is now section 38.

In the Malik and Bagri proceedings that concluded in 2005, the lawyers for the accused were given access to CSIS material, after giving an undertaking that they not disclose the evidence to others, including their clients, without permission. In a joint report on the trial, the lead prosecutor, Robert Wright, and defence counsel, Michael Code, wrote that defence counsel were able to inspect CSIS material "…while the documents remained in the possession of CSIS, and in almost every instance defence counsel were able to conclude that the material was not relevant to the proceedings."[34]

---

30 For an account of the extensive s. 38 litigation in this case, 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. 234-245 [Roach Paper on Terrorism Prosecutions].

31 See the history leading up to the mistrial as discussed in *R. v. Ribic*, 2004 CanLII 7091 (ON S.C.) at paras. 3-9.

32 Colin Freeze, "Ontario judge declares secrecy law unconstitutional," *The Globe and Mail* (January 16, 2009).

33 *R. v. Reyat*, 1991 CanLII 1371 (BC S.C.), affirmed (1993), 80 C.C.C. (3d) 210 (B.C.C.A.).

34 Exhibit P-332: Robert Wright and Michael Code, "Air India Trial: Lessons Learned," Part III.

In his testimony before the Commission, Geoffrey Gaul, Director of the Criminal Justice Branch of the British Columbia Ministry of the Attorney General, stated that the Crown in the Malik and Bagri prosecution was prepared to litigate section 38 issues if necessary, but that it "…would have been a two-front approach"[35] that would have been "clearly daunting."[36]

Bill Turner, a senior CSIS employee, now retired, described the defence counsel undertakings not to disclose information as "a band-aid approach" that emerged from a conflict. The conflict arose because the defence wanted to explore the possibility that the Government of India was involved in the bombing, and the Government of Canada was unwilling to reveal information about "…what the Government of India is doing here in Canada….We will call it 'national security' and we wouldn't budge." Turner explained that, "…rather than go through a stay of proceedings and rather than go to Federal Court and hold the process up further," the "band-aid" solution "…was for the defence and the Crown and CSIS to sit down with all of this vetted material and CSIS would lift the vetting so the defence could look at it all and decide if they needed anything for the defence…. It was a band-aid approach, because we had both drawn a line in the sand. There was clearly a section 7 [*Charter* issue] of rights, disclosure rights and there was clearly a national security interest."[37]

Code testified about what he viewed as the desire by all parties to avoid "…this horrendous Federal Court procedure of going to Ottawa," involving "a document-by-document litigation model"[38] and educating a Federal Court judge about a case on which the trial judge had already spent a year.[39]

7.2.3 Other Experiences with Section 38 of the *Canada Evidence Act*

Although proceedings under section 38 were avoided in the Air India trials, they have been used in other prosecutions. The use of section 38 in the middle of the *R. v. Ribic* trial derailed the prosecution and resulted in a new trial. That prosecution related to the taking of a Canadian soldier hostage in Bosnia. After the Crown had presented its case to the jury over eight days in October, 2002, the accused proposed to call witnesses to give testimony that involved secret information. Although the jury agreed to a postponement while the issue was litigated in the Federal Court under section 38, the trial judge declared a mistrial on January 20, 2003, when it became apparent that an appeal to the Federal Court of Appeal would take place.[40]

---

35 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, p. 11378.
36 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, p. 11391.
37 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8323-8324.
38 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11385.
39 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11387.
40 See the history leading up to the mistrial as discussed in *R. v. Ribic*, 2004 CanLII 7091 (ON S.C.) at paras. 3-9.

The new trial in *Ribic* ended in a conviction. A key factor in holding that the accused's right to a trial in a reasonable time was not violated was that the accused himself had initiated the section 38 procedure by calling defence witnesses to provide evidence that could involve secret information.[41] In many cases, the Attorney General of Canada will pursue a section 38 order, and in such cases the prosecution might be held responsible for any resulting trial delays.

In 2001, amendments to section 38 of the *Canada Evidence Act*, enacted as part of the *Anti-terrorism Act*, attempted to respond to the delay problem revealed in *Ribic* by requiring all justice system participants, including the accused, to provide early notice to the Attorney General of Canada of an intention to cause the disclosure of sensitive information. The notification requirement, contained in section 38.01, is designed to allow the Attorney General of Canada to take steps to resolve national security confidentiality matters before trial and to reduce the risk that "…proceedings will come to a halt while the matter [is] transferred to the Federal Court for a determination." However, the Government can still invoke the *Canada Evidence Act* provisions during a hearing.[42]

Even if an accused does not give proper early notice under section 38.01, it would be difficult to prevent the accused from calling evidence that may involve secret material or from seeking to cross-examine Crown witnesses in areas that may provoke secrecy claims. The accused's right to make full answer and defence could be at stake. For example, the accused might argue that the need to call or to cross-examine on the evidence became apparent only after the Crown set out its case in court. A terrorism trial could be disrupted, and perhaps aborted, if national security confidentiality issues are raised in the middle of the trial, then litigated in the Federal Court, with the possibility of appeal to the Federal Court of Appeal and further appeal to the Supreme Court of Canada. If the accused was being tried by jury, a mistrial would be quite likely, as in *Ribic*.

Even extensive litigation and appeals of section 38 issues before trial at the insistence of the Attorney General of Canada could delay the trial, raising the possibility that the trial judge will declare a permanent stay of proceedings because of unreasonable delay. As discussed in Chapter IX, terrorism prosecutions already sorely tax the stamina of judges and jurors, even without the addition of section 38 litigation in the Federal Court, possibly followed by appeals.

The *Ribic* case demonstrates how an accused might use the two-court approach – dealing with the trial in one court and with section 38 issues in the Federal Court – to sabotage a terrorism trial by trying to call evidence that leads to section 38 litigation in Federal Court. Once an accused seeks information and the Attorney General of Canada refuses to disclose it, litigation in the Federal Court is inevitable, with appeals likely to the Federal Court of Appeal and the Supreme Court of Canada. This litigation will delay and disrupt the main trial and

---

41 *R. v. Ribic*, 2008 ONCA 790 at paras. 138, 147.

42 Department of Justice Canada, "The *Anti-terrorism Act*, Amendments to the *Canada Evidence Act* (CEA)", online: Department of Justice Canada <http://canada.justice.gc.ca/eng/antiter/sheet-fiche/cea-lpc/cea2-lpc2.html#b> (accessed May 26, 2009).

might result in its collapse. Particularly in a jury trial, it is probable that a mistrial will be declared if there is a serious delay. The Attorney General of Canada has to face the dilemma of agreeing to the disclosure of secret information that should not be disclosed in order to prevent the trial from "going off the rails."

Other proceedings in the *Ribic* prosecution highlighted the complexities, delay and duplication of effort caused by the present two-court approach. *Ribic* involved multiple pre-trial applications before specially-designated Federal Court judges to deal with section 38 issues.[43] Under section 38, the Federal Court can make rulings only about one privilege – national security confidentiality. All other decisions about privileges that may shield information from disclosure, including informer privilege, must be made by the trial judge. Even on national security confidentiality issues, the Federal Court's decision does not end the matter; if the Federal Court makes a non-disclosure order, the trial judge must determine whether to provide a remedy to protect the accused's right to a fair trial.

In *Ribic*, the Federal Court used an innovative approach to reconcile the competing demands for disclosure and secrecy by providing that the two witnesses whose testimony the accused wanted would be asked questions by a security-cleared lawyer. To protect against the inadvertent disclosure of secret information, an edited transcript of the testimony would be disclosed for use at trial.[44] However, the transcript was effectively re-litigated before the trial judge, who had to decide whether the edited transcript could be admitted at trial. The trial judge allowed the edited transcript to be used as evidence, in large part because the transcript related to contextual evidence called by the accused and was not central to the allegations about the accused's conduct.[45] This approach will not easily be duplicated in other cases involving secret information and at its best would simply constitute another "band-aid."

In *Ribic*, a disclosure issue that had been litigated and appealed in the Federal Court[46] was effectively re-litigated before the trial judge. A subsequent appeal by the accused to the Ontario Court of Appeal, on the basis that the trial judge should have stayed proceedings because of limited disclosure and trial delay, was only recently dismissed.[47]

The section 38 procedure requires two different courts to decide similar and closely related issues. Any non-disclosure or partial non-disclosure order made by the Federal Court under section 38 will effectively have to be re-litigated before the trial judge. This re-litigation is required because section 38.14 of the *Canada Evidence Act* requires the trial judge to accept the Federal Court

---

43 See, for example, *Nicholas Ribic and Her Majesty the Queen and Canadian Security Intelligence Service*, 2002 FCT 290 and *Canada (Attorney General) v. Ribic*, 2002 FCT 839, 221 F.T.R. 310.

44 *Ribic v. Canada (Attorney General)*, 2003 FCT 10, 250 F.T.R. 161.

45 *R. v. Ribic*, [2005] O.J. No. 2628 (Sup. Ct.).

46 The Supreme Court refused leave to appeal.

47 *R. v. Ribic*, 2008 ONCA 790. The Ontario Court of Appeal noted that four Federal Court judges had already found that the disclosure process was fair to the accused: see para. 92.

order, but also requires the trial judge to determine if any order is appropriate to protect the accused's right to a fair trial in light of the non-disclosure order. Section 38.14 protects an accused's right to a fair trial. However, it places trial judges in the difficult position of deciding, on incomplete information, whether the right to a fair trial has been compromised by a Federal Court non-disclosure order.

An Ontario Superior Court judge who presided at a 1986 terrorism prosecution involving the predecessor to section 38 made it clear that the two-court procedure placed him in a very difficult position. He indicated that "…the trial judge may well be on the horn of a real dilemma if, in his judgment, inspection is needed."[48] He elaborated:

> Blame must be laid squarely at the feet of Parliament which unwittingly may well have created an impasse in certain cases by resorting to two courts instead of one and assigning tasks to each of them that collide or run at cross-purposes to one another…. There appears to be nothing left to do at trial except to consider the impact of the Federal Court determination on the exigencies of a fair trial…. Parliament could not have intended to give the Federal Court jurisdiction nor, in my opinion, could such jurisdiction be exercised by the Federal Court in such a way as to operate in derogation of the duty imposed on trial judges, as courts of competent jurisdiction, to enforce the rights of the accused in the course of the trial, rights that are now constitutionally entrenched.[49]

The prosecution was allowed to proceed even though no court had examined the CSIS surveillance material about the accused. Such an approach would likely not be acceptable today, given the increased emphasis on the accused's rights to disclosure and to make full answer and defence.

7.2.4 Procedures Equivalent to Section 38 in Other Countries

Canada lags behind other counties, including Australia, the United Kingdom and the United States, in establishing an efficient and fair process to enable judges to determine whether intelligence must be disclosed to ensure a fair trial.

A paper prepared for the Commission by Professor Robert Chesney outlined some of the creative approaches that American trial judges have used to avoid the "disclose or dismiss" dilemma. These approaches included allowing foreign security agents to testify under pseudonyms, presenting depositions by video links and disclosing intelligence material to defence counsel who have undertaken not to share the material with clients.

---

48 *R. v. Kevork, Balian and Gharakhanian* (1986), 27 C.C.C. (3d) 523 at 536 (Ont. H.C.J.).
49 (1986), 27 C.C.C. (3d) 523 at 538, 540 (Ont. H.C.J.).

In Australia, the United Kingdom and the United States, the trial judge is allowed to examine secret information to determine whether its disclosure is necessary for a fair trial. In his study for the Commission, Professor Roach concluded that all three countries "…allow the trial judge to decide questions of non-disclosure. This allows issues of non-disclosure to be integrated with comprehensive pre-trial management of a range of disclosure and other issues. Even more importantly, it allows a trial judge who has seen the secret material to revisit an initial non-disclosure order in light of the evolving issues at the criminal trial…."[50]

Australian legislation enacted in 2004 makes the trial judge responsible for reconciling the competing interests in secrecy and disclosure and for managing issues of national security confidentiality, including requiring defence lawyers to obtain security clearances as a condition of access to secret information. This legislation was enacted after a thorough review of options by the Australian Law Reform Commission.[51]

The European Court of Human Rights held that the ability of the trial judge to see the information and "…to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging,"[52] was critical to the fairness of the United Kingdom's system of public interest immunity, which has come into play in many UK terrorism prosecutions. The ability of the trial judge to monitor throughout the trial whether disclosure is necessary helps to ensure fair treatment of the accused. This procedure also promotes an efficient trial process by allowing trial judges to make provisional non-disclosure orders, secure in the knowledge that these orders can be revisited as the trial evolves if fairness for the accused requires it. In contrast, the Federal Court often decides disclosure issues under section 38 before the trial has started and before all the issues that will emerge at the trial are known. As well, the trial judge cannot later revise a non-disclosure order under section 38. The trial judge must abide by the order.

The Canadian two-court system has been the subject of international criticism, including in a recent report by the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights:

> In Canada, the trial judges, who must ultimately decide whether to proceed or order a stay of proceedings, are arguably placed in a difficult position of having to assess the potential prejudice of non-disclosure upon the rights of the accused, without seeing the withheld material.[53]

---

50 Roach Paper on Terrorism Prosecutions, p. 286.

51 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth.); Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/other/alrc/publications/reports/98> (accessed May 28, 2009).

52 *Rowe and Davis v. United Kingdom*, (2000) 30 E.H.R.R. 1 at para. 65. See also *R. v. H; R. v. C*, [2004] UKHL 3 at para. 36, emphasizing that a trial judge's decision not to disclose information because of public interest immunity concerns "…should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review."

53 *Assessing Damage, Urging Action*, p. 153.

The report also observed that the United Nations Human Rights Committee expressed concerns that the section 38 procedure might violate the right to a fair trial, a right protected by Article 14 of the *International Covenant on Civil and Political Rights*.[54]

7.2.5 Submissions to the Commission about the Two-Court System under Section 38

The Attorney General of Canada supported the current two-court approach, primarily because the Federal Court "…is comfortable with national security issues, already has the expertise and already has the required secure facilities."[55] The Attorney General warned that taking these matters away from the Federal Court "…could lead to inconsistent applications."[56] The Attorney General also suggested that it was too soon to determine if the two-court process was a failure and stated that the section 38 process was not linked directly to the trial process.[57] The Attorney General also submitted that the person holding that office would continue to weigh the competing interests for and against disclosure after the Federal Court had ruled on disclosure.[58]

Other witnesses, parties and intervenors before the Commission were almost unanimous in concluding that the current two-court system was inadequate and could cause problems.[59] George Dolhai, of the Public Prosecution Service of Canada, noted that this approach was not used in the United States, Britain or Australia.[60] Jack Hooper, an experienced former CSIS official, stated that the present system was not "…a particularly useful bifurcation…. I think it has an alienating effect on provincial Crown and provincial judges who sit in the weighty position of having to rule on evidence put before the court."[61] Luc Portelance of CSIS testified that the "…bifurcated system is complex, complicated and probably contributes to a loss of momentum in the case."[62] Former RCMP Commissioner Giuliano Zaccardelli stated that legislative change was required "…because using two courts, two judges, simply is not effective and efficient and it has to change. I see no reason why we cannot have one judge who, wherever the case is being heard, for that judge – to say that a judge could look at everything other than this, it's almost insulting to the judge as far as I'm concerned."[63]

---

54 *Assessing Damage, Urging Action*, p. 153.
55 Final Submissions of the Attorney General of Canada, Vol. III, February 29, 2008, para. 92 [Final Submissions of the Attorney General of Canada].
56 Final Submissions of the Attorney General of Canada, Vol. III, para. 93.
57 Final Submissions of the Attorney General of Canada, Vol. III, para. 90.
58 Final Submissions of the Attorney General of Canada, Vol. III, para. 110.
59 Testimony of John Norris, vol. 86, November 30, 2007, pp. 11127-11129; Testimony of Gérard Normand, vol. 86, November 30, 2007, p. 11129; Testimony of Kent Roach, vol. 86, November 30, 2007, pp. 11131-11132.
60 Testimony of George Dolhai, vol. 86, November 30, 2007, p. 11136.
61 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6247.
62 Testimony of Luc Portelance, vol. 88, December 4, 2007, p. 11507.
63 Testimony of Giuliano Zaccardelli, vol. 86, November 30, 2007, p. 11071.

The Criminal Lawyers' Association also addressed the section 38 process:

> **The section 38 process is unworkable.** The need to go to a different court in a different location, before or during the trial slows down the proceedings. The Federal Court is at a disadvantage in not having the full context of the evidence and providing that context is time-consuming for the parties. The trial judge is in the best position to make the necessary determinations under section 38.
>
> **Appellate review by the Federal Court of Appeal also creates the same issues** - multiplication of interlocutory proceedings and determinations made without full context.
>
> **The lack of criminal law experience of Federal Court judges** is also an issue.
>
> **Senior superior court judges who preside over terrorism cases should have the power to deal with section 38 claims** (either by amending section 38 or by designating the judges as *ex officio* members of the Federal Court and allowing the proceedings to take place in locations other than Ottawa.)[64]

The Air India Victims' Families Association also supported moving away from the two-court approach. To preserve the important role of trial by jury, the Association suggested that the court hearing section 38 disclosure issues should be the provincial superior court.[65]

After the Commission hearings ended, the Hon. Patrick LeSage and Michael Code produced a report on long and complex criminal cases. They recommended that federal, provincial and territorial ministers of justice should consider modifying the section 38 procedure "…in order to eliminate the delays caused in major terrorism prosecutions by the bifurcation of the case and by interlocutory appeals."[66] Drawing on their many years of experience with the criminal justice system, LeSage and Code explained that almost every terrorism prosecution will involve attempts to obtain disclosure and to call evidence from CSIS:

---

64 From Yolanda's summary but can't find in submissions

65 AIVFA Final Written Submission, pp.131, 168.

66 Patrick Lesage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (November 2008), p. 93, 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].

> As a result of this intersection between CSIS and RCMP investigations in the context of terrorism offences, national security privilege claims pursuant to s. 38 of the *Evidence Act* are now a common feature of these cases. These privilege claims raise very difficult case management problems. … Bifurcation of criminal trials and interlocutory appeals in criminal proceedings have both been regarded as an anathema for a very long time because they fragment and delay the criminal trial process.[67]

LeSage and Code contemplated that experienced superior court trial judges could decide section 38 issues as part of the trial process and that their decisions would be subject to ordinary appeal procedures, but only after the completion of the trial.

7.3 Is the Two-Court Approach Sustainable

The present two-court system used in deciding section 38 applications is out of step with systems in other democracies. The two-court structure has demonstrated unequivocally that it is a failure.

It is not likely that the two-court system can be saved. One unworkable suggestion was to facilitate communication between the Federal Court judge and the trial judge by amending section 38.05. However, the trial judge would not be permitted to examine the sensitive information in the first place.

Section 38.14 recognizes that the trial judge has a duty to protect the accused's right to a fair trial. The trial judge also has remedial powers under section 24(1) of the *Charter*.[68] However, under the current system, the trial judge does not have the information that is required to craft the appropriate remedy under section 38.14 or under section 24(1) of the *Charter*.

The trial judge can apply a range of remedies in response to a non-disclosure order, including a stay of proceedings. However, the trial judge has no authority to impose what will often be the most appropriate remedy – revision of the Federal Court's non-disclosure order in light of changed circumstances.

The problems of the current two-court system are real and serious. A trial judge might permanently halt a terrorism prosecution under section 38.14 as a result of a non-disclosure order made by the Federal Court. As Geoffrey O'Brian, Director General of Operations at CSIS, testified, "…the issue is not necessarily, can you protect that information? The issue, it seems to me, is: having protected that information, is it fatal to the prosecution? And that's the issue I think that perhaps is the tough one."[69]

---

67 Lesage and Code Report on Large and Complex Criminal Case Procedures, pp. 91-92.
68 *R. v. Ribic*, 2008 ONCA 790 at para. 113.
69 Testimony of Geoffrey O'Brian, vol. 17, March 6, 2007, p. 1582.

Another harm of the current two-court system is that a trial judge who has not seen the secret intelligence that is the subject of a Federal Court order might wrongly conclude that the accused does not need that secret intelligence to make full answer and defence. The result would be an unfair trial.

If a trial judge were allowed to examine the secret information that was the subject of an earlier non-disclosure order, the judge might determine that the information would not be helpful to the accused and that, as a result, the non-disclosure order did not make the trial less fair. If the judge determined that the undisclosed intelligence might be of some use to the accused, the judge could revise an initial non-disclosure order to allow parts of the intelligence to be disclosed to the accused or to require the prosecution to make admissions to compensate for the non-disclosure.

The Attorney General of Canada has submitted that the rationale for the two-court system is the expertise that has been developed by specially designated judges of the Federal Court in deciding matters of national security confidentiality. The need for special expertise to make decisions about national security confidentiality has, in the view of the Commission, been exaggerated.

The first step in the section 38 process as applied to criminal prosecutions is to determine whether the material in dispute is "relevant" in accordance with *Stinchcombe*. This is a matter traditionally decided by trial judges in criminal cases.

If the trial judge determines that the information is relevant, a second step is necessary to determine if disclosing the information would cause harm to international relations, national security or national defence. This is a matter currently within the jurisdiction of specially designated Federal Court judges. The practice at this stage is to accept the Attorney General's claim of injury so long as it is reasonable.[70] If trial judges were allowed to address this issue, they, like Federal Court judges, could be assisted by the *ex parte* submissions of the Attorney General of Canada about the risks flowing from disclosing the information in question.

Finally, the critical step under section 38 is to reconcile the competing demands for disclosure and non-disclosure. The Federal Court of Appeal has expressed a preference that this process be governed by the innocence-at-stake exception,[71] a test well within the competence of trial judges, who face it frequently.

In addition, section 38.06 encourages judges to devise creative solutions, using partial redactions and admissions of fact. Trial judges would be in the best position to devise such tailored remedies on the basis of all the facts in the case before them. As discussed earlier, if Federal Court judges devise the same types of tailored remedies, they will effectively have to be re-litigated before the trial judge, who retains ultimate control over how evidence is presented

70 *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C (3d) 129 at paras. 18-19.
71 *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C (3d) 129 at para. 27.

at trial. Allowing trial judges to make disclosure decisions would avoid this re-litigation.

It is incorrect to suggest, as the Attorney General of Canada did in his Final Submissions to the Commission, that section 38 proceedings are not linked directly to the trial process. Section 38 procedures are used to resist production and disclosure of intelligence to the accused. In principle, section 38 involves an assertion of a privilege that limits the amount of material that the accused and the trial court can have at their disposal at trial. In that sense, section 38 privilege claims are similar to other privilege claims advanced in a trial proceeding. Moreover, under section 38.14, the trial judge plays a critical role in deciding whether a remedy for the accused is necessary to compensate for a Federal Court order for non-disclosure or modified disclosure. The trial judge is left with the ultimate responsibility of dealing with the consequences of any decision by the Federal Court about disclosure. At the cost of repetition, the section 38 process affects both the efficiency and the fairness of terrorism prosecutions and is therefore clearly and directly linked to the trial process.

The Attorney General of Canada argued that allowing trial judges to make section 38 determinations could lead to inconsistent applications of the law. This does not seem to be a problem in other countries that allow trial judges to decide disclosure issues similar to those addressed by section 38. Canadian trial judges, by virtue of their oaths of office, would follow authority in the existing jurisprudence, as it has been developed by the Federal Court and by the Federal Court of Appeal. The *Criminal Code*[72] provides a good example of how federal legislation is applied across the country by superior and provincial courts with little inconsistency among jurisdictions. In any event, the Supreme Court of Canada can resolve any inconsistencies that may arise among courts in interpreting section 38.

The Supreme Court has yet to interpret section 38. This is in part because section 38 issues have often arisen in appeals that are launched before or, as in *Ribic*, during criminal trials. In all these cases, the Court has refused leave to appeal. Granting leave to appeal would have caused even more delay in an already strained trial process. The Court may be better placed to offer guidance about the interpretation of section 38 if this is raised, as with other issues about disclosure and privilege, on appeal after a trial is completed.

In summary, there are serious and irremediable disadvantages to the current two-court system for resolving issues of national security confidentiality. The Federal Court does not have full information about the trial, while the criminal trial judge does not have full information about the secret information that is subject to a non-disclosure order. Section 38 litigation, as it is currently, delays and disrupts terrorism prosecutions, while leaving the trial judge to decide what, if any, remedy is necessary to compensate the accused for the lack of disclosure. The trial judge may have to rely on blunt remedies, including a stay

72 R.S.C. 1985, c. C-46.

of proceedings that will permanently end the prosecution. The trial judge is not able to revise the non-disclosure order, even though this power is considered to be critical in other countries that deal with the same issues of reconciling competing interests in disclosure and secrecy.

Canada's allies trust trial judges to make decisions about the disclosure of secret information, including information provided by allies. In addition, trial judges regularly deal with informer privilege issues where an inadvertent leak of information could result in an informer's death.

7.4 Which Court is Best Suited to Conduct Terrorism Trials and Decide Issues of National Security Confidentiality

The Commission has concluded that a one-court approach to deciding section 38 issues is necessary. The next step is to decide which court – the regular criminal courts or the Federal Court – is best suited to conduct terrorism trials and to make section 38 determinations. The Commission recommends that it should be the regular criminal courts. The Federal Court would retain jurisdiction, as would the superior courts, to hear section 38 applications, but the Federal Court would cease its involvement as soon as the trial begins.

There has been some interest in the United States in creating a national security court to try terrorism cases. However, the US, the United Kingdom and Australia have all had significant successes with the regular criminal courts conducting terrorism prosecutions that involve secret information. The Canadian Bar Association, in its submissions, strongly argued against a special court system for terrorism offences.[73] Both before and after 9/11, attempts in other countries to have an adjudicative body dedicated only to terrorism trials have not been particularly successful.[74]

In his testimony, Jack Hooper expressed a preference for the Federal Court to conduct terrorism trials because of the Court's expertise in national security matters.[75] However, Bruce MacFarlane noted in his paper for the Commission that there is great value in having terrorism trials tried in the regular criminal courts.[76]

The Federal Court is a statutory court with many statutory responsibilities of importance to Canada. When the Federal Court evolved from the Exchequer Court in 1976, it was never intended that the new Court would have criminal jurisdiction. Although terrorism trials involve secret information, including secret information obtained from other countries, they remain criminal trials,

73 Canadian Bar Association, Submission to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, April 2007, p. 36 [Canadian Bar Association Submission].

74 See the history of such attempts discussed in Bruce MacFarlane, "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis" in Vol. 3 of Research Studies: Terrorism Prosecutions [MacFarlane Paper on Terrorist Mega-Trials].

75 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6248.

76 MacFarlane Paper on Terrorist Mega-Trials.

raising a host of procedural, evidential and substantive issues which are best addressed by experienced criminal law judges.

Assigning terrorism trials to the Federal Court might also produce constitutional difficulties. Roach noted in his paper for the Commission that assigning terrorism trials to the Federal Court might be challenged as violating the inherent and constitutionally guaranteed jurisdiction of the provincial superior courts over what, as in the Air India prosecutions, may essentially be murder trials.[77] He suggested that "…it is better to build national security expertise into the existing criminal trial courts than to attempt to give a court with national security expertise but no criminal trial experience the difficult task of hearing terrorism trials."[78]

The preferred solution would be to adopt the practice used in the United States, the United Kingdom and Australia, which would allow superior court trial judges to reconcile the competing demands of disclosure and secrecy. Like some other witnesses, George Dolhai cautioned, but not persuasively, that it was too soon to change section 38. Still, he agreed that not only the Americans, but also the British and, most recently, the Australians "…have all seen fit to assign these complex secrecy issues – to assign them to trial judges as just another issue that has to be continuously managed before and during trial."[79]

One concern was that trial courts would not have the facilities to store and protect secret information,[80] a concern that hardly warrants comment, since superior courts across the country are already able to offer such protection. As John Norris, an experienced defence counsel, testified, the trial courts already handle highly sensitive material that could identify informers and that involve organized crime.[81]

Claims by the Attorney General of Canada and by RCMP Commissioner William Elliott[82] that provincial superior court trial judges lack sufficient expertise in dealing with secret information have no merit. To repeat, much of the section 38 decision-making process turns on matters such as relevance, the right to make full answer and defence and "innocence-at–stake." Experienced criminal trial judges have the expertise to deal with all these issues. As is now done for Federal Court judges, criminal trial judges, under a reformed section 38 hearing process, would receive confidential submissions by the Attorney General of Canada about the harms that disclosing secret information may cause to national security, national defence or international relations.

---

77 Roach Paper on Terrorism Prosecutions, pp. 311-312.
78 Roach Paper on Terrorism Prosecutions, p. 313.
79 Testimony of George Dolhai, vol. 86, November 30, 2007, p. 11136. See also Testimony of Andrew Ellis, vol. 82, November 23, 2007, pp. 10576-10577.
80 Testimony of Gérard Normand, vol. 86, November 30, 2007, pp. 11134-11135.
81 Testimony of John Norris, vol. 86, November 30, 2007, p. 11136.
82 Testimony of William Elliott, vol. 90, December 6, 2007, p. 11811.

As is the normal practice, the chief justice of each provincial superior court would select the judges to hear cases involving section 38 applications. Appointing experienced trial judges to hear section 38 matters early in the trial process would promote efficient case management. As Chapter IX suggests, efficient case management is essential if complex terrorism cases are to proceed efficiently and fairly to a verdict. Someone must be in charge of the complex criminal trial process. This includes taking responsibility for decisions that reconcile the competing demands of secrecy and disclosure, along with those involving multiple pre-trial motions and voluminous disclosure of other materials. As in other countries, the best person to take the lead and to ensure that terrorism prosecutions can be brought to verdict efficiently and fairly is the trial judge.

Recommendation 19:

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

7.5 Appeals before the Completion of Terrorism Trials

The criminal law normally does not allow the accused or the Crown to appeal pre-trial and mid-trial rulings until after the completion of a trial. As an example, the accused cannot appeal a trial judge's decision that a confession was voluntary or constitutionally obtained until the completion of the trial. The same limitations apply to the Crown. The rationale for this traditional policy against interlocutory appeals, or appeals before the completion of trials, is the compelling public interest in completing trials in an efficient manner.[83] There is arguably no public interest in allowing appeals mid-way in the trial. With jury trials, interlocutory appeals might require a completely new trial and a new jury. Even this would not end the possibility of further appeals under section 38. In addition, the issues argued under section 38 on an appeal taken before the end of the trial may have been resolved by the time the trial ends. An appeal on those issues may turn out to have been unnecessary.

Sections 37.1 and 38.09 of the *Canada Evidence Act* allow appeals, both by the accused and by the Attorney General of Canada, from a decision made by a trial judge under section 37 or by a Federal Court judge under section 38. Sections

83 "The effective and efficient operation of our criminal justice system is not served by interlocutory challenges to rulings made during the process or by applications for rulings concerning issues which it is anticipated will arise at some point in the process. A similar policy is evident in those cases which hold that interlocutory appeals are not available in criminal matters.": *R. v. Duvivier*, (1991) 64 C.C.C. (3d) 20 at 24 (Ont. C.A.).

37.1 and 38.09 allow appeals about the disclosure matters dealt with in these sections to proceed before a criminal trial starts. They also authorize the appeal of such issues if they arise during a trial.

In the two criminal prosecutions since 2001 that have involved section 38, the Federal Court of Appeal heard appeals before the criminal trial was completed.[84] The potential for multiple section 38 applications in a terrorism prosecution means the potential for multiple appeals in turn. These appeals unquestionably delay the criminal trial, and still further delay will occur if the losing party seeks leave to appeal to the Supreme Court of Canada and, if successful, has a hearing before the Court.

The Attorney General of Canada has defended the value of interlocutory appeals under section 38.09, arguing that they "…maintain the public interest in a trial proceeding to verdict in a timely manner and, at the same time, may preclude recourse to the use of a prohibition certificate by the Attorney General of Canada under section 38.13 of the [*Canada Evidence Act*]."[85] The concern seems to be that a decision ordering disclosure, if it could not be appealed immediately, might force the Crown to abandon the prosecution if it did not want to disclose the information. These arguments, however, ignore the authority of the Attorney General of Canada to act under section 38.13 where he concludes that disclosure is contrary to the public interest.

The submission of the Criminal Lawyers' Association stated that interlocutory appeals "…inevitably [generate]…excessive delays in the criminal proceedings, sometimes to the extent where the *Charter* right to a speedy trial is engaged." Code stated in his testimony before the Commission that, "The interlocutory appeals are anathema…. [T]hey've never been allowed in the criminal process and the fact that section 38 currently provides for interlocutory appeals, in my opinion, is flatly wrong."[86] A subsequent report by the Hon. Patrick Lesage and Code recommended that these interlocutory appeals be eliminated.[87]

The traditional practice of not hearing appeals before the completion of criminal trials is of long standing and remains sound. Requiring appeals of section 38 matters to await the completion of the trial would allow the appeal court to make its decision on the basis of the complete record.

If appeals are not permitted until after the completion of the trial, the full record will then be available to the court to determine whether the accused's rights were adversely affected by non-disclosure orders made under sections 37 and 38 or by a prohibition certificate issued by the Attorney General of Canada after an order to disclose.

---

84 See *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C. (3d) 129; *Canada (Attorney General) v. Khawaja*, 2007 FCA 342, 228 C.C.C. (3d) 1; *Canada (Attorney General) v. Khawaja*, 2007 FCA. 388, 289 D.L.R. (4th) 260.

85 Final Submissions of the Attorney General of Canada, Vol. III, para. 59.

86 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11388.

87 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 93.

The Federal Court of Appeal might order disclosure of information that the Federal Court originally ordered not be disclosed. The Attorney General of Canada can acquiesce, or can instead prevent the disclosure of the information. To prevent disclosure, the Attorney General can issue a non-disclosure certificate under section 38.13. He can also stay a prosecution or assert his fiat under the *Security Offences Act*[88] and then stay the prosecution.

Section 38.09 authorizes the Federal Court of Appeal to hear appeals of section 38 matters that arise in criminal trials. The Federal Court of Appeal should no longer hear such appeals. Instead, the *Canada Evidence Act* should be amended to authorize only provincial courts of appeal to hear the appeals, and the appeals should be heard only at the conclusion of the trial. Section 37.1 already authorizes provincial courts of appeal to hear appeals where an application for public interest immunity has been made in a criminal trial. Allowing appeals of section 38 matters to be heard by the same courts would avoid fragmenting the appeal process. Provincial courts of appeal would then be able to hear appeals about all the legal issues arising from a terrorism trial, including those relating to section 38. This proposal to expand the jurisdiction of provincial courts of appeal would complement the expanded jurisdiction of trial judges, proposed earlier, to decide section 38 issues in terrorism trials.

Recommendation 20:

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

7.6 Possible Use of Special Advocates in Section 38 Proceedings

Special advocates are lawyers who have received high-level security clearances and can therefore have access to secret material. They can represent the interests of individuals in proceedings where the individuals and their lawyers would be denied access to the secret material. Chapter IV discusses the role of special advocates in proceedings that challenge the legality and constitutionality of warrants.

At present, there is a statutory regime for special advocates for proceedings under the *Immigration and Refugee Protection Act*.[89] This has led to the creation

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

89 S.C. 2001, c. 27. The regime for special advocates was introduced by *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3.

of a cadre of security-cleared lawyers with experience in matters involving national security confidentiality.

Special advocates should have a similar role in proceedings under section 38 of the *Canada Evidence Act*. Section 38.11(2) provides that the Attorney General of Canada may make *ex parte* representations to a judge. The *ex parte* nature of the hearing allows the Attorney General to describe the secret information that may become the subject of a non-disclosure order and to provide confidential details about the harms that disclosure might cause.

Although permitted in some situations, typically during an application for a search warrant, legal proceedings with only one side present before the judge are not the norm. They depart from basic standards of adjudicative fairness. They place judges, accustomed to adversarial argument, in a very difficult position. The interests of the accused and of the judge who decides the matter will be better served if there is an opportunity, through special advocates, for adversarial argument about critical matters – such as whether secret information would be helpful to the accused and whether the claims by the Attorney General about the possible harms of disclosure are valid.

In addition, special advocates could assist in finding ways to reconcile competing interests in disclosure and secrecy – for instance, through partial disclosure of the material.

The Federal Court has appointed security-cleared *amici curiae* to assist it in recent proceedings under section 38 of the *Canada Evidence Act*.[90] The availability to the Court of *amici curiae* has been cited as one reason why section 38 has been found to be consistent with the *Charter*, despite allowing the Attorney General to make submissions to the judge without the accused present.[91]

The Attorney General of Canada, in its Final Submissions, recognized the "inherent discretion" of the Federal Court to appoint an *amicus curiae* as a legal expert to assist the court on national security matters. The Attorney General, however, distinguished the *amicus curiae* from the special advocate who would protect the interests of the accused.[92] The Attorney General, unhelpfully and without persuasive submissions, noted the Government's position that further study was required before special advocates could be used in section 38 proceedings.[93]

There has already been extensive study and extensive support for using special advocates in section 38 proceedings. The House of Commons and

---

90 *Khadr v. Canada (Attorney General)*, 2008 FC 46, 54 C.R. (6th) 76; *Canada (Attorney General) v. Khawaja*, 2008 FC 560; *Khadr v. Canada (Attorney General)*, 2008 FC 807.

91 *Canada (Attorney General) v. Khawaja*, 2007 FC 463, 280 D.L.R. (4th) 32 at para. 59, affirmed without reference to special advocates, *Canada (Attorney General) v. Khawaja*, 2007 FCA 388, 289 D.L.R. (4th) 260.

92 Final Submissions of the Attorney General of Canada, Vol. III, para. 51.

93 Final Submissions of the Attorney General of Canada, Vol. III, para. 53.

Senate committees that reviewed the operation of the *Anti-terrorism Act* both recommended that provision be made for special advocates to provide adversarial challenges to Government claims under section 38 about the need for secrecy.[94] The Federation of Law Societies of Canada, the Canadian Bar Association and the Criminal Lawyers' Association all supported the use of special advocates in section 38 proceedings.[95] The Federation of Law Societies stressed that the accused's *Charter* rights to disclosure and to make full answer and defence were at stake in section 38 proceedings, and that Canada's justice system was based on an adversarial system.[96] It cited the statement by Justice Hugessen of the Federal Court at a recent Montreal conference: "[W]e do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party…."[97]

Section 38 proceedings are important matters that implicate the accused's rights to disclosure and to make full answer and defence. The judge who is given the difficult task of reconciling competing interests in secrecy and disclosure should be assisted by the fully-informed adversarial arguments that special advocates can offer. Full adversarial argument is particularly necessary because of the tendency of the Attorney General of Canada to overstate the need for secrecy. The accused themselves, through their own counsel, should be permitted to make submissions in section 38 proceedings, although they will be at a considerable disadvantage because they will not have seen the secret material or heard the Attorney General's *ex parte* arguments about the dangers of disclosing the secret material.

The special advocates appointed to deal with *Immigration and Refugee Protection Act* matters could just as well be used for section 38 proceedings. They already have security clearances and could be available without delay.

Recommendation 21:

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

---

94 House of Commons Canada, Final Report of the Standing Committee on Public Safety and National Security, Subcommittee on the Review of the *Anti-terrorism Act*, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues*, March 2007, p. 81, online: Parliament of Canada <http://www2.parl.gc.ca/content/hoc/Committee/391/SECU/Reports/RP2798914/sterrp07/sterrp07-e.pdf> (accessed July 30, 2009); The Senate of Canada, *Fundamental Justice In Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, February 2007, p. 42, online: Parliament of Canada <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/anti-e/rep-e/rep02feb07-e.pdf> (accessed July 30, 2009).

95 Submissions of the Federation of Law Societies of Canada, January 31, 2008, p. 2 [Submissions of the Federation of Law Societies of Canada]; Canadian Bar Association Submission, p. 38; Submissions of the Criminal Lawyers' Association, February 2008, pp. 40-41.

96 Submissions of the Federation of Law Societies of Canada, pp. 7-8.

97 Submissions of the Federation of Law Societies of Canada, p. 8.

7.7 The Problems Created by Overstating the Need for Secrecy

The excessive claims about the need for secrecy made by the Attorney General of Canada, during both this inquiry and during the inquiry into the activities of Canadian officials in relation to Maher Arar, were discussed in Volume One. In several recent cases, judges concluded that the Attorney General of Canada failed to demonstrate that the disclosure of information for which a section 38 non-disclosure order was being sought would harm international relations, national security or national defence.[98] Such findings should not be ignored, given the deference shown by the courts to claims made by the Attorney General about the need for secrecy and their willingness to overturn the claims only if they are unreasonable.[99]

Canada is a net importer of intelligence and must protect both its secrets and those of its allies. However, this does not excuse overstating the need for secrecy. An obsessive and risk-averse "culture of secrecy" is a product of Cold War assumptions about the overriding importance of secrecy. It is not appropriate in an age in which terrorism is the primary threat to national security and when information must be shared more extensively than during the Cold War era in order to prevent and prosecute terrorism.

Canada's allies are also being forced to rethink their approaches to secrecy because of the threat of terrorism. The need for disclosure of "secret" information has increased. The need in some situations for intelligence to be used as evidence in terrorism prosecutions has changed the approach of intelligence agencies to collecting information and sharing it with police agencies.

Exaggerating the need for secrecy is not simply something that makes it more difficult for commissions of inquiry such as this one to conduct their work: such exaggeration can threaten public safety. It prevents the sharing among, and within, governments of information that is necessary to prevent terrorism. Unnecessary emphasis on the need for secrecy encourages a narrow, "silo"-based, approach to national security, leading to the results that have been witnessed in terrorist attacks.

Overstating the need for secrecy can also impair the viability of terrorism prosecutions by leading to otherwise unnecessary section 38 applications for non-disclosure orders. Roach stated that overly broad secrecy claims "…can delay and fragment terrorism trials through the use of the s. 38 procedure. They can create the impression that the accused is being denied access to much vital information and this could even result in a trial judge concluding under s. 38.14 that a remedy was required to protect the accused's right to a fair trial."[100]

---

98 *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, 316 F.T.R. 279; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, 219 C.C.C. (3d) 305.

99 *Canada (Attorney General) v. Ribic*, 2003 FCA 246, 185 C.C.C. (3d) 129 at paras. 18-19.

100 Roach Paper on Terrorism Prosecutions, p. 195.

It is particularly disappointing that a pattern of overstating the need for secrecy has emerged in Canada after 9/11, when Canada's allies have placed increased emphasis on sharing information about terrorism. Constantly seeking to protect secrecy suggests that the Attorney General may not fully appreciate the current need to share security intelligence and to conduct terrorism prosecutions that involve that intelligence. Even if Canada's status as a net importer of intelligence may require it to be very diligent in protecting the information it receives from foreign agencies, this is not an excuse for overstating the need for secrecy.

Overstating the need for secrecy may allow some officials to avoid criticism, embarrassment and difficult decisions, but it carries a heavy cost. In his 2006 report, Commissioner O'Connor warned that excessive claims for secrecy would endanger the fairness of some proceedings and that they would damage the Government's credibility when it claimed secrecy in the future:

> [O]verclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of NSC [national security confidentiality] concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality…. I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody's interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.[101]

Unfortunately, Commissioner O'Connor's warnings about the dangers of overstating the need for secrecy have not been heeded. This is confirmed by the experience of this Commission, with the Attorney General of Canada overstating the need for secrecy. As well, several Federal Court decisions have found that the Attorney General brought section 38 claims about irrelevant information and where the Attorney General could not establish that disclosure of the

101 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006), pp. 302, 304 [*Report of the Events Relating to Maher Arar: Analysis and Recommendations*].

information would harm national security, national defence or international relations.[102]

The practice of overstating the need for secrecy is relevant to the policy mandate of this Commission because the practice can prevent the sharing of information that is necessary for effective cooperation between departments and agencies in terrorism investigations and because it brings added, and unnecessary, complexity to terrorism prosecutions. Changes in practice and in legislation are required.

7.7.1 Towards a More Disciplined and Harm-based Approach to Claims of Secrecy

One cause of the practice of overstating the need for secrecy is the use of broad terms in section 38 of the *Canada Evidence Act* to identify the scope of the secret information involved and the harms that disclosure can cause. The duty to notify the Attorney General of Canada about the possibility of disclosure applies to two broad categories of information:

- "potentially injurious information," defined as "…information of atype that, if it were disclosed to the public, could injure international relations or national defence or national security;" and
- "sensitive information," defined as "…information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside Canada or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard."

The definition of "potentially injurious information" is sufficiently circumscribed. However, the definition of "sensitive information" is too broad. The definition of sensitive information can apply to information that Canada is taking measures to safeguard – for example, information relating to national security – whether or not it is reasonable to safeguard that information. The definition can apply to information that, even if disclosed, could not cause harm.

Section 38 is designed to prevent harm to international relations, national defence or national security that can be caused by the disclosure of information. These are extremely broad and vague terms. Courts have attempted to define these terms. Justice Noël of the Federal Court has examined issues relating to definitions at length, noting that "national security" means "…at minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada."[103] He described

---

102 *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, 316 F.T.R. 279; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, 219 C.C.C. (3d) 305.

103 *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, 316 F.T.R. 279 at para. 68.

"national defence" as including "…all measures taken by a nation to protect itself against its enemies" and "a nation's military establishment," while "information injurious to international relations" was referred to as "…information that if disclosed would be injurious to Canada's relationship with foreign nations."[104] These attempts to define the vague statutory terms have tended to make the terms even broader and more vague. In short, there are limits to what can be achieved through definitions of inherently broad and vague terms.

It would be helpful for Parliament to put some flesh on the bare bones of section 38 and provide some concrete examples of particular harms to international relations, national defence and national security. Jim Judd, Director of CSIS at the time of his testimony, stated that section 38 was used mainly to protect secret methods of investigation, information received from foreign authorities that was subject to caveats, and risks to sources and CSIS employees.[105]

In its Final Submissions, the Attorney General of Canada suggested that "…[i]n practical terms, intelligence information relating to international relations, national defence or national security information may include information that reveals or tends to reveal: the identity of a confidential source of information; targets of an investigation; technical sources of information; methods of operation/investigative techniques; the identity of covert employees; telecommunications and cipher systems (cryptology); confidential relationship with a foreign government/agency."[106] This list is long, but it is more helpful than vague references to national security, national defence and international relations.

There is much to be said for a practical approach that focuses on concrete harms caused by the disclosure of secret information rather than on the vague generalities of harm to national security, national defence or international relations. Even if the list of concrete manifestations of harms was not exhaustive, it would help to guide and to limit the Attorney General of Canada's claims of national security confidentiality. It would also help to define the scope of the range of security classifications within government generally. Finally, it would assist judges to make decisions under section 38 of the *Canada Evidence Act*.

As is the case with the *CSIS Act*[107], there is a need to reconsider when to claim secrecy, in order to accommodate today's threat environment where terrorism, not foreign espionage, is the main threat. As the description of the Air India investigation in this report makes clear, obsession with the need for secrecy prevented the exchange of information between agencies in circumstances highly relevant to the destruction of Flight 182.

---

104 2007 FC 766, 316 F.T.R. 279 at paras. 61-62.
105 Testimony of Jim Judd, vol. 90, December 6, 2007, pp. 11861-11862.
106 Final Submissions of the Attorney General of Canada, Vol. III, para. 44.
107 R.S.C. 1985, c. C-23.

7.8 Evolving National Security Confidentiality Jurisprudence

The jurisprudence about national security confidentiality is starting to acknowledge the need for increased exchanges of information to prevent and prosecute terrorism. The "third party rule" prohibits an agency that receives confidential information from a third party from disclosing the information without the third party's consent. This rule evolved to recognize the importance of requesting the third party to amend restrictions that it placed on disclosure.

Canada must respect the caveats that its allies place on disclosing secret information that they share with Canada. In his report, Commissioner O'Connor stressed that caveats are important and should be respected. Commissioner Iacobucci's recent report also reached this conclusion. However, Canada is not without a remedy. It can ask that caveats be lifted to facilitate a terrorism prosecution in Canada. Commissioner O'Connor wrote:

> Caveats should not be seen as a barrier to information sharing, especially information sharing beyond that contemplated on their face. They can easily provide a clear procedure for seeking amendments or the relaxation of restrictions on the use and further dissemination of information in appropriate cases. This procedure need not be time-consuming or complicated. With the benefit of modern communications and centralized oversight of information sharing within the RCMP, requests from recipients should be able to be addressed in an expeditious and efficient manner.[108]

Canada has adequate tools, including non-disclosure orders under section 38.06 of the *Canada Evidence Act*, non-disclosure certificates issued by the Attorney General of Canada under section 38.13 and stays of prosecution, to ensure that the caveats are respected.

Justice Mosley of the Federal Court recognized the importance of the third party rule in promoting "…the exchange of sensitive information between Canada and foreign states or agencies." He stated that, under the rule, Canada should not release information or even acknowledge its source without the consent of the original provider. He noted that, nevertheless, the third party rule was "…not all encompassing….[I]t is not open to the Attorney General to merely claim that information cannot be disclosed pursuant to the third party rule, if a request for disclosure in some form has not in fact been made to the original foreign source."[109] These statements recognize the importance of asking allies to consider lifting caveats to allow the further disclosure of secret information. Such requests are particularly important because the circumstances that originally led the third party to restrict disclosure – such as a concern that disclosure

---

108 *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, p. 339.
109 *Canada (Attorney General) v. Khawaja*, 2007 FC 490, 219 C.C.C. (3d) 305 at paras. 145-146.

might compromise an ongoing intelligence operation of the third party – may disappear by the time a Canadian terrorism prosecution begins.

Justice Mosley also recognized that the third party rule should not apply "… where a Canadian agency is aware of information prior to having received it from one or more foreign agencies" or where the information is in the public domain and can be disclosed "…so long as it is the public source that is referenced."[110] The requirement that the originator of secret information be asked to modify a caveat, and that the third party rule should not apply to information that Canada has obtained independently or that is already in the public domain, are important changes to the third party rule.

Unfortunately, there are signs that the practices of agencies and of the Attorney General of Canada have not fully accepted this evolution of the third party rule in their approach to secrecy. This was illustrated when an affidavit was introduced in a recent case stating that, "…if the RCMP were to seek consent to disclose the information in this case, the RCMP's commitment to the third-party rule may be questioned as disclosure would be sought for a purpose other than law enforcement, and therefore outside the general accepted parameters for seeking consent."[111]

Requests to amend caveats in fact affirm Canada's commitment to the third party rule by acknowledging that disclosure is not allowed without the originating party's consent. A third party that provided the information to Canada could refuse to amend the caveat, and Canada would honour that request. In short, it does not hurt to ask, and it is necessary to do so.

Another part of the national security confidentiality jurisprudence is evolving to reflect the changed threat environment. There is increasing judicial skepticism about arguments that innocuous pieces of information should not be disclosed because of the "mosaic effect." The mosaic effect describes a belief that, by assembling into a "mosaic" bits of information that are innocuous by themselves, a hostile party might acquire more comprehensive knowledge that can be used to harm national security. In a recent case, the Attorney General of Canada relied on an affidavit by a CSIS officer that claimed that, "…in the hands of an informed reader, seemingly unrelated pieces of information, which may not in and of themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source."[112] However, the lack of evidence that this has occurred left this Commission skeptical about the validity of the "mosaic effect" concept.

---

110 2007 FC 490, 219 C.C.C. (3d) 305 at para. 147.

111 As described in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, 319 F.T.R. 279 at para. 72.

112 As quoted in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, 319 F.T.R. 279 at para. 83.

Other countries seem more reluctant than Canada has been to date to restrict disclosure on the basis of the "mosaic effect" argument. Canadian courts are now becoming more reluctant to accept the mosaic effect as the sole reason for refusing the disclosure of information. Justice Mosley concluded that, "… by itself, the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece of information should not be disclosed."[113] If the Attorney General of Canada wants to restrict disclosure on the grounds that disclosure would harm national security, he is entitled to do so.

The current Federal Prosecution Service Deskbook chapter on national security confidentiality has apparently not been revised since 2000.[114] The Director of Public Prosecutions should revise this material to reflect the developments in the case law that were described earlier. In particular, the revisions should reflect the call for Canada to request third parties to lift caveats restricting the disclosure of information, rather than allowing Canada simply to rely on the original caveat. The revisions should also note that the mosaic effect should not be the sole basis for a national security confidentiality claim. More generally, the Attorney General of Canada should exercise independent judgment when making secrecy claims and not be swayed by the various agencies.

The Attorney General of Canada should avoid overly broad claims of harm to national security. As Commissioner O'Connor stressed, making overly broad secrecy claims serves nobody's interests.[115] Over-classification of information – giving a security classification that is higher than warranted – and overstating the need for secrecy actually increase the threat to national security by making it more difficult to share vital information.

The Air India investigation demonstrated how excessive secrecy impeded the state in preventing terrorism. Claims of secrecy also make terrorism prosecutions more difficult. Increased discipline is necessary in making secrecy claims.

The Director of Terrorism Prosecutions – a position proposed in Chapter III – should play a central role in handling claims of national security confidentiality. Lawyers from the Director's office would be in a position to see the problem in the context of the complex relationship between intelligence and evidence and the difficult trade-offs between secrecy and disclosure. They could offer continuity of legal advice.

The Director of Terrorism Prosecutions should be in a position to understand the perspective of CSIS, with its frequent concerns about the disclosure of

---

113 *Canada (Attorney General) v. Khawaja*, 2007 FC 490, 219 C.C.C. (3d) 305 at para. 136. See also *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, 319 F.T.R. 279 at para. 84.

114 As suggested by the Table of Contents, online: Department of Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/toc.html> (accessed July 30, 2009).

115 *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, p. 304.

intelligence, as well as the perspective of the RCMP and other police forces that need admissible evidence to support prosecutions. The Director should be able to understand how overly broad claims of secrecy can hinder a terrorism prosecution. This appreciation of the larger picture may be lacking under the present system, where one group of lawyers represents the Attorney General of Canada in making section 38 claims, and another group – federal or provincial – conducts prosecutions.

Whichever official makes national security confidentiality claims on behalf of the Attorney General of Canada should exercise independent judgment in order to limit the potential for overly broad claims by respective agencies. Such claims must be made in a manner that respects the Attorney General's tradition of pursuing the public interest.[116]

7.9 The Ultimate Responsibility of the Attorney General of Canada with Respect to Disclosure of Intelligence

Several witnesses testified about the uncertainty created by the combination of broad disclosure rules and the lack of jurisprudence under section 38 of the *Canada Evidence Act*. Former RCMP Commissioner Giuliano Zaccardelli testified that this uncertainty affected the RCMP's dealings with its partners, and that that he "totally" agreed that "CSIS has every right to be concerned about what happens when they release some information and it goes into the disclosure pipeline because none of us can control it; that's a legitimate concern." He added that the lack of a guarantee also affected relations with international partners, "…which we need more and more every day because the threats we face transcend all of us…whether they be in the national security area or in the organized crime area."[117] An earlier RCMP Commissioner, Norman Inkster, similarly testified that, in his experience, the RCMP could not give "iron-clad" guarantees of non-disclosure, and that some foreign agencies decided that section 38 was simply not a sufficient guarantee that information they supplied would be protected from disclosure.[118]

There is a vehicle to protect against disclosure. The Attorney General of Canada has the authority under section 38.13 of the *Canada Evidence Act* to issue a certificate personally prohibiting the disclosure of information, even in the event that a judge has made an order for disclosure. This provision was added in 2001 by the *Anti-terrorism Act*, and is subject to limited judicial review.[119]

The personal certificate of the Attorney General is the ultimate protection against the disclosure of intelligence. The certificate places responsibility for

116 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372.
117 Testimony of Giuliano Zaccardelli, vol. 86, November 30, 2007, p. 11037.
118 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10329-10330.
119 A single judge of the Federal Court of Appeal hears applications for an order varying or cancelling the certificate. The judge cancels the certificate if he or she determines that none of the information was obtained in confidence from or in relation to a foreign entity or to national defence or national security: *Canada Evidence Act*, ss. 38.131(1), (4), (9).

protecting secrets on the shoulders of an accountable official who can strike his or her own balance between the demands of secrecy and disclosure.

Although the Attorney General's authority to issue a certificate has generated controversy, the certificate has value as a safeguard that allows the Attorney General to prevent the disclosure of intelligence against the wishes of a foreign government. Neither CSIS nor the RCMP can provide that kind of guarantee.

When deciding whether to issue a non-disclosure certificate, the Attorney General can consult the National Security Advisor and other officials. However, the Attorney General must decide independently whether the public interest requires a non-disclosure certificate.

No Attorney General of Canada has yet issued a non-disclosure certificate under section 38.13. It is understandable that the Attorney General will use this extraordinary power cautiously. The Attorney General should consider using this certificate when it is necessary to honour promises made to allies that intelligence will not be disclosed.

Recommendation 22:

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

Recommendation 23:

The Federal Prosecution Service Deskbook and other policy documents that provide guidance about making secrecy claims should be updated to encourage the making of requests to foreign agencies to lift caveats that they may have placed on the further disclosure of information. These documents should also be updated to reflect the evolution of national security confidentiality jurisprudence. In particular, the Deskbook should direct prosecutors to be prepared to identify the anticipated harms that disclosure would cause, including harms to ongoing investigations, breaches of caveats, jeopardy to sources and the disclosure of secret methods of investigations. The Deskbook should discourage reliance solely on the "mosaic effect" as the basis for making a claim of national security confidentiality.