individuals who may well be charged with terrorism offences, and which involve close co-operation with the police. Even when CSIS material is not subject to *Stinchcombe* disclosure requirements, the accused can demand production and disclosure from CSIS of third party records under *O'Connor*.

The broad definition of terrorism offences make it difficult for the Crown to argue that intelligence about the accused or his or her associates is clearly not relevant under *Stinchcombe* or not likely relevant under *O'Connor*. Intelligence that provides general threat assessment or material that deals with administrative matters may, however, not be relevant to the accused and applications by the accused for disclosure or production could be dismissed on that basis. Once the intelligence records were produced before the judge under *O'Connor*, the judge might balance a number of factors in deciding whether they should be disclosed to the accused. Whether this balancing would occur may depend on whether the judge found that the state's interest in non-disclosure of intelligence was as weighty as the privacy interests of complainants in sexual assault cases. The factors that might be included in the balance could include the extent to which access to the intelligence was necessary for the accused to make full answer and defence, its probative value in any trial and the prejudice that disclosure could cause to state interests and privacy. As will be seen in the next section, it could also be possible to enact legislation to govern and restrict applications for the disclosure and production of intelligence under *Stinchcombe* and *O'Connor*. It could also be possible to expand evidentiary privileges as a means of restricting disclosure obligations.

## V. Methods of Restricting the Disclosure of Intelligence

There are a variety of means through which Parliament or the courts could place restrictions on the production and disclosure of intelligence. Parliament's legislation in response to *O'Connor* provides some precedent, both for placing legislative restrictions on *Stinchcombe* and on the process for obtaining the production of third party records. Such legislation might attempt to create categories of intelligence that could not be disclosed or establish new procedures and new barriers for accused who seek the disclosure of intelligence. *Mills* suggests that legislative restrictions on disclosure may be held to be consistent with the Charter, even if they result in the Crown having some relevant information that is not disclosed to the accused. It also suggests that Parliament can provide legislative

guidance and procedures to govern production from third parties. Finally, *Stinchcombe* disclosure does not apply to information covered by evidentiary privileges such as police informer privileges. Such privileges could possibly be expanded by legislation.

All of these strategies to restrict the production and disclosure of intelligence would be subject to challenge as violating the accused's rights under the Charter. Even the strongest privileges are subject to innocence at stake exceptions. Restrictions on production and disclosure must still respect the accused's right to full answer and defence. Legislation that restricts the Charter also must survive a test of proportionality. Although various restrictions on *Stinchcombe* and *O'Connor* would be rationally connected to the protection of secrets and the effective operation of security intelligence agencies, the ability to secure non-disclosure orders under ss.37 or 38 of the CEA might constitute less drastic means to secure non-disclosure in the context of particular terrorism prosecutions.

**A) Legislative Clarifications of Stinchcombe**

The Supreme Court decided *Stinchcombe* in the context of reform proposals made by both the Law Reform Commission of Canada and the Commission of Inquiry into Donald Marshall's wrongful conviction, that the Criminal Code be amended to specify disclosure obligations. In *Stinchcombe*, the Court also contemplated that judicial rule making power could be used to clarify procedural details and perhaps even the general principles of disclosure. By and large, however, disclosure matters have not been addressed by rules and legislation. Instead they have been worked out after the fact by the decisions by courts in individual cases. Although such an individualized approach allows decisions to be tailored to the facts of individual cases, it also creates a degree of uncertainty about the scope of disclosure obligations. As seen in part one of this study, perceptions that any information that CSIS might share with the police would be subject to disclosure obligations have adversely affected information sharing between CSIS and the RCMP. There have also been perceptions of inconsistency in the manner that *Stinchcombe* disclosure standards have been interpreted by various criminal justice actors. The Attorney General of Canada in at least one current terrorism prosecution seems to have overestimated the demands of *Stinchcombe* and sought non-disclosure orders for material such as administrative memos identifying personnel and general intelligence assessment that have been held not to be relevant material that should even be disclosed to

the accused.[305] All of these shortcomings could potentially be addressed by codification and clarification of disclosure standards.

### B) Legislative Restrictions on Disclosure and Production under Stinchcombe and O'Connor

One of the few contexts in which legislation has been enacted to clarify and narrow the broad disclosure and production obligations and rights contemplated in *Stinchcombe* and *O'Connor* involves the disclosure of therapeutic and other confidential records of complainants in sexual assault cases. Most of the controversy over this matter has focused on the production of such records from third parties such as rape crisis centres and doctors, but these cases also involve legislative restrictions on *Stinchcombe* disclosure obligations on material held by the Crown.

In *R. v. O'Connor,*[306] a 5:4 majority of the Supreme Court held that *Stinchcombe* disclosure obligations applied to a complainants' private records that were in the possession of the Crown. Lamer C.J. and Sopinka J. concluded that "where the Crown has possession or control of therapeutic records, there is simply no compelling reason to depart from the reasoning in *Stinchcombe*: unless the Crown can prove that the records in question are clearly irrelevant or subject to some form of public interest privilege, the therapeutic records must be disclosed to the defence."[307]

In 1997, Parliament enacted legislation that imposed a procedure and required the judge to balance the accused's rights against the complainant's privacy and equality rights, as well as the social interests in encouraging reporting of sexual offences, before ordering that a complainant's private records in the possession of the Crown or a third party would be produced to a judge or disclosed to the accused. The accused argued in *R. v. Mills* that this legislation violated s.7 of the Charter by limiting the broad disclosure required under *Stinchcombe*. The majority of the Court rejected this argument. McLachlin and Iacobucci JJ. distinguished *O'Connor* on the basis that it only applied to records where the complainant had waived her privacy rights. The new legislation

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305 *Canada v. Khawaja* 2007 FC 490 revd on other grounds 2007 FCA 342 *Canada v. Khawaja* 2008 FC 560 holding that general analytic reports, administrative material and correspondence with foreign agencies held by the RCMP was not relevant to the accused under the *Stinchcombe* standard in the course of s.38 proceedings. These cases will be discussed infra Part VI.

306 [1995] 4 S.C.R. 411.

307 ibid at para 14; see also para 189 per Cory J.; at para 254 per Major J.

applied in cases where there was no such waiver and "it was therefore open to Parliament to fill this void legislatively. Viewed in this context, s. 278.2(2) ensures that the range of interests triggered by production will be balanced pursuant to the procedure set out in ss. 278.5 and 278.7. The mere fact that this procedure differs from that set out in *Stinchcombe* does not, without more, establish a constitutional violation."[308]

The Court also concluded that the accused's right to full answer and defence is not "automatically breached where he or she is deprived of relevant information. As this Court outlined in *R. v. La*, [1997] 2 S.C.R. 680, at para. 25, where the claim is based on lost evidence, 'the accused must establish actual prejudice to his or her right to make full answer and defence'. Other public interests may similarly limit the accused's ability to gain access to potentially relevant information. This is clear from *Stinchcombe*, *supra*, where this Court held that the Crown's disclosure obligation is subject to a privilege exception. Similarly, our law has long recognized the importance of protecting the identity of police informers through an informer privilege, subject to the "innocence at stake" exception"[309] In short, the Court ruled that it was constitutional for the Crown "to end up with documents that the accused has not seen, as long as the accused can make full answer and defence and the trial is fundamentally fair."[310]

In *R. v. Mills*, the Court concluded that there were adequate protections for the right to full answer and defence in the legislation in part because the Crown was required to notify the accused of the documents with enough information as to the date and context of the record as to enable the accused to make an argument that access to the document was required for full answer and defence.[311] Chief Justice Lamer dissented on the basis that the legislation required the accused to establish the likely relevance of a document that he had not seen and that a better procedure would be to allow the Crown to establish that the document was not relevant or privileged.[312]

The Court also upheld Parliament's restrictions on the *O'Connor* process of allowing the production and disclosure of records held by third parties not subject to *Stinchcombe*. In s.278.3, Parliament provided a list

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308 [1999] 3 S.C.R. 668 at para 109.
309 Ibid at para 75.
310 Ibid at para 112.
311 Ibid at para 115
312 ibid at para 9.

of assertions that would not be sufficient to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify. In *Mills*[313], the Supreme Court upheld this controversial provision, but stressed that in the end the trial judge would decide whether the record should be produced. The Court also upheld the requirement that production must also be "necessary in the interests of justice" under s.278.5(1). It indicated that in close cases, judges should err on the side of examining the document:

> It can never be in the interests of justice for an accused to be denied the right to make full answer and defence and, pursuant to s. 278.5(2) the trial judge is merely directed to "consider" and "take into account" the factors and rights listed. Where the record sought can be established as "likely relevant", the judge must consider the rights and interests of all those affected by production and decide whether it is necessary in the interests of justice that he or she take the next step of viewing the documents. If in doubt, the interests of justice require that the judge take that step. [314]

The Court also upheld the requirement that the judge consider a variety of factors, including social interests, in encouraging the reporting of sexual offences and the privacy and equality rights of the complainant when deciding whether to disclose the third party record to the accused. It concluded:

> By giving judges wide discretion to consider a variety of factors and requiring them to make whatever order is necessary in the interest of justice at both stages of an application for production, Parliament has created a scheme that permits judges not only to preserve the complainant's privacy and equality rights to the maximum extent possible, but also to ensure that the accused has access to the documents required to make full answer and defence.[315]

The Court's decision in *Mills* provides some precedent for legislation that could attempt to limit disclosure and production of intelligence.

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313 [1999] 3 S.C.R. 668 at para 120.
314 Ibid at para 138.
315 Ibid at para 144.

The applicability of the Court's decision in *Mills* in the national security context is debatable. The Court's approach in *Mills* is premised on the idea that the Court was reconciling the competing Charter rights of the accused and the complainant and that the matter was not being decided under s.1 of the Charter, where the Crown had the burden of justifying limits on Charter rights. It is possible that future courts might distinguish the national security context as one which pits an individual accused against the admittedly weighty interests of the state. The Crown might defend legislative restrictions on *Stinchcombe* or *O'Connor* in terrorism cases on the basis that terrorism itself infringes the Charter right to security, but this would discount the fact that the immediate threat to human security would come from the terrorist and not from the government. At the same time, legislative restrictions on *Stinchcombe* and *O'Connor* in the national security context might, in some respects, be easier to justify than the regime upheld in *Mills* if the judge were to have access to all the information before making decisions about whether it would need to be disclosed.

Much would depend on the precise content of any legislation. One possibility would be to enact legislation that provides that intelligence or information, the disclosure of which could or would harm national security, national defence or international relations, would not be subject to the Crown's disclosure obligation. The only statutory exception would be information that was exculpatory or mitigated the accused's guilt. Such an approach would violate the right to disclosure under s.7 of the Charter. In *Stinchcombe* and subsequent cases, the Court has clearly rejected the idea, found in American constitutional law, that the accused only had a constitutional right to the disclosure of exculpatory evidence. It may be difficult to determine what is exculpatory without full knowledge about the accused's case. It is also possible that such a legislative restriction might be found to violate the right to full answer and defence, given the interpretation provided to that right in the *Taillefer* case discussed above. In other words, there might be a concern that the disclosure of information that is not on its face exculpatory of the accused might nevertheless deprive the accused of evidential or investigative resources that could lead to the impeachment of Crown witnesses or the discovery of witnesses that would be useful to the defence.

A more nuanced legislative restriction on disclosure and production obligations in the national security context might be adapted from the legislative scheme upheld in *Mills*, albeit with due allowance being made

both for the distinct national security context and the fact that the state's interests in protecting secrets, weighty though they are, may be more akin to social interests in encouraging the reporting of sexual assaults than to a complainant's right to privacy and equality. Such an approach could require a judge to consider the harms to various state interests in the production and disclosure of intelligence. It would be advisable for Parliament to be as specific as possible about these harms and not rely on the broad concept of harm to national security, national defence or international relations that can already be protected under s.38 of the CEA. In *Mills*, the Court indicated that it was constitutionally permissible to consider social interests, so long as judicial discretion was preserved "to ensure that the accused has access to the documents required to make full answer and defence."[316]

Judicial discretion in determining the balance of competing interests in disclosure and non-disclosure could be guided by a non-exhaustive list of factors. For example, the exculpatory value of information or the realistic possibility that it would reveal information useful to the accused in making full answer and defence could be listed as a factor favouring disclosure. In contrast, the fact that the material would reveal sensitive investigative techniques, the identity of undercover operatives or confidential informants, the targets of other investigations or internal administrative information about Canadian or foreign security agencies could be listed as factors that favour the non-disclosure of the material to the accused.[317] In such a manner, Parliament could provide guidance to judges in exercising judicial discretion without usurping their discretion to decide what information must be disclosed to the accused in order to ensure a fair trial and to protect the accused's right to full answer and defence.[318]

As under s.278.7(3) of the Criminal Code, the judge could be empowered to impose conditions on disclosure to the accused in order to protect, to

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316 Ibid at para 144.

317 In *Canada. v. Khawaja* 2007 FC 490 at para 8, Justice Mosley observed that that accused "has made it clear that he is not seeking the disclosure of any information that would reveal sensitive investigative techniques, the identity of any undercover operatives of law enforcement and/or intelligence agencies, or the targets of any other investigations." In addition, he noted that 350 of the 506 documents of which the Crown sought a non-disclosure order under s.38 of the CEA "may be described generally as internal administrative information such as the names, telephone or fax number of agency employees; internal file numbers; or references to the existence or identities of covert officers in Canada or abroad….[the accused] does not seek disclosure of this type of information." Ibid at para 44. In other cases, however, the accused could seek disclosure of such information and argue that it is not clearly irrelevant or privileged.

318 An example of such an open ended listing of factors is found in s.276(3) of the Criminal Code governing the admissibility of prior sexual activity by a complainant in a sexual assault case.

the greatest extent possible, the interests of the state in non-disclosure. Conditions could include editing or summarizing the material, ordering that the material not be disclosed except to the accused and kept or viewed at designated secure locations, conditions that no copies of the record be made and that identifying information either be excised or coded to protect the anonymity of intelligence sources and agents.

Such legislation would be challenged under the Charter and it would be likely to be found to violate the accused's right to disclosure as contemplated under *Stinchcombe* to the extent that *Stinchcombe* applied to the intelligence. The legislation could, however, be defended as a reasonable limit on disclosure and production rights; one that is necessary to protect information that if disclosed would affect vital and important interests of the state. The legislation would be likely to be rationally connected to this state objective, but it could be argued that there are more proportionate alternatives for protecting secrets, such as the existing provisions of ss.37 and 38 of the *Canada Evidence Act*. In many ways, restrictions on *Stinchcombe* disclosure and *O'Connor* production obligations in the national security context would serve a similar purpose to s.38 proceedings in the Federal Court.

If the new restrictions on disclosure and production were applied by the trial judge, however, the procedure might have the benefit of not requiring litigation in a separate court and the possibility of interlocutory or pre-trial appeals. In *Mills,* the Supreme Court suggested that early assignment of a trial judge may allow restrictions on production and disclosure to be decided well before trial.[319] Such a pre-trial procedure is also advisable given the length and complexity of terrorism prosecutions. [320] Such an approach would require that the trial judge have adequate facilities and training with respect to the handling of secret information because he or she would have to examine the material before determining whether its non-disclosure was consistent with the accused's right to full answer and defence and the accused's right to a fair trial. One of the main advantages of this approach would be that it would follow the practice of other countries in allowing criminal trial judges to make decisions about disclosure of secret material. [321] In some cases, the trial judge could also re-visit non-disclosure decisions during the trial if the accused's or the state's interests change.

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319 *R. v. Mills* at para 145.
320 Bruce MacFarlane "Structural Aspects of Terrorist Trials" in Vol. 3 of the Research Studies.
321 As discussed infra part 7.

One goal of legislative restrictions on *Stinchcombe,* or the production of records held by third parties under *O'Connor,* would be to minimize the need to make applications under s.38 for non-disclosure. Another goal would be to respond to concerns that the breadth of *Stinchcombe* and *O'Connor* may have adversely affected relations between the RCMP and CSIS and the passage of secret intelligence to the police. That said, legislative restrictions on disclosure and production are not a panacea. They would be vulnerable to Charter challenge. It is not clear that *Mills* is applicable in the national security context. Even if legislation restricting *Stinchcombe* disclosure requirements or *O'Connor* production requirements was upheld under the Charter, there could be much litigation about the precise meaning of the legislation and its relation to Charter standards.

Although the state's interests in non-disclosure are particularly strong in the national security context, there is also a particular danger that non-disclosure of intelligence relating to the accused, his associates and witnesses in terrorist prosecutions could increase the risk of miscarriages of justice. The non-disclosure of intelligence could also deprive the accused of important resources to challenge the manner in which the state investigated the case or to suggest that there is an innocent explanation for the accused's activities and associations. [322] The non-disclosure of material received from foreign sources might also deprive the accused of credible arguments that a Canadian process had been tainted by abuse committed outside Canada. Legislative restrictions on disclosure or production could add another layer of complexity, delay and adversarial challenge to terrorism prosecutions.

### C) Disclosure and the Protection of Informers and Witnesses

Concerns were raised in the Malik and Bagri prosecution about how disclosure obligations interact with the protection of informers and witnesses. As discussed above, it is important to recall that evidentiary privileges were recognized as a legitimate restriction on the right to disclosure under *Stinchcombe*. The most relevant privilege is the police informer privilege, which protects the informer's name and identifying

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322 The RCMP's investigation of Maher Arar reveals some of the dangers of making conclusions about persons on the basis of their associations or their beliefs. On the dangers of tunnel vision see Federal Provincial Task Force on Miscarriages of Justice (2004). On the experience and dangers of miscarriages of justices in terrorism cases see Kent Roach and Gary Trotter "Miscarriages of Justice in the War Against Terror" (2005) 109 Penn State L.Rev. 967.

information from disclosure without the consent of both the informer and the Crown. This privilege is subject only to the exception that the accused's innocence is at stake.[323] The traditional innocence at stake exception is consistent with the importance given to the accused's right to full answer and defence under the Charter.

In 1994 in the context of disclosure of affidavits in support of a wiretap in a drug prosecution, the Supreme Court recognized a range of public interest considerations that could justify editing and non-disclosure of material in the affidavits. Building on the recognition of the factors considered by Justice Watt in the *Parmar* case and recognized by the Court in the 1990 *Garofoli* case discussed above, Sopinka J. recognized the following public interest factors now codified in the wiretap provisions of the Criminal Code:

> (a) whether the identities of confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as muchby reference to the nature of the information supplied by the confidential source as by the publication of his or her name;
>
> (b) whether the nature and extent of ongoing law enforcement investigations would thereby be compromised;
>
> (c) whether disclosure would reveal particular intelligence-gathering techniques thereby endangering those engaged therein and prejudicing future investigation of similar offences and the public interest in law enforcement and crime detection; and
>
> (d) whether disclosure would prejudice the interests of innocent persons.[324]

At the same time, the Court indicated that "disclosure of the full affidavit should be the starting premise". The Court held that the trial judge had erred by editing out material that was no longer confidential, and warned of the danger of requiring the accused "to demonstrate the specific use

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323 *R. v. Leipert* [1997] 1 S.C.R. 281
324 *R. v. Durette* [1994] 1 S.C.R. 469 at 495

to which they might put information which they have not even seen."[325] Three judges in dissent stressed the dangers of disclosure and observed that "police witness programs, which also apply to informers, eloquently speak to the dangers that such people are facing" and that "editing the information relating to wiretap… are part of this effort by society to protect both the identity of informers and police investigation techniques."[326] One implication of the majority's approach, however, is that it may not always be possible to provide complete protection for informants through non-disclosure. In such cases, the adequacy and the attractiveness of witness protection programs become even more important. The failure of the informant in the Parmar prosecution to consent to his identity being revealed was ultimately fatal to that prosecution.

The next case study will reveal how the reluctance to disclose the identity of another informer, as well as the failure to disclose dealings betweens the police and the informer, ultimately led to a stay of proceedings in a case in which two men had originally been convicted, in 1986, of conspiring to blow up another Air India plane.

### D) R. v. Khela: A Case Study of the Limits of Police Informer Privilege and the Failure to Make Full Disclosure

In 1986, five Canadian Sikh men alleged to be members of the Babbar Khalsa were charged in Montreal with planning to blow up Air India flight 110, a Boeing 747, from New York to New Delhi on May 30th of that year. Charges were dropped against three of the individuals due to lack of evidence, but two of the men, Santokh Singh Khela and Kashmir Singh Dhillon, were convicted by a judge and jury, after a three week trial in late 1986, of conspiracy to commit murder. The trial featured evidence of how "Billy Joe", a convicted drug trafficker and long time police informer[327],

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325 ibid at 532

326 ibid. See also *Michaud v. Quebec (Attorney General)* [1996] 3 S.C.R. at paras 48ff stressing the need to limit disclosure to protect informers and warning that the release of even an edited wiretap application could "unintentionally reveal the identity of a police informer with potentially fatal consequences." Ibid at para 53. Note that this case did not involve an application by the accused for disclosure. See also *R. v. Pires; R. v. Lising* [2005] 3 S.C.R. 343 at para 36 noting that concern about revealing the identity of informers is a consideration in restricting the ability of the accused to cross-examine on the affidavit in a challenge to a search warrant.

327 At trial, Constable Jacques Gagne of the Sureté du Quebec testified that he had dealt with Billy Joe for 12 years, that he was known only by his code number 86-07, that Billy Joe had been imprisoned in 1980 for drug possession, conspiracy to traffic in narcotics, forcible confinement and use of a firearm and that the police had guaranteed Billy Joe that he would not have to testify and that they also made successful representations to the parole board to secure the release of one of Billy Joe's friends. He also indicated that the informer had "left town" even though subject to a subpoena for the trial. "Sikhs victims of police trap defence says" Montreal Gazette Dec 10, 1986 A11

had introduced the accused to an undercover FBI agent, Frank Miele, who posed as an explosives expert. The trial featured taped recordings of meetings between the men and evidence about the use of code words to disguise the true meaning of their conversations.[328] The two men were subsequently sentenced to life imprisonment.

The two men's appeal to the Quebec Court of Appeal was successful with Proulx J.A. holding for the Court in 1991 that the trial judge had erred in holding that Billy Joe, an informer, was protected by police informer privilege and need not be called as a witness. Billy Joe had numerous dealings with the accused and was reportedly paid $8000 by the accused. The Crown's position was that the money was paid in relation to the bombing of the Air India aircraft while the defence's position was that the money was paid in relation to a stolen car. Proulx J.A. concluded:

> My analysis of the facts described above in relation to the role of the informer and the law applicable in this case bring me to the conclusion that the informer was "a witness to material facts" and "an agent provocateur who went into the field and that it was "most material to the ends of justice" that disclosure of the identity of the informer be ordered…. the testimony of the informer was relevant to (1) the nature of the agreement (2) the lack of agreement (3) the lack of intent (4) the issue of entrapment (under the existing law at the time) and (5) in relation to credibility…. For these reasons, I am of the opinion that the Trial Judge erred in not ordering at the request of the appellants that the Crown disclose (1) the evidence of the informer before the trial (2) the full name and whereabouts of Billy Joe and (3) that the Crown makes Billy Joe available to the appellants.[329]

Despite the privilege that protects the identity of police informers, their identity and evidence would have to be disclosed to the accused in cases where they became a material witness or an agent provocateur. In this case, "Billy Joe" was a crucial witness because of his participation in the events. Although Billy Joe's identity must be disclosed to the accused, the Court of Appeal indicated that it would have been possible to have him

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328 "Montreal Sikhs guilty of plot to bomb plane" *Ottawa Citizen* Dec. 24, 1986
329 *R. v. Khela* (1991) 68 C.C.C.(3d) 81 distinguishing *R. v. Scott* [1990] S.C.R.

testify under an assumed name in a subsequent trial. Even when disclosure is required to protect the accused's right to full answer and defence, some steps can be taken to limit the damage caused by disclosure.

At the start of the second trial in 1992, the accused applied for a stay of proceedings both on the basis that the Crown had failed to meet its disclosure obligation and on the grounds of a violation of a right to a trial in a reasonable time. The Crown disclosed notes from Billy Joe's police handlers and a statement in which Billy Joe had stated: "Of course, it's blowing up airplanes, and the reason I am ready to testify is because I think it's crazy to conspire to blow up airplanes and to kill hundreds of innocent people."[330] This was claimed to be the only statement made by Billy Joe to the police about the conspiracy. A few weeks before the trial was to start, a person claiming to be Billy Joe was presented to the accused's lawyer, but with his head and face disguised. He would only speak French, even though all his previous discussion had been in English, and he refused to provide his real name and gave only his code name. Justice Steinberg found that the Crown had breached the clear disclosure obligations articulated by the Court of Appeal.[331] He also found that 28 months of delay could be attributed to the Crown because of problems with transcripts and other matters. Consequently, he found a violation of the right to a trial in a reasonable time under s.11(b) of the Charter and stayed proceedings. He ordered the release of the accused who had been imprisoned since their 1986 arrest.

The Crown successfully appealed to the Quebec Court of Appeal. The Court of Appeal held that s.11(b) did not apply to appellate delay and that the delay in this case did not violate s.7 of the Charter. The Court of Appeal also agreed with the Crown's submission that because of danger to Billy Joe, "who has already been the subject of a first attempted murder", the issue of whether the Crown was required to disclose Billy Joe's name and whereabouts should have been left to the trial judge. Baudouin J.A. stated: "As the Supreme Court wrote in *R. v. Stinchcombe*, supra, the Crown's obligation to disclose the evidence is not absolute and disclosure need not necessarily be made at any particular time." [332] The Court of Appeal concluded that "there was clearly a misunderstanding if not confusion between the Crown and the defence with respect to the disclosure of the evidence before the trial without there being, however, bad faith". The stay of proceedings should be overturned with matters of

330 ibid at 87
331 *R. v. Khela* 1992 Q.J. No. 409.
332 *R. v. Khela* (1994) 92 C.C.C.(3d) 81 at 88-89 (Que.C.A.)

disclosure and compliance with the first Court of Appeal decision being left to the trial judge who should have "complete knowledge of the facts and in possession of all the necessary information."[333]

The accused then appealed to the Supreme Court with mixed success. Sopinka and Iacobucci JJ. concluded that:

> …it is quite clear that the Crown totally failed to make full disclosure prior to trial in relation to Billy Joe as required by the three elements of Proulx J.A.'s decision. For the first element, the Crown provided no will-say or statements of the informer prior to trial. For the second element, the Crown did not provide Billy Joe's full, real name, and his whereabouts. The final element of Proulx J.A.'s order is the most problematic. This is because the circumstances of the interview may not have been so much dictated by the Crown, but rather by the informant, Billy Joe, himself…..
>
> Failure to comply with the obligation to disclose by the Crown could impair the right of the accused to make full answer and defence in breach of s. 7 of the Charter. Steinberg J. directed a stay but relied, at least in part, on the ground of unreasonable delay which we find was in error. On the other hand, we find that the Crown is in breach of its obligation to disclose as determined by Proulx J.A. The terms of disclosure accord with the decision in Stinchcombe, supra, except that, in ordering that the informant be made available, the judgment is an extension of the obligation resting on the Crown. Crown witnesses, even informants, are not the property of the Crown whom the Crown can control and produce for examination by the defence. The obligation of the Crown does not extend to producing its witnesses for oral discovery. Nevertheless, subject to variation by appropriate proceedings, the judgment of Proulx J.A. was binding on the Crown, and the Court of Appeal (No. 2) erred in remitting the matter to the trial judge to determine de novo the terms, content and conditions of disclosure relating to Billy Joe.[334]

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333 ibid at 90.
334 *R. v. Khela* [1995] 4 S.C.R. 201 at paras 17-18.

Although noting that the order to make Billy Joe available for oral discovery went beyond *Stinchcombe*, the Supreme Court did not fault the defence for refusing to proceed with an interview with a masked and uncooperative man whom they doubted was Billy Joe. The Court ordered that, "subject to variation by the trial judge on the basis of new evidence relating to the jeopardy of Billy Joe", the Crown must disclose "the evidence of the informer before trial" as well as "the full name and whereabouts of Billy Joe before trial". Alternatively, the Crown could produce Billy Joe for discovery, "ensuring that he will cooperate and answer all proper questions."[335] Justice L'Heureux-Dube in dissent agreed with the Court of Appeal that the Court of Appeal's first judgment was not binding on the trial judge or the parties and that disclosure matters, in light of security concerns, should be left to the trial judge. Like the majority at the Supreme Court, she also indicated that the Court of Appeal's initial discovery order went beyond *Stinchcombe* because "the Crown can only be ordered to produce what it has, and it does not "have" people."[336]

In 1996, the matter went back for a third trial before a judge, who ordered a stay of proceedings on the grounds of failure to make disclosure and abuse of process. Although the Crown had represented, to the second Court of Appeal and the Supreme Court, that Billy Joe's statement: "Of course, it's blowing up airplanes, and the reason I am ready to testify is because I think it's crazy to conspire to blow up airplanes and to kill hundreds of innocent people", was the sole statement made by Billy Joe in the Crown's possession, a large amount of other information relating to Billy Joe came to light and led to the eventual stay of proceedings. Some of this material came from a previously sealed wiretap affidavit. Other information was belatedly produced by the police. The material included a seventeen-page statement taken from Billy Joe in March of 1992. That statement "related in some detail "Billy Joe's" ongoing relationship with persons whom the RCMP suspected of being Sikh extremists and who, in 1986, were under active investigation. It also revealed that, in early 1986, "Billy Joe" had been approached to orchestrate the murder of Tara Singh Hayer, the editor of the Indo-Canadian Times in Burnaby, B.C. In this connection it recounts that "Billy Joe" received a payment of eight thousand dollars for his efforts. That sum, which, according to "Billy Joe", had nothing whatever to do with the blowing up of an aircraft, was the same payment which constituted one of the underpinnings of the Crown's case against petitioners in 1986."[337]

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335 Ibid at para 20.
336 Ibid at para 41.
337 *R. v. Khela* [1996] Q.J. no 1940 at para 22 reported 39 C.R.R. (2d) 68

The third trial judge, Justice Martin, conducted a thorough inquiry into the investigation in light of the newly disclosed evidence. He noted that the police agreed to deal with Billy Joe, who had acted as an informer in drug cases in the past and who had approached the police with information about a plot to bomb another Air India plane. Billy Joe "made it clear from the beginning however that his co-operation would, under no circumstances, extend to testifying in favour of the prosecution and this condition was apparently accepted."[338] Justice Martin commented that:

> To some degree the Crown's position in this matter, at least in the beginning, is understandable. Occurring as they did at the nadir of the investigation into the Air India tragedy the activities of suspected Sikh militants operating in Canada raised urgent and difficult problems for the authorities. The investigation which the police were obliged to undertake was international in scale and multi-faceted in scope. Furthermore the stakes in terms of human life were very high indeed. The information provided by "Billy Joe", while touching only an aspect of the overall investigation, nevertheless raised the awesome and very real spectre of another aircraft and all aboard being blown to smithereens. This, in any event, was the scenario which "Billy Joe" presented to his QPF controller. [339]

Justice Martin also observed that "In view of "Billy Joe's" reluctance, his personal unreliability, his refusal to testify, and the certainty, should he do so, of an embarrassing cross-examination aimed at calling into question his motivation and his dubious credibility, it was decided to replace him by inserting into the operation an undercover agent posing as an "explosives expert" from New-York whom "Billy Joe" would pretend to have recruited. A team of operatives from the New York office of the FBI arrived in Montreal including the undercover agent in question. His name was Frank Miele and he was masquerading under the monicker of George Carbone. By moving "Billy Joe" aside the RCMP hoped, I would suppose, to mount the prosecution from behind the respectability of Miele's badge."[340]

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338 ibid at para 37
339 ibid at para 35
340 ibid at para 40

Although Justice Martin recognized that the Crown's approach was motivated by "real urgency" [341]and was "a considered and deliberate policy rather than a course of action dictated by the whims of one or other of the numerous prosecutors involved"[342], he nevertheless held that it was one that "in my view flies in the face of the principles enunciated in *Stinchcombe*."[343] He identified a number of problems with the Crown's approach that were independent of its refusal to disclose the seventeen-page statement taken from Billy Joe. One was the Crown's position that it need not disclose evidence that had been used to obtain wiretap warrants. He stressed that "the mere fact that information is used to obtain an authorization to intercept private communications will not serve to insulate from disclosure that which the Crown would otherwise be obliged to divulge."[344] Another problem was the agreement that Billy Joe would not have to testify.[345] Although such an agreement might have been motivated by the urgency of the matter, "the Crown however surely knows that the courts will not be bound by such arrangements. In the end they stand to jeopardize if not torpedo the chances of a successful prosecution."[346]

Billy Joe, acting through counsel, "objected formally to any disclosure of his identity or whereabouts. The written motion was supported by an affidavit and alleged generally that the Crown had undertaken both to protect his identity and not to require that he testify. It was further alleged that he feared for his safety if his identity was disclosed."[347] Billy Joe, however, withdrew this application after defence counsel was granted a right to cross-examine him on his affidavit. Billy Joe's real name was subsequently disclosed to the defence counsel, who agreed with Crown counsel and Billy Joe's counsel upon a method of serving a subpoena on Billy Joe.

The fact that after ten years Billy Joe's name was finally disclosed to the accused underlines the importance of effective witness protection programs. Nevertheless, the eventual disclosure of the informer's name did not relieve the Crown of the consequences for its prior disclosure

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341 ibid at para 41
342 ibid at para 71
343 ibid at para 71
344 ibid at para 46
345 An officer of the Surete du Quebec testified at the original trial that Billy Joe had received a promise from the police that he would not have to testify. "2 Sikhs guilty of conspiring to bomb plane" Montreal Gazette Dec 24, 1986 p. A1.
346 ibid at para 67
347 Ibid at para 71

violations; both with respect to relevant material in its possession, including that used to obtain the wiretap warrants, as well as with respect to the seventeen-page statement taken from Billy Joe. Martin J. concluded that the undisclosed materials "are capable of raising a reasonable doubt. The material may also have been very relevant to the issue of entrapment." [348]

Justice Martin concluded that a stay of proceedings was the appropriate remedy for the various disclosure obligations. He noted that the Supreme Court had already indicated that a stay should be entered if the Crown continued to refuse to disclose Billy Joe's identity or did not make full disclosure in relation to Billy Joe. The fact that the Crown had recently disclosed Billy Joe's identity did not relieve it of responsibility for the repeated disclosure violations, including the failure to disclose the seventeen-page statement; a failure that had left both the Court of Appeal and the Supreme Court with the false impression that full disclosure had been made. The Crown's approach to disclosure "bears all the hallmarks of a deliberate policy decision,"[349] was "deliberate" and the prejudice to the accused who had served six years in prison was "palpable".[350] Justice Martin concluded:

> It may be that some are dissatisfied with the consequences of *Stinchcombe*. They may consider the additional obligations imposed upon the Crown and by ricochet upon its agents to be onerous, burdensome, and unfair. They may consider the very principle upon which *Stinchcombe* is based, namely that the fruits of the investigation are the property of the public rather than the Crown, to be flawed. But *Stinchcombe* as qualified and developed in later cases is the law of the land. The Crown and the agents of the State have no option but to conform to it. If they will not do so of their own volition then the courts have no choice but to enforce conformity. In some exceptional situations that may regrettably lead to a stay of proceedings. This, in my view is one of those "clearest of cases" where in all fairness I have no other option. The proceedings are stained and that stain cannot be expunged. [351]

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348 ibid at para 45
349 ibid at para 90
350 ibid at para 88
351 ibid at para 93

The Crown unsuccessfully appealed this stay of proceedings to the Court of Appeal. In its third decision in the matter, the Court of Appeal stressed that the decision to stay proceedings must be considered in light of the Supreme Court's clear directions, setting out specific disclosure requirements that would have to be satisfied to avoid a stay, and Martin J's findings that that "the undisclosed new material 'was of vital interest to the defence', or that it 'would have been of considerable value and assistance to the defence . . .' Proulx J.A concluded: "To put it bluntly, 'enough is enough'".[352]

The *Khela* case demonstrates the limits of police informer privilege when the informer becomes a material witness in an alleged terrorist plot. Although the informer privilege can protect certain informers from disclosure under *Stinchcombe*, it will not apply to those such as Billy Joe, who play an active role, or to those who testify at trial. The reluctance to disclose the interview notes with Billy Joe and all related police notes eventually led to a stay of proceedings, even after the Crown and the accused were able to resolve their long standing dispute over the disclosure of Billy Joe's identity.

Terrorist prosecutions may be highly reliant on human sources, who may not always be reliable. Although electronic surveillance has been used in terrorism prosecutions, conspirators may be guarded about what they say in places that may be bugged. An informer can often be the best source of information about the actions and intent of the accused. The state must take care in handling informers and take care not to make promises about non-disclosure or not testifying that cannot be kept. Interviews and arrangements made with informers should also be fully documented and disclosed if required. If, as in the *Parmar* and *Khela* cases, the identity of informers must be disclosed, it is important that adequate and attractive witness protection programs be available. There is no guarantee that informers such as Billy Joe would enter and co-operate with witness protection programs, but such programs should be available should informers have to testify or have to have their identity otherwise be disclosed.

The *Khela* case also demonstrates how disputes over disclosure can prolong a terrorism prosecution. The case was litigated for twelve years, in large part because of the refusal of the Crown to make full disclosure.

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352 *R. v. Khela* (1998) 126 C.C.C.(3d) 341 at 345-346 (Que.C.A.)

At one point, the process was held to violate the accuseds' Charter right to a trial in a reasonable time, but this was overturned on appeal.

### E) Use of Privileges as a Means to Restrict Disclosure Obligations

As discussed above, evidence that is covered by a privilege is generally not subject to disclosure requirements under *Stinchcombe*. The identity of Billy Joe in the *Khela* case study discussed above would not have had to be disclosed if the courts had determined that it was subject to police informer privilege. The courts held that Billy Joe was no longer protected by police informer privilege because he acted as an active agent in the case. One possible means to restrict disclosure requirements and provide more certainty about their ambit would be to expand existing privileges. As will be seen, however, there are limits to this approach, as even the most sacrosanct privileges are subject to exceptions to ensure fairness to the accused.

#### 1. Expansion of Police Informer Privilege

The police informer privilege could be expanded to make clear that it includes CSIS informers or informers for other foreign security intelligence agencies. Some might even argue that CSIS itself should be treated as a police informer, even though the privilege has traditionally been designed to protect individuals and not entire state organizations from reprisals. The police informer privilege could also be expanded to apply in cases like *Khela* where the informer lost the benefits of the common law privilege by acting as an agent and becoming a material witness. Matters covered by a valid privilege are not subject to the *Stinchcombe* disclosure requirement.

Such an expansion of the police informer privilege would not, however, be absolute. Although the courts zealously guard police informer privilege, they also have always recognized an innocence at stake exception to the privilege. In 1890, it was recognized that "if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."[353] In 1997, the Court held that

353 *Marks v. Beyfus* (1890) 25 Q.B.D. 494 at 498 (C.A.)

the police informer privilege was consistent with the Charter, but only because it accommodated the innocence at stake exception. The Court stated that "to the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial."[354] The Court elaborated:

> When an accused seeks disclosure of privileged informer information on the basis of the "innocence at stake" exception, the following procedure will apply. First, the accused must show some basis to conclude that without the disclosure sought his or her innocence is at stake. If such a basis is shown, the court may then review the information to determine whether, in fact, the information is necessary to prove the accused's innocence. If the court concludes that disclosure is necessary, the court should only reveal as much information as is essential to allow proof of innocence. Before disclosing the information to the accused, the Crown should be given the option of staying the proceedings. If the Crown chooses to proceed, disclosure of the information essential to establish innocence may be provided to the accused. [355]

Although the innocence at stake exception will not lightly be applied, it would be applied more readily if attempts were made to expand the ambit of police informer privilege or to devise a new class of privilege based on concerns that the disclosure of intelligence might harm national security or international relations.

The Supreme Court in *R. v. Scott*, recognized that "if the informer is a material witness to the crime, then his or her identity must be revealed….. An exception should also be made where the informer has acted as *agent provocateur*". [356] This witness/agent exception and the need to reveal the identity of the informer in some search contexts, have recently been affirmed by the Court as valid examples of the innocence at stake exception.[357] This would seem to militate against the expansion of police informer privilege to apply to an informer like Billy Joe, who acted as an agent. Even if an

354 *R. v. Leipert* [1997] 1 S.C.R. 281 at para 24.
355 Ibid at para 33.
356 *R. v. Scott* [1990] 3 S.C.R. 979
357 *Unnamed Person v. Vancouver Sun* 2007 SCC 43 at para 29.

expanded police informer privilege was accepted, it would still be subject to an innocence at stake exception. It is more likely that innocence will be at stake when the informer is a material witness or an active agent.

### 2. Creation of a New National Security Class Privilege for Intelligence

Another possibility would be to create by legislation a new privilege for secret intelligence, or perhaps secret intelligence that Canada has received from foreign agencies or from confidential informants. There has been considerable reluctance to create new class claims of privilege. For example, the Court has rejected a class privilege with respect to religious communications.[358] It also has rejected a class privilege with respect to private records in sexual assault cases because a class privilege would conflict with the accused's right to full answer and defence.[359] Similar concerns would apply to any new class privilege claim based on concerns about the harms to national security and international relations in disclosing intelligence. Some leading commentators doubt whether any new class privilege will be created, and argue that "the self-interest of Ministers of government in asserting a class claim is evident and warrants close scrutiny."[360]

Any new national security privilege to protect intelligence from disclosure would likely have to be created by statute and carefully tailored to apply to material whose disclosure would be particularly damaging. A class privilege would, however, have the advantage of providing the greatest amount of *ex ante* protection that information covered by the privilege would not be disclosed. Any new national security privilege would have to be subject to the innocence at stake exception to be consistent with the Charter. If a new privilege was held to be less weighty than police informer or solicitor-client privilege, it could also be subject to a broader exception to recognize the accused's right to full answer and defence.

Both the innocence at stake and full answer and defence exceptions to privilege may be particularly broad in terrorism investigations. Terrorism investigations may involve far-reaching questions about the nature of the accused's associations with others within and outside of Canada. In addition, they may rely on human sources who may have been paid or protected by the state or who may be implicated in crimes including the

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358 *R. v. Gruenke* [1991] 3 S.C.R. 263
359 *A (L.B) v. B(A)* [1995] 4 S.C.R. 536
360 John Sopinka et al *The Law of Evidence* (Toronto: Butterworths, 1999) at 15.39.

broad range of terrorism offences. Some of this information might have to be disclosed even if a new privilege was created. It will simply not be possible to return to the pre-1982 days of an absolute privilege on national security grounds.

### 3. Case-by-Case Privilege to Protect Intelligence

A less drastic alternative to a class privilege to shelter intelligence from disclosure would be a case-by-case privilege. It is possible that such a privilege might apply to information obtained by Canadian security intelligence agencies from foreign agencies and confidential sources on the basis that: 1) there are communications originating in a confidence that they not be disclosed; 2) confidentiality is essential to the full and satisfactory maintenance of the relation between the parties; 3) the relation must be fostered; and 4) the injury caused to the relation must be greater than the benefit of the correct disposal of the litigation.[361] The problem with such an approach in the context of the criminal trial, however, is the importance of the accused's right to full answer and defence. Even in the private law context, the Court has rejected an all-or-nothing approach to privilege and held that disclosure may be necessary in some cases, even with respect to private records.[362] In the context of private records in sexual assault cases, the Supreme Court recognized that a case-by-case privilege would not address the main policy concerns about disclosure. In other words, it would not be possible to provide an absolute assurance to complainants that their private records would never be disclosed. The records could be disclosed if required for a fair trial.[363] A similar conclusion would be reached in the national security context. It would not be possible to assure foreign agencies or CSIS informants that a disclosure order would never be made. As will be seen, in the next section, the Attorney General of Canada already maintains the ability to issue a certificate under s.38(13) of the Canada Evidence Act and/or to drop a prosecution in cases where a court has found disclosure of national security material to be necessary.

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361 8 Wigmore *Evidence* (McNaughton Rev. 1961) s 2285

362 "It follows that if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. In some cases, the court may well decide that the truth permits of nothing less than full production." *M (A) v. Ryan* [1997] 1 S.C.R. 157 at para 33. The Court stressed that the case for disclosure would be easier to make in a criminal case where the accused's liberty was at stake. Ibid at para 36.

363 *A (L.B) v. B(A)* [1995] 4 S.C.R. 536 at para 77.

## F) Summary

What, if anything, should be done to alter *Stinchcombe* disclosure obligations or *O'Connor* production obligations as they apply to terrorism prosecutions? Ignoring the requirements of *Stinchcombe* is clearly not an option. *Khela* affirms that flagrant disregard of disclosure obligations can lead to stays of proceedings in even the most serious of cases. Evasion of disclosure requirements also increases the risk of wrongful convictions; a risk that may be significant in terrorism prosecutions.

Parliament's legislation in response to *O'Connor* provides some precedent for both placing legislative restrictions on *Stinchcombe* and on *O'Connor* requirements for production and disclosure from third parties. *Mills* suggests that legislative restrictions on disclosure may be held to be consistent with the Charter, even if they result in the Crown having some relevant information that is not disclosed to the accused. In addition, *Mills* suggests that Parliament can place restrictions on production and disclosure of third party records and require judges to consider, in addition to Charter rights, social interests that would be harmed by production or disclosure. At the same time, the Court in *Mills* recognized that the accused should not be placed in the impossible position of having to demonstrate the relevance of information that he had not seen. The Court indicated that the judge should err on the side of production of the documents, even in a context in which Parliament was reconciling the competing Charter rights of the accused and the complainant. Finally, the accused's right to full answer and defence, as defined in *Taillefer*, can be violated by the cumulative effects of non-disclosure, even if no one single piece of non-disclosed information is capable of raising a reasonable doubt as to guilt or casting doubt on the fairness of the trial.

There are reasons to be cautious about relying on Parliamentary attempts to restrict *Stinchcombe* and *O'Connor*. Any such restrictions will attract Charter challenge. There will also be strong arguments that *Mills* should be distinguished because the national security context pits the state against the individual and does not involve a reconciliation of competing Charter rights. The litigation about whether the information falls within legislative restrictions on disclosure and production and whether the legislation is consistent with the Charter's rights of the accused in the particular case may only add more delay to terrorism prosecutions and duplicate the process that is already available and will be discussed in the next section to obtain non-disclosure orders from judges in particular cases.

The creation or expansion of existing privileges may also create problems. Even the strongest privileges, including police informer privilege, are subject to innocence at stake exceptions. Although a broadened police informer or state secrets privilege would be rationally connected to important objectives with respect to the keeping of secrets, it could be found to be a disproportionate restriction on the accused's Charter rights to disclosure and full answer and defence. The courts have refused to allow even the most established and cherished privileges to be absolute. Any privilege must be subject to at least an innocence at stake exception to be consistent with the Charter. Courts could also find that the existing regime under s.38 of the CEA, including the Attorney's General ability to block disclosure under s.38.13, constitutes a less rights restrictive approach to the creation of new privilege. The section 38 procedure allows for a balancing of competing interests in disclosure and secrecy on the facts of the particular case.

The assertion of a case-by-case privilege will require litigation and will not afford certainty to CSIS, its foreign partners or CSIS informers that disclosure will never occur. It may be difficult to determine whether a case-by- case privilege applies without knowing the value of the information in the criminal trial. Any procedure to restrict disclosure or production that is consistent with the right to full answer and defence should require a judge, likely the trial judge, to examine all the relevant material to determine whether it should be disclosed. This may require trial judges to have adequate facilities and training for the handling of secret information. The determination of whether innocence or full answer and defence is at stake is a matter best decided by the trial judge.

Even if legislation restricting disclosure or production or creating a new privilege was upheld under the Charter, there could be much litigation about the precise meaning of the legislation and its relation to Charter standards. Although the state's interests in non-disclosure are particularly strong in the national security context, there is also a particular danger that non-disclosure could increase the risk of miscarriages of justice in terrorism prosecutions. The non-disclosure of even apparently innocuous information about a suspected terrorist cell could deprive the accused of important resources to challenge the manner in which the state investigated the case and its failure to consider alternative understandings of ambiguous events and associations that could point in the direction of the innocence of the accused. Intelligence could also be relevant to the credibility of human sources and informants.

The apparent certainty produced by new legislation in protecting intelligence from disclosure may be more illusory than real. Any procedure to restrict disclosure or production requirements, or to expand privileges, may duplicate and overlap with procedures already available under s.38 of the Canada Evidence Act to obtain non-disclosure orders. Rather than attempting in advance and in the abstract to restrict disclosure and production or to expand privileges, it may be fairer and more efficient to reform existing processes to allow judges to reconcile the competing interests in disclosure and non-disclosure on the facts of the particular case before them.

## VI. Judicial Procedures to Obtain Non-Disclosure Orders

This section will examine the ability of the Crown to seek judicial orders authorizing non-disclosure or modified disclosure for reasons relating to the state's interests in national security, national defence, international relations or other specified public interests. The procedures examined in this section allow judges to determine on the basis of the facts of the particular case whether disclosure is required, whereas the techniques of legislative restrictions and privileges examined in the last section attempt to define information that cannot be disclosed in advance and for all cases. The *ex ante* legislative approach discussed in the last section may at first appear to provide greater certainty that intelligence will not be disclosed, but as suggested above, even the most robust privileges and legislative restrictions will be subject to some exceptions to ensure fair treatment of the accused. The techniques examined in this section are tailored to the facts of specific cases.

As will be seen, the procedures used to obtain non-disclosure orders vary considerably depending on the nature of the public interest in non-disclosure that is asserted. Specified public interests in non-disclosure, as well as common law privileges, can be determined by superior court criminal trial judges under s.37 of the CEA. In contrast, national security confidentiality claims under s.38 that the disclosure of information would injure national security, national defence or international relations, must be determined by specially designated Federal Court judges. The trial judge must accept any non-disclosure order by the Federal Court, but also retains the right to order whatever remedy is required to ensure the fairness of the trial. A number of case studies, including the *Kevork* and *Khawaja* terrorism prosecutions as well as the *Ribic* hostage-taking prosecution, will be used to examine the effects of Canada's dual court approach in resolving claims of national security confidentiality.