COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182

FINAL SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA VOLUME III OF III

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INTRODUCTION

1. An aim of this Inquiry is to make recommendations to help ensure that Canada has sufficient safeguards to prevent a tragedy like Air India from occurring in the future. It is submitted that the Commission will best be able to fulfill this goal by reviewing the current statutory, procedural and policy framework that shapes the Canadian response to terrorism. To this end, the Commission called evidence from expert witnesses who testified alone or in panels about the wisdom of various reforms. Commission counsel also drafted comprehensive dossiers that reviewed the law and policy at stake.

2. The Government of Canada provides the following submissions consisting of 4 subsections, each responding to a different Term of Reference: (1) Intelligence to Evidence; (2) Constraints on Terrorist Financing; (3) Witness Protection; and (4) Challenges Presented by Prosecution of Terrorism Cases including Mega-Trials and Three Judge Panels.

3. Each of these sections attempts to assist the Commission by offering legal and policy perspectives that the Attorney General feels must be considered in order to make fully informed and helpful recommendations on the Terms of Reference. The Attorney General will refrain from offering suggestions about what policy recommendations the Commission should make to the Governor in Council, but wishes to aid the Commission by offering the governmental perspective and experience on these important issues.

I. INTELLIGENCE TO EVIDENCE

Term of Reference

4. The 3rd Term of Reference instructs the Commission to investigate the problem of using intelligence as evidence:

> **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.**

Preliminary Comments

5. These submissions will primarily focus on the use of intelligence in a criminal prosecution.

6. This may involve an assumption that the Government of Canada has determined that the intelligence in question ought to be relied upon for a prosecution – which may not always be the case given the importance of maintaining the strict confidentiality of intelligence in other contexts (advice to government, disruption, policy, foreign policy, etc.).

7. There are good reasons in some situations for keeping intelligence separate from law enforcement in a modern democracy. This theme is developed extensively in *Privacy, Crime and Terror - Legal Rights and Security in a Time of Peril* by

Stanley Cohen.[1] Since law enforcement and intelligence have different purposes, roles, operational techniques and safeguards, their participation in the legal system must also be kept legally distinct:

> 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…
>
> Therefore, in the interests of preserving and respecting basic rights and liberties, these two spheres should be kept conceptually and analytically distinct.[2]

8. Mr. Cohen has drawn a rough analogy between the relationship between regulatory investigations and criminal prosecutions on the one hand, and the relationship between intelligence to evidence on the other:

> Seemingly, if the Supreme Court, through its decisions, is capable of establishing and maintaining a rigorous and meaningful separation between the regulatory and criminal processes, it also should be capable of achieving the same clarity with regard to the divide between the activities related to the criminal process and national security activities.[3]

9. It must also be borne in mind that besides prosecutions, there are other legal proceedings involving the use of intelligence as evidence: security clearance proceedings before SIRC, immigration security certificate cases, and charities

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1 Butterworths; Toronto, 2005.

2 *Ibid.,* p. 54.

3 *Ibid.,* p. 92.

registration litigation and charities de-registration are some examples. These submissions will not deal with these other proceedings.

Background: Intelligence to Evidence

10. The Inquiry heard testimony from serving and retired representatives of intelligence agencies and enforcement agencies as well as from academics and government representatives on the complex relationship between the collection of information by an intelligence agency and the use of that information as evidence in a criminal trial.

11. The post-charge use of intelligence as evidence in a criminal prosecution involving terrorism raises issues regarding the relationship between intelligence agencies and law enforcement agencies; in particular, the relationship between CSIS on the one hand and the police and Crown prosecutors on the other. However, it is vital to bear in mind that serious issues regarding the use of intelligence as evidence would exist even if CSIS had never been created and if the RCMP Security Service was still Canada's security intelligence service. Difficulties in using intelligence as evidence bedevil all western democracies because they are inherent in a legal system that respects the Rule of Law.

12. As prosecutor, the Crown is subject to a disclosure obligation - as determined in *R. v. Stinchcombe*[4] – which obligation however is limited by any applicable privileges, in particular, the protection of state privilege with respect to

[4] *R. v. Stinchcombe* [1991] 3 S.C.R. 326.

intelligence information that, if disclosed, would be injurious to international relations, national defence or national security (in accordance with the procedure set out in section 38 of the *Canada Evidence Act*).

13. Professor Roach observed that "the importance and difficulty of the many different issues raised by the relation between security intelligence and evidence cannot be underestimated."[5] He went on to state that "taken together they raise fundamental issues about the viability of criminal prosecutions for terrorism as well as the important role of security intelligence that flows within and between governments."[6]

14. The issue of whether and how information, produced or acquired by domestic intelligence agencies, can be used as evidence in criminal proceedings in Canada is a complex and long-standing issue, which stems in large part from the fundamental separation of mandates of intelligence gathering agencies and law enforcement agencies, e.g., CSIS and the RCMP.

15. By reason of the differing mandates of intelligence agencies and law enforcement agencies, the information collected by an intelligence agency is collected and used for a different purpose than information collected by a law enforcement agency. Information collected by an intelligence agency is principally intended to advise the government about threats and provide the

5 Exhibit P-309, Roach, K. (2007). *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, p.3.

6 Exhibit P-309, *supra*, at p. 3.

government with the opportunity to take preventive action. As Professor Roach noted in his paper, intelligence is not collected in the same manner and for the same purpose as it would be by a law enforcement agency:

> "… security intelligence is not collected with a view to its admissibility as evidence in court as proof of wrongdoing or its disclosure to the accused. Security intelligence may be based on hearsay reports of what some people have reported that they have heard others say. Security intelligence may also reveal highly sensitive and confidential methods and sources of covert intelligence gathering and other information that if released could harm Canada's national security or defence interests or its relations with other countries. Finally, security intelligence may be collected by methods that may not satisfy constitutional or common law standards that apply to the collection of evidence."[7]

16. Although cases in which intelligence is intended to be used as evidence are not common, there are times when law enforcement would like to be in a position to use intelligence for evidentiary purposes. Most often, law enforcement will use intelligence to initiate an investigation, and then proceed to gather its own evidence. For example, intelligence will usually be used in a document filed in support of a warrant application. As has already been noted, the difficulty of the many different issues raised by the relation between intelligence and evidence and the need to protect intelligence are not unique to Canada.

17. Intelligence can come from various sources and each of these sources may require a different process when it comes to making the information admissible as evidence. For example, in the case of foreign intelligence, the receiving

[7] Exhibit P-309, *supra*, at pp. 1-2.

Canadian agency knows the general source of the intelligence and is able to assess its value through its working relationship with the foreign agency in question. However, the Canadian intelligence agency may not know the specific source of the foreign agency's information, meaning that a definitive assessment of reliability is impossible.

18. Also, since foreign and domestic intelligence agencies collect information for a different purpose and use a different standard for collection, their intelligence may contain hearsay that is not directly admissible as evidence.

19. In short, the differing mandates of intelligence agencies and law enforcement agencies mean that intelligence is collected by an intelligence agency for the purpose of advising government, whereas law enforcement agencies collect evidence for the purpose of the prosecution of criminal offences, including criminal prosecutions involving terrorism.

20. During the 1980's and early 1990's, the nature of the threat to Canada and national governments changed from an emphasis on state-sponsored espionage to an emphasis on counter-terrorism.[8] As a result of a change in the profile of terrorism and the array of tactics that is used by terrorists, the consequences of such terrorist acts have increased and have moved from symbolic attacks to attacks by religious/national groups seeking international attention by a 'body

[8] Evidence of Geoffrey O'Brian, Transcript, Vol. 17, p. 1553.

count'.[9] Also, the change in structure established by the *Canadian Security Intelligence Service Act* did not resolve the debate about the extent that information gathered by an intelligence agency can be used in support of a criminal investigation. This debate was noted by Professor Roach in his paper that was prepared for the Inquiry:

> "The differences between security intelligence and admissible evidence present several challenges for terrorism prosecutions. A basic and largely unexplored question is whether security intelligence gathered by CSIS, CSE or a foreign intelligence agency can be admitted as evidence in a criminal trial. This question involves the different standards that are used to obtain security intelligence and evidence under the Criminal Code."[10]

21. One of the most fundamental responsibilities of a government is to ensure the security of its citizens.[11] The Supreme Court of Canada has observed that "all government must maintain some degree of security and confidentiality in order to function".[12] Advice relating to intelligence information about anticipated threats is crucial to government. At the same time, the protection of the rights of its individual citizens in accordance with the principles of fundamental justice is also a fundamental responsibility of a government.

22. The importance of protecting intelligence information the disclosure of which would harm international relations, national defence or national security has

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9 Evidence of Bruce Hoffman, Transcript, Vol. 19, pp. 1788 and 1804.

10 Exhibit P-309, *supra*, at p. 2.

11 *Charkaoui v. Canada (Minister of Citizenship and Immigration)* 2007 S.C.R. 9.

12 *R. v. Thomson*, [1992] 1 S.C.R. 385.

been long recognized by Parliament and by Canadian courts. This was re-affirmed by the Supreme Court of Canada in respect of the specialized proceedings contemplated by the *Privacy Act* regarding sensitive information:

> The purpose of the exemption contained in s. 19(1)(a) and (b) (of the *Privacy Act*) is to prevent an inadvertent disclosure of information obtained in confidence from foreign governments or institutions. This provision is directly aimed at the state's interest in preserving Canada's present supply of intelligence information received from foreign sources. Section 21 is aimed at Canada's national security interests. The appellant acknowledges that the state's legitimate interest in protection of information which, if released, would significantly injure national security is a pressing and substantial concern. This Court recognized the interest of the state in protecting national security and the need for confidentiality in national security matters in *Chiarelli*, *supra*, at p. 745.[13]

23. The Supreme Court of Canada has re-affirmed in *Charkaoui* that the procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context.[14] The Court, citing its decisions in *Chiarelli,*[15] *Ruby*[16] and *Suresh,*[17]noted that it "has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual.[18]

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13 *Ruby v. Canada*, [2002] 4 S.C.R. 3, at paras. 43, 44.

14 *Charkaoui v. Canada (Minister of Citizenship and Immigration)* 2007 S.C.R. 9, paragraph 27.

15 *Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 S.C.R. 711.

16 *Ruby v. Canada*, [2002] 4 S.C.R. 3, at paras. 43, 44.

17 *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.

18 *Charkaoui v. Canada (Minister of Citizenship and Immigration)* 2007 S.C.R. 9, paragraph 58.

24. A conflict arises when the public interest in the effective prosecution of criminal offences would require the disclosure of intelligence information which would be injurious to international relations, national defence and national security. This, in turn, creates a perennial tension between the constitutional right of an accused in a criminal proceeding to receive disclosure of relevant information and the need to prevent harm to Canada's international relations, national defence or national security that would result from such disclosure.

25. The incidence of this tension has increased since the creation of criminal offences for various forms of terrorist activity. The inclusion of information from domestic intelligence agencies in police investigations requires that special attention be paid to such information; the information may be subject to a claim of privilege or a caveat, in the case of information received from a foreign intelligence agency.

26. This conflict and the application of the principles of fundamental justice in relation to them are shared with other western democracies and, as noted previously, the need to protect intelligence information is not unique to Canada. A key element of fundamental justice is disclosure of the case that a person has to meet.

27. This principle is formulated in different ways in different jurisdictions. The scope of disclosure of intelligence information in a criminal case will vary by the application of the varying disclosure tests. All of the disclosure regimes however are intended to avoid wrongful convictions as well as to protect

privileges, including the state privilege for the protection of intelligence information.

28. In this regard, Canada does not stand alone in providing a means for the state to protect intelligence information the disclosure of which would injure the interests of national security, international relations, or national defence. Other countries with a common-law tradition have procedures for the protection of such information including, in some cases, provision for *ex parte* proceedings.

29. In Canada, as with comparable democracies, "the criminal process must also evolve to take account of the particular challenges of terrorism prosecutions. There is a need for efficient and fair means to ensure that only truly relevant information must be disclosed to the accused. There must also be an efficient and practical venue for the state to assert its interest in national security confidentiality."[19]

30. The "means" for ensuring the disclosure of only relevant information and the "venue" for the state to assert its interest in national security are accomplished in Canada through the use of the constitutionally-mandated disclosure rules in *Stinchcombe*[20] and the procedure set out under section 38 of the *Canada Evidence Act* (CEA).

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19 P-309, *supra*, note 3, p. 4.

20 *R.v. Stinchcombe* [1991] 3 S.C.R. 326.

The Process of Disclosure

31. It is a fundamental element of the fair and proper operation of the Canadian criminal justice system that an accused person has the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information. Relevance, in this context, has been found by the courts to mean that there is a reasonable possibility of the information being useful to the accused person in making full answer and defence.

32. This right to disclosure flows from section 7 of the *Canadian Charter of Rights and Freedoms*, which provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The right to proper disclosure is recognized in particular under principles of fundamental justice as necessary to the accused person's ability to defend himself or herself against the charges that have been laid.

33. The main legal principles applying to the disclosure of information in criminal matters were set down by the Supreme Court of Canada in the landmark case of *Stinchcombe*.[21] Subsequently, these rules have been elaborated and applied in numerous cases. More recently, in *R. v. Taillefer, R. v. Duguay*[22] Mr. Justice LeBel reiterated the key principles as follows:

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21 *R. v. Stinchcombe* [1991] 3 S.C.R. 326.

22 [2003] 3 S.C.R. 307.

> 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…. 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.

The obligation to disclose "relevant" information has been construed broadly by Canadian courts. This was recognized by Mr. Justice LeBel in ***R. v. Taillefer, R. v. Duguay***,:

> 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).

The Challenges Presented by *Stinchcombe*

34. The Crown's disclosure obligation can create significant challenges. Proper disclosure requires managing vast quantities of information within the justice system, i.e. in the possession of the Crown. The task is further complicated by the high degree of sensitivity that is attached to certain relevant information, including privacy concerns, the need to protect victims, witnesses and informants and the need to protect national and foreign government confidences.

35. The challenges involved in managing the sheer volume of information are highlighted most clearly in large and complex cases. Such situations frequently arise, for example, in cases related to terrorism or organized crime, due to the sophistication of the alleged criminal activities, as well as the sophistication of the investigation techniques (like wiretaps). These and other types of large and complex cases can result in an obligation to deal with vast quantities of documents and other pieces of information, such as sound and video recordings. As well, there is an added dimension of complexity flowing from international investigations relying on information or evidence obtained from collaborating agencies in different jurisdictions.

36. However, even in small and moderately sized cases disclosure can be a challenge for the justice system, given the number of such proceedings. Issues related to the sensitivity of information and the need to prevent misuse, for example, can be of concern regardless of the size of the case.

37. Meeting the disclosure obligation, especially in large and complex cases, imposes considerable burdens in human resources and costs. Difficulties in ensuring proper disclosure have led to delayed trials, and even to proceedings being stayed. Disputes over what information should be disclosed and the timeliness and manner of disclosure are not uncommon, and the need for judicial resolution imposes additional costs on parties and the justice system as a whole; the result being additional delays in having the merits of matters heard.

38. In his paper, Professor Roach stated that "although *Stinchcombe* is often cited for the broad proposition that all relevant information in the Crown's possession must be disclosed to the accused, the decision itself is more nuanced."[23] He goes on to quote from the reasons of Sopinka J. in *Stinchcombe*:

> In *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the Court ([1991] 1 S.C.R. 763). She went on to add: "This Court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 774).
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> As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation.[24]

39. Also, it must be noted, there is no constitutional right to adduce information that is privileged. An exception to the disclosure requirements established in the case of *Stinchcombe* is information that is the subject of a claim of privilege. The claim of privilege was an issue in the case of *Ribic* in the Federal Court. In that case, the position of the Attorney General of Canada was clearly stated:

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23 P-309, *supra*, note 3, p. 88.

24 [1991] 3 S.C.R. 326.

> … whether it is informer privilege, solicitor-client privilege or State secrecy privilege, all these privileges are governed by the law and the rules of privilege. They are fundamental to the basic values that each one of them protects and promotes. So the information that they protect can only be disclosed when the innocence of the accused is at stake.[25]

40. In *Ribic*, Justice Létourneau of the Federal Court of Appeal quoted McLachlin J., as she then was, concerning the "innocence at stake" exception to disclosure of informer privileged information:

> After a review of the importance to the administration of justice and the scope of the informer privilege, McLachlin J., as she then was, wrote for a unanimous Court at page 295:
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> Informer privilege is subject only to one exception, known as the "innocence at stake" exception.
>
> She went on to say at pages 295, 298 and 299 that "the only exception to the privilege is found where there is a basis to conclude that the information may be necessary to establish the innocence of the accused".[26]

41. Justice Létourneau went on to offer his opinion (without conclusively deciding) that the innocence at stake exception should also apply to national security privileged information because of the important interests involved. [27]

Section 38 of the *Canada Evidence Act*

Introduction to Section 38

42. The hearing process mandated by s. 38 of the *CEA* is the mechanism by which state privilege, as it applies to issues of injury to national security, national

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25 *Ribic v. Canada (Attorney General)* 2003 FCA 246, paragraph 25.

26 *Ribic v. Canada (Attorney General)* 2003 FCA 246, paragraph 24.

27 *Ribic v. Canada (Attorney General)* 2003 FCA 246, paragraph 27.

defence and international relations, is adjudicated and determined. Also, as noted previously, the rights of the individual are at the heart of the jurisprudence the Federal Court has established as the test to be met when balancing the competing interests.

43. The Federal Court of Appeal has determined that among the several factors relevant to this balancing exercise is whether the information is needed to prove the innocence of the accused -- or whether it establishes a fact crucial to the defence.[28] In either situation, the state's interest in not disclosing information may be outweighed by the interests of the accused if these tests are met within the context of the underlying criminal charge.

44. In practical terms, intelligence information relating to international relations, national defence or national security information may include information that reveals or tends to reveal:

- the identity of a confidential source of information
- targets of an investigation
- technical sources of information
- methods of operation / investigative techniques
- the identity of covert employees
- telecommunications and cipher systems (cryptology)
- confidential relationship with a foreign government / agency

[28] *Ribic v. Canada (Attorney General)* 2003 FCA 246 paragraphs 24-27.

45. It should be noted that this list is not exhaustive and the assessment of injury claims needs to reflect the context of the underlying proceeding.

Three Steps Regarding Disclosure

46. In *Khawaja*, Chief Justice Richard of the Federal Court of Appeal examined the three step procedure set out by the FCA in *Ribic*:

> The first is the issue of relevance. At this first step, the role of the judge … is:
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> The first task of a judge hearing an application is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the Stinchcombe rule, that is to say in the case at bar information, whether inculpatory or exculpatory, that may reasonably be useful to the defence: R. v. Chaplin, [1995] 1 S.C.R. 727, at page 740. This is undoubtedly a low threshold. This step remains a necessary one because, if the information is not relevant, there is no need to go further and engage scarce judicial resources. [para. 17]
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> Where the judge is satisfied that the information is relevant, the next step pursuant to section 38.06 is to determine whether the disclosure of the information would be injurious to international relations, national defence or national security. … He must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence: Home Secretary v. Rehman, [2001] 3 WLR 877, at page 895 (HL(E)). [18]
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> …
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> An authorization to disclose will issue if the judge is satisfied that no injury would result from public disclosure. The burden of convincing the judge of the existence of such probable injury is on the party opposing disclosure on that basis. [20]
>
> Upon a finding that disclosure of the sensitive information would result in injury, the judge then moves to the final stage of the inquiry which consists in determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The party seeking disclosure of the information bears the burden of proving that the public interest scale is tipped in its

favour. [21][29]

47. In balancing the interests at stake in respect of an underlying criminal proceeding, a number of factors have been considered by the courts. One such factor is the need to establish that the information is crucial to the defence.[30] In determining whether the importance of disclosure was outweighed by the importance of protecting the specified public interest, the Federal Court of Appeal took into consideration

> … the factors enumerated in R. v. Kahn, [1996] 2 F.C. 316 (F.C.T.D.): the nature of the public interest sought to be protected by confidentiality, the seriousness of the charge or issues involved, the admissibility of the documentation and the usefulness of it, whether there were other reasonable ways of obtaining the information, whether the disclosure sought amounted to general discovery or a fishing expedition and whether the information will probably establish a fact crucial to the defence. Obviously, the last two factors impose a higher threshold than simple relevancy. [31]

Safeguards

48. Section 38 achieves a nuanced approach that respects the interest of the state in maintaining the secrecy of sensitive information and in protecting the rights of the accused to a fair trial. At the same time, the value of secrecy is not absolute. In accordance with the requirements of fundamental justice, the s. 38 procedure "recognizes the right of the criminal trial judge to order whatever remedy is

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29 *Khawaja v. Canada (Attorney General)* 2007 FCA 388, at paragraphs 36, 40 and 43.

30 *Ribic v. Canada (Attorney General)* 2003 FCA 246, paragraph 22.

31 Ibid.

required in light of non-disclosure orders in order to protect the fairness of the accused's trial."[32]

49. In *Khawaja*, Justice Pelletier of the Federal Court of Appeal noted that "… where it is impossible to meet the requirement of fundamental justice in the usual way, adequate substitutes for the abridged procedural protections must be found."[33] The Federal Court of Appeal went on to describe other substitutes and procedural safeguards:

> Relying on the decision of the Supreme Court in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paragraphs 57 to 59 (*Charkaoui*), the applications judge identified subsequent disclosure, judicial review and the right of appeal as adequate substitutes.
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> Additional adequate substitutes include the fact that the Attorney General may decide to disclose parts of the information. Further, the judge hearing the section 38 application has a discretion to release the information in a form most likely to limit injury to national security. In addition, the judge presiding over the criminal trial also has a discretion to take all necessary measures to ensure fairness to the accused, including ordering a stay of proceedings. The applications judge went on to note that subsection 38.11(2) permits the Court to hear ex parte representations from the person seeking disclosure of the Secret Information. Finally, the applications judge noted that the three step analysis of the appropriateness of disclosure elaborated in this Court's decision in Canada (Attorney General) v. Ribic (F.C.A.), 2003 FCA 246, [2005] 1 F.C.R. 33 (Ribic), is itself a procedural safeguard in that it establishes a balanced and nuanced approach to assessing the right to disclosure.

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32 *Supra*, note 3, p.43.

33 *Khawaja v. Canada (Attorney General)* 2007 FCA 388, at paragraphs 75.

> Having identified these procedural safeguards, the applications judge accorded particular importance to a further safeguard, specifically, the Court's discretion to appoint an amicus curiae (there is no provision for the appointment of an amicus in section 38 – author's addition)."to read, hear, challenge and respond to the ex parte representations made on behalf of the government.": see paragraph 50 of the applications judge's reasons. … .
>
> The applications judge pointed as well to the jurisprudence of the Federal Court itself, specifically Harkat (Re) (F.C.), 2004 FC 1717, [2005] 2 F.C.R. 416, in which Justice Dawson held, at paragraph 20 of her reasons, that "... a power may be conferred by implication to the extent that the existence and exercise of such a power is necessary for the Court to properly and fully exercise the jurisdiction expressly conferred upon it by some statutory provision."
>
> In the result, the applications judge found that "… section 38 … achieves a nuanced approach that respects the interest of the state to maintain the secrecy of sensitive information while affording mechanisms which respect the rights of the accused, including the right to full answer and defence, the right to disclosure and the right to a fair trial in the underlying criminal proceeding."[34]

50. In *Khadr v. Canada (Attorney General)*, Justice Mosley, in appointing an *amicus curiae*, refers to and quotes Chief Justice Lutfy in *Khawaja*:

> In the decision under appeal, *Canada (Attorney General) v. Khawaja*, 2007 FC 463, Chief Justice Allan Lutfy cited the existence of a discretion on the part of the presiding judge to appoint an amicus as a significant factor, stating the following at paragraph 57 of his reasons:
>
> > In my view, the Court's ability, on its own initiative or in response to a request from a party to the proceeding, to appoint an *amicus curiae* on a case-by-case basis as may be deemed necessary attenuates the respondent's concerns with the ex parte process. This safeguard, if and when it need be used in the discretion of the presiding judge, further assures adherence

[34] *Khawaja v. Canada (Attorney General)* 2007 FCA 388, at paragraphs 76-79.

> to the principles of fundamental justice in the national security context.
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> Chief Justice Lutfy noted, at paragraph 49, that a variant of the amicus model, although not identical to the traditional conception of that office, had been used in *Canada (Attorney General) v. Ribic*, 2003 FCA 246. In that case, counsel for the Attorney General on the section 38 application was appointed to act on behalf of the applicant for the purpose of examining two witnesses in camera" [35]

51. The government has acknowledged that the Federal Court has an inherent discretion to appoint an *amicus curiae* and the Attorney General of Canada has characterized the *amicus curiae* as a legal expert to address legal issues relating to national security on behalf of the Court and not on behalf of the accused or the litigant.

52. One of the recommendations arising out of the review by the House of Commons committee of the *ATA* was that a special advocate be added to the s. 38 procedure of the *CEA*. In the view of the House of Commons committee, the special advocate's role would be to protect a person's interests in certain proceedings when evidence is heard in the absence of the public and of the person and their counsel. The special advocate may challenge the claim made by the government to the confidentiality of evidence as well as the relevance, reliability, sufficiency and weight of the evidence and may make submissions, cross-examine witnesses and, with the judge's authorization, exercise any other powers necessary to protect the person's interests.

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[35] *Khadr v. Canada (Attorney General)* 2008 FC 46, at paragraphs 12-13.

53. The Government response to this recommendation was:

> "There remain a number of challenges and considerations related to whether to introduce a special advocate for all in camera, ex parte proceedings, which involve the limited disclosure of information and evidence. Not all processes engage the *Charter* rights of individuals as in the Charkaoui case or to the same extent as in that case. Some of these issues have arisen in other litigation, such as the challenge to section 38 of the CEA in ***R. v. Khawaja***, and in other processes such as the Air India Inquiry.
>
> At the present time, the Government believes that further study of the use of special advocates in other processes is required."[36]

54. Finally, section 38 of the CEA provides other significant and interdependent safeguards relating to the manner in which the Court is able to rule.

55. Subsection 38.06(2) of the CEA provides that where the public interest in disclosure outweighs the public interest in non-disclosure, the judge may, by order, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

56. Subsection 38.06(4) of the CEA allows the Federal Court judge to issue an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection 38.06(2).

[36] Government response to ATA review by the House of Commons.

57. Additional safeguards are provided under sections 38.08 and 38.09 of the CEA.

Section 38.08 provides for an automatic review to the Federal Court of Appeal:

> 38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(*d*), the judge shall refer the order to the Federal Court of Appeal for review.

58. Subsections 38.09(1) and (2) provide for the appeal of an order within an expedited time period:

> 38.09(1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.
>
> (2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

59. These two provisions maintain the public interest in a trial proceeding to verdict in a timely manner and, at the same time, may preclude recourse to the use of a prohibition certificate by the Attorney General of Canada under section 38.13 of the CEA.

60. Under ss. 38.13 and 38.131 of the CEA, the prohibition certificate process itself incorporates safeguards to protect the rights of an accused to a fair trial:

- the certificate can only be issued personally by the Attorney General of Canada;
- the certificate can only be issued after a judicial determination that the information must be disclosed - it cannot be issued at any time;

- the certificate is subject to review by a judge of the Federal Court of Appeal to ensure that the information subject to the disclosure prohibition in fact relates to the information obtained in confidence from a foreign entity or relates to national defence or national security;
- the Federal Court of Appeal judge has the power to vary, cancel or confirm the certificate as issued;
- the certificate must be published without delay in the *Canada Gazette*; and
- the certificate expires after fifteen years, though it may be reissued with renewed publication in the *Canada Gazette*.

61. Section 38.14 of the *CEA* permits a judge presiding over a criminal trial or proceeding to make any order he or she considers appropriate to protect the right of an accused to a fair trial. Section 38.14 reads:

> 38.14(1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.
>
> (2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:
>
> (a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
>
> (b) an order effecting a stay of the proceedings; and
>
> (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

Third Party Rule

62. As a general practice and, as appropriate, the Attorney General of Canada seeks a waiver from third parties regarding the disclosure of information received from them and this is conducted on a case-by-case basis. This is another example of the ongoing obligation and active involvement of the Attorney General of Canada under the s. 38 procedure to oversee the administration of justice in Canada.

63. Such information is often provided on the express condition that it is not to be disclosed. Canada can only provide guarantees to another state that information will not be disclosed if the ultimate decision to do so is vested in the Attorney General of Canada and not the courts. In recent litigation concerning s. 38 of the *CEA*, the federal Crown made the following argument:

> The consequences of a breach of the third party rule would be significant to Canada, given that it is generally a net importer of sensitive information. While other states may still be willing to share information with Canada, their calculations of risk and benefit might well be different in many cases if they considered as potentially unreliable Canada's ability to guarantee the protection of information that was given to it in confidence. This would, in turn, impair Canada's ability to combat terrorism.[37]

64. Noël J. held in *Canada v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to the Maher Arar)* that the protection of the

[37] Memorandum of Fact & Law (Constitutional Question), *Attorney General of Canada and Mohammad Momin Khawaja*, Federal Court, Court File No. DES-2-06.

Third Party Rule is fundamental to Canada's law-enforcement and intelligence capacity:

> This being said, in my view the third party rule is of essence to guarantee the proper functioning of modern police and intelligence agencies. This is particularly true given that organized criminal activities are not restricted to the geographic territory of a particular nation and that recent history has clearly demonstrated that the planning of terrorist activities is not necessarily done in the country where the attack is targeted so as to diminish the possibility of detection. Consequently, the need for relationships with foreign intelligence and policing agencies, as well as robust cooperation and exchanges of information between these agencies, is essential to the proper functioning of policing and intelligence agencies worldwide.
>
> Furthermore, I note that information sharing is particularly important in the Canadian context as it is recognized that our law enforcement and intelligence agencies require information obtained by foreign law enforcement and intelligence agencies in order to nourish their investigations. It has been recognized time and time again that Canada is a net importer of information, or in other words, that Canada is in a deficit situation when compared with the quantity of information it provides to foreign nations.[38]

Use of Intelligence as Evidence

65. Section 38 of the *CEA* provides for a process to adjudicate claims of state privilege on the grounds of injury to national security, national defence or international relations. It sets out a code of procedure to provide guidance to all parties and persons involved in proceedings (criminal, administrative or civil) in which there is a possibility that intelligence information injurious to

[38] *Canada v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to the Maher Arar)*, 2007 FC 776 at paras. 77-78.

international relations or national defence or national security would be disclosed.

66. As a consequence of the enactment of the *Anti-terrorism Act*, s. 38 of the *CEA* was repealed and replaced with new ss. 38.01 through 38.16.[39] The new provisions continue to emphasize balancing the competing public interests in disclosure and non-disclosure and have extended the range of options regarding the disposition of intelligence information. The protection of the public continues to be a driving force in the legislative framework.

67. Elements that the *Anti-terrorism Act (*ATA*)* added to the s. 38 procedure include:

- expressly contemplating various options for judges to promote the public interests in disclosures and in protecting intelligence information relating to international relations or national defence or national security;
- providing for the possibility of the Attorney General of Canada personally issuing a certificate to prohibit the disclosure, but only after an order or decision that would result in the disclosure of intelligence information relating to international relations or national defence or national security; and
- providing the power to the Attorney General of Canada to establish exclusive authority in the Attorney General of Canada with respect to the conduct of a prosecution.

68. Under ss. 38.05(4) and (5), after finding that privileged information ought to be released, in certain circumstances, the Federal Court can make an order of admissibility of the information even if the rules of Court would not normally

[39] *Anti-terrorism Act*, S.C. 2001, c. 41.

permit it to be admitted. These provisions have yet to be applied in Canada, but they may prove to be a useful tool in using intelligence as evidence.

69. The reforms were built on the former *CEA* scheme. The information at issue and the interests to be protected remain the same. These matters continue to be heard by the Chief Justice of the Federal Court or by a judge of that Court designated by the Chief Justice for that purpose. For the most part, the same appellate processes continue to apply.

70. The amendments to s. 38 of the *CEA* are intended to improve the scheme relating to the use and protection of intelligence information under s. 38. They are designed to introduce greater flexibility into the system, offer the opportunity for evidentiary issues to be resolved early on in the proceedings, and improve the federal government's ability to protect from disclosure, and for parties to use, intelligence information relating to international relations or national defence or national security in proceedings, in a manner that is consistent with the fair trial rights of parties.

71. The procedures are intended to facilitate the proper and timely handling of intelligence information relating to international relations, national defence or national security by ensuring that early and effective notice is provided to the Attorney General of Canada who is responsible for assessing whether its disclosure would be harmful.

Challenges in the Process

72. In adversarial systems, the rules of disclosure to the accused are a safeguard against wrongful convictions. In Canada, the scope of disclosure in a terrorism prosecution may include extensive intelligence information. In these cases, the proposed disclosure must be carefully vetted by the prosecution.

73. Intelligence information that is held by a law enforcement agency, which falls within the scope of being "not 'clearly irrelevant'", as that standard is understood in *Stinchcombe,*" continues to be subject to the ongoing disclosure obligation of the prosecution under *Stinchcombe*.[40]

74. Such intelligence information when connected to the holdings of an intelligence agency can be voluminous and the limits of relevance are hard to define. In the case of *Khawaja*, Justice Mosley in the Federal Court made the following observation in regards to this aspect of disclosure:

> At first impression, the material in the twenty-three binders consists, in large part, of the miscellaneous flotsam and jetsam that collects in police files in the course of a major criminal investigation. It is not evidence which the Crown will seek to introduce against the accused at trial. That evidence has been disclosed to the respondent. Nor is the information evidence of an exculpatory nature. Indeed it is difficult to see how it could be of assistance to the defence. The only realistic possibility in my view is that some of this material might be used, as counsel for the respondent has suggested, in cross-examination of witnesses at trial. I find even that use doubtful, having read each of the several thousand pieces of information. [32]

[40] *Canada (Attorney General) v. Ribic* 2002 FCT 839.

75. The tremendous amount of disclosure that can be expected in national security cases has led to the suggestion that there should be reforms that reduce this quantity to a more manageable level. On the point of the volume of disclosure, Professor Roach in his paper quoted from the reasons of Sopinka J. in *Stinchcombe*:

> …discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant ... .[41]

76. Also, in support of this volume aspect of disclosure, Professor Roach in his paper made the following statements:

> "Although all material evidence and information should be disclosed, the Crown has the ability, and indeed the obligation, not to disclose "what is clearly irrelevant."
>
> …
>
> "It is, however, important to recall that Stinchcombe contemplated that only evidence that was relevant to the case and the accused's right to full answer and defence would be subject to disclosure. The Crown had a reviewable discretion not to disclose irrelevant or privileged evidence and to delay disclosure for important reasons such as witness safety or ongoing investigations. It is important that the police and security intelligence agencies understand the precise demands of Stinchcombe and that they neither over-estimate or under-estimate its requirements. Misunderstandings of Stinchcombe may be in part related to the fact that its standards have yet to be codified in accessible legislation."
>
> …
>
> "Evidence that cannot reasonably be used by the accused is not subject to Stinchcombe disclosure obligations."[42]

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41 [1991] 3 S.C.R. 326.

77. In the above quote, Professor Roach raised the issue of adopting the standards articulated in *Stinchcombe* into legislation. However, he acknowledged the difficulties associated with such an approach:

> "Placing too much reliance on legislating narrower disclosure or production rights or expanding privileges may invite both Charter challenges and litigation over whether information fits into the new categories. Rather than attempting the difficult task of imposing abstract limits in advance of the particular case on what must be disclosed to the accused and risking that such limits may be declared unconstitutional or spawn more litigation, a more practical approach may be to improve the efficiency of the process that is used to determine what must be disclosed and what can be kept secret within the context of a particular criminal trial."[43]

> "Even if legislative restrictions on *Stinchcombe* or new and expanded privileges were upheld, they could require the judge to examine information sought to be exempted from disclosure item by item. This process would create uncertainty and delay. Although intended to decrease the need for the Attorney General of Canada to seek non-disclosure orders under s.38 of the CEA, legislative restrictions on disclosure or production or the attempt to create new privileges could add another layer of complexity, delay and adversarial challenge to terrorism prosecutions. They may duplicate and overlap with procedures already available under s.38 of the CEA to obtain non-disclosure orders. It may be better to reform the s.38 process to make it more efficient and more fair than to attempt to construct new and potentially unconstitutional restrictions on disclosure."[44]

78. Proposals for legislative reform in and of themselves may not necessarily "solve" the overall issue of disclosure. The disclosure obligation is a substantial

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42 P-309, *supra*, at pp. 89-90.

43 P-309, *upra*, note 3, p. 211.

44 P-308, Roach, K. (2007). *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence: Executive Summary*, p. 25.

one, and legislative amendments may not be able to eliminate the practical burden of fulfilling the obligation.

Considerations for the Future

79. The Government of Canada has been considering the problem of intelligence and evidence for a long time and matters are still under study today. This process involves extension consultation with the involved agencies, such as the Department of Justice, the RCMP and CSIS.

Impact of Possible Legislative Reforms on Disclosure

80. Given that the scope and format of disclosure goes to the very heart of the ability of the accused to exercise their constitutional right to make full answer and defence and of the Crown to fulfill its constitutional obligations under *Stinchcombe*, any legislative reforms regarding disclosure have significant legal and operational implications.

81. Codification of provisions, even if intended to be permissive or to confirm best practices, may have unintended consequences. All legislative provisions are a policy statement by Parliament. When the common law is codified in part, uncertainty can be created about whether the legislative reforms modify relevant common law which has not been codified. For example, if Parliament confirms that the Crown may/must provide electronic disclosure in particular circumstances, does this mean that it should not do so in other circumstances?

82. In view of the fact that the administration of justice is within provincial jurisdiction, any recommendations regarding disclosure necessarily will have operational implications for the provinces and territories. Depending upon the nature of the recommendations, they could also have significant financial implications.

83. Assessment of operational implications includes recognition that technologies available in rural or remote communities may be vastly different from those available in large urban areas. The costs associated with providing technological assistance or access to technology in remote areas may impose unreasonable demands on one or both parties and may be less effective than other forms of disclosure.

84. Recommendations regarding disclosure should also be assessed for their potential impact on the self-represented accused. Recommendations supporting a particular type of disclosure in particular circumstances could negatively impact rural or remote communities if these various operational and financial considerations are not taken into account.

Section 38 and the Bifurcation Issue

85. In his testimony before the Inquiry, Professor Roach made the following comments and recommendation:

> "It seems to me that the most important intervention that is needed, and I think it is a matter of some urgency, is that we need an efficient and a fair process to determine whether disclosure is

> really necessary for a fair trial. (…) When you look at what our international comparators do, they all give that power to the trial judge. They all allow the trial judge to look at the information and to determine whether disclosure is necessary for a fair trial and to keep on asking him or herself that question throughout the trial. So in my research, Canada is alone in using two courts and so as in the *Ribic* case, this can result in a mid-trial adjournment of a terrorism prosecution, so that there would be litigation in the Federal Court. As in *Khawaja*, this can involve pre-trial appeals before the trial even starts. I think most fundamentally, our system is not fair to either judge who is making a decision. The Federal Court judge is making a decision about whether disclosure is necessary, often at the pre-trial stage, without a full sense of what the trial is about. So I think the Federal Court judge has some real handicaps to deal with. On the other hand, the trial judge has to make a decision about whether a fair trial is possible in light of the federal non-disclosure order without seeing the information that is subject to non-disclosure. And so it's like we've put blinders on both of the key judicial decision-makers (…). The best solution is to allow an efficient and fair process to be made by the trial judge about whether disclosure is truly necessary."[45]

86. In dealing with the bifurcated procedure under section 38 of the *CEA*, it is important that the Inquiry take into consideration the complexity and the nuances of the procedure as a whole. The following are illustrative of some of the matters that may assist the Inquiry in making its recommendations.

87. Section 38.05 of the *CEA* illustrates the nuanced approach of the procedure. That section makes it possible to have the person presiding or designated to preside at the proceeding to which the information relates provide the judge of the Federal Court with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

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[45] Evidence of Kent Roach, Transcript, Vol. 81, pp. 10408-10409.

88. Also, it is worth noting in *Khawaja*, that Justice Mosley provided another court-initiated procedural safeguard by creating a confidential schedule of information to be returned to the trial judge for his or her guidance in addressing related issues in the trial court.

89. The Federal Court (in *Khawaja*) and the Federal Court of Appeal (in *Ribic*) have held that the accused's rights were respected in section 38 *CEA* proceedings arising out of criminal cases. Also, in *Ribic*, the criminal trial judge also concluded that the accused's right to a fair trial was not infringed by the introduction of evidence using the section 38 procedure.

90. The s. 38 procedure is a separate proceeding from the underlying criminal trial and is not linked directly to the criminal trial (e.g., see *Khawaja*, which started before the actual criminal trial). In *Khawaja*, Justice Pelletier quotes the applications judge finding that:

> In the result, … "… section 38, including subsection 38.11(2), achieves a nuanced approach that respects the interest of the state to maintain the secrecy of sensitive information while affording mechanisms which respect the rights of the accused, including the right to full answer and defence, the right to disclosure and the right to a fair trial in the underlying criminal proceeding. I find that subsection 38.11(2) accords with sections 7 and 11(d) of the Charter.": see paragraph 59 of his reasons.[46]

91. The s. 38 procedure is flexible and provides the ability to arrive at innovative solutions – no one size fits all and issues are determined on a case- by-case

[46] *Khawaja v. Canada (Attorney General)* 2007 FCA 388, at paragraphs 76-79.

basis. For example, *Ribic* (three step procedure regarding disclosure concerning intelligence information), *Ribic* (the admissibility of a redacted transcript as an alternative to direct testimony), and *Khawaja* (Justice Mosley's schedule of confidential information).

92. The Federal Court has, for some time, been the court seized with international relations, national defence and national security matters and this provides coherent and consistent decisions on these issues. To be specific, the Federal Court is comfortable with national security issues, already has the expertise and already has the required secure facilities.

93. Placing these matters in provincial courts could lead to inconsistent applications, resulting in different treatments of the same subject matter. The current procedure ensures that all hearings are heard by the same court with a direct appeal route to the Supreme Court of Canada.

94. It must also be borne in mind that the issue of disclosure of sensitive information is often triggered very early in a proceeding, such that the Provincial Court Judge or Superior Court Judge that would have to make the determination (1) may not be the trial judge and (2) may not have the benefit of a comprehensive understanding of the facts of the case.

95. Additionally, the storage, handling, transportation and viewing of sensitive information in provincial facilities could be problematic.

96. There has been limited experience to date with using intelligence information in criminal proceedings since the passage of the *ATA*. To date, the Federal Court has only dealt with two criminal cases under the post-2001, s. 38 procedure. Over time, future cases may provide useful guidance on whether the current regime needs to be modified. Also, it is important to note that the procedure applies to civil and administrative proceedings as well as criminal proceedings.

97. The delays associated with the s. 38 procedure (in both of the criminal prosecutions) to which various Inquiry witnesses have referred have been the direct result of the number of documents involved, the sensitivities of the information at play and the extensive consultation with experts, both domestically and internationally, which such cases require. Delays also arose from the constitutional challenges to the legislative scheme. Many of the issues raised by these concerns would still exist even if bifurcation were eliminated. In any event, there would be inherent delays in any court proceeding regardless of the procedure adopted.

98. The s. 38 procedure is also noteworthy for the involvement of the Attorney General of Canada. The Attorney General of Canada has an important role to play in ensuring the consistent application of national security privilege and in weighing the public interest in disclosure and the public interest in non-disclosure rather than merely implementing instructions of individual departments or agencies.

99. Under s. 38.03(1), the Attorney General of Canada has the discretion to allow the disclosure of sensitive or potentially injurious information that is otherwise prohibited. Subsection 38.03(1) reads:

> (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Common Law Privileges

100. It is important that common law privileges continue to develop in accordance with the circumstances on a case-by-case basis. Legislative initiatives that deal with common law privileges and other aspects of s. 7 of the *Charter* would undoubtedly introduce uncertainty into the judicial system. Also, it should be understood that codifying common law privileges may have unintended, adverse consequences.

Summary for Intelligence to Evidence

101. The *ATA* amended s. 38 of the *CEA* to address the judicial balancing of interests when the disclosure of information in proceedings would be injurious to international relations, national defence or national security.

102. Criminal prosecutions involving terrorism are complex and because of this a nuanced approach is required that includes safeguards to address the two fundamental responsibilities of government (ensure the security of its citizens/protect individual rights).

103. Disclosure in a criminal prosecution is a constitutional right that is subject to the principles established by the decision in *Stinchcombe*. Disclosure is modified by and subject to common law privileges, including the state security privilege. The relationship between disclosure and privilege is dynamic and should be permitted to evolve on a case-by-case basis. Codification by way of legislation of either the *Stinchcombe* disclosure principles or common law privileges may have unforeseen, adverse consequences with respect to the fair trial rights of the accused and the avoidance of wrongful convictions.

104. It should be noted that prosecutions are predominately provincial and, therefore, any issues in relations to *Stinchcombe* would be subject to and require federal-provincial consultations.

105. The s. 38 procedure of the *CEA* has been built upon the established expertise of the Federal Court in dealing with issues related to international relations,

national defence and national security. At the same time, the s. 38 procedure acknowledges the established expertise of the provincial courts in adjudicating trial proceedings. The protection of sensitive information relating to international relations, national defence or national security may actually benefit from some form of bifurcated decision-making. Indeed, many of the issues identified by Professor Roach may be expected to remain regardless of which court or courts are engaged to adjudicate the public interest in disclosure versus the public interest in non-disclosure.

106. There has been limited experience to date with criminal prosecutions involving terrorism that involve the use of intelligence as evidence since the passage of the *ATA*. Proceedings under this section are in their infancy. To date, the Federal Court has only dealt with applications relating to two underlying criminal prosecutions under the post-2001 s. 38 procedure (*Khawaja* and *Ribic* terrorism prosecutions). However, some s. 38 cases are currently making their way through the courts. No prosecution of a terrorism case using this procedure has yet been completed and it is, therefore, too early to draw conclusions concerning its use.

107. As noted previously, the s. 38 procedure is flexible and allows innovative solutions and a determination of issues on a case-by-case basis. There is a mechanism in s. 38 permitting the Attorney General of Canada to avoid the necessity of a Federal Court ruling about the disclosure of sensitive information by authorizing the disclosure of prohibited information under s. 38.03 (1).

Similarly, the Attorney General of Canada and a person who wishes, in connection with an underlying proceeding, to disclose any facts or information may enter into an agreement permitting disclosure, before an application to Federal Court for an order is made under section 38.031 (1) of the *CEA*.

108. Justice Rutherford noted in *Ribic* the need to protect national security interests:

> I must take into account as well, I think, the fact that this case is one which has tested the current scheme under the *Canada Evidence Act* for dealing with information, the disclosure of which may be sensitive and injurious to national interests. I concede that there must be some such scheme and that leaving the issue in the hands of trial courts to deal with in the course of a criminal trial may not be sufficiently protective of national security interests. The instinct of the trial court will likely be to deal with the issue as best serves getting on with the trial and to give less weight to the need to protect the security interests.[47]

109. The s. 38 statutory procedure is intended to resolve these issues before the commencement of the criminal proceeding and may thereby prevent re-visiting the Federal Court decision later on in the trial.

110. An important part of the role of the Attorney General of Canada in the administration of justice is the ongoing obligation to actively seek updates and continue to weigh the public interest in disclosure and the public interest in non-disclosure throughout the criminal trial.[48] The ongoing obligation of the Attorney General of Canada would come into play if a change occurred in

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47 *HMTQ v Ribic*, 2005 O.J. No. 2628, date May 30, 2005, Court File No. 99-10018

48 Evidence of Gerard Normand, Transcript, Vol. 86, pp. 11124-11127.

respect of the balancing of the public interest in disclosure and the public interest in non-disclosure subsequent to the ruling of the Federal Court on the matter. The s. 38 procedure would not require the Attorney General of Canada to return to the Federal Court for a decision.

111. Similarly, the prosecutor will most often have access to unredacted documents and has an ongoing obligation as a representative of the Crown to review the unredacted material in the event of a change in circumstances.

112. Also, it is worth noting that a s. 38 proceeding is separate from the underlying criminal trial and is not directly linked to the criminal trial and a s. 38 appeal is a statutory safeguard for protecting the fair trial rights of an accused. The s. 38 procedure and its appeal provisions can serve to prevent multiple trials and ensure the protection of sensitive information from disclosure. Also, the s. 38 appeal provisions may allow the Crown or the trial judge to avoid withdrawing or dismissing the charge to protect the sensitive information (the 'disclose or withdraw/dismiss dilemma'). An appeal of an order under s. 38 may potentially preclude recourse to a prohibition certificate.

113. Finally, the s. 38 procedure involves more than the information held by CSIS or the RCMP. Therefore, it should be noted that any recommendations intended to address and resolve issues dealing with this sort of information may affect other departments and agencies as well.

II. CONSTRAINTS ON TERRORIST FINANCING

Term of Reference

114. These submissions address this Commission's 4th term of reference, namely:

> **Whether Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations.**

Overview

115. The appropriate conclusion to be drawn from all the evidence is that the working relationship between the various departments and agencies engaged in detecting, deterring and prosecuting those engaged in terrorist activities in Canada is close and cooperative. It serves to promote a strong and unified approach that is consistent with international obligations. The legal framework, which provides the underpinning for all anti-terrorism measures, is clearly more than adequate.

116. The *Charter of Rights and Freedoms* and various laws that protect privacy interests guide government policy, legislation and investigative techniques in its efforts against terrorist activity and terrorist financing (TF). These do not impede legitimate governmental activity in protecting its citizens and residents. The *Charter* requires a balance between individual rights and freedoms and legally sanctioned, reasonable and defensible measures to counter TF.

117. Combating TF is a crucial component of the federal government's national security strategy. Subject to constitutional constraints and privacy protections,

Canada has established a comprehensive anti-terrorist financing (ATF) regime within a flexible legislative framework.

118. Canada's ATF regime is a horizontal initiative involving several federal departments and agencies, including the Department of Finance, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), the Department of Foreign Affairs and International Trade (DFAIT), Canada Revenue Agency – Charities Directorate, Public Safety Canada (PS), the Royal Canadian Mounted Police (RCMP), the Canadian Security and Intelligence Service (CSIS), and the Canada Border Services Agency (CBSA).

119. The ATF regime is still relatively new. It was put in place in 2001 through the *Anti-terrorism Act* (*ATA*) which provided new investigative tools to law enforcement and national security agencies to assist in their fight against terrorism and mandated FINTRAC to make disclosures of financial intelligence relating to TF and threats to the security of Canada. Evidence was heard from representatives of the above-mentioned departments and agencies.

120. The *ATA* amended the *Proceeds of Crime (Money Laundering) Act* to become the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (*PCMLTFA*). Most recently, amendments to the *PCMLTFA* were introduced through Bill C-25, which received royal assent on December 14, 2006. These amendments enhanced client due diligence measures, put in place a registration scheme for Money Services Businesses, introduced an administrative monetary

penalty scheme and allowed for improved information sharing between FINTRAC and disclosure recipients.

121. Dossier 4 entitled Terrorist Financing submitted by Commission Counsel on December 13, 2007 provides a detailed and lengthy discussion/consideration of the international and Canadian perspective on TF and the role and function of the various federal actors. To assist the Commission in responding to this term of reference, these submissions will try to supplement rather than repeat the evidence contained in the dossier and only address salient points raised by the testimony.

122. Therefore, these submissions will: 1) speak briefly to the nature of TF; 2) highlight the steps and legislative action Canada has taken to combat TF; and 3) review the international and domestic review mechanisms.

Nature of Terrorist Financing

123. Now recognized as a global crime, TF threatens not only national security but the integrity of national and international financial systems as well. The potential damage to civil society and the financial sector necessitates a clear and cohesive strategy involving the cooperative efforts of a number of domestic and international partners.

124. As explained through the evidence of John Schmidt and Professor Passas, there are a wide variety of terrorist groups and individuals, "including large international hierarchical organizations, fully autonomous lone wolves… and

those whose role is only to fund and direct others as surrogates to carry out the actual terrorist activities." Terrorist activities can range from the specific, planned and organized to the random and opportunistic. These differences result in different resourcing needs, capabilities and mechanisms.[49]

125. In addressing the issue of TF, Mr. Schmidt testified that he prefers the term terrorist resourcing for the reason that ". . . TF need not involve money or other financial instruments, in fact it might instead involve movement of exchanged goods or even used goods. Even when money is involved it doesn't necessarily go to the operational cell but is spent somewhere upstream of there to acquire end-use goods for the operational cell and it's the end use goods which go to the operational cell."[50]

126. Therefore, financing methods or resourcing methods "are constantly mixed and evolving." As a result, "…the TF or resourcing trail is not like a piece of string one can follow from its beginning to its end but more like a river system with many tributaries and outflows, many obstructions and alternative routes, many different things floating along its course. In other words it is a process that involves many things, from many sources, through many channels, to many recipients for many uses. And potentially, these things can include anything of value or of direct usefulness to the terrorist. Once we begin to understand how

49 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, p. 6655.

50 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, p. 6654.

complex the process can be we start to appreciate the size of the problem which, of course, leads to better strategies for addressing it."[51]

127. Consequently, any approach to combating TF must build on current methods, changing and modifying them as our knowledge and understanding of terrorists and their methods improve.[52] The Canadian legislative and operational response to fighting TF embraces this approach.

Canada's Anti-Terrorist Financing Legislation

Canada's Role in the International Arena Impacts Domestic Legislation

128. As is clear from the testimony of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, Department of Foreign Affairs and Diane Lafleur, Director Financial Sector Division, Department of Finance, Canada has been and continues to be an active contributor to the international effort to combat TF in terms of treaty negotiation, drafting of Security Council resolutions and in discussions at the Financial Action Task Force (FATF), whose membership represents those countries which are most active in the world of combating money laundering and TF.[53] Canada served as president of the FATF for a one-year term ending June 30, 2007.

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51 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, pp. 6655-56.

52 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, p. 6655.

53 Evidence of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, DFAIT, Transcript, Vol. 54, pp. 6678-6720.

129. In these efforts, DFAIT's role with regards to the United Nations and the role of the Department of Finance with regard to the FATF is to ensure that Canada's views are clearly expressed, that its goals are clearly integrated in international initiatives, and that Canada's international commitments are properly reflected in Canadian efforts, such as domestic legislation.[54] This means that, when negotiating a treaty, DFAIT is always mindful of the realities of Canada's system of government, such as the fact that Canada is a federalist state, to ensure that any commitment Canada makes internationally can be effected domestically. [55]

130. The constant throughout these processes is Canada's commitment to an international solution to combating TF, as best reflected by Keith Morrill's observation on Canada's perennial effort "…to get the international community to do more".[56]

131. Mr. Morrill testified that one of the challenges in combating TF is that there is no internationally accepted definition of TF. It was his opinion that if there was

54 Evidence of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, DFAIT, Transcript, Vol. 54, p. 6693.

55 Evidence of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, DFAIT, Transcript, Vol. 54, p. 6716.

56 Evidence of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, DFAIT, Transcript, Vol. 54, p. 6746.

such a definition, it would result in a greater level of international cooperation and consistency in combating TF.[57]

132. However because countries have different concepts of who is a terrorist and what is a terrorist group, and since TF is by definition giving money or financial support in some fashion to a terrorist group, there is inconsistency in the definition of TF. Consequently, this means some domestic efforts to fight terrorism will not be supported internationally where the individual or group at issue is not identified as a terrorist.[58]

133. Some of the testimony of the lawyers who provide tax advice to charities suggested that Canada's commitment to a unified international approach to combating TF was not a made-in-Canada response and was not reflective of Canadian values. This view ignores the active role and contribution of Canada on the international front and fails to understand that the domestic legislation enacted to combat TF is not dictated from the international stage and blindly adopted. Rather, it reflects Canadian input internationally which, when adopted domestically, is adapted to reflect the realities of a federalist democracy which values and protects individual rights and freedoms and privacy concerns.

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57 Evidence of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, DFAIT, Transcript, Vol. 54, pp. 6703-04.

58 Evidence of Keith Morrill, Director of the Criminal, Security and Treaty Law Division, DFAIT, Transcript, Vol. 54, pp. 6699-700.

The *Anti-Terrorism Act*

134. To contribute to the fight against TF and fulfill its international obligations and commitments, Canada put in place a comprehensive domestic regime in 2001, integrated with its existing anti-money laundering (AML) regime, to counter TF. The regime is specifically designed to detect and deter TF and is administered and enforced through a horizontal structure that unites nine federal departments and agencies in a coordinated effort. They in turn work in close cooperation with other governmental entities and the private sector, most notably the financial services industry[59] and international counterparts.

135. The *ATA* amended the *Proceeds of Crime (Money Laundering) Act*, enacted in July 2000, to include TF and renamed it the *PCMLTFA.*

136. The *PCMLTFA* is, by design, enabling legislation, with the details of the regime largely contained in the associated regulations. This was done to allow the regime to be flexible in its response to changing trends and criminal activity. To date, the various provisions of the *PCMLTFA* have been implemented by three sets of regulations, which were brought into force between November 2001 and March 2003. The first two sets of regulations implement the reporting, record-keeping, client identification and compliance requirements under Part I of the

[59] Evidence of Diane Lafleur, Director Financial Sector Division, Department of Finance, Transcript, Vol. 54, pp. 6768, 6753-55 and Exhibit P-227, Tab 2 Slide presentation, slides 1-3.

PCMLTFA. The third set implements the reporting requirements under Part II of the *PCMLTFA*.[60]

137. Bill C-25, an Act to Amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, the Income Tax Act and to make a consequential amendment to another Act, received Royal Assent on December 14, 2006. The majority of the associated regulations have been finalized and will come into force on June 23, 2008. Some of the associated regulations, including the expansion of the definition of "designated information" and the requirement that, in prescribed circumstances, FINTRAC disclose to the Charities Directorate of the CRA, were brought into force in June 2007.

138. Once in force, the requirements under the *PCMLTFA* and its associated regulations will be consistent with the international standards set out by the FATF.

FINTRAC

139. Under the *PCMLA*, as it was then titled, the mandate of Canada's financial intelligence unit, FINTRAC, was to detect and deter money laundering by providing financial intelligence to police based on analysis of data received from reporting entities. After the *Act* was amended and became the *PCMLTFA*, the

[60] Evidence of Diane Lafleur, Director, Financial Sector Division, Department of Finance, Transcript, Vol. 54, pp. 6777-78.

mandate of FINTRAC was expanded to include detection and deterrence of the financing of terrorist activities.[61]

140. Information regarding suspected terrorist activity financing is largely provided to FINTRAC through three different vehicles, suspicious transaction reports (STRs), voluntary information records (VIRs) and queries from foreign financial intelligence units (FIUs).

141. Under the *Act*, FINTRAC was set up to act at arm's length from all disclosure recipients, including FIUs. This meant that it could not respond to any request for information since such an action could be seen as demonstrating a less than arm's length relationship. At the international level, however, FIUs operate by querying each other. As a result, the *Act* was amended in 2001 to state expressly that FINTRAC could respond to FIU queries, but only when a Memorandum of Understanding (MOU) is in place. Therefore, FIU queries are a special type of voluntary information.

142. The reporting entities, which include financial institutions and financial intermediaries, are subject to client due diligence and record-keeping requirements. When reporting entities have reasonable grounds to suspect that a financial transaction is related to the commission of a money laundering or a

[61] Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, p. 6950.

terrorist activity financing offence, they are required to file a suspicious transaction report (STR) to FINTRAC.[62]

143. Reporting entities must also report certain transactions that are prescribed under the *Act* and its regulations (large cash transaction reports (LCTR) and electronic funds transfer reports (EFTR)) when a monetary threshold is reached. In addition, any person or financial institution that is required to make a terrorist property report must also provide a copy of the report to FINTRAC.[63]

144. Voluntary information may be submitted to FINTRAC by police, government agencies and foreign FIUs. Those who provide such information are to provide as much detail as possible concerning their suspicions, including the identifying information on the person(s) or organization(s) that may be involved in the suspicious activities. Such information should include the grounds for suspicion and other relevant information. It should be noted that FINTRAC may receive *any information* from police or other government agencies and FIUs but may receive *only information about suspicions of ML or TF* from the general public.

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62 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, p. 7029.

63 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, pp. 6958-60, Evidence of Janet DiFrancesco, Assistant Director, Macro-analysis and Integration, Operations Sector, FINTRAC, Transcript, Vol. 56, pp. 6990-91.

145. Notwithstanding that VIRs can be provided by anyone, 90% of VIRs come from law enforcement and CSIS.[64] The VIRs provided by RCMP and CSIS typically contain a synopsis of the case, identify the main individuals under investigation, provide name, date of birth and explain how the case relates to TF or why the activity is considered a threat to the security of Canada. [65] Over the 2006-2007 fiscal year, FINTRAC received 30-40 VIRs relating to TF.[66]

146. Superintendent Reynolds testified that 90% of VIRs the RCMP provide to FINTRAC result in a disclosure being provided from FINTRAC to RCMP, the quality of which was described as being "extremely high value".[67] In relation to the remaining 10%, FINTRAC either had no transactions or could not meet its statutory threshold to disclose. It is not simply a question of FINTRAC deciding not to disclose in these cases.

147. The STRs can include valuable information such as names of individuals and entities involved in the transactions; directorships and signing authorities for business accounts; account numbers and other identifiers; the general flow of

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64 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, pp. 6958-60; Evidence of Janet DiFrancesco, Assistant Director, Macro-analysis and Integration, Operations Sector, FINTRAC, Transcript, Vol. 56, pp. 6990-91.

65 Evidence of Superintendent Rick Reynolds, National Security Operations, RCMP, Transcript, Vol. 55, p. 6866; Evidence of Jim Galt, Head, Financial Analysis Unit, Human Sources Operational Support Branch, CSIS, Transcript, Vol. 55, p. 6916-6917.

66 Evidence of Jim Galt, Head, Financial Analysis Unit, Human Sources Operational Support Branch, CSIS, Transcript, Vol. 55, p. 6917.

67 Evidence of Superintendent Rick Reynolds, National Security Operations, RCMP, Transcript, Vol. 55, pp. 6886, 6836.

funds; the historical financial activity; associated entities and individuals and the reporting entity's grounds for suspicion.

148. FINTRAC utilizes this information, in addition to information provided in VIRs and that collected from law enforcement and national security databases and from open-sources, to undertake its analysis to identify and verify links, to identify additional associations[68] and ultimately to justify disclosure of "designated information". FINTRAC has no authority to disclose any voluntary information to law enforcement or anyone else. It is required to disclose "designated information".

149. The following entities are required to report suspicious transactions to FINTRAC when there are reasonable grounds to suspect that a transaction may be related to money laundering or TF: financial entities, including banks, trust companies, credit unions and caisses populaires, life insurance companies, brokers or agents; securities dealers, portfolio managers and investment counsellors who are provincially authorized; persons engaged in the business of foreign exchange dealing; money services businesses (including alternative remittance systems, such as Hawala, Hundi, Chitti, etc.); agents of the Crown when they sell money orders or accept deposits; accountants and accounting firms (when carrying out certain activities on behalf of their clients); real estate brokers or sales representatives (when carrying out certain activities on behalf of

[68] Evidence of Janet DiFrancesco, Assistant Director, Macro-analysis and Integration, Operations Sector, FINTRAC, Transcript, Vol. 56, p. 6991.

their clients); casinos (those authorized to do business in Canada, with slot machines or roulettes or card games, but excluding certain temporary charity casinos). [69]

150. FINTRAC must disclose "designated information" to police when it has reasonable grounds to suspect that the information would be relevant to an investigation or prosecution of a terrorist activity financing offence.

151. It must disclose to CSIS when it has reasonable grounds to suspect that the information would be relevant to "threats to the security of Canada" as that term is defined in the *CSIS Act*.

152. Furthermore, FINTRAC is required to disclose information to CRA where FINTRAC has reasonable grounds to suspect that the information is relevant to determining the charitable status of an organization.

153. FINTRAC may also disclose designated information to its international counterparts with which it has an MOU when it has reasonable grounds to suspect that the information would be relevant to an investigation or prosecution of a terrorist activity financing offence or a substantially similar offence.[70] It should be noted that FINTRAC does not disclose "suspicions of TF" or

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69 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, p. 6973.

70 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, p. 6950.

"suspicions of threats to the security of Canada" since FINTRAC does not come to these conclusions.

154. In 2005/2006, 15 million transactions were reported by institutions to FINTRAC and of these, FINTRAC identified transactions totalling 256 million dollars where it had reasonable grounds to suspect that the information it disclosed would be relevant to a TF investigation or prosecution or an investigation of threats to the security of Canada. [71] These transactions were therefore disclosed to police, CSIS or both.

155. Mr. Potter noted that the disclosed information may not be sufficient to result in charges (reasonable grounds to believe) or convictions, (proof beyond a reasonable doubt) but does contribute to a "growing storehouse of information the RCMP (and other investigative agencies) can draw upon as new investigative leads turn up.[72]

CSIS – ITAC Integrated Threat Assessment Centre

156. ITAC was created in October 2004 following the release of the National Security Policy and replaced the CSIS Integrated National Security Assessment Centre. The National Security Advisor at the Privy Council Office and the Director of CSIS have joint responsibility for ITAC. ITAC completes

71 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, p. 6949.

72 Evidence of Mark Potter, Assistant Director, Government Relationships, FINTRAC, Transcript, Vol. 56, pp. 6952-53.

comprehensive analysis of all available information on potential terrorist threats to Canada and makes the results of the analysis available to all who require them such as policy makers and frontline responders. [73]

157. John Schmidt is a senior financial intelligence analyst with FINTRAC who has been seconded to ITAC since April 2006 as a threat assessment analyst. In this role, he testified as to his work at ITAC and to a TF model he is developing which attempts to provide a basis for a clear and common strategic understanding of how TF operates.[74]

158. Mr. Schmidt explained that the threat assessment process is either initiated by a proposal from an analyst or by a request from a stakeholder or partner - such as other federal government departments or law enforcement agencies - to conduct an assessment. Once a proposal or request is approved, information is gathered from various sources including from CSIS. While recipients of FINTRAC disclosures, such as the RCMP and CSIS, can and do provide disclosed information to ITAC, it should be noted that FINTRAC has no statutory authority to disclose directly to ITAC.

159. The threat assessment goes through a rigorous vetting procedure that often includes consultation with external bodies from which information was received to ensure these bodies are comfortable with the use of the information they

73 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, p. 6643-44.

74 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, pp. 6642, 6651.

provided. The threat assessment is usually classified but an attempt is made to reach the widest possible audience.[75] Five to ten percent of threat assessments completed by ITAC for the year 2007 contained references to TF.[76]

RCMP

Challenges in TF Investigation and Prosecution

160. Superintendent Reynolds testified as to his role and that of the National Security Criminal Operations Branch in fighting terrorism generally and in combating TF and the challenges it presents specifically.

161. It was Superintendent Reynolds' experience that every major investigation into allegations of terrorism has a financial component and almost always involves a non-profit organization or charity.[77] Because of the complex nature of these investigations, they require special expertise and a significant allocation of resources and investment of time. Despite these challenges, charges have been laid in the Khawaja case in Ottawa and the Toronto 17. [78]

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75 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, pp. 6644-46; Exhibit P-223, Tab 2 - "ITAC TF: How It is Done and How It is Countered".

76 Evidence of John Schmidt, Threat Assessment Analyst, ITAC, Transcript, Vol. 53, p. 6648.

77 Evidence of Superintendent Rick Reynolds, National Security Operations, RCMP, Transcript, Vol. 55, pp. 6862-65.

78 Evidence of Superintendent Rick Reynolds, National Security Operations, RCMP, Transcript, Vol. 55, p. 6820.

Disclosure Obligations / s. 38 Application

162. While the standard for disclosure remains the *Stinchcombe* test, in matters of national security which terrorism cases always engage, the application of this test is more involved and more complicated because much of the relevant evidence is subject to protection under s. 38 of the *Canada Evidence Act*. Superintendent Reynolds explained that the more data redacted from documents on the basis of s. 38, the longer the s. 38 application will take. He also explained that, as a consequence, more time is spent in court defending s. 38 applications.[79]

163. All s. 38 applications must be made to the Federal Court of Canada. While this results in a bifurcation from the prosecution in Superior Court, in the TF context, the Federal Court was described as the preferred forum because of the court's expertise in national security matters and the fact the judges have top secret clearance.[80]

International and Domestic Review

International Review - Financial Action Task Force (FATF) Evaluation

164. The FATF, the standard-setting inter-governmental organization whose mandate is to develop and promote national and international policies to combat money laundering and TF, evaluates member countries on a periodic basis to assess

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79 Evidence of Superintendent Rick Reynolds, National Security Operations, RCMP, Transcript, Vol. 55, pp. 6843-46.

80 Evidence of Superintendent Rick Reynolds, National Security Operations, RCMP, Transcript, Vol. 55, pp. 6844-46, 6848-49.

their progress in implementing anti-money laundering and anti-TF (AML/ATF) measures. During a FATF assessment, meetings are held with federal and provincial government representatives as well as representatives from the private sector reporting entities to discuss to what extent the FATF recommendations are being implemented and whether these measures are effective.[81]

165. The FATF has set out nine Special Recommendations (SR) on TF. Canada is currently compliant with seven of the nine SRs and Bill C-25 and its associated regulations address the remaining two. The current status of Canada's compliance is set out below:

(i) SR. I Ratification and implementation of United Nations instruments

Canada has ratified and fully implemented the 1999 UN International Convention for the Suppression of the Financing of Terrorism and UN Security Council Resolution 1373 relating to the prevention and suppression of the financing of terrorist acts.

(ii) SR. II Criminalizing the financing of terrorism and associated money laundering:

Through the *ATA*, Canada amended the *Criminal Code* in 2001 to make the financing of terrorism a criminal offence.

(iii) SR. III Freezing and confiscating terrorist assets:

Canada has effectively implemented an asset freezing and confiscation regime. As of November 1, 2006 there was approximately $186,335 frozen in 10 accounts in Canadian financial institutions. The value of frozen assets fluctuates as financial institutions review their records in light of new information.

81 Evidence of Diane Lafleur, Director, Financial Sector Division, Department of Finance, Transcript, Vol. 54, pp. 6779-80.

(iv) SR. IV Reporting suspicious transactions related to terrorism: Since 2001, under the *PCMLTFA*, financial institutions and other financial intermediaries are obligated to report suspicious transactions to FINTRAC. In addition, changes introduced by Bill C-25 will require reporting entities to report suspicious attempted transactions, consistent with revised international standards.

(v) SR. V International co-operation:

Canada has formal and informal means of providing assistance to requesting countries. Canadian police, directly or through Interpol, can provide assistance on the basis of a simple request where the evidence or information can be obtained without a court order. Where the evidence can only be gathered pursuant to a court order, Canada's *Mutual Legal Assistance in Criminal Matters Act* enables a Canadian court to issue orders compelling the production or authorizing the seizure of the evidence at the request of a treaty partner or designated entity. To date, FINTRAC has signed 45 information-sharing agreements with foreign FIUs and, during 2006-07, made 35 disclosures to fourteen of these foreign FIUs. Canada's extradition laws also operate to deny safe haven to persons alleged to be involved in TF in other jurisdictions.

(vi) SR. VI Alternative Remittance:

This recommendation requires that alternative remittance providers be registered or licensed. In Canada, while money service businesses have been subject to the *PCMLTFA* since 2001, there has not been a licensing or registration scheme for them. Bill C-25 and associated regulations provide for a registration scheme which will become operational in June 2008.[82]

(vii) SR. VII Wire Transfers:

This recommendation requires that measures be taken to address erroneous or incorrect originator information on wire transfers. Regulatory changes associated with Bill C-25 address this recommendation and will be in force in June 2008. These changes provide that the identity of a client initiating a wire transfer has been ascertained and recorded by the entity. This includes the name, address and account number of the originator. [83]

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82 Evidence of Diane Lafleur, Director, Financial Sector Division, Department of Finance, Transcript, Vol. 54, pp. 6768-70.

83 Evidence of Diane Lafleur, Director, Financial Sector Division, Department of Finance, Transcript, Vol. 54, p. 6771; Exhibit P-227, Tab 3, Memorandum of Evidence on TF at pp.19-21.

(viii) SR. VIII Non-profit Organizations:

This recommendation requires countries to review the adequacy of their laws and regulations to prevent charitable and non-profit organizations from being used to finance terrorism. In 2001, as a result of the enactment of the *Charities Registration Security Information Act* (CRSIA), the mandate of CRA's Charities Directorate was expanded to include counter terrorism, to deny support to those who engage in TF, to protect the integrity of the registration system under the *Income Tax Act* and to ensure Canadian taxpayers that the benefits of charity registration are only available to organizations that operate exclusively for charitable purposes.[84] Bill C-25 makes amendments to the ITA to allow for a significant increase in information sharing to strengthen measures to prevent the abuse of registered charities by terrorist groups. In particular, for the first time it will allow CRA to disclose to FINTRAC information about charities suspected of being involved in TF activities and also requires FINTRAC to disclose information to CRA where FINTRAC has reasonable grounds to suspect that the information is relevant to determining the charitable status of an organization. The Bill also introduced further disclosure provisions under the ITA to improve information sharing between CRA and law enforcement and intelligence agencies involved in the detection of TF. These measures came into force in February 2007.

(ix) SR. IX Cash couriers:

This recommendation requires that countries have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligations. Since 2003, a Cross-Border Currency Regime has been in place in Canada to detect the physical cross-border transportation of currency and bearer negotiable instruments. To date, Canada Border Services Agency has made approximately 5,100 seizures, with a dollar value of $132 million. [85]

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84 Evidence of Donna Walsh, Director, Review and Analysis Division, Charities Directorate, CRA, Transcript, Vol. 57, p. 7106.

85 Evidence of Diane Lafleur, Director Financial Sector Division, Department of Finance, Transcript, Vol. 54, pp. 6768-69; Exhibit P-227, Tab 3, Memorandum of Evidence on TF at pp.19-21.

166. While the FATF describes these standards as recommendations, it is important to appreciate that they in fact have the force of international obligations. A consistent application of these recommendations across jurisdictions is the key to their success. Consequently the refusal by a member country to institute any of these recommendations can result in serious consequences for that country. Because the non-compliance of one country can put other countries at risk, other FATF countries can refuse to deal with the non-complying country and effectively shut down the domestic financial system.[86]

167. Where a country has received a rating of non-compliant or partially compliant in relation to any of the Core Recommendations (which include SR 2 and SR 4), an update describing the measures that have been adopted to address the deficiencies must be presented to the FATF no later than two years after the completion of the mutual evaluation. In the event that the assessed country is not showing sufficient progress in addressing its deficiencies, the country will be subjected to enhanced follow-up involving a progressive series of steps.

168. Canada has addressed the revised FATF standards through Bill C-25 which received Royal Assent on December 14, 2006. Bill C-25 and the associated regulations are designed to bring Canada's AML/ATF regime in line with the current FATF Recommendations, will respond to changing domestic risks and will also address the recommendations of the Auditor General of Canada, the

[86] Evidence of Diane Lafleur, Director Financial Sector Division, Department of Finance, Transcript, Vol. 54, p. 6774.

independent Treasury Board mandated evaluation conducted by EKOS and the Standing Senate Committee on Banking, Trade and Commerce. As mentioned in paragraph 22, the majority of the associated regulations have been finalized and will come into force on June 23, 2008.

169. Bill C-25 amendments to the *Income Tax Act* (*ITA*) came into force in February 2007 and allow for an increase in information sharing to strengthen measures to prevent the abuse of registered charities by terrorist groups. In particular, it allows the CRA–Charities Directorate to disclose to FINTRAC information about charities suspected of being involved in TF activities and requires FINTRAC to provide disclosures to CRA where FINTRAC has reasonable grounds to suspect that the information is relevant to determining the charitable status of an organization Bill C-25 also introduces further disclosure provisions under the *ITA* to improve information sharing between the CRA, RCMP and CSIS to promote the detection of TF. [87]

170. Involving the CRA−Charities Directorate in the fight against terrorism has been crucial. As Commissioner Major noted, when the Directorate has a concern that a charity is involved in TF, that concern "is fairly valid because two thirds of the cases result in them not being qualified as charities". [88]

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87 Evidence of Diane Lafleur, Director, Financial Sector Division, Department of Finance, Transcript, Vol. 54, p. 6771; Exhibit P-227, Tab 3, Memorandum of Evidence on TF at pp.19-21; Evidence of Donna Walsh, Director, Review and Analysis Division, Charities Directorate, CRA, Transcript, Vol. 57, pp. 7109-11.

88 Evidence of Commissioner Major, Transcript, Vol. 57, pp. 7134-35; Exhibit P-236, Tab 9, p.2.

Domestic Review

171. Domestic evaluations of Canada's AML/ATF regime have already been undertaken by the Auditor General of Canada in 2004, by EKOS Research Associates Inc. as part of a Treasury Board-mandated evaluation in 2004, and by the Standing Senate Committee on Banking, Trade and Commerce in 2006 as part of a legislatively mandated parliamentary review of the *PCMLTFA*. The next such review is scheduled for 2011. In addition, a Treasury Board-mandated evaluation of Canada's AML/ATF regime is scheduled to take place in 2009-10. It should be noted that all federal partners in the regime participate in the evaluation of Canada's AML/ATF regime. [89]

FINTRAC

172. One of the amendments put into effect by Bill C-25 requires the Office of the Privacy Commissioner, in addition to any reviews or investigations it might undertake under the *Privacy Act*, to conduct a biennial review of FINTRAC's operations to review the measures taken by FINTRAC to protect the information it receives or collects. The first such review is now underway.

CRA – Charities Directorate

173. The activities of the Charities Directorate are evaluated as part of the overall review of CRA which is detailed in its annual public report. The Directorate is also subject to review by: the Auditor General, under the *Privacy Act*, and under

[89] Evidence of Diane Lafleur, Director Financial Sector Division, Department of Finance, Transcript, Vol. 54, p. 6766.

the *Access to Information Act*. Judicial oversight is provided by the courts through: the ITA hearings process, appeals to the Federal Court of Appeal, and mandatory appeal to the Federal Court under the *CRSIA*. In addition, Parliament's five year review of the *ATA* included the *CRSIA*. Justice O'Connor in the second Arar report concluded that the activities of the Directorate did not warrant further independent review. [90]

CSIS- Financial Analysis Unit

174. The Financial Analysis Unit is subject to review by the Security and Intelligence Review Committee (SIRC) and the Inspector General, as is every aspect of the Service. [91]

CBSA

175. The activities of CBSA were reviewed by Parliament as part of the five-year review of the *PCMLTFA*. As explained by Denis Vinette, A/Director General Technology Branch, this review thoroughly considered the activities of the CBSA, "…the different components; identified our successes, our gaps or challenges and ultimately made its way back and that's how we reported back to government, post implementation. Internally the CBSA, it's a component of our program, which is the care and control of the seized currency was audited by -- internally by our internal audit program and aside from a requirement to do

90 Evidence of Maurice Klein, Sr. Advisor, Anti-terrorism, Charities Directorate, Transcript, Vol. 57, pp. 7155-7156.

91 Evidence of Jim Galt, Head, Financial Analysis Unit, Human Sources Operational Support Branch, CSIS, Transcript, Vol. 55, pp. 6924-6925.

some minor clarifications within some of our procedures, found that care and control of these large sums of money was sound. So there's been some oversight and some reviews conducted to ensure that the program is delivering in accordance to (*sic*) the mandate that we were provided under the legislation."[92]

Conclusion

176. It is submitted that the information and analysis contained in Dossier 4 and these submissions should provide an affirmative answer to the query whether the existing legal framework provides adequate constraints on TF. This cannot be a static position; it is an evolutionary one. What is adequate today will inevitably be inadequate in a decade. Departments and agencies as well as those involved in oversight and review mechanisms must constantly improve and update their respective approaches. This Commission, with the public attention it has received, is part of that ceaseless process.

[92] Evidence of Denis Vinette, A/Director General Technology Branch, CBSA, Transcript, Vol. 56, p. 7070.

III. WITNESS PROTECTION

Term of Reference

177. These submissions address the 5th term of reference, namely:

> **Whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases.**

Background

178. The Federal Witness Protection Program (WPP) is the only legislated Witness Protection Program in Canada. It is legislated by the *Witness Protection Program Act*[93] and administered by the RCMP. The purpose of the *Act* is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters".[94]

179. Generally, there are three categories of persons who may need protection because they are under threat for having provided assistance to law enforcement: 1) agents, who are directed by the police to accomplish certain tasks in the course of an investigation, 2) witnesses, including "innocent bystanders", who have information on a crime and decide to come forward and 3) informants,

93 R.S.C. 1996, c.15 [hereinafter the WPPA].

94 Ibid. s. 3.

complainants or victims who are believed to be the source of the charges against an accused.[95]

180. There are generally two instances where the RCMP will consider admitting a person to the Federal WPP. The first instance is when the person is under threat as a result of his/her assistance to an RCMP investigation. The second is where the RCMP is assisting other law enforcement agencies by admitting a person in the Federal Program either because the other agency does not have such a program, or simply to provide federal documents.[96]

181. In determining whether a person should be admitted to the WPP, the Commissioner of the RCMP, or his delegate, must consider the factors listed at s.7 of the *Act*.[97] If it is determined that a person is suitable to be admitted to the Program, the Commissioner and the person enter into a Protection Agreement. This Agreement sets out the obligations of both parties.[98]

182. Protection, as defined in the *Act*, "may include relocation, accommodation and change of identity as well as counselling and financial support, for those or any

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95 The term "witness" is defined at s. 2 of the WPPA. The definition also includes a person who may require protection because of his/her relationship with the witness.

96 A recommendation for admission can also be made by an international criminal court or tribunal see s.6 of the WPPA.

97 For detailed discussion of those criteria, please see : Evidence of Raf Souccar & Michael Aubin, Transcript, Vol. 70, pp. 8902-23; Evidence of Geoffrey Frisby, Transcript, Vol. 69, pp. 8790-96.

98 Exhibit P-274, Tab 3, Witness Protection Program Protection Agreement. The obligations are listed at s.8 of the *WPPA*.

other purposes, in order to ensure the security of the protectee or to facilitate the protectee' s re-establishment or becoming self-sufficient."[99]

183. The nature of the protection measures that are provided to a person are proportional to the threat level. These will not be negotiated below the minimum necessary to ensure the person's safety. For the most part, individuals who are admitted in the Program need to have their identity changed and be relocated.[100]

184. Deciding whether to enter the WPP is an important decision. Even though the RCMP is doing its best to ensure that protectees have a lifestyle similar to the one they had prior to entering the Program[101] and is constantly looking at ways to minimize the impact of being in it, it is nonetheless a life changing experience.

185. For instance, assuming a new name, moving to a new location away from family and friends, obtaining new employment, making new friends, not being able to see family as often as desired, etc. are some of the consequences that an individual may face once in the Program.

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99 Ibid. s.2, definition of "protection".

100 However, there are instances where the identity change is not required.

101 Also referred to as the "like-to-like" principle at the hearings.

186. For those who are incarcerated, segregation may be the only possible option to ensure their safety. As a consequence they often do not have as many opportunities to participate in various rehabilitation programs.

187. Although someone may be determined to be inadmissible to the Witness Protection Program or is admissible and chooses not to enter it because of the demanding nature of the Program, an agreement[102] can be reached with that person to provide him/her with an amount of money to compensate for costs associated with relocation and protective measures outside the admission process.

188. Furthermore, subsection 7(g) of the *WPPA* provides for alternative methods of protection that can be adapted to various situations without formal admission into the Witness Protection Program. These measures are flexible and may be adapted to the specifics of any situation, in order to ensure the provision of responsive protective measures.[103]

189. Once in the Program, a person is deemed to be in it for life. However, the protection can be terminated either voluntarily or on a decision of the RCMP Commissioner where "there has been a material misrepresentation or a failure to disclose information relevant to the admission of the protectee to the Program"

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102 Release and Indemnity Agreement.

103 However, those alternate methods must be separate from any of the defined elements of protection, which require the admission to the Program as per s.6 of the WPPA.

or a deliberate and material breach of the Protection Agreement by the protectee.[104]

Considerations for Change

190. In an effort to improve upon witness protection practices nationally, the RCMP developed a proposal for a National Integrated Witness Protection Program. Such a program would promote witness protection best practices used nationally and internationally by various law enforcement agencies by integrating all field Witness Protection Units into a national program. Ultimately, this would provide a higher level of service while mitigating risks posed by having a multitude of programs.[105]

191. If the Commission is considering changes to the existing program, any recommendations should consider two areas in particular: assistance cases and disclosure of protectee's information. Firstly, in order to avoid the admission of a protectee in two different witness protection programs, consideration could be given to the *WPPA* to allow the RCMP to provide federal documentation without having to accept the individual in the Federal Program.[106]

192. Secondly, s. 11 of the *Act*, which prohibits the disclosure of information about the location or change of identity of a protectee or former protectee, affords

104 S.9 of the WPPA, *supra* note 1.

105 Exhibit P-273, Tab 11, "The RCMP National Witness Protection Program Proposal".

106 Evidence of Raf Souccar & Michel Aubin, Transcript, Vol. 71, pp. 8961-63; Evidence of Regis Bonneau, Vol. 77, p. 9805.

protection only to protectees *that are (or were) in the Federal Program.* It is submitted that the Commission could consider a recommendation extending that protection to protectees who are admitted *to other witness protection programs*.[107]

193. Another area for potential change is s. 18 of the *Act*. Currently Canadian government agencies are statutorily mandated to cooperate, to the extent possible, with the RCMP in the administration of the *Act*. However, when proceeding with an identity change, the RCMP relies on private agencies, in addition to the Canadian government, to obtain certain new documents, such as professional designations, university degrees, etc.

194. Unfortunately, some agencies are reluctant to provide assistance as they feel they may be committing an offence by doing so. Their concern could be addressed by statutorily mandating the cooperation of private and provincial governments and expanding the scope of s. 18 to ensure their immunity from prosecution.[108]

195. With respect to witnesses in detention, it is submitted that the harsh detention conditions they may face are a disincentive to cooperation. It is submitted that an interdepartmental committee could be established to consider various options for

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107 Evidence of Raf Souccar & Michel Aubin, Transcript, Vol. 71, pp. 8965-66.

108 Evidence of Raf Souccar & Michel Aubin, Transcript, Vol. 71, pp. 8963-64.

these individuals. One of the options the committee could consider, for instance, is the possibility of transferring inmates to other countries.[109]

196. Finally, we wish to address the oversight and conflict resolution mechanisms addressed in the evidence lead before the Commission. Some of the evidence suggests implementation of legislative changes to require the Commission of Public Complaints for the RCMP to become more involved in witness protection issues.

197. However the RCMP's public accountability has already been reviewed and addressed in the report of the Task Force on Governance and Cultural Change in the RCMP, released December 16, 2007. The RCMP has not yet had the opportunity to review and consider the Report's recommendations and therefore it is respectfully submitted that to make further recommendations on this issue at this point would be premature.

198. On this point, Yvon Dandurand in his testimony and research paper on best practices and international trends, suggested many ways to improve witness protection.[110] It is submitted however that these recommendations should be considered cautiously in that further analysis is necessary to determine whether they are applicable to or compatible with the Canadian legal framework.

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109 Evidence of Pierre Sangollo and Michael Bettman, Transcript, Vol. 77, pp. 9864 and 9878.

110 Testimony of Yvon Dandurand, Transcript, Vol. 68, pp. 8551-8609; and Exhibit P-271, "Protecting Witness and Collaborators of Justice in Terrorism Cases".

IV. CHALLENGES PRESENTED BY PROSECUTION OF TERRORISM CASES

Term of Reference

199. These submissions address the 6th term of reference, namely:

> **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 changes in practice or legislation that are required to address these challenges, including whether there is merit in having terrorism cases heard by a panel of three judges.**

i) Mega-Trials

200. The Commission considered that the prosecution of terrorist acts are likely to result in what has recently been characterized as "mega-trials", that is, inordinately long and complex trials. As a consequence the Commission heard from numerous witnesses with experience and expertise in the specific challenges associated with the prosecution of long and complex cases.

201. The proffered evidence provided a background against which recurring themes emerged in the context of mega-trials. Some of these are as follows:

- law enforcement officials and Crown prosecutors must make strategic decisions to prevent the magnitude of the case from jeopardizing its proper management;
- some of the fundamental challenges raised by mega-trials are based in the difficulties associated with their management;

- managing large volumes of evidence and providing disclosure in a timely fashion are also two of the most significant challenges in relation to the prosecution of long and complex cases;
- pre-trial applications must be appropriately managed;
- pre-trial conferences must be effective and efficient;
- swearing in of additional jurors may constitute an appropriate means by which to reduce the risk of mistrials due to the loss of jury members;
- ensuring that jurors receive adequate financial compensation for their service to the criminal justice system is important.

202. Many recommendations were put forward to improve the way mega-trials are conducted, several of which called for the reform of certain aspects of criminal procedure. Commission counsel also offered a detailed analysis of many aspects of mega-trial reform. The submissions of the Attorney General of Canada will focus on only the following two issues:

- The use of the preliminary inquiry; and
- Empowering the judge to make certain factual findings in a judge and jury trial.

The Use of the Preliminary Inquiry

203. There are widely divergent opinions about the value of the preliminary inquiry. Some have pressed for its abolition, saying that the preliminary inquiry is out of place in a modern justice system. Others have expressed the view that this process plays an important role and should not be reformed in any manner that reduces its availability to an accused person.

204. Experts who testified before the Commission were also divided on the current role for, and need of, the preliminary inquiry in the context of large and complex cases. For example, Professor Bruce MacFarlane testified that:

> The defence community often will say "If I'd had the opportunity to have a preliminary inquiry, I would have recognized the strength of the case and we probably would have pleaded guilty." The Crown has also told me from time to time, in fact, many Crown attorneys have said "We, the Crown, benefit from a preliminary inquiry in certain circumstances because a) we have a transcript of a witness who might die or disappear at an early stage; and b) where we have a witness and I'm not sure just how strong this witness is going to be. I have an opportunity to see that witness live in court under oath and I can make a better assessment of the strength of that witness' evidence". So both defence and Crown, for different reasons, often support the continuation of a preliminary inquiry. That noted, the original rationale for a preliminary inquiry is largely almost evaporated and I think that, in the long run, we need to reconsider the role of a preliminary inquiry perhaps narrow it down with the benefit of judicial advice in a case management way. Ideally, for instance, in a long trial, if there are three or four witnesses whose evidence are the most contested evidence perhaps through judicial case management, the preliminary inquiry, as opposed to simply the consent of the parties, the preliminary inquiry could focus just on those witnesses and that would assist both the Crown and the defence. But that would require very active judicial case management which is probably not contemplated at the moment by the Criminal Code. I think we need to move in the direction of either elimination or reduction of reliance on the preliminary inquiry but we need to, as well, ensure that all the parties are consulted and have a degree of comfort and that's not there right now.[111] (Our emphasis)

205. On the other hand, Mr. Ralph Steinberg testified as follows:

> [..] the defence Bar has been resisting attempts to either restrict or do away with the preliminary inquiry for about 25 years. The preliminary inquiry is seen, at least in Ontario, as an essential component of the criminal process which actually has the effect of

[111] Evidence of Bruce MacFarlane, Transcript, Vol. 79, p. 10073.

> shortening Superior Court trials. It provides discovery for the defence, but also educates all the parties about the relative strength of their positions.[112]

He went on to say:

> There's just no substitute for cross-examining witnesses and seeing how they perform. In many cases, it educates the prosecutor about the weaknesses of their case and can result in either with all our resolution(*sic*) on much more agreeable terms when the prosecutor sees the weaknesses of their case, but conversely it can also show an accused person and their counsel that resolution by way of a guilty plea is the best course because of the strength of the prosecution's case and the case is resolved before it gets to Superior Court. But also, there's just no substitute. Disclosure just can't be sufficient to, for example, found applications to exclude evidence (*sic*) and if the parties are to, at the Superior Court level, provide a foundation for their applications -- and here I'm referring to Rule 34 of the Ontario Superior Court Rules which gives the presiding judge a threshold screening function that actually existed in the common law in cases such as *Felderhof* in the Ontario Court of Appeal, then the parties have to have an opportunity to create that foundation so that they'll pass the threshold screening test that's imposed in Superior Court. That's very difficult to do on the basis of disclosure.[113]

206. Changes were recently made to the preliminary inquiry provisions in the *Criminal Code*. Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts* was passed by Parliament and received Royal Assent on June 4, 2002. It contained amendments to the preliminary inquiry provisions of the *Criminal Code* that came into force in June 2004. The key changes to the preliminary inquiry process were:

- a preliminary inquiry is only held where either the accused or the prosecutor requests one (s. 536(2));

112 Evidence of Ralph Steinberg, Transcript, Vol. 93, p. 12310.

113 *Ibid,* at pp. 12310-12311.

- where a preliminary inquiry is requested, the requesting party is required to provide to the court and the other party a statement of the issues to be covered and a list of the witnesses the requesting party wishes to hear (s. 536.3);
- the Justice is given the option of convening a focusing hearing, prior to the preliminary inquiry, for the purpose of attempting to determine the scope of the inquiry, on a consensual basis (s. 536.4);
- at the preliminary inquiry, the Justice is expressly required to intervene to limit questioning of witnesses that is abusive, repetitive or otherwise inappropriate (s. 537(1.1)); and
- written statements, in lieu of oral testimony are admissible at preliminary inquiries, with the option of examining or cross-examining a witness at the request of a party (s. 540(7))**.**

207. The Commission should be aware that work is underway in the federal Department of Justice to assess the impact of the Bill C-15A amendments.

Empowering the Judge to Make Certain Factual Findings in a Judge and Jury Case

208. In her testimony before the Commission, the Honourable Ruth Krindle suggested creating a "sort of hybrid trial", to use her expression, whereby the trial judge would be empowered to arrive at some factual conclusions *in lieu* of the jury in certain cases:

> In certain limited circumstances where you have that type of non-core evidence, I would think that a judge -- and where a jury could not come through to verdict, and you came to that conclusion, I don't see why a judge could not, at the outset, determine that that kind of restricted, limited evidence would be dealt with by a judge, by the judge alone. The judge would rule on that component of the trial; would actually come to the conclusion, the factual conclusions necessary…[114]
>
> […]

[114] Evidence of the Honourable Ruth Krindile, Transcript, Vol. 94, p. 12428.

> It would allow you to have a jury trial. But the judge's finding on fact, in that one area, would be read in at the conclusion. The jury wouldn't have to sit through all of that technical evidence.[115]

She went on to say, on the issue of the burden of proof:

> **MR. DORVAL:** Just by curiosity, what do you think would be the burden of proof for the finding of facts by the trial judge?
>
> **HON. KRINDLE:** It would depend. If it's an element of the offence that has to be proved, it's got to be found beyond reasonable doubt.
>
> **HON. KRINDLE:** So if the, for instance again going back to the *Pickton* case, I've never seen the indictment on the *Pickton* case, but the indictment probably says that the accused did unlawfully kill so and so by naming the person and did thereby commit first degree murder. If the judge's evidence -- if the judge has dealt with that area that identifies the deceased, then the judge could find -- and that's the only evidence that identifies the deceased, the judge could tell the jury at the end of the day that the evidence establishes that Ms. so and so was unlawfully killed between whatever dates it was and would satisfy them beyond reasonable doubt. If it's just a fact that the judge is finding, then facts don't need to be found beyond reasonable doubt; they just need to be found on a balance of probability. So that would really depend on the evidence and on what you were dealing with. [116]

209. The witness agreed with counsel for the Attorney General of Canada that such a proposal would implicate section 11 of the *Charter*.[117]

210. The witness' proposal that the role of making factual findings be divided between the trial judge and the jury raises issues in relation to weighing of the evidence as a whole. It also engages the principles articulated by the Supreme Court of Canada regarding standard of proof and the jury's role in decisions

115 *Ibid*, at p. 12429.

116 *Ibid*, at pp. 12429, 12430.

117 *Ibid*, at p. 12432.

such as *R. v. Bouvier* (1984), 11 C.C.C. (3d) 257 (Ont. C.A.), p. 265, affd. [1985] 2 S.C.R. 485. *R. v. Morin*, [1988] 2 S.C.R. 345, paras. 19 to 43; *R. v. White*, [1998] 2 S.C.R. 72, paras. 39 to 44; and *R. v. MacKenzie*, [1993] 1 S.C.R. 212, paras. 33 to 44.

211. These decisions outline, among other things, the principle that the standard of proof beyond a reasonable doubt is not applicable to discrete pieces of evidence, rather the evidence as a whole must be appreciated to determine whether or not the Crown has satisfied the standard of proof in relation to each legal element of the offence.

212. The Supreme Court of Canada stated in its unanimous decision in *R. v. White*, *supra*:

> It is settled that the criminal standard of proof applies only to the jury's final determination of guilt or innocence and is not to be applied to individual items or categories of evidence: *Stewart v. The Queen*, [1977] 2 S.C.R. 748, at pp. 759-61; *Morin*, *supra*, at p. 354. It is improper for the jury to divide their deliberations into separate stages; their verdict must be based on the record as a whole, not merely on items of evidence which have previously been established beyond a reasonable doubt: *Morin*, at p. 360. [Emphasis added.]

213. One can question the ability of a juror to consider "the record as a whole" when part of the factual evidence is removed from the jury's realm and presented to the trial judge only, for his or her appreciation.

214. Furthermore, the Supreme Court of Canada, in its unanimous decision in *R. v. Morin*, *supra*, concluded that:

> The authorities reviewed above are clear that the jury is not to examine the evidence piecemeal by reference to the criminal standard. Otherwise, there is virtually no guidance in previous cases as to what legal rules, if any, apply to the process of weighing the evidence. Attempts to formulate such rules have been frowned upon.[118]

It went on to say:

> The reason we have juries is so that lay persons and not lawyers decide the facts.[119]

215. In light of the above, any recommendation to remove from the jury's realm the responsibility of making certain factual findings should be cautiously weighed and considered.

ii) Three-Judge Panels for Terrorism Trials

216. The following submissions suggest some analytic considerations about the merit in having terrorism trials heard by a panel of three judges.

Background

217. Dr. Bal Gupta, who testified during the first phase of the Inquiry, summarised the inherent appeal of a panel of three judges hearing a terrorism trial given the result in the cases of *R v Malik and Bagri.*

> "There were several significant errors of fact in the verdict. A three-judge panel may be more credible in such cases than the opinion of a

118 *Supra* at paragraph 33.

119 *Supra* at paragraph 41.

> single judge. I am not an expert. I am speaking as a layman. And there is a precedence of such a thing in the Pan Am Flight 103 trial."[120]

218. Dr. Gupta's proposal that a group of judges may be more credible than a lone judge was indirectly commented upon (and supported) by Professor Code in his testimony.

> "There's no question that it's always better to have more minds thinking about a problem and that's why, of course, the jury has such tremendous credibility as the unanimity of a body of 10 or 12 people arriving at a verdict carries great public confidence and, similarly, I'm sure if you had three judges arriving unanimously at a decision, a verdict in a case, it would carry greater weight than one judge and it would be a better process to have more than one person thinking about the case and discussing it and debating it."[121]

219. The Inquiry heard evidence from Professors MacFarlane and Roach in their testimony on aspects of a three-judge panel hearing terrorism cases. In addition Professor MacFarlane submitted a research paper entitled: *Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis.*

220. The following exchange between the Commissioner and Professor Roach underscores the complexity that surrounds this issue:

> **THE COMMISSIONER:** "Can I summarize you to say that there's no guarantee that the three judges are going to be -- they may all have -- they may all be right for wrong reasons and wrong for the right reasons and so on; they're individuals with individual's perception of the evidence.

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120 Evidence of Dr. Bal Gupta, Transcript, Vol. 1, p. 48.

121 Evidence of Michael Code, Transcript, Vol. 88, p. 11404.

> **PROF. ROACH:** That's right. And unlike juries, I really do think that those three judges are going to feel that they have to write their reasons and if they don't agree with the reasons of their colleagues, they're going to express their differences.
>
> So, I actually think that this issue of discrepancy and the repute of the administration of justice could actually become worse under a three-judge panel than either under the existing single judge or the jury system."[122]

221. These sentiments were echoed by Professor MacFarlane who made the following observation regarding the Lockerbie terrorism trial:

> "My final comment -- it's not so much my concern; it's just simply an observation. There is a notion that three heads might be better than one and, at a certain level, that's probably quite true. I would simply observe that in the Lockerbie case, the reason why the case was ultimately reversed by the Scottish Criminal Cases Review Commission was that the three-judge panel on an issue of fact -- on a critical issue of fact -- misunderstood the evidence. So, while it might be reducing the risk of a reversal or a mistrial through a three-judge panel, the experience in Lockerbie is one that we ought to bear in mind in the assessment of that issue."[123]

222. A three judge panel also raises issues surrounding the *Canadian Charter of Rights and Freedoms (Charter)* and questions as to whether such a procedure would result in a higher standard of justice for trials.

The Charter

223. The *Charter* protects the right to trial by judge and jury in serious criminal cases. Paragraph 11 (*f*) provides:

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122 Evidence of Kent Roach, Transcript, Vol. 95, p. 12575.

123 Evidence of Bruce MacFarlane, Transcript, Vol. 95, p. 12576.

> Any person charged with an offence has the right…*f)* except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.
>
> Section 2 of the *Criminal Code* defines the term "terrorism offence." A terrorism offence is not one of the offences listed in section 469 of the *Criminal Code*, which lists offences that come within the exclusive purview of the superior court of criminal jurisdiction.

224. Since these offences are not included under section 469 of the Criminal Code, an accused involved in a terrorism offence is permitted to elect to have a trial before a provincially-appointed judge or to have a trial before a superior court judge sitting with or without a jury. Thus, as Professor MacFarlane noted in his research paper:

> At the outset, it should be recognized that terrorist trials will almost certainly involve offences which carry a maximum punishment of five years imprisonment or more. Section 11(f) of the *Charter of Rights and Freedoms* will therefore be engaged, requiring a jury trial unless the charges were laid under military law and are heard before a military tribunal.[124]

225. Professor MacFarlane has noted in his research paper the importance of legitimacy in the trial process:

> Future terrorist trials face three overarching challenges: first, they need to be manageable in terms of length and complexity. Second, the process and result need to be seen as fair and legitimate, both domestically and in the eyes of the international community. Finally, any new criminal trial process cannot increase the risk of convicting persons who are innocent of the crimes charged….

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[124] Exhibit P-301, Tab 2: Bruce MacFarlane QC "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis", P. 77.

> ….A process that is seen to be fair, open and manageable will, through an international lens, be more likely to be viewed as legitimate and effective, and the political desire to "legitimize" a domestic criminal justice system process will more likely lead to a procedure that is manageable in size, easily understood, and be consistent with internationally-recognized principles of fairness. Perceptions of legitimacy and fairness are further enhanced where reforms are anchored on existing and well established justice structures and processes. And a trial process that is fair, manageable in size and easily understood is less likely to result in wrongful convictions, and enhances the truth-seeking function of criminal trials.

226. A process that would accommodate a lengthy and complex criminal proceeding by derogating from established *Charter* rights would undermine the fairness and legitimacy presently at the core of our criminal courts.

227. In addressing the special circumstances that would justify such derogation from entrenched rights, Professor Roach noted the risk associated with adopting a special set of procedures, as occurred in Ireland to combat the intimidation of jurors:

> So you look at that, you look at the Diplock courts that were used in Northern Ireland; you look at the issues of the military tribunals at Guantanamo. All of these, to me, suggest that you really need to be very, very cautious before moving towards special procedures with respect to some subset of trials. And so that the legitimacy of the ordinary criminal process is one that I think is absolutely crucial. And I believe strongly that one way to be tough on terrorism is to prosecute and denounce terrorist acts as criminal. And I think that the most legitimate way of doing that is through our ordinary criminal procedure. So those are some concerns that I have with respect to legitimacy.[125]

[125] Evidence of Kent Roach , Transcript, Vol. 95, p. 12572.

228. Professor Roach commented on the suggested alternatives to trial by a judge and jury.

> **PROF. ROACH:** Yes, I agree that Justice Krindle's proposal is interesting and creative and I think it's already important because if you were thinking about moving towards a three-judge panel or even judge alone, and essentially taking away the right to jury, as you know, under Section 1 of the *Charter* the courts often look at is there a more proportionate, less drastic way of pursuing efficiency with limiting the right lets (*sic*).
>
> And so it seems to me that you could point to Justice Krindle's proposal as one that allows you to retain the right to trial by jury, even in these difficult cases but to do so perhaps in a more efficient manner by allowing a judge, whether it's the trial judge or the case management judge to make some preliminary findings.
>
> So I think that Justice Krindle's proposal already will have some life, even if it's only as a possible less drastic alternative in Section 1 analysis, if we're talking about taking away the right to a jury.[126]

229. There were, in Professor MacFarlane's view, only two legislative justifications to removing the right to trial by a judge and jury; first under s 33(3) of the *Charter*, by invoking the "notwithstanding clause" or by imposing a limit that could survive s. 1 *Charter* scrutiny.[127]

> At some point in the "length continuum," the right to a fair trial in a jury trial may be placed in jeopardy. By "fair trial," I mean that both the Crown and defence are able to have the trial considered fairly and fully, and that the length of the process does not place an unacceptable burden on the community, including the jury. A jury trial lasting two years or more, with any degree of complexity (as most of them will) is, in my view, overloaded and presumptively unfair to the parties and

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126 Evidence of Kent Roach, Transcript, Vol. 95, P. 12580.

127 Exhibit P-301, Bruce MacFarlane QC "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis", Page 77.

to the community.[128]

230. In constructing a hypothetical situation that might survive *Charter* scrutiny, Professor MacFarlane testified that s. 11(f) would require that circumstances were such that they prevented a prosecution from being manageable or understandable to a jury, before a three judge panel could be justified:

> "It seems to me that the circumstances in which a three-judge panel could be empanelled is (*sic*) in situations where the trial is expected to be so lengthy and in addition to that complex, but primarily lengthy that it's become unmanageable and risks fair trial requirements of the Charter of Rights and Freedoms.
>
> I think that it is important given the reservations that I expressed on the last occasion concerning legitimacy that a three-judge panel be available for any lengthy unmanageable hearing as opposed to certain types of offences or scheduled offences. I think if one was to schedule offences that would heighten the legitimacy concerns.
>
> So in my view, it would hinge entirely on manageability and lengthiness and the need for a fair trial through some other process other than traditional mechanisms that we have under the Criminal Code."[129]

231. The proposal to remove terrorism trials from an entrenched *Charter* safeguard raises a constitutional issue, as well as risking the legitimacy of the underlying criminal process, by limiting the mode of hearing in terrorism trials.

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128 *Ibid*., Page 85.

129 Evidence of Bruce MacFarlane, Transcript, Vol. 95, p. 12557.

Improved Standard of Justice

232. Some of the issues that arose in the evidence when evaluating the standard of justice were:

- Maintenance of a judicial quorum
- Unanimity of verdict
- Unanimity of sentence

Quorum

233. Reduction of participants in a trial due to sickness or other reasons below a required minimum is not limited to trials involving a jury. There would be a similar risk involved in a trial involving a panel of judges. Apart from the immediate resource issues that a three-judge trial would impose on most judicial complements, the involvement of a fourth or alternate judge exacerbates the issue. As Professor Roach noted in his testimony:

> So I agree with Professor MacFarlane that this issue of quorum is quite problematic. And, you know, maybe one solution, but it is certainly going to affect judicial resources, is you start off with four judges. But, you know, even then what happens if two judges on the original panel, for whatever reason -- we're talking about a trial that may be running eighteen months, two years -- what if two of those judges become sick? So even if you start with four, you may still have problems ending with three, and you may have litigation about the fairness of inserting a new judge into a three-judge panel when that judge didn't start the trial and hasn't seen all the witnesses testifying.[130]

Verdict

[130] Evidence of Kent Roach, Transcript, Vol. 95, p. 12567.

234. The proposal for a three judges raises the issue of how they would achieve a legitimate verdict as a panel:

> **MR. DORVAL: "**How would you address the issue of verdict? Would you foresee a majority or unanimous vote as far as verdict?
>
> **PROF. MacFARLANE:** I draw quite a distinction here; based on the decision of the Supreme Court in *Morin* it seems to me to be quite clear that because of the principle of proof beyond a reasonable doubt and the unanimity principle that the -- on the issue of verdict, the three-judge panel must be unanimous.
>
> And I recognize that in some other jurisdictions there are other arrangements but by virtue of our traditions, the central feature of proof beyond a reasonable doubt and unanimity, it seems to me that even a single dissent on a three-judge panel signals the existence of reasonable doubt. Almost by definition there's a reasonable doubt. So it seems to me on verdict it must be unanimous.
>
> **MR. DORVAL:** Mr. Roach, your thoughts on the subject?
>
> **PROF. ROACH:** Yes. Well, I mean my thoughts are mainly centred around some international examples and I'd just like to recognize that a number of students at our international human rights clinic provided some pro bono research to help me out with this question.
>
> I take Professor MacFarlane's point about reasonable doubt but internationally it looks like the practice is to allow the majority verdicts, even on the ultimate issue of guilt or innocence.
>
> So for example, the international criminal court, the Roman statute establishing the international criminal court contemplates a three-judge panel but contemplates that the verdict can be by a majority; two to one.
>
> Similarly, in France, in Ireland, the Lockerbie case coming out of Scotland, all of these contemplated an ability of the three-judge panel to split on the ultimate issue of guilty or innocence.
>
> **THE COMMISSIONER:** The Irish that appeared said it was the judgment of the court that unlike a two/one split in the Court of

> Appeal that would not be disclosed, it would simply be guilty or innocent, by order of the court.
>
> **PROF. ROACH:** Yes.
>
> **THE COMMISSIONER:** So that you wouldn't know whether there was any debate ---
>
> **PROF. ROACH:** Yes.
>
> **THE COMMISSIONER:** --- *or know* behind *that, somebody had a reasonable doubt but that's subsumed into the majority*.
>
> **PROF. ROACH:** *Yes, and my understanding of that, Mr. Commissioner, is that the Irish follow* more *what has been the continental tradition of not allowing dissent.*
>
> *I'm not sure that would necessarily be* workable *in our system. So it would ---*
>
> **THE COMMISSIONER:** *It would remove the spectre of having a dissent, the judge who would have acquitted and having the person in jail. We're talking more optics, I suppose, than anything else. But if you're going to impose a sentence it should look as though it was the decision of the court.*
>
> **PROF. ROACH:** *Yeah. But I mean -- I* guess *my concern, Mr. Commissioner, would be that it would require a Superior Court judge to sit on his or her concerns that there was a reasonable doubt and ---* „[131]

235. Prof. MacFarlane discussed in his research paper[132] the dynamics of judicial decision-making, one aspect of which is the deliberation process. The following exchange with the Commissioner clearly identifies some concerns, the prospect of three judge panels raise, regarding the deliberation process:

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131 I*bid*., pp. 12563 and 12564.

132 Exhibit P-301, Tab 2: Bruce MacFarlane QC "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis", p. 87.

> **THE COMMISSIONER:** "There's also this consideration, I think, that a jury is precluded from discussing the evidence during the course of the trial. I can't imagine a panel of three judges retiring and not discussing the case so that you could -- the possibility of disagreement on points of law or evidence could arise during a break in the retiring room and the tensions could possibly -- it wouldn't be as pure as a jury that must not discuss the evidence. I don't know how you could -- you could impose, but I don't know how you could effectively impose that kind of silence on three judges.
>
> **PROF. MacFARLANE:** I referred to, not in so many words, but role blurring in my paper and I think, Mr. Commissioner, that what you've just described is an aspect of that. The role blurring in this sense, that in Canada the law is quite clear that the jury is instructed not to discuss the case during the course of the trial and then deliberates in group fashion with give and take and listening to each other and deliberating at the conclusion of the trial.
>
> A panel of judges on appeal doesn't necessarily deliberate in the same way, and it's really unclear how a panel of three judges would handle the situation during the course of the trial for the reasons the Commissioner has pointed out, and also, at the end of the trial, would the judges be expected to deliberate in jury-like fashion or would it be more along the lines of how judges handle it on appeal in a panel of three?
>
> So there is a prospect for some forms of role blurring based on Canadian tradition, but at the end of the day, my greatest concern relates to the issue of legitimacy."[133]

236. Speaking to the issue of unanimity of verdict, Professor Code commented on the legal requirement for decision makers to give reasons:

> **PROF. CODE:** "So if we get over that hurdle of the jury having been waived by the defence, then the one difficulty I see with the three-judge panel is that in appellate court where we're used to having panels of three, five, seven or nine judges decides questions of law and if a majority of an appellate court and a minority of the appellate court disagree on a point of law, it doesn't have any consequences.

[133] Evidence of Bruce MacFarlane, Transcript, Vol. 79, p. 10067.

> The majority wins. The law is as stated by the majority, but at a trial level where the fundamental function of a trial court is fact-finding and the -- and when you add on to that the Supreme Court of Canada's decision in *Shepherd* that we now have a duty to give reasons, so you've got a majority that if they arrive -- if they all consent, they agree on their verdict, you don't have a problem. You, in essence, end up with one set of reasons.
>
> But if they get to their verdict by different routes or if they've got a dissent, then I think you're into very, very serious difficulties because what you're going to have is you're going to have a majority carrying out their *Shepherd* duty to show the path by which they got to their fact-finding and a minority setting out their path by which they got to a different factual conclusion."[134]

237. The Commissioner observed the impact that a single dissent could have on a verdict in the following exchange with Mr. Gaul:

> **THE COMMISSIONER:** "The three judges are -- when you raise the dissent of one which raises the reasonable doubt, you're really back to one judge deciding it. So, you know, there's not much gained by having three judges if a dissent carries the day.
>
> **MR. GAUL:** Agreed.[135]

Sentencing

238. Similarly, the witnesses who testified on the issue of a three-judge panel noted issues relating to the imposition of sentence as Professor MacFarlane stated:

> **MR. DORVAL:** How would you foresee a decision on sentence and would all three judges participate in the decision on sentence, Mr. MacFarlane?

134 Evidence of Michael Code, Transcript, Vol. 88, p. 11402.

135 Evidence of Geoffrey Gaul, Transcript, Vol. 88, p. 11405.

PROF. MacFARLANE: I start off in my analysis with this proposition, and it's really quite desirable to have all of the judges who have been sitting in many cases for 15 months, 18 months, two years, participate in the sentencing process. They, in essence, have assumed an ownership responsibility for the trial. They have lived and breathed it for that entire period of time. And so at first blush, it strikes me that all three should be involved, but once you pierce through the veneer and start to consider how it would actually work in practice, again, you start to see some of the problems that arise in a three-judge panel. For instance, one of the examples is based on the *Thatcher* decision from the Supreme Court of Canada, there could well be different theories on how an offence was committed. So on one view of the evidence, it could be that the accused was an aider and abetter and on another view of the evidence the accused could be the principal who actually pulled the trigger. And both of those scenarios could give rise to different sentences, different levels of sentence.

So we could end up in a position where on a three-judge panel, judge A would say, “Well, this should attract ten years.” The second judge say, "No, I think it should be five." And the third judge say, "No, I think it should be three."

That poses a serious problem. As well, based on decisions from Supreme Court of Canada in *Gardner* (*sic*) and other decisions, there is the need for unanimity on the application of aggravating factors. So that complicates matters in terms of how to handle sentencing with a three-judge panel when there's a need for unanimity on the application of the aggravating factors issue.

As well, I noted in my review that in the United States, at least in some jurisdictions, there has been some experiments with three-judge panels, but they found that often, especially in the State of Colorado, one of the judges would dissent where the death penalty was an issue and often the dissent was rounded in ideological terms. So the Americans have started to move away from a three-judge panel that is dealing with the issue of sentence.

I noted with interest, considerable interest, that in the Lockerbie model that was developed, again under the legal instrument that was set up, that in the event of a verdict of guilty, the instrument specifically provides that the presiding judge shall pass sentence. So I anticipate that the Scots understood the problems of multiple judges dealing with the issue of sentence, and that strikes me as being a sensible approach. So in my view, even though there are strong

> issues of ownership of the trial in the event of a finding of guilt, it should fall to the presiding judge alone to pass sentence.[136]

239. On balance from these considerations, Professor MacFarlane noted in respect of terrorism trials in particular:

> Secondly, and this in the context of terrorist mega-trials is quite an important one. And that is if changes are to be made, if proceedings are to be brought, we must instil confidence on the part of the public and proceedings that are currently based, or based on changes, must be seen as legitimate, that is, both domestically and internationally the public must have confidence in the legitimacy of the proceedings. That is particularly important when one considers such things as the participation of the jury, and changes to the way in which we have jury trials. It's also important if we're considering notions of changing the structure of the trial. For instance, if Canada -- and I'm not proposing this at all, in fact I'm proposing quite the contrary -- if Canada was to consider radical changes to the trial process for terrorist trials specifically, I think that that would address the question of legitimacy and how our trials were being perceived internationally. It would be seen in an adverse light.

240. Prof. MacFarlane's overall conclusion to the issue he raised about the propriety of a three-judge panel hearing terrorism cases was as follows:

> The question raises two separate and fundamental issues: is mandatory trial by a judge alone possible; if it is, can or should a panel of judges hear the case?[137]

241. The answer that Prof. MacFarlane provided in his testimony was:

> With respect to the question of a three-judge panel, there are arguments for and against, but my view is that on a policy level, it's

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136 Evidence of Bruce MacFarlane, Transcript, Vol. 95, pp. 12568 and 12569.

137 Exhibit P-301, Tab 2: Bruce MacFarlane QC "Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis", p. 77.

> not a good policy choice because it may and probably would lead to criticisms at the international level on the basis of legitimacy of the Tribunal and might place Canada in a position where it appears that we're having show trials for certain types of terrorist actions.[138]

242. In his opinion, such a proposal should be avoided for the following reasons:

> In my view, replacement of a judge and jury with a panel of three judges in a terrorist case is not a good policy choice for three reasons. While these factors are analytically separate, they are closely linked.
>
> First, it seems to me that the conclusions of a panel would have to be unanimous on all essential issues of fact and law. Otherwise, almost by definition, a reasonable doubt exists in the case and an acquittal must be entered. The reasonable doubt standard at trial is so ingrained in out system of criminal justice that nothing more need be said of it in this paper. I simply note that while Canada has considerable experience in the assessment of reasonable doubt through the lens of a judge alone or a court composed of a judge and a jury, we have absolutely no experience in the determination of that issue through a panel of three trial judges sitting alone. In addition, the "reasonable doubt" filter is unique to the trial stage in our criminal justice system, when we are attempting to find out what the facts are and, to use the vernacular, we are "trying to get to the bottom of what occurred." We only rely on a panel of judges when appeals are taken from those trial decisions—but by that point, the issues for consideration have shifted significantly.[139] Put simply, while a judicial panel may work well when it comes to assessing issues of law, and in the determination of questions of mixed fact and law on appeal, it is far from clear to me that a panel would enhance the quality of justice in Canada in the assessment of the basic facts of the case at trial.
>
> In this context, one factor is critical: at trial, when reasonable doubt is the key issue, twelve persons resolve the issue through a unique process of group deliberation. As the Supreme Court put it in 2001, "Through the group decision-making process, the evidence and its significance can be comprehensively discussed in the effort to reach a

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138 Evidence of Bruce MacFarlane, Transcript, Vol. 79, p. 10069.

139 On appeal, the issues typically relate to whether the trial judge erred in law, whether the trial judge misdirected the jury on an issue of law and whether, despite errors at trial, a substantial miscarriage of justice occurred.

unanimous verdict."[140] The Court put a finer point on the issue when it said that "…an essential part of (the) process is listening to and considering the views of others. As a result of this process, individual views are modified, so that the verdict represents more than a mere vote; it represents the considered view of the jurors after having listened to and reflected upon each other's thoughts."[141] Judges, on the other hand, have no such mandate. While appellate panels in Canada are entitled to confer in individual cases, they are not required to do so, and individual judges can feel secure in their independence from the views of the other judges on the panel.[142] As a result, the group deliberation and dynamic that is so important in jury fact-finding may be absent in trial by a panel of professional judges. There is reason to believe, therefore, that a panel of three trial judges will actually be a less effective fact-finding body than a jury of 12 randomly-selected jurors drawn from the general population.

There is a second reason why the substitution of a three judge panel for trial by judge and jury is not a good policy choice. Quite simply, it is not responsive to the problem that exists. As I have argued throughout this paper, the real challenge with terrorist trials is to ensure that they proceed fully to verdict after a complete and fair assessment of all the evidence. The twin demons, as Justice Moldaver recently said, are prolixity and complexity. Creation of a three-judge bench trial will not solve that problem. In fact, it may create more problems. In a lengthy trial, a judicial panel could lose one of the judges just as easily as a jury could lose one of its jurors. What then? Do you proceed with just two judges? And what happens if your panel is reduced to one? At what stage do you declare a mistrial? Or do you "load up" at the front end with three judges and an alternate? Facially, that seems like a good solution, but it seems plain to me that few if any jurisdictions in Canada could afford the resource burden of routinely assigning four judges to hear lengthy terrorist trials.

The third factor tending to point to the conclusion that a panel is not appropriate concerns the issue of legitimacy—both domestically and internationally. Even assuming that the "fair trial" criterion is met in an individual case, and that a panel is available to all cases meeting this criterion—not just terrorist trials, Canadian law would divert the case out of the mainstream and into a tribunal that is unique,

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140 *R v Pan*, [2001] 2 SCR 344 at par. 43.

141 *R v Sims,* [1992] 2 SCR 858.

142 Concerning the breadth of judicial independence, see *Valente v The Queen* (1985), 23 CCC (3d) 193 (SCC) at pages 202-3.

> unparalleled in Anglo criminal justice systems and without precedent in Canadian history. The temptation to ascribe a political agenda to the proceedings is almost overwhelming. At the international level, proceedings would be vulnerable to even meritless allegations of "show trial", as occurred in Lockerbie. In my view, Canada ought not to be placed in the position of saying internationally: "oh, we expect that this will be a lengthy terrorist trial. We have a special court for those". For a multitude of reasons, there is much to be said for keeping even protracted proceedings within the mainstream of Canadian criminal law and procedure, and to avoid the creation of a unique and unprecedented tribunal that could immediately become a lightening rod for partisan political attacks.

Conclusion on Three-Judge Panels

243. Since the enactment of the *Anti-terrorism Act* there have been few opportunities to evaluate the unique challenges presented by the prosecution of terrorism cases. While a number of terrorism prosecutions are now under way, none has been completed and, arguably, any changes in the justice system to accommodate terrorism trials should await their completion. Much may be learned from the trial process of these cases and it would be premature to make changes at this time.

244. At this time, incremental policy proposals are being developed that keep terrorism trials within the ambit of criminal trials while trying to improve their efficiency.

CLOSING STATEMENT

245. The Commission's work covered a vast amount of territory: international experts, Government employees, and other professionals offered extensive testimony about the complex issues presented by terrorism. These issues include addressing terrorist threats, the prosecution of terrorist acts and the preservation of national security while at all times safeguarding individual rights and freedoms.

246. The Attorney General of Canada acknowledges the considerable task before the Commissioner in formulating practical and effective recommendations from the enormous body of evidence presented during this Inquiry and offers these submissions in the prospect they will assist the Commission in its important work.

247. It is hoped that the work of this Commission will stand as a legacy to those who perished in the Air India and Narita bombings and that the recommendations to come will result in measures that will help Canada stand ready and able to meet the present day challenges posed by terrorism and the challenges that lie ahead. In this way lessons may continue to be learned from the tragic events of June 23, 1985.

248. The Government of Canada looks forward to the Commissioners' report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF FEBRUARY, 2008.

John H. Sims, Q.C.
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