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

CHAPTER IX: MANAGING THE CONSEQUENCES OF DISCLOSURE: THE AIR INDIA TRIAL AND THE MANAGEMENT OF OTHER COMPLEX TERRORISM PROSECUTIONS

9.0 Introduction

The Commission's terms of reference require the Commissioner to make findings and recommendations about "…whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation." They also specifically ask what "changes in practice or legislation" are required to address the challenges of terrorism prosecutions, "…including whether there is merit in having terrorism cases heard by a panel of three judges."[1]

The "prosecutions in the Air India matter" refer to the prosecutions of Ripudaman Singh Malik ("Malik"), Ajaib Singh Bagri ("Bagri") and Inderjit Singh Reyat ("Reyat") in the British Columbia Supreme Court.[2] These prosecutions resulted in the longest and most expensive trial in Canadian history, referred to here as the "Air India trial."

This chapter examines the challenges facing terrorism trials as illustrated by the experience of the Air India trial. It first recounts the trial in some detail. This is done not to second-guess the verdict but rather to make clear the many challenges of terrorism prosecutions. It is important that Canadians understand the extraordinary measures that were taken to conduct this trial and to have it reach a verdict. Such measures will not be duplicated easily in the future.

Terrorism prosecutions require reform to make them manageable. This chapter discusses how to respond to the challenges of voluminous disclosure, multiple pre-trial motions and trial by jury in terrorism prosecutions. It also examines whether there is merit in having terrorism trials heard by a panel of three judges.

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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(vi).

2 As referred to in the indictment filed on June 5, 2001, which charged Malik, Bagri and Reyat jointly.

In recent years, several reports have called for better management of complex criminal trials – the so-called "mega-trials" or "mega-cases." These typically involve multiple accused charged with multiple offences. They are also characterized by extensive disclosure obligations and multiple pre-trial motions.[3] Most terrorism trials will exhibit the characteristics of a mega-trial, as did the Air India trial.

There is no need to repeat much of the valuable research already done on the challenges of the mega-trial. For example, the Barreau du Québec produced a report in 2004,[4] as did the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System.[5] The Ontario Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice produced a report in 2006.[6] In the autumn of 2008, the Federal/Provincial/Territorial Working Group on Criminal Procedure issued proposals for reform of mega-trials after it heard from a roundtable of experts.[7] Most recently, the Hon. Patrick LeSage, Q.C., and Professor (now Justice) Michael Code issued a report to the Attorney General of Ontario on large and complex criminal case procedures.[8]

All these reports are valuable, but they do not focus on the specific challenges facing terrorism trials.[9] Solutions designed for mega-trials in general may not be suitable for terrorism prosecutions, in part because terrorism prosecutions will almost inevitably involve deciding whether secret intelligence must be disclosed to the accused. In addition, terrorism prosecutions may be more resistant to

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3 There appears to be no accepted definition of what constitutes a "mega-trial" or "mega-case." However, the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System provided a workable definition, calling it "...a trial with such complex evidence or a number of accused such that one or both of these characteristics result in exceptionally long proceedings": Department of Justice Canada, *Final Report on Mega trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System to the F/P/T Deputy Ministers Responsible for Justice* (2004), p. 2, online: Department of Justice Canada <http://www.justice.gc.ca/eng/esc-cde/mega.pdf> (accessed December 4, 2008) [Steering Committee Report on Mega trials].

4 Exhibit P-370: Ad Hoc Committee of the Criminal Law Committee on Mega-trials, *Final Report* (February 2004) [Barreau Report on Mega-trials].

5 Steering Committee Report on Mega trials.

6 Superior Court of Justice (Ontario), *New Approaches to Criminal Trials: The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice* (May 12, 2006), online: Ontario Courts <http://www.ontariocourts.on.ca/sjc/en/reports/ctr/index.htm> (accessed December 1, 2008) [Ontario Superior Court Report on Criminal Trials].

7 Federal/Provincial/Territorial Working Group on Criminal Procedure, *Proposals for Reform: Mega-Trials* (2008) [F/P/T Working Group Proposals on Mega-Trials]. See also, for example, Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomenon" (2008) 53 Crim. L.Q. 421 [Code Article on Mega Trial Phenomenon].

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

9 But see Lesage and Code Report on Large and Complex Criminal Case Procedures for some discussion of the unique challenges of terrorism prosecutions and their recommendation at p. 93 that Ministers of Justice consider modifications to the procedure under s. 38 of the *Canada Evidence Act* "in order to eliminate the delays caused in major terrorism prosecutions by the bifurcation of the case and by interlocutory appeals". Similar recommendations are made by the Commission in Chapter VII.

plea discussions and guilty pleas than would mega-trials involving organized crime. Finally, because terrorism prosecutions involve national security matters, the federal interest in such trials is greater than in other mega-trials.

To assist the Commission with issues relating to terrorism prosecutions, Professor Bruce MacFarlane prepared a paper on structural aspects of terrorism trials. This paper included an examination of the possible merit in having terrorism trials heard by a three-judge panel.[10] Professor Robert Chesney prepared a paper on the extensive post- 9/11 American experience with terrorism prosecutions.[11] Professor Kent Roach prepared a paper on the unique challenges of terrorism prosecutions, focusing on developing a workable relation between intelligence and evidence.[12] Commission counsel prepared a background document on the management of terrorist mega-trials.[13] In addition, several witnesses, including lawyers from the Air India trial, testified about the challenges of terrorism prosecutions. The Commission was also able to review a "lessons learned" account of the Air India trial prepared by Robert Wright, Q.C., the lead prosecutor in the case, and Michael Code, one of the defence counsel.[14]

A failure to reform the trial process to address the many challenges of terrorism prosecutions will make it more difficult to prevent terrorism and punish terrorists in Canada through prosecutions. Canada has less experience than many of its allies with terrorism prosecutions. In the 1980s, a number of terrorism prosecutions, including one against Talwinder Singh Parmar and another involving an alleged conspiracy to blow up an Air India aircraft in 1986, collapsed because of problems arising from the disclosure of information that would identify informers. Another terrorism prosecution was abandoned after the disclosure of an affidavit used to obtain a CSIS wiretap warrant. A mistrial was declared in one prosecution after Federal Court litigation about whether the accused could call secret information in his defence.[15] There have been a few post-9/11 terrorism prosecutions, including two that led to convictions in 2008: that of a young offender in relation to an alleged 2006 Toronto plot and that of Mohammad Momin Khawaja[16] (which led to a guilty verdict) in relation to an international terrorist plot. Nevertheless, Canada has had much less experience with terrorism prosecutions than the United Kingdom or the United States.[17]

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10 Bruce MacFarlane, "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis" in Vol. 3 of Research Studies: Terrorism Prosecutions, pp. 246-261 [MacFarlane Paper on Terrorist Mega-Trials].

11 Robert M. Chesney, "Terrorism and Criminal Prosecutions in the United States" in Vol. 3 of Research Studies: Terrorism Prosecutions [Chesney Paper on Terrorism and Criminal Prosecutions].

12 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 [Roach Paper on Terrorism Prosecutions].

13 Exhibit P-300: Background Dossier For Term of Reference (b)(vi): "The Management of Terrorist Mega-trials" [Background Dossier For Term of Reference (b)(vi)].

14 Exhibit P-332: Robert Wright and Michael Code, "Air India Trial: Lessons Learned" [Wright and Code Report on Air India Trial].

15 For extensive case studies of these and other terrorism prosecutions and prosecutions involving national security, see Roach Paper on Terrorism Prosecutions.

16 *R. v. Khawaja*, [2008] O.J. No. 4244 (Sup. Ct.).

17 Roach Paper on Terrorism Prosecutions, p. 48.

Canada will continue to lag behind its allies in its ability to conduct fair and efficient terrorism prosecutions unless some fundamental reforms are made.

In his 2005 report, the Hon. Bob Rae described the Air India trial as "…long and complex, the most expensive and difficult in the history of the country."[18] The length and complexity of the trial, plus national security concerns about disclosure of some evidence, created a series of obstacles that do not typically arise in criminal cases. These obstacles, had they not been addressed effectively, could have prevented the reaching of a verdict or caused the case to, as MacFarlane describes it, "collapse under [its] own weight."[19]

MacFarlane summarized the challenges associated with terrorism trials when he testified before the Commission:

> [T]he real problem, in my view, relates to length primarily, complexity secondarily, and the risk of not being able to reach verdict in a lengthy terrorist trial. And it appears that most of the terrorist trials that have arisen in Canada are expected to be lengthy and have been lengthy. So it's not an idle concern.[20]

Later, he spoke of the urgent need for reform:

> There are so many impediments to completing a mega-trial in Canada -- so many points at which the presiding judge may decide to enter a judicial stay or the Crown might have to enter a Crown stay. There are so many roadblocks particularly in relation to the jury on a mega-trial that I am greatly fearful that Canada is not able to run lengthy terrorist cases. I greatly fear that we are not -- we don't have the tools to run these trials. That will not bode well if our trials consistently fail, case after case after case. And [I] greatly fear that some of the cases, that we are either looking at right now or will be looking at in the not-too-distant future, will fail, and Canada will be seen as a place where the criminal justice system simply can't cope with significant terrorist acts that result in a mega-trial. For that reason, it seems to me that maintaining the status quo is simply not an option. We need a rethinking of our approach to these mega-trials because I do feel that most of the terrorist trials that will arise and have arisen in Canada will be mega-trials. So we're right into it right now.[21]

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18 *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. 24 [*Lessons to be Learned*].

19 MacFarlane Paper on Terrorist Mega-Trials, p. 159.

20 Testimony of Bruce MacFarlane, vol. 79, November 20, 2007, p. 10068.

21 Testimony of Bruce MacFarlane, vol. 79, November 20, 2007, p. 10074.

In his report for the Commission, MacFarlane identified three overarching challenges for future terrorism trials:

> [F]irst, they need to be manageable in terms of length and complexity. Second, the process and result need to be seen as fair and legitimate, both domestically and in the eyes of the international community. Finally, any new criminal trial process cannot increase the risk of convicting persons who are innocent of the crimes charged.[22]

He also posed questions at the core of the search to meet these goals:

> Should the institutional underpinning or "structural" elements of the trial process in Canada be changed to meet the tremendous challenges posed by terrorist trials? Can we provide trials for accused terrorists that comport with Canadian standards of justice, notwithstanding the complex challenges inherent when national security is at risk?[23]

In his report for the Commission, Roach stressed the need for just and efficient processes that respect the principles of fairness to the accused and openness of proceedings, but that also respect important interests in the protection of legitimate secrets developed by Canada's intelligence agencies and its foreign counterparts.[24] Chapter VII discussed Canada's present system, which requires issues of national security confidentiality to be litigated in the Federal Court, with the matter then returning to the trial court. This can fragment and delay terrorism prosecutions and deprive the trial judge of the power to manage the disclosure of secret information and other pre-trial matters.

An important theme in this chapter is the need for the trial judge to be in charge of all aspects of the terrorism prosecution in order to ensure the efficiency and the fairness of the process. The chapter examines several issues relating to terrorism trials: voluminous disclosure, multiple pre-trial motions, control by judges of court proceedings and counsel, securing adequate defence representation, ensuring the viability of juries, federal-provincial cost-sharing to support lengthy trials, and providing for the needs of victims and witnesses. Those issues that can be resolved at the federal level are addressed.

Although some issues relating to terrorism prosecutions fall under provincial jurisdiction, the federal government has an important role in prosecutions that affect national security. As discussed in Chapter III, the Attorney General of Canada can prosecute cases involving terrorism offences and other conduct that affects national security.

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22 MacFarlane Paper on Terrorist Mega-Trials, p. 235.
23 MacFarlane Paper on Terrorist Mega-Trials, p. 159.
24 Roach Paper on Terrorism Prosecutions, pp. 91-93.

9.1 The Challenges of Terrorism Prosecutions

Terrorism prosecutions are difficult – in part because they often involve multiple accused, multiple charges and voluminous disclosure. Criminal trials such as those involving organized crime may also exhibit these features, but they will not involve the same issues as terrorism trials concerning the disclosure of intelligence.

The challenges of terrorism prosecutions can be addressed by reforms such as using severance more often to produce smaller, more manageable prosecutions, avoiding overloaded indictments and using electronic disclosure. However, terrorism trials may be more complex and longer than other trials, as MacFarlane testified, because of the need to establish matters surrounding the terrorist act, such as "…planning, deliberation, the execution, [and] how many people were involved; it's the proof that's required to present the picture concerning the developments up to and including the terrorist act."[25] In addition, terrorism prosecutions may require the Crown to establish the existence of a terrorist group in addition to other elements of an offence.

Proving terrorism offences often involves the difficulty of proving "anticipatory" elements of offences – for example, conspiracy, providing or collecting property intending that it be used to carry out a terrorism offence[26] or contributing to any activity of a terrorist group for the purpose of enhancing its ability to facilitate or carry out a terrorist activity.[27] Roach observed that: "The expansion of the criminal law means that what would have been, before 2001, advance intelligence that warns about threats to the security of Canada may, in some cases, now also be evidence of one of the [terrorism] crimes…."[28]

The terrorism offence provisions of the *Criminal Code* involve significant maximum penalties, many of which are to be served consecutively.[29] The prospect of significant penalties may make guilty pleas less likely, and prosecutors may not consider it to be in the public interest to engage in plea bargains which significantly reduce penalties. As a consequence, the accused may not have an incentive to engage in plea discussions, and the number of trials will increase as a result.

In addition, because of the difficulties surrounding the disclosure of secret information to the accused, disclosure issues may not be fully resolved early in the trial process. This also limits the potential for resolving plea negotiations, since the accused might want disclosure issues addressed first. Some accused may have strong ideological beliefs that make them resist the idea of pleading guilty. Prosecutors and defence lawyers may also, for different reasons, be less inclined to begin plea discussions in terrorism cases, placing further strain on the trial process.

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25 Testimony of Bruce MacFarlane, vol. 78, November 19, 2007, pp. 9892-9896.
26 *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.02 [*Criminal Code*].
27 *Criminal Code*, s. 83.18.
28 Roach Paper on Terrorism Prosecutions, p. 48.
29 *Criminal Code*, s. 83.26.

Most significantly, terrorism trials are likely to have a national security dimension that will involve applications – at present made to the Federal Court under section 38 of the *Canada Evidence Act*[30] – for non-disclosure of information that, if disclosed, will harm national security, national defence or international relations. This raises the prospect of numerous pre-trial motions that would not occur in other criminal trials. Few ordinary criminal trials, even major trials involving organized crime, would involve the potential disclosure of "sensitive information" that would bring section 38 into play.

In his report to the Commission, Professor Roach conducted extensive case studies of terrorism prosecutions in Canada. He concluded that these case studies "…raise doubts about whether Canadian practices and laws are up to the demands of terrorism prosecutions, particularly as they relate to the relation between intelligence and evidence and the protection of informants."[31]

As discussed throughout this volume, the interplay between intelligence and evidence is one of the central and unique features of both terrorism investigations and prosecutions. Earlier chapters have analyzed in considerable detail the relationship between intelligence and evidence and the role of section 38. This chapter therefore does not address section 38 extensively, but does recognize that section 38 applications are likely to be an important matter to be addressed in the management of many terrorism prosecutions. The recently completed *Khawaja* prosecution provides a good example. There, pre-trial motions involving applications for non-disclosure under section 38 were extensively litigated over 18 months in 2007 and 2008.[32] The trial itself took only 27 days.[33] The defence also attempted unsuccessfully to persuade the Supreme Court of Canada to hear an appeal before the trial had even started.[34] Such interlocutory appeals – appeals made before a trial has been completed -- are not permitted in regular criminal prosecutions.

Terrorism trials often have an international dimension, since the planning and execution of terrorist acts may involve players in several countries. This can complicate the trial process in several ways. First, the Crown may need to rely on evidence gathered in, or flowing through, foreign countries; to obtain this evidence requires international cooperation. In some cases, CSIS may already have foreign intelligence that could be useful as evidence or that might be subject to disclosure obligations, but it will need to seek permission from a foreign government to use it for a criminal prosecution. In some cases, foreign intelligence authorities that provided information to Canadian authorities may

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

31 Roach Paper on Terrorism Prosecutions, pp. 288-289.

32 *Canada (Attorney General) v. Khawaja*, 2007 FC 463, 280 D.L.R. (4th) 32, aff'd 2007 FCA 388, 289 D.L.R. (4th) 260, application for leave to appeal dismissed (2008), 166 C.R.R. (2d) 375 (S.C.C.); *Canada (Attorney General) v. Khawaja*, 2007 FC 490, 219 C.C.C. (3d) 305, allowed in part 2007 FCA 342, 228 C.C.C. (3d) 1; *Canada (Attorney General) v. Khawaja*, 2008 FC 560.

33 *R. v. Khawaja*, [2008] O.J. No. 4244 at para. 2 (Sup. Ct.).

34 See *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 (Ont. Sup.Ct. J.), application for leave to appeal dismissed 2007 CanLII 11625 (S.C.C.).

not want the information exposed in a prosecution because doing so might compromise ongoing intelligence activities in their country.

The international dimension also raises the possibility of extradition of an accused to Canada to stand trial. Furthermore, where international players must cooperate before a charge can be laid, the pace will ordinarily be determined by the slowest or most reluctant player. This problem may be particularly acute where governments disagree on whether the criminal justice system has a role to play in a particular situation, or whether it should be left to be dealt with exclusively by the intelligence community. Even if they do not involve an international dimension, terrorism trials will often involve several domestic agencies, increasing the possibility that the pace will be determined by the slowest player.

Prosecutors may have difficulties complying with their disclosure obligations, given the volume of material that has to be disclosed. Disclosure may be rendered even more difficult because some relevant material may relate to vulnerable informers, ongoing investigations or material that was provided from a foreign or domestic agency on the understanding that it would not be disclosed. Unfortunately, it is also possible that unethical defence counsel might try to sabotage the trial through prolonged and frivolous motions, including attempts to call or to gain access to secret information that is not relevant to the case.

The offences created by the *Anti-terrorism Act*[35] are very complex and are only starting to be tested. The relative newness of these offences will likely mean that prosecutors will use extra caution in deciding which offences to charge. There may be a tendency, out of an abundance of caution, to lay more charges than might be the case with other, more established, criminal offences. This in turn may lead to longer trials that will test the endurance of judges, jurors, witnesses, victims and lawyers. MacFarlane, for example, warns that the length of some terrorism trials may exhaust juries.[36]

The accused does have a right to a fair trial without unreasonable delay, but this does not mean that the accused has a right to a perfect trial. That said, it will be very important that the justice system treats those accused of terrorism offences fairly to guard against miscarriages of justice.

The cost of terrorism prosecutions may also give rise to disputes between federal and provincial governments. Some provinces may not have the capacity to conduct a prosecution such as the Air India trial. Federal funding may be needed to help with matters such as the construction of secure facilities, payments to defence counsel above normal legal aid rates and the provision of services for victims and the press.

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35 S.C. 2001, c. 41.

36 MacFarlane Paper on Terrorist Mega-Trials, pp. 251-257.

Terrorism trials involving completed acts of terrorism such as the bombing of Air India Flight 182 may involve many more direct victims than ordinary criminal offences. This will require a much more sophisticated and systematic approach to address the needs of witnesses and victims.

Terrorism is often associated with explosives, and the sheer scale of the forensic investigation (and the resulting evidence) after an explosion is ordinarily much greater than for other violent crimes.

Terrorism trials are also unique because of their public profile. Few criminal trials attract such widespread public interest. In essence, terrorism trials put the justice system on trial in a very public way. MacFarlane argues that accused persons may face the risk of not being able to have a fair trial because of the publicity and pressures that accompany horrific acts of terrorism.[37] However, it is unthinkable that the publicity, cost, complexity or length of a terrorism trial would lead to abandoning a prosecution. As Justice Rutherford said, "The importance of Canada being able to do these things and to make them work without throwing in the towel and saying that we have no capacity to administer criminal justice in cases where national security issues are at stake, cannot be overstated."[38] In short, the fair but efficient conduct of terrorism prosecutions is vital to the national interest.

9.2 The Air India Criminal Trial

On October 27, 2000, Malik and Bagri were each charged with eight counts under the *Criminal Code*. These included the following:

- first degree murder of the 329 Air India Flight 182 passengers and crew;
- first degree murder of the two Japanese baggage handlers who died in the Narita explosion;
- conspiracy to murder the passengers and crew on Air India Flights 182 and 301 and to place bombs likely to endanger safety on board aircraft in service;
- attempted murder of the passengers and crew of Air India Flight 301; and
- causing bombs to be placed on board the various aircraft.[39]

Bagri was also charged with the attempted murder of Tara Singh Hayer, but this indictment was held in abeyance pending the conclusion of the Air India proceedings. The evidence respecting this charge was held not to be admissible in the Air India trial.[40] Malik and Bagri were both detained pending trial and their

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37 MacFarlane Paper on Terrorist Mega-Trials, p. 293.
38 *R. v. Ribic*, 2004 CanLII 7091 (ON C.A.) at para. 49.
39 See Exhibit D-1: "Background and Summary of the Facts" for more information about the charges.
40 See *HMTQ v. Malik, Bagri and Reyat*, 2002 BCSC 823.

applications for judicial interim release were denied.[41] In July 2002 Bagri made a further application for judicial interim release, citing new delays and changes in the strength of the Crown's case in light of new disclosure and recent pre-trial rulings. His application was denied.[42] Malik and Bagri's first court appearance was October 30, 2000, followed by five days of bail hearings between December 21, 2000, and January 2, 2001.

The Crown preferred direct indictments against Malik and Bagri on March 6, 2001. The trial was scheduled to begin on February 4, 2002, before Justice Ian Josephson, sitting with a jury. According to the schedule discussed during the bail hearing,[43] the review by the defence of the disclosure was to last until the autumn of 2001 and preparation for pre-trial motions would last until the winter of 2002. It was also thought that trial preparation would take five months and that the trial itself would begin in the autumn of 2002. The trial was expected to end by late 2002 or early 2003, but it was understood that possible admissions by the defence and courtroom availability could affect the trial length. In fact, the trial began only in the spring of 2003 and the presentation of evidence concluded in December 2004, nearly two years later than expected. The accused remained in custody throughout.

After the prosecutors obtained consent from the United Kingdom,[44] Reyat was added as a defendant in a new indictment that was filed on June 5, 2001. That indictment charged Malik, Bagri and Reyat jointly for all counts except the murder of the two Narita baggage handlers; Reyat had already been convicted of their manslaughter in 1991.[45] On December 14, 2001, Justice Josephson ruled that Reyat's trial was to proceed jointly with that of the other accused and adjourned the trial to November 1, 2002, despite objections by Malik and Bagri to the joint trial.[46] On April 29, 2002, four of Reyat's counsel withdrew and new

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41 *Malik and Bagri v. HMTQ*, 2001 BCSC 2; *R. v. Bagri*, 2001 BCCA 273, 45 C.R. (5th) 143 (B.C.C.A.).

42 *Bagri v. R.*, 2002 BCSC 1025.

43 *Malik and Bagri v. HMTQ*, 2001 BCSC 2 at para. 16.

44 The United Kingdom authorized Reyat's extradition on August 10, 1988, to allow him to be tried for his role in the Narita bombing, although he was not actually extradited until December 13, 1989. A condition of the extradition was that the United Kingdom's consent would be required for any further accusations against Reyat. On January 26, 2001, Canada asked the United Kingdom for consent to try him for the Air India bombing: *R. v. Malik, Bagri and Reyat*, 2002 BCSC 1679 at para. 4. This consent was obtained on June 4, 2001 and Reyat was added as a defendant in a new indictment.

45 *R. v. Reyat*, 1991 CanLII 1371 (BC S.C.). This case lasted roughly 18 months (from December 1989 to May 1991). Reyat was charged only with the manslaughter of the two Narita baggage handlers. He was found guilty of both counts and was sentenced to 10 years in prison (the sentencing decision was not reported). Justice Paris concluded, "For all the above reasons I am satisfied beyond a reasonable doubt that the accused either fabricated or, at the very least, aided others in the fabrication of the bomb which exploded in Narita killing the two baggage handlers. The Crown does not argue that it has proved his exact purpose beyond a reasonable doubt but I am satisfied beyond a reasonable doubt that he knew the bomb was to be used for some illicit purpose. It could not be otherwise. According to the *Criminal Code* the elements of manslaughter are directly or indirectly causing the death of a human being by means of an unlawful act." Reyat's 1991 trial was significantly simpler than the Air India trial, since Reyat's trial involved no conspiracy counts and relied on forensic evidence linking Reyat directly with the parts used to create the bomb that killed the two victims. The trial also relied on an admission by Reyat that he constructed the bomb. Reyat's appeal was dismissed by the British Columbia Court of Appeal: *R. v. Reyat* (1993), 80 C.C.C.(3d) 210 (B.C.C.A.).

46 *HMTQ v. Malik, Bagri and Reyat*, 2001 BCSC 1758.

counsel were retained, resulting in a further adjournment of the trial until March 31, 2003.[47]

Because the Crown elected to proceed by direct indictment, no preliminary inquiry occurred.[48] After initial rulings in January 2002 about the scheduling of motions and the scope of the publication ban,[49] the pre-trial motions proceeded between February and December 2002.[50] Thirteen published pre-trial rulings resulted from four Crown motions,[51] four by Bagri,[52] four by Reyat[53] and one motion by all three accused.[54] In addition, media representatives applied for leave to publish information about one of the pre-trial *voir dires*[55] after their general motion to limit the publication ban was denied.[56] Pre-trial motions addressed a wide range of issues, including disclosure, destruction of evidence, admissibility and use of hearsay evidence, editing of evidence, the voluntary nature of statements made by the accused, and alleged *Charter* violations regarding search and seizure and statements obtained from the accused. Almost all the pre-trial applications were heard by Justice Josephson. Other judges heard other applications – for instance, relating to funding of defence counsel[57] and the sentencing of Reyat.[58] No pre-trial motions, however, involved litigation in the Federal Court under section 38 of the *Canada Evidence Act*.

On February 10, 2003, Reyat pleaded guilty to the manslaughter of the Air India Flight 182 victims and the Crown withdrew the other charges against him. He was sentenced to five years in addition to the ten years he had received in 1991 for the manslaughter of the two Narita baggage handlers.[59] On February 24, 2003, Malik and Bagri re-elected, with the Crown's consent, to be tried by judge alone.[60]

The trial began on April 28, 2003, and continued until December 3, 2004, with adjournments during the summer breaks in both 2003 and 2004. The trial lasted a total of 217 trial days.

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47 See *In the Matter of an Application Under s. 83.28 of the Criminal Code and Satnam Kaur Reyat*, 2003 BCSC 1152 at para. 19.
48 Background Dossier For Term of Reference (b)(vi), p. 96.
49 See *R. v. Malik, Bagri and Reyat*, 2002 BCSC 78; *R. v. Malik, Bagri and Reyat*, 2002 BCSC 80.
50 Background Dossier For Term of Reference (b)(vi), p. 105.
51 *HMTQ v. Malik, Bagri & Reyat*, 2002 BCSC 362; *HMTQ v. Malik, Bagri and Reyat*, 2002 BCSC 823; *R. v. Malik, Bagri & Reyat*, 2002 BCSC 1291; *R. v. Malik, Bagri and Reyat*, 2003 BCSC 29.
52 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 484; *HMTQ v. Malik, Bagri and Reyat*, 2002 BCSC 837; *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864; *R. v. Malik, Bagri and Reyat*, 2003 BCSC 231.
53 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 477; *R. v. Malik, Bagri and Reyat*, 2002 BCSC 1679; *R. v. Malik, Bagri and Reyat*, 2002 BCSC 1731; *R. v. Malik, Bagri and Reyat*, 2003 BCSC 30.
54 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 1427.
55 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 861.
56 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 80.
57 *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R. (2d) 40 at para. 3.
58 *R. v. Reyat*, 2003 BCSC 254.
59 *R. v. Reyat*, 2003 BCSC 1152.
60 See the procedural history in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248 at para. 14.

The trial took place in Courtroom 20, a very secure, state-of-the-art electronic courtroom specially renovated for the trial.[61] Twenty lawyers were involved in the trial for the Crown, six for Malik and eleven for Bagri. In addition, two lawyers acted as counsel for the court. Reyat hired a team of nine lawyers to work on his defence before finally entering his plea.[62]

Twelve rulings were published on issues of law during the trial. Four rulings resulted from applications by the Crown to vacate a previous editing order,[63] have witnesses declared hostile[64] or have hearsay evidence declared admissible.[65] Three rulings related to applications by Bagri to limit the evidence admissible for the Crown's case[66] and to obtain declarations that Bagri's *Charter* rights had been violated because of destroyed evidence[67] and late disclosure.[68] Another ruling resulted from an application by Malik to have hearsay evidence declared admissible,[69] and two rulings resulted from applications by both accused on issues of disclosure[70] and the admissibility of other hearsay evidence.[71] Other rulings followed an application by the media for access to search warrants and related information[72] and a witness's application, opposed by the media, for a permanent publication ban about the witness's identity.[73]

On March 16, 2005, the accused were both acquitted in a judgment that was 1,345 paragraphs long.[74] Justice Josephson concluded that the involvement of the accused in the offences had not been proved beyond a reasonable doubt and that as a result it was not necessary to address the *Charter* breaches that had occurred because of lost or destroyed evidence[75] and late disclosure.[76]

The proceedings involving Malik and Bagri lasted nearly four-and-a-half years. Fifteen months elapsed between the arrest of the first two accused and the beginning of the pre-trial motions, which were then argued over a period of almost a year. The trial itself began nearly two-and-a-half years after the arrest of Malik and Bagri. The filing of a new indictment adding Reyat caused additional delay, not only because of the presence of another accused who could make pre-trial applications, but also because his counsel required time to become familiar

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61 As reported in the British Columbia Ministry of Attorney General, Court Services Branch, *Report of the 2002/2003 Fiscal Year* (June 25, 2003), p. 7, online: Legislative Assembly of British Columbia <http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/348810/csb_annual_report_2002_2003.pdf> (accessed July 7, 2009).

62 *HMTQ v. Malik, Bagri and Reyat*, 2001 BCSC 1758 at para. 4.

63 *HMTQ v. Malik and Bagri*, 2003 BCSC 887.

64 *R. v. Malik and Bagri*, 2003 BCSC 1428, 194 C.C.C. (3d) 572; *R. v. Malik and Bagri*, 2004 BCSC 149.

65 *R. v. Malik and Bagri*, 2004 BCSC 299, 26 B.C.L.R. (4th) 320.

66 *R. v. Malik and Bagri*, 2003 BCSC 1387.

67 *R. v. Malik and Bagri*, 2004 BCSC 554, 119 C.R.R. (2d) 39.

68 *R. v. Malik and Bagri*, 2004 BCSC 1309, 124 C.R.R. (2d) 270.

69 *R. v. Malik and Bagri*, 2004 BCSC 812.

70 *HMTQ v. Malik and Bagri*, 2003 BCSC 1709.

71 *R. v. Malik and Bagri*, 2004 BCSC 819.

72 *HMTQ v. Malik and Bagri*, 2003 BCSC 993.

73 *R. v. Malik and Bagri*, 2004 BCSC 520.

74 *R. v. Malik and Bagri*, 2005 BCSC 350.

75 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864; *R. v. Malik and Bagri*, 2004 BCSC 554, 119 C.R.R. (2d) 39.

76 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 484; *R. v. Malik and Bagri*, 2004 BCSC 1309, 124 C.R.R. (2d) 270.

with the case. Justice Josephson refused to order a severance for Reyat,[77] and no additional preparation time was given to Reyat's counsel.[78]

9.2.1 Project Management

Well before charges were laid in the Air India trial, the BC Ministry of Attorney General recognized the need for a project management approach to the case to ensure that legal and administrative functions were fully integrated. A project management team was created and a project manager appointed.

The project management team was to deal with all the administrative and inter-ministerial matters to ensure that the prosecutors were not distracted from the legal aspects of the case. The team was also the main point of liaison in the BC Ministry of Attorney General for federal and foreign agencies, and for negotiating and applying the policies, protocols and guidelines that defined the tasks of each agency and settled issues of personnel, budgets, facilities and technology.[79]

Early on, the project management team, including members of the prosecution team, contacted the team working on the trial of those accused of bombing the Pan Am flight that crashed at Lockerbie, Scotland in 1988. It was felt that the Air India project management team could benefit from the wealth of knowledge and experience gained by those managing the Lockerbie trial. It was the project manager's responsibility to oversee the Air India team's relations with the Lockerbie team.[80] The project management and prosecution teams had numerous meetings with their Lockerbie counterparts.[81] Wright and Code wrote that these visits proved "invaluable" for the Air India prosecution.[82]

From the very early stages of the case, the project management team received support from the BC Government. According to Robert Wright, the senior Crown prosecutor, and Michael Code, acting for the defence, this ensured that "…the project management approach and support for the team were coordinated across the justice organization and fully understood and supported by decision-makers (Court Services for the courtroom, Management Services for finance and personnel, Justice Services for defence funding issues, Corrections)."[83] The project manager also recommended creating a steering committee and working group structure that "crossed normal branch barriers."[84]

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77 *HMTQ v. Malik, Bagri and Reyat*, 2001 BCSC 1758.
78 *HMTQ v. Malik, Bagri and Reyat*, 2001 BCSC 1758.
79 Wright and Code Report on Air India Trial, Part I, pp. 2, 4. Foreign agencies included the FBI (U.S.) and the Irish Gardia.
80 Wright and Code Report on Air India Trial, Part I, p. 23.
81 Wright and Code Report on Air India Trial, Part I, pp. 1-2. The visits to Scotland and The Netherlands also enabled the Crown to meet with members of court services, sheriff and police agencies involved in the Lockerbie trial and to tour the Lockerbie courtroom complex in Kamp van Zeist in the Netherlands, with its state-of-the-art technology, live-note reporting, security arrangements, victims' safe haven and complex translation system.
82 Wright and Code Report on Air India Trial, Part I, p. 2.
83 Wright and Code Report on Air India Trial, Part I, p. 2.
84 Wright and Code Report on Air India Trial, Part I, p. 3. One example of this was the cross-agency committee that was created for building Courtroom 20 specifically for the Air India trial.

One of the main responsibilities of the project manager was to be lead negotiator with the federal government for the funding agreements in the case.[85] At all times, the project manager had to maintain strong links with the head of the prosecution service and the justice ministry to ensure ongoing ministerial support for the trial.[86]

Wright and Code reported that "…the project manager role [evolved] into a general manager role once the main planning stage was finished and the plan implemented."[87] However, the project manager remained responsible for coordinating the efforts of the services and agencies that participated either indirectly or directly in the Air India trial.[88]

9.2.2 The Disclosure Process

Wright and Code described the volume of documents involved in the Air India trial as "vast." The initial trial material provided by the RCMP to the Crown in 1999 was 500,000 pages long. The narrative was contained in 90 volumes. Additional materials followed, including 40,000 lbs. of reel-to-reel tapes from CSIS.[89] Geoffrey Gaul was the media spokesperson during the Air India trial and in 2003 became Director of the Criminal Justice Branch in the BC Ministry of the Attorney General. He testified before the Commission that at one point the Crown had tens of thousands of additional documents arriving.[90]

Gaul testified that the Air India prosecution team saw the importance of preparing, before charges were laid, the materials that would have to be disclosed to the defence:

> [O]ur task at the front-end, we recognized that there was no point in engaging in a charge assessment, a pre-charge, until the file was formatted in a way that should we reach the point of approving a charge, we would then be in a position to provide prompt disclosure….
>
> Lay a charge and then go "Holy cow, we have to organize this to fairly disclose it to the defence", that can take months if not years. You can imagine the delay problems, Mr. Commissioner. We have an accused who's now been charged. The format of disclosure is unfriendly and the Crown is scrambling to unscramble the egg and put it in a format that we can disclose it.

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85 Wright and Code Report on Air India Trial, Part I, p. 3.
86 Wright and Code Report on Air India Trial, Part I, p. 4.
87 Wright and Code Report on Air India Trial, Part I, p. 3.
88 Wright and Code Report on Air India Trial, Part I, p. 4.
89 Wright and Code Report on Air India Trial, Part II, p. 11.
90 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, p. 11357.

> So what we did in this case, we did a lot of front-end, an enormous amount of front-end work, of getting the file ready so that when we did our charge assessment, we approved a charge, we were able to disclose it.[91]

In a 2001 decision relating to Malik and Bagri, BC Associate Chief Justice Dohm described the enormity of the expected defence tasks in reviewing disclosure. These included the following:

- complete review of 93 binders of recently disclosed materials;
- review of a "second tier" of Crown disclosure, which was to include 170,000 documents containing 600,000 to 1,000,000 pages and a 33-volume index;
- review of all CSIS and RCMP wire materials, which appeared to contain hundreds of hours of conversations. ACJ Dohm reported the understanding of the defence that there were *Criminal Code* wiretaps which ran for seven to eight months, and years of CSIS wiretaps; and
- review of any further materials which were to be disclosed by the Crown, including those provided to the defence by way of disclosure applications.[92]

Justice Josephson found that CSIS was obliged to comply with *Stinchcombe*[93] disclosure requirements.[94] This gave rise to the possibility of litigation about disclosure of information pertaining to national security.

There were "tiers" of disclosure in the Air India trial. The first involved providing both hard copy and electronic copies of the material. The second involved electronic disclosure only. The third involved making a large volume of files available to the defence for manual inspection.

Gaul testified that the Air India prosecution team decided to use electronic disclosure. The trial brief or the "Crown brief" – the summary of the materials that the prosecution would use as the core of its case – was disclosed both electronically and in about 90 volumes of hard copy.[95] Gaul described a second tier of electronic disclosure as covering the "…rest of the evidence that might well have been relevant to the defence but was not going to form a portion of the prosecution."[96]

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91 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, pp. 11366-11367.
92 *Malik and Bagri v. HMTQ*, 2001 BCSC 2 at para. 16.
93 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
94 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864 at paras. 9-10, 14.
95 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, pp. 11366-11367.
96 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, p. 11368.

Wright and Code noted that no private law offices in Vancouver at the time the charges were laid were equipped with the computer equipment or expertise to handle disclosure on the scale of the Air India case, especially in electronic form.[97] To remedy this, the Crown negotiated with each defence team to provide the appropriate computer equipment and applications to handle the disclosure.[98]

Another issue was the equipment to be sent to the accused, since they were in preventive detention awaiting trial. For this, the Project Manager worked with Corrections sheriffs to ensure the security of data throughout the trial.[99]

The Crown proceeded with electronic disclosure, maintaining close contact with the defence teams about information technology issues that might arise.[100] A database for every disclosure transaction was also created to avoid confusion about which information had or had not been disclosed.[101]

Code testified about a third tier of disclosure involving "peripheral material" in the filing rooms – "…rooms and rooms and rooms of documents that nobody had even looked at but that you couldn't say that they were clearly irrelevant; they still met the *Stinchcombe* standard." Because it was inefficient for the Crown to scan and disclose these documents electronically, the Crown and defence established a procedure to give counsel access to the documents in a file room on an undertaking of confidentiality. It was the responsibility of defence counsel to review these documents. If they found documents of interest, they would ask for photocopies and take the photocopies back to their offices.[102]

Undertakings: The Crown and defence agreed on three defence undertakings relating to disclosure. The first undertaking applied where the subject material was voluminous and likely largely irrelevant to the proceedings. In that instance, a copy of the material was physically provided to defence counsel for review at their offices. The undertaking included obligations to keep documents secure and also prohibited defence counsel from disclosing the information further, including to the accused, without Crown consent or a court order. The undertaking required the eventual return of the material to the Crown.[103]

The second undertaking related to material that was to remain in the possession of the Crown, but that would be made available to defence counsel for inspection. This form of undertaking was used for smaller amounts of privileged material that remained at all times in the Crown's possession.[104]

The third undertaking allowed defence counsel to go to the Crown office or CSIS to examine the documents that CSIS had not disclosed or that it

97 Wright and Code Report on Air India Trial, Part I, p. 13.
98 Wright and Code Report on Air India Trial, Part I, p. 13.
99 Wright and Code Report on Air India Trial, Part I, p. 16.
100 Wright and Code Report on Air India Trial, Part I, pp. 15-16.
101 Wright and Code Report on Air India Trial, Part I, p. 14.
102 Testimony of Michael Code, vol. 88, December 4, 2007, pp. 11372-11373.
103 Wright and Code Report on Air India Trial, Part III.
104 Wright and Code Report on Air India Trial, Part III.

had disclosed before in an edited ("redacted") form. Although the material pertained to matters of national security, these matters were largely irrelevant to the proceedings. Defence counsel were able to view the full documents electronically while the documents remained in the possession of CSIS. Defence counsel were permitted to prepare a list of relevant information to which the defence might seek access, but no other notes could be made of the information. The undertaking prohibited defence counsel who signed it from disclosing the information to any person, including clients, without a court order or Crown consent. Counsel could, however, disclose the information to other defence counsel who had signed the undertaking.[105]

The third undertaking stated that the undertaking did not compromise any privilege claim by the Crown, CSIS or the Attorney General of Canada. In almost every case, defence counsel concluded that the material was not relevant to the proceedings.[106] If the defence approached the Crown about a document that was relevant and useful to the defence, Code testified, the Crown would always relieve the defence of the undertaking not to disclose the information.[107]

This third undertaking avoided the need for litigation under section 38 of the *Canada Evidence Act*. As Code testified, "…we negotiated the solutions to disclosure that you would ultimately normally have to litigate."[108] No applications were made under section 38 as a result, so the defence and prosecution teams were never required to undergo the logistically difficult and lengthy process of bringing section 38 issues before the Federal Court.

9.2.3 Services for Family Members of Flight 182 Victims

Shortly after Reyat's guilty plea, the National Parole Board gave the victims' family members an opportunity to register as victims and to submit victim impact statements.[109] This process allowed registered victims to receive updates about Reyat's sentence and any parole eligibility dates.[110] Reyat served his sentence and was released on bail in July 2008 while awaiting trial on perjury charges relating to his testimony in the Air India trial.[111]

Several steps were taken to ensure that victims' families could attend the trial and witness the judicial process first-hand. In British Columbia, the *Crime Victim Assistance Act*[112] and regulations[113] provide for services and funding

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105 Wright and Code Report on Air India Trial, Part III.
106 Wright and Code Report on Air India Trial, Part III.
107 Testimony of Michael Code, vol. 88, December 4, 2007, pp. 11375-11376.
108 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11384.
109 Maryam Majedi, *Air India Victim Services Legacy* (April 2005), para. 28 [*Air India Victim Services Legacy*]. Ms. Majedi was Manager of the Air India Prosecution Team's Victim Services, Criminal Justice Branch, BC Ministry of Attorney General.
110 *Air India Victim Services Legacy*, para. 28.
111 "Convicted Air India bombmaker Inderjit Singh Reyat free on bail" (July 10, 2008), online: CBC News <http://www.cbc.ca/canada/british-columbia/story/2008/07/10/bc-reyat-bail-posted.html> (accessed December 2, 2008).
112 S.B.C. 2001, c. 38.
113 B.C. Reg. 161/2002.

for immediate family members of victims of certain criminal offences and give significant discretion to the Director of Crime Victim Assistance[114] to pay the travel and other expenses of immediate family members to attend legal proceedings.[115] Total assistance is limited to $3,000 per family member.[116]

On October 27, 2000, when charges were laid against Malik and Bagri, BC's Crown Victim Witness Services informed the known family members of the Air India victims of the charges and inquired whether they wanted further contact about the proceedings.[117] Shortly after that, a special program (the Program) was established to provide comprehensive assistance to immediate family members both before and during the trial. The BC Ministry of Attorney General created the Air India Crown Victims and Witnesses Service (AICVWS), which became responsible for managing the Program.[118]

One of the first tasks of the AICVWS was to find the family members who had not yet been located. Out the 487 family members listed in the AICVWS database, the Service established contact with 376.[119] The remainder could not be located, had died or requested that they not be contacted further.[120]

Once accredited, up to two family members from each victim's family unit received travel, accommodation, meal allowances and travel insurance to attend the trial for one week.[121] "Family member" was defined as the spouse, parent, child, sibling, grandparent, aunt or uncle of a deceased victim.[122] The AICVWS also accommodated special circumstances at the accreditation stage, allowing more than two family members to travel where one or more of the accredited family members was frail (elderly or sick) and required a companion for support. The AICVWS also made exceptions where the deceased's family had separated into two non-communicating parts.[123]

Family members of victims came from as far away as India, Saudi Arabia, Sri Lanka and Australia. This imposed additional management duties and costs.[124]

Another problem lay in managing the flow of information to victims' family members, since the AICVWS thought, from the outset, that keeping them

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114 Section 18 of the *Crime Victim Assistance Act* allows the minister to designate a public service employee as Director.
115 B.C. Reg. 161/2002, s. 23(3)(a).
116 B.C. Reg. 161/2002, s. 23(5).
117 See *Air India Victim Services Legacy*, para. 3.
118 The same organization is referred to as "Air India Victim/Witness Services (AIVWS)" in *Air India Victim Services Legacy*.
119 *Air India Victim Services Legacy*, para. 8.
120 *Air India Victim Services Legacy*, para. 8.
121 Air India Victim/Witness Services Department, Ministry of Attorney General (BC), *Victim Services Handbook*, pp. 43, 46 [Air India Victim Services Handbook].
122 Air India Victim Services Handbook, p. 41.
123 Wright and Code Report on Air India Trial, Part I, p. 17.
124 Wright and Code Report on Air India Trial, Part I, p. 18.

informed was an important objective.[125] This was accomplished through means that included a secure website, newsletters, a handbook for victims, funding for travel to attend the trial, visits to the warehouse housing forensic evidence (the partially-reconstructed aircraft), meeting space in Crown offices, victim services staff and counsellors, regular briefings of visiting victims' family members by the head prosecutor, production of a remembrance book, telephone and email contact with their homes, and regional group meetings with Crown, police and victims.[126]

The Program assigned five AICVWS caseworkers and one lawyer to assist the victims' family members during the Air India trial and for some time after.[127] Caseworkers paid special attention to family members during portions of the Crown's evidence that were expected to be more emotionally charged, such as the testimony of the Irish rescue workers who attempted to recover the victims' bodies.[128]

AICVWS caseworkers began preparing for the verdict as early as May 2004. The weekend before the verdict was pronounced, the AICVWS, the Air India project manager, the head prosecutor and the head of the RCMP Air India Task Force met with local and visiting family members to discuss the possible verdict and to answer questions.

A total of 77 family members, friends and witnesses attended the verdict proceedings on March 17, 2005. After the verdict was rendered, the lead prosecutor, the Crown's media liaison and the head of the RCMP Air India Task Force gave a debriefing session. AICVWS caseworkers were on hand with numerous counselling strategies to deal with the emotional outpouring that might follow. These caseworkers helped many family members through this difficult time. Their help was especially important since some family members had not received any counselling in 1985 immediately after the tragedy.

Section 722 of the *Criminal Code* permits family members of deceased victims to submit victim impact statements on sentencing. However, since both Malik and Bagri were acquitted and there was no sentencing, the section 722 provision did not apply.

Although Reyat had been convicted in 2003 of manslaughter, family members were not asked to submit victim impact statements at that time. Nevertheless, in his decision on sentence, Justice Brenner quoted with approval the comments of the lead prosecutor who, when speaking about the impact of the tragedy on the family members, said: "The immensity of this catastrophe is almost indescribable."[129]

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125 Wright and Code Report on Air India Trial, Part I, p. 18.
126 Wright and Code Report on Air India Trial, Part I, p. 18.
127 See the names and biographies of caseworkers and legal counsel in Air India Victim Services Handbook, pp. 66-70.
128 This testimony is reflected in *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 40-48.
129 *R. v. Reyat*, 2003 BCSC 254 at para. 12.

9.2.4 Trial Costs

Victim Services: The total cost for the AICVWS and the Program came to $1.8 million. Although the Program was entirely managed by the AICVWS, which was part of the BC Ministry of Attorney General, the federal government assumed the entire cost.[130]

Prosecution Costs: The BC Ministry of Attorney General reported on the expenditures made by BC to mount the trial, excluding police costs. Prosecution costs associated with the trial started with preparations by a small prosecution team in 1996 and ended in March 2005 with the acquittal.[131] The expenditures were broken down into the following categories and amounts:

Pre-trial[132]	$ 5,610,144
Prosecution except for Witnesses and Victim Services	$13,249,967
Expert and non-expert witnesses[133]	$ 1,759,333
Victim Services	$ 1,766,623
Prosecution total[134]	**$22,386,067**

Defence Costs: Shortly after the charges were laid, Bagri was declared eligible for legal aid funding because of the complexity of the case and the significant preparation time that had been given to the Crown. This happened even though Bagri's income and net worth would normally have made him ineligible. Reyat was also found to be eligible for legal aid when his name was added to the indictment, mainly because he was then in custody and had no way to fund his defence.

Malik, however, did not meet the legal aid criteria in BC and was deemed ineligible. At his bail hearing, he estimated his net worth at $11.6 million. Nonetheless, in February 2002, he reached an interim funding agreement with the Attorney General of BC. This ensured that funding could be applied immediately to his defence costs while he liquidated his assets. As of September 19, 2003, the Attorney General of BC had paid more than $3.6 million to Malik's 11-member defence team under the interim funding agreement. At that time, Malik argued that his defence would require about an additional $2.7 million, plus several hundred thousand dollars in computer costs, to complete the trial.[135] Malik also claimed that he had personally paid $650,000 in legal fees to that date.[136]

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130 Ministry of Attorney General (BC), *Factsheet: Statement of Expenditures for the Air India Trial*, 2005AG0036-001081 (November 23, 2005), p. 1, online: Government of British Columbia <http://www2.news.gov.bc.ca/news_releases_2005-2009/2005AG0036-001081-Attachment1.pdf> (accessed November 28, 2008) [Air India Statement of Expenditures].

131 Air India Statement of Expenditures, p. 1, fn. 1.

132 This figure does not include expenditures relating to the trial and conviction of Reyat in 1991: Air India Statement of Expenditures, pp. 1-2.

133 The Crown called a total of 90 witnesses (including experts and laypersons).

134 Air India Statement of Expenditures, p. 1.

135 A history of this agreement, as well as the amounts advanced to Malik, can be found in *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R. (2d) 40 at paras. 2, 4-15.

136 *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R. (2d) 40 at para. 17.

Malik applied for funding by way of what is known as a "Rowbotham application" after disagreements arose with the Attorney General of BC about his solvency and unsecured debts.[137] A hearing was held in the summer of 2003 and a decision was rendered on September 19, 2003.[138] There, the Attorney General of BC conceded that Malik could not receive a fair trial without the assistance of counsel.[139] Still, the judge found that Malik was not entitled to funding for his defence since he was not indigent and had not made the necessary efforts to obtain funds to cover his defence. The judge found that Malik could pay the balance of his defence costs and take any measures necessary to reduce those costs, but made no finding as to the past funding provided by the state.[140]

Despite this decision, the Attorney General of BC advanced further funds to Malik for the duration of the Air India trial, based on terms of the interim funding agreement, which was amended periodically to take into account the changing nature of Malik's case.

The province took security against property owned by each co-accused and would seek reimbursement under the terms of the agreement.

BC's *Freedom of Information and Protection of Privacy Act*[141] protects personal information about individual agreements. However, the BC Ministry of Attorney General provided some insight into the extent of funding for the three co-accused, estimating their combined funding to total over $21 million. This represented all the defence costs advanced, either through loan or grant, since the laying of the charges in 2000.[142] Another $358,000 was added for administrative costs related to the defence,[143] for a final total of $21.4 million.[144]

Media reports in November 2005 quoted BC Attorney General Wallace Oppal as saying that Bagri still owed the government $9.7 million and that Malik owed $6.4 million.[145]

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137 *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R. (2d) 40. *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 established that anyone charged with a serious criminal offence and who has been denied a referral to a legal aid lawyer can apply to a judge to appoint a lawyer for them.

138 *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R (2d) 40.

139 *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R. (2d) 40 at para. 1.

140 *HMTQ v. Malik*, 2003 BCSC 1439, 111 C.R.R. (2d) 40.

141 R.S.B.C. 1996, c. 165.

142 Air India Statement of Expenditures, p. 1.

143 These administrative costs included printing and photocopying as well as the computer equipment necessary to view and search the electronically-disclosed evidence.

144 Air India Statement of Expenditures, p. 1.

145 As quoted in reports published by the *Vancouver Sun*, *The Province*, *Times Colonist* and *The Globe and Mail* on November 24, 2005.

Summary of Costs

The BC Ministry of Attorney General estimated the total expenditures for the Air India Trial, before the federal contribution, at just under $58 million.

Courts - Trial Support and Security Operating Expenditures	**$7,753,052**
Prosecution Expenditures	
Pre-trial	$5,610,144
Prosecution except for Witnesses and Victim Services	$13,249,967
Expert and non-expert witnesses	$1,759,333
Victim Services	$1,766,623
Prosecution total	**$22,386,067**
Justice Services Expenditures	
Defence Funding	$22,026,914
(Less PST charges included)	($945,105)
Defence Funding before PST	$21,081,809
Administrative	$357,717
Justice Services total	**$21,439,526**
Corrections - Operating/Custody Expenditures	**$1,958,581**
Management Services - Administrative Support Expenditures	**$230,718**
Total Expenditures before Amortization Expense	**$53,767,944**
Amortization Expense	
Capital costs	$7,825,453
Less: net book value	$3,815,903
Air India Share	**$4,009,550**
Total Expenditures before Federal Contributions	**$57,777,494**[146]

9.2.5 Federal-Provincial Cost-sharing

The federal government and the BC Ministry of Attorney General negotiated a cost-sharing agreement for the Air India trial. Shortly after the charges were laid and before entering the agreement, the federal government granted $1 million to the Ministry. In 2001, under the concluded agreement, the federal government agreed to pay roughly half the total costs of the Air India trial, including all costs related to the AICVWS.[147] Excluded from the agreement were the capital costs

146 Not included in this figure are any wind-up costs in 2005/06: Air India Statement of Expenditures, pp.1-2

147 Air India Statement of Expenditures, p. 1.

incurred by BC, mainly for building the high-security Courtroom 20 where the trial took place.[148]

The BC Ministry of Attorney General estimated that the federal government contributed a total of $27.5 million, leaving a total expenditure by the Ministry of $30.3 million.[149]

9.3 Making Terrorism Trials Workable

Several events could have prevented the Air India trial from reaching a verdict. The trial might have proceeded with a jury. Once a trial by 12 jurors starts, the discharge of more than two jurors due to illness or personal hardship results in a mistrial. Even if ten jurors could have lasted for the duration of the trial, more frequent breaks would have been required than in a judge-alone trial to accommodate matters such as the illness of jurors. The trial judge could have become incapacitated; in the case of a judge-alone trial, the entire trial would have had to start anew. Counsel might have ignored their professional duties as officers of the court and employed tactics such as frivolous applications, including those requiring litigation in the Federal Court and interlocutory appeals, calling unnecessary witnesses, engaging in excessive cross-examination, refusing to agree to non-contentious facts and attempting to appeal adverse findings before the trial was completed. Such tactics could have delayed the trial beyond repair. If lead counsel had been inexperienced, they might have lacked the judgment to avoid avenues of prosecution or defence that would have further delayed or complicated the trial.

If less well-organized, the Crown might not have been able to cope with the enormity of the disclosure obligations. This would have led to a stay. If relations among defence and prosecution teams had deteriorated,[150] cooperation would have also diminished, perhaps preventing agreement on the *ad hoc* procedure for dealing with issues that otherwise would have brought litigation under section 38 of the *Canada Evidence Act* into play, which would have greatly prolonged the trial.

In his paper for the Commission, Bruce MacFarlane offered a more generic analysis of the "realities" of terrorism trials, and identified further impediments that could prevent such trials from reaching verdicts:

> Terrorist trials have several important realities. They are usually lengthy and very complex. Crown disclosure obligations often raise difficult national security issues. Those accused of terrorism, at least in Canada, have the right to choose

148 Air India Statement of Expenditures, p. 2.
149 Air India Statement of Expenditures, p. 1.
150 Wright and Code spoke of the "good administrative relationship" between Crown and defence in the Air India trial and how this led to a successful disclosure process and other successfully managed aspects of the trial: Wright and Code Report on Air India Trial, Part I, p. 10.

> trial before a trial and jury, or a judge sitting alone. The acts charged are usually horrific in nature, enraging the public and placing extraordinary pressure on the police and prosecutors to convict those responsible. And politicians sometimes wade into the case, making fair trial requirements even more difficult to meet.
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> These realities can place a terrorist trial at risk. For a variety of reasons, an unmanageably long trial may never reach verdict: a mistrial may be required where more than two jurors have to be discharged; the trial may abort where the trial judge cannot continue with the case; Crown mismanagement or the simple reality of its disclosure obligations may force a judicial stay; defence demands for disclosure of security-sensitive information may, if successful, force the Crown to terminate the case to protect the information; and, if the case reaches "mega" proportions, the simple passage of time can lead to the evidentiary collapse of the Crown's case, prompting a Crown stay with no determination on the merits of the evidence. Accused persons, as well, face the risk of not being able to have a fair trial where the acts alleged are so horrific that their simple allegation has had a direct impact on the fabric of society – potentially tainting the pool from which jurors are chosen, and altering normal decision-making by police, prosecutors, scientists and, some would argue, the judiciary.[151]

The Air India trial did reach a verdict. Good management and, in some cases, good fortune allowed the trial to avoid many impediments that might otherwise have seriously delayed, or even scuttled, it. Lessons must be learned from this experience. Nevertheless, the management measures and procedures employed at the Air India trial should not automatically be seen as a template for future terrorism cases. Each case will have its own unique features.

The following section discusses several measures to reduce the risk of terrorism trials failing to reach a verdict. These measures include sound administrative management of the trial, appointing the trial judge early in the process, developing an appropriate disclosure process, organizing the early hearing of motions, ensuring appropriate funding of both defence and prosecution counsel, encouraging judges to take firmer control of the trial and counsel to act more responsibly as officers of the court, and increasing the number of jurors to prevent mistrials in long jury trials. In addition, though not directly germane to the trial reaching a verdict, the dictates of decency require that the terrorism trial process fully address the needs of victims and their families.

The importance of amending section 38 of the *Canada Evidence Act* to allow the trial judge to make and revise non-disclosure orders on the basis of national

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151 MacFarlane Paper on Terrorist Mega-Trials, p. 293.

security confidentiality was discussed fully in Chapter VII. The section 38 issue will be discussed only briefly here, and only as it relates to the pre-trial management responsibilities of the trial judge.

9.3.1 Project Management

Wright and Code suggested that "…a megacase should be seen not only as a prosecution but as a major administrative project," and called for a project management approach to mega-cases, "…including a project manager, project team, project management planning, budgeting, risk assessment, implementation, monitoring and evaluation."[152]

The project management approach adopted in the Air India trial was an essential part of the trial process. In future trials, project managers may be equally important, addressing the multitude of administrative complexities that can delay or even defeat a terrorism prosecution, and allowing counsel to focus on the legal issues.

9.3.2 Cost-sharing

The Air India trial provided a model for federal-provincial cost-sharing arrangements in future major terrorism trials. Adequate funding is necessary for all aspects of a terrorism trial: for project management and the disclosure process, for the hiring of sufficient numbers of competent and experienced prosecutors and defence counsel, and for the provision of services to victims and their families.

The federal government has a clear interest, and a central role, in terrorism prosecutions. One essential federal role in long and complex prosecutions is to provide financial support. British Columbia faced a bill of over $30 million for the Air India trial, even after the federal government had contributed $27.5 million. Smaller provinces may not have the financial capacity to underwrite such lengthy and complex trials; generous federal cost-sharing will be necessary. As will be seen, federal cost-sharing could also encourage experienced defence counsel to become involved in lengthy terrorism prosecutions. Cost-sharing could also fund proper project management so that counsel can focus on legal issues instead of administrative and logistical details.

9.3.3 The Trial Judge

While many procedural changes can be made to enhance the prospect of terrorism trials reaching a verdict, the pivotal point of the entire process is the trial judge. A competent, experienced judge is essential. That means a judge with criminal law experience, an appreciation of the independence of the judiciary, good health and a readiness to take on what may turn out to be a very lengthy case.

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152 Wright and Code Report on Air India Trial, Part I, p. 2.

Wright and Code identified certain qualities that the judge should possess:

> You need a trial judge who is bright, experienced and fair and who is patient and able to listen for a long time.… Because mega-trials generally cannot be repeated, there is a high premium on choosing a trial judge who will not make reversible errors. This means choosing from the brightest, most experienced and fairest judges. At the same time, the extreme length of these cases means that you must choose a judge who will remain patient and not try to take over the case, as it will inevitably drag on.[153]

In a recent article Code argued that the judiciary is afraid to control counsel. He called for a clear legislative statement to declare the existing common law powers of the judiciary:

> It needs to be clarified that the courts have the power to enforce these particular duties, and thus to require that counsel "act responsibly", in order to ensure a fair and efficient trial. The judiciary fear intervening in this area due to concerns about perceived partiality, and the law societies almost never use their discipline processes to enforce these basic tenets of professionalism, all of which are set out in the Rules of Professional Conduct. As a result, counsel's ethical duties as officers of the court are rarely enforced. A clear legislative statement on the point would resolve any uncertainty about judicial powers to enjoin and sanction counsel in this sphere and would encourage enforcement of the basic requirements of professionalism. Such a statement would only need to be declaratory of the existing common law as this kind of modest approach has often been helpful in educating the bench and bar and encouraging cultural change within the justice system.[154]

At trial, the trial judge must not be timid in controlling the conduct of counsel and should not hesitate to rein in counsel who, for example, bring dilatory motions, present massive and unnecessary amounts of irrelevant evidence or conduct excessive cross-examinations. However, the authority to control the excesses of the adversarial process is not a licence for the judge to descend into the forum. The latter is not permitted, whereas the former is a necessary part of the judge's obligations to ensure a fair trial.

The trial judge should be appointed early to allow the judge to become involved from the start in managing the trial. In the terrorism context, a trial judge who

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153 Wright and Code Report on Air India Trial, Part II, p. 1.
154 Code Article on Mega Trial Phenomenon at 467.

is appointed early can take control of the pre-trial process and establish rules to avoid the process being derailed. Early nomination of the trial judge also gives the judge greater "ownership" of the case. It allows the judge to establish procedures, and, in particular, allows the judge to make it clear to counsel the level of professionalism that is expected of them.

Appointing trial judges early also allows them to deal with disclosure, since disclosure issues are most often dealt with in the early stages of the trial process. At the same time, early appointment of trial judges ensures that they will not face the burden of handling files from other cases as they are trying to get the terrorism trial process underway. Although it may cause scheduling difficulties in some jurisdictions, early appointment is necessary. At present, only trial judges have the legal power to make binding rulings on matters such as the admissibility of evidence and *Charter* motions.[155] Early appointment of a trial judge would also be facilitated if, as recommended in Chapter VII, a chief justice selects a trial judge who can decide national security confidentiality matters under section 38 of the *Canada Evidence Act* as well as other disclosure issues and pre-trial motions. Such a comprehensive approach to pre-trial management would follow international best practices as seen in Australia, the United Kingdom and the United States.[156]

9.3.4 Defence and Crown Counsel

9.3.4.1 Funding

At its peak, the Air India trial involved 46 Crown and defence lawyers, with the three defence teams totalling 26 lawyers.

Wright and Code argued that the prosecution in such cases should be headed by a "…senior crown counsel with leadership credentials, experienced in both complex, difficult trials and administrative matters," since both skill sets are bound to be critical in weathering the many challenges that can arise throughout the pre-trial and trial phases of any mega-trial.[157] Wright and Code suggested that the lead prosecutor must have a "…resilient, pragmatic and flexible personality" to "…negotiate the innumerable procedural and substantive issues with the defence, so that the trial proceeds in a reasonably efficient manner."[158] They added:

> In particular, disclosure, admissions, procedural and evidentiary motions and scheduling will be the subject of continuous discussions over a number of years, as the case proceeds. The Crown inevitably must take the lead in these

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155 *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Hynes*, 2001 SCR 82, [2001] 3 S.C.R. 623.
156 Roach Paper on Terrorism Prosecutions, pp. 248-287.
157 Wright and Code Report on Air India Trial, Part I, p. 5.
158 Wright and Code Report on Air India Trial, Part II, p. 2.

> discussions, as the Crown has the burden of moving the case forward. For these discussions to succeed the lead prosecutor must be a skilled and pragmatic negotiator who does not insist on winning every small point and who is not deterred by any of defence counsel's failings. . . . If every little point has to be fought, the "mega-trial" will never end.[159]

For similar reasons, Wright and Code recommended that the accused's defence should be conducted by experienced and senior counsel who have good judgment and who understand "…the delicate balance between counsel's duty to their client and their duty to the court." This includes "…a strong element of public interest . . . which obliges counsel to pursue justice in an efficient and expeditious manner."[160] Such senior defence counsel would know "…which issues are worth pursuing, which issues should be discarded and which issues can be satisfactorily resolved through negotiations with the Crown."[161]

Canada's largest and most complex trials should be handled by the most capable and experienced lawyers, but the ability of some governments and virtually all accused to pay for these lawyers remains a significant problem. The Air India trial showed the extensive prosecution and defence costs that may be involved in future terrorism trials. As described earlier in this chapter, prosecution costs totalled over $22 million[162] and the estimated defence costs for Reyat, Malik and Bagri totalled over $21 million.[163]

Wright and Code emphasize the importance of providing adequate funding for the defence:

> From the defence perspective, experienced and senior counsel will simply not take on such a case without appropriate resources as it requires counsel to essentially give up the rest of their practice. Furthermore, every step taken by a well-resourced Crown and police team has to be matched or responded to by the defence. Significant resources are required before the trial even starts simply to read the voluminous disclosure, to retain private investigators, to interview witnesses and to confer with experts. If the resourcing levels for the Crown and the defence do not reflect some general proportionality, the trial will not be fair and senior and experienced counsel will not participate. On the other hand, if the resourcing is too generous it will exacerbate

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159 Wright and Code Report on Air India Trial, Part II, p. 2.
160 Wright and Code Report on Air India Trial, Part II, p. 3.
161 Wright and Code Report on Air India Trial, Part II, p. 3.
162 As reported in Air India Statement of Expenditures, p. 1.
163 To this figure must be added more than $350,000 in administrative costs related to the defence: Air India Statement of Expenditures, p. 1.

> the worst features of the "mega-trial"....[D]efence counsel who are guaranteed generous levels of "cash for life" from the public purse will not be eager to return to the challenges of their ordinary practice where retainers are almost always limited. In conclusion, a delicate balance is required between too [few] resources for the Crown and defence and too [many] resources.[164]

They stress the need to avoid the extremes of a "blank cheque" approach to funding the defence or an approach that will make it impossible for experienced counsel with significant overhead expenses and other clients to take on a major case. Providing adequate resources to retain experienced counsel will pay important dividends. It should result in responsible admissions of fact, more focused pre-trial and trial proceedings and less needless conflict between Crown and defence. Otherwise, excessive pre-trial motions and trials and unwarranted conflicts between counsel can greatly prolong a trial and, in extreme cases, prevent it from reaching a verdict.

Legal aid is generally seen as falling within provincial jurisdiction over the administration of justice.[165] However, the federal government has since 1972 treated legal aid as falling within its "overall reform strategy" aimed at addressing poverty, crime and disorder.[166] Since that time, the federal government has agreed to share the cost of criminal legal aid with the provinces. The administration of the legal aid programs remains a provincial responsibility.[167]

A review of provincial eligibility guidelines shows that most accused with full-time employment when arrested are not likely eligible for assistance under their local legal aid schemes.[168] The likely length and complexity of terrorism proceedings will mean that nearly all accused would be unable to afford their legal fees on their own. Even if they were eligible for legal aid, the amount of legal aid funding available would almost certainly fall far short of that needed to retain experienced counsel.

Proper funding is vital for the efficient management of the trial. The cost of experienced counsel may seem high, even extraordinary, to an outside observer,

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164 Wright and Code Report on Air India Trial, Part II, p. 3.

165 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(24).

166 Karen Hindle and Philip Rosen, "Legal Aid in Canada" (Parliamentary Information and Research Service, Library of Parliament, August 6, 2004), p. 4, online: Government of Canada <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0438-e.pdf> (accessed December 3, 2008) [Legal Aid in Canada].

167 The Federal-Provincial Agreement on Legal Aid in Criminal Matters, signed in December 1972, established a cost-sharing arrangement between the federal government and the provinces: Legal Aid in Canada, p. 4.

168 However, some legal aid laws allow the government to take into account special circumstances and grant legal aid in cases where it would normally be denied. See, for example, Quebec's *Legal Aid Act*, R.S.Q. c. A-14. Section 4.3 provides that, where exceptional circumstances warrant and in order to avoid the occurrence of irreparable harm, the administrative committee may rule that a person who is ineligible for legal aid is in fact eligible on payment of a contribution (as interpreted in *Attorney General of Quebec v. R.C.* (also cited as *Quebec (Attorney General) v. R.C.))*, [2003] R.J.Q. 2027 (C.A.) at para. 13.

but the increase in the efficiency of the trial process is more than likely to offset the increased cost. The undertakings reached in the Air India trial between defence and prosecution about disclosure, particularly disclosure that might otherwise have required national security confidentiality litigation under section 38 of the *Canada Evidence Act*, for example, were the mark of experienced counsel. Those undertakings prevented debilitating delays and possibly even the collapse of the case, both of which would have imposed significant further costs.

In *R. v. Rowbotham*,[169] the Ontario Court of Appeal held that the denial of state-funded counsel to an indigent, unrepresented accused facing serious and complex criminal charges violated the rights to a fair trial and to make full answer and defence under sections 7 and 11(d) of the *Charter*. The appropriate remedy in these circumstances was a conditional stay of proceedings pending the appointment of state-funded counsel by the appropriate Attorney General or legal aid program. The prosecution could not proceed unless the Government agreed to pay for the accused's lawyer.[170]

For cases that present additional special circumstances, an accused may file a "Fisher application" for a court order that the Government fund the case at levels exceeding ordinary legal aid rates. Named after the leading case, *R v. Fisher*,[171] a Fisher application is in essence a special type of Rowbotham application. A Fisher application typically involves a request for funding to pay for higher fees, extra preparation time, additional defence lawyers and other forms of enhanced services.[172] In several provinces, Fisher applications have succeeded where the trial is exceptionally long and complex. Nonetheless, debate continues about whether the courts have the authority to order governments to provide this increased funding.[173]

Rowbotham and Fisher applications will increasingly be a feature of terrorism trials, given the likely size of the files, the complexity of the evidence and the need to involve experienced lawyers to ensure that the trials proceed efficiently and fairly. If at all possible, decisions about funding defence counsel should be made without such applications. The courts will impose a solution if they must,[174] but it would be better for all concerned if governments could reach prompt agreements with counsel about funding that will avoid the time and expense of litigating the issue.

Low legal aid tariffs make it very difficult for experienced lawyers to take on long cases. It is one matter to take a short trial at a rate that does not pay the

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169 (1988), 41 C.C.C. 1.

170 As described in the BC "Legal Services Society Factsheet" [BC Legal Services Society Factsheet].

171 *R. v. Fisher*, 2001 SKCA 136, 217 Sask. R. 134 (Q.B.).

172 *Attorney General of Quebec v. R.C.* (also cited as *Quebec (Attorney General) v. R.C.)*, [2003] R.J.Q. 2027 (C.A.) at para. 168.

173 BC Legal Services Society Factsheet.

174 However, uncertainty remains about whether courts should make orders departing from inadequate legal aid tariffs or if they should stay proceedings: See *Attorney General of Quebec v. R.C.* (also cited as *Quebec (Attorney General) v. R.C.)*, [2003] R.J.Q. 2027 (C.A.) at paras. 6, 163-164, which held that a stay of proceedings was the appropriate remedy but which also recognized that in a long prosecution the Government had agreed to pay counsel fees beyond the regular legal aid rate.

overhead of a successful law practice, but it is quite another to sign up for a year-long trial at such rates. The Lesage and Code recently commented that this can lead to "…a vicious circle: the longer criminal trials become, the less likely it is that leading counsel will agree to conduct them on a Legal Aid certificate; and yet having leading counsel conduct the defence in these cases is one of the solutions to the overly long trial, as it is these counsel who are most likely to conduct the trial in an efficient and focused manner."[175]

British Columbia has taken steps to attract experienced and leading counsel to complex cases by providing an enhanced fee structure and a separate and confidential fee structure for exceptional matters.[176] Federal cost-sharing is one factor that allows British Columbia to do this. Indeed, federal funding facilitated negotiating a consent Fisher order in the Air India trial, and this approach should be used in future terrorism prosecutions. Attempting to save money by insisting on regular legal aid rates for long terrorism prosecutions is short-sighted. It will only add to the length and cost of the trial and may even diminish the chances that the trial will reach a verdict.

9.3.4.2 Conduct of Counsel

Establishing a good working relationship between Crown and defence counsel is an essential precondition to the successful management of any terrorism prosecution. Given the difficult situations that counsel involved in terrorism trials are likely to encounter, it is vitally important that counsel respect and adhere to the rules of professional conduct and demonstrate civility in their relations with each other.

In the Air India Trial, 37 counsel interacted over a 19-month trial, as well as during the pre-trial process, which lasted almost three years and which also involved the nine lawyers representing Reyat. The lawyers had to fulfill their roles in the adversarial system while maintaining sufficient professional courtesy and respect to work together and make appropriate concessions and admissions. Wright and Code spoke of how well this relationship worked:

> The exceptionally good administrative partnerships between Crown and the defence resulted in immense savings in time and money. At the end of final submissions, the trial judge stated that had it not been for this Crown and defence partnership, along with the very effective technology innovations by Court Services and other agency staff, the trial would have lasted at least twice as long.[177]

Lesage and Code noted how admissions made by defence counsel in the Air India trial reduced a list of 883 potential Crown witnesses, with an estimated

175 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 96.
176 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 103.
177 Wright and Code Report on Air India Trial, Part I, p. 3.

trial length of three to four years, to 85 Crown witnesses.[178] This underlines how responsible defence counsel who are willing to make reasonable admissions of fact can shorten a complex terrorism trial. Conversely, irresponsible counsel can prolong a trial to the point of making it almost impossible to reach a verdict.

Even during the Air India trial, however, defence lawyers at times expressed concern about their relationships with the prosecution team[179] and even accused some counsel of misleading and sharp practice.[180] Justice Josephson suggested the need for increased courtesy in communications between Crown and defence.[181] He stated that proceedings such as the Air India trial could be made significantly more difficult if a "…reasonable degree of mutual respect and trust between counsel" was not present.[182]

In a recent article, Code stated that there is "…a well documented argument that standards of civility have been in serious decline throughout all segments of society in recent years" and that "…the legal profession has been subject to a number of specific influences, pressures and changes that have made the modern practice of law particularly susceptible to incivility."[183] This decline, he said, is likely to cause more incidents that will require the intervention of trial judges.

LeSage and Code addressed the ethical and legal duties of Crown and defence counsel, as officers of the court, to make admissions of fact. They observed that "…[c]ounsel for the Crown and the defence are both under ethical duties to make reasonable admissions of facts that are not legitimately in dispute. The court should encourage and mediate efforts to frame reasonable admissions. When the defence fully admits facts alleged by the Crown, the court has the power to require the Crown to accept a properly framed admission and to exclude evidence on that issue."[184]

Clearly, the conduct of counsel can have a profound effect on the pre-trial and trial processes, and counsel must remember their ethical obligations. Code identified several ethical duties that apply to counsel as officers of the court which can facilitate trials in mega-cases. These duties would apply equally to counsel in terrorism trials:

> It is obvious that long and complex trials place a particularly high premium on counsel's ethical duties as officers of the court. These duties apply to both the Crown and the defence. Making responsible admissions of matters that

178 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 103, fn. 133.
179 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 484 at para. 24.
180 2002 BCSC 484 at para. 42.
181 2002 BCSC 484 at para. 40.
182 2002 BCSC 484 at para. 40.
183 Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97 at 98 [Code Article on Counsel's Duty of Civility].
184 LeSage and Code Report on Large and Complex Criminal Case Procedures, p. 89.

> cannot realistically be disputed, refusing to make frivolous arguments that have no real basis in fact or law and treating your opponent with respect and courtesy are all hallmarks of the professionally responsible lawyer. When counsel abide by these ethical duties in large complex cases, their conduct will invariably shorten and simplify the trial and the pre-trial motions. The result will be a better quality of justice both for the client and for the overall administration of justice.[185]

It cannot be stressed too much that the trial judge plays a key role in determining the level of civility in the courtroom. It is the judge's responsibility not to remain passive, but to set the tone and to discipline errant counsel. Ultimately, the trial judge is the person in charge and, regrettably, as discussed below, it is not uncommon for trial judges to lose control of the proceedings.

9.3.5 Accountability of the Legal Profession for Trial Delays

Legitimate criticism has been directed at the legal profession for its role in extending the length of trials. This criticism applies to civil and criminal proceedings, but the following discussion addresses criminal proceedings, where lawyers and judges both bear responsibility for the problem.

9.3.5.1 Lawyers

It is essential that constitutional rights granted to Canadians not be placed in jeopardy. However, obstructionist tactics employed under the guise of protecting *Charter* rights are a reality in our justice system. Such tactics are an abuse of the system and a threat to the efficient administration of justice. Regrettably, obstructionist tactics are a frequent occurrence in Canadian courts. When they are allowed to be used, it can fairly be said that the judge has lost control of the court proceedings to some extent.

Evidence of this loss of control is seen in the tolerance of judges for delay tactics and frivolous applications by defence counsel. Though the right to fair answer and defence is unassailable, applications without merit by defence counsel should not be tolerated in light of their duties as officers of the court.[186] Besides being admonished by the trial judge, miscreant lawyers should be reported to the appropriate law society.

Lesage and Code, as well as some judges, have raised concerns about the ability of law societies to discipline lawyers for making frivolous motions that threaten the possibility of deciding a case on its merits.[187] Law societies must

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185 Code Article on Mega Trial Phenomenon at 463.

186 See, for example, Chapter 10 of Alberta's *Code of Professional Conduct,* addressing the lawyer's role as advocate. Rules 1 and 2 provide, respectively, that "A lawyer must not take any step in the representation of a client that is clearly without merit" and that "A lawyer must use reasonable efforts to expedite the litigation process".

187 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 141; *R. v. Dunbar* (2003), 191 B.C.A.C. 223 (B.C.C.A); *R. v. Francis* (2006), 207 C.C.C. (3d) 536 at 542-543 (Ont. C.A.).

take their disciplinary mandates seriously when confronted with misconduct in the court room. They should consider robust sanctions, including suspensions from practice and even disbarment, for lawyers who bring genuinely frivolous motions that threaten the viability of long trials. As discussed earlier, adequate funding should also be available to ensure that experienced defence lawyers can afford to take on long terrorism prosecutions. Invoking disciplinary measures and involving experienced counsel in terrorism trials will minimize the chances that terrorism prosecutions will be impaired by needless motions and delaying tactics.

Equally, the conduct of Crown counsel is not beyond reproach. Agents of the Attorneys General are under the disciplinary control of the law society to which they belong.[188] In addition, their conduct of trials is the responsibility of the Attorney General of the province where the trial occurs. Those in charge of Crown counsel should not wait for judges or law societies to take remedial action if unreasonable actions by Crown counsel contribute to prolonged trials. It is important that experienced and reasonable prosecutors be assigned to terrorism prosecutions and that there be effective oversight of their actions.

While delay and ill-conceived applications are, as a rule, the province of defence counsel, the Crown contributes equally to the length of trials by overcharging. In many cases, instead of carefully considering a charge or charges, the Crown lumps several accused together and lays multiple charges of conspiracy and specific offences. This is a particular likelihood under the *Anti-terrorism Act*, which contains many overlapping offences. Overcharging results in long preliminary hearings and lengthy instructions to juries at trial. The corollary of overcharging is that it gives defence counsel the chance to attack legitimately the multiplicity of inappropriate charges. All this serves only to lengthen a trial.

Canadian law societies have a duty to respond when irresponsible actions by their members add to the length of trials. Law societies must respond to complaints, particularly from judges, but they must do more. In today's climate of frequent abuse, it is not sufficient that law societies react only to complaints by the courts or others. Law societies must be more proactive, in order to ensure that all counsel are aware of their ethical duties to the court, including the prohibition against frivolous motions or refusals to make obvious admissions of fact. As Lesage and Code argued, trial judges should also "…insist on high levels of professionalism from all counsel in long complex trials. This should begin with educative steps, to remind counsel of the basic rules of court room behaviour and of their duties as officers of the court. At the first sign of misconduct, the judge should intervene and remind counsel of their proper role."[189]

9.3.5.2 Judges

The increased length of Canadian criminal trials is a recent development. Chief Justice McLachlin recently observed that murder trials which used to take five

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188 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372.
189 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 179.

to seven days now routinely take five to seven months, if not longer.[190] Other judges have observed how the *Charter* and pre-trial motions have contributed to prolonging trials.[191] However, the judicial contribution to overly long trials has sometimes been overlooked. Judges bear a good part of the responsibility for delay caused by misconduct by counsel, and by endless, pointless applications in their courtrooms. It is important to understand why some judges today are losing control of long trials.

In recent years, there has been a large increase in the number of judges, both provincial and federal. Each judge brings different experiences, strengths and weaknesses to the court room. All judges, however, must be able to conduct themselves in a fully independent manner.

Judicial independence has been a pillar of our judicial system. It may be that not all judges realize the full reach of that independence. Judicial independence can be abused, but history has shown that the benefits of such independence outweigh the risk of abuse. Judicial independence is one of the principle features of a democracy and is essential to the impartial administration of justice. It ensures that a judge cannot be removed simply because the government of the day happens to dislike his or her decisions. Judicial independence is said to put the judiciary in a position where there is nothing to lose by doing what is right and little to gain by doing what is wrong in the performance of its duties.[192]

The independence of the superior courts is entrenched in section 99 of the *Constitution Act, 1867*, which provides that superior court judges hold office during good behaviour and may only be removed by the Governor General on Address of the Senate and House of Commons. The cumulative effect of sections 96 to 100 of the Constitution is to assign the appointment, tenure and removal of superior court judges to Parliament. Judicial independence is also protected under section 11(d) of the *Charter*, which gives a person who is accused of an offence the right to be tried before an independent and impartial tribunal.[193] Finally, judicial independence has been recognized as a fundamental principle of the Constitution that is not limited to the textual provisions described above.[194] Concerns about judicial independence should not be limited to the mechanics of security of tenure, financial security and institutional independence from the legislature and the executive. Concern should also extend to the spirit of judicial independence.

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190 Rt. Hon. Beverley McLachlin, "The Challenges We Face", Remarks Presented at the Empire Cub of Canada (March 8, 2007), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp> (accessed December 3, 2008).

191 Hon. Michael Moldaver, "Long Criminal Trials: Masters of a System They Are Meant to Serve" (2006) 32 C. R. (6th) 316 at 319[Moldaver Article on Long Criminal Trials]. The remarks were made during the John Sopinka Lecture on Advocacy at the Criminal Lawyers' Association Annual Fall Conference held in Toronto on October 21, 2005.

192 W.R. Lederman, "The Independence of the Judiciary" 1956 (Volume 34) The Canadian Bar Review 1139 at 1179, citing R. MacGregor Dawson, *The Government of Canada*, 2nd ed. (Toronto: University of Toronto Press, 1954), p. 475.

193 *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Generoux* [1992] 1 S.C.R. 259.

194 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3.

Although the formal requirements of judicial independence continue to be honoured, some judges in some long cases may believe that they are not fully independent. Such perceptions may be inhibiting the ability of trial judges to control a trial. In their recent report, Lesage and Code spoke of how "timid judging"[195] erects a barrier to effective judicial case management, including the trial judge's common law powers to determine schedules, set time limits and impose other requirements with respect to pre-trial motions. The reasons for this timidity must be addressed and, to the extent possible, it must be eliminated.

For a variety of reasons, judges may perceive that they are not fully free to make rulings without fear of consequences. They may fear that exerting tight control over the trial process may lead to claims of reasonable apprehension of bias, reversal on appeal and complaints to their chief justice or to the Canadian Judicial Council. This fear may inhibit judges from exercising the type of judicial independence and power necessary to manage long terrorism trials. The only factor that should influence a stern direction, an unpopular decision or a difficult choice should be the judge's carefully considered opinion.

Fortunately, appellate courts are increasingly recognizing that trial judges must be able to exercise strong case management authority in order to control the trial process. In one recent case involving protracted proceedings, the Ontario Court of Appeal upheld the trial judge's refusal to allow the Crown to lead documentary material on the 67th day of a trial. Justice Rosenberg recognized that "…a trial judge does have and must have a power to manage the trial." He added that, "in exceptional circumstances," case management "…can even include a power to require the prosecution to call its evidence in a particular order."[196] He added:

> The trial judge had spent 67 days of trial with the case. He was intimately familiar with the issues and the potential pitfalls of proceeding in the way suggested by the prosecution. Far from showing impatience or partiality to one side or the other this trial judge had shown considerable patience and restraint. But, he was of the view that something had to be done to bring the case back under control. This was not a demonstration of partiality but an exercise of a trial management power.
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> Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost

195 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 16.
196 *R v. Felderhof* (2003), 180 C.C.C. (3d) 498 at paras. 36, 39 (Ont. C.A.).

> unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.[197]

Another case involved devoting five weeks to an issue raised under section 37 of the *Canada Evidence Act*. This involved access to information about an informer. At an appeal taken before trial, Justice Sharpe warned that "…[t]he trial judge certainly could and should have taken a firmer hand in moving this issue along. She entertained lengthy and repetitive submissions that became an ongoing dialogue instead of insisting on focused submissions."[198] The test for reasonable apprehension of bias in a judge is strict. It requires a real likelihood or probability of bias in the eyes of a reasonable and informed person.[199] Trial judges should not allow the remote possibility of reversal on appeal to fetter their exercise of strong case management authority. To this end, it will be helpful if terrorism prosecutions were conducted by trial judges who are experienced and knowledgeable about the complex evidentiary and criminal law issues involved.

Another possible perceived threat to judicial independence is the ability of the Canadian Judicial Council (CJC), which is composed of about 40 chief justices and associate chief justices, to investigate complaints about the judicial conduct of the more than 1,000 federally-appointed judges.

The CJC was created pursuant to section 59 of the *Judges Act*. [200] Under the Act, the CJC has the power to investigate complaints made by members of the public about the conduct of superior court judges. Complaints can be made by anyone, including an unhappy litigant or lawyer who has appeared before the judge.

The Judicial Conduct Committee of the CJC can generally dismiss without further process any complaints that are trivial, vexatious, made for an improper purpose or manifestly without substance, or it can deal with complaints in a summary manner. If the complaint is not dismissed summarily, additional information may be sought from the judge, the judge's chief justice and the complainant, and remedial measures may be imposed. At higher levels, the complaint may be considered by a panel of three or five judges, but the panel may not include a judge from the same court as the judge who is the subject of the complaint. This panel may recommend a formal inquiry, and the CJC may

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197 *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at paras. 39 and 40 (Ont. C.A.).
198 *R. v. Omar*, 2007 ONCA 117, 218 C.C.C. (3d) 242 at para. 31.
199 *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at paras. 111-112.
200 R.S.C. 1985, c. J-1.

then decide to conduct a formal inquiry. Section 63(1) of the Act requires that a formal inquiry be held without any of these intermediate steps if the complaint is made by a provincial Attorney General or the federal Minister of Justice. The Federal Court of Appeal has upheld this as consistent with judicial independence even though the Attorney General or Minister may also effectively be a litigant in the case in question.[201]

The CJC is chaired by the Chief Justice of Canada and consists of the chief justice and associate chief justices of each superior court or branch or division thereof throughout Canada, as well as the senior judges in the courts of the territories. Section 60 of the Act defines the objectives of the CJC as being to promote efficiency and uniformity, and to improve the quality of judicial service in all superior courts of Canada. The CJC has the power under section 63 to investigate complaints by members of the public or by a member of the Council itself but, as noted above, it must conduct an inquiry if the Minister of Justice or the Attorney General of a province requests one. After the investigation or inquiry, which may include a request for a response from the judge, the CJC can make recommendations, ranging from the removal of the judge from office to delivery of a reprimand or a dismissal of the complaint.

Does the current Canadian Judicial Council (CJC) process sufficiently respect judicial independence? The fact that the CJC is composed of judges and not members of the executive or legislative branches of government satisfies some of the more formal requirements of judicial independence. However, it is important to go beyond formal requirements to ensure that, substantively, every judge is able to exercise judicial independence when making difficult decisions in often tense environments. There is a reasonable possibility some judges may see the disciplinary power of the CJC as being akin to a "watchdog" that second guesses difficult judicial decisions. Fear of such a watchdog is incompatible with a full and robust exercise of judicial independence.

An instructive case bearing on these very issues involved a long "biker gang" trial in Quebec. In the middle of the trial, the judge recused himself after he was reprimanded by the CJC for insulting one of the accused's lawyers at an earlier bail hearing.[202] The CJC's disciplinary decision was made available to a press reporter before the judge had received official notification of it. The judge took the position that, as a result of the reprimand, he had lost his moral authority to preside over the trial. A mistrial was eventually declared. A 15-week jury trial that had heard 113 witnesses had to be aborted. The judge's recusal then became the subject of a complaint by the Attorney General of Quebec to the CJC. A formal inquiry found that the judge's recusal was "improper" and that the reason he gave for recusing himself "…was not a valid reason for withdrawal

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201 *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, 279 D.L.R. (4th) 352 at para. 51. This decision effectively recognizes that the historic mandate of the Attorney General to safeguard the integrity of the Justice system is not incompatible with his or her ultimate responsibility for the conduct of criminal prosecutions. The unique role played by the Attorney General is discussed elsewhere in this volume.

202 *R. v. Beauchamp*, [2002] R.J.Q. 2071, 4 C.R. (6th) 318 (Que. S.C.).

from the case."[203] The inquiry, undertaken by a panel of the CJC, found that the judge had failed in the execution of his office, but that this failure did not constitute grounds to recommend his removal from his office. The results of the panel's inquiry then came before the full CJC. The full CJC agreed that the judge should not be removed but disagreed with the inquiry's finding of impropriety. It stated: "Except where a judge has been guilty of bad faith or abuse of office, a discretionary judicial decision cannot form the basis for any of the kinds of misconduct, or failure or incompatibility in due execution of office…. Exercise of a judicial discretion is at the heart of judicial independence."[204] The CJC also articulated some limits on complaints by Attorneys General under section 63(1) of the *Judges Act*.

The CJC should continue to be sensitive to, and be seen to be sensitive to, the difficult position of trial judges who must aggressively manage long criminal trials. It should avoid fostering a concern that its operations threaten judicial independence, particularly in relation to the management of trials. One change that might reduce this concern lies in the composition of the Council. At present, membership in the CJC is limited to chief justices and associate chief justices. Historically, the chief justice was seen as the first among equals. The opinion of a chief justice, then as now, is of no greater weight than that of a puisne judge of the same court. As the number of judges has expanded in recent years, the administrative role of chief justices and associate chief justices has grown. The increase in administration includes additional and serious responsibilities, such as dealing with space requirements, budget allocations and court assignments, to name only a few. As a result, chief justices have become more distant from the other members of the court. Increased responsibility has also added more power to the office of chief justice. The result is a growing perception of what might be described as an "employer-employee" relationship in the courts.

The employer-employee characterization is not apt because a chief justice has no power of suspension or termination. Such powers would be inconsistent with the independence of each judge, even though the chief justice is a judge and not part of the executive or legislature. Chief justices do, however, have responsibility for assigning cases and for approving attendance at conferences, sabbaticals and other like activities, including service on public inquiries. Not surprisingly, some judges may see the chief justice as their "boss" in the real sense and not want to be adverse in interest. In truth, however, striving to please the "boss" threatens judicial independence.

There is merit in making all superior court judges eligible to serve as Council members, not merely as members of subcommittees. Professor Martin L.

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203 Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss. 65(1) of the *Judges Act* concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec (December 19, 2003), p. 1, online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/cmslib/general/conduct_inq_boilard_ReportIC_200312_en.pdf> (accessed December 5, 2008) [Canadian Judicial Council Report on Mr. Justice Boilard].

204 Canadian Judicial Council Report on Mr. Justice Boilard, p. 2, quoted with approval in *Cosgrove v. Canada (Attorney General)*, 2008 FC 941, 331 F.T.R. 271 at para. 15.

Friedland has argued that "…it would be desirable to involve puisne [regular, as opposed to chief] judges in discipline matters….To involve them in discipline would give them a greater stake in the process and would ensure that it is not solely the chief justices who are making the decisions."[205] This would allow puisne judges to participate in the critical initial decisions about whether complaints merit a formal public inquiry.[206] It would also allow puisne judges to take part in deciding whether to accept the findings and recommendations of inquiries.

Members of the CJC could be elected by members of their courts and serve a fixed term, to allow for rotation of members. To maintain continuity, the Chief Justice of Canada should remain the permanent Chairperson, as is the case at present. Along with a reaffirmation by the CJC of the centrality to judicial independence of judicial discretion and of the immunity of such discretionary decisions from disciplinary oversight, such changes to the structure and composition of the CJC would remove any alleged "chilling effect" that might otherwise result from the CJC's disciplinary powers. This "chilling effect" would no longer serve as an excuse for judges to fail to discharge their duty to act decisively and authoritatively in controlling the process in their court rooms.

Another change in the procedures of the CJC that would mitigate concerns that the hearing of complaints could impinge on judicial independence is the repeal of section 63(1) of the *Judges Act*. As discussed above, this provision requires a formal and public inquiry if a provincial Attorney General or the federal Minister of Justice lodges a complaint about a judge. The section 63(1) procedure short-circuits many intermediate steps that are available to deal with complaints that are made under section 63(2) of the Act. Section 63(1) has been the source of controversy[207] and *Charter* challenge on the basis of alleged inconsistency with judicial independence. There is no evidence that the procedure has been abused or exercised in a manner inconsistent with the Attorney General's obligations to act in the public interest.[208] Without considering the merits of the *Charter* issue, which will be resolved finally by the courts, section 63(1) is, in the Commission's view, in conflict with the spirit of full judicial independence. Section 63(1) allows one side to a dispute, provincial or federal attorneys general who may prosecute terrorism cases, to trigger a very formal and public process that can lead to

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205 M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), p. 138 [Friedland, *A Place Apart*].

206 A report commissioned by the Canadian Judicial Council recommended that while *puisne* judges should be allowed to serve on subcommittees, they should not serve on committees. With respect to the Judicial Conduct committee, the reason given was "…that it would not be appropriate for individual *puisne* judges to have [the authority to resolve complaints] in respect of complaints about other *puisne* judges": *The Way Forward: Final Report of the Special Committee on Future Directions to the Canadian Judicial Council* (2002), p.27, online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_FuturesReport_20021129_en.pdf> (accessed December 3, 2008).

207 Professor Friedland recommended that the ability of provincial Attorneys General to initiate an inquiry under s. 63(1) be removed: Friedland, *A Place Apart*, p. 139. Provincial Attorneys General conduct the vast majority of criminal prosecutions, but in the terrorism context, the federal Attorney General will frequently be the prosecution: see Chapter III.

208 Since 1977, there have been seven requests by an Attorney General for an inquiry under s. 63(1). Four resulted in a recommendation that the judge in question not be removed, two resulted in the judge's resignation before the inquiry started and one resulted in the judge's resignation after the inquiry recommended that the judge be removed from office: *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, 279 D.L.R. (4th) 352 at para. 40.

a recommendation that a judge be removed from office. Section 63(1) is not necessary because provincial and federal attorneys general can bring complaints like anyone else under section 63(2). Complaints under section 63(2), especially when supported by an Attorney General, would be considered seriously. They would, however, be subject to a process that is designed to resolve complaints in a much more summary and less public manner and that reserves the formal inquiry process as the last step of the complaint resolution process.

There are many reasons for the type of prolonged trials that create the danger of rendering some terrorism prosecutions unmanageable. A variety of other remedies relating to matters such as disclosure and pre-trial motions are necessary and are examined elsewhere in this chapter. No single measure can eliminate overly long trials. In some cases, such as the Air India trial, the very nature of the subject matter will require a long trial. Nevertheless, the control that judges exercise over the proceedings before them is a key factor in helping long trials to proceed fairly and efficiently. Terrorism prosecutions present special challenges in part because the stakes are so high. Both the prosecutor and the accused may engage in unnecessary tactics for a variety of reasons, ranging from extreme caution and adversarialism to outright attempts (by defence counsel) to sabotage the prosecution. Such tactics can only be controlled by a strong and independent judge. Although the suggestions advanced in the present discussion can be helpful in removing perceived obstacles to the exercise of judicial independence, in the end the issue comes down to judges' willingness to accept – and exercise with courage and integrity – the responsibility implicit in their role. Even if it means exercising powers that will be unpopular with some or all litigants and the public, or making decisions that run a risk of an appeal or a complaint to the Canadian Judicial Council, judges must remain in control of trials. Judicial independence is a fundamental part of our constitution. When managing terrorism prosecutions, judges must appreciate the role of judicial independence and act accordingly.

9.3.6 Pre-trial Motions

Much of the delay in a long trial occurs at the pre-trial stage. Ontario Court of Appeal Justice Michael Moldaver once described long criminal trials as a "… cancer on our criminal justice system" that posed a threat to its very existence.[209] He attributed long trials largely to the increasing length of the pre-trial phase, calling pre-trial motions "…this country's greatest growth industry."[210] The 2006 Ontario Superior Court Report agreed with Justice Moldaver, adding that pre-trial applications are "…the greatest reason why trials last longer than anticipated."[211]

Delays caused by pre-trial applications threaten the viability of terrorism trials. It is here that the greatest need to introduce efficiencies to the trial process arises. No legislative amendment is required to streamline pre-trial applications.

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209 Moldaver Article on Long Criminal Trials at 316.
210 Moldaver Article on Long Criminal Trials at 319.
211 Ontario Superior Court Report on Criminal Trials, para. 307.

As discussed earlier, much of the solution can be found with the judge hearing the applications. A judge should not be afraid to control the courtroom – including taking control of the pre-trial process and establishing ground rules and deadlines for bringing applications.

Wright and Code recommended that all pre-trial applications be subject to the following rules:

- that all motions be in writing;
- that they be served on opposing counsel with two weeks notice; and
- that any defence to a motion be served in writing no later than one week before its presentation.[212]

The trial judge, appointed early in the process, should hear most pre-trial applications. As noted earlier, the Commission recommends that trial judges be authorized to handle applications under section 38 of the *Canada Evidence Act*. In fact, the trial judge should be the only judge to hear motions that are central to the case. Since only the trial judge can decide constitutional issues, having the trial judge appointed early also allows the early determination of those issues. In addition, questions of admissibility of evidence are so central to the case that they should not be heard by any judge but the trial judge. Such an approach also reinforces the notion that the responsibility of ensuring that the case comes to trial must be that of the trial judge.

There may be a few situations, however, where it is more appropriate for another judge to decide pre-trial motions. For example, the following pre-trial matters might be handled by a judge other than the trial judge:

- Rowbotham and Fisher-type applications;
- judicial interim release;
- plea discussion negotiations and guilty pleas (unless all accused plead guilty); and
- related investigative hearings.

In the Air India case, at least three judges heard motions besides trial judge Justice Josephson. Having such motions heard by a single judge other than the trial judge would promote continuity in decisions about the case and would make it much more likely that the judge hearing those motions would have a sound knowledge of the case. However, appointing a single judge to hear all motions that are not heard by the trial judge does risk setting up a second centre of power in the trial, which may detract from the authority of the trial judge.

Some groups have called for a "case management" judge to handle many of the pre-trial motions that the Commission recommends be handled by a trial

212 Wright and Code Report on Air India Trial, Part II, p. 8.

judge who has been appointed sufficiently early in the trial process. The Federal/Provincial/Territorial Working Group on Criminal Procedure, for example, recently called for the nomination of a "trial management judge" as part of the "exceptional trial procedure" that would come into play in a mega-trial.[213] The 2004 Steering Committee Report called for appointing a special "case management judge" to share the workload of the trial judge in mega-cases. This judge would have the same powers as the trial judge, and both judges would have the same status.[214] The Steering Committee recommended that the case management judge would be given authority to do the following:

- Consider all the issues relating to disclosure and make orders, particularly on the content and format of the disclosure and on its scheduling;
- Rule on bail applications and review of bail conditions;
- Rule on issues relating to funding for defence counsel, witnesses or jury members ...;
- Permit, where necessary, access to proceeds of crime;
- Rule on applications for severance ...;
- Rule on preliminary issues involving the presentation of evidence, including:
  - Admissibility of evidence;
  - *Charter* questions;
  - Requests of the *R. v. Corbett* type (regarding the exclusion of past convictions from the evidence);
  - Expert status;
- Fix deadlines and ask the parties to report on the progress of the file;
- Invite the parties to identify the issues, keeping in mind that the accused cannot be forced to make admissions ...;
- Put admissions made by the parties in the file.[215]

The Steering Committee recommended that the case management judge act as a facilitator for any negotiations between the prosecution and the defence – for example, about potential pleas and stays of prosecution. This was because "… the trial judge must refrain from participating in any such discussions."[216] The case management judge would serve as a mediator in negotiations regarding potential pleas by the accused and potential stays of certain charges by the Crown. The Steering Committee also recommended authorizing the case management judge, in certain circumstances, to hear guilty pleas and pass sentence.[217]

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213 F/P/T Working Group Proposals on Mega-Trials, pp. 6-9.
214 Steering Committee Report on Mega trials, s. 4.2.1.
215 Steering Committee Report on Mega trials, s. 4.2.3.
216 Steering Committee Report on Mega trials, s. 4.2.6.
217 Steering Committee Report on Mega trials, s. 4.2.6.

In addition, the Steering Committee recommended that "…motions on matters filed during the trial … be referred to the management judge when they deal with matters completely separate from the evidence, or where a ruling from the management judge may need to be reopened in light of new facts or exceptional circumstances."[218] As well, once the case is in order and ready to go to trial, the case management judge would give the trial judge a report containing rulings on preliminary motions, orders about the disclosure of evidence, admissions made by the parties and issues identified by the parties.[219]

Some provinces already use case management judges and pre-trial judges to ensure efficiency in managing the pre-trial process.[220] The Steering Committee's recommendations would remove disparities among the provinces. The recommendations would ensure that many more pre-trial applications could be heard by a judge other than the trial judge, freeing the trial judge to attend to trial issues exclusively. In particular, the recommendations would allow for another judge to hear certain applications that are not appropriate for the trial judge to hear. The recommendations would also ensure that a single judge is responsible for every related application that is not to be heard by the trial judge. Finally, the 2004 Steering Committee Report's recommendations would force parties to bring their applications before the case management judge during the pre-trial phase or run the risk of having their late applications refused.[221]

Forcing parties to bring all or most of their applications during the pre-trial phase would represent a significant departure from the existing practice in most provinces and may not be advisable, particularly when it may not be possible for counsel (both defence and prosecutor) to identify in advance all the applications that should be brought. Good preparation and communication among counsel will provide some certainty, but it is impossible to script litigation in the way envisaged by the 2004 Steering Committee Report.

Leaving aside the merits of the proposals for non-terror cases, the Steering Committee proposals do not take into account the unique challenges of terrorism prosecutions. As discussed earlier, terrorism prosecutions are less likely than many other cases to be resolved by plea negotiations. Issues of disclosure, including whether secret intelligence will be disclosed to the accused under section 38 of the *Canada Evidence Act*, will play an important and sometimes critical role in terrorism prosecutions. The unique demands of disclosure in terrorism prosecutions may result in late disclosure issues that should be resolved by the trial judge. The trial judge must be able to reconcile the competing needs for disclosure and secrecy in a terrorism prosecution and revisit disclosure orders as the trial evolves. Remedies for disclosure violations may be best decided at the end of the case by the trial judge, as would have

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218 Steering Committee Report on Mega trials, s. 4.2.6.

219 Steering Committee Report on Mega trials, s. 4.2.4.

220 Background Dossier For Term of Reference (b)(vi), p. 41. See, for example, the pre-trial recommendations of the Ontario Superior Court Report on Criminal Trials as well as the "management" and "facilitation" conferences for penal and criminal cases in Quebec.

221 Steering Committee Report on Mega trials, s. 4.2.3.

occurred in the Air India case but for the acquittals. These distinctive traits of terrorism trials all suggest that a competent, experienced and committed trial judge with the powers to make decisions about the broadest range of pre-trial matters should be appointed early on in a terrorism prosecution. Such early appointment should largely eliminate the need to bring another judge (except in the case of certain pre-trial motions described earlier) into a terrorism prosecution, even if the case management judge recommended in the 2004 Steering Committee Report is available.

Relying on a single trial judge to "case manage" a terrorism prosecution would avoid the need for legislative amendments to empower pre-trial management judges or to allow the parties or the Chief Justice to identify when a prosecution would be sufficiently complex to require the appointment of a case management judge. Moreover, relying on a single judge avoids the possibility of parties attempting to ask the trial judge to re-open earlier decisions of the pre-trial management judge.[222] It is simpler and more efficient to appoint the trial judge at an early stage. The proposed authority of the trial judge to re-visit any non-disclosure orders made under section 38 of the *Canada Evidence Act* would also help to ensure fairness towards the accused if developments in the trial make it necessary to disclose national security material that has previously been withheld. Whatever the merits of a pre-trial management judge may be in non-terrorism prosecutions, a matter that is in any event beyond the Commission's mandate, the challenges of terrorism prosecutions require that the trial judge firmly manage most aspects of the trial at the earliest possible opportunity. In principle, divided responsibilities and accountability should be avoided. Someone should be in charge. In a terrorism prosecution, the trial judge is that person.

9.3.7 Pre-trial Conferences

Section 625.1 of the *Criminal Code* provides the authority for pre-trial conferences. These are meant to promote a fair and expeditious trial and constitute one of the first official meetings between Crown and defence counsel. Pre-trial conferences

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222 Although he favoured the two-judge model because the single judge model was "administratively rigid," Code conceded that "…educating two separate judges about one case is more resource intensive and creates some risk that the trial judge will disagree with the pre-trial judge's rulings and will reverse them if persuaded that something material has changed between the pre-trial and the trial. Only the judge who makes the pre-trial ruling really knows whether some change in circumstances would have been material to his or her original decision. Having two separate judges will inevitably encourage attempts to revisit earlier rulings. Furthermore, assigning the case at an early stage to one judge, who must both manage the case prior to trial and then try it (the one-judge model found in the English rules), encourages that judge to take ownership of the case, work diligently to either resolve it or shorten it, and take responsibility for the efficient management of his or her overall caseload": Code Article on Mega Trial Phenomenon at 457-458. On the English approach, which gives the trial judge extensive powers of active case management, including the power to decide and if necessary revise non-disclosure orders on the basis of public interest immunity, see Code Article on Mega Trial Phenomenon at 440-445; Roach Paper on Terrorism Prosecutions, pp. 260-269. Roach also notes that trial judges in Australia and the United States have robust case management powers, including the ability to make decisions about whether secret intelligence must be disclosed to the accused or can be disclosed in a modified form.

are mandatory in jury trials. In other trials, Crown or defence counsel may apply to the court for a pre-trial conference, or the court may order one on its own motion.

The pre-trial conference is often the ideal forum for discussions between counsel and the judge on matters such as disclosure, including disclosure involving section 38 of the *Canada Evidence Act*, plea bargaining, choice of mode of trial and length of trial, admissions of fact, *Charter* applications and other pre-trial motions, including the rules for the presentation of the motions.[223] Efficient and early discussions on these issues, combined with the willingness of counsel to compromise (and the authority to do so), can narrow the issues to be addressed at trial and provide a more efficient pre-trial and trial.

However, in many jurisdictions, counsel fail to take pre-trial conferences seriously,[224] if they even bother to attend them at all. Counsel who do attend often do so unprepared and without instructions from their clients, or they may send junior counsel with no knowledge of the file and no authority to make decisions or compromises.[225] In addition, the judge who presides at the pre-trial conference, if not the trial judge, may essentially be powerless to make binding orders on critical matters such as disclosure.[226] Such pre-trial conferences serve no useful purpose.

The 2006 Ontario Superior Court Report recognized that pre-trial conferences were not being taken seriously, were not being used to their full potential and did not fulfill their role as case management tools. The Report responded with a series of recommendations which set out proposed obligations for counsel and the matters to be covered.[227] The goal of these recommendations was to create a pre-trial conference system where counsel would study the case before the pre-trial conference and make binding commitments about various pre-trial and trial issues, including pre-trial applications that they intended to present and rules for their presentation.

The 2008 F/P/T Working Group Proposals also called for an enhanced pre-trial conference procedure, recommending a provision in the *Criminal Code* similar to section 536.4, which provides for pre-hearing conferences in the context of preliminary inquiries.[228] Section 536.4 contemplates meetings to identify the issues that require the calling of evidence, which witnesses must be heard, and their needs and circumstances. The section seeks to encourage the parties to make decisions to promote a fair and expeditious process.[229] Lesage and Code commented, however, that pre-hearing conferences are not being used effectively in preliminary inquiries because of the inability of the judges to make

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223 Ontario Superior Court Report on Criminal Trials, paras. 197, 208.
224 Ontario Superior Court Report on Criminal Trials, para. 154.
225 Ontario Superior Court Report on Criminal Trials, paras. 155-156, 158-159.
226 *R. v. S.(S.S.)* (1999), 136 C.C.C. (3d) 477 (Ont. S.C.J.).
227 Ontario Superior Court Report on Criminal Trials, Chapter XVII: Compilation of Recommendations, Recommendations Regarding Pre-trial Conferences.
228 F/P/T Working Group Proposals on Mega-Trials, p. 8.
229 Allowance would have to be made for the differences between preliminary inquiries, which have limited objectives, and the conduct of actual criminal trials.

binding orders about the conduct of the proceeding.[230] This again underlines the importance of allowing the trial judge, not another judge, to conduct a pre-trial conference that produces binding deadlines and rulings.

As with the hearing of pre-trial motions, the trial judge should be involved in the pre-trial conference. The trial judge is fully invested in the case and will have a very direct interest in pressing for the case to proceed as efficiently as possible. This is not to say that the trial judge should try to force counsel to attend a pre-trial conference and dictate the issues to discuss. In some cases, it may be more appropriate for the judge to inform counsel that he or she is available for a pre-trial conference, but not to dictate the process, at least at that time. The main point, however, is that the trial judge should be in charge. Moreover, the trial judge should not be timid about managing the process to ensure that the case proceeds to verdict in an efficient and fair manner.

9.3.8 Reducing Delays and Re-litigation Caused by Severance Orders and Mistrials

Judges encouraging counsel to bring their applications early promises to expedite the trial process. Many pre-trial matters relating to issues such as disclosure, applications under section 38 of the *Canada Evidence Act*, the sufficiency of search warrants and perhaps even the admissibility of evidence could be made before trial. At the same time, it may be desirable for a terrorism prosecution of multiple accused, each perhaps with differing levels of involvement in the alleged terrorist activity, to be severed into smaller, more manageable prosecutions. There is also a possibility that a terrorism prosecution will end in a mistrial, as happened in *R. v. Ribic*, where the accused attempted to call secret evidence in the middle of the trial. Litigation and appeals in the Federal Court were necessary while the jury was kept waiting.[231] The jury agreed to the postponement, but the trial judge concluded at one point that, with more Federal Court proceedings pending, he must dismiss the jury and declare a mistrial.

At present, rulings rendered before a mistrial or before severance may have to be re-litigated before the judge of the severed or new trial.[232] Similarly, there is no provision in the *Criminal Code* to allow common pre-trial motions to be heard and decided in cases that were severed into separate prosecutions from the start. The present state of the law provides a perverse incentive for prosecutors to overload indictments with many accused and many charges and to resist severance in order to achieve efficiency and consistency in decisions about pre-trial motions. This deficiency in the *Criminal Code* persists despite the observations of many trial judges that severance of prosecutions with many

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230 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 60.

231 For a case study of this prosecution, see Roach Paper on Terrorism Prosecutions, pp. 217-234.

232 Courts of Appeal in Canada appear to be divided about whether rulings of a trial judge before a mistrial continue to bind in the subsequent trial. See *R. v. Wu (J.J.)* (2002), 167 O.A.C. 141 at para. 25, suggesting that such rulings do bind. In contrast, see *R. v. Reashore*, 2002 NSCA 167, 170 C.C.C. (3d) 246 at para. 11, suggesting that such rulings may not be binding at the second trial.

accused and many charges is essential.[233] Although overloaded indictments and refusals to sever can make trials unwieldy, they ensure consistency in rulings about critical pre-trial matters such as the disclosure of intelligence and the admissibility of wiretaps, a consistency that might not be achieved with severed counts if essentially identical pre-trial motions are decided by different trial judges in separate trials.

MacFarlane argued that one of the causes of prolonged trials is overloaded indictments with too many accused and too many charges. He maintained that "…the Crown need not include every potential accused and every potential charge on the indictment."[234] Code agreed that "…there is no doubt that one cause of the mega trial phenomenon is over-loaded indictments with too many accused and too many counts." He added:

> One of the main disincentives to severance under our current legislative regime is that the Crown has a legitimate interest in obtaining single consistent rulings on the major procedural issues in a big case, such as disclosure, admissibility of evidence and any arguable Charter breaches. It makes no sense to litigate these issues repeatedly before separate judges at separate trials. As a result, under our current regime, the Crown understandably resists severance in order to consolidate the rulings before a single judge at a single trial. If the Criminal Code provided for an omnibus hearing of related motions from all related trials, severance of large cases into smaller cases would become a much more palatable remedy.[235]

It would not diminish the fairness of a subsequent trial to have the original ruling bind the judge of a new trial that occurs because of a severance or a mistrial. The accused and the Crown would have fully participated in the arguments leading to the ruling that was made before the severance or mistrial. The same is true if the cases are severed into separate, more manageable, prosecutions from the start and an omnibus hearing of common motions, with all accused represented, occurs before a single judge. In all these scenarios, the accused and the Crown will have been present and participated fully in the arguments leading to the ruling. Neither the accused nor the Crown can claim that the process is unfair, and neither should be allowed to re-litigate the ruling unless they can demonstrate a material change in circumstances. The same principle should apply after a mistrial.[236] Unless a material change in circumstances has occurred, the trial judge's rulings at the first trial should bind the parties at the second trial.

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233 Justice Krindle, for example, has observed: "In my opinion, a trial of perhaps seven or eight accused would be difficult, but could be conducted, with the proper aids to the jury, without the jury's losing focus on the evidence and without the jury's losing the ability to isolate the evidence to the individuals and the issues. Beyond that number I believe that the interests of justice require severance": *R. v. Pangman*, 2000 MBQB 71, 149 Man. R. (2d) 68 at para. 30.

234 MacFarlane Paper on Terrorist Mega-Trials, p. 304.

235 Code Article on Mega Trial Phenomenon at 461-462.

236 However, this principle does not extend to a new trial ordered by an appeal court after it quashes a conviction. In such a case, the parties would have to agree to be bound by the pre-trial rulings made at the first trial.

Experienced counsel can agree to accept a ruling made before severance or a mistrial, but the preferred solution is to amend the *Criminal Code* to ensure that the ruling of the original trial judge is not affected by a severance order or a mistrial. The *Criminal Code* should also be amended to permit omnibus hearings on common motions in related prosecutions that have already been severed. That would mean, for example, that a pre-severance ruling on a *voir dire* about the constitutionality of the anti-terrorism legislation would bind the judge at the severed trial or that a ruling on the constitutionality of a wiretap at an omnibus hearing would bind trial judges in subsequent and separate prosecutions. The same should apply with rulings made before a mistrial is declared. The subsequent judge should be permitted to revisit rulings of the original judge only if materially different facts arise – as might occur, for example, because of continuing disclosure.

Finality is an important value in the criminal justice system. Litigants have no right to a second "kick at the can." The approach proposed above is fair because, in every case, the accused and the Crown are heard before rulings are made. Such an approach is efficient because it prevents re-litigation of the same issues in separate prosecutions. This approach is particularly important for prosecutions of alleged terrorist groups or cells because it allows the prosecution to be broken down and severed into manageable cases while still allowing common pre-trial issues to be resolved in a consistent manner.

It would be important to restrict interlocutory appeals of rulings made before a severance or mistrial, as well as those made at an omnibus motions hearing. Interlocutory appeals can be prevented by deeming the pre-severance, pre-mistrial or omnibus hearing rulings to be rulings of the trial judge in each prosecution. The accused and the Crown could still appeal these rulings, but only after the verdict, according to the standard appeal process of the *Criminal Code*.

Once severed trials conclude, there may be separate appeals of similar issues – for example, separate appeals of a pre-severance ruling about the constitutionality of a wiretap. In cases of separate appeals of similar issues, it should be possible for appellate courts to consolidate the appeals or grant standing to all the accused who would be affected by the appeal. Appeal courts regularly deal with problems created by multiple appeals of similar issues.[237]

The 2008 F/P/T Working Group Proposals suggest that more work needs to be done to ensure that the accused and the Crown are bound by decisions made before the prosecution is severed into separate trials and to deal with problems such as standing at appeals of issues decided before severance.[238]

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237 See, for example, *Re McDonald and the Queen*, 21 C.C.C. (3d) 330 (Ont. C.A.).

238 F/P/T Working Group Proposals on Mega-Trials. The F/P/T Working Group suggests that "extensive examination" is still required "…to ensure that the joint hearing procedure as proposed would facilitate the conduct of mega-trials and not give rise to further complexity and additional procedural delays": p. 20, Proposal 8. At the same time, the Working Group accepts the principle that rulings should continue to bind after a mistrial is declared, absent fresh evidence or prejudice: p. 18, Proposal 7. It is difficult to comprehend the idea that the accused or Crown can claim prejudice from the application of the prior ruling unless there is fresh evidence demonstrating a material change in circumstances. It may promote unnecessary litigation and should be abandoned.

The Commission disagrees. The basic principles are relatively simple. First, decisions made before severance should bind separate trials conducted after severance. Second, omnibus hearings of common pre-trial motions should be allowed in related prosecutions. Section 645 of the *Criminal Code* should be amended to provide that decisions made on pre-trial motions before severance or at an omnibus hearing are deemed to be decisions of the trial judge in any subsequent prosecution. The decisions should be binding absent demonstration of a material change in circumstances. The accused and the Crown should have the right to appeal these rulings only according to regular appeal procedures that apply after the completion of the trial. Appellate courts should be able to manage problems raised by the possibility that one of the severed prosecutions may result in an appeal before the other prosecution is completed, given their control over matters of standing and intervention rights. An appellate decision that is rendered in one case before a related prosecution is completed should also be manageable. Trial judges regularly have to contend with changes in the law that are made in unrelated appeals and they can do so even if the appeal decision is made in a related case.

Prosecutions of suspected terrorist cells may involve many individuals with differing levels of involvement in a terrorist plot. Indeed, one group may be involved in multiple plots. The need for fairness and efficiency requires some prosecutions to be severed into separate and more manageable proceedings. At the same time, the problems of delay and re-litigation that will flow from sensible severance orders need to be remedied. This can be done by amendments to section 645 of the *Criminal Code*, as explained earlier, that will allow common pre-trial issues to be decided fairly and efficiently, and with some finality.

Recommendation 25:

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

Recommendation 26:

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

Recommendation 27:

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

Recommendation 28:

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

9.4 Disclosure

Chapter V reviewed the law relating to disclosure and production of relevant information to the accused. Canada has broad rights of disclosure which allow the accused to have access to information held by the Crown that is not clearly irrelevant to the case. The rationale of the rule is to protect the accused's right to a fair trial and to make full answer and defence, and to prevent miscarriages of justice. However, broad disclosure rights impose costs. There is evidence that they have damaged the relationship between the RCMP and CSIS because they limit the willingness of CSIS to give information to the RCMP and the willingness of the RCMP to receive it. Of greater relevance to the discussion in this chapter, broad disclosure rights place a significant burden on the trial process. Disclosure obligations in any terrorism prosecution are bound to be very onerous and will include many documents related to the police investigation, including non-privileged material relating to sources and agents. Disclosure may also involve intelligence material developed by CSIS or foreign agencies.

Chapter V examined the possibility of enacting legislation to limit the accused's rights to disclosure and production of material from third parties. Ultimately, it was concluded that such legislation would increase litigation, including *Charter* challenges, and that it would not help produce a workable relationship between intelligence and evidence. That said, it was also recommended that prosecutors be reminded in clear terms of their obligation to disclose only information that is relevant to the case, and that they need not disclose privileged material – notably material protected by informer privilege or a national security confidentiality claim. An indiscriminate "dump truck" approach to disclosure should be avoided. Early, well-organized and focused disclosure facilitates admissions of fact that will both shorten the trial process and permit the Crown and defence to plan their cases.

In a case the size of the Air India trial, early preparation is vital to ensure that the start of the trial is not delayed by late or incomplete disclosure. LeSage and Code noted that early disclosure requires police and prosecutors to collaborate closely to ensure a well-organized disclosure brief.[239] Fortunately, the Federal

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239 Lesage and Code Report on Large and Complex Criminal Case Procedures, p. 44.

Prosecution Service Deskbook recognizes this important role of Crown counsel.[240] The policies in the Deskbook stress close cooperation between the police and the prosecutor with respect to the legal requirements and the organization of disclosure. One of the important roles of the new federal Director of Terrorism Prosecutions, a position whose creation is recommended in Chapter III, will be to assist investigators in developing a well-organized disclosure brief and giving legal advice to investigators about privileges that can protect information from disclosure. Close prosecutorial involvement in investigations is also required because section 83.24 of the *Criminal Code* requires the consent of the Attorney General to proceedings in respect of terrorism offences. Prosecutorial involvement should also facilitate informed discussions about the appropriate charges and consequent disclosure obligations. The precise extent of disclosure obligations depends on the nature of the charges that the accused faces.[241]

9.4.1 Electronic Disclosure

As noted earlier, much of the material disclosed in the Air India trial was disclosed electronically. This included the Crown brief (which was also disclosed in hard copy) and a second tier of material that might have been relevant to the defence but was not going to form a portion of the prosecution. A third tier of disclosure involved making large volumes of files available to the defence for manual inspection.

In his testimony, Code spoke about coming up with a practical procedure in the Air India trial and in future terrorism trials:

> The procedure can be devised, and there's nothing constitutional about proper procedure here or practical procedures here, so I think doing exactly what the B.C. prosecutors did in Air India and that we agreed with -- there was negotiation over this but it was all agreed with three tiers of disclosure. The most relevant the core Crown brief should be organized and produced in a hard copy in a Crown brief as it always has been. The second tier of what's recognized as relevant but the Crown's not relying on it, should be disclosed

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240 The Federal Prosecution Service Deskbook provides that: "The most effective way of satisfying Crown counsel's ethical obligation to make full disclosure of the Crown's case is to be involved at an early stage and continue to be involved throughout the investigation. More than any other issue, the preparation of disclosure materials requires intensive cooperation between Crown counsel and the investigative agency, such that the responsibility should be viewed as a joint one. Crown counsel must give the investigative agency sufficient assistance and direction to ensure that the investigators produce a well-organized package that is as complete as possible and in a user-friendly format before charges are laid. The assistance provided should seek to enable the police to produce both excellent Crown briefs and complete disclosure packages for the defence." It goes on to note the role of the prosecutor in "…providing legal advice as to what material is privileged or non-disclosable for any other reason": The Federal Prosecution Service Deskbook, c. 54.3.1.3, online: Department of Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch54.html> (accessed November 24, 2008).

241 See *R. v. Chaplin*, [1995] 1 S.C.R. 727, discussed in Chapter V.

> in CD ROM form after scanning it, and the third tier of the really marginal not clearly irrelevant material the Defence should have access to and on an undertaking and it's the Defence onus to ask for a copy of something that they find helpful. That's the first question about how can we come up with a practical procedure.[242]

Lawyers are increasingly computer literate. In terrorism trials that involve teams of lawyers, the inability of some members of those teams to deal with electronic disclosure should not be a problem since others will have sufficient computer skills. In addition, enhanced funding for counsel can be made contingent upon the legal team possessing sufficient technical abilities to manage electronic disclosure.

Although the trend of recent decisions affirms the validity of electronic disclosure, a legislative presumption in favour of electronic disclosure is necessary to ensure that trials are not derailed by unnecessary proceedings requesting paper disclosure.[243] The Hon. Bernard Grenier testified about the utility of electronic disclosure at mega–trials,[244] as did Bruce MacFarlane.[245] RCMP Assistant Commissioner Souccar advocated identifying and managing disclosure issues "…from day one of the investigation and not at the conclusion of the investigation."[246]

To encourage early disclosure and make voluminous disclosure more manageable, the *Criminal Code* should be amended to permit electronic disclosure and inspection of material by defence counsel in complex criminal cases that are designated as such by the presiding judge. This would allow a tiered approach to disclosure in appropriate cases, like that used in the Air India prosecution. As in that prosecution, defence counsel could in appropriate cases be required to attend at a secure location to inspect documents that, if disclosed, could harm national security. This inspection option is particularly important if, as required by the Supreme Court's recent decision in *Charkaoui*[247], material relating to prior CSIS investigations and surveillance of the accused and their associates is retained and the Crown agrees to make this material available to the accused. In such circumstances, defence counsel should be permitted

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242 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11373. See also Code's elaboration of a proposed disclosure process at pp. 11371-11373.

243 In *R. v. Chan* 2003 ABQB 759 (Q.B.) at para. 77, Sulyma J. referred to a June 2000 order by a Provincial Court judge, Maher J., that electronic disclosure was insufficient and that hard copy disclosure was required. This order dealt a considerable blow to the Crown in this case, as providing disclosure in hard copy to 34 co-accused was an enormous task. A stay of proceedings ultimately ended the Chan trial. At that time, the Crown was still in the process of providing hard copy disclosure to the co-accused: *R. v. Chan* 2003 ABQB 759. But for more recent decisions that recognize that electronic disclosure is sufficient see *R. v. Greer et al*, 2006 BCSC 1894 and *R. v. Piaskowski et al*, 2007 MBQB 68, [2007] 5 W.W.R. 323.

244 Testimony of Hon. Bernard Grenier, vol. 92, December 10, 2007, pp. 12179-12183.

245 Testimony of Bruce MacFarlane, vol. 78, November 19, 2007, pp. 9915-9917.

246 Testimony of Raf Souccar, vol. 78, November 19, 2007, p. 9983.

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

to inspect such materials, but at a secure location where there are facilities for maintaining the confidentiality of the lawyer's work. Proposals have been made in England for similar limits on access to respond to concerns that disclosure could be misused, for example, to reveal the identity of those engaged in covert surveillance.[248]

In its Final Submissions, the Attorney General of Canada warned that even minor changes to the disclosure regime introduce complex and intractable issues about provincial jurisdiction and the ability of northern and remote communities to deal with the complexities of electronic disclosure.[249] In an age of widespread computer use, such concerns are overstated. In any event, the Attorney General of Canada retains the authority to prosecute terrorism offences and to change the province of venue of a terrorism trial, in the unlikely event that electronic disclosure would prove to be beyond the capabilities of a particular jurisdiction. In short, a provision could be added to the *Criminal Code* to allow the Crown to disclose evidence electronically.

9.4.2 Staged Disclosure

As discussed earlier, the Air India trial involved staged disclosure. The Crown brief was disclosed in paper format and electronically. Other relevant material was disclosed electronically, and defence counsel were permitted to inspect and obtain copies of further material, including sensitive material held by CSIS that was not clearly irrelevant. This type of inspection may be particularly valuable in cases like the Air India trial, where masses of wiretaps and other investigative materials exist, but are of limited relevance and will not be adduced as evidence. [250]

By all accounts, the staged approach to disclosure at the Air India trial was fair to all parties. It made the voluminous disclosure in this case more manageable. Although the Crown brief in the Air India trial was disclosed in paper as well as electronic format, paper disclosure may no longer be necessary. In these days of the ubiquitous computer, "…if the accused or counsel requires a hard copy of any of the material on the hard drive other than the video or audio portions it is a simple matter of printing it from the hard drive."[251] In appropriate cases, however, the Crown can make paper as well as electronic disclosure of the Crown brief.

Staged disclosure, including the possibility of simply making some material available for inspection, will be important in many terrorism cases. Relying on inspection allows the Crown to comply with even the broadest reading of *Stinchcombe* disclosure obligations while recognizing that disclosure of material of limited relevance at the outer peripheries of the *Stinchcombe* rule, even

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248 David Ormerod, "Improving the Disclosure Regime," (2003) 7 International Journal of Evidence and Proof 102 at 127.

249 Final Submissions of the Attorney General of Canada, Vol. III, February 29, 2008, paras. 80-84.

250 *Criminal Code* wiretaps that are used as evidence must be transcribed: *Criminal Code*, s. 540(6).

251 *R. v. Greer et al*, 2006 BCSC 1894 at para. 32.

electronic disclosure, may sometimes be unworkable. Inspection requirements can be designed to alleviate legitimate security concerns that sensitive material that the Crown agrees can be disclosed to the accused's counsel not be used for other illegitimate purposes that may endanger sources and operatives. The accused should be given the option of inspecting material at a secure location, subject to compliance with security privileges that respect the need for solicitor-client confidentiality and the confidentiality of the lawyer's work product.

The trial judge should also set time limits for this staged disclosure and not allow disputes about disclosure to simmer or to delay the start of trial. In complex terrorism prosecutions, it is a reality that not all disclosure can occur at the same time. For this reason, the trial judge should "stay on top" of the disclosure process. This does not mean that the trial judge should attempt to read all the disclosure material or that counsel should be encouraged to dump all possible disclosure issues onto the trial judge. The trial judge should be able to expect that Crown counsel will discharge their ethical and legal obligations about disclosure, and that defence counsel will take the opportunity to inspect material of limited relevance, employ search engines to access electronically-disclosed materials, and justify requests for disclosure that go beyond the investigative file and raise peripheral matters.

Recommendation 29:

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

Recommendation 30:

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

Recommendation 31:

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

Recommendation 32:

The Crown should be able to disclose all other material that must be disclosed pursuant to *Stinchcombe* and *Charkaoui* by making it available to counsel for the accused for manual inspection. In cases where the disclosure involves sensitive material, the Crown should be able to require counsel for the accused to inspect the documents at a secure location with adequate provisions for maintaining the

confidentiality of the lawyer's work. Defence counsel should have a right to copy information but subject to complying with conditions to safeguard the information and to ensure that it is not used for improper purposes not connected with the trial;

Recommendation 33:

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

Recommendation 34:

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

9.4.3 Disclosure Issues Relating to Section 38 of the *Canada Evidence Act*

The undertakings signed by defence counsel in the Air India case permitted disclosure of sensitive material without bringing into play the Federal Court process currently required by section 38 of the *Canada Evidence Act*. This avoided what Code described as a "…document-by-document litigation model instead of a sensible negotiation model between counsel."[252] As noted earlier, counsel who signed an undertaking were allowed to view documents that the Crown might otherwise attempt to claim should be protected under section 38.

Code testified about the problems that he believed would arise if the parties had litigated claims under section 38. He stated that "…nobody wanted to do the section 38 procedure. It was an anathema." This was in part because of the procedure involved in educating a Federal Court judge about the case.[253] He testified further about hearing "…over and over again the legitimate concerns of the victims in these cases that the delays are unacceptable and ... we're just inviting delays with the current section 38 procedure."[254]

Two measures could facilitate addressing section 38 claims in future terrorism trials. The first, used in the Air India trial, has been described as a "band-aid" solution. It involved allowing defence counsel access to sensitive information on signing an undertaking. The second, discussed extensively in Chapter VII, is to move section 38 litigation out of the Federal Court and into the hands of Superior Court judges presiding at terrorism trials.

The first solution – the undertaking by defence counsel – worked well in the Air India trial. It was evidence of the commitment of experienced counsel to a manageable trial. It also worked because many of the incidents under

252 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11385.
253 Testimony of Michael Code, vol. 88, December 4, 2007, pp. 11386-11387.
254 Testimony of Michael Code, vol. 88, December 4, 2007, p. 11391.

examination in the Air India trial were almost two decades old. Even if the documents being reviewed were originally highly classified, their age meant that there would be little danger of disclosing current CSIS intelligence, sources or operational methods.

This will likely not be the case with future terrorism trials. The classified information to which defence counsel will seek access will likely be current and may reveal existing operations, targets, sources and intelligence. Understandably, CSIS and the Attorney General would be reluctant to allow counsel who do not have security clearances to review some of these documents, and may challenge or prevent their release by using section 38.

Section 38 litigation may therefore be the only practical way to assess whether it is appropriate to disclose material that brings national security issues into play. Where litigation does become necessary, the Commission's proposed procedure for having section 38 applications heard by trial judges[255] would be much less disruptive than the current Federal Court procedure.

9.4.4 Late and Continuing Disclosure

The volume of materials to be disclosed can create a contest between providing early partial disclosure on time and providing complete disclosure later. Given that the accused are entitled to disclosure of all relevant evidence in the Crown's possession, the Crown's inclination may be to withhold disclosure until it has completed its review of all documents in the investigative file. In a perfect world, the Crown would be able to provide disclosure as of the date of the indictment, but this is often not the case, for a variety of reasons:

- The size of the investigative file may not permit a full review of the evidence to be completed in time;
- The accused may be charged very quickly if they are caught in the act;
- Evidence may be in the possession of numerous agencies and there may be delays in compiling it;
- Evidence may continue to be gathered after the charges are laid, especially if the investigation involves co-conspirators who have not yet been indicted;
- The Government may have to request other agencies to remove restrictions on the disclosure of information, but may not have received permission as of the date of the indictment; and
- The Crown may have exercised its discretion over the timing of disclosure to protect witnesses and sources.

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255 See Chapter VII.

A complete review of the evidence before disclosure might cause delays, and ongoing investigations might make a complete one-time disclosure all but impossible in any event. As a result, it is necessary to strike a balance between timely and complete disclosure.

Late or incomplete disclosure has often been a significant issue in pre-trial applications during mega-trials. In the Air India trial, for example, Justice Josephson ruled on four occasions that the accused's disclosure rights had been violated as a result of lost or destroyed evidence[256] or late disclosure.[257] The extent of the Crown's duty to disclose and the timing of the disclosure required considerable judicial attention, involving 14 days of hearings and elaborate written submissions. At times, the discord that arose over disclosure strained the relationship between Crown and defence counsel.[258]

Because Justice Josephson ultimately acquitted Malik and Bagri, he did not need to decide the appropriate remedies for the various *Charter* breaches that involved late disclosure.[259] In other cases, *Charter* breaches flowing from late disclosure have given rise to a range of different remedies. In most cases, the remedies granted have been costs and adjournments. However, at times they have included the more drastic remedies of exclusion of evidence, mistrials and even stays of proceedings.[260] In *Chan*, late and incomplete disclosure led the accused to apply for a stay of proceedings on the grounds of unreasonable delay and breach of the right under section 11(b) of the *Charter* to be tried within a reasonable time.[261] The judge ordered the stay.

The lesson is clear. Timely and full (to the extent possible) disclosure is an indispensable element of the trial process. That said, there may be legitimate reasons for delays in disclosure, especially in complex terrorism prosecutions that may involve difficult issues of source and witness protection. The trial judge should be available to deal with disclosure disputes at the earliest juncture, and both the Crown and defence should come to the trial judge at the earliest opportunity with disputes over disclosure.

9.5 Issues at Trial

9.5.1 Inability of the Trial Judge to Continue

The Air India trial began on April 28, 2003, and continued until December 3, 2004 – a total of 217 trial days. Justice Josephson delivered his judgment on March 16, 2005.

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256 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864; *R. v. Malik and Bagri*, 2004 BCSC 554, 119 C.R.R. (2d) 39.
257 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 484; *R. v. Malik and Bagri*, 2004 BCSC 1309, 124 C.R.R. (2d) 270.
258 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 484 at para. 24.
259 *R. v. Malik and Bagri*, 2005 BCSC 350 at para. 1250.
260 The remedial jurisprudence is examined in Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1996), paras. 9.134-9.225.
261 *R. v. Chan*, 2003 ABQB 759.

In a jury trial, section 669.2 of the *Criminal Code* allows for a new judge to continue a jury trial if the first judge dies or becomes unable to continue. The new judge has the discretion to continue the trial or to recommence it as if no evidence had been taken.

The 2004 Barreau Committee Report and the 2004 Steering Committee Report both offered recommendations to deal with the death of the trial judge or the judge's inability otherwise to continue with a jury trial. Recognizing that this discretionary power to order a new jury trial could prove problematic, the Barreau Committee recommended that, when appointing a trial judge, the chief justice should also appoint an alternate judge. The alternate judge would keep abreast of the facts of the trial on a regular basis, such as through weekly summaries provided by the trial judge, and would be able to step in should the trial judge be unable to complete the trial.[262] The Barreau Committee argued that appointing a judge as an alternate would not prevent that judge from taking on other matters in the interim, since the responsibilities as an alternate would not fully occupy the judge. This arrangement would therefore not further strain judicial resources.[263] The 2004 Steering Committee Report, following a similar train of thought, spoke in favour of using a "case management judge" who could replace the trial judge if necessary,[264] as did the F/P/T Working Group.[265]

However, neither committee addressed the situation of a trial involving a judge alone. Section 669.2 of the *Criminal Code* requires that if a trial judge sitting alone becomes unable to complete the trial, the trial must begin anew. In the Air India trial, this did not occur, but there was a theoretical possibility that the trial judge could have become incapacitated. This would have led to the declaration of a mistrial. The proceedings would have had to commence anew in their entirety before another judge.

The 2008 F/P/T Working Group Proposals envisaged a trial management judge hearing a range of motions to assist the trial judge. If a mistrial occurred because of the inability of the trial judge to continue the trial or because of insufficient juror numbers, rulings and orders made by the management judge, as well as admissions by the parties, would continue to bind the parties. However, the parties would not be bound if prejudice to the accused could be demonstrated or if fresh evidence was introduced.[266]

There is a possibility a judge in a judge-alone terrorism trial would become unable to continue. However, appointing an alternate judge or a case management judge who could take over the trial may be an unnecessary response to a problem that at this point remains largely theoretical. That said, rulings made

262 Barreau Report on Mega-trials, s. 2.6.2.
263 Barreau Report on Mega-trials, s. 2.6.2.
264 Steering Committee Report on Mega trials, s. 4.2.6.
265 F/P/T Working Group Proposals on Mega-Trials, pp. 6-7.
266 F/P/T Working Group Proposals on Mega-Trials, p. 18. The Working Group noted the similar recommendation (recommendation 12) of the F/P/T Heads of Criminal Prosecutions on the Management of Mega-cases, adopted by the F/P/T Deputy Ministers Responsible for Justice, Ottawa, January 2004.

by the trial judge should continue to bind the parties if there is a mistrial unless a material change in circumstances can be demonstrated. This will at least preserve pre-trial rulings if a trial judge in a judge-alone terrorism prosecution becomes incapacitated. In many terrorism cases, the pre-trial rulings will take up most of the judge's time and thus the recommendation earlier that the pre-trial rulings of a judge shall continue to bind the parties will go a long way towards responding to the potential problems of the trial judge being incapacitated.

9.5.2 The Jury

Section 11(f) of the *Charter* guarantees the right to a trial by jury for offences carrying a maximum punishment of imprisonment for five years or more. With few exceptions, terrorism offences[267] qualify for jury trials on this basis. Some have suggested that juries are not well-suited to terrorism trials and that terrorism offences should be tried by a judge sitting alone. Trying terrorism offences before a three-judge panel sitting without a jury is a second option, one that the Commission's terms of reference require it to explore. However, both modes of trial would deprive the accused of the right to trial by jury. Doing so would attract constitutional scrutiny.

It is of course possible to avoid a constitutional issue by employing one of the following four measures:

- amending the *Charter*: Reaching the necessary political consensus for such an amendment would be extremely unlikely, so this possibility can be discounted;
- using the "notwithstanding clause" of the *Charter*[268]: It is unlikely that a government would rely on the notwithstanding clause and, in any event, the use of the notwithstanding clause would have to be renewed every five years;
- justifying the abolition of jury trials for terrorism trials as a reasonable limit on the section 11(f) *Charter* right to a jury trial
- that "…can be demonstrably justified in a free and democratic society"[269]: It will be very difficult to rely on section 1 of the *Charter* to justify abolishing jury trials because of the range of more proportionate responses that can be taken to improve the trial process and the jury system for long terrorism trials. There is also no evidence of widespread jury intimidation or juror partiality in Canada, circumstances that have been used to justify abolishing jury trials for terrorism trials in jurisdictions such as Ireland and Northern Ireland; or

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267 Set out in Part II.1 of the *Criminal Code*.

268 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 33 [*Charter*].

269 *Charter*, s. 1. See also the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

- reducing the maximum penalty for terrorism offences to less than five years so that the right to trial by jury under section 11(f) would not apply: Given the gravity of most terrorism offences, a reduction of maximum penalties to less than five years imprisonment is simply not warranted.

As a result, the right to a jury trial is almost certain to remain a feature of terrorism trials. It is not feasible to override the *Charter* right to trial by jury or even to justify limits on the right, at least in the present circumstances in Canada.

Even if it was constitutionally possible to require that terrorism trials be held before either a single judge or a panel of three judges, it is not clear that it would be desirable to prevent trial by jury. In *R. v. Turpin*, Wilson J. spoke of the historical importance of the right to a jury trial:

> The right of the accused to receive a trial before a judge and jury of his or her peers is an important right which individuals have historically enjoyed in the common law world. The jury has often been praised as a bulwark of individual liberty. Sir William Blackstone, for example, called the jury "the glory of the English law" and "the most transcendent privilege which any subject can enjoy": Blackstone, Commentaries on the Laws of England (8th ed. 1778), vol. 3, at p. 379.
>
> The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community standards to trial verdicts. Sir James Stephen underlined the collective interests served by trial by jury when he stated:
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> > ... trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source
> >
> > J. Stephen, A History of the Criminal Law of England (1883), vol. l, at p. 573.
>
> In both its study paper (The Jury in Criminal Trials (1980), at pp. 5-17) and in its report to Parliament (The Jury (1982), at p. 5) the Law Reform Commission of Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles.[270]

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270 *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1309-1310.

The Quebec Barreau Committee report stated that "…this constitutional guarantee [of a right to a jury trial] serves to protect citizens against potential abusive or arbitrary procedures. It also serves to reassure citizens as to the quality and impartiality of our justice system."[271] The Barreau Committee concluded that the right to a jury trial should be maintained for all persons accused of a crime for which section 11(f) of the *Charter* guaranteed a right to a jury trial:

> An important part of the right to a fair trial is the right to be judged by a jury of peers, especially for the gravest crimes. The creation of special tribunals goes against the underlying principles of our legal tradition and our democratic values.... There is no reason justifying the setting aside of a right that is essential to the functioning of the judicial system in a democratic society.[272] [Translation]

At a conference in Ottawa in 2007, Justice Josephson spoke of his experience with the Air India trial and suggested that rulings in high profile terrorism trials have a better chance of winning public approval if delivered by juries rather than by judges: "I would have loved a jury trial to have made the factual findings in that case.... I think there's better acceptance of a verdict from a jury in the community, whether they convict or acquit."[273]

The issue then is not really about abolishing juries in terrorism trials. Instead, it is about how to make the trial environment less problematic for juries. Many of the recommendations discussed earlier are designed to make terrorism trials more efficient and more manageable. For example, encouraging the counsel to address matters through pre-trial motions, rather than motions during trial, will resolve many matters before the jury even begins sitting, and avoid the delay and the waste of jurors' time that would occur if these matters were brought up during the trial. Should motions that have to be heard outside of the jury's presence be required at trial, it is possible to schedule them in a manner that reduces the inconvenience to jurors who, after all, are providing a valuable public service. The Commission's recommendations, designed to facilitate the severance of terrorism prosecutions of large cells of alleged terrorists, should enable trials to be broken down into manageable portions while ensuring that common pre-trial motions are decided in a consistent, efficient and fair manner.

There is little doubt that a lengthy terrorism trial is likely to have a very negative financial impact on jurors. A review of the various provincial juror fee schemes reveals that many jurors can earn less, sometimes much less, than $100 per

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271 Barreau Report on Mega-trials, s. 2.2, relying on the findings in *R. v. Born With A Tooth* (1993), 10 Alta. L.R. (3d) Q.B.

272 Barreau Report on Mega-trials, s. 2.2, relying on the findings in *Genest v. R.*, [1990] R.J.Q. 2387 (C.A.).

273 Jim Brown, "Jury trials preferable in terror cases, says Air India judge" *Winnipeg Free Press* (June 11, 2007), online: Winnipeg Free Press <http://www.winnipegfreepress.com/historic/32266404.html> (accessed July 8, 2009).

sitting day, depending on their province of residence.[274] In addition, the Canada Revenue Agency considers juror fees to be income for a service and thus taxable.[275]

More generous stipends should be available for jurors to avoid creating financial hardship if they sit on a lengthy case. This would also ensure that the jury represents a broad cross-section of the public, not merely those individuals whose employers are willing or able to continue paying them during prolonged jury duty. Although the setting of juror fees is a matter of provincial jurisdiction under section 92(14) of the *Constitution Act, 1867*, the federal government may have a role to play through cost-sharing agreements for particularly long terrorism trials.

Ultimately, to facilitate the work of juries and to minimize the personal difficulties that a lengthy commitment to a jury trial can cause, the trial process must become more efficient. Many of the measures proposed elsewhere in this volume are directed at doing just that. For example, allowing trial judges to decide matters under section 38 of the *Canada Evidence Act* and abolishing pre-trial appeals could prevent a situation like that in *R. v. Ribic*, where a jury was kept waiting and ultimately was dismissed because of lengthy litigation and appeals in the Federal Court. Measures recommended in this chapter should help significantly to shorten terrorist trials and make them more manageable. These measures include allowing omnibus hearings on common pre-trial motions and encouraging severance of terrorism prosecutions that might otherwise be characterized by multiple counts, multiple accused and multiple alleged terrorist plots. Trials such as the recently completed *Khawaja* prosecution tend to be heavily focused on pre-trial motions, with limited trial days. In *Khawaja*, the pre-trial motions on various matters took two years, while the actual trial – the time that a jury would be present if the case had been tried by jury – took only 27 days of hearings.[276] The early appointment of the trial judge and adequate funding for experienced counsel should also facilitate making reasonable admissions of fact. All these measures should help avoid the undesirable spectre of jury trials that last for years.

In summary, the following measures could lighten the load on juries:

- encouraging judges to be more assertive in controlling the trial – for example, by discouraging counsel from making needless or late motions, introducing unnecessary or excessive evidence or conducting excessive cross-examinations;

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274 See the paper entitled "Juror Fees in Canada," appended as Appendix 1 to Background Dossier For Term of Reference (b)(vi).

275 Canada Revenue Agency, "Questions and answers about Other kinds of income", online: Canada Revenue Agency <http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/rprtng-ncm/lns101-170/130/fq-eng.html> (accessed July 8, 2009).

276 *R. v. Khawaja*, [2008] O.J. No. 4244 (Sup. Ct.).

- providing sufficient funding to allow accused to retain experienced counsel and encouraging counsel to remember their obligations as officers of the court, both of which will promote a more efficient trial;
- encouraging more complete disclosure at the pre-trial stage so that counsel will not need to take time to review newly-disclosed material during the trial;
- encouraging severance where there are multiple accused and multiple counts, in order to reduce the length and complexity of trials;
- amending the law to ensure that decisions of the original pre-trial judge on pre-severance motions (the admissibility of wiretap evidence, for example) will not be re-litigated during the new trial that was created by the severance, and by allowing omnibus motions to be decided by one judge for common issues even when the prosecutions were severed from the start;
- facilitating the pre-trial resolution of motions;
- encouraging the use of pre-trial conferences to arrive at agreed statements of facts, admissions of fact and agreements on other trial management issues; and
- involving an efficient project management team in the pre-trial and trial processes.

9.5.2.1 Avoiding Mistrials Caused by Discharge of Jurors

During a jury trial, counsel and even the trial judge may be replaced without having to start the trial anew. However, jurors may not be replaced, and section 644(2) of the *Criminal Code* requires a minimum of 10 jurors for a valid verdict. If fewer than 10 jurors remain to deliberate after the evidence is heard, the trial judge must order a mistrial and begin the trial anew with a new jury.[277] Since jury trials begin with 12 jurors, this means that the judge may discharge at most two jurors. A discharge of three or more jurors results in a mistrial.[278] Jurors are chosen from the population at large and inquiries are generally not made about a juror's health at the start of the trial. Some jurors find the experience of sitting on a jury to be quite stressful, for a variety of reasons, and this can contribute to health problems. In contrast, a chief justice who assigns a trial judge to a particularly long trial can take steps to ensure that the judge is experienced and healthy. Thus there is a greater danger that jurors will become incapacitated during a terrorism trial than a judge.

The risk of a mistrial in a long trial is obvious. In a 2003 BC Supreme Court decision, Southin J. spoke of the need to make changes to the current jury system because of this:

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277 The issue of mistrials because of too few jurors is discussed in detail in Background Dossier For Term of Reference (b)(vi), pp. 20-22.

278 Since 2002, s. 631(2.1) of the *Criminal Code* allows the trial judge to empanel up to 14 jurors at the time of jury selection. However, these alternates are excused at the start of the trial if they are not required at that time (s. 642.1(2)). The risk remains of a mistrial because of too few jurors at the stage of jury deliberation.

> I digress to note that on at least five occasions, the 21st May, 3rd June, 16th June, 11th July, and 25th July, this trial had to be adjourned because a juror was ill. Indeed, on the 25th July, two jurors were ill. The Criminal Code prescribes the minimum number of jurors who can give a verdict as ten. If the two jurors were too ill to continue and had been discharged and if a third juror had died suddenly on 29th July, this trial would have become a thing of naught. With the advent in recent years of very long trials, Parliament ought to enact a system in which more than twelve jurors shall be empanelled, but at the end of all the evidence only twelve, chosen in some manner, shall deliberate upon the evidence and return the verdict.[279]

Given the pressures that jurors may face in future terrorism trials of the length and complexity of the Air India trial, there is a substantial risk that more than two jurors will be discharged over the course of the trial, leading to a mistrial and the waste of much time. There also is a danger that unethical defence counsel may attempt to "rag the puck," hoping for such a mistrial.[280] Wholly apart from the additional stress and frustration for all parties – including the victims – that would flow from having to empanel a second jury and undergo a second trial, such a trial would impose enormous additional costs on the justice system. It could undermine the right of accused to be tried within a reasonable time and lead to a stay of proceedings. This in turn could (perhaps deservedly) cast the justice system in a very negative light.

Empanelling additional jurors might also prevent the need for adjournments when one of the jurors is temporarily unable to sit because of illness. In such cases, the trial judge could dismiss the ill juror and continue the trial before the remaining panel of jurors. Code noted that, at present, when jurors become sick during a long trial, "…the present statutory regime places great pressure on the trial judge to adjourn the trial, until the juror recovers, instead of simply replacing the sick juror with an 'alternate'. As a result, long trials become even longer."[281]

The Barreau Committee recommended increasing to 14 the number of jurors empanelled in a mega-trial.[282] Several witnesses before the Commission also

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279 *R. v. Ho*, 2003 BCCA 663, 17 C.R. (6th) 223 at para. 6.

280 "An accused who has a weak defence on the merits, in a long complex case, may not agree to admissions or to a judge-alone trial because the risk of a s. 644(2) mistrial becomes part of the defence strategy. This kind of conduct is probably unethical but it introduces a completely arbitrary risk that is unacceptable and that needs to be removed from our justice system": Code Article on Mega Trial Phenomenon at 454.

281 Code Article on Mega Trial Phenomenon at 454.

282 Barreau Report on Mega-trials, s. 2.2. See also Testimony of Hon. Bernard Grenier, retired Justice of the Cour du Québec Criminal Division, who participated in the work of the Barreau Committee. He described this 14-juror approach, rather than 15 or 16 jurors, as "a suitable compromise": Testimony of Hon. Bernard Grenier, vol. 92, December 10, pp. 12157-12158; translation, original in French. See also Code Article on Mega Trial Phenomenon at 453, where the author states his support for introducing "alternate" jurors. Sections 642.1, 643 and 644(1.1) of the *Criminal Code* would have to be amended to allow a judge to empanel a jury of 14.

supported increasing the maximum number of jurors empanelled to hear a case,[283] generally suggesting a total of 14 or 16 jurors.[284] The Criminal Lawyers' Association proposed a system very similar to that suggested by the Barreau Committee: 14 jurors to hear the case, and a random system to discharge any excess jurors if more than 12 remain at the start of jury deliberations.[285]

On the other hand, the 2004 Steering Committee Report rejected increasing the maximum number of jurors and recommended instead that there be a "…specific and in-depth examination" of the issue of reducing the minimum number of jurors to 9 or 8, "…in particular, as regards potential constitutional implications."[286] The 2008 F/P/T Working Group Proposals called for swearing in up to 14 jurors, and reducing the minimum number required to deliberate to nine.[287]

Using any of these models, the judge would be able to discharge more jurors than at present and yet still prevent a mistrial. However, the model that involves reducing the number of jurors required to deliberate to fewer than 10 raises constitutional issues.[288] Allowing a lesser number of jurors to render a verdict might also raise concerns about how well the jury represents the community.[289] (However, as long as 10 jurors remain at the start of deliberations, it is worth considering allowing a verdict to stand even if one of those remaining 10 jurors becomes unable to complete the deliberation process.)

The better approach is simply to increase the maximum number of jurors. It avoids potential *Charter* issues and increases the likelihood that the jury will be seen as representing the community.

If judges are allowed to empanel additional jurors, there are two plausible models for choosing the jurors who would ultimately deliberate on the case if more than 12 jurors remain when deliberations begin. In the first model, all jurors believe from the outset of the trial that they are full jurors, but some may

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283 Testimony of Ralph Steinberg, vol. 93, December 11, 2007, pp. 12316-12317; Testimony of Bruce MacFarlane, vol. 79, November 20, 2007, pp. 10041-10046. The Air India Victims' Families Association stated that "…(c)onsideration should be given to the provision of alternate jurors or reducing the number of jurors required to maintain the trial and deliver a verdict", but it did not provide any further detail or opinion on the matter: *Where is Justice?* AIVFA Final Written Submission, February 29, 2008, p. 168.

284 Bruce MacFarlane stated that, under federal American law, it is well established that up to and including six alternate jurors can be empanelled when a case is expected to be lengthy. He suggested that adopting this practice in Canada "…would be quite a jump from where we are right now" and that adding four extra jurors, as is done in the Victoria model in Australia, would be an acceptable compromise: Testimony of Bruce MacFarlane, vol. 78, November 19, 2007, p. 9905; Testimony of Bruce MacFarlane, vol. 79, November 20, 2007, pp. 10045-10046.

285 Submissions of the Criminal Lawyers' Association, February 2008, pp. 50-51 [Submissions of the Criminal Lawyers' Association].

286 Steering Committee Report on Mega trials, s. 5.3.

287 F/P/T/ Working Group Proposals on Mega-Trials, p. 15.

288 Testimony of Pierre Lapointe, vol. 94, December 12, 2007, pp. 12478-12479; Barreau Report on Mega-trials, s. 2.2. See also Testimony of Ralph Steinberg, vol. 93, December 11, 2007, p. 12316 and Code Article on Mega Trial Phenomenon at 452.

289 Code Article on Mega Trial Phenomenon at 452-453.

be removed by ballot as deliberations begin.[290] Balloting would not inevitably be necessary, since juror illness during a long trial could see the jury numbers reduced.

The second model involves distinguishing from the outset between regular and alternate jurors.[291] Alternate jurors would know that they would be called on to deliberate only if too few regular jurors remained when deliberations began.

The Commission prefers the balloting system, which should promote greater "ownership" of the case by all jurors. The "alternate" juror model might lead to the alternates not feeling as fully committed to paying attention at the trial, since there would be a good chance that they would not ultimately be involved in the jury deliberations.[292]

The Commission recommends authorizing the trial judge to empanel up to four additional jurors at the outset of the trial, bringing the possible number of jurors at the start of the trial to 16. This would permit the judge to discharge six jurors before it would be necessary to declare a mistrial (if the minimum number of jurors remains at 10). If more than 12 jurors remain at the start of deliberations, the 12 jurors who are to deliberate should be selected by ballot.

Empanelling additional jurors would of course raise costs and introduce additional logistical issues. Increasing to 16 the number of jurors was considered by the Quebec panel at Commission hearings to be something that would considerably increase jury management problems. This might be a price that must be paid. The disadvantages are easily outweighed by the many benefits of reducing the risk of a mistrial or having to adjourn a trial because a juror is sick. If more jurors are empanelled at the start, the trial judge can dismiss a sick juror in order to continue the trial in an efficient manner. Moreover, the trial judge could decide how many additional jurors would hear the case and would not have to empanel 16 jurors in every case.

9.5.3 Three-judge Panels

The Commission's terms of reference require it to analyze "…whether there is merit in having terrorism cases heard by a panel of three judges." The issue of a three-judge panel was raised in the Rae Report:

> The families' concerns also extend to the conduct of criminal trials in cases of this kind. Some have suggested that a panel of three judges would be more appropriate. While I have not suggested this as a specific question for the inquiry, it is certainly an issue worthy of study and discussion.[293]

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290 Testimony of Bruce MacFarlane, vol. 78, November 19, 2007, p. 9906.
291 Testimony of Bruce MacFarlane, vol. 78, November 19, 2007, p. 9906.
292 Testimony of Bruce MacFarlane, vol. 79, November 20, 2007, p. 10047. See also Submissions of the Criminal Lawyers' Association, p. 51.
293 *Lessons to be Learned, p.* 4.

It is apparent that discussion of three-judge panels was intended to focus on their use within the existing common law model of adjudication. The call to consider a three-judge panel at the trial level is not to be misinterpreted as a call for an inquisitorial system. Any such change would profoundly alter the principles of the Canadian legal system. The terms of reference would certainly have made it clear if a consideration of shifting from a common law to an inquisitorial model of adjudication was to form part of the analysis.

The passage from the Rae Report quoted above leaves open three possible uses of a three-judge panel:

- to replace a judge sitting alone;
- to replace a judge sitting with a jury, leaving the jury to perform its traditional function; or
- to replace both judge and jury.

It is apparent that proposals for three-judge panels in terrorism cases are limited to cases that are not heard by a jury. It would not be practical or desirable for a three judge panel to sit with a jury. As a result, the discussion of three-judge panels here is restricted to considering whether they should replace trial by judge and jury or trial by judge alone.

Replacing judge and jury: Some foreign jurisdictions allow trials for terrorism offences to be heard without a jury even if the right to trial by jury is long-established and constitutionally protected. In the Republic of Ireland, the Special Criminal Court hears trials for numerous matters, including terrorism offences.[294] The Special Criminal Court sits as a three-judge panel with no jury, and verdicts are by majority vote.[295] Judge-alone trials, known as "Diplock"[296] courts, were used for terrorism trials in Northern Ireland after the right to a jury trial was suspended in 1973, in large part because of concerns about juror partiality and intimidation.[297] The authority to hold such non-jury trials continues under the *Justice and Security (Northern Ireland) Act, 2007*,[298] including in cases involving proscribed organizations or offences committed "…as a result of, in connection with or in response to religious or political hostility of one person or group of

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294 *Offences against the State Act, 1939*, Ireland Statute No. 13/1939, online: Irish Statute Book <http://www.irishstatutebook.ie/ZZA13Y1939.html> (accessed November 20, 2008).

295 The Courts: Special Criminal Court, online: Ireland Courts Service <http://www.courts.ie/courts.ie/Library3.nsf/6556fea313d95d3180256a990052c571/41c06a30e5feda7b80256d870050508c?OpenDocument> (accessed November 20, 2008).

296 MacFarlane describes the origins of the "Diplock courts": "When the United Kingdom government imposed direct rule on Northern Ireland in 1972 following Bloody Sunday, it tried to steer towards a policy, known as "criminalization", of dealing with political violence through the criminal courts. It set up a commission chaired by Lord Diplock, a British law lord, to review criminal procedure, which recommended a number of security measures, including the introduction of single judge trials known as "Diplock" trials in place of the jury in cases of political violence": MacFarlane Paper on Terrorist Mega-Trials, pp. 174-175.

297 MacFarlane Paper on Terrorist Mega-Trials, pp. 174-175.

298 (N.I.), 2007, c. 6, s. 1.

persons towards another person or group of persons."[299] The evidence before the Commission makes it clear that one of the purposes of the three-judge panel in Ireland is to increase the level of safety of the judges themselves.

Another example of a three-judge panel without a jury was the *ad hoc* court created to hear the Lockerbie case. By agreement, the Libyan accused were tried in The Netherlands before a panel of three Scottish judges sitting without a jury. The Scottish Parliament had to enact a special provision to create the three-judge panel, allow it to hear the case in the absence of a jury, issue verdicts by majority vote and sit outside Scotland.[300] Bruce MacFarlane has commented on the dangers of *ad hoc* changes to the justice system to respond to horrific acts of terrorism, including the Lockerbie and Air India bombings.[301]

France uses jury trials for the gravest offences, but has also adopted a trial system without jury for terrorism trials.[302] *Le tribunal de grande instance de Paris* – the Tribunal of Paris – was granted a national competence for terrorism cases.[303] This led to the specialization of eight magistrates from the prosecution service and eight judges from the investigation service.[304] From this pool of magistrates and judges, a panel with one president and six assessors is assembled for each trial.[305] Verdicts are rendered by a majority vote.[306]

The constitutional difficulties that would arise if a three-judge panel were to replace trial by judge and jury are substantial. Furthermore, there is a long tradition of trust in the jury in the common law system. For these reasons alone, the jury trials should remain an option in terrorism cases unless compelling reasons can be provided to eliminate the jury.

This is not to deny that three-judge panels may have some attractive features. For example, the Hon. Ruth Krindle, a retired Manitoba Court of Queen's Bench judge, suggested in her testimony that three judges would probably move more expeditiously than a jury. However, there is no *certainty* that three judges would be significantly more efficient than a judge and jury. Indeed, it is possible that the need to retain the attention of a jury helps focus the efforts of both the Crown and the accused. Even informed speculation that a three-judge panel might be more efficient than a jury does not justify the procedural upheaval that introducing a three-judge panel would cause.

In his report prepared for the Commission, MacFarlane rejected the notion of a three-judge panel for several reasons:

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299 (N.I.), 2007, c. 6, s. 1(6).
300 *The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998* (S.I. 1998 No. 2251), Arts. 3, 5.
301 MacFarlane Paper on Terrorist Mega-Trials, pp. 181-193.
302 French *Penal Code*, Art. 698-6(1).
303 French *Penal Code*, Art. 706-17.
304 Olivier Dutheillet de Lamothe, "French Legislation Against Terrorism: Constitutional Issues" (November 2006), pp. 6-7.
305 French *Penal Code*, Art. 698-6.
306 French *Penal Code*, Art. 698-6(3). This vote is tabulated through a secret ballot system, where each ballot is read in open court and then burned (Art. 358).

> In my view, replacement of a judge and jury with a panel of three judges in a terrorist case would, from a policy perspective, be ill-advised for several reasons.
>
> First, it seems to me that the conclusions of a panel would have to be unanimous on all essential issues of fact and law. Otherwise, almost by definition, a reasonable doubt exists in the case and an acquittal must be entered. In a jury trial, the issue of reasonable doubt is resolved through a unique process of group deliberation. Judges, however, have no such mandate, and would be entitled, in essence, to "vote" on the issue. Because the group deliberation and dynamic that is so important in jury fact-finding will not necessarily be present in a trial by a panel of professional judges, it seems to me that a bench trial could actually be a less effective fact-finding body than a jury of twelve randomly-selected jurors drawn from the general population.
>
> Second, the real challenge for future terrorist trials is . . . prolixity and complexity. Creation of a three judge bench trial is not responsive to that issue. Indeed, a bench trial simply raises new problems. . . . [I]n a lengthy trial a judicial panel could lose one of the judges just as easily as a jury could lose one of the jurors. What happens then? Do you proceed with just two judges? What do you do if the panel is reduced to one? At what stage do you declare a mistrial? Or do you "load up" at the front end with three judges and an alternate? In my view, few if any jurisdictions in Canada could afford the resource burden of routinely assigning four judges to hear terrorist trials.
>
> Finally, bench trials are ill-advised in Canada because they will raise significant issues of legitimacy. A panel of judges hearing a criminal case will be unique and without precedent in Canadian legal history. At the international level, terrorist cases would be seen as having been diverted out of the mainstream of Canadian trial procedure, and placed into the hands of a tribunal which has no parallel in Anglo-based criminal justice systems. Such a process would expose the tribunal to allegations of "show trial", as occurred in the Lockerbie experience, and may tend to diminish Canada's reputation for fair justice in the eyes of the international community.[307]

As discussed earlier, it would be extremely difficult to argue successfully that taking away the accused's right to a jury trial under section 11(f) of the *Charter* is a reasonable and demonstrably justified limit on the right. A court hearing

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307 MacFarlane Paper on Terrorist Mega-Trials, p. 301.

such an argument would rightly be concerned that the state had not pursued other means of expediting terrorism trials that are less likely to diminish rights. Indeed, the simple expedient of increasing the number of alternate jurors has not been tried. The many reports and recommendations that have already been issued on the reforms needed to reduce the length of criminal trials would be cited as persuasive evidence that there are means to deal with the problem of long criminal trials short of taking away the right to trial by jury. Courts would also be aware that Canada, fortunately, has not suffered the history of juror intimidation and partiality found in places such as Northern Ireland. The remaining constitutional options, such as amending the *Charter*, adjusting maximum punishments for terrorism offences below five years so that the right to trial by jury does not apply, or using the notwithstanding clause, are simply not feasible.

Realistically, that only leaves consideration of the three-judge panel as a replacement for a judge sitting alone. In other words, the accused would have the ability to select either trial by jury or trial by a three-judge panel in terrorism cases. There are possible merits in three-judge panels here:

- "Three heads may be better than one" in a long, complex terrorism trial. The combined attention of three judges might ensure a more thorough and accurate understanding of the evidence. MacFarlane noted, for example, that "… [i]nternationally, trial by a panel of judges is considered desirable on the basis that a panel sitting together (usually three) would reduce the strain on a single judge, and the resulting decision would have greater credibility than a judge sitting alone";[308]

- The law recognizes terrorism as a special phenomenon in criminal justice, in terms of motive, purpose, potential penalties, and (until recently, when the authority to hold investigative hearings and make preventive arrests ended) investigative procedures. Arguably, the institutional structure for adjudication should also be adapted to respond to terrorism as an especially grave political or moral phenomenon. If nothing else, the allocation of extra judicial resources to terrorism trials would symbolize the state's recognition of terrorism as being uniquely hostile to Canadian values; and

- In the absence of a jury of fellow citizens, the public might have more confidence in a panel of judges, deliberating collectively on a verdict, than in a single judge, deciding alone without the benefit of a "sounding board" for some critical decisions (for example, on a matter of personal judgment such as assessing a witness's credibility). In the event of a controversial

308 MacFarlane Paper on Terrorist Mega-Trials, p. 250. See also Testimony of Michael Code, vol. 88, December 4, 2007, p. 11404.

> acquittal or conviction, the system of justice as a whole might be better protected from the corrosive effect of public criticism if a panel of judges, rather than a lone – and possibly overburdened – judge, reached the decision.

However, it is not clear that having three judges would reduce the risk of a mistrial, since one of them might become ill. Other questions remain to be resolved. How would the members of the panel be nominated, what rules of procedure would apply, and how would the panel's decisions be rendered about procedural questions, findings of law, findings of fact, credibility of witnesses, and ultimate findings about guilt? Although these procedural complexities are not insurmountable, they would make terrorism trials more complex and uncertain. Terrorism prosecutions are already difficult enough without having to work with novel and unprecedented institutions such as a three-judge trial panel. Although it can be argued that decisions rendered by three judges rather than one judge may inspire greater public confidence, even this is not a certainty, especially if one judge issues a dissent on a contentious issue. It would be difficult to force unanimity on judges who each enjoy the protections of judicial independence.

Code specifically raised in his testimony the difficulty posed by inconsistent findings of fact among panel members:

> At a trial level where the fundamental function of a trial court is fact-finding and . . . [the judges] agree on their verdict, you don't have a problem. You, in essence, end up with one set of reasons.
>
> But if they get to their verdict by different routes or if they've got a dissent, then I think you're into very, very serious difficulties because what you're going to have is ... a majority carrying out their [R. v. Sheppard[309]] duty to show the path by which they got to their fact-finding and a minority setting out their path by which they got to a different factual conclusion.[310]

The verdict of a judge sitting alone has the advantage of being clear and unequivocal. Divergent verdicts in a three-judge panel could cause serious problems. For example, a majority decision could lead to numerous appeals and further delays.

Ralph Steinberg, an experienced criminal lawyer, suggested that three-judge panels "…would add another layer of complexity that would just probably lengthen the duration of trials. I mean, if that proposal is directed toward one judge becoming incapacitated and causing a mistrial ... it may be an answer

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309 2002 SCC 26, [2002] 1 S.C.R. 869.
310 Testimony of Michael Code, vol. 88, December 4, 2007, pp. 11401-11402.

to that but I don't think that that problem occurs with sufficient frequency to cause that kind of reform to be instituted."[311] Justice Krindle testified that, "… on a very practical level it would decimate any court to have three experienced trial judges [try a case]."[312] Indeed, a three-judge panel could place undue strain on already sparse judicial resources, especially in smaller provinces.[313] It could also generate pressure for appeals on matters in which the three-judge panel rendered a split decision.[314]

There are other reasons for rejecting three-judge panels for terrorism trials. Among the most important, introducing a three-judge panel would be inconsistent with the spirit of other Commission recommendations that move towards strengthening the role of Superior Court judges in non-jury trials. There is a need for one trial judge, not a panel of independent judges, to be in charge of managing the trial process. As well, there is no sound basis for believing that the verdict of the judge alone is any less valid than that to be rendered by a three-judge panel. The use of the three-judge panel might not make the trial shorter or more likely to come to a verdict. It therefore does not appear to be a certain solution to concerns about unduly lengthy trials.

Finally, the legitimacy of the novel institution of a three-judge panel might be called into question, especially if used only for terrorism trials. As MacFarlane suggested in his study for the Commission, Canada's reputation for fair justice in the eyes of the international community may be diminished if terrorist cases are seen as having been diverted from the ordinary system of justice.[315] Attempts to devise new courts to deal with national security matters have not generally been successful.[316]

9.5.4 Mandatory Jury Trials

At present, there are two trial options for terrorism trials – trial by judge alone or trial by judge and jury. Is there any compelling reason for terrorism offences to involve a mandatory jury trial?

The *Criminal Code* contains a number of offences that at first reading seem to compel trial by judge and jury. These are found in section 469 and include murder, treason and crimes against humanity. Even with these offences, however, the accused and the Attorney General can consent under section 473(1) to a trial by a Superior Court judge. Thus, there are no offences in the *Criminal Code* that must always be tried by a jury. The recommendation made by AIFVA that no terrorism prosecutions be held before a judge alone would require creating a new and unprecedented category of offences that could not be tried by judge alone even if the Crown and defence were prepared to consent to trial by judge alone.

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311 Testimony of Ralph Steinberg, vol. 93, December 11, 2007, pp. 12364-12365.
312 Testimony of Hon. Ruth Krindle, vol. 94, December 12, 2007, p. 12425.
313 Testimony of Kent Roach, vol. 95, December 13, 2007, p. 12558.
314 Testimony of Kent Roach, vol. 95, December 13, 2007, p.12570.
315 MacFarlane Paper on Terrorist Mega-Trials, p. 301.
316 *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125.

Requiring mandatory jury trials for all terrorism prosecutions would add further inflexibility to the present system. It could result in jury trials when both the Crown and the accused agree that a jury trial is not appropriate or even possible. The result could be lengthy trials that would tax the endurance of juries. The result, even with an expanded 16-member jury panel, could be mistrials that prevent important cases from reaching a verdict.

A less drastic alternative would be to add terrorism offences to the short list of offences under section 469 of the *Criminal Code*. Trial by jury would be required unless the Crown consented under section 473(1) to trial by judge alone. It would take away the option, exercised by Mohammad Momin Khawaja, the first person charged with a terrorism offence under the *Anti-terrorism Act*, to select trial by judge alone.

There are good reasons why those accused of terrorism offences may want to elect trial by judge alone. The facts or allegations in a terrorism cases may be both shocking and very well-publicized. The trial may involve evidence, including that relating to the accused's motives, which could have a significant prejudicial effect on the jury. A powerful argument is needed to justify restricting the choice of the accused about mode of trial.

Some might suggest that a mandatory jury trial will produce a more just verdict than trial by judge alone. However, there is no evidence to show this to be the case, and a decision to impose a mandatory jury trial should not be based on mere speculation that it will produce a better result. In addition, greater efficiency can be achieved in cases involving trial by judge alone – for example, the ability to decide questions of law that arise during the trial without having to excuse the jurors.

Recommendation 35:

It is recommended that:

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

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

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

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

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

9.5.5 Addressing the Needs of Victims

Unlike most criminal trials, where the number of victims is limited, the Air India tragedy profoundly affected the lives of direct family members and others close to the victims. Accommodating the important needs of so many individuals at the trial was challenging. In fact, Gaul described the efforts of the Air India Crown Victims and Witnesses Service in dealing with the families of the Air India victims as "Herculean":

> It was a joint venture with the federal government in the sense of financing of the project. They provided the financing. We provided the…human resources, and it was [an] integral, absolutely integral part of the prosecution team of having a professional staff to be able to deal with the victim issues…of them coming into Vancouver, how to handle them in the sense of logistically, but also emotionally.
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> . . .
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> I think it's important that the resources are made available and the right people so to speak; again, you have to have people skills.... [Y]ou can put up with some difficult personalities or challenging personalities for a month or so, but if we're talking years, you have to have somebody who knows their field but also has strong interpersonal skills to deal with the emotional aspects of this case and can lead the team of people working with that person….[317]

Unfortunately, future terrorism trials could again see many victims or family members of victims. In such cases, the only way to deal humanely with their needs and to make the resulting trial workable is to provide carefully designed, culturally sensitive, comprehensive and adequately funded victim services. The approach to witness services in the Air India trial, detailed earlier in this chapter, may serve as a very useful model.

9.6 Conclusion

In his report for the Commission, Bruce MacFarlane notes that "…[t]wenty-first century terrorist trials are exceptionally complex in nature, and there is a demonstrable need to ensure that they do not collapse under their own weight."[318] The Air India trial reached a verdict despite significant obstacles. These included: the extraordinary length of the trial; huge costs; massive amounts of material to disclose, including documents that brought national security considerations into play; numerous motions, witnesses and exhibits; scores of defence and Crown counsel; hundreds of family members of the victims; and a very significant public profile. Much could have happened to prevent the trial from reaching a verdict.

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317 Testimony of Geoffrey Gaul, vol. 88, December 4, 2007, pp. 11414-11415.
318 MacFarlane Paper on Terrorist Mega-Trials, p. 297.

The experience of the Air India trial offered several lessons that can help future terrorism trials reach a verdict. This chapter has also explored several other measures that will lead to the same result. Collectively, these lessons and measures can be summarized as follows:

- putting in place a project management team;
- early selection of a trial judge who can exercise firm control over the pre-trial and trial processes;
- organizing and controlling the pre-trial process more effectively to minimize pre-trial delays, and making rulings on many pre-trial motions that will continue to bind the parties even if the prosecution is severed into smaller prosecutions or a mistrial is declared;
- allowing omnibus hearings of related motions from all related trials;
- putting into place a process for early and staged disclosure, relying heavily on electronic disclosure and the ability of defence counsel to inspect material that is of only marginal relevance to the case;
- ensuring that funding is available to retain experienced counsel, both defence and Crown, who can better serve the interests of their clients and help the trial move forward efficiently;
- developing a more effective procedure for trial judges to deal with applications under section 38 of the *Canada Evidence Act*; and
- providing comprehensive services for the families of victims.

Many of these measures will also reduce the burden on juries. The likelihood of reaching a verdict in a jury trial can be further enhanced by empanelling additional jurors. The present situation, where there are no alternate jurors and no more than two jurors can be discharged once a trial has started without causing a mistrial, is unacceptable. It is an invitation to having an important terrorism prosecution like the Air India trial fail to reach a verdict.

As noted at the outset, Canada has had very little experience with terrorism prosecutions. This relative good fortune should not become an excuse for failing to address the deficiencies in the justice system that may derail future prosecutions. The gravity of terrorist acts and the compelling public interest in bringing prosecutions for those acts to a final verdict demands that Canada's justice system prepare for the exceptional challenges of terrorism prosecutions. That is the very least that can be expected of governments in Canada. The federal government should be prepared to lead through the limited but vital amendments to the *Criminal Code* proposed in this chapter. It should also be willing to enter into cost-sharing agreements with the provinces in order to serve the national interest in fair and efficient terrorism prosecutions.