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

CHAPTER VIII: MANAGING THE CONSEQUENCES OF DISCLOSURE: WITNESS AND SOURCE PROTECTION

8.0 Introduction

The terms of reference for the *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* require the Commissioner to make findings and recommendations with respect to "…whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases."[1]

The analysis that addresses this part of the Commission's mandate is included in this volume because of the critical importance that witness protection plays in terrorism prosecutions.[2] In addition, protecting witnesses from intimidation is an important means to improve the relationship between secret intelligence and public evidence. The adequacy of witness protection is often influential in deciding whether secret human sources should testify and provide evidence in public trials. Witness protection may also be necessary where identifying information about an informer is disclosed, even when that informer does not testify.

The terms of reference do not call for the Commissioner to reach conclusions specifically about the intimidation of witnesses involved in the investigation of the bombing of Air India Flight 182, and this report does not do that. However, the Commission received evidence on this point, and this evidence provided the background for the assessment of the challenges of witness protection in terrorism prosecutions.

The requirements for witness protection may create the impression that the witness is the beneficiary. In fact, it is the members of the public who benefit. This

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1 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Terms of Reference, P.C. 2006-293, para. b(v).

2 Professor Yvon Dandurand prepared a paper on this topic for the Commission: "Protecting Witnesses and Collaborators of Justice in Terrorism Cases" in Vol. 3 of Research Studies: Terrorism Prosecutions [Dandurand Paper on Protecting Witnesses]. Professor Bruce Hoffman also touched on intimidation of witnesses and witness protection in his testimony and in a paper he prepared for the Commission: "Study of International Terrorism" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation [Hoffman Paper on International Terrorism].

is particularly true with terrorism, where murder and mayhem are indiscriminate. It is principally to protect innocent Canadians that witness protection must be as efficient and secure as possible. If Canada can improve witness protection measures, those with information vital to public safety will be more likely to disclose it and, when necessary, testify.

8.1 Terminology

Several terms are used in the legal and social sciences literature to describe individuals who help authorities with investigations and prosecutions. These terms are used imprecisely, confusing the discussion about the status and rights of the individuals, the type of assistance they are providing and the extent of their need for protection from retaliation. Broad statutory definitions can add further confusion. For example, a witness is defined for the purpose of the *Witness Protection Program Act* as both a person who has agreed to give evidence and a person who has already given information, as well as any close relative who may require protection.[3]

The commonly described "informer" could be one of several different participants in the justice system:

- A person who hears about a terrorist plot and passes the information to police (a police informer) or intelligence authorities, but does not testify at a subsequent trial. This individual can also be called a "source;"
- A criminal or other individual directed by the proper authorities to infiltrate an organization (police agent) and perhaps try to influence events (possibly becoming an *agent provocateur*[4]);
- A material witness[5] – a witness who can testify to material facts,[6] as well as someone considered a "crucial" witness;[7] and
- An individual who eventually testifies at trial as a witness.

In this chapter, the term "informer" is used interchangeably with "source." An informer refers to an individual who provides information to authorities, but who does not qualify as a police agent, *agent provocateur*, material witness or witness at trial.

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3 Section 2 of the *Witness Protection Program Act*, S.C. 1996, c. 15 [*Witness Protection Program Act*] defines a "witness" as: (a) a person who has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution, or (b) a person who, because of their relationship to or association with a person referred to in paragraph (a), may also require protection for the reasons referred to in that paragraph.

4 *R. v. Scott*, [1990] 3 S.C.R. 979 at 996.

5 *R. v. Scott*, [1990] 3 S.C.R. 979 at 996.

6 *Lemay v. The King*, [1952] S.C.R. 232 at 242.

7 As was "Billy Joe" in *R. v. Khela*, [1995] 4 S.C.R. 201.

There is a need for precision when referring to individuals who provide information, since different rules apply depending on the nature of the individual's involvement. The identity of a police informer cannot be disclosed to an accused in a criminal trial because of the "police informer privilege" exception in criminal law. The only time this privilege does not apply is when the innocence of the accused is at stake.[8] However, if the person is actually operating under the direction of the police, the person is then a police *agent*, not an informer, and the person's identity would, subject to some exceptions, have to be disclosed. Similarly, the identity of an *agent provocateur* and a material witness generally need to be disclosed. As discussed in Chapter VI, it is not clear that a CSIS source enjoys the benefit of police informer privilege.

This chapter focuses on witnesses who are expected to testify and whose identity will normally be disclosed. In some cases, however, sources who do not testify may also need protection because of the risk that they can be identified by their adversaries. In addition, protection may be necessary as a precautionary measure because it may not be clear whether the identity of the source will eventually be protected by police informer privilege.

8.2 Why Witness Protection

A failure to provide adequate protection for witnesses threatens their safety and, sometimes, their lives. It discourages others from helping intelligence or police agencies. In the end, poorly designed witness protection measures can rob the justice system of crucial assistance.

Witness protection, both for witnesses who testify and for sources who provide information, is examined here. The focus on both witnesses and sources is necessary to ensure that sources can sometimes be developed into witnesses able to provide evidence in terrorism prosecutions. The examination of both witnesses and sources is also necessary to ensure that valuable sources are not lost because of ineffective attempts to have them testify. It may be possible for a source developed by CSIS to become a witness in a terrorism prosecution, and such transitions can be seen as part of the intelligence/evidence relationship discussed throughout this volume.

Witness protection that encourages people with information to come forward involves physical protection against retribution and other measures designed to protect and comfort them while under witness protection. This enhances their trust in intelligence and police agencies and creates an environment where important information is likely to flow more freely to the authorities. Witness protection also involves developing a "culture of security" within the institutions that reflects an awareness of the real risks to those who assist the authorities in guarding against terrorism.[9]

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8 See *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 252 at paras. 27-30 and Section 8.4.3.

9 Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, pp. 8771-8773.

Early witness protection programs in Canada were designed to deal with informers and witnesses in organized crime cases.[10] Too little thought has gone into witness and source protection in terrorism investigations and prosecutions – an environment that can have very different witness protection needs and challenges. As the investigation into the Air India tragedy showed, the RCMP viewed witnesses and sources in terrorism matters in the same way that it had viewed them in ordinary criminal investigations. This lack of appreciation of the difference between witnesses and sources in ordinary criminal cases and those in terrorism cases also resulted in insensitive approaches by the RCMP to those involved in the Air India tragedy. This placed them at risk and created a distrust of law enforcement.

Many potential witnesses in terrorism prosecutions may already have been confidential sources for CSIS. Since the eligibility of CSIS sources to claim informer privilege is not clear, it is also not clear whether a CSIS handler can make a promise of anonymity. Care must be taken to avoid making unrealistic promises of permanent anonymity to sources. Sources must be sensitively and adequately prepared for the possibility that they may have to testify in some cases. In addition, there is a need for both CSIS and the RCMP to understand and accommodate the difficulties of converting intelligence sources into witnesses.

Also missing from witness protection to date is a consideration of the measures which lie between providing complete anonymity and fully disclosing identity. These include protections available under sections 37 and 38 of the *Canada Evidence Act*[11] and partial anonymity at trial through the use of pseudonyms, screens or remote testimony. The possibility of allowing anonymous testimony at a criminal trial is also explored.

The Commission has concluded that police, intelligence agencies, prosecutors and judges should explore the full range of these measures. If the measures are not appropriate (for example, if prosecutors determine that testimony in open court is essential), the government should provide appropriate protection measures, including formal witness protection programs attuned to the sometimes unique needs of witnesses in terrorism cases.

This chapter examines the characteristics of terrorism that may impede the recruitment of witnesses and sources. It discusses both specific and "community-wide" intimidation, and how genuine fear in some communities, combined with the cultural insensitivity of the authorities approaching members of those communities, makes it difficult to persuade individuals to share valuable information about terrorist activities. There is an examination of means other than formal witness protection programs to protect individuals who assist the authorities. The emphasis is on developing a range of graduated and appropriate strategies to protect witnesses. The notion that "one size fits all"

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10 See Gregory Lacko, "The Protection of Witnesses" (Ottawa: Department of Justice, 2004), p. 3, online: Department of Justice Canada: <http://www.justice.gc.ca/eng/pi/icg-gci/pw-pt/pw-pt.pdf> (accessed June 2, 2009) [Lacko Paper on Protection of Witnesses].

11 R.S.C. 1985, c. C-5.

when protecting witnesses and sources is unrealistic, particularly in the unique context of international terrorism investigations.

The existing federal Witness Protection Program (WPP), developed largely to protect witnesses in criminal prosecutions, cannot easily be transplanted to the terrorism environment. The management of the Program, as well as several other aspects of it, must change significantly – as must the attitudes of police and intelligence agencies dealing with witnesses and sources. This chapter recommends a new national security witness protection program separated from RCMP control. It would be headed by a respected independent individual to be known as the National Security Witness Protection Coordinator. The Coordinator would determine qualifications, requirements and approval of candidates for acceptance into the Program. The Coordinator would be able to seek advice, when appropriate, from various agencies including CSIS, the RCMP, the office of the proposed Director of Terrorism Prosecutions and other prosecutorial officials, Corrections Canada, immigration officials and others. The Coordinator should consult, but he or she would make the final decisions.

The Coordinator would be responsible for making arrangements for protection while the person is in the program and for resolving disputes that may arise between the protectee and the program. In some cases, the Coordinator should be prepared to justify unpopular arrangements that were made for valid reasons of witness and source protection. The Coordinator would act in the public interest and be independent of the police and prosecutors. He or she would have the power to devise creative and flexible solutions to the varied problems of witness and source protection in terrorism investigations. The Coordinator could also act as a resource for the agencies and the National Security Advisor on witness and source protection issues.

Removing from the RCMP the authority to decide who qualifies for witness protection avoids the perception of conflict of interest. The inference that arises when the RCMP has that authority is obvious: "Co-operate with the RCMP, say what is required and we at the RCMP will decide if you qualify for protection." Such a conflict of interest can damage perceptions about the credibility of a witness who is in witness protection. The National Security Witness Protection Coordinator would be able to avoid the conflict of interest between witness protection and policing/prosecutorial interests. However, the Coordinator would receive input from the RCMP and the RCMP would continue, when appropriate, to provide actual protection to the witness.

The conflict between policing/prosecutorial interests and the protection of witnesses would be similar in other criminal cases. However, the terms of reference restrict the Commission's recommendations to the problems of witness protection in terrorism cases. In addition, witness and source protection in terrorism investigations can give rise to a need for ethnic, cultural, religious and linguistic sensitivity that may not be necessary in ordinary criminal cases. There may also be more of an international dimension to witness and source protection in some terrorism investigations.

8.3 Witness Intimidation and its Impact on Terrorism Investigations and Prosecutions

8.3.1 The Context of Terrorism

In his testimony, Professor Yvon Dandurand of the University of the Fraser Valley described how international terrorist groups have increasingly turned for support to overseas communities:

> [I]f you look at studies in the last 20 years on the evolution of terrorist movements, one of the characteristics that experts normally isolate is the fact that more and more international terrorist groups have found effective ways of obtaining support from diasporas and from ethnic groups, in different countries, that either are sympathizers or are not sympathizers but fall under the influence of these radical groups.[12] [translation]

For this reason, Dandurand argued, the assistance of members of these communities is essential for preventing and prosecuting terrorist activity:

> [I]t is absolutely essential that we be able to count on the cooperation of the communities within which terrorist groups have a tendency to hide. We must therefore work very closely with those communities.[13] [translation]

Unfortunately, some of the communities with the greatest potential to assist the authorities in terrorism investigations and prosecutions also often face the greatest barriers to providing that assistance. Among those barriers is the fear of intimidation against community members who cooperate or speak out against extremists. Other significant barriers to providing assistance include a distrust of the authorities and the distance and alienation of these communities from broader Canadian society. These barriers are discussed below.

8.3.2 Exploiting the Particular Vulnerabilities of Some Communities – "Community-wide" Intimidation

To assert their power, terrorists threaten, intimidate or attack those who cooperate against them. This has a three-pronged effect: exacting revenge on individuals, reducing the chances of a successful prosecution and discouraging others from helping the authorities.

Members of some minority communities who assist the authorities in terrorism investigations can face significant risks if their assistance becomes known to

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12 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8576.
13 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8566.

extremists. These communities can be so close-knit that cooperation with investigators is readily noticed. Individuals who are exposed fear violence, ostracism by the community, or both.

They are also vulnerable to a less common type of intimidation – "community-wide" intimidation. This involves "…acts that are intended to create a general sense of fear and an attitude of non-cooperation with police and prosecutors within a particular community."[14] Intimidation can be experienced by individuals who have not been directly or personally threatened, but who are aware that any member of their community who is seen as assisting the authorities is likely to face reprisals. Community-wide intimidation can also help to silence those who simply oppose extremist agendas and rhetoric.

Dandurand stated in his report for the Commission that community-wide intimidation is especially frustrating for the police and prosecutors because, even if no actionable threat is made, witnesses and victims are still effectively discouraged from testifying.[15] As he explained:

> Terrorist groups and criminal groups make very organized efforts to convey … to communities, the message that, if someone from the community decides to work with the authorities, there will be highly unpleasant consequences for that person. They do this systematically; they constantly reinforce the message. And so the people who live in these communities know it even though it is not always necessary to make explicit threats. [translation]

Dandurand elaborated on his analysis in his testimony:

> ... [R]umours are spread in the community, veiled threats are made, metaphors and so forth are used to spread the message that people who work with the authorities do so at their own risk and peril, and this message is usually buttressed by striking examples that will ignite community members' imaginations. So an example is made of one or two people who, for instance, came out publicly against a movement or against certain individuals involved in a conspiracy or a radical group, and they are made examples of by violence or ostracism.[16] [translation]

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14 Dandurand Paper on Protecting Witnesses, p. 30, citing K. Dedel, *Witness Protection* Problem-Oriented Guides for Police Series, No. 42 (Washington, D.C.: United States Department of Justice, Office of Community Oriented Policing Services, 2006), p. 4.

15 Dandurand Paper on Protecting Witnesses, p. 31; Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8565-8566.

16 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8568-8570.

For ostracism to be a meaningful threat, individuals must also view their community as distinct from the wider society, and they must see the wider society as antagonistic to their community. Being ostracized would mean being left to fend alone.

Dandurand told the Commission that criminal organizations and some terrorist groups are sophisticated enough to present themselves to some communities as protectors. He called this tactic "…a very effective method of keeping a community under control."[17] Intimidation and indoctrination work together. "[V]ulnerable, disenfranchised, or segregated communities," he argued in his research paper, were susceptible to "low-level community-wide intimidation" by either organized criminals or radical groups:[18]

> It is apparently often the case that ethnic communities living in ethnic enclaves are less inclined to integrate with their host societies and thus become more susceptible to insurgent indoctrination and vulnerable to intimidation by terrorists and other criminals. Anything that contributes to the isolation or ghettoization of these groups increases the likelihood that they could be intimidated, victimized, recruited or exploited by criminal or terrorist organizations.[19]

Dandurand also emphasized that creating a sense of vulnerability among members of these communities is important for criminal and terrorist groups:

> Criminal groups often go to great lengths to maintain their victims in a constant state of vulnerability and powerlessness. This is often the case, for example, with illegal immigrants illegally smuggled into the country and potentially subject to deportation. Their vulnerability to deportation can be purposefully manipulated and exploited by terrorist groups.
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> …
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> ... Anything that contributes to the further alienation and isolation of these individuals can indirectly facilitate their exploitation by terrorist groups. Furthermore, these illegal residents/immigrants normally have strong and immediate ties to other members of the same immigrant community. What happens to them and how they are treated can also contribute to feelings of alienation, exclusion and vulnerability within the community as a whole. Criminal and terrorist groups are of

17 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8590.
18 Dandurand Paper on Protecting Witnesses, p. 31.
19 Dandurand Paper on Protecting Witnesses, p. 42.

> course known to blackmail illegal residents and their relatives (even if they are themselves legal residents) by threatening to denounce them to the authorities.[20]

Dandurand suggested that threats against family members overseas can be credible and effective means of intimidation.[21]

A March 2006 Human Rights Watch report[22] offered examples of intimidation of members of overseas communities. The report detailed the alleged intimidation of Tamil communities in Canada, the UK and other countries by the Liberation Tigers of Tamil Eelam (LTTE, or Tamil Tigers). The report claimed that the LTTE, besides pressuring individuals to donate to charitable organizations linked to the LTTE, used several intimidation tactics to silence dissent:

> Tamils in the West have been subject to death threats, beatings, property damage, smear campaigns, fabricated criminal charges, and even murder as a consequence of dissent. Although incidents of actual violence have been relatively rare, they reverberate strongly within the community and effectively discourage others from expressing views that counter the LTTE.[23]

This phenomenon of community-wide intimidation is widespread, and perhaps growing, outside the context of terrorism. William Blair, Chief of the Toronto Police Service, attributed many unsolved crimes to this type of intimidation. Witnesses were unwilling to come forward in criminal investigations, he testified, because they expected criminal gangs to be informed quickly of their cooperation with police:

> And what they complain to us is … that the accused and all of his friends and everyone in their neighbourhood will know that they were the one that came forward with information and from that point on, they're in danger; from that point on, their children can't go to the same schools as their neighbours; that their reputation in the community is destroyed…. In some cases, their statements are being handed around the neighbourhood because we'd given them to a defence lawyer who has given them to the accused who has handed them out, just to show to his other gang members or his neighbours and

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20 Dandurand Paper on Protecting Witnesses, pp. 41-42.

21 Dandurand Paper on Protecting Witnesses, pp. 41-42. See also Testimony of Isabelle Martinez-Hayer, vol. 76, November 15, 2007, pp. 9534-9535.

22 Jo Becker, *Funding the 'Final War*: LTTE Intimidation and Extortion in the Tamil Diaspora" *Human Rights Watch* (March 2006), online: Human Rights Watch <http://hrw.org/reports/2006/ltte0306/ltte0306webwcover.pdf> (accessed June 2, 2009) [Becker Paper on LTTE]. See also the discussion of LTTE coercion and fundraising in Hoffman Paper on International Terrorism, pp. 43-44.

23 Becker Paper on LTTE, p. 14.

> friends that this is the person who has been a witness against him.… They don't trust us and they don't cooperate with us. And they tell their neighbours and their friends and their children not to trust us either.[24]

8.3.3 How Distrust and Distance Limit the Ability of Authorities to Provide Protection

The distance and distrust between police and intelligence agencies and communities can increase reluctance to cooperate with authorities and heighten the sense of vulnerability flowing from intimidation tactics. Several factors may contribute to this distance and distrust:

As Dandurand stated in his research paper:

> Counter-terrorism strategies do not typically address the need to offer active protection to these vulnerable groups. A legalistic/instrumentalist approach to this question tends to prevail. As a result, the services of State protection programs are extended to victims of intimidation and exploitation in their capacity as witnesses and informants, but only to the limited extent that their participation is required by the justice system itself. Otherwise, intimidated individuals tend to be left to their own devices.[25]

Dandurand argued that investigative hearings[26] previously permitted by the *Criminal Code*[27] "…clearly add to the already existing feelings of vulnerability and insecurity of members of vulnerable groups. They also convey a conflicting message by suggesting to those with information about potential terrorists that volunteering it to the authorities could result in their finding themselves subject to an investigative hearing, a preventive arrest or a charge under a broad array of new terrorism offences."[28]

- Distrust may also arise when police or intelligence agencies are not faithful to their promises – particularly promises to keep the identity of sources secret. Other times, authorities may not be open about legal obligations to disclose the identity of

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24 Testimony of Wiliam Blair, vol. 78, November 19, 2007, pp. 9996-9998.

25 Dandurand Paper on Protecting Witnesses, p. 44. See also Testimony of Ujjal Dosanjh, vol. 80, November 21, 2007, p. 10168.

26 Investigative hearings, a procedure introduced by the *Anti-terrorism Act*, S.C. 2001, c. 41, allowed a court to issue an order for the gathering of information from a named individual. The power to order investigative hearings ended in 2007 because of a "sunset" clause in the legislation. A bill to revive these hearings, Bill S-3, died on the Order Paper when Parliament was dissolved for the October 2008 election: Bill S-3, *(An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Sess., 39th Parl., 2007-2008.)

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

28 Dandurand Paper on Protecting Witnesses, pp. 43-44.

the source. Distrust may arise even if the police truly want to keep someone's identity secret, but are forced to reveal it by disclosure rules. As Blair testified, "[I]t doesn't do that I tell them that I was required by law to do it. They don't understand that. They don't trust us and they don't cooperate with us."[29]

- Community members may distrust these agencies because of experiences with similar organizations in their countries of origin. They may associate the authorities with corruption, predatory behaviour and incompetence. In some communities, Dandurand testified, the idea that police officers are there to help and protect would be radical.[30]

- Even if there is no distrust of authority among community members, there may be an *absence* of trust in intelligence and police agencies simply because those agencies are not well-established in the communities, often do not understand their dynamics and appear unwilling to help. For example, Dandurand told the Commission that "…a number of threats, means of intimidation, are delivered secretly, in code or veiled words, by metaphors and so forth. Thus, someone with only a superficial knowledge of the culture would often find it very hard to decode threats, decode conversations."[31] [translation] Former police officer Mark Lalonde described another circumstance where "ethnic radio" could broadcast a threat that was well understood by the targetted audience but would not be interpreted as such by the public at large. The message would not violate any laws, so no police intervention would occur. However, the targeted groups would interpret this as the police being "unwilling or unable to respond."[32]

8.3.4 Examples of Individual and Community-wide Intimidation in the Air India Context

Both the judgment of Justice Josephson in *R. v. Malik and Bagri*[33] and evidence before the Commission were replete with descriptions of attempted and successful intimidation.

In 2004, Justice Josephson ordered a permanent publication ban relating to the identity of one witness, Ms. E, at the Air India trial. He spoke of the serious threat to the lives of Ms. E and her family:

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29 Testimony of William Blair, vol. 78, November 19, 2007, p. 9997.
30 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8585-8586.
31 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8572.
32 Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8630-8631.
33 2005 BCSC 350.

> There is evidence of threats and violence being directed towards those who have taken contrary positions to those of certain extremist elements. There is also evidence of what the Witness not unreasonably interpreted to be a serious threat to the lives of herself and her family should she reveal certain information. Only upon receiving an assurance that her identity would remain confidential did she disclose this information to the authorities, maintaining throughout that she would never testify out of fear for the safety of herself and her family.
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> In this context, the Witness's ongoing security concerns rise beyond the merely speculative. The risk also does not abate simply because she has completed her testimony, as retaliation is a strong element of the risk.[34]

Ms. E was a former friend of Ajaib Singh Bagri who provided statements to CSIS and the RCMP in the years following the Air India tragedy. A former CSIS agent testified at trial that Ms. E had told him of a threat by Bagri. Bagri had allegedly said that they shared secrets and that she knew what he would do if she told anyone. According to the CSIS agent, Ms. E indicated that she was certain that Bagri meant that he would kill her.[35] The CSIS agent testified before the Commission to the same effect.[36]

Several threats were also made against a Ms. D and her family. From the beginning of her dealings with the authorities, Ms. D indicated that she had been the victim of threats and intimidation and that she feared for her safety.[37] Early in November 1997, the RCMP installed a video surveillance camera at Ms. D's residence.[38] Ms. D continued to receive threats after she began speaking with the RCMP.

On February 14, 1998, Ms. D was warned by a relative of Balwant Bhandher to be careful because three men, Ripudaman Singh Malik, Bhandher and Aniljit Singh Uppal, had met and would "…try to shut her up permanently."[39] Shortly after, she was approached at a Sky Train station and told by a young East Indian male that Malik would "finish" her and reporter Kim Bolan.[40] In March 1998, eggs were thrown at her house in the middle of the night and she received a number of unsettling phone calls.[41] In June 1998, Ms. D was at a shopping centre with her child when a former acquaintance from the Khalsa School where she had worked

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34 *R. v. Malik and Bagri*, 2004 BCSC 520 at paras. 6-7.
35 *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 960, 980.
36 Testimony of William Laurie, vol. 61, October 15, 2007, pp. 7411-7412.
37 *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 380, 396.
38 2005 BCSC 350 at paras. 377, 414.
39 2005 BCSC 350 at para. 352.
40 Exhibit P-101, CAF0485, p. 1.
41 Exhibit P-101, CAF0485, p. 3.

approached her and warned her that she was creating a lot of problems.[42] The individual was aware of personal information about Ms. D's child and warned her that she and her family would be severely harmed if she did not "watch it."[43]

In July 1998, Kim Bolan contacted the RCMP and advised that she had received information about a "hit list" and had been told that a person from the US would come with AK-47s "…to take care of the hit list."[44] Ms. D's name, as well as those of Tara Singh Hayer and Ms. Bolan herself, were reportedly included on the list.[45] At the time, Bolan, who had heard a gun shot on her street on July 16, reported to the RCMP her belief that the person from the US and the AK-47s were "… already in town to carry out the hit list contract."[46] As a result of the "hit list" information, an additional video surveillance camera was installed at Ms. D's residence by the RCMP.[47]

Justice Josephson's 2005 judgment in *R. v. Malik and Bagri* noted that Ms. D "… continues to have constant concerns about her safety and security."[48]

The Commission learned of other examples of feared intimidation or actual intimidation and retaliation:

> **Mr. A**: A former CSIS officer told the Commission about his relationship with a Mr. A. Mr. A had been providing information to CSIS in confidence but was very reluctant to deal with the RCMP because he feared for his personal safety if he had to lose his anonymity and testify.[49] The former CSIS officer testified that Mr. A's fear was a "…very legitimate concern ... for sure."[50]
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> **Tara Singh Hayer**: Hayer was the publisher of the *Indo-Canadian Times* and an outspoken critic of extremism. He also provided information to CSIS and then to the RCMP about the Air India bombing. An attempt on his life left him paralyzed in 1988. The BC Crown later alleged that the attempt related to his knowledge about Air India. He was murdered in 1998. Those responsible for his murder were never caught.[51]

8.3.5 Intimidation of Members of the Sikh Community for "Speaking Out"

Beyond intimidation of specific individuals involved in the investigation of the Air India case, community-wide intimidation was at play against those who

42 *R. v. Malik and Bagri*, 2005 BCSC 350 at para. 352.
43 2005 BCSC 350 at para. 352.
44 Exhibit P-101, CAF0485, p. 3.
45 Exhibit P-101, CAF0485, p. 3.
46 Exhibit P-101, CAF0485, p. 3.
47 Exhibit P-101, CAF0485, p. 5.
48 *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 352-353.
49 Exhibit P-291: "Mr. A Agreed Statement," pp. 25-26.
50 Testimony of Neil Eshleman, vol. 75, November 14, 2007, p. 9449.
51 See Volume Two, Part 2, Post-Bombing, Section 1.2, Tara Singh Hayer.

might want to speak out against extremism. In his 2005 report, the Hon. Bob Rae described how family members of Air India Flight 182 victims perceived a "culture of fear" within communities that prevented people from telling the truth about what had happened.[52] That culture of fear was reinforced by specific acts of violence and extended beyond intimidation of witnesses to the suppression of community opposition to extremist agendas.[53]

Tara Singh Hayer's son, David ("Dave") Hayer, a Member of the BC Legislative Assembly, told the Commission how his father's opposition to Sikh violence in the aftermath of the Air India bombing resulted in an attempt to bomb his father's office, numerous threats, and an attempt on his life in 1988.[54]

Dave Hayer also testified about the fearful atmosphere in the Sikh community in 1986-87:

> I think everybody was afraid and if you said anything that did not support the cause of the people who were trying to support terrorism and violence, a state of -- independent State of India, you will be called names and you will -- on the radio stations you will be called outside. They will go to Sikh temples. They had basically taken over the Sikh temples, these groups. They [a small group of people who were trying to promote an independent State of Khalistan by violent means] would be threatening to you there. There were beatings in the community.[55]

Tara Singh Hayer's daughter-in-law, Isabelle Hayer (also Martinez-Hayer), told the Commission about the "extensive" terror that was felt in the Indo-Canadian community at that time.[56]

The Hon. Ujjal Dosanjh testified about the treatment of Indo-Canadians who publicly opposed Sikh extremism or who resisted demands to embrace extremism after the 1984 Golden Temple incident in Amritsar. He said that, beginning in 1984, Sikhs in Canada were "…left to fend for ourselves" when Canadian institutions were unable to deal with "…a wave of hatred, violence, threats, hit lists, silencing of broadcasters, journalists, activists."[57] He said that moderates who sought to regain control of Sikh temples in the 1990s were brutally beaten.[58]

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52 *Lessons to be Learned: The report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* (Ottawa: Air India Review Secretariat, 2005), p. 3 [*Lessons to be Learned*].
53 *Lessons to be Learned*, p. 3.
54 Testimony of Dave Hayer, vol. 76, November 15, 2007, pp. 9528-9529.
55 Testimony of Dave Hayer, vol. 76, November 15, 2007, pp. 9533-9534.
56 Testimony of Isabelle Martinez-Hayer, November 15, 2007, vol. 76, pp. 9534-9535.
57 Testimony of Ujjal Dosanjh, vol. 80, November 21, 2007, p. 10168.
58 Testimony of Ujjal Dosanjh, vol. 80, November 21, 2007, p. 10175.

Dosanjh's account of the intimidation that he, his family and others faced highlights the risks encountered by individuals who did not yield to intimidation:

> So there used to be hit lists and you would get anonymous letters delivered through your mail slot or by mail by some regiment or other organization that they were going to eliminate you and "reform you", and I was no exception. So I received some of those things as well.
>
> . . .
>
> There were threats to kidnap my children, and this was 1984-85, and my eldest son was 11 years old. I have three sons. And there were threats on the phone, message recorder threats to kill my children, kill my wife, abduct my children, firebomb my home, kill me and these came of course, as I said, directly sometimes on the phone, on the voice mail, through third parties, in fact.
>
> One time I remember a threat was directly given to a distant relative of mine that I would be killed that particular night. And that threat was then delivered, passed on to my brother-in-law who, en masse with his entire family, ended up at my home at 11 o'clock at night while I am sleeping on the mattress on the floor, on the ground floor worried about being firebombed with my children sleeping on the top floor. We slept on the ground floor, on the mattresses or even on the carpet floor for almost several years because we were worried somebody might firebomb our house and ... and we would all be going up in smoke if we were sleeping on the top floor.
>
> . . . One watched one's back all the time.[59]

Undoubtedly, intimidation to prevent individuals from speaking out against extremist agendas would foster a general atmosphere of fear that would also make community members reluctant to help authorities in terrorism investigations and prosecutions. Vancouver Police Department Detective Don McLean, who worked in the Sikh community as part of the Indo-Canadian Liaison Team before and immediately after the Air India bombing, indicated in testimony that the level of intimidation in the Vancouver Sikh community was comparable to that found in communities suffering intimidation from organized criminal groups and that there was a generalized fear of reprisals against those who cooperated with police.[60]

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59 Testimony of Ujjal Dosanjh, vol. 80, November 21, 2007, pp. 10169-10172.
60 Testimony of Don McLean, vol. 35, May 29, 2007, pp. 4131-4132.

Dave Hayer referred to a perception among Indo-Canadians that organizations such as Babbar Khalsa are politically influential, and can operate with impunity. He testified that the Air India acquittals reinforced this impression, allowing intimidation in the Sikh community to increase.[61]

8.3.6 Reducing Intimidation and Promoting Trust

The authorities must understand the intimidation and threats that witnesses face and take the most appropriate measures to protect them. Dandurand suggested several ways to increase trust in the authorities and to avoid or limit the damage done by attempts to intimidate communities:

- hiring, training and promoting officers from a variety of cultural backgrounds, including "target" communities, to help build bridges with those communities and increase the level of confidence in the authorities;[62]
- providing training to all officers about the culture, language and customs of various communities;[63]
- receiving complaints about intimidation and providing a means for further contact should the intimidation become more serious;[64]
- thoroughly investigating complaints of intimidation, which may involve injecting the necessary resources;[65]
- following up with victims of intimidation and informing them, as well as the entire community, of the measures taken;[66]
- prosecuting incidents of intimidation to the full extent of the law to show criminals, as well the community, that such incidents are taken seriously;[67] and
- improving and developing the coordination of witness protection with foreign police forces.[68] Witness protection must be flexible enough to respond to the particular and often very difficult circumstances faced by witnesses in terrorism prosecutions.

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61 Testimony of Dave Hayer, vol. 76, November 15, 2007, pp. 9539-9540, 9582.

62 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8570-8571. The idea of promoting officers implies hiring officers who are more than simple token police officers from a particular community. These officers would over time move up the chain of command.

63 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8571-8572.

64 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8577-8581. The Air India Victims' Families Association (AIVFA) also spoke of the need to give greater priority to investigating complaints of intimidation: "The authorities must respond vigorously to threats and not wait until actual acts of violence occur": *Where is Justice?* AIVFA Final Written Submission, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, February 29, 2008, p. 174 [AIVFA Final Written Submission]. No other parties or intervenors commented on Professor Dandurand's findings and recommendations on this topic.

65 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8579. See also Dandurand Paper on Protecting Witnesses, p. 76.

66 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8580.

67 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8579. See also Dandurand Paper on Protecting Witnesses, pp. 36, 77.

68 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8570-8591; vol. 69, October 30, 2007, pp. 8695-8698.

Honesty is essential. Authorities should not promise anonymity when it cannot be guaranteed – for example, when legal obligations, such as the right of an accused to disclosure of the identity of police agents, may well prevent promises from being honoured.

8.3.7 Witness Protection during the Air India Investigation

The preceding material described the intimidation of those who spoke against extremism or who were seen to be helping the authorities. In some cases, physical protection of these individuals was necessary. Yet the Commission's review of CSIS and RCMP dealings with witnesses and sources, and with each other, produced several examples of inadequate measures to protect witnesses.

Unlike CSIS, which viewed sources as "crown jewels," the RCMP often perceived them as informants or criminals who should be approached with skepticism and who should be expected to "put up or shut up." To the RCMP, the main value of sources was the evidence they could provide in a court of law as witnesses. The Force was relatively unconcerned with any value they could bring as confidential sources of intelligence.[69]

In several cases, the RCMP did an inadequate job in dealing with sources that CSIS had developed. The RCMP's aggressive all-or-nothing approach to Mr. A, for example, was indicative of its approach to sources as criminals and not as assets. It also showed the RCMP's insensitivity to the demands of potential witnesses for protection and other benefits.

The RCMP also failed to appreciate the need for successful partnership with the Sikh community for its investigations. In several cases, the RCMP showed a troubling lack of cultural sensitivity when approaching sources. Beyond the RCMP, the Government in general exhibited a wilful blindness to the intimidation and fear within the Canadian Sikh community.

The way in which the RCMP approached, treated and protected potential sources might have caused individual sources to refuse to provide further information. It may also have caused a greater wariness in the community about providing information to CSIS. CSIS investigator William Dean ("Willie") Laurie testified about this point:

> **MR. LAURIE:** … sometimes we were familiar with people who had been interviewed by the RCMP, ostensibly for the same purpose, and they were so intimidated that they could -- even if they wanted to help, they were convinced that they shouldn't help because they didn't want to be involved with people who treated them that way.
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> **MR. KAPOOR:** Which way?

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69 See Volume Two, Part 2, Post-Bombing, Chapter I, Human Sources: Approach to Sources and Witness Protection.

> **MR. LAURIE:** As though they had to participate, you know, that they were being forced into it, that they were being pushed under duress perhaps to assist because you must know something and we are the police after all, and you know, we can make trouble for you perhaps, or something like that. You know, we know somebody in your family who has had trouble with the law, blah, blah, blah, that sort of thing. It's not something that ever worked for people on my desk.[70]

The RCMP's failure to appreciate the ongoing threat posed by Sikh terrorism led the RCMP to approach at least one source in a manner which may have placed the source in danger. More generally, the RCMP had no strategies for dealing with fearful witnesses. In at least one instance, the RCMP repeatedly contacted a source to attempt to secure her cooperation without trying to meet her concerns.

Witness protection, in fact, was envisioned by the RCMP as a benefit to be provided to an individual in exchange for information and services. There was a perception that, until someone had "signed on" to help, it was premature for the RCMP to think about protection measures.

The following examples demonstrate a lack of sensitivity to witness protection issues during the Air India investigation and trial:

- The RCMP approached Mr. A, fully knowing that he did not wish to speak to the police. This approach caused Mr. A to express concern for his safety. RCMP members used an unmarked vehicle to visit Mr. A, but approached him publicly and unannounced, spoke to him on the doorstep of his residence in plain view of neighbours, and later required him to travel with them, all of which could have attracted unwanted attention from neighbours and others at his residence;[71]

- The RCMP's inadequate protection of Tara Singh Hayer may in large part be attributed to its inability to understand the larger context of the threats against him. By viewing such threats as localized and isolated incidents, the RCMP did not recognize the greater threat posed to Hayer by Sikh extremism. When RCMP members finally installed video cameras in Hayer's home, they failed to explain the proper functioning of the system to the family, installed the system in a less than optimal manner and did not monitor it adequately. After Hayer's murder, the RCMP discovered that the system

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70 Testimony of William Laurie, vol. 61, October 15, 2007, pp. 7403-7404.
71 See Volume Two, Part 2, Post-Bombing, Section 1.1, Mr. A.

had failed to record any video of the shooting and did not disclose this failure to the family;[72]

- RCMP members failed to appreciate the threat that Bagri and his associates could pose to Ms. E's safety. Ms. E had a genuine fear for her safety and that of her family. Still, the RCMP continued to approach her in a public way, at times questioning her within earshot of others. RCMP members similarly made no serious attempt to assess the danger she faced by cooperating with police. In fact, the RCMP discounted Ms. E's fears in 1990. When the RCMP did ask her about her safety concerns, she was told to particularize and define her concerns herself and received no counselling or guidance to help her express her fears or understand the precautions that could be taken. Ms. E was also often approached in a confrontational and insensitive manner – for example, when RCMP officers repeatedly accused her of having had an affair with Bagri in spite of her denials and then told her common-law husband, who she was with at the time of the events, that she had been "seeing Bagri;"[73]

- CSIS "handed" Ms. D to the RCMP Air India Task Force after she provided information about Malik. The RCMP commercial crime section also dealt with Ms. D, since her information related in part to allegations of fraud. Ms. D's name was released when a warrant application was inadvertently left unsealed by the commercial crime section. Ms. D had to enter the RCMP Witness Protection Program much earlier than planned, which disrupted her life significantly.[74]

Conflicts between CSIS and the RCMP at times resulted in the loss of valuable sources and information. There was no collegial method of deciding when it was appropriate to "share" sources between the agencies. The eagerness of the RCMP to convert various sources into witnesses during the Air India investigation is understandable, given the magnitude of the crime. However, the RCMP was not as sensitive as it should have been when approaching those sources and not as effective as it should have been in providing for their safety.

8.3.8 Conclusion

Both community-wide intimidation and specific instances of intimidation played a role in the Air India investigations. The evidence before the Commission suggests that, even a quarter century after the Air India investigation began, intimidation is still very much an issue.

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72 See Volume Two, Part 2, Post-Bombing, Section 1.2, Tara Singh Hayer.
73 See Volume Two, Part 2, Post-Bombing, Section 1.3, Ms. E.
74 See Volume Two, Part 2, Post-Bombing, Section 1.5, Ms. D.

Effective protection for threatened individuals and a firm response to incidents of intimidation bolster the credibility of the justice system. A pattern of threats without a police response simply strengthens the hand of extremists or terrorist groups. Even an isolated instance of ineffective protection or a single threatened or intimidated witness can seriously damage the credibility of the authorities and dissuade other members of the community from coming forward.

In terrorism investigations at least, the RCMP should not see witness protection as a benefit that must be earned by testimony. Reasonable steps should be taken to respond to a source's safety concerns even before the source is considered for formal admission to a witness protection program. The RCMP should become more familiar with problems of intimidation in the particular communities that may be involved in terrorism investigations. They should also recognize that not all witnesses in terrorism investigations will be criminals and that human sources can be a valuable source of intelligence about terrorism even if they do not testify in court.[75]

All authorities, including CSIS, must be honest in their dealings with sources. They must be careful to avoid making promises to sources which cannot be kept – for example, that the identity of a source will be kept confidential and that the source will never be required to testify. They must be candid about the burdens and the limits of witness protection programs. Deception breeds distrust among potential sources; distrust too often engenders their silence.

8.4 Protecting Identity to Avoid the Need for Witness Protection

The previous section explained some of the real dangers facing individuals whose assistance to intelligence and police agencies becomes known. In terrorism investigations and prosecutions, the surest way to protect individuals against direct intimidation is to ensure that their identity remains secret. If no prosecution occurs, keeping the identity of a source secret is relatively easy for skilled intelligence agents. However, there is a legitimate public interest in prosecuting many terrorism offences. Proceeding with a prosecution makes it much more difficult to protect the identity of those who help the authorities. Fortunately, the government and prosecutors do have an array of legal measures that can offer partial or total anonymity to sources and witnesses, reducing the chances that they will need to enter witness protection programs.

As discussed in Chapter IV, CSIS officials who testified before the Commission appeared to assume that preventing disclosure of identity was the main way to protect confidential sources.[76] CSIS officials should become fully aware of the legal system's many protections against disclosure, including informer privilege. Finally, CSIS should have access to programs to protect vulnerable witnesses and sources. These programs should facilitate continuity in the handling of sources to avoid the problems that arose in the Air India investigation when CSIS sources were transferrred to new and unfamiliar RCMP handlers.

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75 See Volume Two, Part 2, Post-Bombing, Chapter I, Human Sources: Approach to Sources and Witness Protection.

76 See Section 4.5.

This section summarizes a variety of measures which can offer some protection to witnesses and sources when prosecutions proceed. As discussed in detail later, even the best-designed witness protection programs can pose significant hardships for those accepted into them. The preferred course of action is to look first for measures that avoid the need to enter witness protection. If these measures do not permit investigators to use information supplied by secret sources and allow prosecutors to satisfy their disclosure obligations, witness protection programs will be necessary.

8.4.1 The Role of Prosecutorial Discretion

One important safeguard in protecting sources and the safety of witnesses is the discretion of prosecutors to decide whether to commence or continue a prosecution. The Supreme Court of Canada has recognized that the Crown can properly use its power to stay or stop a prosecution as a means of protecting the identity of informers.[77]

Many terrorism offences in the *Criminal Code* attract lengthy maximum sentences. For example, instructing someone to carry out an activity for the benefit of a terrorist group,[78] instructing someone to carry out a terrorist act[79] and committing an indictable offence for the benefit of a terrorist group[80] all carry maximum sentences of life imprisonment.

Prosecutors may be tempted to proceed with as many terrorism charges as possible to increase the odds of conviction on some of them, but fewer, well-placed, charges could achieve the same result. The need to protect sources should be a factor that informs the exercise of prosecutorial discretion. This might reduce the number of individuals who would have their identities exposed to comply with disclosure obligations or to testify. In some cases, a non-terrorist criminal charge or perhaps a terrorist financing charge, as opposed to one based on an alleged terrorist plot, might protect sources who were privy to the details of the plot. As discussed in Chapter V, there are no disclosure obligations if the information is not relevant to the charges faced by the accused.[81]

However, prosecutorial discretion may be of limited utility in protecting sources because the courts may interpret disclosure obligations as applying to the entire investigation. Even a charge based on financing terrorism as opposed to charges that involve alleged terrorist plots will generally require disclosure in relation to issues such as the accused's intentions to facilitate or carry out a terrorist activity or to benefit a terrorist group.[82] The relevance of such issues could require wide-ranging disclosure. Such disclosure could place the identity of sources at risk.

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77 *R. v. Scott*, [1990] 3 S.C.R. 979.
78 *Criminal Code*, R.S,C. 1985, c. C-46, s. 83.21 [*Criminal Code*].
79 *Criminal Code*, s. 83.22.
80 *Criminal Code*, s. 83.2.
81 *See R. v. Chaplin*, [1995] 1 S.C.R. 727.
82 *Criminal Code*, ss. 83.03, 83.04.

8.4.2 Editing Affidavits Prepared in Support of Applications for Warrants

As discussed in Chapter IV, the process for using electronic surveillance warrants obtained under section 21 of the *CSIS Act* or Part VI of the *Criminal Code* involves disclosing the affidavit used to obtain the warrant in the first place. Before disclosing the affidavit, the government can remove information that might reveal the identity of a confidential source. However, any identifying material deleted from the affidavit cannot be used to support the constitutionality of the warrant and the search. In some cases, withholding identifying information about a source could destroy the validity of the warrant. *R. v. Parmar*[83] is a case in point. There, an informant refused to allow his or her name to be disclosed. As a result, the prosecution did not disclose an affidavit that would reveal the informant's identity. The legality of the warrant could not be sustained without this information. Wiretap information obtained under an invalid warrant was, at that time, subject to automatic and absolute exclusion. The prosecution collapsed because of a failure to make full disclosure, which in turn stemmed from the informant's refusal to allow his or her name to be disclosed and to enter a witness protection program.

Chapter IV proposes a new regime that would allow security-cleared special advocates to represent the interests of the accused in challenging warrants under section 21 of the *CSIS Act* or Part VI of the *Criminal Code*. Special advocates would have complete access to the affidavit used to obtain the warrant, including information that identified any confidential source, and would represent the interests of the accused without disclosing the identity of the source to the accused. If adopted, this proposal could provide significant protections for informers while not sacrificing the ability to subject the warrant to adversarial challenge and to assert the accused's right to be secure against unreasonable search or seizure.

8.4.3 Relying on Police Informer Privilege

At common law, police informers (other than police agents and material witnesses) have a right to keep their identities from being revealed to the defence in a criminal prosecution. In *Named Person v. Vancouver Sun*, the Supreme Court of Canada described this "informer privilege" rule, noting that it "…protects from revelation in public or in court the identity of those who give information related to criminal matters in confidence."[84] The Court stressed that the duty to keep an informer's identity confidential applies to the police, the Crown, attorneys and judges, and that any information which might tend to identify an informer is protected by the privilege. The protection is not limited simply to the informer's name, but extends to any information that might lead to identification.[85]

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83 (1987) 34 C.C.C. (3d) 260 (Ont. H.C.J.).
84 2007 SCC 43, [2007] 3 S.C.R. 252 at para. 16.
85 2007 SCC 43, [2007] 3 S.C.R. 252 at para. 26.

In an earlier Supreme Court decision, *R. v. Leipert*, then Justice McLachlin spoke of informer privilege as being of such importance that it cannot be balanced against other interests: "Once established, neither the police nor the court possesses discretion to abridge it."[86]

The police informer privilege rule is an exception to the broad right set out in *R. v. Stinchcombe*[87] for an accused to receive full disclosure. The privilege is absolute and allows an exception only where innocence is at stake. The innocence-at-stake exception arises if there is no way other than through disclosure for the accused to demonstrate innocence.[88] For example, the identity and evidence of an informer would have to be disclosed to the accused in cases where the informer had become a material witness or an *agent provocateur*.[89] Alternatively, the Crown could withdraw the charges against an accused to protect the identity of an informer.

At present, it is not clear whether police informer privilege applies to confidential CSIS sources. However, section 18 of the *CSIS Act* prohibits disclosure of confidential CSIS sources, albeit subject to many exceptions set out in section 18(2), including court-ordered disclosure. Chapter VI discusses the need for CSIS to be able to pass information to the RCMP without sacrificing the ability of informers or the state to claim informer privilege at a later date.

Chapter VI discusses how informers must be carefully managed. Both CSIS and the police should ensure that they have the most complete information possible before they promise anonymity to an informer in exchange for information. This care is required for a number of reasons. In some cases, the promise of anonymity may not be legally enforceable. For example, an officer might "suggest" that an informer ask specific questions to elicit certain information from the target of an investigation. Even years later at trial, a judge might decide that the individual was not an informer but became a police agent as a result of the police suggestion. The informer privilege would no longer apply.

In addition, promises of anonymity may seriously compromise the ability to commence a subsequent terrorism prosecution. As discussed earlier, the 1987 Hamilton prosecution of Talwinder Singh Parmar and others collapsed when an informer refused to consent to the disclosure of identifying information. In another case, charges for a 1986 conspiracy relating to a plot to blow up

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86 *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 14. See also the discussion of informer privilege in 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. 66-67, 73-75 [Roach Paper on Terrorism Prosecutions].

87 [1991] 3 S.C.R. 326.

88 See Chapter VI. The *Witness Protection Program Act* contains a similar innocence-at-stake exception to the general obligation to protect information about the changed identity or location of an individual in a witness protection program. Section 11(3)(d) permits the RCMP Commissioner to disclose information about the location or a change of identity of a current or former "protectee" if the disclosure is essential to establish the innocence of a person in criminal proceedings.

89 *R. v. Scott*, [1990] 3 S.C.R. 979, discussed in Roach Paper on Terrorism Prosecutions, p. 167. At pages 157-165, Roach discusses the various judgments in *R. v. Khela* relating to a police informer, "Billy Joe," who had been promised anonymity.

another Air India aircraft were eventually stayed. The stay occurred, in large part, because a key informer had apparently been promised that his identity would never be revealed. The courts, however, found that the informer was not protected by informer privilege because he had acted as a police agent. The police remained reluctant to disclose information relating to the informer, and the case was eventually permanently stayed by the courts as a result.[90]

In some cases, the benefits of keeping a source's identity secret to obtain information which may prevent an act of terrorism can clearly outweigh the value of the source as a witness in a subsequent prosecution. Prevention may often be more important than prosecution. Difficult decisions by security intelligence and police officers to offer anonymity in exchange for information which may be urgently needed should not be second-guessed.

Both police and the Crown have developed policies to help ensure that informers do not lose their privileged status through state action.[91] These policies need to be extended and adapted for CSIS. Moreover, there needs to be greater coordination among the agencies involved in terrorism cases concerning the treatment of sources. The proposed Director of Terrorism Prosecutions discussed in Chapter III would be able to provide consistent and expert legal advice about the legal status of informers as they transferred from CSIS to the RCMP and, in some cases, back again. Each agency needs to better appreciate the needs and perspective of the other. Disputes about the ultimate use of human sources could, when necessary, be resolved through the intervention of the National Security Advisor, as described in Chapter II.

The law surrounding police informer privilege is complex and evolving. There may be considerable uncertainty in a particular terrorism investigation about whether a source is protected by privilege. In particular, questions may arise about when and whether valid promises of anonymity may have been made to the source, and whether a source who is otherwise protected by the privilege has lost that privilege by becoming an active agent, material witness or *agent provocateur*. The prudent path with such factual and legal uncertainty is to take reasonable steps to protect informers who are vulnerable to retaliation if identified publicly. At the same time the state, on behalf of the informer, should assert the police informer privilege to withhold identifying information.

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90 *R. v. Khela* (1991), 68 C.C.C. (3d) 81 (Que. C.A.); *R. v. Khela*, [1995] 4 S.C.R. 201; *R. v. Khela* (1998), 126 C.C.C. (3d) 341 (Que. C.A.).

91 For example, the RCMP offers a one-week course entitled "Human Source Management" to train officers in the handling of agents and informers. One objective of the course is "…to ensure that an informer remains an informer and does not drift over into an agent capacity": Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8890. The Federal Prosecution Service Deskbook calls upon Crown counsel to obtain a full understanding of the nature of the relationship between the police and the informer/agent early on to determine the person's status and foresee any potential risks: Department of Justice Canada, The Federal Prosecution Service Deskbook, c. 36, online: Department of Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch36.html> (accessed June 2, 2009).

8.4.4 Disclosure: Non-relevance and Timing

Stinchcombe imposes a broad constitutional duty on the state to retain and disclose relevant information to the accused. Prosecutors may properly refuse to disclose information, including information about identity, if the information is not relevant. Prosecutors may also refuse to disclose evidence that is subject to a valid privilege such as the police informer privilege.

Prosecutors also have a reviewable discretion about *when* they disclose evidence and could use this discretion to delay disclosing the identity of an informer or witness for his or her protection. Late disclosure can undermine the efficiency of a trial because it may lead to adjournments allowing the defence to review the disclosed material. Late disclosure might also reduce the chances of resolving a case before trial. For these reasons, prosecutors should not lightly decide to delay the disclosure of relevant information. Nevertheless, the need to protect the safety of informers and witnesses is one of the few reasons that will justify delayed disclosure. The delay in disclosure should, however, be limited to the time necessary to ensure effective protection for the individual whose safety may be jeopardized by the disclosure.

8.4.5 Sections 37 and 38 of the *Canada Evidence Act*

Section 37 of the *Canada Evidence Act* permits ministers to object to the disclosure of information by certifying that the information should not be disclosed on the grounds of a specified public interest. As discussed more fully in Chapter VII, the protection of informers is considered one of those public interests. The trial judge is permitted to balance the competing interests in disclosure and non-disclosure, and can make an order placing conditions on disclosure.[92] Thus, the judge might prohibit disclosing the identity of an informer. At the same time, the judge can make an order to protect the right of the accused to a fair trial. This could include a stay of proceedings.[93]

Section 38 of the *Canada Evidence Act* allows the Attorney General of Canada to seek non-disclosure orders on the basis that the disclosure of information would harm national security, national defence or international relations. Similar to section 37, the judge is allowed to balance competing interests in disclosure and non-disclosure and place conditions on disclosure. As a result, the judge might prohibit disclosing the identity of an informer. Section 38 might be of particular importance to prevent harm to national security that would flow from a successful argument that the transfer of human sources from CSIS to the RCMP resulted in a loss of informer privilege.

Chapter VII recommends how to improve the efficiency and fairness of the process used to obtain judicial non-disclosure orders under section 38. In appropriate cases, sections 37 and 38 could be used to prevent the disclosure of identifying information about an informer. The public interest or Crown privileges asserted under these sections provide less protection than the privilege for police informers.

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92 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 37(5) [*Canada Evidence Act*].
93 *Canada Evidence Act*, s. 37.3.

8.4.6 "Partial Anonymity"

The measures discussed above all relate to the pre-trial stages of a prosecution and involve attempts to prevent the disclosure of identifying information about informers to the accused. Several measures are also available to offer some protection to witnesses at the actual trial, either by limiting access to information about their identities (for example, through publication bans) or by permitting measures to make them feel less intimidated when they testify.

Many of these partial anonymity measures will only protect the witness against intimidation by those other than the accused because, in most cases, the accused will already know the identity of the witness. It may be possible in some cases to allow a witness, particularly an undercover officer, to testify using a pseudonym. In this way, the accused does not learn the actual identity of the witness even though the Crown has disclosed all relevant information about the witness to the accused. The issue of anonymous testimony, where the accused does not know the identity of the witness, is examined in the next section.

Partial anonymity measures constitute exceptions to the "open court principle" recently articulated by Justice Lebel in *Named Person v. Vancouver Sun*:

> In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions.[94]
>
> . . .
>
> The open court principle is not absolute, however. A court generally has the power, in appropriate circumstances, to limit the openness of its proceedings by ordering publication bans, sealing documents, or holding hearings *in camera*. It can also authorize an individual to make submissions or appear in court under a pseudonym should this be necessary in the circumstances. In some cases, courts may be required by statute to order such measures. In others, they are merely authorized to do so, whether under legislation granting them this power or — where superior courts are concerned — pursuant to their inherent power to control their own processes.[95]

Many of these exceptions to the open court principle are found in the *Criminal Code*:

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94 2007 SCC 43, [2007] 3 S.C.R. 253 at para. 81.
95 2007 SCC 43, [2007] 3 S.C.R. 253 at para. 91.

- **Excluding the public from the courtroom**: Section 486(1) allows a judge to exclude members of the public from the courtroom for all or part of the proceedings in the interest of the proper administration of justice. This includes ensuring that justice system participants (which would include witnesses) are protected.[96]

- **Testifying outside the courtroom, etc.**: If an accused is charged with a terrorism offence set out in the *Criminal Code*, the judge may order that some or all witnesses testify outside the courtroom if the order is necessary to protect the safety of the witnesses. The judge may order that a witness testify behind a screen or similar means of preventing the witness from seeing the accused if the judge concludes that the order is necessary to obtain a full and candid account from the witness.[97]

  A witness can, however, testify outside the courtroom only if the accused, the judge and the jury can watch the testimony by closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.[98] The accused can still see the witness, but the witness has the comfort of not having to see the accused while testifying.

A 2006 Australian federal criminal case, *R. v. Lodhi*,[99] suggests how partial anonymity measures might be further expanded in Canada. In pre-trial proceedings, the judge ordered that a screen be used so that the accused could not identify Australian Security Intelligence Organisation (ASIO) officers when they testified. This was to prevent "…the real possibility of the compromise of intelligence operations in Sydney."[100] The parties consented to the ASIO officers testifying via closed-circuit television at the trial, instead of using screens. Monitors were available to all court participants, including the accused. However, the accused's monitor was intentionally not operational, though the jury apparently did not know this.[101]

- **Publication bans**: Section 486.5(1) of the *Criminal Code* allows a judge to make an order directing that any information that could identify a witness not be published, broadcast or

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96 R.S.C. 1985, c. C-46, s. 486(2)(b). Section 2 of the *Criminal Code* defines "justice system participant" to include "an informant, a prospective witness, a witness under subpoena and a witness who has testified."

97 *Criminal Code*, s. 486.2(4). In upholding a previous version of this section under the *Charter*, the Supreme Court noted that the accused could still see the complainant and the screen would not adversely affect the accused's right to cross-examine the witness: *R. v. Levogiannis*, [1993] 4 S.C.R. 475.

98 *Criminal Code*, s. 486.2(7).

99 [2006] NSWSC 596.

100 [2006] NSWSC 596 at para. 59.

101 See the more extensive discussion of the *Lodhi* case in Roach Paper on Terrorism Prosecutions, pp. 282-286.

transmitted if the judge is satisfied that the order is necessary for the proper administration of justice. In deciding whether to make an order, the judge must consider several factors that relate to the well-being of the witness:

- whether there is a real and substantial risk that the witness would suffer significant harm if his or her identity were disclosed;
- whether the witness needs the order for their security or to protect him or her from intimidation or retaliation; and
- whether effective alternatives are available to protect the identity of the witness.[102]
- **Pseudonyms**: As Justice Lebel noted in *Named Person v. Vancouver Sun*, a court can authorize an individual to make submissions or appear in court under a pseudonym if necessary in the circumstances.[103] Testifying under a pseudonym is another vehicle for shielding the identity of a witness from the general public. It might also prevent the accused from learning the true identity of the witness – for example, if the accused only knew the witness under that person's assumed name. However, a pseudonym would offer little protection to a witness if the witness could be identified by the accused even while testifying under a pseudonym. Still, pseudonyms may be especially important and valuable in protecting the identity of CSIS officers and undercover officers who may be required to testify in terrorism prosecutions.

These various measures seek to provide "partial anonymity" and offer some, but not total, identity protection to witnesses at trial. The accused can still determine the identity of the witness if the witness testifies by closed-circuit television or behind a screen, as well as when there is a publication ban or order removing the public from the courtroom. Even testifying using a pseudonym does not guarantee anonymity, since the accused can see the witness.

8.4.7 Conclusion

This section has considered various ways to protect the identity of individuals necessary for the proper prosecution of a trial and at the same time avoid the need to have them enter a witness protection program. As well, this section has discussed the important role of police informer privilege and judicial non-disclosure orders under sections 37 and 38 of the *Canada Evidence Act* in preventing the disclosure of identifying information about an informer. However, the privilege and these measures may impair terrorism prosecutions, in part because the informer will not be available to testify in such cases.

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102 *Criminal Code*, s. 486.5(7).
103 2007 SCC 43, [2007] 3 S.C.R. 252 at para. 91.

Several other options offer a middle ground between protecting informers through anonymity and completely disclosing their identity. These options include delayed disclosure to allow sufficient time to put protection measures in place, the exercise of prosecutorial discretion about laying charges and the commencement and continuation of prosecutions, as well as the use of a variety of "partial anonymity" devices that limit the disclosure of the identity of a witness to the public.

The real dangers faced by some witnesses and their families makes it imperative that judges and prosecutors carry out their functions within a "culture of security." They must understand the risks to witnesses and sources and the variety of measures that can protect them, while still providing a fair trial to an accused. Dean Anne-Marie Boisvert of the Faculty of Law, l'Université de Montréal, spoke about this culture of security before the Commission:

> I think that we will have to develop an awareness and a culture of security, while preserving, of course, the fundamental rights of our Justice system.… Crown prosecutors have, on occasion, been too timid in their objections to disclosure applications; the judiciary has also, on occasion, been timid or could have ordered disclosure subject to certain conditions.[104] [translation]

As a general rule, whenever an individual's identity may need to be revealed to further a prosecution, the preferred option should be to reveal only as much identifying information as is necessary to ensure the viability of the prosecution and fairness to the accused. If a partial anonymity measure satisfies the needs of the prosecution and ensures fairness for the accused, the prosecution should not resort to a procedure that may fully expose the witness and possibly force him or her into a highly restrictive witness protection program.

Although they can be important, partial anonymity measures only go so far. They still contemplate that the accused and perhaps others will learn the identity of the witness. The next section examines the option of anonymous testimony in which even the accused does not know the identity of the witness.

8.5 Anonymous Testimony

As discussed earlier, the *Criminal Code* provides several measures that offer "partial anonymity" by allowing a witness to testify at a remote location, or while protected by a publication ban, closed court or physical screen. These measures may reduce the threat and discomfort that witnesses feel when they testify. Nevertheless, none of these measures would prevent a determined person from learning the identity of a witness.[105]

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104 Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, pp. 8771-8773.

105 Jean-Paul Brodeur, "The Royal Canadian Mounted Police and the Canadian Security Intelligence Service: A Comparison of Occupational and Organizational Cultures" in Vol. 1 of Research Studies: Threat Assessment RCMP/CSIS Co-operation, p. 204.

The limits of partial anonymity measures raise the question of whether witnesses facing serious threats in terrorism prosecutions should be permitted to testify in complete anonymity. Since their identities would remain secret, they would not need to consider enduring the hardship of a witness protection program. Although Canada does not at present allow anonymous testimony, some other democracies do.

There is no statutory authority in Canada for anonymous testimony. Section 650 of the *Criminal Code* requires the accused to be present at trial when evidence is given. This provision has been interpreted broadly by the Supreme Court of Canada to include all proceedings where the accused's interests are at stake.[106]

In the landmark disclosure case of *R. v. Stinchcombe*,[107] Justice Sopinka recognized that while informer privilege could protect the identity of some informers, "…it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify," adding that witnesses "…will have to have their identity disclosed sooner or later." Anonymous testimony runs contrary to judicial trends that favour extensive disclosure to the accused,[108] including disclosure of information about potential witnesses. This information can be useful to the accused in challenging the credibility of statements made by a witness.

Professor Dandurand observed that many European countries allow anonymity for those who provide evidence in criminal proceedings, but only in exceptional circumstances and in compliance with European human rights law.[109] Belgium, France, Germany, The Netherlands, Moldova, Finland[110] and now, most recently, the United Kingdom have all enacted rules allowing anonymous testimony under tightly controlled circumstances. In each case, the rules conform to the three guiding principles set by the European Court of Human Rights:

- There must be compelling reasons to justify anonymity;
- The resulting limitations on the effective exercise of the rights of the defence must have been adequately compensated for; and
- The conviction must not be exclusively or substantially based on anonymous testimony.[111]

Dandurand described in general the restrictions on anonymous testimony in jurisdictions where it is permitted:

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106 *R. v. Vezina*, [1986] 1 S.C.R. 2; *R. v. Barrow* [1987] 2 S.C.R. 694.
107 [1991] 3 S.C.R. 326 at 339, 335.
108 See, for example, *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 and *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
109 Dandurand Paper on Protecting Witnesses, p. 54.
110 Dandurand Paper on Protecting Witnesses, p. 55, citing N. Piancete, "Analytical Report" in Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice* (Strasbourg: Council of Europe, 2006), p. 19.
111 Dandurand Paper on Protecting Witnesses, p. 55.

- It is generally limited to cases where there is reason to believe that the witness would be seriously endangered;
- The decision to grant the status of anonymous witness rests with the *juge d'instruction*, who must interview the witness, who will be under oath;
- The principal elements to be established during the interview are the risk to the witness, and the identity, credibility, and reliability of the witness;
- The accused, accused's counsel, and the public prosecutor can be excluded from the interview, although the public prosecutor may follow the interview through an audio-link with a voice transformer or other secure means;
- The defence may be allowed to follow the interview and ask questions via audio link, but may also be limited to submitting a list of questions to the judge beforehand;
- If, after weighing the interests of the defence against those of the witness, the judge is satisfied that anonymity should be allowed, the Crown will be allowed to use statements of that witness as evidence in court. However, a conviction may not be based on these statements alone; and
- It is also often possible to grant partial anonymity to witnesses at risk.[112]

Even where anonymous testimony is allowed in Europe, it has caused controversy and is rarely used.[113] Dandurand explained some of the reasons for the controversy:

> There are significant issues surrounding the legitimacy and legality of the use of such measures and, in the words of one vocal critic of this approach: "Arguments in favour of witness anonymity are based on the contention that prejudice to the accused can be minimized and that which remains can be justified through a purported "balancing" of competing interests in the administration of justice. The problem with this approach, despite its superficial appeal, is that it is unfairly balanced against the accused from the very outset."[114]

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112 Dandurand Paper on Protecting Witnesses, pp. 53-55.

113 For example, The International Criminal Defence Attorneys' Association, in its submission to the United Nations Preparatory Conference on the International Criminal Court Rules of Procedure and Evidence, opposed anonymous testimony, arguing that complete witness anonymity is only appropriate in instances where the individual is an informant who aided in the discovery of admissible evidence, but is not testifying against the accused in the proceeding: International Criminal Defence Attorneys Association, *Protection of Witnesses*, Position Paper presented during the United Nations Preparatory Conference on ICC Rules of Procedure and Evidence, 26 July - 13 August 1999, July 15, 1999, p. 3. See also Dandurand Paper on Protecting Witnesses pp. 54-55.

114 Dandurand Paper on Protecting Witnesses, p. 55.

Dandurand also noted the limited value of anonymous testimony:

> Even when permitted by law, the procedure for granting partial or full anonymity to a witness tends to be rarely used because of how, in practice, it can limit the admissibility of various elements of their testimony.[115]

Allowing anonymous testimony would also necessarily mean not revealing identity during disclosure.

8.5.1 The British Experience with Anonymous Testimony

In *R. v. Davis*,[116] the House of Lords overturned a murder conviction after three witnesses who identified the accused as the gunman testified under pseudonyms because they feared for their lives. The accused alleged that his ex-girlfriend was behind a plot to falsely accuse him of the murder, but he was not allowed to ask the witnesses any questions that would reveal their identity. The anonymous testimony was decisive in the accused's conviction, and Lord Brown concluded that "…effective cross-examination in the present case depended upon investigating the potential motives for the three witnesses giving what the defence maintained was a lying and presumably conspiratorial account."[117]

The House of Lords stressed that the ability of the accused to confront and cross-examine known witnesses had long been fundamental to the common law. It noted that some departures had been made long ago in the national security context including, for example, the treason trial of Sir Walter Raleigh, but that these departures were much criticized.[118] The use of anonymous witnesses had been proposed but rejected even in Northern Ireland during the height of concerns about the intimidation of witnesses and other justice system participants.[119]

The House of Lords relied on authority under the *European Convention on Human Rights*[120] that holds that no conviction should be based solely or to a decisive extent on anonymous testimony.[121] The focus of this jurisprudence is not on the admissibility of evidence under national law, but on "…whether the proceedings as a whole, including the way in which evidence was taken, were

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115 Dandurand Paper on Protecting Witnesses, p. 54.
116 [2008] UKHL 36.
117 [2008] UKHL 36 at para. 96.
118 [2008] UKHL 36 at para. 5.
119 [2008] UKHL 36 at para. 6. Some anonymous testimony was used in a trial in Belfast for murder of two members of the British army, but no objection was made by the defence and the evidence did not implicate the accused in the killings and the credibility of the anonymous witnesses (press photographers) was not at issue: [2008] UKHL 36 at paras. 12, 53 and 73, discussing *R. v. Murphy* [1990] NI 306.
120 Section 6(3)(d) of the *European Convention on Human Rights* provides that everyone charged with an offence has "…the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."
121 [2008] UKHL 36 at para. 25.

fair."[122] It is also significant that the European case law to date is grounded in an "inquisitorial" context where the judge not only knows the identity of the witness, but also has a mandate to investigate the case.[123]

A little more than a month after the decision in *R. v. Davis*, the United Kingdom enacted the *Criminal Evidence (Witness Anonymity) Act 2008*.[124] The Act abolished "…the common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant."[125] The Act potentially applies in all criminal cases. Its provisions will expire at the end of 2009 unless extended for a 12-month period by the Secretary of State.[126]

The Act allows both the prosecutor and the accused to apply to a court for an anonymity order as well as a range of other measures, such as the use of pseudonyms and screens to prevent the disclosure of identifying information.[127] Although both the accused and the prosecutor can apply for such measures, there are specific measures for *ex parte* hearings in the absence of a defendant if the court concludes that they are appropriate.[128] The Act is silent on the appointment of special human rights advocates.

Under the Act, a court must be satisfied that three conditions, described as conditions A to C, are met before it can make an anonymity order. The conditions are as follows:

> Condition A is that the measures to be specified in the order are necessary
>
> > (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or
> >
> > (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).
>
> Condition B is that, having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial.

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122 *Doorson v. Netherlands* (1996) 22 EHRR 330 at para. 67.
123 *Doorson v. Netherlands* (1996) 22 EHRR 330 at para. 73.
124 (U.K.), 2008, c. 15.
125 *Criminal Evidence (Witness Anonymity) Act 2008* (U.K.), 2008, c. 15, s. 1(2) [U.K. *Criminal Evidence (Witness Anonymity) Act 2008*].
126 U.K. *Criminal Evidence (Witness Anonymity) Act 2008*, s. 14.
127 U.K. *Criminal Evidence (Witness Anonymity) Act 2008*, ss. 2-3.
128 U.K. *Criminal Evidence (Witness Anonymity) Act 2008*, s. 3(7).

> Condition C is that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that
>
> (a) it is important that the witness should testify, and
>
> (b) the witness would not testify if the order were not made.[129]

Condition A would be satisfied where there are concerns about the safety of the witness. The Crown Prosecution Service, in its guidelines for prosecutors, has interpreted safety concerns to relate both to specific threats to a witness as well as "…a general climate of fear in the environment in which the witness lives." In either case, it is essential that the Crown Prosecutor be satisfied that the police have evidence to support the concerns of the witness.[130] Condition A also covers a broad range of public interests. It can allow for police officers and other officials to give anonymous testimony.

Condition C relates to concerns that important witnesses might not testify if not protected by an anonymity order.

In many cases, the most difficult determination under the new legislation will be Condition B, which requires that the anonymity order be consistent with the defendant receiving a fair trial. The court can consider all relevant circumstances, but section 5(2) of the Act specifies that consideration should be given to the following factors:

> (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
>
> (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
>
> (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
>
> (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
>
> (e) whether there is any reason to believe that the witness

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129 U.K. *Criminal Evidence (Witness Anonymity) Act 2008*, s. 4.

130 Crown Prosecution Service (United Kingdom), "The Director's Guidance on Witness Anonymity", online: Crown Prosecution Service (United Kingdom) <http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html#04> (accessed June 2, 2009).

> (i) has a tendency to be dishonest, or
>
> (ii) has any motive to be dishonest in the circumstances of the case,
>
> having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;
>
> (f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

These provisions recognize that accused persons have a traditional right to know the identity of witnesses who testify against them. They also recognize that an anonymity order may make it difficult for an accused to test the credibility of the witness, including credibility in matters such as the relationship of the witness with the accused.

In response to the European Convention on Human Rights, the legislation instructs judges to consider whether the anonymous evidence will be "the sole or decisive evidence" against the accused. As noted above, under the European Convention, no conviction should be based solely or to a decisive extent on anonymous testimony.

The British legislation also addresses the need for proportionality by requiring the judge to consider whether "it would be reasonably practicable to protect the witness's identity" by less drastic means. This refers to partial anonymity devices discussed above, such as the use of remote testimony, screens or publication restrictions.

8.5.2 Anonymous Testimony and the Adversarial System

The British experience, as well as related experience in New Zealand,[131] demonstrates that anonymous testimony can be used in common law countries. Nevertheless, anonymous testimony has been used mostly in civil law jurisdictions where the judge (who knows the identity of the witness) can play an active investigative role.

In *Charkaoui v. Canada (Citizenship and Immigration)*, Chief Justice McLachlin highlighted a fundamental distinction between inquisitorial and adversarial systems:

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131 New Zealand *Evidence Act 2006*, ss. 110-120. These provisions allow for anonymity orders both for preliminary hearings and trials and also contemplate the appointment of independent counsel to assist the judge.

> In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence. The designated judge under the [*Immigration and Refugee Protection Act*] does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged — perhaps unknowingly — to make the required decision based on only part of the relevant evidence.[132]

The Chief Justice noted that the role assigned to judges under the *Immigration and Refugee Protection Act*[133] was "*pseudo*-inquisitorial." She stated that "…[t]he judge is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture."[134] These comments underline some of the difficulties and dangers of using anonymous testimony in a common law adversarial system.

There was no consensus among parties and intervenors before the Commission about allowing anonymous testimony. There was some support for such testimony, but also a recognition of the legal problems that it might cause.[135]

8.5.3 Anonymous Testimony and the *Charter*

Any provision allowing for anonymous testimony would be challenged as infringing the accused's rights under sections 7 and 11(d) of the *Charter*. The first question would be whether the right to know the identity of a witness in

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132 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 50.

133 S.C. 2001, c. 27.

134 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 51.

135 B'nai Brith supported importing anonymous testimony for "innocent bystander witnesses" into Canadian law: Final Submissions of the Intervenor, B'nai Brith Canada, paras. 86-87. The AIVFA acknowledged that the use of anonymous witnesses involves a number of complex procedural and substantive issues, and called for further investigation and consideration of the issue: AIVFA Final Written Submission, p. 173. The Criminal Lawyers' Association argued that "…witness anonymity will always detract from the accused's ability to full test the credibility of that witness" but also suggested that anonymous testimony would be better than reliance on hearsay or an inability to call a witness for the defence: Submissions of the Criminal Lawyers' Association, February 2008, pp. 45-46. The Attorney General of Canada did not comment on allowing anonymous testimony, but suggested that the Commission consider cautiously Dandurand's recommendations, stating that "…further analysis is necessary to determine whether they are applicable to or compatible with the Canadian legal framework": Final Submissions of the Attorney General of Canada, Vol. III, February 29, 2008, para. 198 [Final Submissions of the Attorney General of Canada].

order to challenge that person's evidence is a principle of fundamental justice under section 7 and/or a requirement of a fair trial under section 11(d).

If the accused's rights were violated by anonymous testimony, the second question would be whether and in what circumstances the violation could be justified under section 1 of the *Charter*.

8.5.3.1 No Right to Physical Confrontation of a Witness but a Right to Have an Opportunity to Engage in Cross-Examination

In the 1989 case of *R. v. Potvin*,[136] the Supreme Court of Canada upheld a provision that allowed evidence given by a witness at a preliminary inquiry to be used at trial when the witness was not available. The accused argued that his "…ability to cross-examine all adverse witnesses at trial before the trier of fact is a principle of fundamental justice and a requirement of a fair trial. Basic to this argument is an acceptance of the proposition that the trier of fact will be unable to assess the credibility of a witness in the absence of his or her physical presence at the time the evidence is presented to the trier of fact."[137] The Court held that such a proposition did not qualify as a principle of fundamental justice under section 7 of the *Charter* because, "…[o]ur justice system has…traditionally held evidence given under oath at a previous proceeding to be admissible at a criminal trial if the witness was unavailable at the trial for a reason such as death, provided the accused had an opportunity to cross-examine the witness when the evidence was originally given."[138] These authorities "…indicate that the right to confront unavailable witnesses at trial is neither an established nor a basic principle of fundamental justice."[139]

Although the Court decided that the right to confront witnesses was not a principle of fundamental justice, it did hold that the accused's opportunity to have cross-examined the witness at an earlier point at the preliminary inquiry was a constitutional requirement.[140] In the case of anonymous testimony, the question would be whether the inability to learn the identity of the witness would so damage the accused's cross-examination on issues of credibility that the accused could not be said to have had an opportunity to cross-examine the witness, as section 7 of the *Charter* requires.

8.5.3.2 Anonymous Testimony and the Right of Cross-Examination

The hearsay rule generally prohibits the introduction of a statement when the declarant is not available to be cross-examined by the accused. Exceptions to the hearsay rule can produce situations where an accused may not be able to cross-examine the person who makes a statement against him that has been given in evidence. Exceptions must be justified on the basis of necessity and reliability.[141] Justice Binnie observed that "…while in this country an accused

136 [1989] 1 S.C.R. 525.
137 [1989] 1 S.C.R. 525 at 540.
138 [1989] 1 S.C.R. 525 at 540.
139 [1989] 1 S.C.R. 525 at 542-543.
140 [1989] 1 S.C.R. 525 at 544.
141 *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144.

does not have an absolute right to confront his or her accuser in the course of a criminal trial, the right to full answer and defence generally produces this result."[142] Reliability is a particular concern with exceptions to the hearsay rule, since the accused may not be able to cross-examine the person who made the hearsay statement.

Anonymous testimony makes it difficult for the accused to cross-examine a witness effectively without knowing the identity of the witness. The South African Constitutional Court rejected anonymous testimony on the basis that it "has far more drastic consequences" than the use of publication bans and *in camera* hearings or screens. It noted that depriving the accused of the identity of the witness would mean the following:

> No investigation could be conducted by the accused's legal representatives into the witness's background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general.
>
> It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him.
>
> It would further heighten the witness's sense of impregnability and increase the temptation to falsify or exaggerate….[143]

The United States Supreme Court reached a similar conclusion:

> The witness' name and address opens countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.[144]

Thus, the main problem with anonymous testimony lies in its impairment of the accused's ability to engage in full and informed cross-examination. Cross-examination has long been regarded as the best means of achieving the truth. Some wrongful convictions in Canada have been directly related to the inability of the accused to conduct a full and informed cross-examination of a lying witness.[145]

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142 *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178 at para. 51.

143 *S v. Leepile* 1986 (4) S.A. 187 at 189.

144 *Smith v. Illinois* 390 U.S. 129 at 130 (1967).

145 The Royal Commission on the Donald Marshall, Jr., Prosecution concluded that "We believe a full and complete cross-examination of John Pratico at this stage by [Marshall's lawyer] almost certainly would have resulted in his recanting the evidence given during his examination-in-chief that he had seen Marshall stab Seale. In those circumstances, no jury would have convicted Donald Marshall, Jr.": *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1 - Findings and Recommendations (Halifax: Royal Commission on the Donald Marshall, Jr., Prosecution, 1989), p. 79.

8.5.3.3 Section 7 of the Charter and Anonymous Witnesses

Anonymous testimony might be held to violate fair trial rights under section 7 of the *Charter*, including the accused's right to know the case to meet, the accused's right to make full answer and defence and the accused's right to conduct a full cross-examination. The right to confront a known witness at some point in the trial process might also be held to be a principle of fundamental justice in its own right. This would not necessarily be inconsistent with the ruling in *Potvin* that the actual confrontation between the accused and an unavailable witness at trial is not a principle of fundamental justice, as long as the accused has had a previous opportunity to cross-examine the witness.

The accused's right to confront and cross-examine a known witness during the trial process is a long-established legal principle. It has only a few, manageable exceptions in relation to absconding accused and unavailable witnesses. As well, there are certain exceptions relating to the hearsay rule. Furthermore, the principle against anonymous testimony relates to matters that are within the inherent domain of the judiciary as a guardian of a judicial system that aims not to convict the innocent.

8.5.3.4 Section 1 of the Charter

If it is accepted that anonymous testimony would violate the principles of fundamental justice, the next question is whether that testimony could in some circumstances nevertheless be justified under section 1 of the *Charter*. No section 7 violation has yet been found by the Supreme Court of Canada to be justified under section 1. Nevertheless, section 1 does apply to section 7 rights, and the courts will consider attempts to justify violations of section 7.[146]

Anonymous testimony in terrorism cases would relate to the objectives of witness protection and making evidence available about a serious crime. Both objectives would be sufficiently important to justify limiting even section 7 rights.

The next question would be whether the use of anonymous testimony would be rationally connected to such objectives. There would be a strong argument for a rational connection to the goal of witness protection because anonymity is the best way to protect witnesses and informers from retaliation. This is recognized in the jurisprudence on informer privilege. As discussed elsewhere in this chapter, no witness protection program provides a complete guarantee of protection. In addition, witness relocation and the need for a new identity divorced from the previous life of the witness impose great hardships. On this basis, using anonymous testimony would likely be found to be rationally connected to witness protection.

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146 "The *Charter* does not *guarantee* rights absolutely. The state is permitted to limit rights – including the s. 7 guarantee of life, liberty and security – if it can establish that the limits are demonstrably justifiable in a free and democratic society. This said, violations of s. 7 are not easily saved by s. 1": *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

Anonymous testimony might also be held to be rationally connected to the objective of making evidence about terrorism crimes available to a court. The Air India investigation is replete with examples of potential witnesses being reluctant to testify for fear that their identities might be disclosed. The only reservation in this respect is the possibility that witnesses would testify even if offered partial anonymity measures such as publication bans on identifying information, the use of screens, remote testimony and entry into a witness protection program.

Whether witnesses could testify without complete anonymity and be protected would be the central consideration in determining whether anonymous testimony constitutes a minimal impairment of the section 7 right. Under this part of the section 1 test, courts would likely require that less drastic alternatives to anonymous testimony either have been tried or would be bound to fail. The UK *Criminal Evidence (Witness Anonymity) Act 2008* addresses this issue by requiring a court to consider "…whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court."[147] A similar requirement would have to be included in any Canadian legislation that hoped to pass the minimal impairment test. Anonymous testimony would not be accepted if less drastic partial anonymity measures were available to protect the witness.

Another less drastic alternative, in light of the 2007 *Charkaoui*[148] decision, would be to allow adversarial challenge to anonymous testimony by a special advocate who would know the identity of the witness. This would respond to some of the difficulties that an accused would face in cross-examining an anonymous witness. However, problems could emerge if the special advocate believed it necessary to communicate with the accused after learning the identity of the witness. The special advocate would not be permitted to reveal identifying information to the accused, but this might mean that the accused could not inform the special advocate of the best grounds to challenge the credibility of the witness. These difficulties would be especially acute where there was a previous but undisclosed relationship between the accused and the anonymous witness.

Courts might also consider witness protection programs to be a less drastic alternative to anonymous testimony. A conclusion that these programs have not been properly funded or administered might suggest that there are still viable alternatives and reforms available short of using anonymous testimony. However, courts would still likely recognize that entry into a witness protection program imposes hardships.

Even if a court accepted that there was no reasonable alternative to anonymous testimony, it would still have to measure the adverse effects on the accused of admitting the testimony against the benefits of allowing its use. Here, courts

147 U.K. *Criminal Evidence (Witness Anonymity) Act 2008*, s. 5(2)(f).
148 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

would probably pay attention to the balance struck by the European Court of Human Rights that anonymous testimony should not be used as the sole or decisive evidence in the case. The Court's approach is based on a weighing of the risk of a miscarriage of justice because of the absence of effective cross-examination, and the unfairness to the accused, against the benefits of testimony from a witness who cannot otherwise provide evidence.[149]

Although it is not possible to predict whether legislation authorizing anonymous testimony would be upheld by the courts, it is clear that courts would not lightly accept such a radical departure from Canadian traditions of a fair trial. They would have to be convinced that there were no less drastic means for protecting witnesses, including various partial anonymity measures such as screens and publication bans, witness protection programs, or permitting special advocates to challenge the anonymous witness. Relevant information possessed by the Crown about the anonymous witness would also have to be disclosed to the accused to assist in the cross-examination, albeit without the information identifying the witness.

Even if no less drastic alternatives were available to make it possible for witnesses to testify, the courts would have to be convinced that, overall, the balance between the harm to the accused and the benefits to society favoured the acceptance of anonymous testimony. At a minimum, Canadian courts would likely follow the European Court ofHuman Rights in not allowing anonymous testimony to be used as the sole or decisive evidence in a prosecution. Canadian courts might well opt for a higher standard that prohibits all anonymous testimony, given the Supreme Court of Canada's treatment of section 7 of the *Charter* and its unwillingness to date to uphold limitations on section 7 rights under section 1.

Even if the courts accepted that anonymous testimony could be justified in some cases, it would be difficult to predict which cases these would be. In every case, less drastic alternatives such as partial anonymity orders would have to be shown to be inadequate. Even if they were inadequate, the benefits of anonymous testimony to the government's objectives of witness protection and prosecuting terrorism cases would have to outweigh the harms of anonymous testimony to the accused.

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149 These factors are represented in section 5(2) of the U.K. *Criminal Evidence (Witness Anonymity) Act, 2008*, where the judge is instructed to consider:

> (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
> (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
> (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
> (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
> (e) whether there is any reason to believe that the witness—
>
> > (i) has a tendency to be dishonest, or
> > (ii) has any motive to be dishonest in the circumstances of the case,
> >
> > having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant.

The conditions that would need to be met to justify anonymous testimony would make it very difficult to predict whether anonymous testimony could be used in a particular case. This would make it virtually impossible for CSIS and the police to promise that a person could testify anonymously. Indeed, promises made by the police would have to be carefully framed because a promise of anonymity that was not subsequently accepted by the court under section 1 of the *Charter* might in some cases be interpreted as a promise that would give the potential witness police informer privilege. In such a case, the witness could not be forced to testify without his or her consent. On the other hand, if courts found that the police had not promised anonymity, the witness could be compelled to testify.

Litigating the necessity of anonymous testimony would also lengthen terrorism prosecutions. A decision by a trial judge that anonymous testimony was justified would be open to challenge on appeal. The cumulative effects of non-disclosure are considered on appeal in determining whether an accused's right to make full answer and defence has been violated.[150] The accused could argue that even if the acceptance of anonymous testimony in itself did not make the trial unfair, the anonymous testimony, combined with non-disclosure of other information, could violate the accused's right to make full answer and defence and produce an unfair trial.

8.5.4 Conclusion

Anonymous testimony raises complex issues. Anonymous testimony would be challenged as violating the accused's right to make full answer and defence, including cross-examination, under the *Charter*. The Crown could attempt to justify any violation as a reasonable limit under section 1, but it would have to demonstrate that other measures short of anonymous testimony, such as the use of partial anonymity measures – for example, publication bans, screens or giving testimony from a remote location – would not be adequate. Even then, courts would have to assess the adverse effects of anonymous testimony on the accused's rights, especially in challenging the credibility of the anonymous witness, against the state's interests in securing the anonymous testimony. Of course, Parliament could enact legislation authorizing anonymous testimony notwithstanding the legal rights in the *Charter*. Such legislation would have to be renewed every five years.

Anonymous testimony would not only raise serious *Charter* issues, but also practical issues. Even if Canadian courts followed the European example and allowed anonymous testimony, pre-trial litigation would be necessary to decide whether anonymous testimony was justified. Security intelligence agencies and the police would not know in advance whether anonymous testimony would be allowed. Moreover, the European jurisprudence, as well as the recent British legislation on anonymous testimony, demonstrates a reluctance to allow anonymous testimony to play a decisive role in a criminal prosecution. This reluctance is related to the difficulties that the accused would have in challenging

150 *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307.

the credibility of an anonymous witness and the dangers of miscarriages of justice. Finally, the nature of clandestine terrorist plots may mean that, regardless of court-ordered anonymity, the accused and their supporters may still be able to determine the identity of an anonymous witness.

Before anonymous testimony can be justified, less drastic measures should be exhausted. Several existing measures protect the identity of informers and witnesses in terrorism cases. Measures discussed elsewhere in this volume, such as the police informer privilege and orders under sections 37 and 38 of the *Canada Evidence Act*, can prevent the disclosure of identifying information about informers who do not testify. Other measures discussed in this chapter can provide partial anonymity and protections against full public disclosure when vulnerable people do testify. The use of pseudonyms may be particularly important in allowing CSIS agents to testify, provided that the Crown makes full disclosure of relevant information about the agent. The robust use of these existing measures can be combined with enhanced and more flexible methods of witness protection.

In light of all the legal and practical difficulties of anonymous testimony, present conditions do not justify a recommendation that the government amend the *Criminal Code* to allow anonymous testimony. However, these conditions may change. The idea that anonymous testimony could be justified in some terrorism prosecutions should not be dismissed out-of-hand. There is ample evidence that witness intimidation frustrated the Air India investigation and prosecution. The government should monitor the use of anonymous testimony under the new British legislation and continue to study the legal and practical implications of witness protection measures including, at the extreme end, the possibility of using anonymous testimony. The government should be prepared to reconsider the present prohibition on anonymous testimony if circumstances warrant.

8.6 Witness Protection Programs

Although there are a variety of measures available to protect the identities of witnesses and sources, there remains a real possibility that some informers and most witnesses will have their identities exposed during testimony. Canada's apparent determination to prosecute terrorism offences also makes it unlikely that the risk of exposing a witness or source would always persuade prosecutors to drop charges.[151] In addition, identity can sometimes be disclosed inadvertently,[152] and the full legal extent of protections from disclosure by means of the police informer privilege and applications for judicial non-disclosure orders under sections 37 and 38 of the *Canada Evidence Act* may not always be clear. As a result, measures are needed to protect those whose identity is

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151 See Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8912: "The more serious it [the offence] is, the less discretion would be available."

152 For example, in the Air India investigation, Ms. D's name was released when a warrant application was inadvertently left unsealed by the RCMP commercial crime section. This resulted in her entering the Witness Protection Program much earlier than she had anticipated.

disclosed. This leads to witness protection, a program adopted to manage the consequences of disclosure of the identity of the witness and the resulting risk to the witness and his or her family.

8.6.1 Responsibility for Protecting Witnesses

The protection of witnesses is the responsibility of the police force or agency that intends to rely on that witness. RCMP Assistant Commissioner Raf Souccar testified that, because of the RCMP's leadership role in Integrated National Security Enforcement Teams (INSETs), the RCMP is almost always responsible for protecting witnesses in terrorism investigations. In cases where a source already has a "handler" from another police agency, the source could be transferred to the RCMP and an RCMP handler assigned to the source. As an alternative, the handler from the police agency that first handled the source could be seconded to the RCMP during the investigation.[153]

The practice of seconding a CSIS handler to the RCMP is noteworthy because it may help to avoid the unfortunate treatment received by CSIS sources when transferred to the RCMP during the Air India investigation. For example, Mr. A was transferred from CSIS to the RCMP in March 1987 in an insensitive manner which reduced his possible value as a source of information about Sikh extremism and perhaps as a witness in the Air India prosecution. The handling of Mr. A destroyed the rapport with him achieved by CSIS. Ms. E, who had a good rapport with her CSIS handler, became completely alienated from the authorities after her dealings with the RCMP.

CSIS may have established good relations with sources in the course of previous terrorism investigations. CSIS officers may also have better foreign language skills than their RCMP counterparts and also, perhaps, a greater sensitivity to diverse cultures. Any redesigned system for witness and source protection should permit as much continuity as is feasible in the handling of sources. This is so even if it means that CSIS agents would continue to work with a source who had been transferred to the RCMP and who may eventually testify in a terrorism prosecution. CSIS agents who continue to work with sources must be familiar with, and receptive to, the obligations of disclosure as well as the workings of witness protection programs.

8.6.2 The Federal Witness Protection Program

Because of the central role of the RCMP in witness protection in terrorism investigations, the Commission heard mainly about the protection measures of the RCMP, particularly the federal Witness Protection Program (WPP).

The *Witness Protection Program Act* (WPPA) came into force in 1996, officially establishing the WPP. However, formal witness protection measures in Canada began more than a decade earlier. In 1984, the RCMP established its first major

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153 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8896-8897.

program, the "Source-Witness Protection Program," because of heightened concern about witnesses in national and international drug smuggling cases. The program had no specific legislative authority. According to author Gregory Lacko, the program was successful in that no protected witnesses ("protectees") were killed while enrolled. However, misunderstandings arose over protection agreements. Some protectees complained, sometimes going as far as sacrificing their anonymity to draw attention to their complaints. Complaints also came before what was then called the RCMP Public Complaints Commission.[154] This led to the enactment of the WPPA in 1996, creating a more formal witness protection regime, the Witness Protection Program (WPP).

Like many of its foreign counterparts[155] and the earlier Source-Witness Protection Program, the WPP was initially established for witness protection needs relating to organized crime.[156] The focus of the WPP continues to be on witnesses who are hardened criminals or who lead a criminal lifestyle.[157]

Under the WPPA, "protection" may include relocation, accommodation and change of identity, as well as counselling and financial support.[158] The purpose of the Act is not simply to facilitate protection for persons assisting the RCMP. The Act also envisages protecting those assisting *any* law enforcement agency or international criminal court or tribunal where an agreement is in place to provide such protection.[159] The Act also contemplates protection for those who act as sources but not as witnesses, though it is generally seen and described as a protection program for witnesses and their close relatives.

The Commissioner of the RCMP or his or her delegate[160] determines whether a witness should be admitted to the WPP and the type of protection to be provided.[161] In practice, the WPP is managed by RCMP Witness Protection Coordinators located across Canada.[162]

The WPPA allows the Commissioner to enter into agreements with other law enforcement agencies to permit a witness to be accepted into the WPP.[163] He may also enter into arrangements with provincial Attorneys General for the same purpose. On the international front (important in the terrorism context),

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154 Lacko Paper on Protection of Witnesses, p. 3.

155 For example, the American federal witness protection program, also known as the Witness Security Program or WitSec, was established under the *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922, a statute aimed at combatting organized crime.

156 Lacko Paper on Protection of Witnesses, p. 3. The Source-Witness Protection Program became known as the WPP following the enactment of the *WPPA* in 1996.

157 Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, p. 8826. See also Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8615-8616.

158 *Witness Protection Program Act*, s. 2.

159 *Witness Protection Program Act*, s. 3. Section 14 sets out the powers of the RCMP Commissioner and the Minister of Public Safety to enter such agreements.

160 *Witness Protection Program Act*, s. 15.

161 *Witness Protection Program Act*, s. 5.

162 See Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8893-8895 for an explanation of the process through which the application of a witness, in this case an RCMP agent, is reviewed by a coordinator and ultimately recommended for admission into the WPP.

163 *Witness Protection Program Act*, s. 14.

the Minister of Public Safety, not the Commissioner, may enter into a reciprocal arrangement with the government of a foreign jurisdiction to enable a witness there to be admitted to Canada's WPP. Similarly, the Minister may make arrangements with international criminal courts or tribunals to admit witnesses from those courts or tribunals to the Program.

As of 2007, there were about 1,000 protectees in the WPP, including 700 managed by the RCMP and 300 from other police forces. About 30 per cent of these protectees were not witnesses, but individuals who had relationships with witnesses.[164]

Other jurisdictions in Canada have created their own witness protection programs – for example, Quebec, Ontario and the City of Montreal. British Columbia established an Integrated Witness Protection Unit in 2003.[165] These programs are independent of one another and, except for the BC program, do not necessarily involve the RCMP.[166] Still, the RCMP can and does on occasion work closely with these programs and it allows officers from these programs to participate in RCMP witness protection training courses.[167]

8.6.3 Hardships Related to Living in the WPP

Souccar testified that entering the WPP is voluntary.[168] This is technically correct. However, the seriousness of threats against those who assist with terrorism investigations and prosecutions may offer little choice but to enter the WPP.

Witnesses before the Commission emphasized the rigours and hazards of life in the WPP. Geoffrey Frisby, a former WPP coordinator, described the program as "very, very difficult" for anyone:

> I don't care who you are; whether you're a hardened criminal with a lengthy criminal record or whether you're an individual who just happened to witness be in the wrong spot at the wrong time. To be able to adjust to the program and to what the program entails, especially when we are looking at having to take a person's identity away from them and give them a new identity. The problems that go with that are increased tremendously with the more protective measures that you provide to an individual.[169]

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164 House of Commons Canada, Report of the Standing Committee on Public Safety and National Security, *Review of the Witness Protection Program*, March 2008, p. 16, online: Public Works and Government Services Canada <http://dsp-psd.pwgsc.gc.ca/collection_2008/parl/XC76-392-1-1-01E.pdf> (accessed June 2, 2009) [House of Commons Report on the Witness Protection Program].

165 House of Commons Report on the Witness Protection Program, p. 4; Dandurand Paper on Protecting Witnesses, pp. 64-65. Dandurand's description of the integrated BC witness protection unit is an interesting model for consideration, as it appears to integrate municipal police forces and the RCMP under one set of policies.

166 However, the assistance of the WPP is necessary to obtain the federal documents required for a change of identity. See Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8895.

167 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8960.

168 Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8974-8975.

169 Testimony of Geoffrey Frisby, vol. 69, October 30, 2007, p. 8794.

RCMP Staff Sergeant Régis Bonneau described undergoing a change of identity and entering the WPP as "…the most stressful things, I imagine, that [protected witnesses and their families] can possibly have to go through in [their lives],"[170] while RCMP Superintendent Michel Aubin characterized the WPP as "a life-altering experience."[171]

The human cost of participation in the WPP was also made clear in *R. Malik and Bagri*, when Justice Josephson described the impact of witness protection on Ms. D:

> She emotionally described how being in the witness protection program had cost her her job, family and contact with friends.[172]

With the help of the RCMP, Commission counsel conducted a survey of WPP protectees to learn more about life under witness protection.[173] The results of the survey and the testimony of witnesses highlighted many hardships that protectees face.

First, protectees are almost inevitably relocated and may have to undergo a change of identity. They often find being uprooted from their home, routine, job and circle of friends particularly difficult. Many protectees report difficulty with the idea of having to "live a lie" for the rest of their lives, and describe how this can inhibit their ability to form lasting relationships in their new location.

Second, protectees generally experience difficulty because of their separation from family members who either were not invited into the WPP or who refuse to enter. Custody arrangements may also prevent a protectee's children from entering the WPP.[174] The WPP can and does organize communication and visits with children of protectees.[175] However, visits are less frequent than most protectees would like and do not come close to approximating the contact with children that parents normally enjoy.[176]

Third, protectees often have difficulty finding employment and becoming self-sufficient in their new location. This often flows from problems in transferring diplomas, work histories and references, as well as their need to receive training in a new field and the heavy demands of their ongoing assistance to the authorities.[177]

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170 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9781 [translation].
171 Testimony of Michel Aubin, vol. 70, October 31, 2007, p. 8913.
172 *R. Malik and Bagri,* 2005 BCSC 350 at para. 353.
173 See the description of the survey in the statement of Commission counsel Louis Sévéno, vol. 77, November 16, 2007, pp. 9746-9760. See also the accompanying PowerPoint presentation (Exhibit P-298, Tab 1) and report, *Summary, Analysis and Amalgamation of Responses by Protectees of the Federal Witness Protection Program to a Survey Questionnaire* Created by Commission counsel (Exhibit P-298, Tab 2) [Witness Protection Survey].
174 Witness Protection Survey, pp. 16-17, question 43. See also Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, p. 8821.
175 Witness Protection Survey, pp. 10-11, question 26. See also Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9775.
176 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9775.
177 Witness Protection Survey, pp. 16-16, questions 39, 42.

Fourth, certain protectees are unable to maintain their earlier lifestyles.[178] WPP administrators will generally liquidate a protectee's assets before proceeding with a change of the protectee's identity. This liquidation can cause a serious loss of capital for the protectee.[179] The WPP strives to follow the "like-to-like" principle and will often provide living allowances to protectees in need. However, the Program is not generally able to match the salary of those witnesses who were well off before.[180]

Finally, most protectees find WPP rules and conditions very difficult to follow, especially restrictions on travelling back to the "danger zone" or contacting friends and relatives in a non-secure manner.[181]

In short, it is almost impossible to overestimate the difficulty and emotional burden of being separated from one's community, and of then having to deny one's entire past and step away from one's roots. Many protectees have left the WPP because of these strict conditions.[182] These conditions, along with the obligation to relocate, are also cited by witnesses who refuse to enter the WPP.[183]

The WPP is also unforgiving, at least on paper. Despite the extraordinary challenges posed by having to remove oneself from one's past, and the understandable desire to maintain some contact with one's former life, the WPPA states that a "deliberate and material contravention of the obligations of the protectee under the protection agreement" can lead to protection being terminated.[184]

The WPP strives to improve the living conditions of protectees and reduce the hardships of life in the WPP. Ways in which the Program can be improved are discussed below. However, several profound hardships that flow from entering and living in the WPP simply cannot be avoided. It is difficult to imagine how the conditions of the WPP could be relaxed, for example, to facilitate a protectee's contact with his or her old community without seriously compromising safety. Even if the Program improves, living under its restrictions will always be a serious challenge for protectees, those who enter the Program with them and those close to the protectee who remain outside the Program. For this reason, the WPP must be viewed as a vital option for protecting witnesses, but almost inevitably one with human costs.

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178 Witness Protection Survey, p. 14, question 40.
179 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8907.
180 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9784.
181 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9787. See also Witness Protection Survey, pp. 18-19, question 52.
182 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8928-8929.
183 Lacko Paper on Protection of Witnesses, p. 15. See also, for example, Exhibit P-273, Tab 10: *Witness Protection Program Act, Annual Report 2005-2006.*
184 *Witness Protection Program Act*, s. 9(1)(b).

8.6.4 Additional Challenges of Living in the WPP in Terrorism Matters

8.6.4.1 Minority Communities

The presence in some ethnic, cultural and/or religious communities of some individuals involved in activities that threaten the security of Canada makes gathering intelligence from within these communities vital. It is essential that the law-abiding majorities in communities be able to provide valuable information to the justice system and that they be protected from intimidation and violence should their assistance become known.

On occasion, the identity of community members who assist security intelligence agencies and the police in terrorism investigations can be kept secret. However, some community members who assist the authorities and testify in terrorism prosecutions may need to enter the WPP. For example, one witness who testified at the Air India trial entered the WPP.[185] It was therefore important for the Commission to assess whether the WPP can meet the needs of individuals from minority communities. Both current and former WPP officials testified about the specific challenges that can arise.

Challenges regarding language skills: Some members of minority communities, especially those who have recently arrived in Canada, may not feel comfortable speaking either of the country's official languages. This makes it more difficult to deal with WPP officials, to understand rights and obligations flowing from a protection agreement, to undergo psychological assessments (a component of the WPP) and to benefit from the services offered through the WPP, such as career counselling and educational programs.

In addition, protectees who were able to live and function normally in their original minority community using their mother tongue may find it impossible to function in a different community where that language is uncommon. This limits the options for relocating protectees.

Souccar told the Commission that to meet the challenge presented by language barriers, the WPP and the RCMP do their best to attract as much diversity as feasible within the WPP to reflect the communities which they serve.[186] Nevertheless, the success of this initiative, established for the entire range of services offered by the RCMP, remains unproven. The initiative constitutes at best a work-in-progress. Souccar also said that the WPP routinely provides protectees with translation services, especially to ensure that they understand the implications of protection agreements.[187] However, these measures do not resolve the difficulties of moving to a community where the protectee's language is not commonly used.

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185 See *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 352-353.
186 Testimony of Raf Souccar, vol. 71, November 1, 2007, p. 8971.
187 Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8971-8972.

Relocation sites: If the protectee is a member of a visible minority, there may be fewer relocation choices. A protectee would be more easily identified in a small community that lacks others from that minority group. The wearing of traditional or religious garb, as well as distinctive features such as a long beard or tattoos, could increase the risk of being identified.[188] This problem may diminish as Canada, and especially its urban centres, continues to increase in diversity.

Even if a protectee moves to another province, a significant risk of being identified remains. Souccar attributed this to the closeness of some communities across the country:

> It is certainly a challenge depending on the communities, the ethnic communities and their closeness, if you will. The relationship between the same ethnic community in one province perhaps to another. It is a challenge. We work with the individuals who may need protection or relocations to find out what, if any, concern he or she may have in term of relocation and being identified.[189]

However, Bonneau told the Commission that Canada has many large cities in which to relocate members of visible minorities and that this issue was therefore not of particular concern to him.[190]

Limitations on religious freedoms: To reduce the risk to protectees, the WPP generally requires that they not engage in activities that would place them in contact with people who could discover their real identity. This may involve restricting a protectee's place and manner of worship.[191] Because of this, there is a risk that the WPP will be perceived as being insensitive to the cultural and religious customs of minority communities.[192] As well, the pressure to stay away from religious activities could dissuade many who might otherwise help with terrorism investigations and prosecutions. The WPP should be sensitive to these concerns and seek whenever possible to accommodate the religious practices of protectees.

8.6.4.2 Lack of WPP Benefits beyond Protection

Not surprisingly, the evidence before the Commission shows that the major focus of the WPP continues to be on witnesses who are hardened criminals or who lead a criminal lifestyle.[193] These individuals will not see entering the WPP as problem-free, but may recognize it as providing a chance to improve

188 Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, pp. 8832-8833.
189 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8937-8938.
190 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9785.
191 Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, pp. 8832-8833.
192 Testimony of Régis Bonneau, vol. 77, November 16, 2007, pp. 9785-9786.
193 Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, p. 8826. See also Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8615-8616.

their lives and get a fresh start. WPP benefits include drug rehabilitation, career training and counselling.[194] For witnesses who are poor, the WPP ensures a better standard of living.

For those without a criminal past, such as many witnesses and sources in terrorism matters, the benefits mentioned above are less significant (apart from the vital core benefit of protection). Witnesses and sources with no criminal antecedents have fewer reasons than criminals for enduring the hardships of witness protection programs. As a corollary, potential witnesses and sources in terrorism matters have a greater incentive than criminals to withhold useful information from investigators to avoid the need to enter witness protection.

The WPP does not differentiate between the protective measures offered to law-abiding individuals and those offered to career criminals. Souccar testified that, because of its enabling legislation and policies, the WPP's "hands are tied" in the protection that it can offer to "innocent" witnesses, even though WPP officers feel more sympathy for them.[195]

Souccar told the Commission about alternative measures that the police might be able to provide for those who do not enter the WPP, but said that these will often give insufficient protection against a terrorist organization.

All of this points to a need for extra attention within the WPP to make the conditions of the WPP less difficult for witnesses in terrorism cases. In fact, the RCMP has taken steps to soften the harshness of life in the WPP. Measures have included provisions for more frequent visits with family members and the use of systems to ensure safe communications between protectees and those outside the WPP.[196]

8.6.5 Alternative Measures to Protect Witnesses

Because the WPP entails a serious, sometimes intolerable, disruption of the lives of those who require protection, authorities should treat the WPP as the last resort for those at risk, to be used only when less confining protection measures are inadequate or inappropriate.

In fact, the WPPA instructs the RCMP Commissioner to consider "…alternate methods of protecting the witness without admitting the witness to the Program."[197] These alternate methods are not explicitly catalogued in any RCMP policy. However, witnesses told the Commission that a number of measures may be available,[198] according to the level of threat to the witness[199] and the

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194 Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, p. 8843.
195 Testimony of Raf Souccar, vol. 70, October 31, 2008, pp. 8910-8911.
196 Testimony of Michel Aubin, vol. 70, October 31, 2007, p. 8913. See also Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8988-8989.
197 *Witness Protection Program Act*, s. 7(g).
198 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8902. See also Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8611-8612.
199 This requires an evaluation of the threat to the witness, a threat assessment, which, in the terrorism context, is likely to be conducted at the INSET level, with the cooperation of all partners.

comfort of the witness with the measures. These measures can be used, for example, where the risk to the witness does not warrant admission to the WPP or where the WPP is not an option, either because the witness refuses to enter or is considered unfit for it.[200]

Security at the home of a witness might be enhanced by an alarm system, surveillance cameras, bars on windows, and by giving the witness and family members emergency emitters ("panic buttons").[201] Witnesses may receive cell phones to facilitate contact with the police, and patrol cars may make frequent rounds in the neighbourhood of the witness.[202] The degree and nature of police presence can vary according to the immediate risk, with an extreme case warranting around-the-clock protection by an emergency response team.[203]

The threat is sometimes limited to a geographical area. Relocation to another neighbourhood may be sufficient to avoid threats from a local gang.[204] In other cases, the need for protection may dissipate with time – after a trial ends, for example. Temporary relocation may resolve the problem here too. However, such measures may not be sufficient in terrorism cases where an extremist organization has a powerful ideological drive, international reach and few scruples about silencing those who work against its interests.

On occasion, a witness who refuses to enter the WPP or is not suitable for the Program is offered a lump sum to pay for private protection services.[205] In exchange, the witness signs an agreement to release the WPP from any protection obligations or further liability. This type of payment arrangement is under some circumstances also offered to witnesses who leave the WPP, but not if payment has already been made for a permanent relocation site.[206]

The lump sum offered to a witness usually equals the WPP's estimate of the cost of protecting the witness (and family) for one year.[207] Souccar testified that, "… [w]e're not going to pay him an amount that is insignificant as compared to what he needs to do to protect himself."[208] An RCMP document showed that between January 1, 2004, and September 13, 2007, 34 witness protection cases were resolved through release and indemnity agreements, with an average payment of $30,000.[209]

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200 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8902.
201 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8911.
202 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8911. See also Testimony of Mark Lalonde, vol. 68, October 29, 2007, p. 8613.
203 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8911.
204 Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8612-8613. See also Testimony of Geoffrey Frisby, vol. 69, October 30, 2007, pp. 8791-8792 and Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8684-8685.
205 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8931-8932.
206 Testimony of Michel Aubin, vol. 70, October 31, 2007, p. 8929.
207 Testimony of Régis Bonneau, vol. 77, November 16, 2007, pp. 9801-9802.
208 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8931-8932.
209 Exhibit P-273, Tab 12: R&I Payments by RCMP Regional/Divisional SWP Units, January 1, 2004-September 13, 2007.

Witnesses who receive lump-sum payments generally either relocate or implement security measures through private security firms. Using private security firms allows a witness to tailor protection as the witness sees fit. Some witnesses who would balk at the strict conditions of the WPP may be willing to accept private security protection because they have more control over the constraints imposed by the protection.

With private security arrangements, continued protection is not linked to the cooperation of the witness with the police and Crown. However, the cost of private protection can be high, especially where the witness needs around-the-clock protection. A $30,000 lump sum will not go far in such cases. In contrast, witnesses entering the WPP are free of worry about the cost of protection since the RCMP absorbs all costs.

Alternative measures may provide adequate protection in some cases. However, former WPP coordinator Geoffrey Frisby told the Commission that nothing short of admission into the WPP will guarantee the safety of an exposed witness in some situations, and the RCMP will not in such cases offer alternative measures. To do less than what is necessary to make the witness safe, he testified, would be negligent.[210]

Indeed, the single-mindedness of some extremist groups and their willingness to resort to violence to further their objectives means that witnesses and sources whose identities are revealed may often require the extensive protection offered by the WPP. Alternative measures simply may not work.

8.6.6 Organizational Problems in the WPP

8.6.6.1 The Need to Consider the Interests of All Parties in Terrorism Prosecutions

Terrorism investigations and prosecutions can involve many more agencies and departments than other criminal investigations and prosecutions. In gathering intelligence, CSIS will generally play a large role in terrorist investigations and can more easily develop sources in the terrorism milieu than can police agencies. Other agencies may include the RCMP, the National Security Advisor,[211] the proposed Director of Terrorism Prosecutions,[212] federal and provincial Crown prosecutors, Public Safety Canada, Immigration Canada, the Correctional Service of Canada and the Department of Foreign Affairs and International Trade.

Whenever a terrorism prosecution is contemplated, the institutions likely to be affected should be able to express their views about the needs and methods of protecting witnesses and sources. The imposition of expanded disclosure obligations on CSIS as a result of the 2008 *Charkaoui*[213] decision may mean that

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210 Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, p. 8851.
211 See Chapter II for a discussion of proposals for enhancing the role of the National Security Advisor.
212 See Chapter III for discussion of this proposed position.
213 2008 SCC 38, [2008] 2 S.C.R. 326.

CSIS sources, even if not required to testify, risk being exposed because of a decision by the Crown to prosecute for a terrorism offence. Given the importance that CSIS attaches to keeping the identity of its sources secret, CSIS needs a voice in decisions that might reveal the identity of those sources.

Police and prosecutors may want CSIS intelligence used as evidence by having CSIS sources testify at trial, as happened in the Air India trial. CSIS has a strong interest in ensuring that promises it made to sources, particularly about their anonymity and treatment, are not broken when those sources are transferred to the RCMP. In addition, the value to CSIS of maintaining the anonymity of some sources may exceed the value of those sources for any one particular investigation and prosecution. CSIS may not want to risk ruining ongoing or future intelligence operations about serious threats for the sake of one prosecution. The person holding the enhanced position of National Security Advisor, discussed in Chapter II, will in some cases be able to make decisions about whether preserving the anonymity of CSIS human sources is in the public interest.

If CSIS sources do eventually become witnesses, CSIS will have an interest in ensuring that they receive appropriate witness protection. A failure to provide adequate protection could dissuade others from becoming sources for CSIS and make existing sources reluctant to cooperate further. The CSIS handler may be an important resource in ensuring as smooth a transition as possible from secret human source to witness. There is a need for a person to be in charge and to oversee the transfer of human sources from CSIS to the RCMP as part of the relationship between intelligence and evidence. As discussed later, this person should work closely with both CSIS and the RCMP, but also be independent from the two agencies.

There is also a need to involve prosecutors in matters of witness protection. Prosecutors ultimately make decisions about whether and how to proceed with a prosecution and whether to continue a prosecution in light of a disclosure requirement that may place the life of a witness or source in jeopardy. Prosecutors are responsible for making claims of informer privilege and claims under sections 37 and 38 of the *Canada Evidence Act*. They are also required to justify to the court the use of partial anonymity measures to protect vulnerable witnesses. As discussed in Chapter III, many of these prosecutorial functions in terrorism cases should be performed by the proposed Director of Terrorism Prosecutions.

8.6.6.2 Lack of Firewall between Investigative Units and the WPP

At present, the Commissioner of the RCMP is responsible for the WPP. Because the ultimate decision-making power in the WPP currently resides within the RCMP, which also has an interest in seeing investigations and prosecutions proceed, the lack of an effective "firewall" can create the impression that the interests of the protectee might be sacrificed to serve the ends of an investigation. A perception that the Program is not fair will deter potential witnesses from coming forward.

The RCMP claims to have established a firewall between its investigative and WPP units to ensure the independence of the investigative function from the witness protection function. However, the evidence before the Commission shows that the firewall has not achieved an adequate separation.[214] As a result, investigative units may inappropriately interfere with the protective measures offered to protectees, to their detriment.

The House of Commons Standing Committee on Public Safety and National Security recommended that the RCMP not make decisions about witness admission and protection agreements, but that it should be responsible for threat assessments, determining the necessary level of security and implementing protective measures.[215]

8.6.6.3 Inadequate Conflict Resolution Mechanisms

The very nature of witness protection implies a significant power imbalance between the protectees and those protecting them. This imbalance permeates the current conflict resolution and complaints process.[216] Protectees require RCMP assistance to remain safe, so they are naturally reluctant to raise complaints about the way the RCMP runs the WPP. Dandurand testified that one of the main challenges of conflict resolution in the WPP is that protectees find themselves in conflict with the organization that affords them the protection they need.[217] Since all current methods of dispute resolution are initiated by the protectees, Dandurand maintained, protectees will be reticent about asserting their rights. Asserting rights through a complaint amounts to "biting the hand that feeds them."[218] [translation]

The conflict resolution process for protectees begins at the level of the WPP handler or coordinator, where most disagreements can be resolved.[219] However, if a protectee is not satisfied by a decision taken at this level, the complaint

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214 Geoffrey Frisby testified that, in his experience, the policy of a strict firewall between protective and investigative units is "not real at all": Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, p. 8827. Frisby spoke of instances of contact between investigators and their protected witnesses in which the investigators attempted to sway a WPP unit's decision regarding a given witness and his/her treatment: Testimony of Geoffrey Frisby, vol. 70, October 31, 2007, pp. 8825-8826. Régis Bonneau also described communications between investigators and witness protection to resolve conflicts as "an avenue that's used regularly" [translation]: Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9792. Furthermore, the funding for the protection measures extended to a given protectee comes from the investigative budget. This further decreases the independence of the WPP from the rest of the RCMP: see, for example, Testimony of Régis Bonneau, vol. 77, November 16, 2007, pp. 9800-9801. Finally, the Commission heard that what little independence may exist at the level of the coordinators is nearly erased at the upper levels of the RCMP, since the officers who are ultimately responsible for the WPP, the Commissioner and the Assistant Commissioner, Federal and International Operations, also oversee the operations of investigative units: Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, p. 8756.

215 House of Commons Report on the Witness Protection Program, p. 26.

216 Testimony of Paul Kennedy, vol. 70, October 31, 2007, p. 8875.

217 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, p. 8703.

218 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, p. 8704.

219 Testimony of Régis Bonneau, vol. 77, November 16, 2007, pp. 9790-9791. According to Bonneau, roughly 50 per cent of all complaints are resolved at this level.

may be addressed to more senior officers of the WPP/RCMP, and make its way eventually to the Commissioner or his or her delegate.[220] Bonneau estimated that roughly 75 per cent of all protectee complaints can be resolved within the RCMP.[221]

For those issues that cannot be resolved within the RCMP to a protectee's satisfaction, the protectee may complain to the Commission for Public Complaints Against the RCMP (CPC). However, this option is often of little use to the protectee, since the CPC does not generally receive full access to the documents it might require to render a decision. Furthermore, its decisions are not binding on the RCMP Commissioner, who may substitute findings of fact or simply ignore the decision. For these reasons, the CPC does not appear to be the ideal venue for complaints from protectees in terrorism matters.

The only option today for a protectee to obtain a decision that binds the RCMP is to take time-consuming legal action. This usually involves either filing a civil action in provincial courts or presenting a *certiorari* or *mandamus* motion in the Federal Court. Adding to this problem is the lack of readily available legal advice on the merits of complaints against the RCMP.

Any new witness protection program should aim to render unnecessary any reliance on either the CPC or litigation. A new program should be more witness-centred and take the interests of witnesses into account in protection matters. It should also include dispute resolution mechanisms that respect the absolute need for confidentiality in witness protection matters.

There should be continuity with respect to dispute resolution so that a single grievance, that might not seem serious if viewed in isolation, can be seen in the broader context of the protectee's entry and history in the Witness Protection Program. As has been suggested, an independent person could play an ombudsperson's role in resolving disputes about protection.[222] In addition, private and binding arbitration by a retired judge or other respected individual, preferably legally trained, could also play a role. A binding arbitration clause could be included in protection agreements that would prevent protectees from litigating their disputes in the courts, at least at first instance, in exchange for an efficient, credible and confidential system of dispute resolution. Such an approach is especially necessary in the terrorism context, where sensitive national security matters might complicate the resolution of protectee concerns.

8.6.6.4 The Need to Restructure the WPP in Terrorism Matters

The current WPP model is ill-suited for terrorism matters for the three main reasons described earlier:

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220 Testimony of Régis Bonneau, vol. 77, November 16, 2007, pp. 9790-9791. Currently, the Commissioner's delegate, according to s. 15 of the *Witness Protection Program Act*, is the RCMP's Assistant Commissioner, Federal and International Operations.

221 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9791. According to Bonneau, roughly 50 per cent of all complaints are resolved at the level of the handler and coordinator, while another 25 per cent are resolved by officers in the upper echelons of the RCMP.

222 Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8651-8652.

- The WPP is not equipped to provide continuity in the handling of CSIS sources who may become witnesses;

- The approach of the WPP is too rigid to respond to the varying needs of witnesses in terrorism cases and is based on an implicit assumption that most protectees have a criminal background; and

- The management functions of the WPP lack independence from the investigative teams within the RCMP.

These reasons provide a strong case for the adoption of a terrorism-specific approach when dealing with the witnesses and sources who may help in terrorism investigations and prosecutions. They also point to a need to facilitate the interagency cooperation that is essential for effectively dealing with terrorism.

8.6.7 A New Body to Manage Witness Protection: A National Security Witness Protection Coordinator

Recent reviews of witness protection issues have favoured establishing a separate body to administer and manage the WPP. For example, the House of Commons Standing Committee on Public Safety and National Security recommended this approach its March 2008 report:

> [E]ntrust the administration of the Witness Protection Program to an independent Office within the Department of Justice. A multidisciplinary team from the Office, which could consist of police officers, Crown attorneys and psychologists and/or criminologists with appropriate security clearance, should be responsible for making decisions about witness admission and for monitoring of protection agreements. Police forces should be responsible for threat assessments, determining the level of security and implementing the protective measures.[223]

The Standing Committee reasoned that a multidisciplinary team would be in a much better position to "…strike a balance between the public interest (vis-à-vis the risk posed by a witness's participation in the Program) and the interests of the prosecution (from the police standpoint)."[224] The Committee referred to the testimony before it of Nick Fyfe, Director of the Scottish Institute for Policing and Research and Professor of Human Geography. Fife testified that "…having that kind of group taking those decisions, one that is slightly removed from the police, may offer a more independent and perhaps more dispassionate view of whom it is appropriate to protect and who would be included and who should be excluded from these programs."[225]

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223 House of Commons Report on the Witness Protection Program, p. 26.
224 House of Commons Report on the Witness Protection Program, pp. 25-26.
225 House of Commons Report on the Witness Protection Program, p. 26.

Dandurand, former police officer Mark Lalonde and Boisvert also stated their support for reform similar to that proposed by the Standing Committee.[226] Dandurand testified that an independent organization would enhance the image and credibility of the WPP. Individuals who were considering cooperating in an investigation or prosecution would immediately know that they were dealing with an organization that had a mandate to protect them, rather than simply to conduct investigations. "[I]n terms of perceptions," he testified, "it is crucial."[227] [translation]

Separate administration of witness protection matters may also enhance the credibility of witnesses. The fact that a witness receives money for assistance or a living allowance for protection may undermine the credibility of the witness at trial. The defence may argue that the testimony of the witness is being "bought" by the police or the Crown. However, there will be less merit in such claims if a separate body decides the awards and living allowances. Such a separate body, headed by a person who inspires public confidence, may also be able to explain the need for protection measures including, when necessary, lump sum payments. The person heading this body should not hesitate to speak out about the difficult situations experienced by some witnesses, as well as of the vital public service that witnesses provide.

Some parties before the Commission rejected the notion of a separate body to administer witness protection. For example, Souccar argued that only the police have the experience and expertise to handle and protect human sources, and also to admit them to and terminate them from the WPP.[228] He was satisfied that, although some improvements were warranted, the WPP was working well and that "it's not broken." In its Final Submission, the Air India Victims Families Association (AIVFA) recognized the need for independence of the investigative and protective units, but argued that an independent agency would lack expertise and that it did not make sense to create one.[229]

The core logic in proposals for a new agency is to insulate decisions about protection of witnesses from decisions about investigations and prosecutions. Decisions about witness protection have direct implications which go beyond policing, affecting in particular the rights and interests of the witnesses and, more broadly, the administration of justice. Boisvert argued that it would be inappropriate to leave decisions about using the services of a witness and offering witness protection in the hands of the police exclusively:

> When you want to establish procedures and use the services of a collaborator for whom the human cost will be significant, a decision must be made as to how justice can best be

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226 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, pp. 8707-8708; see also Testimony of Mark Lalonde, vol. 68, October 29, 2007, pp. 8652-8653 and Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, pp. 8745, 8765.

227 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, p. 8735.

228 Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8968-8969.

229 AIVFA Final Written Submission, pp. 171-172.

> served. An analysis must be conducted … a cost-benefit analysis naturally, but also an analysis of the human cost and the decision's impact on the administration of justice. In my opinion, this decision should not be left to just the police. The police are certainly major players. They have significant expertise, but it seems to me that it isn't for the police to determine, on their own, whether to use a witness who will then have to be protected, and whether, ultimately, the case will be prosecuted.[230] [translation]

Many jurisdictions, including Belgium,[231] Italy[232] and Quebec, use a multidisciplinary approach to witness protection, an approach also supported by the recent House of Commons Standing Committee on Public Safety and National Security.[233]

In Quebec, witness protection decisions were recently removed from the Sûreté du Québec, although it continues to provide physical protection. Decisions about other aspects of protection are now made by a committee with representatives from four agencies: the Department of Justice (Québec), the police force that recruited the witness, the Ministère de la sécurité publique and the Direction générale des services correctionnels.[234] No prosecution may use the testimony of a "collaborator" witness until a protection agreement is negotiated with the committee.

In terrorism matters, the bodies likely to have the interest and expertise to be involved in decisions regarding witness protection include the RCMP, CSIS, the National Security Advisor (Privy Council Office), the federal Department of Justice as represented by the proposed Director of Terrorism Prosecutors, Public Safety Canada, Immigration Canada, the Correctional Service of Canada and, especially when international agreements are involved, the Department of Foreign Affairs and International Trade.

There is a danger that putting representatives of each of these agencies on a committee that has decision-making power might result in bureaucracy and delay. This would be dangerous, given that decisions in terrorism matters

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230 Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, p. 8765.

231 In Belgium, the Witness Protection Commission, an independent agency comprising representatives from the Attorney General, the King's Counsel, the General Directorate for Operational Support, the Ministry of Justice and the Ministry of the Interior, decides any matters relating to the extension, modification or removal of protective measures for witnesses, as well as financial awards/aid. See Anne-Marie Boisvert, "La protection des collaborateurs de la justice: éléments de mise à jour de la politique québécoise" (June 2005), p. 20, online: Sécurité publique Québec <http://www.msp.gouv.qc.ca/police/publicat/boisvert/rapport_boisvert_2005.pdf> (accessed June 2, 2009) [Boisvert Report on the Protection of Justice Collaborators].

232 In Italy, the Central Witness Protection Commission makes the decisions to admit or refuse witnesses, based on recommendations from government prosecutors. Another agency, the Central Witness Protection Service, is responsible for the practical aspects of the program. This last agency is part of the Criminal Police Central Directorate, which answers to the Department of Public Security: Boisvert Report on the Protection of Justice Collaborators, p. 20.

233 House of Commons Report on the Witness Protection Program, pp. 25-26.

234 See Boisvert Report on the Protection of Justice Collaborators, p. 14.

may have to be made quickly. For example, an intelligence investigation may discover evidence of criminality and quickly have to be converted into a criminal investigation. Arrangements for the protection of CSIS sources may have to be made quickly in such cases. Even where the Crown will assert police informer and other privileges, the National Security Witness Protection Coordinator will need to have contingency plans that can be implemented quickly should identifying information about a human source be disclosed.

To ensure quick and decisive action, the Commission calls for the creation of a position of "National Security Witness Protection Coordinator" to deal with witness protection issues in terrorism matters. Wherever possible, this person should consult closely with the various agencies listed above. In almost all cases, the Coordinator will have to work very closely with CSIS, the RCMP and prosecutors. At the same time, the Coordinator should be independent of all these agencies and have ultimate power to make decisions in witness protection matters.

The National Security Witness Protection Coordinator would generally become involved after a decision has been made to commence a terrorism prosecution that would require witness and source protection. The National Security Advisor[235] may have already carefully examined the case and may have even consulted the National Security Witness Protection Coordinator to obtain independent advice about witness protection options. In appropriate cases, the National Security Advisor may have made a decision, such as that made in the post-bombing investigation in the Air India case, that CSIS sources should be made available to the RCMP.

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

- assessing the risks to potential protectees resulting from disclosure and prosecutions, as well as making decisions about accepting an individual into the Witness Protection Program and the level of protection required;
- working with relevant federal, provincial, private sector and international partners in providing the form of protection that best satisfies the particular needs and circumstances of protectees;
- ensuring consistency in the handling of sources and resolving disputes between agencies that may arise when negotiating or implementing protection agreements (this function would be performed in consultation with the National Security Advisor);
- providing confidential support, including psychological and legal advice, for protectees as they decide whether to sign protection agreements;
- negotiating protection agreements, including the award of payments;

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235 As explained in Chapter II.

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

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

The Coordinator would not recruit sources or make decisions about the coordination of intelligence or the appropriateness of criminal prosecutions. Such matters would fall to the National Security Advisor and to the appropriate prosecuting authorities. The Coordinator could, however, provide advice to the National Security Advisor and to prosecutors about options for witness protection.

The position of the National Security Witness Protection Coordinator would be recognized in amendments to the *Witness Protection Program Act*. These amendments would also mean that the RCMP Commissioner would no longer administer the Witness Protection Program in national security matters.

The National Security Witness Protection Coordinator should be a respected, independent individual, such as a retired judge, who would be chosen for his or her knowledge and experience in criminal law, national security issues and witness protection. He or she could consult widely, but ultimately would have the power to make final and binding decisions about witness protection in terrorism cases.

The Coordinator should provide an impartial public interest perspective in disputes between intelligence and police agencies. Perhaps as important, the Coordinator could serve as a voice for the witnesses and sources whose lives may be so profoundly affected by matters of witness protection. Finally, the Coordinator could press the government for appropriate resources and cooperation in witness protection matters. The Coordinator would have ready access to the National Security Advisor. In cases where the National Security Advisor had made decisions involving the transfer of sensitive sources from CSIS to the RCMP, the Coordinator would work closely with CSIS and the RCMP to

ensure that the transition would be as smooth as possible. This is the minimum required if intelligence provided by secret CSIS sources is to be converted into testimony in a terrorism prosecution.

The Coordinator's independence would allow him or her to defend the terms of witness protection agreements. Because the police would have no control over administration of witness protection, there would be no appearance that the police were "buying" testimony through an offer of witness protection.

The Coordinator should stress flexibility and the need for quick and decisive action in matters of witness protection. The Coordinator should not take a "one-size-fits-all" approach to protection. He or she should look at each case and try to devise workable and sustainable protection agreements that minimize the considerable hardships relating to life under witness protection.

Life under the WPP will never be easy, and the National Security Witness Protection Coordinator should consider alternative protection measures, including international transfers, lump sum payments and arrangements with the private sector. Such measures may in some cases be just as effective in providing safety and peace of mind for witnesses as their entry into a life-changing witness protection program. The Coordinator should consider the least restrictive protective options that provide sufficient protection. He or she should be a creative, hands-on presence in matters of witness protection.

The RCMP and CSIS will, of course, remain free to develop their own sources and agents. However, the National Security Witness Protection Coordinator, perhaps in consultation with the proposed Director of Terrorism Prosecutions, could provide guidance to the agencies that would discourage handlers from acting improperly, such as by using deceit, showing insensitivity about problems that witnesses and sources encounter, and making inappropriate or unrealistic promises of anonymity. The Coordinator could also conduct "lessons learned" analyses of past cases to enable the agencies to make better source handling decisions in the future.

Although some aspects of witness protection agreements for those who testify may be subject to disclosure under the broad disclosure rights set out in *Stinchcombe*[236] or as records held by third parties under *O'Connor*,[237] other aspects may be covered by informer privileges or by specified public interest or national security privileges under sections 37 and 38 of the *Canada Evidence Act*. In addition, section 11 of the *Witness Protection Program Act* prohibits the direct or indirect disclosure of the location or change of identity of a person who is in or has been in the WPP, subject to limited exceptions including when the innocence of the accused is at stake.

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236 [1991] 3 S.C.R. 326. See Chapter V for a discussion of the breadth of such disclosure obligations. For an application of *Stinchcombe* with respect to witness protection matters, see *R. v. McKay*, 2002 ABQB 335.

237 [1995] 4 S.C.R. 411. See Chapter V for a discussion of these procedures for obtaining records from a third party not subject to *Stinchcombe*. For an application of *O'Connor* with respect to witness protection matters, see *R. v. James; R. v. Smith*, 2006 NSCA 57, 209 C.C.C. (3d) 135.

For purposes of the informer privilege, the National Security Witness Protection Coordinator should be considered a part of law enforcement, and it should be clear that the passing of information to the Coordinator would not in itself defeat claims of informer privilege.[238]

The assignment of powers to the National Security Witness Protection Coordinator to make witness protection decisions avoids the danger of creating one more layer of bureaucracy that might be required should an interdisciplinary and multi-agency committee have the power to make decisions. The Coordinator could and should consult with multiple agencies.

There should be firm time limits for decisions about witness protection. The requirements for witness protection must be widely known and generous. The most efficient organizations to spread the knowledge would be agencies such as the RCMP and CSIS.

8.6.7.1 Judicial Review of the National Security Witness Protection Coordinator's Decisions

In the absence of a privative clause, the National Security Witness Protection Coordinator's work could be subject to judicial review pursuant to the *Federal Courts Act*.[239] In the Commission's view, the decision by the Coordinator to admit or refuse a person entry into a witness protection program should not be subject to judicial review. Still, there may be a role for judicial review of disputes between protectees and those who administer the program, but only after they have exhausted an internal and confidential mediation and arbitration processes.

8.6.7.2 The Decision to Admit or Refuse Entry to Witness Protection

Admission to witness protection must advance the particular investigation and also be in the public interest. To assess the public interest, a broad set of factors must be considered.

The factors will vary from case to case. An RCMP witness seeking protection may have been a source for CSIS in the past, which may limit the viability of that person as a witness. There may also be international implications to providing protection where a witness is being targeted by a foreign service or is wanted by a foreign law enforcement agency, or where the witness may ultimately be moved out of Canada to afford protection. It may also be necessary to assess the proposed evidence of the witness, both to determine its value to the prosecution and to assess whether it could reveal sensitive information. These factors involve considering sensitive issues that render judicial review inappropriate.

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238 See also Chapter IV, where it is suggested that the passing of information from CSIS to law enforcement officials under s.19 of the *CSIS Act* should not in itself defeat any subsequent claims of informer privilege.

239 R.S.C. 1985, c. F-7.

It ought to be the purview of the Coordinator to decide on protection by taking into account the exigencies of the particular investigation and the impact of such a decision across a variety of interests. This decision must be free from judicial review and interference. The judiciary is not part of the investigative machinery of the state, save to protect individuals from state excess.[240] Absent a potential constitutional infringement, the judiciary should not sit in review of decisions about how to conduct an investigation.

No person has a right to be admitted to a witness protection program. The decision to admit does not engage any constitutional issues. It rests solely within the discretion of the state.

Some applicants will be disappointed if they are refused admission. That should not give rise to a legal right to challenge the refusal. The reasons for refusing admission will often involve strategic issues of national security that cannot be disclosed to the person – nor should they be disclosed. This is not akin to seeking a government benefit where there is some entitlement to that benefit. This program is an investigative device to support national security investigations, not an entitlement. Viewed in that light, it is obvious that judicial review is inappropriate.

For this reason, there should be a privative clause prohibiting both judicial review of and appeals from the decision of the National Security Witness Protection Coordinator to admit or refuse to admit an individual into the witness protection program.

8.6.7.3 Dispute Resolution

When being admitted to the WPP, the protectee must come to an agreement about the terms of protection. These terms will identify the respective legal obligations, entitlements and duties of the protectee and the program including, in most cases, the RCMP.

During the period of protection, disputes may arise between the RCMP and the protectee. There must be a dispute resolution mechanism to deal with the myriad of issues that may arise. It would make sense for the National Security Witness Protection Coordinator or a person delegated by the Coordinator, rather than the courts, to address these disputes. The Coordinator might wish to delegate binding decisions to a third party to enable the Coordinator to serve as an ombudsperson or a mediator.

It is important that there be continuity with respect to dispute resolution. The same person should resolve all disputes between a given protectee and the RCMP. Continuity ensures that disputes are viewed not only in light of the current situation, but also in light of the history of the file. This ensures the long-term

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240 This is the constitutional justification for prior judicial authorization for invasions of privacy. Certainly, the judiciary determines if the state will be permitted the investigative tool that invades privacy (for example, a search warrant). However, that is a necessary byproduct of protecting the individual's right to privacy.

viability of protection in a given case. For this reason, all protectees should have to accept that all disputes be dealt with in the first instance by the Coordinator or the Coordinator's delegate.

The Coordinator should have the authority to determine the process by which disputes are resolved. The process should be flexible, not formal and "court-like." Given the interests at stake, a private arbitration of the dispute is the most appropriate way to ensure that the various interests are represented and issues resolved. Privacy will often be necessary to ensure the safety of the protectee and protect the state's interest in safeguarding sensitive information.

There must be sufficient substantive protections for the protectee. At a minimum, the protectee should be represented by counsel, if desired, and be provided an opportunity to be heard. This would include the right to put supporting information before the Coordinator or the person designated by the Coordinator to address disputes. If the protectee could not afford counsel, the federal government should cover the cost in accordance with Treasury Board guidelines.

Given that the adjudication of rights and obligations is involved, it is appropriate for the dispute resolution decisions of the Coordinator or his or her delegate to be reviewable by the Federal Court pursuant to section 18 of the *Federal Courts Act*. Although the Court would determine the nature of the review, considerable deference ought to be afforded to the arbitration process developed by the Coordinator. In dealing with protection matters, the Coordinator would have expertise akin to that of many specialized tribunals that operate within federal jurisdiction. It is important that the Coordinator be afforded the flexibility to devise the process and that rules of evidence not frustrate the process. With these principles in mind, the aims of the witness protection program and the reasonable concerns of the protectee can be harmonized. However, judicial review is appropriate as an ultimate safeguard to ensure that substantive protections are afforded to the parties.

Recommendation 24:

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

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

Where appropriate and feasible, the Coordinator should consult any of the the following on matters affecting witness and source protection: the RCMP, CSIS, the National Security Advisor, the proposed Director of Terrorism Prosecutors,

Public Safety Canada, Immigration Canada, the Department of Foreign Affairs and International Trade and the Correctional Service of Canada. The Coordinator would generally work closely with CSIS and the RCMP to ensure a satisfactory transfer of sources between the two agencies.

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

- assessing the risks to potential protectees resulting from disclosure and prosecutions, as well as making decisions about accepting an individual into the witness protection program and the level of protection required;
- working with relevant federal, provincial, private sector and international partners in providing the form of protection that best satisfies the particular needs and circumstances of protectees;
- ensuring consistency in the handling of sources and resolving disputes between agencies that may arise when negotiating or implementing protection agreements (this function would be performed in consultation with the National Security Advisor);
- providing confidential support, including psychological and legal advice, for protectees as they decide whether to sign protection agreements;
- negotiating protection agreements, including the award of payments;
- providing strategic direction and policy advice on protection matters, including the adequacy of programs involving international cooperation or minors;
- providing for independent and confidential arbitration of disputes that may arise between the protectee and the witness protection program;
- making decisions about ending a person's participation in the program;
- acting as a resource for CSIS, the RCMP, the National Security Advisor and other agencies about the appropriate treatment of sources in terrorism investigations and management of their expectations;
- acting as an advocate for witnesses and sources on policy matters that may affect them and defending the need for witness protection agreements in individual cases.

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

8.6.8 Other Issues Relating to Witness Protection in Terrorism Cases

8.6.8.1 International Agreements

Relocating some witnesses within Canada may not protect them sufficiently. The WPPA allows the Minister of Public Safety to enter into a reciprocal arrangement with the government of a foreign jurisdiction which would enable a witness to be relocated to that jurisdiction.[241] Two such agreements were signed as of April 2007, and a further two with international tribunals in June of that year.[242] However, Souccar testified that Canada's size allowed it to "…relocate and ensure the safety of an individual…in Canada fairly well." A more typical situation would be for other countries to seek to transfer their protectees to Canada.[243] As of June 2007, 27 foreign protectees had been admitted to Canada's WPP.

Once a Canadian witness is enrolled in a foreign witness protection program, the Canadian WPP cannot address the safety concerns of that witness as capably as if the witness were in Canada. Accordingly, WPP officials must have confidence in the foreign program before relocating a witness.[244] Dandurand testified that it is not easy to evaluate the trustworthiness of foreign police forces, programs and public servants, but that RCMP liaison officers abroad should be able to help.[245]

It is likely that international relocation will be considered only in very exceptional circumstances. The witness may be needed during trial preparation and testimony, which can last many years, so international relocation during that period would not be practical. For a Canadian protectee, adapting to a life in a foreign country may be even more difficult than adapting to a life elsewhere in Canada. In addition, there are administrative challenges to transferring a protectee. Nonetheless, international relocation remains a possibility and has been used in several cases.

If the Minister of Public Safety makes arrangements with additional foreign jurisdictions, Canadian protectees will benefit from a wider range of choices for relocation. This is likely to be particularly beneficial for protectees from certain ethnic, cultural or religious communities because the added choice may help them to find an environment in which they are comfortable. For this reason, the Commission encourages the Minister of Public Safety to explore further international arrangements under section 14 of the WPPA.

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241 *Witness Protection Program Act*, s. 14(2).

242 Exhibit P-274, Tab 5: Letter, June 27, 2007, signed on behalf of Beverley A. Busson, RCMP to Gary Breitkreuz, President, House of Commons Standing Committee on Public Safety and National Security, p. 1. Section 14(3) of the *Witness Protection Program Act* allows the Minister of Public Safety to enter into an arrangement with an international criminal court or tribunal.

243 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8938; Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8977-8978.

244 Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8977-8978.

245 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, pp. 8697-8698.

8.6.8.2 Independent Legal Advice for Protectees

As noted earlier, witnesses negotiating entry into the WPP do so from a position of weakness, since they are highly dependent on the protection that the WPP can offer.[246] They are often frightened by the threats they face and may not fully understand how entering the program will affect their lives. They may feel pressure to accept a protection agreement as it is presented to them, and they may also lack the understanding to ask important questions about their rights and obligations and the obligations of others.

Souccar testified that the protective measures provided by the WPP cannot be "negotiated down" to less than those required to ensure the safety of the protectee. However, several other important aspects of the protection agreement can be negotiated.[247] Examples include the living conditions of the protectee,[248] the relocation site,[249] visitation rights and the frequency of family visits[250] and the number of family members who may be admitted to the WPP.[251]

Several witnesses before the Commission called for protectees to have access to independent legal advice.[252] In its March 2008 report on the WPP, the House of Commons Standing Committee on Public Safety and National Security reached a similar conclusion.[253]

Some officials told the Commission that independent legal advice was being made available to prospective protectees, but this claim conflicted with the findings of the survey[254] of protectees conducted by Commission counsel (with the assistance of the RCMP) and with the recent report of the Standing Committee. That report stated that, at present, potential protectees negotiating with the RCMP for protection are not offered the services of a lawyer.[255] As well, Commission counsel examined several versions of the Sample Protection Agreement.[256] Only one version mentioned the availability of independent legal advice for the protectee. None of the agreements contained a clause for the protectee to indicate that he or she had either obtained or declined such advice.

The WPP should ensure that individuals are informed in writing, where practical, about the availability and importance of independent legal advice, and explain

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246 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, p. 8701.
247 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8924-8925.
248 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9810.
249 Testimony of Raf Souccar, vol. 71, November 1, 2007, p. 8950.
250 Testimony of Régis Bonneau, vol. 77, November 16, 2007, p. 9775.
251 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8908.
252 Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, p. 8761; see also Testimony of Yvon Dandurand, vol. 69, October 30, 2007, pp. 8700-8701.
253 House of Commons Report on the Witness Protection Program, p. 28.
254 The general findings of this survey are discussed above. Some 62 per cent of respondents stated that they had not been offered independent legal advice during the negotiation of their protection agreement.
255 House of Commons Report on the Witness Protection Program, p. 27.
256 See Exhibits P-273, Tab 1 and P-274, Tabs 3, 7, 8.

that the WPP will pay the reasonable costs of the advice.[257] In addition, protection agreements should be revised to include a clause for the prospective protectee to sign confirming that he or she has been advised of the availability of free independent legal advice and that the advice was either obtained or declined.

It may be necessary as well to require that counsel be security-cleared, since counsel might need access to information covered by national security privilege in order to advise the protectee knowledgeably.

Independent legal advice could equally be warranted for other agreements involving witnesses at risk, such as a release and indemnity agreement. It would also be useful in dealing with a notice of termination from the WPP, particularly where termination might jeopardize the protectee's safety.

8.6.8.3 Psychological Evaluations

Several RCMP officials[258] testified about the psychological challenges of life in the WPP. As well, Dandurand told the Commission that the limited research on this topic revealed that protectees often "…find … themselves quite depressed and despondent and having a very difficult time adapting." Dandurand concluded that this caused many protectees to withdraw from the WPP.[259]

Psychological assessments can help to evaluate a protectee's capacity to adapt to the rigours of the WPP. They can detect signs of depression, the risk of suicide and substance abuse problems. The WPP provides psychological help to protectees after they join the WPP if they request or accept assistance. However, psychological assessments before entry to the WPP are not conducted as frequently as required. Section 7 of the WPPA obliges the RCMP Commissioner to consider a range of factors to determine whether prospective protectees are admitted the WPP. One factor is "…the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness."[260] The evidence shows that WPP coordinators perform this evaluation themselves,[261] rather than relying on psychologists or psychiatrists. Furthermore, the WPP does not have psychologists on staff.

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257 The House of Commons Standing Committee on Public Safety and National Security called for similar measures in recommending that "…the *Witness Protection Program Act* be amended so that potential candidates are automatically offered the aid of legal counsel with an appropriate security clearance during the negotiation of the candidate's admission to the Witness Protection Program and the signing of the protection contract. The fees of such counsel should be paid by the independent Office responsible for witness protection at the Department of Justice": House of Commons Report on the Witness Protection Program, p. 28.

258 See, for example, Testimony of Geoffrey Frisby, vol. 69, October 30, 2007, p. 8794. See also Testimony of Régis Bonneau, vol. 77, November 16, 2007, pp. 9764-9765.

259 Testimony of Yvon Dandurand, vol. 68, October 29, 2007, pp. 8681-8682.

260 *Witness Protection Program Act*, s. 7(e).

261 Testimony of Raf Souccar, vol. 70, October 31, 2007, p. 8915. Former WPP Coordinator Geoffrey Frisby testified that he would generally conduct these assessments himself, but that he had access to a psychologist when required: Testimony of Geoffrey Frisby, vol. 69, October 30, 2007, p. 8800.

The House of Commons Standing Committee on Public Safety and National Security recommended in its March 2008 report that the WPPA be amended to require an automatic psychological assessment of candidates over the age of 18, including family members, before any candidate is admitted to the WPP, particularly when a change of identity is being considered.[262]

This recommendation makes sense. In terrorism investigations and prosecutions, psychological evaluations could help the National Security Witness Protection Coordinator make decisions about admitting individuals into the witness protection program. Evaluations could also help to ensure that protective measures are tailored to individual needs. However, evaluations can also constitute relevant material that may have to be disclosed to the accused if it relates to the testimony of the witness and is not in an exempt category.

8.6.8.4 Witnesses who are Minors

To date, all minors who have entered the WPP have done so as family members of an adult protectee. The adult protectee signs the protection agreement for children who are admitted. However, the current WPP admission process and RCMP policies make no provision for minors who enter the WPP as individual protectees. While this situation has yet to arise, there may come a time when a key witness in a terrorism case will be a minor who needs protection.

Dandurand told the Commission that the issue of minors as individual protectees has been given very little thought both in Canada and abroad. He suggested that this is in large part because the major drug and organized crime cases that have been at the root of most developments in witness protection do not usually involve witnesses who are minors. However, he said, terrorism investigations and prosecutions are more likely to involve minors.[263] For example, four of the original alleged co-conspirators in the ongoing "Toronto 18" terrorism prosecution[264] were minors, as is the one person who had been convicted at the time of writing. Informers with information about accused who are minors may well come from that same age group. In addition, an alleged conspirator who is a minor might choose to testify against associates. In such cases, the minors might need witness protection.

If a minor decided to help authorities to investigate members of the minor's family, possibly even the parents, the parents could not be expected to act in the best interests of the minor in witness protection matters. It would then be necessary to have in place a process that would enable some authority other than the parents to make decisions on behalf of the minor.

If a minor becomes a witness in a terrorism case, other issues arise:

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262 House of Commons Report on the Witness Protection Program, p. 27.
263 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, pp. 8701-8702.
264 *R. v. N.Y.*, unreported decision, September 25, 2008 (Ontario Sup. Ct.) Court File YC-07-1587.

- whether a minor can decide alone to cooperate with the authorities and enter the WPP, or whether a minor's guardian(s), or even youth services agencies, could prevent the minor from entering the WPP (or whether they could force the minor to enter the WPP); and
- how to deal with possible variations among provincial youth protection statutes that might in turn impose differing requirements on handling witnesses who are minors.

Several witnesses before the Commission called for an examination of methods of dealing with witnesses who are minors.[265] As recommended above, the National Security Witness Protection Coordinator would be responsible for strategic direction and policy advice to guide CSIS, police forces, Crown prosecutors and the WPP when handling witnesses who are minors. The Coordinator should be able to consult with relevant officials, including provincial child welfare authorities, on these matters.

8.6.8.5 Collaborators who are Inmates

Some protectees acquired their knowledge of targeted organizations while participating in the illegal activities of those organizations. They are criminals themselves and are described here as "collaborators." Because of their criminal activities, these collaborators may be facing or serving jail sentences. If sentenced to imprisonment of two years or more, imprisoned collaborators ("collaborator inmates") serve their sentence under the supervision of the Correctional Service of Canada (CSC).

The Commission heard evidence that collaborator inmates who testify against their organizations are generally despised by other inmates. There is a very real risk that they will be seriously harmed or killed in prison.[266] Pierre Sangollo, CSC Director of Intelligence and National Project Manager, Public Safety, suggested that collaborators can face an even greater risk if they testify against an international terrorist organization because inmates sympathetic to the organization's cause, but whose sympathies are unknown to the collaborator, might target the collaborator.[267]

The evidence before the Commission shows that the odds of a collaborator remaining anonymous during incarceration are extremely remote.[268] This, coupled with the apparently greater risk of retaliation in terrorism cases, creates a very dangerous situation for collaborator inmates connected with such cases.

Protecting collaborator inmates by using administrative segregation to isolate them from the general population is the general practice today.[269]

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265 See, for example, Testimony of Yvon Dandurand, vol. 69, October 30, 2007, p. 8701. See also Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, pp. 8776-8777.

266 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, p. 9835. See also Testimony of Michael Bettman, vol. 77, November 16, 2007, pp. 9842-9843.

267 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, p. 9824.

268 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, p. 9834.

269 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, p. 9869; Testimony of Michael Bettman, vol. 77, November 17, 2007, pp. 9829, 9838.

CSC's objective is to find the least restrictive environment for collaborator inmates. Inmates in less restrictive environments have better access to programs, employment and education and can "move forward" in their correctional plans.[270] However, once anonymity is no longer possible, segregation is the only way to ensure protection for collaborator inmates.[271] Because of the high likelihood of being exposed, collaborators are likely to go directly from a segregation unit in the reception centre to one in a penitentiary. The evidence before the Commission clearly shows that, because of their frequent need for segregation, collaborators as a whole endure poorer conditions than those in the general inmate population.[272]

In some cases, collaborators testify before they are tried for the offences they may have committed. In such cases, collaborators are detained in local provincial facilities before testifying[273] and become the CSC's responsibility only when convicted. However, Sangollo noted that collaborators increasingly plead guilty and are sentenced before they testify. In this way, they may fall under the CSC's jurisdiction (if sentenced to two years or more) and receive protection from the CSC much earlier than would otherwise be the case. As a result, besides protecting those who have already testified, the CSC frequently needs to protect those who have yet to testify. Sangollo told the Commission that this places considerable strain on CSC resources and programs.[274] Furthermore, since the Crown will want access to its witness during the pre-trial and trial phases, moving the collaborator inmate to another region or province is impossible. Terrorism trials may be lengthy,[275] and a collaborator inmate may have to wait years to testify. During that time, the CSC will be unable to move the inmate to a "less restrictive environment," leaving the inmate in segregation.

The unfortunate result is that an important terrorism witness is likely to be held in segregation at the very time that the police and Crown need the full cooperation of the witness. This seems to be a recipe for serious problems. Collaborators who are isolated and unable to participate in prison programs might simply refuse to cooperate further. In most cases, the collaborator inmate will already have pleaded guilty and been sentenced, so there is nothing more for the inmate to lose and much to gain by ceasing to cooperate. Souccar reinforced this point when he told the Commission that an individual has little incentive to assist law enforcement if he or she is disadvantaged by providing that assistance.[276] Boisvert told the Commission that a perception that the worst

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270 Testimony of Michael Bettman, vol. 77, November 16, 2007, p. 9844.

271 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, pp. 9836-9837. This view is shared by Michael Bettman: Testimony of Michael Bettman, vol. 77, November 16, 2007, p. 9838.

272 For example, Dandurand told the Commission that collaborators often need to serve their whole sentence in isolation and in very difficult circumstances, particularly in psychological terms: Testimony of Yvon Dandurand, vol. 68, October 29, 2007, p. 8689. Boisvert told the Commission that the net result was for collaborator inmates to be systematically treated more harshly than those they help to convict: Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, p. 8767.

273 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, pp. 9819-9820.

274 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, pp. 9820-9821.

275 For more on this topic, see Chapter IX.

276 Testimony of Raf Souccar, vol. 71, November 1, 2007, pp. 8953-8954. This point was conceded by the Attorney General of Canada: Final Submissions of the Attorney General of Canada, Vol. III, para. 195: "With respect to witnesses in detention, it is submitted that the harsh detention conditions they may face are a disincentive to cooperation."

treatment awaits those who cooperate will doom the system to failure in the long term.[277]

Because of the importance of collaborator inmates in terrorism investigations and prosecutions, great care is required to avoid discouraging them from helping the authorities. Witnesses before the Commission proposed a variety of ways to prevent alienating collaborator inmates by improving their detention conditions. These included the following:

- transferring collaborator inmates to other Canadian penitentiaries or facilities in other countries;
- building a penitentiary or adequate facility for the exclusive use of collaborator inmates;
- creating a special wing within a larger penitentiary for collaborator inmates;
- creating a special unit in the middle of a military base; and
- transporting collaborator inmates away from the penitentiary for rehabilitation programs.[278]

Collaborators clearly deserve treatment that, to the extent possible given their security needs, is comparable to that given other inmates. They also need the same chances to obtain release under parole. At the same time, it is important to avoid giving collaborators preferential treatment, since this could be seen as "buying" their testimony and might affect their credibility as witnesses.

Given the range of possible solutions, the complexity of the collaborator inmate issue and the number of agencies that have an interest in the issue, some have called for an interdepartmental committee to consider protection options.[279] Certainly, federal agencies such as the CSC, the Attorney General of Canada, Immigration Canada, the RCMP and CSIS would wish to take part. The National Security Witness Protection Coordinator could help to air and resolve the concerns of these bodies and of collaborator inmates.

8.6.8.6 Investigative Hearings

The *Criminal Code* was amended in 2001 to allow investigative hearings in connection with "an investigation of a terrorism offence."[280] The investigative hearing provision lapsed in 2007 as the result of a five-year "sunset clause"[281] in

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277 Testimony of Anne-Marie Boisvert, vol. 69, October 30, 2007, p. 8769.

278 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, p. 9864. See also Testimony of Michael Bettman, vol. 77, November 16, 2007, pp. 9844-9845, 9878.

279 Testimony of Pierre Sangollo, vol. 77, November 16, 2007, pp. 9864-9865. The Attorney General of Canada favoured creating an interdepartmental committee, arguing that the committee could consider various options, including the international relocation of detained collaborators: Final Submissions of the Attorney General of Canada, Vol. III, para. 195. No other parties or intervenors made submissions about protecting collaborator inmates.

280 *Criminal Code*, s. 83.28(2).

281 *Criminal Code*, s. 83.32.

the *Anti-terrorism Act*.[282] Bill S-3, introduced on March 7, 2008, proposed to re-introduce these investigative hearings in the *Criminal Code*.[283] The Bill died on the Order Paper with the calling of the October 2008 federal election, but was revived in the House of Commons as Bill C-19 on March 12, 2009.[284]

Under the *Criminal Code* provision, a peace officer, with the consent of the Attorney General of Canada or a provincial Attorney General, could apply to a judge for an order for the gathering of information from a named individual. If the judge decided to hold a hearing, the judge would have the power to compel a person to testify. Section 83.29 of the *Criminal Code* provided for means to compel the attendance and cooperation of the person.

The only attempt to use investigative hearings occurred during the Air India trial, where the Supreme Court of Canada upheld their constitutionality.[285] The Court also stated that because investigative hearings are judicial hearings, there is a presumption that they will be held in open court.[286]

Witnesses who are compelled to appear before investigative hearings are likely to face the same threats, intimidation and retaliation as witnesses who testify in criminal trials or otherwise assist the authorities. It seems unlikely that a terrorist organization would view the compelled testimony of a witness at an investigative hearing any more charitably than it would view their testimony at trial. In his research paper, Dandurand was skeptical of claims that compelled witnesses would be insulated from threats and retaliation simply because they were compelled to cooperate. [287] He reinforced this point in his testimony.[288]

RCMP Superintendent Michel Aubin testified that the police could seek admission to the WPP for individuals who have been compelled to testify at investigative hearings.[289] In addition, he said, the RCMP might conduct a threat assessment at that point.[290] Souccar confirmed that the RCMP would be as proactive in identifying threats to compelled witnesses as it would be with other witnesses. He testified that RCMP investigators generally "…have a good sense of the individuals being investigated" and that "…should it be that the individual subject to the investigative hearing could potentially be at risk," the investigators would "…get ahead of the ball, ahead of the curve and either notify the individual [or] put measures in place." Souccar did not exclude the possibility that the RCMP might perform a formal threat assessment for the witness, should the situation warrant one.[291]

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282 S.C. 2001, c. 41.
283 *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Sess., 39th Parl., 2007-2008.
284 *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions*), 2nd Sess., 40th Parl., 2009.
285 *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248.
286 *Re Vancouver Sun* 2004 SCC 43, [2004] 2 S.C.R. 332.
287 Dandurand Paper on Protecting Witnesses, p. 43.
288 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, p. 8698.
289 Testimony of Michel Aubin, vol. 70, October 31, 2007, p. 8939.
290 Testimony of Michel Aubin, vol. 70, October 31, 2007, p. 8940.
291 Testimony of Raf Souccar, vol. 70, October 31, 2007, pp. 8940-8941.

Witnesses forced to appear before investigative hearings would appear to satisfy the broad definition of "witness" in section 2 of the WPPA, and therefore could presumably enter the WPP if a police force recommends entry. Under the proposals discussed earlier, the National Security Witness Protection Coordinator would advise about witness protection matters in investigative hearings. This could include considering any damage that compelling testimony might cause to the fragile trust between some communities and police and intelligence agencies. The Coordinator should also consider which protection measures could be used in a given investigative hearing when the witness may be inadvertently or deliberately identified to the public or the affected parties. This would avoid the present conflict of interest encountered by the RCMP. The RCMP, as the investigating force, may have an interest in conducting an investigative hearing to obtain information and evidence. It will also be in charge of determining whether the witness who is being compelled to testify in what may be a public hearing also needs witness protection.

The now-defunct investigative hearing provisions did not explicitly provide for the Crown or police to assess threats to compelled witnesses, nor does Bill C-19 impose such an obligation. As well, RCMP policy does not require a threat assessment for witnesses forced to appear before investigative hearings.

Investigative hearings are contentious, in part because they place an onerous obligation on the ordinary citizen. Dandurand stressed that the police must take immediate steps to ensure the protection of any witnesses asked or compelled to testify.[292] The authorities should fully explore less public and less coercive means to secure information from a person with information relevant to a terrorism investigation. An investigative hearing not only forces a reluctant human source to cooperate, but it also runs a real risk of disclosing that source's identity.

If investigative hearings are revived and if they are deemed to be necessary in a particular investigation, the RCMP is the police force most likely to apply for such hearings, and an Attorney General must support the requests. Both have at least an ethical obligation to ensure that appropriate protection measures are in place or available to those who are forced to provide information at an investigative hearing. They should also carefully consider the possibility that a person compelled to testify at an investigative hearing may later turn out to be a person who could be charged with a terrorism offence. Once the person has been compelled to testify at an investigative hearing, the state cannot use the compelled material or any material derived from that material against the person in subsequent proceedings.[293]

Under the Commission's proposals, the National Security Witness Protection Coordinator should be responsible for deciding whether witness protection was necessary for the subject of an investigative hearing.

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292 Testimony of Yvon Dandurand, vol. 69, October 30, 2007, pp. 8698-8699.

293 *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248 at paras. 71-72.

8.7 Conclusion

This chapter has described how, through threats and violence, including murder, extremists deter individuals from assisting police and intelligence agencies in terrorism investigations and prosecutions. Intimidation also discourages others from coming forward to help. The examples of intimidation relating to the investigation of the Air India tragedy showed clearly that too many individuals who assisted the state as witnesses and sources, or even merely spoke out against extremism, suffered unnecessary hardship. That is a deterrent, not an incentive, for others to volunteer, and a clear indication that witness protection needs were not being met. The Air India case also showed how community-wide intimidation can breed a dangerous silence among those best positioned to help investigate and prosecute terrorists.

The chapter has examined ways to reduce the potential danger to individuals who assist the authorities. Keeping the identity of such individuals completely secret can be achieved through a variety of mechanisms, including the police informer privilege or a non-disclosure order made under sections 37 or 38 of the *Canada Evidence Act*. Nevertheless, anonymity of sources, let alone witnesses, is not always possible if criminal prosecutions for terrorism offences proceed. In such cases, other measures – both legal and operational – can reduce the risk to witnesses and sources and help foster their willingness, and that of their communities, to help authorities. A range of partial anonymity alternatives between full disclosure and total anonymity may also reduce the risks that witnesses may face. These include the use of closed courts, publication bans, screens, videotaped testimony and testifying under a pseudonym.

Judges, like other justice system participants, need to understand the difficulties faced by some witnesses and sources. Judges should not hesitate to devise creative and reasonable solutions which can reconcile the demand for public disclosure on the one hand and the secrecy that may be necessary to protect witnesses and encourage potential witnesses, on the other.

The Witness Protection Program represents the most forceful response to threats against witnesses and sources. However, despite its excellent record in safeguarding the lives of protectees, the current Program is not fully attuned to the needs of sources and witnesses in terrorism investigations and prosecutions.

It is essential to have a flexible witness protection program that allows the precise level and method of protection to be tailored to the particular circumstances and needs of the protectee. This chapter discussed several ways to improve the current Program and to mitigate the difficulties that flow from entering the Program. These include the acquisition of a better understanding of the nature and needs of protectees in terrorism matters and the introduction of a process for making decisions about witness protection which is independent of the interests of police and prosecutors and which more closely reflects the interests of witnesses themselves.

A key element of witness protection reform is the proposed National Security Witness Protection Coordinator. The creation of this position would remove the administration of witness protection from the RCMP and prosecutors.

Even if a witness protection program becomes more closely attuned to the needs of witnesses and sources, entering the program can painfully disrupt the lives of protectees and of those around them. The best-designed and most humane witness protection programs cannot avoid imposing this hardship. For this reason, the human dimension of witness protection must always figure prominently in decisions about how and when to use witnesses and sources in terrorism investigations and prosecutions.