

VII. Disclosure and Secrecy in other Jurisdictions

In what follows, I will outline the approach used to resolve national security confidentiality claims in the United States, the United Kingdom and Australia. In all of these democracies, the criminal trial judge decides questions of national security confidentiality that in Canada are reserved to the Federal Court. In addition, I will examine provisions in other jurisdictions for requiring defence lawyers to obtain security clearances as a prerequisite to the viewing of sensitive material, as well as the role played by security-cleared special advocates or *amicus curiae* to challenge the government's case that secret intelligence need not be disclosed to the accused.

United States

1. Disclosure Requirements

Material held by intelligence agencies and classified as secret security intelligence may be subject to constitutional and statutory disclosure standards in the United States. The main constitutional case is *Brady v. Maryland*⁵⁶⁴ which held that "the suppression by the prosecution of evidence favorable to the accused upon requests violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁵⁶⁵ An associate general counsel of the CIA has written that "close coordination between the activities of law enforcement and intelligence agencies in a particular matter should subject the intelligence files to *Brady* search."⁵⁶⁶ Other disclosure requirements relate to material that can be used to impeach a government witness, statements made by the accused, and documents or tangible objects that are material to the defence, belong to the accused or are intended to be used by the prosecution.⁵⁶⁷ Material subject to disclosure under either constitutional or statutory standards could, however, be the subject of an application for a non-disclosure order on the basis of national security concerns.

⁵⁶⁴ 373 U.S. 83 (1963)

⁵⁶⁵ *Ibid* at 87

⁵⁶⁶ Jonathan Fredman "Intelligence Agencies, Law Enforcement and the Prosecution Team" (1998) 16 *Yale Law and Policy Review* 331 at 354. But for a more limited approach to the search of an intelligence agency's files for exculpatory material see Mark Villaverde "Structuring the Prosecutor's Duty to Search the Intelligence for Brady Material" (2003) 88 *Cornell L. Rev.* 1471.

⁵⁶⁷ Fred Manget "Intelligence and the Criminal Law System" (2006) 17 *Stanford Law and Policy Rev.* 415 at 423.

2. Classified Information Procedures Act

In 1980, the United States enacted the *Classified Information Procedures Act*⁵⁶⁸ (CIPA) to provide procedures for pre-trial determinations of national security confidentiality. Before that time, many believed that it would be impossible to prosecute spies because it would result in the disclosure of classified information. Since 1980, however, CIPA has been successfully used in many successful espionage and terrorism prosecutions.⁵⁶⁹ Although CIPA has already influenced the 2001 amendments to s.38 of the CEA, it still provides a relevant example for further law reform that would allow trial courts to resolve issues of national security confidentiality.

Like s.38 of the *Canada Evidence Act*, CIPA defines the information covered by it broadly, to include classified information that the government is taking steps to protect for reasons of national security. National security is also defined broadly, to include considerations of national defence and international relations. Section 5 of CIPA, like s.38.01 of the CEA, places robust requirements on the accused to notify both the United States attorney and the court before trial if they expect to disclose, or cause the disclosure of, classified information. Section 5(2), however, specifically provides that the court may preclude disclosure and prohibit the examination of witnesses as a sanction for failure to disclose. Although such sanctions are contemplated in the statute, their use could adversely affect the accused's constitutional right to make full answer and defence and a fair trial.

A noteworthy feature of CIPA, as compared to the CEA, is that the notice is given not only to United States Attorney but also to the trial court. CIPA contemplates that national security confidentiality claims can be managed by the trial judge as part of the case management and discovery process. To this end, section 2 of CIPA allows any party after the filing of the indictment or information, or the court on its own motion, to convene a pre-trial conference to establish the timing of requests for discovery, notices and hearings about national security confidentiality and any other "matters which relate to classified information or which may promote a fair and expeditious trial".⁵⁷⁰ In Canada, national security confidentiality issues would be delegated to the Federal Court and as such segregated from general pre-trial management in the criminal courts.

⁵⁶⁸ PL 96-456

⁵⁶⁹ Serrin Turner and Stephen Schulhofer *The Secrecy Problem in Terrorism Trials* (New York: Brennan Center, 2005).

⁵⁷⁰ CIPA s.2 (emphasis added)

3. Security Clearances for Defence Lawyers

One of the core dilemmas of national security confidentiality is that the process of determining whether the government has made a legitimate claim of secrecy may itself sacrifice secrecy. Section 3 of CIPA protects this anticipatory interest in confidentiality by providing that, upon a motion of the United States, “the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court in the United States.” Although CIPA on its face does not contemplate that courts can require defence lawyers to obtain security clearances as a prerequisite to obtaining access to classified information, courts have found this power is an incident to CIPA’s procedures. In *United States v. Bin Laden*⁵⁷¹, Judge Sands found authority to order security clearances for defence lawyers from security procedures promulgated by the Chief Justice of the United States under s. 9 of CIPA that allowed the government to use “lawful means” to obtain information “concerning the trustworthiness of persons associated with the defence” and to bring such information to the court’s attention for the purpose of framing an appropriate protective order under s.3 of CIPA.⁵⁷²

Judge Sands rejected constitutional challenges to the security clearance process on the basis that it did not necessarily give the Department of Justice a veto over the accused’s choice of lawyer.⁵⁷³ He also noted that similar requirements were imposed on court staff who had access to the classified documents.⁵⁷⁴ He also stressed that the government’s concerns about preventing leaks of classified information:

are heightened in this case because the Government’s investigation is ongoing, which increases the possibility that unauthorized disclosures might place additional lives in danger. In addition, the Government has alleged that the Defendants are part of a conspiracy whose members have previously gained access to un-filed

⁵⁷¹ 58 F.Supp.2d 113. To the same effect see *United States v. Al-Arian* 267 F.Supp. 2d 1258.

⁵⁷² *ibid* at 116 citing 18 U.S.C.A. app 3 s.9 (West, 1999) and distinguishing earlier cases holding that the notice requirements in s.5 of CIPA did not authorize requiring defence lawyers to undergo a security clearance. *United States v. Joliff* 548 F.Supp. 232 (D.Md.1981); *United States v. Smith* 706 F.Supp. 593 (M.D. Tenn. 1989).

⁵⁷³ Early commentary had raised concerns that “to eliminate a particularly troublesome opponent, the Justice Department may deny a security clearance to a specific attorney, investigator, or expert witness retained by the defendant, who needs access to classified information to be effective.” Brian Tamanaha “A Critical Review of The Classified Information Procedures Act” (1986) 13 Am. J. Crim. L. 277 at 289.

⁵⁷⁴ Such requirements were upheld in *United States v. Smith* 899 F. 2d 564 (6th Cir, 1990).

court documents and forwarded those documents to other members of the conspiracy....Our insistence that every person who comes into contact with classified information in this litigation undergo some objective evaluation is, of course, no commentary on the reputations of the Defence counsel in this case. The fact remains that it is practically impossible to remedy the damage of an unauthorized disclosure ex post and we refuse to await the possibility of repairing what in this case might be a particularly disastrous security breach when reasonable measures could have prevented the disclosure altogether. We believe it is appropriate to require some form of clearance on the facts we have before us.⁵⁷⁵

As will be seen, Australian legislation explicitly contemplates that defence lawyers may require security clearances in order to gain access to classified information.

Although requirements that defence lawyers receive security clearances as a prerequisite to viewing classified material can adversely affect choice of counsel, it does have some advantages. In the Malik and Bagri trial, defence lawyers were able to inspect CSIS material on an initial undertaking that it not be disclosed with their client, but they did not receive security clearances. A defence lawyer with a security clearance may be able to participate more effectively in proceedings about classified information than a security-cleared special advocate or *amicus curiae*, who will inevitably not be as familiar with the case as the accused's own lawyer.

At the same time, however, the defence may be adversely affected if the security-cleared defence lawyers cannot consult with their clients. In a 2001 ruling in the Bin Laden case, Judge Sands was confronted with an argument that a security-cleared lawyer's inability to share classified information with his client denied the accused the effective assistance of counsel. The accused argued that they were severely handicapped in not being able to consult with their counsel because of "the length of the alleged conspiracies, their geographical scope, the language barriers, the myriad names (some very similar) and aliases, and the cultural and ethnic

⁵⁷⁵ 58 F.Supp.2d 113 at 121.

diversity involved.”⁵⁷⁶ Judge Sands rejected this claim, noting that some of the information under dispute was being declassified so it could be shared with the accused. Moreover, “the hypothetical benefit” of being able to share all classified information with the accused was outweighed by the “government’s compelling interest in restricting the flow of classified information.”⁵⁷⁷ Judge Sands also cited in support cases in which individual courts had ordered that a defence lawyer not disclose specific information to his or her client, such as the identity of an informer, the addresses of witnesses or the fact that the accused was being investigated for jury tampering. Judge Sands also rejected the accused’s argument that he had a right to be present at the CIPA hearing on the basis that such hearings revolved around questions of law and it was not essential for the accused to be present.⁵⁷⁸

One recent study has recommended that Congress amend CIPA to provide an independent process that would allow defence lawyers to be security-cleared in advance of particular cases and provide a fair means to allow the defence counsel to apply to the court for permission to consult with the accused about the classified information.⁵⁷⁹ That said, security clearances for lawyers and orders that they not share classified information with their clients only addressed the disclosure phase of the trial. In the United States, as in Canada, the accused would be present when evidence was presented against them in a criminal court.⁵⁸⁰ A former deputy counsel of the Central Intelligence Agency, Fred Manget, has recently recommended expanding CIPA “to allow nonpublic trial, protective secrecy orders that applied to jury members, criminal sanctions for unauthorized disclosure of classified information introduced in evidence and other means of confining national security information to the fewest necessary participants in a trial process.”⁵⁸¹ Many of these proposals would be available in Canada although exclusion of the public and the media would have to be justified under the Charter.

⁵⁷⁶ *United States v. Bin Laden* 2001 U.S. Dist. Lexis 719.

⁵⁷⁷ *Ibid* at para 15.

⁵⁷⁸ *Ibid* at para 22.

⁵⁷⁹ Serrin Turner and Stephen Schulhofer *The Secrecy Problem in Terrorism Trials* (New York: Brennan Center, 2005) at 80.

⁵⁸⁰ Robert Chesney “The American Experience with Terrorism Prosecutions” in vol. 3 of the *Research Studies*

⁵⁸¹ Fred Manget “Intelligence and the Criminal Law System” (2006) 17 *Stanford Law and Policy Rev.* 415 at 428.

4. Notice Provisions

The requirement for notice of an intent to introduce classified information under s.5 of CIPA, as well as the requirements for *in camera* hearings to determine whether the information should be disclosed or whether some form of substitution could be used, have been upheld in the United States in the face of repeated constitutional attack. Courts have generally held that the notice provisions do not violate the accused's right against self-incrimination because they do not require an accused to reveal all of his defence, plans for cross-examination or plans to testify, but only an intent to use classified information.⁵⁸² The two-court structure of s.38 of the CEA, along with the ability of the accused to make *ex parte* submissions to the Federal Court judge, as well as the ability to segregate the prosecutors at trial from the prosecutors at the s.38 proceedings, may provide more protections in Canada than in the United States for the accused's interest in not prematurely disclosing the defence than the American CIPA procedures.

5. Means of Reconciling Secrecy with Disclosure

CIPA is designed to give both governments and judges the greatest flexibility possible in reconciling the state's interests in the secrecy of security intelligence with the interests of the accused and the public in the disclosure of evidence. CIPA allows the government to propose substitutions, admissions and summaries for classified information at two different junctures. Section 4 of CIPA allows the United States to propose a summary, admission or substitution on an *ex parte* basis. This section has been strongly criticized as forcing the court to decide the adequacy of the substitution or summary at an early stage of the proceedings and without the benefit of the accused's argument or knowledge of the accused's defence. It is an explicit statutory displacement of a strong presumption against *ex parte* hearings even in the national security context. For example the United States Supreme Court has warned in the context of national security claims that "in our adversary system,

⁵⁸² See for example *United States v. Wen Ho Lee* 90 F.Supp. 1324. The defence lawyers in that case later wrote: "At the CIPA section 6 hearing, the defendant must establish the relevance of each listed item of classified information. This affords the prosecution a unique insight into the defence strategy, as defence counsel sets forth the theory of the defence and ties particular pieces of evidence to the theory. In no other part of the criminal justice system must the defendant provide such a complete explanation of the defence before trial without a reciprocal obligation on the prosecution. As with other aspects of CIPA, however, courts have found no constitutional defect in Section 6 procedures." John D. Cline and K.C. Maxwell "Criminal Prosecutions and Classified Information" *Los Angeles Lawyer* September, 2006 35 at 39.

it is enough for judges to judge. The determinations of what may be useful to the defence can properly and effectively be made only by an advocate."⁵⁸³

Section 4 also does not provide statutory criteria for deciding the adequacy of the substitution, but it does provide that the government's *ex parte* submissions should be preserved under seal and available to an appeal court. Even those who support the *ex parte* nature of the section 4 process suggest that "the court should retain the power to revoke any of its findings of adequacy of substitutions if it later finds that the defendant's need for non-disclosed material outweighs the government's interest in protecting the material."⁵⁸⁴ As will be seen, the ability of trial judges to revisit their initial non or partial disclosure orders are similarly an important feature of both the Australian and British systems.

Section 6 of CIPA provides a second, less problematic, vehicle for substitutions and summaries. It only contemplates mandatory *ex parte* hearings with respect to the Attorney General's certification that the disclosure of the information would cause identifiable damage to national security.⁵⁸⁵ It provides that upon any determination by the court that disclosure is necessary, the United States may propose the substitution for such classified information "of a statement admitting relevant facts" that the information would provide or "a summary of the specific classified information." Under this section, the Court is to allow the proposed substitution "if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defence as would disclosure of the specific classified information." One court has indicated that this provision "does not preclude presentation of the defendant's story to the jury, it merely allows some restriction in the manner in which the story will be told."⁵⁸⁶

Section 8 of CIPA allows the trial judge considerable flexibility, when admitting classified information as evidence, to edit the information to

⁵⁸³ *United States v. Dennis* 384 U.S. at 875. In another case, the Court similarly warned that "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of the accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." *Alderman v. United States* 394 U.S. at 183-185.

⁵⁸⁴ Richard Salgado "Government Secrets, Fair Trials and the Classified Information Procedures Act" (1988) 98 Yale L.J. 427 at 445.

⁵⁸⁵ CIPA s.6(c) (2)

⁵⁸⁶ *United States v. Collins* 603 F. Supp at 304.

minimize harm to national security. Section 8(b) allows the editing of classified documents and photographs to exclude classified information “unless the whole in fairness ought to be considered.” Section 8 (c) addresses the difficulties of testimony that may blend classified and unclassified evidence, a difficulty that has led to the use of edited transcripts of testimony being used in the *Ribic* case discussed above. It provides that once an objection is made to testimony that will reveal classified information, “the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information” including proffers by the prosecution and the accused concerning the testimony and any information they seek to elicit. As in *Ribic*, this procedure seems to contemplate the reduction of live testimony to writing so as to allow more efficient and effective editing of the information to protect national security.⁵⁸⁷

6. Remedies for Non-Disclosure

The court is also accorded flexibility in fashioning an appropriate remedy under CIPA for the consequence of determinations that information cannot be disclosed. Section 6 of CIPA provides that in lieu of dismissing an indictment, the trial court can fashion an appropriate remedy for a decision not to disclose classified information to the defence. These remedies include dismissing parts of the indictment or striking or precluding all or part of the testimony of a witness. This approach is consistent with the remedial flexibility accorded to trial judges under s.38.14 of the CEA.

7. Interlocutory Appeals

The trial judge’s selection of lesser remedies, as well as the judge’s determination that classified information can be disclosed, is subject under s.7 of CIPA to an interlocutory appeal by the government. As was seen in the *Ribic* and *Khawaja* cases, determinations by the Federal Court under s.38 can be subject to appeal to the Federal Court of Appeal. Such proceedings can delay the start of trials. Section 7 of CIPA provides that the Court of Appeal “shall hear argument on such appeal within four days

⁵⁸⁷ *United States v. Moussaoui* 382 F.3d 453, 480 (4th Cir., 2004). For arguments that the trial judge’s original proposal that live testimony be given by videotape would be a fairer reconciliation of the competing demands of fairness to the accused and the protection of secrecy see Turner and Schulhofer *The Secrecy Problem in Terrorism Trials* at 41.

of the adjournment of the trial” and “shall render its decision within four days of argument on appeal”, and may dispense with written briefs and reasons. Section 38 of the CEA imposes ten-day time-limits on bringing appeals, but does not itself provide for expedited appeals. The accused under CIPA is not bound by the Court of Appeal’s interlocutory ruling on an appeal from conviction. This suggests that the value of interlocutory appeals mainly resides with the prosecution, who may otherwise be in a position of having to disclose the material ordered by the trial court or dismiss. In Canada, the use of a s.38.13 certificate may provide the state with an option short of dismissal.

8. The Management of the Relation between Intelligence and Evidence and Tensions Between Intelligence Agencies and Prosecutors

CIPA contemplates ongoing accountability structures to monitor how the government itself manages the relation between intelligence and evidence. Section 12 requires the Attorney General to issue guidelines about whether to prosecute cases involving classified information, and the preparation of written reasons in cases in which prosecutions are not undertaken because of the possibility of revealing classified information. Section 13 requires reports by the Attorney General to the legislative intelligence committees of such decisions. This provides a potential feedback loop about the adverse law enforcement consequences of the protection of classified information. One of the main themes of this study has been that security intelligence agencies need to be aware of the evidentiary consequences of their counter-terrorism practices, including their information sharing practices with foreign agencies. There should be some feedback loop so that intelligence agencies and the government consider the consequences of secrecy claims. Such a feedback loop is contemplated in the American legislation and it could serve as a brake on overbroad claims of secrecy that frustrate terrorism prosecutions.

CIPA was amended in 2000 as part of an intelligence reform and appropriations bill to require briefings between senior justice and senior intelligence officials. Section 9A of CIPA now provides:

(a) Briefings Required.— The Assistant Attorney General for the Criminal Division and the appropriate United States attorney, or the designees of such officials, shall provide briefings to the senior agency official, or the designee of such official, with respect to any case involving classified

information that originated in the agency of such senior agency official.

(b) Timing of Briefings.— Briefings under subsection (a) with respect to a case shall occur—

(1) as soon as practicable after the Department of Justice and the United States attorney concerned determine that a prosecution or potential prosecution could result; and

(2) at such other times thereafter as are necessary to keep the senior agency official concerned fully and currently informed of the status of the prosecution.⁵⁸⁸

This provision can be seen as a legislative response to the tensions between the frequent desire of intelligence agencies to keep intelligence secret and the desire of prosecutors for evidence that can be disclosed and used in public trials. Mandated briefings could allow intelligence agencies to learn more about the disclosure and evidentiary demands of terrorism prosecutions, while also allowing prosecutors to learn more about why intelligence agencies require that intelligence as well as methods and sources remain secret. Although legislation alone cannot mandate co-operation or resolve these tensions in individual cases, it can provide a framework for resolving such conflicts and tensions. Overclassification of secrets can impede terrorism prosecutions. In one post-9/11 terrorism prosecution, the government decided to declassify intercepts three days before trials, and commentators have recommended that classification of relevant information be reviewed once a prosecution has been commenced.⁵⁸⁹ Once a prosecution has commenced, intelligence agencies should start a process of reclassifying relevant information about the case in order to respond to the problem of overclassification.⁵⁹⁰

CIPA is most relevant in cases where the accused might seek access to classified information that is of no or minimal relevance to the case. In cases where the evidence is very relevant, it is unlikely that courts will hold that the evidence cannot be disclosed to the accused or that they will be able to devise non-classified substitutions that treat the accused

⁵⁸⁸ as added Pub. L. 106–567, title VI, § 607, Dec. 27, 2000, 114 Stat. 2855.)

⁵⁸⁹ Turner and Schulhofer *The Secrecy Problem in Terrorism Trials* at 27, 80.

⁵⁹⁰ *Ibid.*

fairly.⁵⁹¹ In those cases, the prosecutor may be faced with the stark dilemma of whether to disclose or to dismiss.⁵⁹² As one former prosecutor has concluded:

CIPA has never been viewed as assuring that all national security issues could be resolved. Since the executive branch maintains control of prosecutorial decisions, it still must decide whether or not to pursue a prosecution once an adverse ruling is rendered....What CIPA does do...is to eliminate certain forms of graymail in which the alleged secrets are actually irrelevant to the defence. If the evidence is not peripheral, it is deemed material to the defence and disclosure is therefore necessary to ensure a fair trial. If the national secrets and the illicit conduct are actually one and the same, ultimately, the prosecution may be thwarted.⁵⁹³

CIPA, however, provides some accountability for decisions to sacrifice prosecutions for the public interest in keeping secrets by providing written reasons for not prosecuting and reports to Congressional intelligence committees. It also now provides for early prosecutorial briefings of intelligence agencies about the evidential implications of their security intelligence work.

9. Summary

Although CIPA has already influenced s.38 of the CEA in terms of early notification requirements and giving judges a flexible array of options in reconciling the interests in secrecy and disclosure through editing, summaries and substitutions, it still differs from s.38 in a number of respects. CIPA allows questions of national security confidentiality to be decided by the judge who tries terrorism offences. The trial judge is provided with appropriate facilities to ensure the secrecy of the classified

⁵⁹¹ Brian Tamanaha "A Critical Review of The Classified Information Procedures Act" (1986) 13 Am. J. Crim. L. 277 at 305-306.

⁵⁹² On this dilemma see Robert Chesney "The American Experience with Terrorism Prosecutions" in vol. 3 of the Research Studies

⁵⁹³ Sandra Jordan "Classified Information and Conflicts in Independent Counsel Prosecutions" (1991) 91 Columbia L.Rev. 1651 at 1662-1663.

information.⁵⁹⁴ CIPA contemplates that national security confidentiality issues will be factored-in to general case management questions, whereas s.38 of the CEA delegates these to a separate court. The trial judge under CIPA is able to revisit initial non-disclosure orders, whereas the trial judge in Canada must accept non or partial disclosure orders made by the Federal Court before trial, while retaining the ability to fashion a remedy for the accused to respond to any non-disclosure.

Another difference between CIPA and the CEA is that CIPA has been interpreted to allow the trial judge in appropriate cases to require defence lawyers to obtain security clearances as a condition of having access to classified information. This procedure has, however, been challenged as restricting the ability of the defence lawyer to reveal the classified information to his or her client. The defence lawyer can generally be expected to be in a better position to know the utility of the information to the defence than a separate lawyer such as a security-cleared special advocate or *amicus curiae*.

Finally, CIPA attempts to manage the inevitable tensions within government between the demands by intelligence agencies for secrecy and the interests of prosecutors in disclosure. It provides several potentially valuable feedback mechanisms so that the government, including legislative committees, is aware of the consequences of overbroad claims of either secrecy or overbroad demands for disclosure. Recommendations have been made that in order to respond to the problem of overclassification, intelligence agencies should reclassify information about a case once a prosecution has commenced.

B) United Kingdom

The United Kingdom, like the United States, allows trial judges to make and revisit determinations of national security confidentiality. The British experience is of particular note because of the role of statutory disclosure standards and security-cleared special advocates.

⁵⁹⁴ As one judge who conducted a post 9/11 terrorism prosecution has explained: “the court and the prosecution must ensure that [classified] information is maintained in a completely secure facility called a Secure Compartmented Information Facility (SCIF), which is basically a fully secured and alarmed office. All highly classified intelligence must not only be kept in a SCIF, but any review of this information- whether by the prosecutor, defence counsel, or the court must be done in the SCIF itself. I now have a SCIF near my chambers, and I can tell you that entering the SCIF and reviewing materials in it is something of a twilight-zone experience.” Judge Gerald Rosen “The War on Terrorism in the Courts” (2004) 21 T.M. Cooley L.Rev. 159 at 164.

1. Disclosure Requirements

The disclosure regime used in a particular country may affect the need for recourse to obtain non-disclosure orders for reasons of national security confidentiality. The disclosure regime in the United Kingdom is quite complex. There is a common law regime of disclosure that governs disclosure in relation to offences in which the investigation began prior to April, 1997. The landmark case involved a wrongful conviction in a terrorism case. It articulated a broad right of disclosure of all relevant evidence somewhat similar to the *Stinchcombe* decision examined above.⁵⁹⁵ The *Criminal Procedure and Investigations Act 1996* narrowed this common law test by providing under s.3(1)(a) that primary disclosure must be made of any prosecution material which might undermine the case for the prosecution against the accused.⁵⁹⁶ Secondary disclosure under section 7(2)(a) was required for previously undisclosed material which might be reasonably expected to assist the accused's defence. Section 32 of the *Criminal Justice Act 2003* amended section 3(1)(a) of the 1996 Act to require primary disclosure of any previously undisclosed material "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". As the House of Lords recently recognized:

⁵⁹⁵ In *R v Ward* [1993] 1 WLR 619, 674, the Court stated: "An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial". See also *R v Keane* [1994] 1 WLR 746, 752 in which the Court held that the prosecution should put before the judge only those documents which it regarded as material but wished to withhold on grounds of public interest immunity. "Material" evidence was defined as evidence which could be seen, "on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)".

⁵⁹⁶ A 2006 Protocol for the Control and Management of Unused Material in the Crown Court issued by the Court provides detailed guidance for the disclosure process that supplements the statutory guidance. It provides: "the more complex the case, the more important it is for the prosecution to adhere to the overarching principle in paragraph 54 and ensure that sufficient prosecution resources are allocated to the task. Handing the defence the 'keys to the warehouse' has been the cause of many gross abuses in the past, resulting in huge sums being run up by the defence without any proportionate benefit to the course of justice. These abuses must end. The public rightly expects that the delays and failures which have been present in some cases in the past where there has been scant adherence to sound disclosure principles will be eradicated by observation of this Protocol. The new regime under the Criminal Justice Act and the Criminal Procedure Rules gives judges the power to change the culture in which such cases are tried. It is now the duty of every judge actively to manage disclosure issues in every case. The judge must seize the initiative and drive the case along towards an efficient, effective and timely resolution...In this way the interests of justice will be better served and public confidence in the criminal justice system will be increased." at <http://www.hmcourts-service.gov.uk/publications/guidance/disclosure.htm>

Whether in its amended or unamended form, section 3 does not require disclosure of material which is either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence.⁵⁹⁷

In general, disclosure obligations in both the United States⁵⁹⁸ and the United Kingdom are less broad than in Canada. Both the United States and the United Kingdom attempt to flesh-out disclosure requirements in statutes and other rules⁵⁹⁹ while, as discussed above, Canada relies on a case-by-case adjudication under the Charter. Both the decreased breadth and increased certainty of disclosure requirements in the United States and the United Kingdom may make it less necessary for prosecutors to claim national security confidentiality over material that may be relevant to a case, but which does not significantly weaken the prosecution's case or strengthen the accused's case.

2. Public Interest Immunity

In a 1993 case which overturned a terrorism conviction in part because the Crown had not made full disclosure, the Court of Appeal criticized the prosecution for acting "as a judge in their own cause on the issue of public interest immunity". The Court of Appeal indicated that if the Crown was "not prepared to have the issue of public interest immunity determined by the court, the result must inevitably be that the prosecution will have to be abandoned."⁶⁰⁰ In some ways, this sounds a similar warning to that articulated in *Khela* about prosecutors taking issues of disclosure into their own hands. At the same time, more recent disclosure developments in the United Kingdom have stressed the importance of the prosecutor not simply dumping all possibly relevant information on the accused, but rather only disclosing information that is required under statutory disclosure requirements.

The Court of Appeal decided that while the material over which public interest immunity is claimed must always be disclosed to the court, and such applications should generally be disclosed to the defence, there may be cases in which the general category of the evidence claimed to

⁵⁹⁷ *R. v. H and C* [2004] UKHL 3 at para 17.

⁵⁹⁸ *Brady v. Maryland* 373 U.S. 83.

⁵⁹⁹ See Rule 16 of the Federal Rules of Criminal Procedure

⁶⁰⁰ *R. v. Ward* [1993] 1 W.L.R. 619 at 648.

be covered could not be disclosed to the accused because it would reveal secrets. The Court of Appeal indicated that there may be exceptional cases in which no notice at all would be given to the accused because such notice would reveal the nature of the evidence in question.⁶⁰¹ In Canada, s.38.04(5) of the CEA vests in the Federal Court a judicial discretion to give notice of a hearing and to make representations, but s.38.08 contemplates an automatic review by the Federal Court of Appeal in cases where a judge determines that party's interest is adversely affected, but that party has not been allowed to make representations to the judge.

In 1994, the Court of Appeal stressed that the Crown need only apply for public interest immunity with respect to material evidence that would be subject to a duty of disclosure. It warned against prosecutors dumping "all its unused material in the court's lap to sort through it regardless of its materiality to the issue present or potential." It also warned that "the more full and specific the indication the defendant's lawyers give of the defence or issues they are likely to raise, the more accurately both prosecution and judge will be able to assess the value to the defence of the material."⁶⁰² As discussed above, the judge conducting s.38 hearings in the *Khawaja* prosecution has expressed some concern both that the Crown has sought non-disclosure orders for administrative matters and general analytical intelligence that is not relevant to the case or could not be of any assistance to the accused. The Court has also expressed concerns that the accused had not taken the opportunity even on an *ex parte* basis to inform the judge about the accused's defences. Prosecutors can be criticized if they define their disclosure obligations either too broadly or too narrowly. In borderline cases, it may be advisable for the prosecutor to be able to seek guidance from the trial judge about whether sensitive information is even subject to disclosure obligations.

The House of Lords considered the proper procedures and approaches to public interest immunity in *R. v. H. and C*⁶⁰³. It recognized the close connections between disclosure and public interest immunity when it stressed that there would be no need to claim immunity for material that was not subject to disclosure "if material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it." It also warned about the dangers of the accused being "permitted to make general and unspecified allegations and then seek

⁶⁰¹ *R. v. Davis, Johnson and Rowe* [1993] 1 W.L.R. 613

⁶⁰² *R. v. Keane* [1994] 1 W.L.R. 746 at 752

⁶⁰³ [2004] UKHL 3

far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court.”⁶⁰⁴ An approach to disclosure that is more restrictive than in Canada -- especially in relation to material in state files that is damaging to the accused but will not be used as evidence -- limits the opportunities in which the Crown must make non-disclosure applications in order to protect secrets.

The House of Lords has outlined the following approach which seeks to exclude from a public interest immunity application any material that the Crown need not disclose, and material that would not cause serious prejudice to an important public interest:

- (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
- (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.
- (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
- (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence? ...
- (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
- (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure

⁶⁰⁴ bid at para 35

should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?⁶⁰⁵

In cases where the material is both subject to the duty of disclosure because it would weaken the prosecution or strengthen the defence and there is a serious prejudice to an important public interest, the House of Lords stressed means to reconcile the demands of secrecy and disclosure through devices such as court-approved editing or summarizing the evidence, or having the prosecution make admissions of facts. This flexible approach is consistent with the orientation of both the American CIPA legislation and s.38.06 of the CEA.

There are two features of the British approach to public interest immunity which are somewhat unique and merit consideration.⁶⁰⁶ The first is the recognition by the House of Lords that: "in appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected... In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4)." The House of Lords recognized that the appointment of special counsel was not without difficulties. These problems included the lack of explicit authorizing legislation, the delay caused while the special advocate becomes familiar with a complex case and "ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession."⁶⁰⁷ The Federal Court Trial Division's recent decisions that have contemplated or appointed security

⁶⁰⁵ *ibid* at para 36.

⁶⁰⁶ The 2001 report of the Auld Committee recommended introduction of a scheme for instruction by the court of special independent counsel to represent the interests of the defendant in those cases at first instance and on appeal where the court now considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material." *The Review of the Criminal Courts in England and Wales* (2001) at para 197.

⁶⁰⁷ *R v. H and C* [2004] UKHL 3 at para 22.

cleared counsel in s.38 proceedings⁶⁰⁸ have not discussed the practical or ethical problems identified by the House of Lords.

The second important feature of the British approach is the emphasis that it places on the continuing review of any non-disclosure order made by the trial judge. In other words, any such order “should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.”⁶⁰⁹ This was underlined by its recognition that a special advocate if appointed would likely have “to assist the court in its continuing duty to review disclosure.”⁶¹⁰ In contrast, the Canadian procedure requires the Federal Court judge to reach a final decision under s.38. Although this decision may be subject to clarification by that judge or to appeal to the Federal Court of Appeal, it must at the end of the day be accepted by the trial judge.

The above procedure should also be considered in light of the European Court of Human Rights Grand Chamber’s decision in *Edwards and Lewis v. the United Kingdom*⁶¹¹ which held that the right to a fair trial had been violated in public interest immunity proceedings. The Grand Chamber endorsed the following consideration of the law on disclosure by the Fourth Chamber:

It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (ibid., § 51). In addition, Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (ibid.)

The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings

⁶⁰⁸ *Canada v. Khawaja* 2007 FC 463 aff’d without reference to the ability to appoint security cleared counsel 2007 FCA 388; *Khadr v. The Attorney General of Canada* 2008 FC 46; *Canada (Attorney General) v. Khawaja* 2008 F.C. 560.

⁶⁰⁹ *R v. H and C* supra at para 36.

⁶¹⁰ ibid at para 22.

⁶¹¹ Judgment of October 27, 2004

there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (ibid, § 52)...⁶¹²

These statements suggest a willingness to accept limits on the right of disclosure for reasons of national security provided that they are “sufficiently counterbalanced” by other procedures to ensure a fair trial. Some commentators have suggested that the Grand Chamber’s emphasis in *Edwards and Lewis* on the importance of adversarial challenge suggests that special advocates should be used in public interest immunity proceedings.⁶¹³

On the facts of the *Edwards and Lewis* cases, which involved public interest immunity applications that shielded investigative techniques used by the police in cases in which the accused claimed entrapment defences, the Grand Chamber held that the right to a fair trial in Article 6 had been violated and endorsed the following conclusion:

In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the

⁶¹² ibid at para 46.

⁶¹³ Mike Redmayne “Criminal Justice Act 2003: Disclosure and its Discontents” [2004] Crim L.Rev. 441 at 456-457 (in reference to the lower chamber’s ruling in *Edwards and Lewis v. The United Kingdom*)

police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police ... Had the defence been able to persuade the judge that the police had acted improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications. Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue...

In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6 § 1 of the Convention in this case.⁶¹⁴

This ruling affirms that the fairness of non-disclosure depends on the relation between the non-disclosed information and the issues raised in the trial. In this case, the Grand Chamber was concerned that the non-disclosed information related to the entrapment defences raised by the accused.

In another public interest immunity case, the European Court of Human Rights found a violation of the right to a fair trial where the prosecutor's late disclosure of the material meant that it had only been reviewed by the Court of Appeal in *ex parte* proceedings, but not by the trial judge. The Court concluded:

⁶¹⁴ Judgment of October 27, 2004 at para 46.

The Court does not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give the testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases.⁶¹⁵

This case is relevant to the Canadian experience because it suggests that the European Court of Human Rights is uneasy about the fairness of procedures that do not allow the trial judge to revisit non-disclosure issues in light of the defence case and the cross-examination of witnesses at trial.

The British experience is instructive in Canada in several respects. It indicates that questions of public interest immunity cannot be divorced from the scope of disclosure obligations. Britain has moved away from relying on court decisions to define the prosecutor's disclosure obligations and legislation has both reduced disclosure obligations and made them more certain. The British example also provides some experience with the use of special advocates in public interest immunity proceedings. It warns of the danger of increased delay and of the difficulty of the special

⁶¹⁵ *Rowe and Davis v. United Kingdom* (2000) 30 E.H.R.R. 1 at para 65. See also *Atlan v. The United Kingdom* (2001) E.H.R.R. 33 to the same effect. One commentator has observed that these cases illustrate "the importance of entrusting the decision on PII to the trial judge because only he can shape proceedings to ensure that withholding the information does not result in unfairness to the defence. In England, whenever an application for PII is granted, it is the duty of the trial judge to keep the matter under review and, if events at the trial dictate, he must order that the interests of justice require disclosure of the relevant information after all. This appears to be the inevitable and sensible result of entrusting the original decision to the trial judge." Peter Duff "Disclosure of Evidence and Public Interest Immunity" (2008) *Scots Law Times* 63 at 66.

advocate to take meaningful instructions from the accused after the special advocate has seen the secret and undisclosed information.

Finally and most importantly, both the House of Lords and the European Court of Human Rights have placed considerable emphasis on the ability of the trial judge to revisit initial decisions that the disclosure of sensitive information is not required in light of an evolving trial, including the defence's case and defence cross-examination of witnesses. Although the courts have approached the trial judge's ability to revisit public interest immunity decisions mainly from the perspective of ensuring fairness to the accused, it also has an efficiency dimension because it allows the trial judge to include such issues in general case management issues. The trial judge can examine the undisclosed material and order non-disclosure, but be confident that he or she can revisit that order on his or her own motion as the trial evolves in order to ensure a fair trial. This approach is not an option under the two-court structure of s.38 of the CEA.

C) Australia

Australia has extensive recent experience with claims of national security confidentiality. Its Law Reform Commission has prepared an excellent report on the subject and it enacted new legislation to govern national security confidentiality in 2004. This new legislation has already been tested in completed terrorism prosecutions. In what follows, I will outline the history of public interest immunity claims in Australia, assess the major features of the new legislation and conclude with a case study in which the legislation was challenged and employed in a creative manner.

1. Public Interest Immunity Cases

A 1984 case dealt with a public interest immunity claim made to secure non-disclosure of the Australian Security Intelligence Organization's (ASIO) files about an informer in a case where a number of accused found with explosives were charged with conspiracy to commit murder and attempted murder. There were also possible connections between the case and a 1978 terrorist bombing aimed at an Indian delegation staying at the Hilton Hotel in Sydney. The trial judge accepted the Attorney General's claim of public interest immunity on the basis that his affidavit "asserts matters which this court should without more accept." The High Court in a 3:2 decision reversed this decision. Gibbs C.J. for the majority

distinguished the deferential approach that judges at the time took to public interest immunity applications in civil cases with the approach that should be applied to criminal cases. He stated that trial judges must attach:

...special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere “fishing” expedition can never be allowed, it may be enough that it appears to be “on the cards” that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done.⁶¹⁶

Similar views about the importance of full disclosure in criminal cases were also expressed by Murphy J. who stated:

...the trial judge should have inspected the documents subpoenaed to ascertain if they contained anything which tended to show that the case against the accused was fabricated (or otherwise tended to assist the accused in their defence, either directly, for example, by providing a basis for cross-examination, or indirectly, by pointing to the existence of other material which might assist). There is a public interest in certain official information remaining secret; but there is also public interest in the proper administration of criminal justice. The processes of criminal justice should not be distorted to prevent an accused from defending himself or herself properly. If the public interest demands that material capable of assisting an accused be withheld, then the proper course may

⁶¹⁶ *Alister v. The Queen* (1984) 154 C.L. R. 404 at 415.

be to abandon the prosecution or for the court to stay proceedings.⁶¹⁷

Brennan J. wrote a third concurring judgment that warned of the dangers of disclosing too much intelligence to the accused. In his view, ASIO documents should only be admitted as evidence in relatively narrow circumstances related to the accused's innocence.⁶¹⁸

Wilson and Dawson J. dissented on the basis that "we do not think that the trial judge or this Court is in a position to do other than accept that disclosure of the information would endanger national security". They would have required the accused to demonstrate that the ASIO intelligence "would go substantially to proof of their innocence of the charges against them" before engaging in any balancing of the competing public interests for and against disclosure.⁶¹⁹

In light of these judgments, the Attorney General produced the ASIO files to the High Court. Gibbs C.J. concluded for four judges that the material should not have been disclosed and would not have affected the result in the trial. The High Court made this decision without hearing from the accused, noting that "it is the inevitable result when privilege is rightly claimed on grounds of national security."⁶²⁰ Gibbs C.J. concluded:

We have formed the clear view that none of the documents is relevant to the issues at the trial or could have been used for the purpose of cross-examining the Crown witnesses. When we say that, we do not discount the significance of the argument that the parties may be more able than the members of the court to discern the possible relevance of material in a trial of this kind, but we remain satisfied that the material would not assist the appellants... We are further satisfied that the appellants have not lost the chance of an acquittal by the failure to produce the material.⁶²¹

⁶¹⁷ Ibid at 431

⁶¹⁸ Ibid at 455

⁶¹⁹ Ibid at 439

⁶²⁰ Ibid at 469

⁶²¹ Ibid at 469

The majority's judgment supports the importance of having judges examine intelligence files in criminal cases, as well as the conclusion that such intelligence may often not assist the defence.

Murphy J. dissented on the basis that after examining the ASIO documents he had a doubt about their relevance to the outcome of the case. In his view, the High Court should have heard argument from the accused about the possible relevance of the undisclosed intelligence. He stated that he had "no objection to disclosure of the documents to counsel for the parties upon appropriate undertakings being given."⁶²² Murphy J. concluded in strong language:

If the defence, or both parties, could assist the Court to a conclusion that the material would have been of assistance to the defence, it is a grave injustice to preclude them from doing so. If, however, the documents would not have assisted the defence, then it would be more satisfactory and more just if such a conclusion were to be reached after having the assistance of both parties. In my opinion, it is an injustice to both the Crown and the accused and casts a further shadow over this case that the Court makes a decision without the proffered assistance of both prosecution and defence. I find it a strange and disturbing case. I adhere to the view which I expressed in the first disposition of special leave to appeal, that in all cases there has been a substantial miscarriage of justice and that the appeal should be granted and the convictions set aside.⁶²³

This dissenting judgment stands for the proposition that decisions about disclosure will be improved by participation by the accused with "appropriate undertakings". The accused was subsequently convicted. They were, however, later pardoned on the basis that the convictions were unsafe.

A second case that led Australia to re-examine the relation between intelligence and evidence was a 2001 prosecution of a government employee named Lappas who was charged with offences relating to the disclosure of classified information to a foreign power. The

⁶²² Ibid at 470

⁶²³ Ibid at 470

government claimed public interest immunity with respect to two of the documents in the middle of a criminal trial. The trial judge noted that it was regrettable that the claim was made “at this late stage” because it would have been possible for the prosecution to have charged the accused with a different offence, one which would not require proof that the classified information would be of use to a foreign power, an element of the offence that “puts directly at issue the contents of the document”⁶²⁴. The government proposed to introduce a redacted shell of the document to be supplemented by some general oral evidence about the content of the document. The trial judge resisted such a procedure on the basis that “there could be no cross-examination on whether the interpretation [offered in oral evidence] accurately reflected the contents for that would expose the contents. Nor could a person seeking to challenge the interpretation give their own oral evidence of the contents for that also would expose those contents. The whole process is redolent with unfairness....I do not accept that upholding the claim with the exceptions expressed to it would enable justice to be done to either the prosecution or the defence case. More particularly, I do not think the accused can have a fair trial unless far more of the text of the documents is disclosed to enable the accused, if he wishes to do so, to give evidence concerning it.”⁶²⁵ In the result, the trial judge stayed the relevant counts of the indictment, although the accused was convicted on other counts that did not involve the document. This case confirms how reluctance to disclose some classified material may undermine a prosecution, but also that the particular nature of the criminal charge may affect how much secret material is relevant and must be disclosed to the accused.

The *Lappas* case, like the *Ribic* case, raised the issue of whether adequate provisions had been made in Australian law for early notice and resolution of national security confidentiality issues and for a flexible approach that would provide workable and fair alternatives to the extremes of disclosing or not disclosing the materials.

2. The Australian Law Reform Commission’s Report

In 2004, the Australian Law Reform Commission produced an extensive final report on secrecy in a variety of proceedings. It recommended that all parties be required to give notice to the court and other parties as soon

⁶²⁴ *R. v. Lappas and Dowling* [2001] ACTSC 115 at para 20

⁶²⁵ *R. v. Lappas and Dowling* [2001] ACTSC 115 at para 14.

as practicable about whether classified or sensitive information would be used. The Attorney General of Australia would have to be notified and would be able to intervene in criminal cases that were prosecuted by other officials. The court would have extensive powers to conduct pre-trial hearings and make directions with respect to the relevance and admissibility of sensitive or classified information. The Commission specifically recommended that:

In criminal matters, the court may order that the prosecution be excused in part or whole from any obligation that it would otherwise have been under to disclose classified national security information or other national security information to an accused person, or that any such obligation be varied, subject to the following safeguards:

- (a) the information in question is not central to the case before the court;
- (b) the information must not be exculpatory of, or reasonably assist, the accused;
- (c) the prosecution is precluded from relying on or adducing the information at trial;
- (d) the application and the reasons for the court's order are made known to the accused...

This recommendation was subject to another recommendation that on application of any party or on its own motion, "the court or tribunal may order the disclosure of material that it had previously ordered could be withheld or introduced in another fashion in the light of subsequent developments in the proceedings or elsewhere which alter the requirements of justice in the case or reduce the sensitivity of the material in question."⁶²⁶ This latter power is similar to the ability of British courts to re-visit public interest immunity determinations. It recognizes that both the demands of secrecy and fairness may evolve during a trial. The report also addressed whether lawyers should be required to obtain security clearances as a precondition to obtaining access to sensitive or classified material. It noted that in the *Lappas* case discussed above,

⁶²⁶ Australian Law Reform Commission *Keeping Secrets The Protection of Classified and Security Sensitive Information* (2004) Recommendation 11-29.

the defence lawyer declined to seek a security clearance and the trial judge decided that there was no power to require a clearance. The accused's lawyer was, however, allowed to see the documents subject to a confidentiality undertaking that only allowed the material to be disclosed to other lawyers and the accused and to take appropriate steps for the secure storage and eventual destruction of the material.⁶²⁷ The Commission commented that:

A security clearance does not of itself guarantee that information is safe from improper disclosure. Indeed, it is not facetious to say that, when national security information has been disclosed unlawfully, it is usually at the hands of someone with a high-level security clearance—since by definition these are the people with access to such information. On the other hand, requiring a security clearance is an essential feature of sensible risk management in that it helps to prevent people who are discerned to be security risks from gaining access to the information, as well as providing training and reinforcement about proper handling of such sensitive information.⁶²⁸

The Commission recommended that on a motion of any party or its own motion, the Court may require that specified material only be disclosed to lawyers with security clearances. It stressed that this would reassure allies, allow lawyers to have access to information and not unduly restrict choice of counsel. For the Commission, “this issue is not primarily about the rights of lawyers but rather about the rights of clients to be assured that their lawyers have access to all information relevant to their case.”⁶²⁹ It also recommended that the court have the same power to require specific undertakings of confidentiality. It concluded that security clearances and undertakings served distinct but complementary purposes, with the security clearance going to issues of character and reliability and undertakings relating to specific obligations in specific circumstances.⁶³⁰ Agreements between the accused and the Attorney General with respect to the disclosure of sensitive material were to be encouraged, including

⁶²⁷ *ibid* at 6.26. The Law Commission noted, however, that “these undertakings apparently did not satisfy the foreign power from which the two highly sensitive documents were sourced since it continued to refuse to permit them to be tendered in the proceedings.” Appendix 3 at para 30.

⁶²⁸ *Ibid* at 6.95

⁶²⁹ *Ibid* at 6.98

⁶³⁰ *Ibid* at 6.97

the possibility of lower sentences to recognize the accused's co-operation in such matters.⁶³¹

The Law Commission's report, also dealt with the issue of admissibility of classified information in court and proposed that judges be allowed to use a variety of flexible and innovative procedures to reconcile national security interests with the need to disclose and admit relevant evidence. The devices that trial judges should be empowered to use would include:

- (i) the redaction, editing or obscuring of any part of a document containing or advertent to classified or sensitive national security information;
- (ii) replacing the classified or sensitive national security information with summaries, extracts or transcriptions of the evidence that a party seeks to use, or by a statement of facts, whether agreed by the parties or not;
- (iii) replacing the classified or sensitive national security information with evidence to similar effect obtained through unclassified means or sources;
- (iv) ... concealing the identity of any witness or person identified in, or whose identity might reasonably be inferred from, classified or sensitive national security information or from its use in court or tribunal proceedings (including oral evidence), and concealing the identity of any person (including jurors) who come into contact with classified or sensitive national security information;
- (v) the use of written questions and answers during otherwise oral evidence;
- (vi) closed-circuit television, computer monitors, headsets and other technical means during proceedings by which the contents of classified or sensitive national security information may be obscured from the public or other particular people;

⁶³¹ Ibid Recommendations 11-16.

(vii) restrictions on the people to whom any classified or sensitive national security information may be given or to whom access to that information may be given (which may include limiting access to certain material to people holding security clearances to a specified level);

(viii) restrictions on the extent to which any person who has access to any classified and sensitive national security information may use it; and

(ix) restrictions on the extent to which any person who has access to any classified and sensitive national security information (including any juror) may reproduce or repeat that information.⁶³²

With respect to the use of anonymous witnesses, the Court warned that the accused and his or her lawyers should generally be able to see the witness and the court should be reluctant to convict “either solely or to a decisive extent on the testimony of any anonymous witness.”⁶³³

Although the Commission was prepared to recommend a wide range of innovative means to reconcile the competing interests in secrecy and disclosure, it drew the line at the use of “secret evidence” in criminal cases that was not disclosed to the accused. It reasoned that:

As a matter of principle, the leading of secret evidence against an accused, for the purpose of protecting classified or security sensitive information in a criminal prosecution, should not be allowed. To sanction such a process would be in breach of the protections provided for in Article 14 of the International Covenant on Civil and Political Rights for an accused to be tried in his or her presence and to have the opportunity to examine, or have examined any adverse witnesses. Where such evidence is central to the indictment, to sanction such a process would breach basic principles of a fair trial, and could constitute an abuse of process.⁶³⁴

⁶³² Ibid Recommendation 11-10

⁶³³ Ibid Recommendation 11-11

⁶³⁴ Ibid at 11.203

The Commission also recommended that, in any case in which the judge “suppressed evidence which in the judge’s opinion must raise a reasonable doubt as to the guilt of the accused, the court may enter a verdict of acquittal or order that no further proceedings be brought for the crime(s) charged.”⁶³⁵ At the same time, the Commission recommended that *ex parte* procedures could be used with respect to obtaining orders that material need not be disclosed to the accused, and that public interest immunity applied to the material.⁶³⁶

The Commission also proposed that the Attorney General retain the right to issue a certificate prohibiting court-ordered disclosure, but that the court retain the right to stay any part of a proceeding as a result of the certificate.⁶³⁷ In some ways, this duplicates the checks and balances available in Canada with respect to the use of the Attorney General’s certificate under s.38.13 of the CEA and the ability of trial judges to stay proceedings under s.38.14 as a result of non-disclosure orders or certificates.

Finally, the Commission recognized that adequate handling of sensitive and classified material would require courts to take adequate precautions for keeping secrets. It recommended that the Attorney’s General department should train officers who would be answerable to their assigned court to assist federal and state courts on the “technical aspects of the physical storage and handling of classified or sensitive national security information.”⁶³⁸

3. The National Security Information Act

Even before the Australian Law Reform Commission had delivered its final report a comprehensive *National Security Information Act*⁶³⁹ was introduced in the Commonwealth Parliament. This bill followed many of the directions proposed by the Law Reform Commission, but departed from them in some respects. The Act has already been amended to include civil proceedings. My discussion will focus on the current version of the

⁶³⁵ Ibid Recommendation 11-26.

⁶³⁶ Ibid at 11.205

⁶³⁷ Ibid Recommendation 11-33.

⁶³⁸ Ibid Recommendation 11-38.

⁶³⁹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 24. For a critical overview of the act see Patrick Emerton ‘Paving the Way for Conviction without Evidence’ (2005) 4 *Queensland University of Technology Law and Justice Journal* 1.

act as it relates to disclosure and the relation between secret intelligence and public evidence in criminal trials.

In part because the trial judge is the ultimate decision-maker about national security confidentiality, the Australian law places greater emphasis on trial management than s.38 of the CEA. Under s.21 of the *Act*, either the prosecutor or the defence in federal criminal proceedings can apply to the court to hold a pre-trial conference in relation to the disclosure of national security information. The court under s.22 may make orders to give effect to agreements reached between the accused and the prosecutor. These provisions recognize the complexity of most trials involving intelligence and attempt to promote efficient pre-trial management.

As under s.38 of the CEA, both prosecutors and the accused have obligations to notify the Attorney General of Australia as soon as practicable if they know they will disclose or call a witness who will disclose national security information. The judge is then required to adjourn proceedings until the Attorney General decides whether to issue a certificate opposing the disclosure or one setting-out terms for the disclosure. In the case where an objection is raised during the examination of the witness, the trial judge is also required to adjourn hearings after having obtained the witness's written answer to the question *in camera*.⁶⁴⁰ Although judged necessary to protect national security, these mandatory adjournment requirements underline how such proceedings can slow the trial process.

After having received notice, the Attorney General has the option of authorizing the disclosure of the information with information deleted and a summary attached, or with a statement of the facts that the information would likely prove.⁶⁴¹ The Attorney General may also provide a certificate prohibiting the calling of a certain witness on national security grounds.⁶⁴² In this way, the Attorney General is given the "first crack" at reconciling the competing goals of secrecy and disclosure, and his or her decisions are considered binding and conclusive until reviewed by a court.⁶⁴³ The *Act* makes it an offence punishable by two years imprisonment to disclose material in a matter that is not contemplated in the Attorney's General certificate.⁶⁴⁴

⁶⁴⁰ Ibid s.24(4), 25(7).

⁶⁴¹ Ibid s.26

⁶⁴² Ibid s.28

⁶⁴³ Ibid s.27

⁶⁴⁴ The various offences are contained in ss.40-46 of the *Act*.

The Attorney's General certificate is reviewed by the trial judge in a closed hearing in which the court may exclude the accused and any lawyer representing the accused who has not been given the appropriate security clearance.⁶⁴⁵ Section 39 of the Act allows the Attorney General to serve notice on a defence lawyer that they must obtain an appropriate security clearance to gain access to national security information. The judge must adjourn proceedings to allow this to happen, and can inform the accused of the consequences of having a lawyer without a security clearance. The Law Reform Commission's proposals would have vested the power to trigger security clearances in the court and this part of the legislation has been criticized as giving the Attorney General too much power in the security clearance process.⁶⁴⁶

At a closed hearing to review the Attorney General's certificate about what can be disclosed, the judge has the ability to change the terms of disclosure set by the Attorney General. In making this decision, however, the judge is instructed under s.31(7) of the Act to consider both risk of prejudice to national security and adverse effects on the accused's right to a fair hearing, including the conduct of his or her defence. Section 31(8) provides that in making its decision, the Court must give greatest weight to the risk of prejudice to national security. National security is defined broadly under the Act to include not only national defence and international relations, but also law enforcement interests broadly defined to include various forms of information gathering.⁶⁴⁷ The statutory provision that the judge must give greater weight to risks to national security has been criticized as a significant departure from the test for public interest immunity articulated in 1984 by the High Court in the *Alister* case discussed above.⁶⁴⁸ A recently retired High Court judge has commented that the law "does not direct the court to make the order

⁶⁴⁵ Ibid s.29. The appropriateness of the security clearance is determined not by the judge but by the Secretary of the Attorney-General's department.

⁶⁴⁶ Patrick Emerton "Paving the Way for Conviction without Evidence: A Disturbing Trend in Australia's 'Anti-Terrorism' Laws" (2004) 4 Queensland U. Tech L. and Justice J. 1 at 20-21. Emerton argues that the provision that a lawyer with an appropriate security clearance cannot be excluded from the closed hearing to review the Attorney's General certificate "offers little protection to the accused's right to a fair trial. First, there is no obligation on the part of the Secretary of the Attorney-General's Department to grant a security clearance at the appropriate level. Second, the defendant's rights turn entirely upon the executive's conception of an 'appropriate level' of security clearance." Ibid at 28

⁶⁴⁷ *National Security Information Act* s. 8. Section 11 defines law enforcement interests as a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence; (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence; (c) the protection and safety of informants and of persons associated with informants; (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

⁶⁴⁸ Patrick Emerton "Paving the Way for Conviction without Evidence: A Disturbing Trend in Australia's 'Anti-Terrorism' Laws" (2004) 4 Queensland U. Tech L. and Justice J. 1 at 30.

which the Attorney General wants. But it goes as close to it as it thinks it can.”⁶⁴⁹

The court’s reasons to affirm or alter the Attorney’s General certificate must be given to the prosecutor and the Attorney General. They can make submissions to the court about whether the reasons themselves disclose national security information. The court must adjourn proceedings at the request of any party pending appeal and the court’s order does not take effect until the appeal period has expired.⁶⁵⁰

The decision made by the trial judge to affirm or alter the Attorney’s General certificate is not necessarily final. Section 19(2) provides that “An order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under section 31 would have a substantial adverse effect on a defendant’s right to receive a fair hearing.” As in Britain, the ability of the trial judge to re-visit matters as the trial evolves can be seen as both a safeguard for the accused, and as a means for the judge to authorize limited or no disclosure subject to a reappraisal as the evidence in the case is placed before the trial judge.

Summary

The *National Security Information Act* has been controversial and as will be seen, it was challenged as unconstitutional in the first terrorism prosecution in which it was invoked. Many of the criticisms of the *Act* have revolved around the Attorney’s General power with respect to the initial editing of evidence, the primacy given in the statute to national security over fair trial concerns and the Attorney’s General power to require security clearances for defence lawyers. On all these issues, the Law Reform Commission would have given the judiciary more power to make its own determinations of the appropriate means to reconcile secrecy with disclosure. The Australian law, like s.38, encourages flexibility in reconciling disclosure with secrecy, through the use of devices such as summaries. The Law Reform Commission would have provided an even broader menu of alternatives, including the ability of witnesses to give anonymous testimony, testimony by way of video or closed-circuit television and testimony by written questions and answers in a manner not dissimilar to that used in *Ribic*.

⁶⁴⁹ Michael McHugh ‘Terrorism Legislation and the Constitution’ (2006) 28 *Australian Bar Review* 117 at 131.

⁶⁵⁰ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss. 24, 32, 33, 34, 36.

The Australian law has a number of distinguishing features from the Canadian approach. It gives the trial judge the power to decide issues involving national security confidentiality. It allows for pre-trial conferences to manage the many problems arising from disclosure of national security information. It provides the opportunity for defence lawyers to obtain security clearances. Finally, it allows the trial judge to revisit issues of disclosure as the trial evolves. As will be seen, the Australian law has already been tested in one completed terrorism prosecution.

4. The Lodhi Case: The New Australian Law Tested in a Completed Prosecution

The *National Security Information Act* was invoked in federal criminal proceedings against Faheem Lodhi, who was charged with a range of offences related to preparation for acts of terrorism. In December, 2005, the trial judge, Whealy J., rejected a challenge that the *National Security Information Act* was unconstitutional on the grounds that it was inconsistent with the exercise of judicial power and the implied freedom of speech in relation to political matters. Whealy J. stressed that the Act did not infringe “in any fundamental way upon the ordinary process of the establishment of guilt or innocence by judge and jury. The onus of proof does not alter. The rules of evidence are not changed. The discretions as to the exclusion of evidence in the trial remain untouched. The traditional protections given to an accused person are not put aside by legislation.”⁶⁵¹

The judge retained the ability to decide whether evidence and the courtroom would be open to the public.⁶⁵²

Whealy J. noted that the legislation provided for mandatory adjournment to provide for notice to, and a certificate from, the Attorney General about the admissibility of sensitive information, and that these procedures clearly could entail a delay.⁶⁵³ Nevertheless, he held that the legislation did not infringe on the court’s ability to control its own process, including staying proceedings. Although offences for failing to notify the Attorney General of an intent to introduce sensitive information were in the judge’s view “novel”, and even “startling”⁶⁵⁴, they did not directly infringe

⁶⁵¹ *R. v. Lodhi* [2006] NSWSC 571 at para 85

⁶⁵² *ibid* at para 124

⁶⁵³ *R. v. Lodhi* [2006] NSWSC 571 at para 86.

⁶⁵⁴ *Ibid* at para 94

on the function of the court. The same was true for requirements that court staff and personnel have security clearances. He also concluded that the statutory exclusions of the accused and non- security-cleared lawyers from the s.31 hearings were not “materially different from the situation that arises traditionally where a public interest immunity claim is made.”⁶⁵⁵

Whealy J. also found that the statutory terms for the review of the Attorney’s General certificate, including the requirement in s.31(8) that the court give the greatest weight to the risk of prejudice to national security as opposed to fair trial considerations, were not inconsistent with the judicial function. The law still allowed the judge to balance the competing interests and to stay proceedings if a fair trial was impossible. It did not make the Attorney’s General certificate conclusive. This conclusion that the tilting of the balance towards national security did not deny the accused a fair trial or interfere with the judicial function has now been upheld by the New South Wales Court of Criminal Appeals.⁶⁵⁶

Whealy J. held that a special security-cleared counsel could be appointed to represent the accused in a s.31 hearing despite the fact that the *Act* did not specifically provide for such an officer. Although not able to share classified information with the accused, a special advocate would still be “a legal representative of the defendant” and, as such, entitled to attend a closed hearing to review the Attorney’s General certificate.⁶⁵⁷ He also relied on the fact that the *Act* did not affect the ability of a court to control the conduct of a federal criminal proceeding.⁶⁵⁸ In many ways, this decision is similar to that made by the Federal Court Division in *Khawaja*, which affirmed the ability of the Federal Court, on its own discretion, to appoint a security-cleared *amicus curiae*.⁶⁵⁹

A number of other pre-trial rulings made in this case are of significance to the relation between intelligence and evidence. One was a decision to close the court whenever evidence was presented that disclosed ASIO’s dealing with sources or its relationship with a foreign agency. In reaching this decision, Whealy J. considered both a public and a confidential affidavit by the head of ASIO detailing the dangers of revealing ASIO

⁶⁵⁵ Ibid at para 96

⁶⁵⁶ *R. v. Lodhi* [2007] NSWCCA 360.

⁶⁵⁷ *R. v. Lodhi* [2006] NSWSC 586 at para 28.

⁶⁵⁸ *National Security Information (Criminal and Civil Proceedings) Act 2004* s.19(1).

⁶⁵⁹ 2007 FC 463 aff’d without reference to the ability to appoint security cleared lawyers 2007 FCA 388.

targets, members and methods. The accused was given a copy of the confidential affidavit. The judge also ordered that a transcript of these closed hearings with redactions for national security information could be given to the media.⁶⁶⁰

Whealy J. also dealt with the competing considerations of fairness to the accused, the open court principle and concerns about national security when ASIO officers testified. In pre-trial proceedings, he ordered that a screen be used so that the accused could not identify ASIO officers when they testified in order to prevent "the real possibility of the compromise of intelligence operations in Sydney".⁶⁶¹ These orders were upheld with the Court of Appeal deciding that the trial judge had balanced the competing principles of open trials and fairness of the accused with the need to protect national security.⁶⁶²

Justice Whealy has, however, commented in an extrajudicial speech that the screening of the accused from ASIO officers "had a high capacity to implant prejudice in the minds of the jurors." On the consent of the parties, the ASIO officers were allowed to give testimony by means of closed circuit television at the trial as opposed to the use of screens. Monitors were available to all court participants including the accused. The accused's monitor, however, was not operational, but this fact was presumably kept from the jury because of the position of the monitor. The parties agreed to this procedure as one that was less prejudicial to the accused than the screens that were used in the pre-trial proceedings. Justice Whealy noted that: "The fact that orders of this kind were sought at all highlights the tremendous clash existing between the need to protect national security matters and the rights of an accused to a fair trial. The resolution of the conflict between these notions presents challenges of the highest order for a trial judge."⁶⁶³

In another pre-trial motion, Whealy J. upheld Lodhi's request for a subpoena to both the Australia Federal Police and ASIO for all warrants with respect to the investigation of the accused and an alleged co-conspirator. The judge stressed that "it is, 'on the cards' that the material" was relevant,⁶⁶⁴ noting that even the failure of such warrants to discover

⁶⁶⁰ *R. v. Lodhi* [2006] NSWSC 596 at para 29

⁶⁶¹ *Ibid* at para 59.

⁶⁶² *R. v. Lodhi* [2006] NSWCCA 101 at para 31

⁶⁶³ Justice Whealy "Terrorism" prepared for a conference for Federal and Supreme Court Judges, Perth 2007.

⁶⁶⁴ *R. v. Lodhi* 2006 NSWSC 585 at para 16

incriminating evidence could be of assistance to the defence. He rejected the prosecutor's arguments that the accused could only speculate whether such warrants existed.⁶⁶⁵

In another pre-trial motion, Whealy J. ruled that a person in American custody and two American FBI officers could testify by way of video link.⁶⁶⁶ He held that juries can judge credibility through videos and that the accused would not be prejudiced in this regard. He also indicated that the presence of an independent observer could ensure that the prisoner in American custody gave testimony freely.⁶⁶⁷

In an interesting speech given after the completion of the trial, Justice Whealy reflected on the implications of the Lodhi case for future terrorism trials. He stated that "delay and disturbance to the trial process is perhaps the most significant potential problem created by the legislation". In the end, Justice Whealy concluded that the trial was able to reach verdict because "there was a considerable degree of co-operation between experienced counsel for the prosecution and the defence. It was plainly the desire of all parties to ensure that the trial proceeded as normally as possible." Similar comments have, of course, been made in relation to the Bagri and Malik trial. At the same time, it cannot be assumed that counsel in all terrorism prosecutions will genuinely want the case to go to verdict. Reforms, especially with respect to the abolition of pre-trial appeals, may be necessary in order to ensure that procedures used to determine national security confidentiality do not frustrate terrorism trials.

Justice Whealy concluded his extra-judicial speech with comments that are directly relevant to the evolving relation between intelligence and evidence. He stated:

To my mind prejudice, delay and secrecy are the principal problems confronting a trial judge in these matters. I have endeavoured to argue in this paper that appropriate directions to jurors should mitigate and diminish the problem of bias and prejudice. Secondly, that sensible co-operation between counsel, and the use of appropriate pre-trial procedures, should reduce the problem of delay significantly. In the third area, that of secrecy, I can offer no

⁶⁶⁵ *ibid* at para 21

⁶⁶⁶ *R. v. Lodhi* 2006 NSWSC 587.

⁶⁶⁷ *ibid* at para 70.

magic solution. There is likely to be an increasing presence of ASIO agents in relation to the collection of evidence to be used in criminal trials involving terrorism. Yet our intelligence agency, for all its skill in intelligence gathering, is perhaps not well equipped to gather evidence for a criminal trial; and its individual agents are not well tutored in the intricacies of the criminal law relating to procedure and evidence. Moreover, the increasing presence of our intelligence agency in the investigating and trial processes brings with it an ever increasing appearance of secrecy which, if not suitably contained, may substantially entrench upon the principles of open justice and significantly dislocate the appearance and the reality of a fair trial.⁶⁶⁸

In other words, he confirmed that establishing a workable relation between intelligence and evidence is a critical priority for future terrorism trials. He expressed concerns that the need to maintain the secrecy of intelligence would place strains on the criminal trial process. This latter challenge is particularly acute because of the increasing presence of intelligence agencies in terrorism prosecutions.

5. Summary

The Australian experience, like that of the United States and the United Kingdom, provides valuable information for reforming s.38 of the CEA so as to better manage the relation between secret intelligence and evidence or information that should be disclosed to ensure a fair trial. All three foreign jurisdictions allow the trial judge to decide questions of non-disclosure. This allows issues of non-disclosure to be integrated with comprehensive pre-trial management of a range of disclosure and other issues. Even more importantly, it allows a trial judge who has seen the secret material to revisit an initial non-disclosure order in light of the evolving issues at the criminal trial, a fact that has been emphasized by both the House of Lords and the European Court of Human Rights as essential for the fair treatment of the accused.

The comparative experience also reveals some interesting procedural innovations. British courts have held open the possible use of special

⁶⁶⁸ Justice Whealy "Terrorism" prepared for a conference for Federal and Supreme Court Judges, Perth 2007.

advocates in public interest immunity proceedings, while also indicating some awareness that delay may be caused as the special advocate becomes familiar with the case and that ethical problems may emerge from restrictions on the special advocate in communicating with the accused after the special advocate has seen the secret information. Both the United States and Australia provide for the alternative of defence counsel themselves being able to examine the sensitive material contingent on obtaining a security clearance. Although the process of obtaining a security clearance could cause delay and adversely affect choice of counsel, it also allows the person most familiar with the accused's case to have access to secret material in order to make arguments about whether its disclosure is necessary for a fair trial. Security clearance requirements may also encourage the use of experienced defence lawyers in terrorism trials. The Australian experience also suggests that the creative use of testimony by closed-circuit television can help in reconciling competing interests in disclosure and fairness when members of foreign or domestic intelligence agencies testify in terrorism prosecutions.

Conclusions

A) The Evolving Relation Between Intelligence and Evidence

What might be seen as intelligence at one point in time, might be evidence at another point in time.⁶⁶⁹ There is a need to re-examine traditional distinctions between intelligence and evidence in light of the particular threat and nature of terrorism and the expanded range of crime associated with terrorism. Terrorism constitutes both a threat to national security and a crime. Although espionage and treason are also crimes, the murder of civilians in acts of terrorism such as the bombing of Air India Flight 182 demands denunciation and punishment that can only be provided by the criminal law. The same is true with respect to intentional acts of planning and preparation to commit terrorist violence. Although attempts and conspiracies to commit terrorist violence have always been serious crimes, the 2001 *Anti-Terrorism Act* has changed the balance between intelligence and law enforcement matters by creating a wide range of terrorist offences that can be committed by acts of preparation and support for terrorism which will occur long before actual acts of terrorism. The prevention of terrorism must remain the first priority, but

⁶⁶⁹ Fred Manget "Intelligence and the Criminal Law System" (2006) 17 *Stanford Law and Public Policy Review* 415 at 421-422.