Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

Submissions of the Criminal Lawyers' Association

"Those who would sacrifice liberty for security deserve neither."

Benjamin Franklin

FEBRUARY 2008

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I. Preface - The CLA's role in this Inquiry

The Criminal Lawyers' Association is a non-profit organization which was founded on November 1, 1971. The Association is comprised of over 1000 criminal defence lawyers, many of whom practice in the Province of Ontario, but some of whom are from across Canada. The objects of the Association are to educate, promote and represent the membership on issues relating to criminal and constitutional law. To that end, the Association presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Programme. This Programme often includes guest speakers and justice system participants from the United States, and, on occasion, the United Kingdom.

The Association has routinely been consulted and invited by House of Commons and Senate Committees to share its views on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Association is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, the Ontario Legal Aid Plan and various other concerns that involve the administration of criminal justice in the Province of Ontario.

The Association has been granted standing to participate in many significant criminal appellate cases as well as public inquiries. For example, the Association was granted standing in, and participated throughout, the Commission on Proceedings Involving Guy Paul Morin (the "Kaufman Inquiry") and the Inquiry into Pediatric Forensic Pathology in

Ontario (the "Goudge Inquiry"). The Association has been granted permission to intervene in many appeals heard by the Court of Appeal for Ontario and many others heard by the Supreme Court of Canada. The submissions of the Association have often been referred to by those courts when rendering their decisions.

By Ruling, dated August 23, 2006, the Honourable Commissioner granted the CLA Intervenor status with a right to provide written submissions on issues relating to three of the Terms of Reference:

> iii) the manner in which the Canadian government should address the challenge, as revealed by the investigation and prosecutions in the Air India matter, of establishing a reliable and workable relationship between security intelligence and evidence that can be used in a criminal trial;
>
> v) whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases;
>
> vi) whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation and, if not, the challenges, including whether there is merit in having terrorism cases heard by a panel of three judges

In terms of the evidence heard at this Inquiry, it appears that the above-noted three Terms of Reference have translated into the following issues for consideration:

1. **What, if any, changes should be made to existing rules of criminal procedure and evidence which would make it easier to use intelligence-information in the process of criminal investigations and prosecutions?**

2. **What, if any, changes should be made to the rules and practices governing disclosure in terrorist (or other criminal) mega-trials?**

3. **What, if any, changes should be made to s. 38 of the *Canada Evidence Act* ("*CEA*")?**

4. **What, if any, changes should be made to the rules and practices governing the protections afforded to sensitive witnesses in terrorist prosecutions?**

5. **With respect to the actual trial of terrorist offences, should jury-trials be abandoned in favour of trials before three-judge panels and, if not, what changes should be made to the jury-trial process to better the administration of justice in those cases?**

The Criminal Lawyers' Association finds it to be both a privilege and a pleasure to be given the opportunity to make submissions on these issues as an Intervenor before This Honourable Commission.

II. Overview - The CLA's position on the issues at this Inquiry

Much has changed in the 20 years since June, 1985, when Air India Flight 182 and Air India Flight 301 were the targets of vicious terrorist attacks and hundreds of innocent lives were lost. While more improvements to aviation safety and national security threat assessments are undoubtedly feasible and advisable, the modern means of preventing, investigating and prosecuting terrorist offences is nothing like what it was two decades ago. Nevertheless, that is one of the difficulties facing this Inquiry; namely, to assess how the rules and practices of the ***2008*** Canadian criminal justice system would function in the context of the events surrounding the Air India case in ***1985***. In short, the CLA's position is that, apart from some recommendations concerning the conduct of a terrorism "mega-trial" – which, in the case of Bagri and Malik, was in the relatively recent past – the events surrounding the investigation and prosecution of the Air India bombings provide an unsafe basis for recommending changes to fundamental procedural and evidentiary rules designed to guarantee the fairness and reliability of the criminal trial process.

While the CLA respects the pressing need for the effective prosecution of serious criminal cases, such as those involving terrorist offences, the CLA wishes to re-emphasize the central importance of fairness and reliability in the criminal adjudicative process. Rules relating to disclosure and the admission of evidence, such as hearsay and privilege, must be viewed in a purposive context. The fact that terrorism charges in the Air India case may have stemmed from CSIS-generated intelligence-information or that the police-led terrorism investigation may have generated massive amounts of information should not, and cannot, serve to justify changes to the rules of criminal procedure and evidence. As Canadian appellate courts have repeatedly said, the fundamental purpose behind these sorts of rules is to ensure the fair prosecution of accused persons and to ensure the reliability of trial verdicts. In any event, changing those rules will do little or nothing to ***prevent*** future terrorist attacks.

The inherent value of requiring ***full*** disclosure of all potentially relevant information in the Crown's possession was recognized more than 15 years ago by Justice Sopinka in *R.* v. *Stinchcombe*[1]:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming.

The groundless nature of arguments opposed to the disclosure of "all relevant information" have been exposed in many of the Supreme Court of Canada's judgments on the importance

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[1] [1991] S.C.J. No. 83 at paras. 11-12.

of the right to ***full*** disclosure, such as in *R. v. Taillefer*, where Lebel J. wrote (at para. 1)[2]:

> ... Our Court's decision in R. v. Stinchcombe,[1991] 3 S.C.R. 326, enshrined it among the fundamental rules of Canadian criminal procedure. It facilitates the trial process, but, most importantly, it affords additional protection for the right of accused persons to make full answer and defence. The way in which the disclosure of evidence was viewed in the past -- as an act of goodwill and cooperation on the part of the Crown -- played a significant part in catastrophic judicial errors. On this point, we need only recall that the Royal Commission on the Donald Marshall, Jr., Prosecution identified the failure to disclose all the relevant evidence as one of the causes of the judicial error that deprived Donald Marshall of his liberty for 11 years, for a crime he had not committed (Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations (1989), vol. 1, at pp. 238 et seq.).

And then later:

> 59 After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in Stinchcombe. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in R. v. Egger, [1993] 2 S.C.R. 451, at p. 467:
>
> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- Stinchcombe, supra, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

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[2] [2003] S.C.J. No. 75

> 60 As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in Dixon, supra, "the threshold requirement for disclosure is set quite low... . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" (para. 21; see also R. v. Chaplin, [1995] 1 S.C.R. 727, at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (Stinchcombe, supra, at p. 339).
>
> 61 This right is a constitutional one. It is protected by s. 7 of the Charter, and helps to guarantee the accused's ability to exercise the right to make full answer and defence (see R. v. Carosella, [1997] 1 S.C.R. 80, at para. 37; Dixon, supra, at para. 22). As Cory J., speaking for this Court, wrote in Dixon, at para. 22:
>
> > ... where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure.

Similarly, the Supreme Court of Canada has repeatedly held that the limits on the use of hearsay information as evidence in a criminal trial, and rigorous judicial screening of that information, are fundamental to both the fairness and reliability of the trial process. In *R.* v. *Khelawon*, Charron J. wrote[3]:

> In a criminal context, the inquiry [into necessity and reliability] may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions

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[3] [2006] S.C.J. No. 57 at paras. 47-49.

> in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."

The fundamental importance of the jury trial was aptly set out by Justice Arbour in *R.* v. *Pan*; *R.* v. *Sawyer*[4]:

> The jury trial is a vital component of our system of criminal justice. Its importance in our justice system is described by Cory J. in R. v. G. (R.M.), [1996] 3 S.C.R. 362, at para. 13, as follows:
>
> > Our courts have very properly stressed the importance of jury verdicts and the deference that must be shown to those decisions. Today, as in the past, great reliance has been placed upon those decisions. That I think flows from the public awareness that 12 members of the community have worked together to reach a unanimous verdict.
>
> The various rationales underlying the continued vitality of the jury as decision maker in our criminal justice system are summarized in the majority judgment of this Court in R. v. Sherratt, [1991] 1 S.C.R. 509, by L'Heureux-Dubé J. as follows (at p. 523):
>
> > The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

These are just a few of the emphatic statements which the Supreme Court of Canada has repeatedly made over the years about the importance of our rules of criminal procedure and evidence to not only those accused of criminal offences but to our society as a whole.

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[4] [2001] 2 S.C.R. 344 at paras. 41-43.

III. Introduction - Events of the distant past provide a weak basis for altering fundamental rules of criminal procedure and evidence in Canada

In the months leading up to those attacks, Canada' newly formed Canadian Security Intelligence Service ("CSIS") had acquired "intelligence" information which could have (and should have) helped to prevent those attacks. Worse yet, in the months following the catastrophic attacks, CSIS failed to provide the police who were investigating the terrorist attacks (*i.e.*, the RCMP), with intelligence information which could have helped the RCMP effectively and efficiently identify the perpetrators of the terrorist attacks. Nevertheless, in February, 1988, as a result of the RCMP investigation, Mr. Reyat was arrested and charged with making the bomb that had been intended for Air India Flight 301. After being extradited from England on December 13, 1989, his trial in Canada began on September 17, 1990. Following an eight-month trial, on May 10, 1991, Reyat was found guilty of manslaughter by B.C. Supreme Court Justice Paris, sitting without a jury. The other principal suspect at the time, Mr. Parmar, was killed by Indian authorities in 1992. Still, the investigation in to whether others may have been involved in the attacks on the two Air India flights continued on for almost a decade more.

On October 27, 2000, more than 15 years after the events, Mr. Malik and Mr. Bagri were arrested in relation to the Air India bombings. Later, on June 5, 2001, Reyat was also charged such that, ultimately, the three men faced charges of murder, attempt murder and conspiracy to commit murder in relation to the two terrorist attacks. On February 10, 2003, Reyat pleaded guilty to manslaughter in relation to the bombing of Air India Flight 182. On March 16, 2005, after a trial which had lasted for 233 court days, B.C. Supreme Court

Justice Josephson, sitting without a jury, acquitted Malik and Bagri of all counts. As the Honourable Bob Rae observed in his 2005 Report to the Minister of Public Safety and Emergency Preparedness on outstanding questions with respect to the bombing of Air India Flight 182, *Lessons to be Learned* (at p.15):

> Justice Josephson found that the evidence against Malik and Bagri was not of sufficient credibility to meet the standard of proof in a criminal trial, which is guilt beyond a reasonable doubt. Unlike the Reyat trial, there was no physical evidence that could link these two particular individuals to the conspiracy. The Crown relied on several witnesses coming forward who testified as to what they knew and had been told. Thus, the case turned on the trial judge's view of the reliability of the testimony of the witnesses who came forward.

Not only was the "evidence against Malik and Bagri ... not of sufficient credibility to meet the standard of proof in a criminal trial", Justice Josephson found that "the evidence has fallen ***markedly short*** of that standard" (emphasis added)[5].

Arguably (and for reasons which this Inquiry may see fit to remark upon), not much about our system of prevention, investigation and prosecution of terrorist offences had changed until after September 11, 2001, almost a year ***after*** Malik and Bagri were arrested in the Air India case. However, in the months following the terrorist attacks on September 11th, Parliament enacted Bill C-36, known as the *Anti-terrorism Act* (the *"ATA"*) in order to assist law enforcement agencies to combat terrorism. In the name of combatting terrorism, Bill C-36 amended a number of existing investigative powers:

- The *Proceeds of Crime (Money Laundering) Act* was amended so as to extend its coverage to terrorist financing activities. This enhancement generated concomitant record keeping and disclosure obligations pertaining to the personal financial affairs

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[5] *R. v. Malik and Bagri,* [2005] B.C.J. No. 521 (S.C.) at para. 1345.

of suspected individuals and corporations. It also resulted in a substantial enlargement of the role and responsibilities of the Financial Transactions Reports and Analysis Centre (FINTRAC), the central institution charged with the retention, control and ultimate dissemination of the acquired information. In addition, new restrictions were placed on funding terrorist support groups, including the creation of new terrorist financing offences in the *Criminal Code* and authorizing the restraint and forfeiture of terrorist property.

- Amendments to the *National Defence Act* resulted in the statutory recognition of the Communications Security Establishment ("CSE") which had been operating for many years without a legislative definition of its mandate, scope or accountability. Under the *ATA*, the CSE was authorized to acquire foreign intelligence from targets abroad, provide advice and services to law enforcement and security agencies and protect government systems. CSE was precluded from targeting Canadians but, given its role in collecting foreign intelligence, could still intercept the communications of Canadians with persons abroad.

- Investigatory powers under the *Criminal Code* were modified to eliminate the "last resort" requirement for wiretap judicial authorizations in the investigation of terrorist offences as well as to extend the time during which those judicial authorizations could remain in effect.

- Entirely new investigatory powers were added to the *Criminal Code* specifically for the purpose of dealing with terrorist offences. Investigative hearings (s. 83.28) allow the police to compel answers from persons believed to have information relevant to a terrorism investigation. Section 83.3 allows the police to arrest persons who may only be ***suspected*** of being involved in terrorist activity and to then have the courts impose strict supervisory conditions upon those persons.

- The *Canadian Evidence Act* was amended to include changes to courtroom and other proceedings to help better protect classified information, including (if not, especially) national security and foreign intelligence information.

Simply put, as was said in the Supreme Court of Canada's judgment in *Application under s. 83.28 of the Criminal Code (Re)*[6], "the purpose of the Act is the prosecution and prevention of terrorism offences".

In addition to these legislative changes, the 9/11 terrorist attacks also led to a number

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[6] [2004] S.C.J. No. 40.

of significant operational changes in the way that the Canadian government collected, analyzed and distributed intelligence information, especially as it relates to terrorist activities. As Professor Martin Rudner has written[7]:

> [Canada's security and intelligence community] could no longer remain in essentially reactive mode, as gatherers and assessors of information in response to threats to national security. Rather, they were impelled to shift gears to become pro-active hunters after their quarry.

Along with their shifting of gears, Rudner noted a substantial expansion in the role of the intelligence community as demonstrated by "a sharpening of its legislative weaponry; the intensification of its international intelligence cooperation; the reorganization of government responsibilities around a new Department of Public Safety and Emergency Preparedness Canada; and a move to formulate Canada's first-ever National Security Policy". In or around October 2004, as part of that same National Security Policy, the Government established the Integrated Threat Assessment Centre ("ITAC"), about which this Inquiry heard. ITAC's primary objective is to produce comprehensive threat assessments which evaluate the probability and potential consequence of threats. Those assessments are then distributed within the intelligence community and to the relevant first-line responders, such as the police, in a timely manner. By all accounts given at this Inquiry, ITAC and the related systems, are effectively and efficiently achieving that primary objective. In addition, as the evidence before this Inquiry shows, CSIS is a much different organization today than it was in 1985, or even 1995[8]. Equally, the RCMP is a much different organization today than it

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[7] M. Rudner, "Challenge and Response: Canada's Intelligence Community and the War on Terrorism" (2004), 11 Canadian Foreign Policy 17 at p.17.

[8] See, for example, Evidence of C. Scowan, Vol. 50, September 21, 2007, at p. 6116 *et seq*.

was twenty years ago. More importantly, however, is that the modern day operational relationship between the RCMP and CSIS is marked by a high level of cooperation and professionalism[9].

None of these factors were present in 1985 at the time of the attacks on the two Air India flights, nor in the 15 years following. Indeed, quite the opposite state of affairs prevailed.

Since the enactment of the *ATA* and the development of a healthy working relationship between CSIS and the RCMP, the only terrorist threats which Canada has faced have been successfully thwarted and the alleged terrorists have been brought before the courts. In June 2006, using the powers afforded by the *ATA,* and armed with information provided by CSIS, the RCMP were able to prevent an alleged terrorist threat posed by 18 young men in the Toronto area. Similarly, since 2004, the RCMP have made arrests in at least two other cases where Canadians were thwarted in the early stages of their alleged terrorist activities. In other words, ***recent*** history shows that while there will always be a need for vigilance by those responsible for keeping watch along the watchtower, there is no need for further legislative or administrative action because the RCMP and CSIS now have the tools which they need to effectively prevent and investigate terrorist activity.

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[9] See, for example, Evidence of M. Bloodworth, Vol. 95, December 13, 2007; Evidence of RCMP Assistant Commissioner McDonnell, Vol. 95, December 13, 2007, at p. 12620 *et seq.*; as well as the evidence from the RCMP officers currently involved in the investigation of terrorist offences in Canada.

That is not to say that some improvements cannot be made to the way by which the criminal justice system processes terrorism cases. The trial of Malik and Bagri in the Air India case was the first Canadian trial of terrorism charges in the modern era. As the evidence before this Inquiry showed, there are a number of challenges which will arise in most (if not all) terrorism cases. However, many of those challenges are the same as those which will arise in the context of any one of the increasing number of "mega-trials" that now plague our criminal justice system. Accordingly, the CLA does have some recommendations on how to improve the efficiencies of a mega-trial and, more specifically, the terrorist mega-trial.

IV. The Issues for which the CLA has been called upon to assist

ISSUE #1: Whether or not to ease the restrictions on the use of security intelligence information as evidence at a criminal trial

The CLA respectfully submits that there is no need to create any new rule to ensure that intelligence-information could be used as evidence at a future criminal trial relating to that information. The manner by which intelligence-information is presently collected and shared with the police and the existing legal rules which allow trial judges to consider admitting intelligence-information in appropriate cases are more than adequate to address the issue. More importantly, the current legal framework governing how and when intelligence-information may be used by the police in their investigation and how and when intelligence-information might be admitted at trial, is the most effective way for ensuring

that a proper balance is struck between the societal interests and *Charter* values at stake.

(a) Current rules and practices governing the use of intelligence-information as part of a criminal investigation are more than adequate

The Inquiry's Terms of Reference request provide that the Commissioner should make findings and recommendations with respect to not only whether information collected by agencies like CSIS should be more readily used as evidence in a criminal case, but also on whether:

> ii) ... there were problems in the effective cooperation between government departments and agencies, including the Canadian Security Intelligence Service and the Royal Canadian Mounted Police, in the investigation of the bombing of Air India Flight 182, either before or after June 23, 1985, whether any changes in practice or legislation are required to prevent the recurrence of similar problems of cooperation in the investigation of terrorism offences in the future....

The CLA submits that the "findings and recommendations" with respect to issue of expanding the use of intelligence-information as evidence at a criminal trial must be informed by its finding and recommendations with respect to the above-noted issue. In other words, the necessity of making changes to the "relationship between security intelligence and evidence that can be used in a criminal trial" will largely be determined by the level of cooperation between CSIS and the RCMP in terrorist investigations. In that regard, the high level of cooperation which currently marks the relationship between CSIS and the RCMP militates against any need to recommend any changes to the rules of evidence and criminal procedure which govern the potential use of intelligence information in a criminal investigation and prosecution of terrorism offences. The evidence before this Inquiry shows that, with CSIS's cooperation, the RCMP is now able to effectively convert intelligence-

information which they receive from CSIS as investigative leads into evidence which can fairly and properly be used in a criminal prosecution (*i.e.*, by conducting their own independent investigations to obtain admissible forms of the original, or related, information).

It has long been the case that the police could lawfully use intelligence-information during the course of their investigation. At this Inquiry, senior RCMP officers (such as Jagoe and McDonnell) testified about how CSIS will provide letters to the RCMP setting out details of intelligence-information which CSIS has determined may be relevant to a criminal investigation. There is nothing in the law which prevents the RCMP from using that information as a clue to investigate or even as a basis for the grounds upon which to obtain judicial authorizations to search or to wiretap. The confidentiality required by CSIS is easily achieved by the existing rules governing confidential informers[10]. Given the very high threshold which must be overcome before a trial judge will compel disclosure of information provided confidentially to the police which is used only as an investigative lead, the threat to the confidential nature of the intelligence-information is extremely small. (Even were a trial judge to order disclosure of the confidential information filed in support of the warrant, the Crown always has the option of having the trial judge consider the admissibility of the seized evidence as though it was obtained pursuant to a warrantless search[11].) In many cases,

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[10] *R. v. Leipert*, [1997] 1 S.C.R. 281.

[11] See, for example, *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wijesinha*, [1995] S.C.J. No. 49; *R. v. Fliss*, [2002] S.C.J. No. 15; *R. v. Silveira*, [1995] 2 S.C.R. 297 and, generally on the scope of admitting illegally/unconstitutionally obtained evidence, see *R. v. Stillman*, [1997] 1 S.C.R. 607.

CSIS has willingly provided the RCMP with a redacted version of the initial letter which they know will form part of the police file (which is ultimately disclosed to the defence).

(b) History cautions against expanding the use of intelligence-information as evidence in a criminal trial

Our history has shown that the more we encourage state agents to consider using the fruits of intelligence information in criminal cases, the greater is the risk that the intrusive intelligence-gathering powers will be abused. The genesis of the sharp separation of intelligence gathering from evidence collection can be traced back more than 20 years, to an earlier public inquiry into the civil liberties occasioned by the intelligence-gathering activities of the RCMP[12]. As a result of the recommendations in that public inquiry, the intelligence-gathering role of CSIS was intentionally separated out from the RCMP in an effort to prevent future abuses of intelligence-gathering powers. The CLA submits that none of the evidence before this Inquiry provides any compelling basis for undoing the changes made as a result of the 1981 McDonald Commission[13].

One of the principal reasons why encouraging more intelligence-gathering produces more abuses is that, by its nature, intelligence-gathering is almost always exempt from any form of judicial review and is never subjected to the same judicial scrutiny as traditional

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[12] See, generally, the Final Submissions of the Canadian Civil Liberties Association filed at this Inquiry.

[13] *Commission of Inquiry Concerning Certain Activities of the R.C.M.P.*, Freedom and Security Under the Law, Second Report, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1981) ("the McDonald Commission").

evidence-gathering. The correlation between the unreviewable nature of intelligence-gathering and abuses of power appears to be all the more true in the case of foreign intelligence, which seems to increasingly be the product of torture[14]. Furthermore, even a gentle interpretation of history demonstrates that when intelligence agencies believe their investigative behaviour will be shielded from the light of a courtroom, there is a greater likelihood that those agencies will adopt a reckless disregard for the truth as they gather intelligence. For example, in the *Atwal* case[15], CSIS had actively resisted disclosure of information submitted in support of a wiretap though without ever claiming that the information ought to be shielded in the interests of national security. Then, after the Federal Court of Appeal had ordered disclosure of the supporting information, CSIS suddenly claimed that "serious and extensive errors" had been made during the preparation of the wiretap (*i.e.,* "the Barr") affidavit and consented to the quashing of the wiretap authorization so that the affidavit would not have to be publicly disclosed[16]:

> ... the respondent's counsel filed the affidavit of Francis Elmer Saunders sworn on September 11, 1987 (the Saunders affidavit). Mr. Saunders is the Regional Director General of the Toronto Region of CSIS. He was requested on August 27, 1987 by Mr. T. D. Finn (then the Director of CSIS) to conduct an immediate investigation to ascertain, inter alia, if any information contained in the Barr affidavit was unreliable or incorrect and, if so, to determine how and why such errors had been made. Mr. Saunders deposes that, as a result of his investigation, he was able to identify four instances

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[14] Consider the now well-documented cases of the C.I.A. "waterboarding" detainees at its secret prisons or the fact that the U.S. authorities rendered Maher Arar to Syria knowing that he would be interrogated using torturous methods by the Syrian authorities. Evidence obtained from such foreign torture has been tendered by government lawyers in Canadian criminal courts: see *India v. Singh* (1996), 108 C.C.C.(3d) 274 (B.C.S.C.).

[15] *R. v. Atwal* (1987), 36 C.C.C.(3d) 161 (F.C.A.).

[16] *R. v. Atwal*, [1988] 1 F.C. 154 at para. 5 (T.D.).

> wherein the Barr affidavit contained statements of fact which were inaccurate or could not be substantiated on the basis of the information known to CSIS when the affidavit was sworn on July 18, 1985. He deposes further that the internal audit group of CSIS found two other instances of unsubstantiated statements in the Barr affidavit.

The "errors" (or misstatements) used to obtain the CSIS wiretap in *Atwal* would never have been disclosed, let alone discovered, but for the threat of exposure in a judicial forum[17].

In many cases (including the Air India case), it is only after the fact that intelligence agencies will reveal that they either intentionally or negligently destroyed intelligence information which may have been helpful to the defence[18]. For example, in June, 2005, U.S. District Judge Henry Kennedy had ordered the U.S. Government to safeguard "all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the U.S. Naval Base at Guantanamo Bay". ***Five months later***, as it was very recently discovered, the CIA had destroyed the interrogation videos of suspected terrorists Abu Zubaydah and Abd

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[17] In a similar vein, during the early stages of the Air India investigation, CSIS had "alluded to the possibility of refusing to agree" to disclosure of the fact that it had intercepted potentially relevant communications and that it had destroyed those tapes: Memorandum of Mr. McMeans, Dec 15, 1987, Document CAF0171, p.7-8. The correlation between secrecy and abuse is no different for the police: also in the early stages of the Air India investigation, the RCMP had approached CSIS seeking to have CSIS forward the interceptions obtained pursuant to a CSIS wiretap order to which the RCMP wiretap order would not have allowed access: see Evidence of C. Scowan, Vol. 50, September 21, 2007, at pp. 6150-1.

[18] One is hard-pressed to understand why an agency focussed on collecting information would ever destroy information, especially if it was singularly helpful to the state (as opposed to partially helpful to the defence). It is reasonable to expect that such incriminating information would be preserved for future use (either as intelligence or as evidence in one or more future prosecutions).

al-Rahim al-Nashiri[19]. Government lawyers claimed that those tapes were technically not covered by Judge Kennedy's order because those two men were not at the Guantanamo Bay facility at the time the tapes were made, but rather had been held overseas in a network of secret CIA prisons. Once again, were those tapes entirely inculpatory, it seems odd that the public interest was better served by their destruction rather than by their preservation. Similarly, experienced Federal Court Trial Judge Leonie Brinkema recently (on November 20, 2007) expressed serious doubts about the reliability of what federal government lawyers were telling her about the existence of information relevant to two terrorism cases, including the Moussaoui case. In a letter made public on November 13, 2007, prosecutors in the Moussaoui case admitted to Judge Brinkema that the CIA's earlier assurances as to the previous destruction of key videotapes and audio tapes were "wrong"[20]. In fact, two such videotapes and one audio tape existed[21]. Most recently, in *Gates v. Bismullah*[22], the U.S. Court of Appeals for the District of Columbia held that the government must provide "all

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[19] Information from those two men is allegedly responsible for the subsequent detentions of Ramzi Binalshibh (an alleged 9/11 accomplice) and Khalid Sheikh Mohammed (the alleged mastermind behind the 9/11 attacks).

[20] Moussaoui had argued for the right to interview and depose those detainees on the basis that they would be able to exonerate him. His pre-trial motion was largely dismissed, especially his request for a fresh interview of the detainees. However, he was allowed to use written summaries of the interviews which had already been conducted. Judge Brinkema had been told that the written summaries were all that remained of the original interviews as the tapes had all been destroyed. See Evidence of Prof. Chesney, Vol. 83, November 26, 2007, at pp. 10691-2.

[21] Although by the time of this revelation, Moussaoui had already changed his pleas to "guilty" and had been sentenced.

[22] (U.S.C.A., D.C., October 3, 2007) online at <http://www.asil.org/pdfs/ilib080208_bismullah3.pdf>

the information" ***available*** to the military tribunals which had reviewed the grounds for detaining "enemy combatants" at the Guantanamo Bay facility. The government had argued before the appeals court that this would be impossible as it had not preserved evidence that it did not present to the tribunals. Again, one is compelled to ask "why not?" If the evidence was only inculpatory, it would have been maintained – if not to guarantee success in future challenges to the detentions, then certainly as "intelligence", the significance of which may only later become known.

(c) The use of intelligence-information as evidence in a criminal case breeds unfairness and unreliable results

The CLA submits that there are a number of fundamental differences between the nature of intelligence information and the nature of criminal evidence which caution against any proposed recommendation to ease the restrictions on using intelligence information as evidence in a criminal prosecution of terrorism offences. First, unlike evidence gathered by the police for use at a criminal trial, intelligence information is, by nature, must less prone to judicial review. In light of their goal being to protect national security, and knowing that their actions are unlikely to ever be subjected to public, let alone judicial, scrutiny, intelligence agents carry out their work in a culture where the ends may well justify the means. That cannot be, and never has been, true of the Canadian criminal justice system and is certainly not true since the advent of the *Charter* 25 years ago. Second, unlike evidence which the police gather for use at a criminal trial, intelligence information will often be divorced from its original source, the identity of which may not even be known (and will almost never be disclosed). Not only will the reliability of intelligence information therefore

be difficult for the trier of fact to assess, it also risks being artificially inflated as a result of the information being circulated by different members of the international intelligence community[23].

Regardless of what recommendations this Commission may see fit to make on this issue, there is already a healthy amount of CSIS-generated information which flows through to criminal prosecutions of terrorism charges. Those cases, as well as cases from other jurisdictions, demonstrate that when intelligence-information is used as evidence in criminal cases it creates unfairness and unreliability in the trial process. Historically, only information which CSIS deems inculpatory is "disclosed" to the RCMP. Other information which points towards "other suspects" is almost always deemed "protected", unless that information also inculpates the accused. This "one-way street" approach to the disclosure of intelligence-information for criminal cases is typical of intelligence agencies. As noted above[24], in the Moussaoui case, U.S. District Judge Leonie Brinkema ruled that prosecutors could not allege that he had a link to the 9/11 conspiracy because the government had denied the defendant, on national-security grounds, access to witnesses who were in a position to say whether he was part of the 9/11 gang – namely, Ramzi Binalshibh, Khalid Sheikh Mohammed and other key al-Qaeda figures who the U.S. had captured and were detaining

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[23] That phenomenon was prominently featured in the O'Connor Inquiry into the role which CSIS and the RCMP played in the U.S. rendition of Maher Arar to Syria. As a result of such circular validation, the U.S. came to believe that Arar was involved in terrorist activities and wanted him to be aggressively interrogated. As Justice O'Connor found, there was no evidence that Arar had anything to do with terrorist activities.

[24] See ftnt. 18, *supra*.

abroad. In a more Canadian context, we know that the risk of wrongful convictions increases when the state denies the defence access to information relating to other suspects[25].

Beyond just information relating to "other suspects", one of the fundamental problems with using intelligence-information as evidence in a criminal case is that the intelligence-information will most often be devoid of context. In a criminal case, context can be everything[26] – mistaken belief, self-defence and duress are all examples of lawful defences which, despite the apparent criminal nature of the conduct, render the accused's actions non-culpable. In addition, the new "terrorist offences" include inchoate offences such as "participation" in a terrorist group and the commission of a criminal act for the benefit of a terrorist organization. In each case, there is minimal "action" component (*i.e.*, the accused need not have done anything overtly "terrorist") which is rendered culpable by the presence of a certain state of mind, namely, that the conduct was for a terrorist purpose. Put differently, the accused's belief as to the nature and purpose of the group with which he is interacting will almost always be a central issue in a terrorism prosecution. Consequently, one isolated comment made to or by the accused may, at first glance, seem like powerful evidence of the accused's state of mind. However, when placed into the context of hundreds, if not thousands, of other conversations where other purposes are discussed or where other boastful claims are made the original remark may take on a

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[25] Consider the cases of Morin, Milgaard, Marshall, Sophonow and Truscott.

[26] See, for example, *R. v. Ferris,* [1994] 3 S.C.R 756.

different meaning[27]. Denying an accused access to contextualizing evidence is unfair and it increases the risk of wrongful conviction.

(d) The potential benefits from expanding the use of intelligence-information as evidence in a criminal trial do not outweigh the costs

The CLA submits that the evidence at this Inquiry fails to show that the potential benefits from diluting our well-settled rules of criminal procedure and evidence will outweigh the resulting costs to the administration of justice and to the fundamental values

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[27] A few years ago, seven Miami men were accused of plotting to join forces with Al-Qaeda to blow up Chicago's Sears Tower. The case became known as the "Liberty City Seven", based on the area of Miami in which the seven were alleged to have conspired. Recently, after nine days of deliberation on four terrorism-related conspiracy charges, the jury refused to return verdicts on six of the seven accused. They did, however, acquit one of the accused. At the trial, prosecutors had claimed that the group had sworn allegiance to Al-Qaeda and had hoped to forge an alliance to carry out bombings against the Sears Tower and some federal government buildings. The group never actually made contact with Al-Qaeda, nor did the group ever acquire any weapons or explosives. Instead, a paid FBI-informer (*i.e.*, a civilian) posed as an Al-Qaeda emissary. The prosecution was built primarily on wiretap intercepts (approximaely 12,000 of them) and surveillance videos, including one where all seven accused were seen pledging an oath of loyalty to Al-Qaeda in a March 2006 ceremony and one where the group's leader was overheard talking about starting a war against the U.S. Government by bringing down the Sears Tower. The leader had supplied the informer with detailed wish lists that included weapons, bulletproof vests, motorcycles and cash. At trial, however, the accused testified that he had faked interest in the plot and had really only wanted to defraud the emissary of money. The defence position at trial was that the FBI and their undercover informer were overzealous and ultimately were responsible for pushing the group beyond mere musings to an apparent conspiracy. It goes without saying that the jury's ability to fully and fairly assess the positions of the prosecution and defence depended upon its access to ***all*** of the interactions between the informer and the accused as well as between the informer and the FBI. Consider also the decontextualized evidence of the jailhouse informers in the case of Guy Paul Morin. Divorced from the context, it appeared as though Guy Paul Morin had admitted to killing Christine Jessop, which science later proved he did not do. When the full context of the alleged "jailhouse confession" was brought to light, however, it was clear that the jailhouse informer had manipulated and distorted the conversation in such a way as to have rendered it meaningless.

enshrined in our Constitution. In terms of the potential benefits, it is important to bear in mind that none of the proposed changes to the RCMP-CSIS relationship, nor to the relationship between intelligence information and criminal evidence, would have helped to prevent the tragic bombing of Air India Flight 182. By all accounts, even the antiquated intelligence-gathering process of 1985 had generated enough informational bits to create a perceived threat. The evidence before this Inquiry suggests that, back in 1985, CSIS did share its limited understanding of the threat posed to Air India flights with the RCMP in a timely manner[28]. The problem back in 1985 lay with the weak (if any) analysis of the information which had been collected. As the Submissions of Bnai Brith Canada point out, the evidence at this Inquiry demonstrates that the failure was not an inability (neither judicial nor practical) to implement wiretaps or to collect more information but rather a lack of analysis of the information at hand[29]. (Interestingly, as the "9/11 Commission" in the U.S. found, it was the same type of analytical failure which was largely responsible for the inability to prevent the September 11th terrorist attacks, and not some legal impediment to the collection of adequate information.) Even without the added information-collecting powers provided by the *ATA* in 2001, the powers available to CSIS and the RCMP in 1985 allowed them to obtain the needed information – the failure arose from the manner by which that information was handled. At best, the use of intelligence information as criminal evidence may assist in a prosecution of persons alleged to have been responsible for ***previous*** criminal acts of terrorism. However, unless this Commission is prepared to impugn

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[28] See Final Submissions of B'nai Brith Canada, at para. 34.

[29] See Final Submissions of B'nai Brith Canada, at paras. 31 and 36.

the verdicts rendered by Justice Josephson in March, 2005, there is no evidence before this Inquiry that the use of intelligence-information at the criminal trial of Malik and Bagri would have assisted in the prosecution of the people actually responsible for the terrorist attacks on the two Air India flights.

(e) The current legal rules allow trial judges to strike the right balance between the societal interest in admission of some intelligence-information at trial and the overarching importance of fairness and reliability in the trial process

An examination of the complete trial proceedings in *R. v. Malik and Bagri* reveals that the existing rules of criminal procedure and evidence already provide for the use of intelligence information as part of a criminal investigation and as evidence in any subsequent criminal trial ***subject to a determination by the trial judge as to whether the use of that intelligence-information unduly impacted upon the fairness or reliability of the trial***. For example, at the trial of Malik and Bagri, the Crown sought to introduce a statement which a CSIS agent had obtained from one of the Crown`s key witnesses, Ms E, pursuant to the modern day rules governing hearsay evidence. After a full hearing where all of the relevant surrounding context was explored, Justice Josephson admitted the statements which Ms E had made to CSIS agent Laurie on the basis that they satisfied the principled exception to the hearsay rule. Similar "exceptions" to evidentiary and procedural rules could allow for admission of CSIS-generated wiretap evidence if, on balance, a trial judge determined it appropriate[30].

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[30] Even though the intelligence-information *qua* evidence may have been obtained for another limited purpose, that would not necessarily render it inadmissible at a criminal trial: see, for example, *R. v. Stillman*, *supra*; *R. v. Jarvis,* [2002] 3 S.C.R. 757; *R. v. Colarusso,* [1994] 1 S.C.R. 20.

The CLA strongly resists any recommendation which would oust the current judicial discretion for deciding upon the admission of intelligence information in favour of an automatic inclusionary rule based on the apparent inculpatory nature of the intelligence-information (*e.g.* a CSIS-generated wiretap). While it may be trite law, it is helpful to remember that even in the context of serious criminal offences, s. 8 of the *Charter* prohibits *ex post facto* justifications for what were initially unlawful searches or seizures by the state[31]:

> If the issue to be resolved in assessing the constitutionality of searches under s. 10 were in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a post facto analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.

The danger of allowing such *ex post facto* reasoning to justify the admission of evidence is that it encourages police to ignore the constitutional need for ***prior*** judicial authorization and to, instead, engage in unrestricted surreptitious electronic surveillance of whomever they wish (knowing that they will ultimately be able to use the unconstitutionally obtained evidence at a trial). In *R. v. Wong,* Justice LaForest said explained why this cannot be tolerated[32]:

> I am firmly of the view that if a free and open society cannot brook the prospect that the agents of the state should, in the absence of judicial authorization, enjoy the right to record the words of whomever they choose,

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[31] *Hunter v. Southam,* [1984] 2 S.C.R. 145.

[32] [1990] 3 S.C.R. 36 at para. 15.

> it is equally inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video surveillance. George Orwell in his classic dystopian novel 1984 paints a grim picture of a society whose citizens had every reason to expect that their every movement was subject to electronic video surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. The notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government. As in the case of audio surveillance, to permit unrestricted video surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society. There are, as R. v. Dyment, [1988] 2 S.C.R. 417, at pp. 428-29, tells us, situations and places which invite special sensitivity to the need for human privacy. Moreover, as Duarte indicates, we must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy.

As the Supreme Court of Canada has recognized, the insidious nature of such *ex post facto* reasoning is no more tolerable simply because the offence at issue involves terrorist activity[33]:

> Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy. As eloquently put by President Aharon Barak of the Israeli Supreme Court:
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> > This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

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[33] *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40 at para. 7.

(H.C. 5100/94, Public Committee Against Torture in Israel v. Israel, 53(4) P.D. 817, at p. 845, cited in Barak, supra, at p. 148.)

(f) Are there any viable alternatives to expanding the use of intelligence-information as evidence at criminal trials?

Instead of expanding the opportunities to use the intelligence-information collected by CSIS as evidence in a criminal case, one might argue that we could simply lower the thresholds by which the RCMP collect evidence during a criminal investigation so that the RCMP end up with their own access to roughly the same pool of information for evidentiary purposes. In other words, rather than requiring reasonable grounds to believe that an offence will be (or has been) committed and that the target's communications will afford evidence of that offence, the law could be amended to allow the RCMP to obtain wiretap authorizations on the basis of mere suspicion.

The problem with such a recommendation is that it overlooks the fact that for terrorist investigations the *ATA* has already dispensed with one of the two fundamental safeguards against the overuse of police wiretaps, namely, the "investigative necessity" requirement[34]. Lowering the remaining safeguard should to a level of mere "suspicion" would widen the investigative net beyond constitutionally acceptable limits and would risk catching more than just the communications of terrorists (or criminals). Even Reid Morden, the former Commissioner of CSIS, in describing the changes already made by the *ATA,* has said that "[t]he overall effect is to lengthen the long reach of the criminal law in a manner

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[34] For a discussion of the importance of the "investigative necessity" requirement see the Supreme Court of Canada judgment in *R. v. Araujo*, [2000] S.C.J. No. 65.

that is complex, unclear and unrestrained"[35]. As noted above, the *ATA* enlarged the field of criminal liability by creating broadly defined inchoate "terrorist" crimes. With that broadening of potential liability, the vulnerability of the individual to state incursions upon his or her privacy has been magnified. In other words, the broader basis for criminal liability also broadens the scope of claims which the police may make to justify peering into an individual's private life to include an examination of simple associations and lifestyle choices (*i.e.,* who one hangs around with and where one hangs around). Lowering the authorization threshold to one of mere suspicion would allow the police to focus their investigative efforts on the ambiguous activities of any member of a suspect group (*e.g.*, radical religious sects). Although there is nothing in the *ATA* that specifically authorizes the police (or any other state agency) to engage in racial, religious or ethnic profiling, lowering the authorization requirement to one of mere suspicion will enhance the potential for using the police wiretap power to unfairly target and stigmatize members of minority communities.

In addition to the policy reasons against lowering the evidentiary threshold for police wiretaps in terrorism cases to a level of suspicion, s. 8 of the *Charter* undoubtedly prohibits legislation which purports to authorize the use of surreptitiously seized conversations as evidence at a subsequent terrorism trial. As noted above, the Supreme Court of Canada, in its seminal decision in *Hunter v. Southam,* held that s. 8 imposes a prior judicial authorization requirement which, in the criminal context, will only be satisfied when

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[35] R. Morden, "Spies, Not Soothsayers: Canadian Intelligence After 9/11" in CSIS Commentary No. 85, Fall 2003 [2003-11-26].

"credibly-based probability replaces suspicion"[36]:

> The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence may be uncovered by the search, would be to define the proper standard as the possibility of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

For the reasons set out above, the CLA submits that it would be wrong to recommend a lowering of the wiretap authorization threshold (to mere suspicion) and/or to recommend that admission of the intelligence-information at trial could be justified on *ex post facto* analysis of the content of a CSIS-generated wiretap. Even if we purport to limit such drastic changes to terrorism cases, there is a very real danger that the relaxed rules and practices will soon leak into domestic criminal investigations. For example, following 9-11, the U.S. Government amended the language of the *Foreign Intelligence Security Act* ("*FISA"*) to seemingly dispense with the need to have a foreign-intelligence gathering purpose as a precondition to using the lower wiretap authorization threshold found in the *FISA*. According to Professor Chesney, it was not long before U.S. federal criminal prosecutors tried to take advantage of that change by seeking *FISA* warrants for domestic criminal

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[36] *Hunter v. Southam, supra*

investigations[37]. In commenting upon the case of an American citizen who had been selling cigarettes to North Vietnam and who was caught up in a "foreign intelligence" wiretap, Professor Chesney testified:

> Sometimes the government wants to use the – it's a foreign intelligence surveillance in criminal cases and indeed, we have seen a lot more of that after 9/11 thanks to the reduction of this notion that the primary purpose test was the cut-off for when you could do this.

It is not hard to conceive of situations where the police could believe (or claim) that because their investigation "relates" to "suspected" terrorist preparatory activities, such as money-laundering or drug trafficking offences, they can forego the more stringent requirements of a domestic criminal investigation and proceed by way of the relaxed standards for terrorism cases. In this regard, the CLA respectfully adopts the following passages from Stanley Cohen`s text, titled Privacy, Crime and Terror[38] as the reason for not creating any more special police powers purportedly aimed at the investigation of only terrorist offences:

> It is vitally important that a bright line be maintained between national security intelligence gathering activities and ordinary criminal investigation. If we are unable to ascertain and maintain the existence of this bright line, then our ability to protect the ordinary criminal justice system from the tainting effects of activities or techniques used in the national security sphere will be compromised.
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> Therefore, in the interest of preserving and respecting basic rights and liberties, these two spheres should be kept conceptually and analytically distinct....
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> . . . .

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[37] Evidence of Prof. Chesney, Vol. 83, November 26, 2007, at p. 10712. Interestingly, in the one case where the evidence obtained pursuant to an intelligence-gathering wiretap was challenged in a domestic criminal court, the court allowed the challenge and excluded the evidence.

[38] S. Cohen, Privacy, Crime and Terror (Toronto, 2005), at pp. 54 and 57.

> Today, no one seriously disputes that national security and the threat of terrorism are valid and serious concerns. Nevertheless, these concerns pose serious dangers to the integrity of the legal system. The essence of the danger is that our concerns regarding national security may eventually overwhelm our normal vigilance concerning the criminal justice system. The necessarily more relaxed standards that allow our security services to obtain intelligence and develop leads so as to safeguard the national interest cannot serve as the norms that regulate the workings of the larger justice system. Where this occurs, distortions appear and basic rights and liberties can come under threat.

The solution to the failings of CSIS-generated "evidence" is not to dilute the reliability and fairness of the criminal process by a distortion of well-settled rules of evidence, but rather to encourage state agents to make better use of the other legal proceedings which Parliament has created as a means of protecting the public in cases of "suspected" terrorist activities. Where intelligence-information fails to meet the fairness and reliability requirements of a criminal trial, it will likely still be adequate for use in a less intrusive proceeding, such as an application by the Crown pursuant to s. 83.3 for a "terrorist recognizance". The supervision provided in s. 83.3 is akin to the long-term supervision orders which Parliament created to help supervise "almost dangerous offenders" and to the recognizance provisions which have been used to protect vulnerable members of the public by imposing strict supervisory conditions on serial sex offenders[39] and on gang members. Because those provisions are considered preventive and not punitive, the rules of evidence and procedure are much relaxed as compared to a criminal trial which can result in very significant punishment to the individual. Accordingly, intelligence-information which falls

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[39] See *Budreo*, [2000] O.J. No. 72 (C.A.) and Evidence of Prof. Chesney, Vol. 83, November 26, 2007, at pp. 10659-64 (his discussion of the "prevention paradigm").

short of the admissibility requirements for a criminal trial will likely be sufficient for the purpose of a s. 83.3 hearing. So, while a criminal prosecution may be unfair and unreliable, an application for close supervision of someone "suspected" to be involved in terrorist activities is constitutionally acceptable.

ISSUE #2: What, if any, changes should be made to the rules and practices governing disclosure in terrorist (of other criminal) mega-trials?

As noted above in the Overview of these Submissions, the constitutional requirements for the rules governing disclosure in criminal cases have been firmly established by the Supreme Court of Canada in a long series of cases. In short, the Crown is obliged to disclose to the defence ***all potentially useful information in its possession***. As the Commissioner noted at various points in this Inquiry, this rule presents serious practical problems for the administration of justice in a complex mega-trial, problems which may actually undermine the purpose of the right to full disclosure.

In terms of the disclosure issue, the CLA intends to deal with the following two areas of concern:

(a) How might the present disclosure rules affect the relationship between CSIS and the RCMP?

(b) Are the present disclosure rules adequate for the fair and efficient administration of justice in terrorist mega-trials and, if not, what changes could be made to improve the efficiencies which would not infringe on the accused's ability to make full answer and defence and, thereby, increase the risk of wrongful convictions?

(a) How might the present disclosure rules affect the relationship between CSIS and the RCMP?

The CLA has already addressed the fact that the existing legal rules for protecting information relating to "confidential informers", coupled with the *CEA*'s protections for national security information, are more than adequate to foster a healthy relationship of cooperation and candour between CSIS and the RCMP. The evidence at this Inquiry has proven that. None of the CSIS and/or RCMP witnesses at this Inquiry ***who are currently involved in the investigation of terrorist threats*** (as opposed to some of the retired officers) complained that the current legal regime for disclosure in a criminal case creates a chill over CSIS's willingness to share important investigative leads with the RCMP in a timely manner. Nor did any of those witnesses suggest that the current disclosure regime created problems for when the police used intelligence-information either as evidence to further their investigation or as evidence to be tendered at trial. Significantly, the two British criminal justice officials who were called at this Inquiry to discuss the British approach to prosecuting terrorist offences both testified that the practice is to with disclosure in terrorist cases virtually the same way cases as disclosure in domestic criminal cases[40]: in either case, the state discloses all information capable of undermining the prosecution case or capable of assisting the case for the defence. There was no suggestion that following their traditional model for disclosure in criminal cases created problems for either the police, the prosecutors or the security agencies involved in terrorist cases.

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[40] Evidence of C. Gibbs, Vol. 84, November 28, 2007, at pp. 10770-71.

(b) Are the present disclosure rules adequate for the fair and efficient administration of justice in terrorist mega-trials and, if not, what changes could be made to improve the efficiencies which would not infringe on the accused's ability to make full answer and defence and, thereby, increase the risk of wrongful convictions?

Despite the legal rules for disclosure being essentially the same, the British approach to achieving "disclosure" in terrorist mega-trial cases did stand in stark contrast to the typical Canadian approach to disclosure in a mega-trial case. In Britain, prosecutors seem to approach their disclosure obligations on a two-tier basis. At the first level, copies of any and all information upon which the prosecution will be based (and information which may undermine that evidence) is automatically provided to the defence. Other information which is in the possession of the police and which may somehow be relevant is catalogued and summarized for the defence, but is not automatically copied for the defence. Instead, the defence is free to request copies of any original documents in this second tier based on the summaries prepared by the file officer. So long as there is some arguable basis for the request, copies are provided to the defence. In effect, while the defence is still provided with "disclosure" of all potentially helpful information, the heavy costs involved in needlessly generating multiple copies of thousands, if not millions, of documents is avoided.

At this Inquiry, Assistant Professor Code spoke of using a similar two-tiered approach to the disclosure in the prosecution of Malik and Bagri. As might be expected in an investigation which took 15 years to complete, the Air India case involved millions of documents containing information which was not "clearly irrelevant" (*i.e.*, the threshold trigger for the Crown's obligation to "disclose"). Like in Britain, the prosecutors provided the defence with copies of all documents which either related to the Crown's case or which

the prosecution knew could help the defence undermine that case. The remaining mass of material which the Crown could not say was "clearly irrelevant" was made available to the defence for review pursuant to an undertaking not to disclose any of the contents without first obtaining the consent of the Crown. As Code explained, when the defence team would discover some documents in this second tier which were potentially helpful to its case, they would present them to the prosecutors who invariably consented to the undertaking being lifted with respect to those documents. In following this approach, the defence was still provided with ***full*** "disclosure" but at a greatly reduced cost to the administration of justice (and the environment).

The CLA recommends that disclosure in a terrorist (or any other criminal) mega-trial follow a two-tiered approach similar to that employed in Britain. In other words, while the Crown need only provide the defence with copies of the documents which reasonably relate to the prosecution's case, the Crown must also provide the defence with an itemized list of the documents which it has decided need not be provided. The CLA submits that the latter is an essential part of this alternative method for satisfying the Crown's disclosure obligation. In allowing the Crown to narrow the disclosure "brief" to the "obviously relevant", we must safeguard against the risks occasioned by potentially relevant defence information going unnoticed and unreviewed. The creation of an inventory-summary would have the salutary effect of forcing at least someone with knowledge of the prosecution case (*i.e.*, the "big picture) to have reviewed every potentially relevant piece of information. Moreover, the inventory-summary would serve to reduce the demands placed upon the defence side of a mega-trial; rather than lawyers for multiple accused each having to blindly

pour through the boxes of additional material, the one inventory-summary prepared by the prosecution/police would serve as a roadmap for all.

As part of the new two-tiered approach to "disclosure" in a mega-trial case, the CLA strongly recommends that, at the earliest possible stage of proceedings, the Crown should be compelled to make a summary presentation of its case to the defence[41]. In any mega-trial case, the disclosed material, though fulsome, is also overwhelming. Given the way that the information is organized, it is generally very difficult for defence counsel to see the "forest through the trees" until s/he has first mapped out almost every tree in the forest. The summary presentation of the prosecution at an early stage allows the defence (and the case-management judge) to appreciate both the narrative and the relative importance (or lack of importance) of certain witnesses and evidence. This overcomes some of the practical difficulties which arise from the defence needing time – often considerable time – to review all of the disclosure material before the trial process can begin to move forward. Moreover, this approach helps to reduce the costs to the legal aid system as it allows the defence lawyers to better focus in on the disclosure materials relevant to the case their clients will have to meet. The CLA submits that there is certainly no good reason for ***not*** requiring the

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[41] In the "California Sandwiches" case in North York, Ontario (*i.e.*, the mistaken shooting of Louise Russo), senior Judge Taylor (former head Crown Attorney in Peel Region), ordered the prosecutors to "present" its case to lawyers representing the multiple accused the defence as part of the pre-trial process leading up to what was anticipated to be an extremely long and complex preliminary inquiry. Over the span of a few hours, using Powerpoint, video and audio, the prosecutors laid out how they would seek to prove the guilt of each of the accused. A few months later, after the accused had themselves seen the same presentation (in a closed courtroom), the case was resolved by way of plea bargains. Justice Taylor continues to use this approach in lengthy serious criminal cases which wind their way through the North York Ontario Court of Justice.

Crown in a mega-trial case to make such a summary presentation of its case.

Before leaving the topic of disclosure, the CLA wishes to make clear that any recommendations calling for legislative limits on the right to meaningfully access ***full*** disclosure would be misguided and contrary to the evidence heard at this Inquiry. As noted above, the SCC has repeatedly recognized the right to full disclosure as fundamental to the administration of Canadian criminal justice. All of the lawyers who were asked to comment on disclosure at this Inquiry (*i.e.,* both Crown and defence), readily accepted the fundamental importance of the right to full disclosure[42]. As defence counsel, John Norris, reminded the Commission, many of the documented cases of wrongful convictions (both in Canada and the U.S.) are attributable to failures in the disclosure process, even failures to disclose small bits of information[43]. While hindsight reasoning might suggest that the solution to those failures is to simply make sure that the prosecution discloses those small bits of information, in the reality of criminal prosecutions, that is not a viable solution. The unwavering belief in the accused's guilt will often make it hard for the prosecution and the police to objectively assess the significance of small bits of potentially exculpatory information[44]. Even apart

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[42] See Evidence of G. Dolhai, Vol. 86, November 30, 2007; Evidence of K. Roach, Vol. 86, November 30, 2007; Evidence of J. Norris, Vol. 86, November 30, 2007; Evidence of M. Code, Vol. 88, December 4, 2007; Evidence of G. Gaul, Vol. 88, December 4, 2007.

[43] See, for example, *Re Truscott*, [2007] O.J. No. 3221 (C.A.). Also consider the case of Romeo Phillion, where a single report from one of the lead investigators which was not disclosed would have provided both the defence lawyer and the jury with information establishing that Phillion had an alibi.

[44] In the literature on "wrongful convictions", this is referred to as "tunnel vision". It does not necessarily imply *mala fides* on the part of those justice officials, but is simply a recognition of the realities of human psychology. As few prosecutors or police would

from the problems caused by "tunnel vision", the prosecution and police may simply not appreciate the significance of a small piece of information because they are not privy to the information provided to the defence team by the accused. Fortunately or unfortunately, searching through mounds of police files is the lifeblood of being a criminal defence lawyer in a mega-trial; *i.e.,* to make sure that there is not some other explanation for how the crime may have occurred or who may have perpetrated it. While the task often seems much like looking for the proverbial needle in the haystack, it is those needles which weave the "golden thread" of innocence through the fabric of our criminal law.

Regardless of which approach to ***full*** disclosure is applied, the evidence at this Inquiry speaks overwhelmingly to the need to ensure that, like the police and the prosecution, the defence team is properly funded. As Assistant Professor Code observed, going through the "second tier" of disclosure was an incredibly time-consuming task in the case of Malik and Bagri, one that was much too costly to have senior defence counsel do it. Instead, the defence team hired a bright young lawyer, fully briefed on the case, to conduct the review of the additional "not clearly irrelevant" materials in the Crown's possession. When that lawyer would discover something of potential relevance, senior counsel would then attend with him at the Crown's secure file room to review the documents. Though more cost-efficient than having senior counsel conduct the "first cut" himself, the review process

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seek to send someone they thought was innocent to jail for life, they naturally develop a "belief" in the righteousness of their cause. Consequently, having formed a belief that the person they are prosecuting is responsible for a heinous crime, it becomes easy for them to discredit or discard information which seemingly may point to a different conclusion.

was still time-consuming and expensive. In Ontario, constrained by its budget, Legal Aid Ontario is often very reluctant to authorize more than one defence lawyer to represent an accused, even in mega-trials of very serious charges, and will impose limits on the number of hours which defence counsel may work on a file. In the same way that inadequate resources contributed to the failure by CSIS and the RCMP to effectively prevent and investigate the bombing of Air India Flight 182, an under-resourced defence team is equally prone to make catastrophic mistakes in a terrorist case. Indeed, under-resourced defence lawyers have been identified as another cause of wrongful convictions. Accordingly, the CLA urges this Commission to recommend that both the provincial and federal governments create a special fund, administered by the legal authorities, from which provision can be made for the defence of serious criminal mega-trials.

ISSUE #3: What, if any, changes should be made to s. 38 of the *CEA*?

The CLA respectfully adopts the submissions of the Federation of Law Societies of Canada in relation to the shortcomings of s. 38 of the *CEA*. The CLA believes that those proposed amendments are vital to improving the efficiency of the trial process while at the same time enhancing the twin constitutional values of fairness and reliability in that process. In particular, the CLA supports the following recommendations:

- That s. 38 be amended to require the appointment of a special advocate to represent the interest of the accused and that the special advocate shall have access to all information that is proposed to be withheld from the accused.

- That s. 38 be amended to provide the accused person the right to choose the special advocate from a list of qualified and independent lawyers approved of by the Minister of Justice.

- That the Minister of Justice be required consult with organizations external to the government including the Federation of Law Societies, the local Law Societies and groups such as the Criminal Lawyers Association who have a direct and vested interest in ensuring that selected special advocates have related criminal law experience.

- That s. 38 be amended to allow special advocates to ***receive*** information from accused persons and/or their counsel (subject to an undertaking not to disclose the information at issue). The special advocate must also be entitled to bring an *ex parte* application to the vetting judge to ***ask specific questions*** of the accused and/or their counsel. The vetting judge's decision on whether to permit the questions would be whether the question(s) would tend to disclose the contents of the information at issue.

- The special advocate must be given access to the disclosure already made to the accused so that the special advocate's submissions can be informed and appropriately tailored.

- That a "solicitor-client" type of confidentiality protect all communications between the special advocate and the accused person which only the accused can waive.

- The government should be obligated to provide the infrastructure (*e.g.*, interpreters, investigators, experts and travel expenses) necessary to support the work to be done by the special advocates.

In addition to supporting the Federation's submissions, the CLA makes the following additional recommendations:

- Where possible, the case-management judge and/or the trial judge should strongly encourage prosecuting and defence counsel to resolve potential s. 38 claims in a spirit of reasonableness and cooperation.

- Parliament should take legislative action to authorize senior superior court criminal judges who will preside over terrorism cases to also deal with s. 38 claims (either by amending s. 38 or by designating certain superior court judges as *ex officio* members of the Federal Court and by allowing the s. 38 issues to be dealt with in locations other than Ottawa).

The current s. 38 process is unworkable for a number of reasons. First, the process

is costly and necessarily fractures the pre-trial or trial process. Not only does the current process contemplate a physical change in location from wherever the trial is to Ottawa, it also contemplates a change in location whenever and however often the issue arises during the course of a criminal trial. Moreover, the current provisions permit interlocutory appeals which run the risk of further fracturing and delaying the trial process. Interestingly, this troubling feature of the current provisions was highlighted by the Federal Court itself in *Canada* v. *Ribic*[45]:

> First, the issue of sensitive information arose in mid-trial of the appellant. The criminal trial had to be adjourned for a determination of the accused's right of access to the privileged information. In the meantime, the jury was kept waiting. The applicable legislation was new and a solution had to be found quickly.

Second, the Federal Court Judge hearing the claim is at a distinct disadvantage in that he or she is not privy to the complete factual record which supplies the context within which the disclosure claim is to be litigated. How is the judge to assess the three step analysis set out in *Canada*. v. *Ribic* , *supra*, without having the full evidentiary picture? Moreover, if that evidentiary picture already exists before the trial court, why cause the parties to recreate it once again elsewhere? While admittedly in a different context, the Supreme Court in *R*. v. *Litchfield*[46], has discussed the policy reasons for vesting trial judges with authority to make decisions relating to the trial process. Writing for the majority, Justice Iacobucci had the following to say[47]:

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[45] [2005] 1 F.C.R. 33 at para. 43 (F.C.A.).

[46] [1993] 4 S.C.R. 333.

[47] *Ibid* at para. 29.

> Moreover, as a matter of practice and policy, it is obviously preferable that the trial judge hear applications to divide and sever counts so that such orders are not immunized from review. Otherwise, procedure begins to govern substance. Indeed, it makes sense that the trial judge consider applications to divide and sever counts since an order for division or severance of counts will dictate the course of the trial itself. Courts have recognized that it is preferable that trial judges make division and severance orders (see, e.g., R. v. Watson (1979), 12 C.R. (3d) 259 (B.C.S.C.), and R. v. Auld (1957), 26 C.R. 266 (B.C.C.A.)). Not only are trial judges better situated to assess the impact of the requested severance on the conduct of the trial, but limiting severance orders to trial judges avoids the duplication of efforts to become familiar enough with the case to determine whether or not a severance order is in the interests of justice. It seems desirable, therefore, that in the future only trial judges can make orders for division or severance of counts in order to avoid injustices such as occurred in this case.

The same reasoning applies equally to the current process for appellate review of s. 38 claims. As it currently stands, the section permits appeals to the Federal Court of Appeal which is must then assess the correctness of the trial court's decision in the absence of the full evidentiary context.

The appellate review created by the current s. 38 also promotes undesirable interlocutory appeals in criminal cases, despite increased efforts to stem the tide of such interlocutory litigation in criminal cases. Our history with criminal litigation firmly establishes that the availability of interlocutory appeals (***to either the Crown or the defence***) inevitably generates unwanted an excessive delays in the criminal proceedings, sometimes to the extent where the *Charter* right to a speedy trial is engaged. Even assuming that the current s. 38 appeal can be achieved expeditiously, the Federal Court's appellate review will, by nature, be unable to focus on what the Supreme Court of Canada has said should be the issue on an appeal from a non-disclosure ruling; namely, whether the failure to disclose the information actually impaired the accused's right to make full answer and defence. As Cory

J., writing for the Supreme Court of Canada in *R.* v. *Dixon*, explained[48]:

> ... At this stage, an appellate court must determine not only whether the undisclosed information meets the Stinchcombe threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired. Where, as here, the accused was tried before a judge alone, the judge has provided thorough reasons for the decision, and the undisclosed evidenced is available for review, an appellate court is particularly well placed to assess the impact of the failure to disclose on the accused's ability to make full answer and defence at trial.

Without the benefit of the complete trial record, the Federal Court of Appeal is obviously ill-suited to conduct the type of appellate review set out by the Supreme Court in *Dixon*.

The practical difficulties with litigating disclosure claims under the current s. 38 were highlighted at this Inquiry in the testimony of Assistant Professor Michael Code[49]:

> There is no question that the threat of having to go to Ottawa, to having to move our offices, move our files, move the whole defence team, move the Crown office, move the Crown files, up to the Federal Court in Ottawa, and go through the procedure of educating a Federal Court judge about the case, at this point, we had spent a year with Justice Josephson, not in court, but on various motions, in particular on the CSIS wiretap motion. He was very knowledgeable about this case. He was completely up to speed on it and he knew the niceties of the CSIS documents. He knew the theory of the Crown, the theory of the defence. And we could conduct very efficient motions with Justice Josephson. We never spent more than a week on any motion, as I recall, in front of Justice Josephson. We'd set four or five days and we'd get a lot done because we had a judge who was fully up to speed. We had our offices there. We had al the documents in the courtroom. We had files and files and files in the rooms back beside the courtroom. There were massive filing issues in this case.

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[48] [1998] 1 S.C.R. 244 at para. 31.

[49] Evidence of M. Code, Vol. 88, December 4, 2007, at pp. 11386-7.

> The prospect of trying to move that to Ottawa, to the Federal Court building, get a fresh judge with no background in the case whatsoever, and there's additionally experiential problems with the Federal Court not being a criminal court. There are one or two judges in that court who have some criminal law background, but there's very few of them. It would have been an enormous undertaking. The costs to the taxpayer would have been staggering to move us to Ottawa, put us up in hotels here, get all our files out and camp out in the Federal Court building for six months doing a document-by-document examination would be -- it was unthinkable.
>
> So the motivation to solve this problem was very powerful indeed on all sides. Nobody wanted to do the section 38 procedure. It was an anathema.

Any proposed change to s. 38 of the *CEA* which serves to improve the efficiency of the process without sacrificing the accused's right to full disclosure would find support with the CLA.

ISSUE #4: What, if any, changes should be made to the rules and practice governing the protections afforded to sensitive witnesses in terrorist prosecutions?

Consistent with its opposition to the series of amendments to the *Criminal Code* which have allowed for more and more witnesses in more and more criminal trials to testify from outside the courtroom or from behind a screen, the CLA is generally opposed to any dilution of the accused's right to confront the Crown's witnesses. The "confrontation right", as it is known (see *R. v. L.(D.O.)*[50]), relates to both the fairness of the trial and to the reliability of the outcome of the trial. In terms of trial fairness, the concern is always that special procedures to "protect" certain witnesses may create a perception in the minds of both the public and the trier of fact that the accused has done something which requires such

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[50] [1993] 4 S.C.R. 475.

special procedures. As for the impact on the reliability of the trial, witness anonymity will always detract from the accused's ability to fully test the credibility of that witness.

That said, the CLA recognizes that the Supreme Court of Canada has already held that the public interest in facilitating the prosecution of certain serious criminal offences outweighs the accused's confrontation rights, at least in so far as the adverse impact on the accused's fair trial rights can be minimized through alternative means (such as by providing limiting instructions to juries). Moreover, in the context of terrorist cases, if given a choice between having an opportunity to cross-examine an anonymous witness or, instead, to contend with the information provided by that anonymous witness by way of hearsay through another witness, the fairness and reliability of the trial process will always be better served by having access to anonymous witnesses. In other words, if a further extension of the *Criminal Code*'s existing witness protection provisions would equally facilitate testimony from intelligence agents who have evidence relevant ***to the defence***, the CLA would see this development as promoting the fairness and reliability of the criminal trial process in terrorism cases.

ISSUE #5: With respect to the actual trials of terrorist offences, should the right to trial by jury be abolished in favour of trials by three-judge panels and, if not, what changes should be made to the jury-trial process to better the administration of justice in those cases?

(a) Three-judge panels should not, and cannot, oust the right to elect trial by jury

The CLA is respectfully opposed to the concept of forcing a person charged with a

terrorism offence to have his/her trial before a panel of three judges sitting without a jury. The right to choose a trial by jury remains a fundamental component of the Canadian criminal justice system. Indeed, it is constitutionally enshrined in s. 11(f) of the *Charter* for all cases in which the maximum available punishment is 5 years or more.

The CLA resists any recommendation which suggests that accused persons facing prosecution for terrorism related offences could be denied their constitutional right to choose to be tried by a jury. Indeed, the CLA is confident that any such legislative amendment would be vigorously challenged under that *Charter* and, thus, given the (fortunate) dearth of Canadian terrorism prosecutions, would generate considerable delay as each of those cases wound its way up the various provincial appellate systems until the issue was finally resolved. Moreover, given the high likelihood that such constitutional challenges would succeed, the uncertainty of any conviction coupled with further delays for any new trials are a heavy cost associated with any legislative attempt to remove the right to a jury trial from terrorist prosecutions.

If trial by jury is so problematic for complex serious criminal cases, one must question why in Ontario the overwhelming practice of the Attorney General is to refuse to consent to trials by judge alone in serious high-profile criminal cases. Serious criminal cases which involve charges that fall within s. 469 of the *Criminal Code* ***must*** be tried by a judge and jury unless the Crown consents to a judge alone trial[51]. While the practice of giving

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[51] s. 473(1) of the *Criminal Code*.

consent varies from province to province, consent is rarely granted in Ontario. Moreover, in the absence of arbitrary, capricious or improperly motivated conduct, the courts have deferred to the Crown's decisions to refuse consent, regardless of whether the decision seems unfair or whether the trial could more effectively be conducted by a judge alone[52]. It therefore seems off to suggest that for some of the most serious "s. 469 offences" (*i.e.*, terrorist offences), an accused's constitutional right to refuse consent to a non-jury trial could, or should, be overridden in the name of trial efficiencies.

Senior superior court judges in both Canada and the U.S. have resisted the claims that mega-trials of serious criminal charges, like terrorist offences, would be better dealt with by specialized courts and/or by panels of judges. Both U.S. District Judge Leonie Brinkema, who presided over the Moussaoui trial, and Rob Spencer, the lead prosecutor in the Moussaoui case, have said that federal trial courts are well able to handle terrorism trials, despite suggestions by American Attorney General Michael Mukasey (and others) that some sort of new national security court should be established to handle such cases[53]. Similarly, former Manitoba Queens Bench Justice Ruth Krindle, who testified at this Inquiry about the difficulties which trial judges face in having to deal with lengthy complex criminal trials, whether or not a jury is involved, was firm in her rejection of the "three-judge panel" as either an appropriate or effective solution to those challenges. For example, in terms of the

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[52] See *R.* v. *Ng* (2003), 173 C.C.C. (3d) 349 (Alta.C.A.), *R.* v. *MacGregor* (1999), 134 C.C.C. (3d) 570 (Ont.C.A.), *R.* v. *Bird* (1996), 107 C.C.C. (3d) 186 (Alta.Q.B.).

[53] M. Barakat, "Moussaoui Judge: Terror Trials Work", online at <http://www.wtop.com/?nid=251&sid=1337644>.

putative gain from having three judges to handle the workload involved in deciding complex pre-trial or mid-trial motions, Justice Krindle pointed out that she would be very reluctant to endorse a decision of panel in which she did not actually participate. Conversely, as Justice Krindle pointed out, if the proposed three-judge panels were to be comprised of experienced criminal law judges – an essential requirement, from her point of view, for any judge involved in a criminal "mega-trial" – that would leave the regular criminal docket of most courts significantly short. Most importantly, however, Justice Krindle noted that[54]:

> ... As a straight matter of efficiency, it may be more efficient but as I said, it would decimate the court and I don't think it would give you the representativeness that you would get from a jury. If you're talking about representing the public, if that's what you see as being the strength of the jury system, you're not going to find that with three judges.

The Inquiry did, on the other hand, hear evidence suggesting that adding judicial resources to a complex criminal case can improve the efficiencies of the trial while, at the same time, reduce the risk of a wrongful conviction. Rather than investing the additional judicial resources at the trial, the benefits are obtained by providing for a judge to conduct a preliminary inquiry prior to the trial. In lauding the advantages produced by having a preliminary inquiry prior to a complex criminal trial, As Justice Krindle testified[55] :

> **MR. DORVAL:** Do you feel that it creates a bit of a problem for the parties to be able to foresee all these motions without the benefit of a preliminary inquiry?
>
> **HON. KRINDLE:** It does.

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[54] Evidence of R. Krindle, Vol. 94, December 12, 2007, at p.12426.

[55] Evidence of R. Krindle, Vol. 95, December 11, 2007, at p. 12378.

> **MR. DORVAL:** It does.
>
> **HON. KRINDLE:** It does.... I think our experiences as trial judges is that trials flow more smoothly and easily if there is a preliminary inquiry....

Similarly, quoting from Chief Justice Lesage's Report on the Wrongful Conviction of James Driskell, Ralph Steinberg testified[56]:

> The preliminary inquiry has a long history in Canadian criminal law. It can be, and often is, of immeasurable assistance to the Crown and more often to the accused. Overriding the right to a preliminary inquiry, when that right is available in the Criminal Code, is an extraordinary step to be used in the rarest of cases. I believe that had a preliminary inquiry been conducted in this case, the likelihood of this miscarriage of justice having occurred would have been diminished. It is my recommendation that the accused counsel should be invited to make submissions to the Attorney General not only when the decision about proceeding by way of direct indictment is being considered by the Attorney General after an accused has been discharged at the preliminary inquiry but also in situations like Mr. Driskell's where the accused has been charged but there has been no preliminary inquiry.

The CLA adopts Chief Justice Lesage's recommendation and urges it upon this Commission.

(b) Improving the administration of justice in jury "mega-trials"

(i) Composition of the Jury

The CLA acknowledges that the jury system is strained by lengthy mega-trials. Jurors are taken out of their ordinary lives for extended periods of time with little or no compensation. The CLA accepts that the possibility of mistrial due to loss of jurors is an issue that can and should be addressed by Recommendations from this Honourable Commission. In particular, the CLA supports a recommendation that alternate jurors be empanelled at the start of a trial in accordance with s.631(2.1) and section 642.1 of the

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[56] Evidence of R. Steinberg, Vol. 93, December 11, 2007, at pp.12311-2.

Criminal Code. However, the CLA proposes that the following process be adopted to ensure that the jury that hears the case remains fair and impartial:

(i) The Judge should empanel a jury of 14 people with an indication that only 12 will actually participate in the final deliberations;

(ii) All 14 jurors will listen to the evidence;

(iii) Assuming no one is excused, at the end of the trial, the Judge will randomly discharge two of the jurors;

(iv) The remaining 12 jurors would deliberate the verdict(s);

(v) If a juror is excused during the trial, at the end of the trial the Judge would randomly excuse only one of the two alternate jurors; and

(vi) If two or more jurors are excused during the trial, all of the remaining jurors shall deliberate the verdict so long as there are at least 10 jurors remaining;

(vii) If more than 4 jurors are excused, the Judge shall declare a mistrial.

In this manner, all jurors would feel compelled to listen to the evidence under the assumption that they are just as likely to be involved in the final deliberations. This will avoid the risk of having designated alternates distracted from their task of listening to the evidence on the (ultimately mistaken) assumption that they will not be called upon to serve as a juror in the final deliberations.

(ii) Juror Compensation

The CLA supports a Recommendation that the various systems of jury compensation used across the country be amended to provide for meaningful financial compensation for jurors chosen to sit on lengthy and complex cases. This compensation should make it feasible for jurors to absent themselves from their families and employment commitments for the required period of time.

(iii) Juror Anonymity

The CLA accepts that in serious criminal cases security issues may arise which require precautions being taken in order to insure juror safety. In this regard, the CLA has two brief submissions to advance. First, a Trial Judge should only interfere with the customary openness and transparency of the jury system where an evidentiary basis clearly establishes an objective identifiable risk to the safety of the prospective or actual jurors. Second, any order fashioned by a trial judge in this regard should respect the need of the accused person to make informed decisions regarding juror selection. An example of a tailored juror anonymity order is found in Justice Ferguson's endorsement in *R. v. Jacobson* wherein the following conditions were imposed[57]:

1. The panel lists for the three groups of persons summoned to come for jury selection in this case or for any further persons summoned shall not be disclosed to anyone without my order.

2. The panel lists showing juror numbers, names, addresses and occupations shall be provided to each of the 4 counsel in this case if all 4 counsel give the court an undertaking that, unless the court orders otherwise:

    i. they will not disclose to their client or any other person whatsoever the names or addresses or any identifying information about any person on the panel lists except the person's juror number and occupation, and

    ii. They will not make copies of the panel lists.

3. The court staff will prepare the jury cards stating the juror's number, name, address and occupation. These will be accessible to no one but the Registrar and the trial judge.

4. On the day each panel or group arrives, defence counsel may before court convenes show their client the list for that panel or group and discuss the contents but shall not permit their clients to make any notes about the

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[57] 2005 CanLii 34538 (Ont. S.C.J.).

contents. This is the only exception to the undertaking in para. 2(ii).

5. Crown counsel may on the day each panel or group arrives show the content to the two instructing police officers, Det. Henderson and Det. Lynch and discuss the content but shall not permit those officers to make any notes about the contents. This is the only exception to the undertaking in para. 2.

6. After the opportunities mentioned in para. 3 and 4 counsel may not show or discuss the content of the lists with their respective clients except for the juror number and occupation. They may only disclose the juror number and occupation to their respective clients during jury selection.

7. During jury selection the Registrar will read out only the juror number and occupation. (s. 631(3.1))

8. When a person's card is chosen from the box that person will be asked to come to the front of the courtroom. The Registrar will show that person the juror card and ask the person, "Is the information on this card about you and is it correct?" If the juror answers in the negative then the juror will be asked to write the correct information on the card.

9. Except as permitted in para. 3 and 4 no one shall mention the name or residence of any person on the panel lists or any person chosen as a juror and all references to those persons shall be by juror number.

10. At the conclusion of the jury selection the panel lists will be collected from counsel and shredded. The Registrar and judge's lists and all juror cards will be sealed in an envelope and placed in the court file which shall not be opened without a judge's order.

11. No information or image that could disclose the identity of the members of the jury shall be published in any document or broadcast in any way.

12. When jurors are called in for the challenge procedure the Registrar shall ask the person: "Do you or any member of your family know the accused, Mr. Jacobson, or any member of his family ?"Have you ever seen Mr. Jacobson anywhere outside the courtroom?" If they answer either question in the affirmative the judge shall make an enquiry.

13. No information about the fact that hearings were held to deal with pre-trial motions and issues or about what happened at the hearings shall be published before the jury retires to consider their verdict unless the court makes an order permitting publication.

(iv) The importance to the administration of justice of proper (state) funding for the defence in criminal mega-trials

A common theme amongst several witnesses was that the proper management of "mega-trials" is in great part dependent on the conduct of the counsel involved. There is evidence before this Commission that suggests that in some instances counsel who take on these types of cases are either not sufficiently skilled or are unable to deal with the pressure of a long complex trial. The result is that matters are "over-litigated" likely to the detriment of all parties involved including the accused.

The CLA notes that the problem is not confined to the defence bar. Indeed, an over zealous prosecution will often foster a reactionary defence, especially by younger or less experienced defence counsel. The CLA submits that a recommendation aimed at creating incentives for experienced counsel to take on mega-trials would go some way to alleviating this problem.

In Ontario, Legal Aid Ontario pays counsel in a three tier tariff system depending on their years of experience. The top tier is reserved for counsel with 10 or more years experience in criminal law. The rate of hourly pay for legally aided counsel in this top tier is $96.75.[58] It is less than the rate charged for an hour of an articling student's time at a Bay Street law firm. The rate does not vary in accordance with the complexities of the case nor with the length of the trial. Simply put, the legal aid rate acts as a deterrent to those senior

[58] http://www.legalaid.on.ca/en/info/PDF/hourly_rate_chart.pdf - note that the rate for senior counsel taking on a case in remote Northern Ontario are paid at a rate of $106.65

defence counsel who could best serve the public interest in becoming involved in a terrorist (or any other complex serious criminal) mega-trial. It is not surprising, then, that defence counsel with 15 or 20 years experience are reluctant to take on a legally aided case that is hugely complex and anticipated to last for months, if not years. Apart from the adverse impact on the lawyers' physical health[59], such cases so seriously affect the health of the lawyer's practice that they are, colloquially speaking, often referred to as "practice killers".

The problems created by having a legal aid fee structure which discourages senior criminal defence lawyers from taking on complex mega-trials were highlighted by Professor Code in his testimony[60]:

> The -- first of all, on the whole issue of personal costs of these trials and the stress for counsel, let me agree with everything that Mr. Gaul said. And what this underlines is the importance of having senior counsel on these cases. The -- somebody at the symposium last night said that, "You can put up with somebody who you find obnoxious for a few days, but to put up with them for a year requires some ability to detach yourself from the process." And lawyers learn that with experience. So experienced counsel can do these big, long, difficult cases without melting down and, in the paper that I presented last night at the symposium on the mega-trial, we see over and over and over again the counsel breaking down; engaging in highly unprofessional conduct because they essentially crack under the pressure of these trials. So it leads us back into the earlier discussion we had about the need for the Law Societies and the Legal Aid authorities to come up with lists of the senior, competent counsel who are able to do these trials and to make sure that the trials are funded appropriately, so that they can have the support they need from juniors to do these trials.
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[59] See the Evidence of R. Krindle.

[60] Evidence of M. Code, Vol. 88, December 4, 2007, at pp. 11412-11413, 11415-11416. See also the Evidence of R. Krindle, Vol. 93, December 11, 2007 at pp. 12375-12376.

> Experienced counsel will have good judgment as to which the arguable motions are. What we have seen in the mega-trials that have got completely out of control is literally hundreds of motions or 30 or 40 or 50 motions. It is inconceivable to me how you can have 30 or 40 arguable motions in a criminal case. That simply reflects very, very poor judgment of counsel who are taking a scatter-gun approach and who don't know how to separate the wheat from the chaff.

Similar concerns were echoed in the testimony of Ralph Steinberg[61]:

> **MR. DORVAL:** In the context of a mega-trial, trial which would probably last more than a year, maybe a whole lot more, what is the importance of these legal aids reform?
>
> **MR. STEINBERG:** It's extremely important. In Ontario presently, the system allows 64 hours preparation for any trial. And if preparation is going to exceed 64 hours, and it's estimated that fees will be above $20,000, defence counsel have to meet with Legal Aid officials and have what's called a big case management conference where the defence counsel has to set out how it's intended to defend the case, what motions will be brought. Defence counsel has to justify their anticipated conduct of the case and work out a budget in excess of $20,000 for such a case. If the case is anticipated to exceed $75,000 in cost, then in addition to having a big case management conference, counsel has to meet with the Exceptions Committee which is composed of senior criminal defence counsel and Legal Aid officials and work out a budget and that's -- that budget is where they're set in stone; it won't be exceeded. And that's difficult because it's hard to encourage defence counsel in very long trials to take them on because there may be significant economic risks to them doing so.

In regard to the importance of properly funding the defence lawyers in lengthy complex serious cases, the CLA offers the following two recommendations:

- That the Legal Aid system be changed to provide a fourth tier of experienced criminal counsel who are designated by Legal Aid as sufficiently capable of taking on complex and lengthy criminal cases.

- That the Legal Aid hourly rate for the highest experience tier should be a rate that is

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[61] Evidence of R. Steinberg, Vol. 93, December 11, 2007, at pp. 12302-5.

close to the market rate for senior experienced criminal defence counsel or, at least, at a rate that such counsel will not be deterred from assisting the administration of justice in dealing with the most serious and complex cases.

V. Conclusion - No change for change's sake

In 1867, Canada was founded on the rule of law. Much has happened to our country in the past century and a half: Japanese internment camps, the Quebec October Crisis, the enactment of the *Charter of Rights and Freedoms* and the bombing of Air India Flight 182, to name just a few of the events which have shaped our nation. While critics of the *ATA* were quick to point out that Canada is rarely mentioned as a direct target of terrorist threats, the bombing attacks of the two Air India flights in 1985 clearly show that Canada is not immune from terrorist attacks. Regardless of whether the *ATA* should be considered a positive or a negative development for Canada, the fact remains that it is here and, moreover, that it is now likely here to stay. As this Inquiry has heard, along with the major legislative changes produced by the *ATA,* the state agencies responsible for the prevention, investigation and prosecution of terrorism have made significant changes to the way they do "business" in the new millenium. By all accounts, all of these changes (*i.e.*, both administrative and legislative) have resulted in dramatic improvements to the efficacy of the Canadian Government's response to the domestic threat of terrorism and to the prosecution of terrorism offences. While it would be foolish to think Canada is immune from the threat of terrorism, recent history has shown that the current system for prevention, investigation and prosecution of terrorist offences is working well. Unless the Commission is satisfied on a balance of probabilities that change to the current system is more likely than not to prevent

terrorism or to increase reliability of the verdicts in terrorism trials, any recommended changes to the recent advances in the investigation and prosecution of terrorism are at least as likely to, instead, have a detrimental impact. Simply put, there is a grave danger to making change for change's sake.

Our history has consistently demonstrated the folly of trying to legislate in response to national emergencies. As Stanley Cohen reminds us (at pp. 193-4 of his text, *supra*):

> Indeed, the intertwined history of Canada and the United States can be said, at too many junctures, to have shown a tendency toward overreaction to perceived threats to national security and the trampling of human or civil rights. There are some who insist that our governments have already gone too far in displacing the constitutional and legal rights that we cherish. Their fears and warnings should not easily be dismissed for, if we have learned anything from our history, it is that embracing measures too ardently can ultimately damage the fabric of the very society we wish to preserve.

There is nothing about the Air India case which would justify restricting an accused`s right to access information nor that would justify allowing the Crown to more easily rely upon more hearsay information. The trial of Malik and Bagri in the Air India case is a paradigmatic example of the important role which contextual and background information plays in a fair and reliable assessment of the prosecution's case. As Josephson J. noted in his reasons for acquitting both Malik and Bagri, absent any physical evidence purporting to link Malik or Bagri to the terrorist attacks, the Crown`s case depended entirely on witness testimony, witnesses whose credibility Josephson J. found fell "markedly short" of the requisite standard of proof. Any additional procedural or evidentiary hurdle which could have detracted from the pool of information relevant to the witnesses' reliability would have risked impairing the reliability and fairness of the verdicts rendered by Justice Josephson in

this case. (It is noteworthy that the Crown never saw fit to appeal against the verdicts on the basis of any of Josephson J.'s evidentiary or procedural rulings; that is, the Crown accepted that Josephson J. correctly applied the traditional rules of evidence and procedure.)

In closing, the CLA strongly urges this Commission to find the courage to stand pat with the rules and practices which the Canadian Government has dealt out over the past few years and to not overreact by recommending changes to fundamental rules of the criminal process. The legacy of the victims on Air India Flight 182 must not be a nation governed by a regime of draconian (and unnecessary) powers which serve mostly to produce unfair and unreliable criminal trials. That is what the terrorists who destroyed Flight 182 would have wanted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE CLA:

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