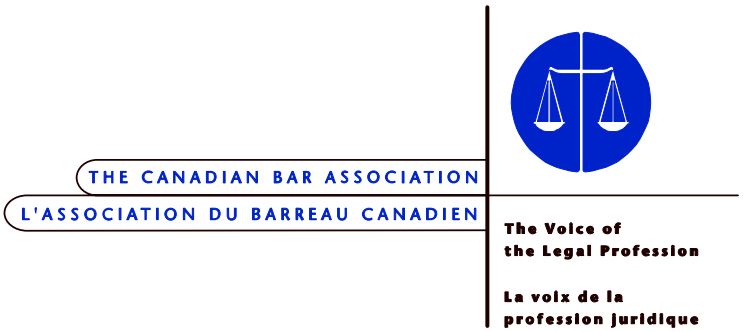

Submission to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

CANADIAN BAR ASSOCIATION

April 2007

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section, the National Criminal Justice Section, the National Charities and Not-for-Profit Law Section, the National Privacy Law Section, and the National Constitutional and Human Rights Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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

EXECUTIVE SUMMARY

A. Introduction

The Canadian Bar Association (CBA) is pleased to have been granted intervener status at the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, so that we may address the Commission as it hears as opinion evidence concerning policy recommendations. The CBA has a long-standing interest in the issues confronting legislators when they consider, in fighting international terrorism, how to strike the appropriate balance between the imperatives of national security and the strong desire of Canadians' to preserve our way of life, in which we aspire to respect rights and freedoms, celebrate diversity, and conform to the Rule of Law. The Commission must confront these same issues in providing its recommendations to the federal government as to whether the circumstances surrounding the Air India bombing demonstrate the need for any changes to legislation, law enforcement practices, or court rules and procedures.

B. The Investigation: Relationship between RCMP and CSIS

The role of CSIS and the RCMP, as well as their procedures for gathering intelligence information and evidence to be admitted at trial respectively, are fundamentally different in nature. The sometimes difficult relationship between the RCMP and CSIS may undermine the Crown's ability to mount its case and meet its constitutional obligations under *R. v. Stinchcombe*, in circumstances where information flows from CSIS to the RCMP and some or all of the information is withheld from the RCMP, Crown or defence on grounds of national security.

These difficulties emerged in the Air India trial, *R. v. Malik and Bagri*, in which it was found that CSIS had erased tapes and destroyed notes and transcripts relating to witness interviews. In the circumstances of the case, the Crown conceded that CSIS fell under the umbrella of the Crown for the purposes of determining whether it had discharged its constitutional disclosure obligations. These actions were found to amount to "unacceptable negligence" in the preservation of evidence, and thus, that the accuseds' section 7 *Charter* rights to a fair trial had been violated. Despite the introduction into evidence of CSIS' interview summaries, which contained the witnesses' hearsay statements, their weight was seriously compromised given the destruction of this confirmatory evidence. CSIS' failure to maintain proper interview notes, transcripts and wiretap evidence likely seriously undermined the prosecution of the Air India bombing.

In light of more recent information indicating that CSIS has not changed its practices to ensure the preservation of evidence, and concerns raised in the Arar Inquiry about the practices of the RCMP and CSIS in sharing information among themselves and with foreign intelligence agencies (particularly those who violate human rights), legislation should be adopted to control the sharing of intelligence information between intelligence agencies in general, and CSIS and the RCMP in particular. This legislation should clearly state when intelligence agencies will be required to gather intelligence information in a fashion consistent with the Crown's constitutional disclosure obligations. Further, the legislation should require written reliability assessments and use of caveats in appropriate cases when information is provided to other agencies within or outside Canada.

C. The Trial Process

Canadian criminal law is defined by the following principles: that offences are set out by the *Criminal Code*, that the rules of evidence are as set out in the *Canada Evidence Act*, that there are rules of procedure applicable to all criminal matters, and that all actions of the state with respect to the accused are subject to the *Canadian Charter of Rights and Freedoms*. Criminal law, including constitutional concepts such as "fundamental justice," "fair and public hearing," and "independent and impartial tribunal," has evolved over time. As well, while criminal law reflects a balancing between rights of the individual suspect or accused and the broader rights of society, the balance is adjusted from time to time. However the basic principles cited above

have remained the same. The fundamental purpose of criminal law remains to ensure that innocent people are acquitted and that the guilty are convicted only after a fair trial.

Adjusting the respective weight given to individual rights and the interests of society should only occur on the basis of a demonstrable need for change. Further, any adjustment should be consistent with the basic principles of Canadian criminal law and not undermine its fundamental purpose. The Air India prosecution does not provide a basis upon which to conclude that change is required. The tragedy associated with the Air India bombing is unparalleled in Canadian history and is one that Canada will never forget. However, our analysis of the prosecution is that the two accused were acquitted because the Crown's case rested on unreliable witnesses and the Crown failed to present evidence that established guilt beyond a reasonable doubt, not because of any flaws in the trial process. Further, there were numerous problems with disclosure, not only relating to the destruction of evidence by CSIS, but the nondisclosure of witness interviews that the trial judge found were "conducted at the behest of the Crown" and "clearly relevant" to the trial. We urge the Commission to be mindful of the causes of wrongful convictions and any recommendations for change should be assessed to ensure that they do not introduce greater risk of such convictions into the system.

If the outcome of the Air India trial was affected by the negligent destruction of evidence, then the practice of law enforcement, rather than the law, should change. In the CBA's view, the Commission should find that the Air India trial demonstrates no need to change the criminal trial process.

D. Special Courts and Advocates

The CBA is not opposed to the concept of special courts *per se*, in light of existing special courts that bring specialized knowledge of community resources available to those involved with the criminal justice system. However, this does not appear to be the type of special court being proposed for terrorist offences, but rather a structurally independent court system, or one employing rules and procedures different from ordinary courts, or a court system with both features. Not only would a parallel criminal justice system for terrorism-related matters be extremely costly, special procedures for these offences, proposed to address national security concerns, will greatly increase the risk of wrongful convictions. Any modifications to

established procedures that ensure compliance with an accused's right to a fair trial should be considered only if it were established that the current system is ineffective in dealing with the prosecution of certain offences. The failure of the prosecution in the Air India trial was not because the current system is ineffective in dealing with lengthy or complex trials of offences related to international terrorism, but because of the quality of the Crown's evidence. For these reasons, the CBA recommends that no special court system be created to prosecute terrorism offences, and that section 38.06 of the *Canada Evidence Act* be amended to preclude the withholding of evidence and the use of summaries of evidence in criminal proceedings.

Outside the criminal context, the CBA acknowledges that there may be cases where there cannot be complete disclosure of evidence against a person for reasons of national security. In *Charkaoui v. Canada (Citizenship and Immigration)*, the Supreme Court of Canada found that a process (there, the security certificate proceedings under the *Immigration and Refugee Protection Act*) involving a Federal Court judge evaluating secret evidence, without any independent counsel representing the interests of the person concerned, did not meet the requirements of fundamental justice and therefore constituted a section 7 *Charter* violation. The CBA's view is that in any proceeding where it is proposed that evidence be withheld from an affected person for reasons of national security, the judge should have the assistance of independent counsel representing the interests of this person. This would include a section 38 *Canada Evidence Act* hearing where the government requests a non-disclosure in a civil or criminal proceeding on the basis of national security. The independent counsel must, at a minimum, be permitted to have ongoing communication with the person concerned throughout the process to be able to effectively represent the person's interest, including after the independent counsel receives the secret evidence. Further, any counsel must have sufficient resources to be able to undertake their function effectively.

E. Air Transportation Security

Increased aviation security, particularly the proposed "no fly" list (referred to by the federal government as the "Passenger Protect" program) engages the rights of Canadians under *Charter* sections 6 (mobility), 7 (life, liberty and security of the person), 8 (unreasonable search and seizure), 9 (arbitrary detention), and 15 (equality). Privacy is protected through the right to be secure against unreasonable search or seizure, and is fundamental to security of the person. Any measures taken to prevent terrorism and increase aircraft security will have to be implemented in a way that enables the public to travel with the minimal affront to their legal rights and their dignity, is consistent with legislative and other national and international standards applicable to the protection of personal information in Canada, and upholds the principle of judicial oversight within the Rule of Law.

Through proposed *Identity Screening Regulations* under the *Aeronautics Act*, the government would be able to prevent persons on such a "no fly" list from boarding aircraft. Further, the government proposes to proclaim controversial section 4.82 of the *Aeronautics Act*, which provides authority for the disclosure of passenger information to the RCMP and CSIS, for reasons of national security and safety, but also to enforce arrest warrants for serious offences. The Commission should first consider whether a "no fly" list would in fact be an effective method of addressing transportation security in a manner that minimally infringes the valid interests of the traveling public, or whether other less intrusive measures (such as truly random baggage searches) would be more effective.

If the Commission does recommend a "no fly" program, it should caution the government against relying upon intelligence obtained from foreign authorities. Where possible, this information should be independently confirmed to Canada's satisfaction. Any list should be compiled from "made in Canada" criteria, all of which must relate directly relate to safety and security. As well, use of any list must be specifically constrained to prevent "mission creep," which risks expanding it from a tool to prevent threats to safety on aircraft and national security to a tool used for law enforcement purposes. While immediate threats such as terrorism may constitutionally justify incursions into Canadians' privacy and ability to travel, lower level criminality would not.

Further, safeguards must be established to reduce the risk that a "no fly" list will

unintentionally exclude persons who pose no risk to the traveling public. Confusion may arise particularly with the transliteration of non-English and non-French names and thus could result in racial profiling: those excluded from traveling or singled out for greater scrutiny will be from non-European ethnic groups. Consequently, there should be a mechanism by which individuals can positively confirm that they are not persons on the list so that they are not routinely challenged when attempting to board an aircraft. There should also be an appeal mechanism by which individuals can challenge their inclusion on the list that is independent of law enforcement and national security agencies. Where an appeal is made, the onus should be on the government to prove the appropriateness of the person's inclusion accordingly to publicly available criteria. The person should also be informed of the basis they are included on the "no fly" list, and to the extent possible in light of national security, be given the information the government relies upon in support of their inclusion. Personal information collected by government in connection with the "no fly" list should be retained only long enough to accomplish legitimate national security purposes, and to provide records to affected individuals who wish to challenge their inclusion on the list. Last, the risk assessment in the proposed system lacks nuance (persons are either designated "green" and permitted to board, or "red" and prohibited from boarding) and likely means that many more people will be included than is necessary. Any "no fly list" should include a provision whereupon person whose risk status is not well determined is able to board after additional screening.

F. Terrorist Financing

The current legislative and regulatory regime against terrorist financing in place in Canada represents an unprecedented level of monitoring, information sharing and government oversight in relation to charities. It has created a due diligence burden for charities and made full compliance with the law impossible to ensure. In light of this, the CBA urges the Commission to consider this, to recognize the profound negative effect on Canadian charities and their operations, and therefore not to recommend further constraints.

The *Anti-terrorism Act* may unwittingly catch innocent charities in its sweeping definitions of "terrorist activities," "terrorist group," and "facilitation of terrorist activities," the deregistration process for charities suspected of involvement in "terrorist activities," and broad legislation to curtail "terrorist financing." These measures drastically expand state powers at the expense of due process and individual rights and freedoms. A recent court decision, *R. v. Kawaja*, may have actually increased the risk for charities. The court struck down the portion of the definition of "terrorist activities" that dealt with purpose and motive (making the definition even more broad) and upheld the "facilitation" definition, to which Canadian charities are particularly vulnerable.

The broad definition of "terrorist group" and "facilitation" in the *Criminal Code* could include legitimate and unsuspecting charities, with no direct or indirect involvement or intention to participate in "terrorist activities" and with no knowledge of the ramifications of their actions. Charities seeking to support local recipient organizations in regions hit by natural disasters could be held accountable for the recipient organizations' actions and therefore responsible for due diligence investigations of them. The definitions also fail to distinguish between organizations working under a dictatorial regime and those working under a democratic regime, with the result that legitimate political dissenters in repressive regimes are caught in the operation of the legislation. Canadian charities providing assistance to such groups may also be caught in the definition, while companies operating in the same countries that effectively are financing dictatorships would be free to pursue their business interests.

Notwithstanding the very small number of suspicious financial transactions attributed to charities, they may be subject to the record keeping and reporting duties in the *Proceeds of Crime Act* and *Regulations* as "reporting entities." Even if they are not "reporting entities", their own transactions could be reported by the financial institutions and accountants with whom they deal, without their knowledge. Information reported to the Financial Transactions & Reports Analysis Centre of Canada (FINTRAC), could be shared with other government and law enforcement agencies, with consequences such as the denial of registration or deregistration under the *Charities Registration (Security Information) Act*, criminal charges, and freezing and seizing of their charities' assets. These potential consequences have a chilling

effect on the motivation and ability of charities to pursue charitable objectives, particularly in the international arena.

The recent Bill C-25 amending the *Proceeds of Crime Act* and the *Income Tax Act* increases the monitoring and oversight of the charitable sector and has a significant impact on charities that transfer funds internationally. Virtually any means used by a charity to transmit funds may result in reports to FINTRAC. Bill C-25 also significantly expands the nature of information to be disclosed concerning the transaction and the parties involved, including directors, officers, trustees, agents, and employees of charities. The circumstances in which information about an organization flows to both foreign and domestic government agencies, including the Canada Revenue Agency (CRA), is also expanded. A report to CRA on suspicion that the information is relevant to an organization with charitable status or applying for charitable status, could quash an organization's application or result in a deregistration investigation under the *Charities Registration (Security of Information) Act*. At the same time, CRA officials can freely disclose information about a charity to the RCMP, CSIS, and FINTRAC that would be relevant to investigations under the terrorist activity and facilitation provisions of the *Criminal Code*.

The deregistration process under the *Charities Registration (Security of Information) Act* raises concerns regarding basic principles of natural justice and due process, particularly in light of the serious consequences that could result. In addition to losing the tax benefits of charitable status, this process may expose the charity or its directors to investigation and prosecution under the *Criminal Code* and freezing or seizure of its assets. The result could be bankruptcy, insolvency, or winding up of the charity, in turn exposing the charity's directors to civil liability at common law for breach of their fiduciary duties for not having adequately protected the assets of the charity. No knowledge or intent is required, the provision is retroactive, normal rules for the admissibility of evidence do not apply, "confidential" information may be considered but not disclosed to the charity, there are no warnings or other opportunity for a charity to change its practices, there is no appeal or review by a court, the justification is based upon the low standard of "reasonable belief," and the onus is on the charity to prove its innocence. The concerns were recently echoed by the House Subcommittee on the Review of the Anti-terrorism Act.

G. Conclusion

The Air India case poses difficult questions for this Commission, for government, and for the Canadian people. The CBA thanks the Commission for the opportunity to provide its insight and would be happy to supplement our submission with more detailed information on the issues outlined above as additional information and testimony is received by the Commission.

I. INTRODUCTION

In the recent case of *Charkaoui v. Canada (Citizenship and Immigration)*[1] Chief Justice McLachlin prefaced her remarks about the constitutionality of anti-terrorist provisions in the immigration context by stating:

> One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.[2]

The bombing of Air India Flight 182 in 1985 which killed all 329 passengers and crew, and the related bomb that detonated in the Narita airport in Tokyo, Japan, represent the most horrific acts of international terrorism having their origin on Canadian soil. While occurring over twenty years ago, these events continue to resonate. Post-September 11, 2001, Canadians continue to fear for their safety at home, at work or school, and while they are flying within Canada or to foreign destinations. However, post-Maher Arar, they question whether the steps being taken in the name of national security are required and legitimate, and whether national security is being purchased at the price of our way of life, in which we aspire to respect rights and freedoms, celebrate diversity, and conform to the Rule of Law. As the Chief Justice alluded to above, it is those divergent concerns which ought to press upon the conscience of law makers in coming to terms with the risk of terrorism, and which this Commission of Inquiry must integrate in making its recommendations.

Since anti-terrorism laws were first enacted in Canada, the Canadian Bar Association (CBA) has actively participated in law reform efforts to improve Canada's various strategies. For

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1 2007 SCC 9.

2 *Ibid,* at para. 1.

example, we appeared before both House and Senate Committees on then Bill C-36, *Anti-terrorism Act*[3], Bill C-7, *Public Safety Act*[4] and the various bills that culminated in the *Immigration and Refugee Protection Act*[5]. CBA intervened on *Suresh v. Minister of Citizenship and Immigration*[6], raising issues relating to Canada's international obligations as a signatory to the UN Convention Against Torture. The CBA also intervened before the Supreme Court of Canada when it considered section 83.28 of the *Criminal Code*[7] that provides the power to conduct investigative hearings.[8]

In 2005, the CBA appeared before both House and Senate Committees as part of the three-year review of Canada's anti-terrorism laws, and our recommendations are cited in both Committee reports. That same year, we made representations to the Commission of Inquiry in Relation to Maher Arar. Most recently, the CBA intervened in *Charkaoui v. Canada (Citizenship and Immigration),*[9] *Almrei v. Canada (Citizenship and Immigration),* and *Harkat v. Canada (Citizenship and Immigration)* [10] concerning the constitutional validity of security certificates.

Throughout our efforts, we have stressed that any review of Canada's anti-terrorism laws should involve:

- identifying appropriate objectives of an anti-terrorism strategy, including distinguishing between national security and the criminal law;
- identifying requirements for an effective anti-terrorism strategy;
- determining appropriate methods for measuring or determining the nature and extent of risk of terrorism;

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3 S.C. 2001, c. 41.

4 S.C. 2004, c. 15.

5 S.C. 2001, c.27 [*IRPA*].

6 [2002] 1 SCR 3.

7 R.S.C. 1985, c. C-46 [*Criminal Code*]

8 *Application under section 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248.

9 *Supra,* note 1.

10 *Ibid.* The Court's reasons in all three cases were contained in a single judgment.

- articulating the legal, constitutional and moral standards that must be maintained and protected while advancing objectives associated with anti-terrorism;
- ensuring that measures enacted purportedly for national security purposes are not then utilized for extrinsic purposes; and
- creating a unified, national, independent review mechanism responsible for ensuring comprehensive accountability of all agencies and departments responsible for advancing anti-terrorism strategies.

We are pleased to have been granted intervener status so that we may address this Commission as it hears opinion evidence concerning policy recommendations. We wish to preface our remarks with a number of qualifications. The CBA has not participated in Commission proceedings thus far, and has not heard the evidence placed before the Commission. Our focus is not with respect to the factual determinations this Commission will make regarding the events surrounding the Air India bombing, but rather the policy recommendations that this Commission will make after hearing all of the evidence. We recognize that policy decisions must be informed by factual considerations, as well as the interests of those groups or entities that will be affected by the operation of the policy. This Commission has heard, and will hear, a great deal of evidence on a wide range of issues, and is likely to make findings of fact that will be relevant to any policy recommendations ultimately put forward.

Further, our expertise does not lie in logistical planning to achieve policy objectives, and we recognize that policy recommendations often have practical ramifications relating to factors such as staffing and budget, which are likewise beyond our own expertise. Finally, there may be more than one way of meeting various objectives. Therefore, our comments and recommendations are at a general and necessarily broad policy level, with adherence to the foundational constitutional principle of the Rule of Law and the express constitutional guarantees as guiding principles.

II. THE INVESTIGATION: RELATIONSHIP BETWEEN RCMP AND CSIS

A. Introduction

The Commission's terms of reference state that it is to inquire into whether "there were problems in the effective cooperation between government departments and agencies, including the Canadian Security Intelligence Service and the Royal Canadian Mounted Police" that revealed the need for any changes in practice and legislation to prevent the occurrence of similar problems, and also "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." Both of these matters directly implicate information sharing between the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP). At the crux of this issue is finding a way to facilitate proper cooperation between intelligence to ensure agencies and police agencies within Canada and abroad, and at the same time to ensure that information sharing be done in a manner that is consistent with the *Canadian Charter of Rights and Freedoms*, does not result in abuses of human rights and is consistent with the Rule of Law.

B. Intelligence Information and Evidence

According to the Security Intelligence Review Committee (SIRC), the role of the Counter Terrorism Branch of CSIS is "to advise the Government of Canada on threats of serious violence that could affect the safety and security of Canadians and Canada's allies".[11] In contrast, the RCMP describes its role as to enforce the laws of the Parliament of Canada and of municipal or provincial governments pursuant to policing agreements.[12] Intelligence information is generally gathered with the understanding that it will not be used in a court of

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11 Canada, Security Intelligence Review Committee, *Annual Report* 2005-2006 (Ottawa: Public Works and Government Services Canada, 2006), online: http://www.sirc-csars.gc.ca/annual/2005-2006/toc_e.html [2005-2006 SIRC Report]

12 "Organization of the RCMP," online, The Royal Canadian Mounted Police http://www.rcmp.ca/about/organi_e.htm. See also "About the RCMP," online, The Royal Canadian Mounted Police http://www.rcmp.ca/about/index_e.htm, describing its multi faceted policing role as follows: "The RCMP is unique in the world since it is a national, federal, provincial and municipal policing body."

law and will not be subject to the process of testing for reliability and relevance that is the hallmark of an adversarial judicial process. The procedures for gathering and preserving intelligence information do not contemplate that they will be admitted as evidence in a trial. It is for these reasons, among others, that the McKenzie[13] and McDonald[14] Commissions both recommended that security and intelligence function be separated from the RCMP in recognition of "the conflicting combination of priorities and responsibilities of security intelligence investigations as compared to police work."[15]

Regrettably, from its inception, the relationship between the RCMP and CSIS has been marked with turf wars, differing policies and practices, and a lack of precision about when an intelligence investigation ends and a policing investigation begins. Whether prosecutions are conducted under the old provisions of the *Criminal Code* or the new, the sometimes difficult relationship between CSIS and the RCMP may undermine the Crown's ability to mount its case and meet its constitutional disclosure obligations under *Stinchcombe*.[16] This conflict, which can have serious effects on any trial, may arise in circumstances where information flows from CSIS to the RCMP and some or all of the information is withheld from the RCMP, Crown or defence on the grounds of national security.[17]

C. The Air India Prosecution

It is clear from the evidentiary rulings in the Air India trial[18] that the use of intelligence information in police investigations and trials remains problematic for both the legal and intelligence community. Some intelligence information was ruled inadmissible, other

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13 Report of the Royal Commission on Security, McKenzie Report (Ottawa: Queen's Printer, 1969).

14 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission), (Ottawa: Supply and Services, August, 1981).

15 "Backgrounder No. 5: A Historical Perspective on CSIS," online, CSIS http://www.csis-scrs.gc.ca/en/newsroom/backgrounders/backgrounder05.asp. See also the testimony of Professor Wesley K. Wark before this Commission, Volume 16 of the Transcript (5 March, 2007), in particular, pages 1434 to 1437.

16 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 CCC (3d) 1 (cited to CCC) [*Stinchcombe*]

17 Martin L. Friedland provides an overview to this problem in "Police Powers in Bill C-36," in Daniels, Macklem and Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 270-71. See also Canada, Security Intelligence Review Committee, *Annual Report* 2003-2004 (Ottawa: Public Works and Government Services Canada, 2004), online, http://www.sirc-csars.gc.ca/annual/2003-2004/toc_e.html [2003-2004 SIRC Report]

18 *R. v. Malik and Bagri* 2005 BCSC 350.

information which met the threshold test for admissibility was found so inherently unreliable that it was given little or no weight. CSIS' destruction of evidence used in the RCMP investigation played a substantial role in these rulings. It had destroyed notes and tapes of conversations the Crown alleged were vital to proving its case.

The judge in the Air India proceedings struggled with CSIS policies and practices and their impact on the trial. In 1985, CSIS intercepted telephone conversations of Parmar, one of the co-conspirators, and then subsequently erased them. Bagri, one of the accused, brought a *Charter* application prior to trial arguing that the erasure of the tapes violated his section 7 *Charter* right to disclosure. In reaching his decision, Josephson J. noted the Crown's concession that the RCMP had reached an agreement in 1987 with CSIS, which gave it unfettered access to relevant CSIS files. This concession led inexorably to the conclusion that CSIS fell under the umbrella of the Crown for the purpose of applying the disclosure obligations in *Stinchcombe*. As well, the Crown conceded that erasing the intercepts was "unacceptable negligence" within the meaning of that phrase described in *R. v. La*.[19] After concluding Bagri's section 7 rights had been violated, the judge granted the defense the right to place before the court evidence of the erasure of the tapes by CSIS. He also gave Bagri the right to re-visit this issue at trial and argue that the erasure of the tapes was an abuse of process and a violation of his right to a fair trial.[20]

CSIS policies and practices were again considered and criticized when Malik, the other accused, brought his own application before trial arguing that his section 7 *Charter* rights were violated by CSIS' destruction of notes, audiotapes and transcripts relating to interviews of a Crown witness.[21] In granting the application and finding that CSIS conduct again amounted to "unacceptable negligence," the court considered and rejected the argument of the Crown that CSIS' destruction of notes, transcripts, etc. was not negligent because the CSIS operative had done so in accordance with his ordinary procedure when dealing with intelligence sources. In reaching this conclusion, the trial judge relied on section 19 of the

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19 (1997), 116 C.C.C. (3d) 97 (S.C.C.).

20 *R. v. Malik*, [2002] B.C.J. No. 3219 (B.C.S.C.) [*Malik* [Erasure of wiretap recordings]]

21 *R. v. Malik* [2004] B.C.J. No. 842 [*Malik* [Destruction of CSIS notes, audiotapes and transcripts]].

Canadian Security Intelligence Act,[22] which provides for disclosure of CSIS' information for the purposes of a criminal prosecution:

> 19. (1) Information obtained in the performance of the duties and functions of the Service under this Act shall not be disclosed by the Service except in accordance with this section.
>
> (2) The Service may disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,
>
> > (a) Where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken.

Citing this statutory framework and a stated commitment to cooperate with the criminal investigation of the Air India bombings, the trial judge concluded:

> There is simply no evidentiary basis upon which I can distinguish the categorization of this destruction of material from that of the Parmar tapes. While Laurie may have been following his normal practice in his dealings with the Witness as a source of intelligence information, C.S.I.S. appears to have failed at an institutional level to ensure that the earlier errors in the destruction of the Parmar tapes were not repeated.
>
> Despite clear lines of demarcation between the roles of C.S.I.S. and the R.C.M.P., the information obtained from the Witness immediately struck Laurie as being of extreme importance and relevance to the Air India criminal investigation. When, in the course of his information gathering role, he uncovered evidence relevant to that investigation, he was obliged by statute and policy to preserve and pass on that evidence to the R.C.M.P.[23]

While two of the witness's interview summaries were admitted as having met the threshold criteria of necessity and reliability pursuant to a principled exception to the hearsay rule, the trial judge recognized that these "statements" were a summary of selected portions of the interview of particular interest as "intelligence." This raised serious concern about the accuracy and reliability of the statements given their lack of completeness, the focus of the

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22 *Canadian Security and Intelligence Service Act*, R.S.C., 1985, c. C-23.

23 *Malik* [Destruction of CSIS notes, audiotapes and transcripts], *supra,* note 21, at paras. 19-20.

operative and the perception of the prospective witness that they were acting as a confidential intelligence source. These concerns ultimately proved fatal to the prosecution.

Despite the introduction of these statements into evidence, Josephson J. approached the statements with caution acknowledging that their weight was seriously undermined, as the summary prepared by CSIS was not entirely full or accurate and there was a reasonable possibility that the missing context may have affected the meaning. In acquitting Bagri, Josephson J. observed:

> Thus, proof of Mr. Bagri's guilt beyond a reasonable doubt rests upon hearsay statements for which there is no reliable confirmatory evidence. These statements were provided on a confidential basis and not under oath by a person who falsely claimed loss of memory when testifying. When one adds to this the inability of the defence to conduct an effective cross-examination on significant issues surrounding those hearsay statements, I conclude that, even without turning to the need for a Vetrovec caution, a reasonable doubt arises with respect to the ultimate reliability of Ms. E's hearsay statements to Mr. Laurie.
>
> This Court found Mr. Bagri's rights under s. 7 of the *Charter* to have been violated on three separate occasions. The first two breaches arose from the destruction by CSIS of relevant material, namely, the Parmar telephone intercepts and Mr. Laurie's notes and audiotapes of his interviews of Ms. E. The third breach was occasioned by delayed Crown disclosure during the defence case. Mr. Bagri was granted certain interim remedies and the parties agreed to defer the final determination of appropriate s. 24 remedies until the conclusion of trial so that the prejudice to Mr. Bagri's fair trial interests could be assessed in light of the full evidentiary record. The parties made comprehensive closing submissions with respect to both the applicable test of prejudice and the appropriateness of various remedies to address any such prejudice. In light of the outcome of the case against Mr. Bagri, however, it is not necessary to consider these matters.[24]

The rulings in the Air India case raise serious questions about whether CSIS collects and retains information in a form that permits its dissemination to the RCMP or other municipal police forces for a criminal prosecution. Obviously, its failure to maintain proper interview notes, transcripts and wiretap evidence likely seriously undermined the prosecution of the Air India bombing, the most important Canadian prosecution of terrorist activity that has been undertaken.

It then begs the question whether CSIS has changed its practices to ensure that intelligence

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[24] *R. v. Malik and Bagri*, *supra,* note 18, at paras. 1236 and 1250.

information can be provided to the RCMP in a form useable in a criminal investigation and prosecution. It is clear that in the past 30 years, the Crown has encountered numerous legal problems due entirely to the destruction of evidence by CSIS. SIRC explained the situation in its 2003-04 Annual Report as follows:

> In July 1984, the *Canadian Security Intelligence Service Act* was proclaimed, creating CSIS to investigate, analyze and advise the Government of Canada on threats to Canada's national security. At the same time, Parliament put in place a comprehensive system of accountability for the new agency. The centerpiece of that accountability system is the ongoing external independent review of CSIS for which we are responsible.
>
> It is worth recalling the events that led to the passage of this legislation, in circumstances not unlike those of today. Allegations of unlawful or improper behavior by security intelligence officers of the RCMP prompted the government in 1977 to establish the *Commission of Inquiry Concerning Certain Activities of the RCMP*, chaired by Mr. Justice David McDonald. The Commission concluded that Canada needed an effective security service to protect itself, but recommended that, given the differences between security intelligence work and police work, the government separate the security intelligence function from the law enforcement function of the RCMP. The creation of CSIS and SIRC was the result.[25]

In its list of important accomplishments, SIRC includes the following:

> In 1992, after an extensive review of the 1985 Air India tragedy, the Committee reported that CSIS had not been in a position to predict that the Air India flight was to be the target of a terrorist bomb. SIRC also concluded that CSIS senior management had not provided adequate direction to employees concerning the Service's mandate and role in relation to the RCMP criminal investigation, and that <u>CSIS policies in relation to the collection, retention and erasure of surveillance audiotapes were seriously deficient</u>.[26]

It remains the practice of CSIS to avoid taking notes from key sources[27] and to destroy notes from other meetings[28]. For a police force to direct such policies be followed would clearly be a gross and deliberate violation of an accused's right to full answer and defence. It appears CSIS accepts this as routine and justified by the interests of national security.

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25 2003-2004 SIRC Report, *supra,* note 17 at 9.

26 *Ibid*., at 10, emphasis added.

27 2005-2006 SIRC Report, *supra,* note 11.

28 *Ibid.*

Two illustrations of the damage that results from this stubborn persistence will suffice. The first involves the case of Bhupinder Singh Liddar. Because of faulty CSIS investigations, his personal and professional reputation was sullied, and he was denied an Indian Consul appointment. Mr. Liddar received an official apology from the Government of Canada, delivered by then Foreign Affairs Minister Pierre Pettigrew, as a result of a stinging review of CSIS' conduct by former SIRC chair, Paule Gauthier. The report claimed that CSIS investigators routinely destroy screening interview notes and that CSIS will lie and manipulate information to achieve its ends.[29]

The second example is the case of Adil Charkaoui, who was held in custody under a security certificate. Charkaoui was interviewed by CSIS, and the transcripts of the interview were destroyed after CSIS summarized the interviews in accordance with CSIS policy.[30] A motion was made to vacate the certificate on the basis that this resulted in a denial of procedural fairness. While the motion was dismissed on the basis that, "the interview summaries are of no significance to the foundation of the facts and allegations on which the certificate and detention are based," Noel J. nevertheless agreed that "all of the information collected by the CSIS and relevant for the purposes of the proceeding must be communicated to the Ministers"[31] and that the destruction of interview transcripts rendered this impossible. The interviews took place in early 2002 – this demonstrates that the CSIS policy of evidence destruction remained in place ten years after the SIRC 'Air India' admonition.

The CBA submits that the separation of intelligence gathering and policing duties arising out of the McKenzie and McDonald Commissions was in recognition of the different nature and quality of information gathered and preserved by the two processes and that accordingly moving such information between the two types of gatherers should be approached with caution.

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29 The report is listed as "Top Secret". It was, however, obtained by the Globe and Mail, CTV, and others. See "Gov't apologizes for bungled CSIS investigation," *CTV News* (15 September 2005), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126713937939_122123137/?hub=Canada>.

30 *Re Charkaoui*, [2005] F.C.J. No. 139 (T.D.) at para 10. The appeal of the case to the Federal Court of Appeal was dismissed (2006 FCA 206), and leave to appeal to the Supreme Court of Canada was allowed on March 15, 2007.

31 *Ibid*., at para 16.

D. The Arar Inquiry

Maher Arar is a Canadian citizen who was rendered to Syria from the U.S. in the fall of 2002. His case is of such notoriety that the details do not bear repeating in this submission. The Honourable Justice Dennis O'Connor was named Commissioner to conduct an inquiry into the actions of Canadian government officials and their relationship, if any, to his detention in the U.S. and Syria. During the Arar Inquiry, the Commissioner heard extensive evidence about the interface between the RCMP and CSIS, as well as evidence relating to the mandate of the RCMP to conduct national security investigations. Post 9/11, the RCMP became involved in national security investigations which may have had an eye to possible criminal prosecution but were, in fact, almost indistinguishable from the activities CSIS carries out. Once again, the mandate of the two organizations appears overlapping and inherently likely to cause conflicts. Equally, once again, a policing entity is in charge of the very kinds of investigations that the McDonald Commission decided it should not undertake. Justice O'Connor in his report again emphasized the need for measures to ensure proper information sharing between CSIS and the RCMP.[32]

The Arar case stands as a clear lesson on the pitfalls of simply passing this information freely and without a clear set of legislative guidelines setting out rules for assessing reliability and disseminating this information. In general, if such information sharing is required, it should be done only pursuant to strict legislative guidelines governing dissemination and the use to which it may be put. Policies and guidelines without the force of law are not adequate.

One of the difficulties that emerged at the Air India trial was the failure of CSIS agents to maintain proper records and preserve evidence obtained during the course of their investigation. As noted above, this is not an isolated occurrence. The lack of the original

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[32] See, for example, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa, Minister of Public Works and Government Services, 2006) at 501:

> As the flow of information between agencies increases, so too does the need for a strong and effective review mechanism. To ensure that information sharing is being conducted in conformity with law and policy and that it is not having an unfair or improper impact on individuals or groups, it is essential that RCMP policy in this regard be followed. A strong system of review should play an important role in ensuring that information-sharing practices comply with policy and accepted norms.

notes prepared by the CSIS officers leads to difficult situations in which there are serious credibility concerns concerning the accuracy of the interview summaries' outlining what was said by a particular person within a particular context. If this information may be provided to police forces or used in trial, CSIS officers should be instructed to keep the notes and any tape recordings of their interviews. Absent such procedures, it remains questionable whether such witness interviews can ever have evidentiary value.

The CBA recognizes that at times it may be vital to share of information between CSIS and law enforcement agencies. By the same token, it is important that when CSIS shares information, it performs and provides proper and fully documented reliability assessments. Within the context of the Arar Inquiry, Justice O'Connor found that the CSIS agent charged with evaluating the credibility of Arar's statement brought back from Syria by CSIS agents in November 2003 erred in his assessment. The agent found that the information was reliable when he should have concluded that it unreliable because it was obtained under torture. This serious error had a significant impact on the ongoing criminal investigation and on the position taken by the RCMP and CSIS with respect to efforts to bring Mr. Arar back to Canada. Thus, when CSIS shares information with other agencies, it must ensure that it does a careful reliability assessment and fully document the same so as to ensure that the information is provided with a proper understanding as to its reliability and worth.

As CSIS shares intelligence, as opposed to evidence, the receiving law enforcement agencies must ensure that they approach the information understanding that they have not necessarily been provided with evidence that can be used within the context of a criminal procedure.

E. Sharing Information from Foreign Intelligence Agencies by CSIS

Within the context of the Arar Inquiry, it was clear that CSIS received information from other intelligence agencies and shared it with the RCMP. Obviously, sharing that information will require CSIS to provide caveats with respect to the use of the information and to obtain permission from foreign intelligence agencies before the information is used in other contexts, especially within the context of criminal trials. Having said this, it is also important that CSIS provide law enforcement agencies with proper assessments of the

reliability of the information obtained from foreign intelligence agencies. It is important that CSIS carefully evaluate the information obtained in order to ascertain whether or not it was likely obtained under torture or in other circumstances that would call into question its reliability.

F. Intelligence Sharing between CSIS or the RCMP and Foreign Agencies

Another lesson learned from the Arar Inquiry was the importance of the RCMP *supplying* reliable information to foreign intelligence agencies. Justice O'Connor found that the information the RCMP shared with the U.S. agencies was inaccurate, inflammatory and prejudicial, and this contributed to the decision to deport Mr. Arar to Syria.[33] We can see the extreme importance of information shared with foreign agencies being reliable, relevant, and subject to proper caveats on the reliability and use of the information. The RCMP put no such caveats on the information it provided to the U.S. relating to Mr. Arar, thereby increasing the risk the information would be used for unacceptable purposes.[34]

By the same token, law enforcement and intelligence agencies must consider the rules to be applied when sharing information with foreign intelligence agencies that violate human rights. Within the context of the Arar hearing, the RCMP sent questions to Syrian military intelligence concerning Abdullah Almalki. These questions created a "credible risk" that Mr. Almalki would be subjected to torture.[35] Before Canadian intelligence and law enforcement agencies share information with regimes that engage in torture, they must be satisfied that it is not likely to result in the use of torture.

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33 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa, Minister of Public Works and Government Services, 2006) at 24-30.

34 *Ibid.,* at 147.

35 *Ibid,* at 38-39.

Finally, when Canadian agencies share information or receive information from regimes that engage in torture, we must be certain that Canada is not being complicit in the use of torture, that we do not encourage regimes to extract information under torture, and that we carefully evaluate and assess information obtained from these regimes that routinely engage in the practice of torture.

Justice O'Connor made important recommendations in this regard that should be accepted by this Commission of Inquiry.

RECOMMENDATION:

Canada should adopt legislation to control the sharing of intelligence information between intelligence agencies in general, and CSIS and the RCMP in particular.

This legislation should clearly state when intelligence agencies will be required to gather intelligence information in a fashion consistent with the Crown's disclosure obligations. Further, the legislation should require written reliability assessments and use of caveats in appropriate cases when such information is provided to other agencies within or outside Canada.

III. THE TRIAL PROCESS

A. Introduction

The Terms of Reference state that the Commission of Inquiry is to consider:

> …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.

In responding to this aspect of the Terms of Reference, the Commissioner should consider the Air India case in the context of Canada's criminal justice system generally. While we do not intend to offer a comprehensive historic or philosophical analysis of criminal law, it may generally be said that criminal law in Canada is defined by the following:

- The offences are those set out in the Criminal Code, as is amended by Parliament from time to time;
- The rules of evidence are as set out in the *Canada Evidence Act*,[36] and as defined by common law;
- There are rules of procedure applicable to all criminal matters;
- All of the foregoing, as well as all other actions of the state with respect to the accused are subject to the *Canadian Charter of Rights and Freedoms*.

Canada's criminal justice system has evolved, and continues to evolve, in response to factors such as changing notions of morality, what is required by the pubic interest, notions of fault, and notions of harm. Further, constitutional principles such as "fundamental justice," "fair and public hearing," and "independent and impartial tribunal" continue to evolve as our understanding of the issues is refined and new issues confront society and the courts. As well, while criminal law reflects a balancing between the rights of the individual suspect or accused and the broader rights of society, that balance is adjusted from time to time.

A thorough analysis of this evolution is beyond the scope of this submission. However, one may fairly state that, despite these historical changes, the fundamental purpose of criminal law remains the same: to ensure that innocent people are acquitted and that guilty persons are convicted only after a fair trial. The CBA is of the view that adjusting the respective weight given to individual rights and interests of society should only occur on the basis of a demonstrable need for change. Further, any adjustment must not undermine the fundamental purpose of the criminal law.

We believe that the Air India prosecution does not provide a basis upon which to conclude that change is required. In stating this position, we wish to be clear. The tragedy associated with the Air India bombing is, perhaps, unparalleled in Canadian history and it is one that Canada will never forget. The pain inflicted upon the families and friends of the victims is immeasurable and nothing can compensate for their loss. However, our analysis of the prosecution is that the accused were acquitted because the Crown's case rested upon

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[36] R.S.C., c. E-10 [*Canada Evidence Act*].

unreliable witnesses, and the Crown failed to present evidence that established guilt beyond a reasonable doubt, not because of any flaws in the trial process.

B. Avoiding Miscarriages of Justice

Regrettably, Canada now has a growing list of recognized cases in which people have been wrongfully convicted for murder. The disturbingly long list reveals many ways in which imperfections may insidiously creep into the criminal justice system, with the result that an innocent person is convicted. The desire to have those responsible for the crime brought to justice cannot override the most fundamental principle of criminal law, that is, that there cannot be a conviction unless admissible evidence proves guilt beyond a reasonable doubt. Without a doubt, time and expense are associated with a thorough criminal investigation and a fair criminal trial. At times, frustration is likely associated with that time and expense.

However, frustration must never be an excuse or justification for the rigorous standard of proof beyond a reasonable doubt to yield to guilt based upon suspicion, or for a fair and open trial to give way to adjudication behind closed doors.

In a recent paper,[37] Bruce MacFarlane observes that Canada, England, Australia, New Zealand and the U.S. have all recognized the occurrence of wrongful convictions within their respective criminal justice systems. The causes identified by the author include:

- public pressure;
- unpopular defendant;
- conversion of the adversarial process into a game;
- noble cause corruption (a belief by police that the ends of securing the conviction of a guilty person justifies the fabrication or artificial improvement of evidence);
- eyewitness misidentification;
- police mishandling of the investigation;

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37 "Convicting the Innocent: A Triple Failure of the Justice System", (2006) 31 Man. L.J. 403.

- inadequate disclosure to the defence;
- unreliable scientific evidence;
- criminals as witnesses for the Crown;
- inadequate defence work;
- false confessions; and
- misleading circumstantial evidence.

Canada is finally gaining an understanding of the causes of failure within the criminal justice system that have resulted in the conviction of innocent persons. This Commission's recommendation for change should be assessed to ensure that they do not introduce greater risks of wrongful conviction into the criminal justice system.

C. The Air India Prosecution

The experienced judge presiding over *R.* v. *Malik and Bagri*[38] heard the evidence and listened to the arguments of experienced counsel. He determined that critical Crown witnesses lacked credibility and, consequently, that the Crown had failed to prove guilt beyond a reasonable doubt. No appeal was taken by the Crown and, for purposes of this Commission, we urge the conclusion that no error was made by the trial judge. The circumstances mandated an acquittal and a finding of guilt would have been perverse. In other words, regardless of the result that may have been hoped for, the fair and proper functioning of the criminal justice system did not permit any other result on the evidence presented.

This is illustrated in the following excerpts which, though extensive, are important to demonstrate that the critical weaknesses in the Crown's case were attributable to witnesses who lacked credibility rather than to deficiencies in the existing legal process.

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38 *Supra,* note 18.

In relation to Crown witness Reyat, who pleaded guilty to related offences and who, according to the Crown, was involved in acquiring parts for the bombs used to blow up the planes, the trial judge wrote:

> **Mr. Reyat's credibility on the witness stand is also of little moment in relation to the outcome of this trial**. That said, it is without hesitation that I find him to be an unmitigated liar under oath. Mr. Reyat endeavored to reveal as little information as possible regarding the complicity of himself and others in the offences, while attempting unsuccessfully to craft a story consistent with his plea to manslaughter and his admissions of fact in that connection.
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> Much of his evidence was improbable in the extreme and entirely inconsistent with common sense. When caught in obvious and numerous irrationalities, he would seek refuge in memory loss or offer tentative possibilities or guesses.
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> The most sympathetic of listeners could only conclude, as do I, that his evidence was patently and pathetically fabricated in an attempt to minimize his involvement in his crime to an extreme degree, while refusing to reveal relevant information he clearly possesses. His hollow expression of remorse must have been a bitter pill for the families of the victims. If he harboured even the slightest degree of genuine remorse, he would have been more forthcoming.[39]

Similarly, the evidence of witness D was central to the Crown's case against Malik. The Crown's theory was that Malik had a number of conversations with D in which he implicated himself in the crimes.[40] The Crown also attempted to prove through witnesses A and B that Malik had motive to commit the crimes. In relation to A, the trial judge found that, "I accept the defence submissions to the effect that the evidence of this witness is not only implausible, but impossible."[41] He concluded that A **"has no credibility**."[42] Similarly damning findings were made against witness B. The trial judge wrote, "I conclude not only that Mr. B held strong motives to seek vengeance against Mr. Malik, but also that he was not truthful in his evidence when describing his motives in first going to police."[43] The basis for the judge's findings in relation to B's credibility were:

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39 *Ibid,* at para. 225-227, emphasis added.

40 *Ibid,* at para. 272.

41 *Ibid,* at para.681.

42 *Ibid,* at para.687, emphasis added.

43 *Ibid,* at para.695.

- His evidence regarding his suitcase conversation with Mr. Malik contains information easily gleaned from the public domain;
- He did not reveal this conversation for some 12 years after the event;
- He harboured a powerful motive for revenge after experiencing years of what he perceived to be on-going and significant deception by Mr. Malik, leading to his financial ruin;
- He disclosed the conversation to the police for the first time almost immediately after threatening harm to the person and reputation of Mr. Malik;
- He was not being truthful when he testified that his motive in coming forward then was his conscience. That rather obvious deception was calculated to enhance his credibility;
- In the past, he has provided false information under oath when it advanced his own interests;
- His evidence suffered internal inconsistencies; and
- His evidence conflicted to some degree with that of Mr. Narinder Gill and Ms. D.[44]

Finally, the trial judge found that D was not a credible witness, and that there were serious concerns with respect to her "veracity and motivations."[45] Therefore, "Having found that Ms. D was not truthful with respect to the core of her testimony against Mr. Malik, it would be wholly unsafe to rely on her other evidence tending to incriminate Mr. Malik."[46]

The trial judge also made conclusive findings against the credibility of the witnesses the Crown presented against Bagri. As against witness C, the trial judge found that the witness,

> …is a person driven by self-interest, not conscience or altruism as he testified. The extent to which his actions have been motivated and coloured by that self-interest was evident from his testimony and raises serious, if not overwhelming, concerns with respect to his credibility as a witness."[47]

Further, the judge noted:

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44 *Ibid,* at para.699.

45 *Ibid,* at para.777.

46 Ibid.

> As outlined fully in defence submissions, Mr. C's immigration history from the time he entered the U.S. illegally in 1983 until as recently as January, 2004 reveals his willingness to engage in deception and lies, even under penalty of perjury, whenever he believed it would advance his self-interest. His attempts to rationalize his falsehoods on the basis that he had simply sought to better himself and his family, not harm others, do nothing to mitigate the obvious fact that he considered the truth secondary when it conflicted with his self-interest.[48]

Finally, the trial judge characterized C's evidence as being "rife with examples of evasiveness and internal contradictions, followed by implausible explanations."[49] The judge concluded that C's testimony about overhearing inculpatory statements from Bagri could not be accepted.

The Crown's case against Bagri also rested on the evidence of witness E. The trial judge expressed concern that documents summarizing hearsay statements by E were incomplete and the defence were, for that reason, unable to cross-examine E on the accuracy of the record.[50] The problems with the record were described as follows:

> Mr. Laurie's notes, any tapes of his interviews of Ms. E and the transcripts prepared there from were destroyed, leaving his reports as the sole record of Ms. E's statements. Mr. Laurie relied very heavily upon them to refresh his memory when testifying about what Ms. E had told him. These reports, however, are replete with problems.
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> The fact that Mr. Laurie was a CSIS agent gathering intelligence, not a police officer gathering evidence, had attendant consequences for how he conducted and reported his interviews with Ms. E. He admitted, for example, that he had told Ms. E that she could share rumor and gossip with him since the source of the information was less important than the intelligence itself. He did not take contemporaneous notes during the interviews, and then prepared his reports using his own language, not hers. The reports are far from complete in terms of capturing his interactions with Ms. E due to the simple fact that they were drafted for the purpose of transmitting the intelligence she had provided. They do not include, for example, what Mr. Laurie said to Ms. E to channel and orient her thinking so that she would speak about matters in which he was interested. Mr. Bagri submits, for example, that there must have more of a preamble at the first interview than Mr. Laurie recalls to have prompted such a torrent of information from Ms. E. Consequently, there is no record of what was actually said or of the context of the questions being asked, both important indicators of ultimate

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47 *Ibid,* at para.1176.

48 *Ibid,* at para.1177.

49 *Ibid,* at para.1187.

50 *Ibid,* at para.1247.

> reliability.
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> The reliability problems inherent in the reports are exacerbated by the fact that they contain two separate layers of hearsay statement evidence with an absence of a proper record at either level: Mr. Laurie reporting on what Ms. E told him, who was relating what Mr. Bagri had allegedly told her two years earlier. Mr. Bagri submits that the reports have tenuous probative value on this basis alone.[51]

As noted above, the *Charter* guarantees for an accused charged with a criminal offence and the rules of evidence that govern a criminal trial will dictate what is admissible and reliable, regardless of the agency that collected the information being presented as evidence, and regardless of whether the information is labeled as "intelligence" or "evidence." The fact that a government agency might have understood that it was gathering intelligence, not evidence, will not and should not diminish the strength of the rights and protections given to an accused at a criminal trial.

The trial judge concluded with these remarks:

> I began by describing the horrific nature of these cruel acts of terrorism, acts which cry out for justice. Justice is not achieved, however, if persons are convicted on anything less than the requisite standard of proof beyond a reasonable doubt. Despite what appear to have been the best and most earnest of efforts by the police and the Crown, the evidence has fallen markedly short of that standard[52].

The CBA agrees. The outcome of the prosecution provides no foundation upon which to conclude that any aspect of the criminal justice system should be modified.

D. Disclosure

The importance of disclosure to an accused has been recognized, and repeatedly affirmed by the Supreme Court of Canada. Beginning with *R. v. Stinchcombe*,[53] where the Court recognized that, "the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of

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51 *Ibid,* at paras. 1131-1133, emphasis added.

52 *Ibid*, at para. 1345.

53 *Supra,* note 16.

the public to be used to ensure justice is done."[54] Sopinka J. emphasized, "It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information."[55] These general principles were affirmed in *R. v. Egger,*[56] *O'Connor v. The Queen*,[57] *R. v. Chaplin*,[58] *Carosella v. The Queen*,[59] and *R. v. Dixon*.[60]

The importance of full and fair disclosure has also been recognized by the Commissions that have examined wrongful convictions. Again, in *Stinchcombe* where Sopinka J. observed:

> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person.[61]

Despite the established law, the trial judge in the Air India trial was required to address problems associated with the Crown failing to disclose relevant materials to the defence due to destruction of evidence by CSIS.[62] This was unfortunately not the only problem with disclosure upon which the trial judge was required to adjudicate. In another ruling,[63] the trial judge addressed the nondisclosure of witness interviews which the judge characterized as having been "conducted at the behest of the Crown" and which "were clearly relevant"[64] to the trial. He wrote:

> While the enormous disclosure burden on the Crown has been recognized in past rulings, **I have also previously expressed my concerns regarding the manner in which the Crown has undertaken to fulfill its disclosure obligations in this case in certain instances**. New concerns are now being raised regarding the "relevance test" being employed by the Crown when assessing information that

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54 *Ibid,* at 7.

55 Ibid.

56 (1993), 82 CCC (3d) 193 (SCC).

57 (1995), 103 CCC (3d) 1 (SCC).

58 (1995), 96 CCC (3d) 225 (SCC).

59 (1997), 112 CCC (3d) 289 (SCC).

60 (1998), 122 CCC (3d) 1 (SCC).

61 *Supra,* note 16 at p.9.

62 See the discussion under Part II The Investigation: Relationship between the RCMP and CSIS.

63 *R. v. Malik* 2004 BCSC 1309 [*Malik* [Late disclosure – Section 7 Charter application]].

64 *Ibid,* at para. 26.

> comes into its possession.[65]

The right to make full answer and defence, specifically respecting the accused's ability to meet a case, was addressed in *Charkaoui v. Canada (Citizenship and Immigration)*.[66] Regarding the manner in which the scheme under the *Immigration and Refugee Protection Act* resulted in a named person being denied information, the Court noted that, "the right to know the case to meet is not absolute"[67] and, "[i]n some contexts, substitutes for full disclosure may permit compliance with s.7 of the *Charter*."[68] However,

> In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes if difficult, if not impossible, to find substitute procedures that will satisfy s.7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s.7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found.[69]

These remarks directly apply, but with greater force, to the right of an accused at a criminal trial to make full answer and defence.

Changes to the laws should be made in response to a demonstrable need for change and then, after careful consultation and debate. Ideally, that consultation and debate will involve all participants in the criminal justice system, and will be based upon a careful canvassing of all relevant information. The government has engaged in consultations in relation to disclosure and mega-trials. The anti-terrorism provisions of the *Criminal Code* have been the subject of extensive debate, review, and in the instance of s.83.28 (investigative hearings), the subject

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65 *Ibid,* at para. 25, emphasis added.

66 *Supra,* note 1.

67 *Ibid,* note 1, at para.57.

68 *Ibid,* para.59.

69 *Ibid,* at para.61.

of a Supreme Court of Canada decision.[70] No recommendations for change to criminal procedure have been made.

It is the position of the CBA that the Air India prosecution did not reveal a demonstrable need to change trial practices or applicable legislation. The case turned on the credibility of witnesses. If, however, the outcome of the trial was affected by the negligent destruction of evidence, then the practice of law enforcement, rather than the law, should change. The CBA has a long history of responding to proposed legislative changes and, should any concrete proposals for change be suggested, we would be pleased to consider those specific proposals.

RECOMMENDATION

The Commission of Inquiry should find that the Air India trial demonstrates no need to change criminal trial process.

IV. SPECIAL COURTS AND ADVOCATES

A. Special Courts

Among the issues the Commission has been asked to consider is the establishment of special courts to deal with terrorism offences.[71] While the CBA appreciates the opportunity to comment on this aspect of the Commission's mandate, it is difficult to do so on such a broad topic area without more concrete information as to what would constitute a special court.

In practice, courts bringing specialized knowledge of the community resources available to victims, the accused and even convicted offenders have enhanced the justice system. Examples of special courts making a valuable contribution are family courts and drug courts. In general though, these courts have succeeded by integrating the justice system with other community resources to provide seamless access to specialized resources in the community.

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70 *Supra,* note 4.

71 See the Terms of Reference cited under Part III – Trial Process, above.

They have not introduced specialized procedures, evidentiary rules or substantive changes in the law in order to alter the burden or standard of proof. However, it does not appear that this is the type of special court being proposed for terrorism offences, but rather a structurally independent court system, or one employing rules and procedures different from ordinary courts (including the suggestion in the Terms of Reference that such a court would be presided over by three judges), or a court system with both features.

The creation of a parallel criminal justice system for terrorism-related matters would be extremely costly. A permanently established court would require physical and professional infrastructure, with courtrooms, judge's chambers, clerks and court staff. Given the very small number of terrorism-related offences tried in Canada to date, this would be an enormous expense to try a very small number of accused.

The use of special procedures and evidentiary rules is more problematic. The justification for special rules and procedures is to protect sources of information for national security reasons, while permitting the Crown to use the information to prove the elements of the offence. The special procedures might consist of limiting the accused's access to the information (such as those which currently exist under s.38.06 of the *Canada Evidence Act*) or permitting evidence not usually admissible at trial.

Numerous wrongful conviction inquiries have shown that failure to disclose evidence, whether willfully or inadvertently, is a factor in almost all wrongful convictions and a major factor in many. The absence of full and frank disclosure prevents the defence from testing and challenging the Crown's case. Other near universal factors in wrongful convictions is tunnel vision in the police investigation and unreliable informants. Procedures that prevent the defence from accessing the evidence against the accused make it difficult or impossible to test the reliability of the informants or to formulate alternate theories for the known facts.

Terrorist offences are amongst the most serious offences of which a person in Canada can be accused. That accused persons charged with these offences are unsympathetic and unpopular figures in the eyes of the public is an understatement. The public pressure on law enforcement agencies to investigate and prevent terrorist attacks is immense. These

circumstances heighten the risk of wrongful convictions. The CBA is concerned that special procedures for these very serious offences will greatly increase this risk. The Arar Inquiry showed that intelligence information is no more inherently reliable than any other type of evidence and the seriousness of the offences charged argues against, rather than for, relaxed standards of evidence. While the CBA is not opposed to the concept of special courts *per se*, we cannot conceptualize any model of special court that would be an appropriate, measured and financially feasible method of dealing with terrorism offences.

The only significant departure from the general principle that a person has a right to know and meet the case against him or her has been in the context of security certificate hearings in immigration. The security certificate hearing system was struck down as unconstitutional in *Charkaoui v. Canada (Citizenship and Immigration).*[72] It did not adequately protect the right of the accused to know the case against him due to secret evidence presented to the judge deciding the reasonableness of the certificate. The Court found that that the system resulted in the judge being unable to rule based upon "fact and law," because the accused's counsel could not supplement or challenge the factual matrix presented, and could not properly raise legal objections relating to the evidence or make legal argument relating to the evidence. *Charkaoui* demonstrates the substantial constitutional limits on establishing "special" rules or procedures on the basis of national security, to deal with situations of persons accused of participating in terrorism and terrorist organizations. The Court's reasoning would apply with even greater force in the criminal context.

Further, any modifications to established procedures that ensure compliance with an accused's right to a fair trial should be considered only if it were established that the current system is ineffective in dealing with the prosecuting of certain offences. While the Air India trial was extremely complex, complexity alone does not warrant abrogating from the basic principle that a person has a right to know and meet the case against him or her. The failure of the prosecution in the Air India trial was not related to the length or complexity of the process, but rather the quality of the Crown's evidence. Simply put, the CBA believes that the Air India trial does not provide a reasonable basis to depart from the fundamental rules

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72 *Supra,* note 1.

and procedures of criminal law in the prosecution of offences relating to terrorist acts.

RECOMMENDATION:

This Commission of Inquiry should not recommend the creation of a special court system to prosecute terrorism offences.

The Commission should recommend that section 38.06 of the *Canada Evidence Act* be amended to preclude the withholding of evidence and the use of summaries of evidence in criminal proceedings.

B. Special Advocates

The CBA acknowledges that there may be cases outside the criminal context where there cannot be complete disclosure of evidence against a person for reasons of national security. In *Charkaoui*,[73] the Supreme Court of Canada noted that notwithstanding the review of the secret evidence by a Federal Court judge, the judge could not assume the role of counsel and effectively challenge the evidence. Only counsel would be in a position to effectively advocate for the person concerned and challenge the secret evidence presented by the Minister. The Court found that a process involving a Federal Court judge alone without any independent counsel representing the interests of the person concerned did not meet the requirements of fundamental justice. The Court reviewed several other procedures used in Canada, including the procedure followed during the Arar hearings and the use of independent counsel at SIRC, and noted that these procedures would provide the person with a greater opportunity to challenge the secret evidence without compromising national security.

There are several other instances in which Federal Court justices do sit alone to consider submissions by the government with respect to confidentiality. Under section 38 of the *Canada Evidence Act*, when the government objects to the disclosure of evidence within the context of either a civil or criminal proceeding, the matter is referred to a Federal Court judge. The judge reviews the evidence *in camera*, receiving submissions from counsel for the government, and must balance of the relevance and importance of the evidence, the importance of disclosure, and the prejudice that would result from release of the evidence. The judge must

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[73] *Supra,* note 1.

then determine the extent of the disclosure, taking into consideration the competing interests. We are of the view that a Federal Court judge should have the assistance of an independent counsel representing the affected person's interests in any proceeding where it is proposed that evidence be withheld from an affected person for reasons of national security, including a section 38 proceeding.[74]

When independent counsel is required, the question arises as to the minimum requirements to ensure that the principles of fundamental justice are met. The independent counsel must, at minimum, be permitted to have ongoing communication with the person concerned throughout the process, so as to be able to effectively represent the person's interests. The Supreme Court of Canada noted in *Charkaoui* that only an independent counsel representing the interests of the person concerned could effectively challenge the credibility of the evidence by knowing the position of the person concerned. For independent counsel to be able to do so, it is essential that they are able to continue to liaise with the affected person throughout the process. Finally, counsel must have sufficient resources to undertake their function effectively. The U.K. system of special advocates has come under considerable criticism for the lack of these latter two safeguards, and these flaws should not be repeated in any Canadian system.

The House Subcommittee on the Review of the *Anti-terrorism Act* recommended that a "Panel of Special Counsel be established by the government in consultation with the legal profession and the judiciary…The functions of Special Counsel should be to test the need for confidentiality and closed hearings, and to test the evidence not disclosed to a party."[75] Further, the Subcommittee recommended that "the Panel should have the capacity to provide counsel appointed to it with the investigative, forensic and other tools they require to effectively carry out the functions assigned to them."[76] The Special Counsel procedure would apply to the list of terrorist entities under the *Criminal Code,* the deregistration of registered charities or applicants, the *Canada Evidence Act* procedures for withholding evidence, and the security certificate procedure under *IRPA*.

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74 These proceedings are listed in the Report of the Parliamentary Subcommittee on the Review of the *Anti-terrorism Act*, discussed below.

75 Canada, Parliament, Subcomittee on the Review of the *Anti-terrorism Act*, "Rights, Limits, Security: A Comprehensive Review of the *Anti-terrorism Act* and Related Issues: Final Report of the Standing Committee on Public Safety and National Secuirty" (March 2007) [Subcommittee Report on *Anti-terrorism Act*] at 80-81.

76 *Ibid.*

Similarly, the Special Senate Committee on the *Anti-terrorism Act* recommended appointment of a special advocate in these circumstances, adding that the special advocate should "be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending *in camera* hearings…"[77]

RECOMMENDATION:

Outside the criminal law context, in any proceedings where the use of secret evidence is contemplated, including those under section 38 proceedings under the *Canada Evidence Act,* a special counsel or special advocate system should be implemented.

Any special advocate system should provide adequate resources for the special counsel to respond to the Crown case, and should permit communication with the affected party after review of the secret evidence.

V. AIR TRANSPORTATION SECURITY

A. Constitutional and Legal Imperatives Generally

This portion of the CBA's submission relates to the following aspect of the Terms of Reference:

> …whether further changes in practice or legislation are required to address the specific aviation security breaches associated with the Air India Flight 182 bombing, particularly those relating to the screening of passengers and their baggage.

The CBA recognizes that the prevention and investigation of terrorism is a compelling state purpose. However, any actions towards this end must be consistent with the letter and the spirit of the *Charter*. Increased aviation security, particularly the proposed "no fly" list (referred to by the federal government as the "Passenger Protect" program) discussed below, engages the *Charter* rights of Canadians guaranteed under sections 6 (mobility), 7 (life, liberty and security of the person), 8 (unreasonable search and seizure), 9 (arbitrary detention),[78] and 15 (equality).

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77 Canada, Senate, Special Senate Committee on the *Anti-terrorism Act*, "Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the *Anti-Terrorism Act*," (February 2007) at 42.

78 See *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, finding that random spot checks on the highways violate section 9 of the Charter, but are justified under section 1. Targeted stops, however, are found to require cause.

Privacy is protected through the right to be secure against unreasonable search or seizure, and is fundamental to the security of the person. Any measures to prevent terrorism and increase aircraft security must be implemented in a way that enables the public to travel with the minimum affront to their legal rights and their dignity. They should also be consistent with privacy best practices as expressed in the *OECD* [*Organization for Economic Cooperation and Development*] *Guidelines on the Protection of Privacy and Transborder Flows of Personal Information*[79] and the Canadian Standards Association's *Model Code for the Protection of Personal Information*.[80] Further, the Government should act consistently with the obligations placed on government institutions in the *Privacy Act,*[81] and uphold the fundamental principle of judicial oversight within the Rule of Law.

It is generally acknowledged that Canadians and lawful residents have the freedom to travel, both internally and internationally. In a country as large as ours, air travel is often the only practical mode of travel for long distances within the country. Other than to the U.S., Canadians exercising their lawful right to enter into and leave Canada are only able to do so by air. Any regulation that would impair a resident's ability to travel by air may effectively impair that person's section 6 mobility rights.[82] Any infringement must be justifiable under Section 1 of the *Charter*.

The state's unreasonable invasion of an individual's privacy will constitute a search within the meaning of section 8.[83] In this context, we are concerned with informational privacy:

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79 OECD (2005), online: http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html. Canada is an OECD member country.

80 Online: http://www.csa.ca/standards/privacy/code/Default.asp?language=English.

81 R.S.C. 1985, c. P-21 [*Privacy Act*]

82 See, for example, *Black* v. *Law Society of Alberta* [1989] 1 S.C.R. 591, where the Supreme Court states that the intended purpose of s.6(2) includes protection of "the right of a citizen (and by extension a permanent resident) to move about the country" (at para. 62).

83 *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Law*, [2002] 1 S.C.R. 227; *R. v. Buhay*, [2003] 1 S.C.R. 631.

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.[84]

"No fly" lists either exclude individuals from traveling by air, or at least subject individuals to additional scrutiny before boarding an aircraft. In this context, mobility, liberty and informational privacy are intertwined. The adoption of more stringent and individually-targeted aviation security techniques may have an adverse impact upon these rights and can only be lawfully implemented if the infringement is rationally connected to the prevention and investigation of terrorism, and the infringement is a proportionate response to that purpose.

The government has given notice of its intent to introduce a "no fly" list in the *Identity Screening Regulations*[85] under the *Aeronautics Act*,[86] which would require air carriers to exclude "specified persons" from boarding aircraft. The government also proposes to proclaim the controversial section 4.82 of the *Aeronautics Act*, which provides authority for disclosure of passenger information to the RCMP and CSIS for purposes related to transportation safety and national security, and enforcement of arrest warrants for offences punishable by five years or more of imprisonment.

The question is then whether these measures are an effective method of addressing transportation security and minimally infringe the valid interests of the traveling public. Alternatives should be carefully considered, particularly those that do not pose a risk of racial profiling or of being too intrusive. In addition to electronic screening of all passenger

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84 *R. v. Dyment*, *ibid,* at para. 22, per La Forest J. The reference to a "Task Force" relates to the Report of the Task Force established by the Department of Communications/Department of Justice: *Privacy and Computers* (Ottawa: Information Canada, 1972).

85 Notice (Department of Transport), C. Gaz. 2006. I. 3463 (Proposed Identity Screening Regulations).

86 R.S.C. 1985, c. A-2 [*Aeronautics Act*]

baggage (x-ray and traces of explosives), it could conduct random baggage inspection and random inspection of passenger and carry-on items. This may do more to increase security because random searches of this type are more difficult to circumvent.

B. Use of Data from Foreign Sources or for Extrinsic Purposes

The federal government must be particularly careful in using data from foreign authorities. One need not look any further than Maher Arar's situation. Despite his exoneration at the Inquiry bearing his name, the U.S. continues to maintain Mr. Arar's name on its "no fly" list as a terror suspect. Where possible, this information should be independently confirmed to Canada's satisfaction. Simply importing a "no fly" list from the U.S. would place upon individuals such as Mr. Arar unreasonable and untenable restrictions on their movements in Canada. Instead, any list should be based only upon "made in Canada" criteria, all of which must relate directly to the safety of transportation and the safety of the traveling public. Projects based on personal information are prone to including irrelevant criteria out of a belief that it would be better to scoop up innocents than to allow a true risk to the public onto an aircraft. In addition, there may be a tendency to list individuals who do not pose an immediate threat to the traveling public, but are otherwise of interest to law enforcement.

Any "no fly" list must be specifically constrained to prevent this type of "mission creep." As the CBA previously commented in its 2002 submissions on the *Public Safety Act*, which created s. 4.82 of the *Aeronautics Act*:

> Authority to match passenger information against other information held by the RCMP and CSIS should not serve as a "fishing expedition" in the fight against all crime, in contravention of existing constitutional protections. Even limiting this matching process to the identification of risks to transportation security or potential terrorists allows significant potential for expansive, and *Charter* infringing, interpretation. At best, there is a tenuous connection between airline passenger safety and the presence of a person aboard who is subject to an outstanding warrant, if that person's information cannot otherwise be collected under the categories of "transportation security" or "threats to the security of Canada". Police already have the power to obtain a search warrant under the *Criminal Code* in the normal course if they have reasonable grounds to believe that there is something in the passenger lists that will reveal the whereabouts of a person who has committed an offence.

Section 4.82 of the *Aeronautics Act* is a good example of "mission creep." This program, that involving the collection, use, and disclosure of information, was nominally for the purposes of protecting the traveling public from terrorism threats; however, the government proposes to extend it to include ordinary law enforcement. A mere incremental change would extend the provision to lower-penalty indictable offences, summary offences, outstanding child support, or other purposes. While immediate threats such as terrorism may constitutionally justify incursions into Canadians' privacy and ability to travel, lower level criminality would not. At the same time, if the "no fly" system accurately identifies a person who poses an immediate threat to aviation safety and who is the subject of an outstanding warrant related to that threat to aviation safety, it would be reasonable to alert law enforcement who would could take lawful steps to arrest that person.

C. Preventing or Limiting Confusion of Individuals

Reports on the U.S. "no fly" list highlight significant issues with respect to the source of the data and its accuracy. The effectiveness of a list depends upon how it is applied and whether the persons to be screened are accurately identified. Issues related to the transliteration of non-English and non-French names create an additional layer of ambiguity, compounding the possibility that it will unintentionally exclude persons who otherwise pose no risk to the traveling public. This problem is associated principally with non-European names and could result in racial profiling: those misidentified, and thus excluded from traveling or singled out for greater scrutiny, will principally be from non-European ethnic groups.

The "no fly" list, if implemented, will need a mechanism through which individuals can positively confirm their identity so they are not routinely challenged when attempting to board an aircraft. The proposed *Identity Screening Regulations* would permit the immediate prevention of boarding an aircraft. There is no time to permit an accidentally excluded person from positively proving identity. The unlucky airline employee who advises passengers that they will not be permitted to board will not be in a position to offer any assistance. In addition, passengers will likely be informed of their excluded status in the presence of other passengers. Any "no fly" program should provide a means by which individuals can demonstrate they have been misidentified as a person on the list. One option may be to flag previously misidentified persons so that when a match occurs, additional information is sought, and individuals are not

prevented from traveling without justification.

In addition, any "no fly" list should provide a mechanism whereby individuals can challenge their inclusion in the list. The appeal mechanism should be independent of law enforcement and national security agencies. The onus should be on the government to prove that the individual is properly on the list according to strict criteria that is publicly available. The current proposal does not give individuals an opportunity to know the basis upon which they were placed on the list. Recognizing that information may be properly shielded from disclosure for national security reasons, individuals should be informed, to the extent possible, that they are included on the "no fly" list and on what basis. Doing otherwise would place an enormous burden on an individual to prove they are not a risk to the traveling public, rather than the more reasonable burden of challenging particular allegations.

D. Incidental Collection of Personal Information

How ever a "no fly" list may be implemented, it should ensure that passenger information is collected and disclosed as minimally as possible, and is not retained beyond a reasonable amount of time. If the "no fly" list is administered by a government body, the system should be designed so that personal information of passengers not on the list is not retained by the government. If the purpose of the "no fly" list is to prevent individuals who pose a threat to aviation from boarding an aircraft, there is no reason to retain personal information. It may be justifiable to retain information on individuals who "match" for follow-up investigation, or to alert security personnel at the relevant airport. It may also be justifiable to retain this information as a record of the match and the response so the individual can challenge the inclusion in the system, but this information should only be retained for as long as is reasonable for these purposes.

E. General Prohibition on Boarding

The proposed Passenger Protect program would prevent individuals whose names appear on a "no fly" list from boarding aircraft. The U.S. CAPPS II program, which classifies supposed threats to aviation safety and provides a category of passenger (labeled "yellow") who are able to board an aircraft after closer screening at the airport. Those identified as "red" are

prohibited from boarding. The Passenger Protect program, in contrast, only has "green" and "red" categories. Individuals on the list do not have the opportunity to submit to additional screening. The lack of nuance likely means that more people will be included than necessary. It is a reasonable assumption that those deciding who to include on the list will err on the side of caution and include those whose risk status is not well-determined.

RECOMMENDATION:

The Commission of Inquiry should consider whether there are less intrusive and more effective measures than a "no fly" list to accomplish the objectives of increasing aviation safety.

The Commission should caution the government against relying upon intelligence obtained by foreign authorities when making decisions about whether to add individuals to the "no fly" list;

If the Commission recommends a "no fly" program, the recommendation should be accompanied by the following recommended safeguards:

- **A mechanism to allow individuals to challenge their inclusion on the "no fly" list by providing sufficient information about the basis for the individual's inclusion to permit him or her to adequately respond;**
- **Reasonable provisions to avoid errors or circumstances in which individuals are incorrectly identified based on non-English and non-French names;**
- **A means by which a misidentified person is subsequently allowed to travel, both at the time the misidentification is made and for subsequent trips;**
- **Publication of criteria for inclusion on a "no fly" list. The criteria should not permit inclusion simply based on an individual's inclusion on a foreign "no fly" list, without independent verification;**
- **Explicit provisions constraining the use of information to prevent "mission creep" or the collateral use of personal information;**
- **A nuanced categorization of passengers, so that those whose risk to aviation safety is not well-determined are permitted to board after additional screening.**
- **Explicit provision limiting the retention of information collected as part of a "no fly" program to prevent the secondary use of that information.**

VI. TERRORIST FINANCING

A. Introduction

This portion of the CBA's submission relates to following aspect of the Terms of Reference for this Commission of Inquiry:

> …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.

The legislative and regulatory regime against terrorist financing in place in Canada since the fall of 2001 represents an unprecedented level of monitoring, information sharing and government oversight in relation to charities. This regime has created a crushing due diligence burden for charities and made full compliance with the law literally impossible to ensure. The compliance and due diligence responsibilities for Canadian charities are the result of a multiplicity of legislation, most of which has been enacted in stages beginning in the fall of 2001 and continuing to as recently as December 2006. The following is an overview of the existing Canadian anti-terrorism financing legislation and its impact on charities and their operations. We urge the Commission of Inquiry to consider the substantial legislative tools already in place, to recognize its profound negative effect on Canadian charities, and therefore not to recommend further constraints on the operations of charities.

B. *Anti-terrorism Act*

The *Anti-terrorism Act*, is extremely complicated legislation that coordinates the provisions of many federal Acts, including the *Criminal Code*, the *Canadian Human Rights Act*[87] and the *Proceeds of Crime (Money Laundering) Act*[88] (including regulations issued in May 2002). Part 6 of the *Anti-terrorism Act* also creates the new *Charities Registration (Security Information) Act*.[89] The *Anti-terrorism Act* may inadvertently catch innocent charities within its provisions, including:

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87 R.S.C. 1985, c. H-6.

88 *Proceeds of Crime* (Money Laundering) and *Terrorist Financing Act*, S.C. 2000, c. 17 [*Proceeds of Crime (Money Laundering)* and *Terrorist Financing Act,* respectively].

89 S.C. 2001, c. 41, s. 113, [*Charities Registration* (Security Information) *Act*].

- new criminal offences that are contingent on sweeping definitions of terms such as "terrorist activities," "terrorist group" and "facilitation of terrorist activities";
- a deregistration process for charities suspected of involvement in "terrorist activities"; and
- broad new legislation to curtail "terrorist financing".

The CBA expressed serious concerns when the *Anti-terrorism Act* was first introduced, and advocated review and repeal of any hastily enacted legislation as soon as legitimate security reasons were no longer demonstrable.[90] Since then, the federal government has continued to propose and enact other measures both explicitly and implicitly based on the fear of terrorism. These measures dramatically expand state powers at the expense of due process and individual rights and freedoms.

The definition of "terrorist activities" in section 83.01(1) of the *Criminal Code*, as amended by section 4 of the *Anti-terrorism Act*, is split into two disjunctive parts. Part (a) of the definition incorporates ten offences that already exist under section 7 of the *Criminal Code*, each of which implements a specific United Nations Convention regarding terrorism. The more familiar part of the definition of "terrorist activity" is in part (b):

> b) an act or omission, in or outside Canada,
>
> (i) that is committed
>
> (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
>
> (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
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> (ii) that intentionally

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90 Canadian Bar Association, "Three Year Review of the *Anti-terrorism Act*: Submission to Special Senate Committee on the *Anti-Terrorism Act*" (May 2005), online: http://www.cba.org/CBA/submissions/pdf/05-28-eng.pdf.

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).

In *R. v. Khawaja,*[91] Rutherford, J struck down the portion of the definition that dealt with purpose and motive, with the result that the definition is even broader in application. As well, the decision upheld the "facilitation" definition, to which Canadian charities are particularly vulnerable. Thus, the decision offers charities little relief from their susceptibility to unintentional contravention of the law.

Further, the broad definition of "terrorist group" in the *Criminal Code* could include legitimate and unsuspecting charities if they are not diligent. The reference to "entity" in the definition casts a broad net, and includes trusts, unincorporated associations and organizations, as well as an association of such entities. Given the breadth of the definition of "facilitate", the definition of "terrorist group" under either paragraph 83.01(1)(a) or (b) of the *Criminal Code* could apply to charitable organizations with no direct or indirect involvement or intention to participate in "terrorist activities."

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[91] [2006] O.J. No. 4245 (Sup. C.J.)

The definition of "facilitation" in subsection 83.19(2), as amended by the *Anti-terrorism Act*, is of even more concern. The definition is so broad that charities could easily violate the *Criminal Code* by "facilitating" a "terrorist activity" without actually intending to directly or indirectly support any terrorist activity whatsoever and without knowing the ramifications of their actions.

This concern is particularly relevant in the wake of recent natural disasters, like the tsunami that hit Southeast Asia in December 2004 and the earthquake in Pakistan in October 2005, both of which prompted an outpouring of international humanitarian support. Charities meeting the desperate need for aid in these areas must comply with the significant legal requirements, regardless of their size or the method of providing assistance. The potential application of anti-terrorism legislation is heightened, in part, because these areas have been identified as central operating areas for several terrorist organizations. The chances of contravening anti-terrorism legislation are heightened even more when charities support a local recipient or donee organization in the regions, becoming potentially accountable for the recipient organization's actions and therefore responsible for due diligence investigations of the recipient organization.

In its submission on the three year review of the *Anti-terrorism Act*,[92] the CBA noted that the breadth of the definitions of terrorist groups and facilitation capture legitimate entities that are not the intended target. For example, a legitimate charity could be a "listed entity" if the nature and location of its international humanitarian work led the government to believe on "reasonable grounds" that it had knowingly carried out, attempted to carry out, participated in, or facilitated a terrorist activity. Coupled with the definition of "facilitate", the definition of "terrorist group" could apply to charitable organizations with no direct or indirect involvement or intent to participate in terrorist activities.

These broad definitions fail to distinguish between organizations working under a dictatorial regime and those working under a democratic regime. Citizens of a repressive country who are legitimately fighting for freedom might be considered "terrorist groups." Think of the African

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92 *Supra* note 86.

National Congress, student groups in China demonstrating in Tiananmen Square in 1989, or more recently, student groups supporting independence in East Timor or southern Sudan.

Canadian charities that provide medicine, food, and other assistance to such groups might be considered to have committed criminal offences such as "facilitating" and financing these "terrorist groups." On the other hand, a company operating in the same country through a partnership with the government, thus effectively financing the government's dictatorship, would be free to pursue its business interests.

C. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

The *Proceeds of Crime (Money Laundering) Act* was originally enacted in 1991 and overhauled in 2000, meeting Canada's international obligations to combat organized crime. After September 11, it was amended again and renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. It is Canada's primary legislation dealing with terrorist financing.[93] New regulations came into force in May 2002.[94]

Criminals laundering money and terrorists seeking to finance terrorist activities use similar methods to achieve the appearance of legitimacy in their activities.[95] Hence, it is assumed that terrorist activity can be minimized by cutting off finances from terrorist organizations through the use of money laundering legislation. The validity of this assumption is open to question, especially if the definition of terrorism itself requires religious, political or ideological motivation.[96]

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93 For an in-depth discussion of the Act, see A. Manzer, *A Guide to Canadian Money Laundering Legislation*, (Markham: Butterworths, 2002).

94 *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-781, s. 31(1) ["*Proceeds of Crime Regulations*"].

95 The primary difference concerns the phase of the suspicious transaction. When tracking down money laundering transactions, the aim is to discover the criminal source of the funds, while with terrorist financing legislation, the aim is to find the intended recipient who is expected to use the money in order to engage in terrorist activities. See Manzer, *supra* note 93, at 19.

96 This is subject to the outcome of any appeals related to the *Khawaja* decision, *supra* note 91.

Where there is an ideological motivation for terrorist acts, perpetrators will find a means to execute their plan with whatever means are available, even if finances are limited. The Financial Transactions & Reports Analysis Centre of Canada ("FINTRAC") is the government agency established to implement Canada's money laundering legislation. Its Director, Horst Intscher, stated:

> [s]uspected cases of terrorist financing often involve only small amounts of money, such as $8,000 transactions, but there are often many 'clusters' of transactions that make them suspicious. ... The numbers on the terrorist financing side will always be smaller."[97]

He also stated that, of the approximately $100 million in suspicious transactions the agency reported to law enforcement agencies in the first five months of reporting, only one percent, or less than $1 million, was related to suspected terrorist-financing activities.[98]

Notwithstanding the very small number of suspicious transactions attributed to charities, they may be subject to the prescribed record keeping and reporting duties outlined in the *Proceeds of Crime Act* and *Regulations* as a "reporting entities," either as companies to which provincial trust company legislation applies or as entities authorized under provincial legislation to engage in the business of dealing in securities. Even if they are not deemed "reporting entities," charities could still have their own transactions reported by other reporting entities that deal with them, such as banks, accountants or life insurance companies, without the charities knowledge.[99]

Regardless of how charities are caught in the ambit of the *Proceeds of Crime Act,* expanded federal government power to collect and share information on terrorist financing compliance may have an indirect yet significant impact upon them. Information collected by FINTRAC and

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97 A. Dawson, "Agency flagged $100 million in illicit cash" *The National Post* (6 November 2002).

98 *Ibid*. The first reporting requirements came into force on 8 November 2001, and the report covered the period to 31 March 2002.

99 For example, a charity's bank or its accountants may now be required to report to FINTRAC any suspicious transactions, large cash transactions, or cross border transactions of the charity as specified in the legislation and regulations. The reporting entities are specifically enjoined from letting the subject organization know, either directly or by implication, that they have made such a report. See the *Proceeds of Crime Act*, s. 8; see also Manzer, *supra* note 93, at 10-11. The implications are that reporting entities must obtain detailed information for all transactions, not only reported transactions, in order not to tip off a client about an intended report.

shared with other government and law enforcement agencies could lead to investigation, criminal charges, listing, deregistration, as well as the freezing and seizing of the charities' assets. Whether any of these consequences materialize, the knowledge that authorities are monitoring their activities will have a chilling effect on the motivation and ability of charities to pursue their charitable objectives, particularly in the international arena.

The information reported to FINTRAC can also affect charities through the broad powers granted under the *Charities Registration (Security Information) Act* to the Solicitor General and the Minister of National Revenue. Information collected by FINTRAC may be used by them in considering whether to revoke an organization's charitable status or to deny a charitable status application.

The reporting requirements may also have an impact on charitable fundraising with large cash donations or funding of international projects. *Bona fide* donors may be deterred from making large donations to Canadian charities, especially organizations with which they are not intimately familiar, and Canadian charities discouraged from transferring funds to support projects in foreign jurisdictions.

A Canadian charity that transfers charitable funds to a foreign charity under an agency or a joint venture agreement may become the subject of a reported transaction to FINTRAC.

D. 2006 Amendments to Terrorist Financing Legislation: Bill C-25

Bill C-25 amending the *Proceeds of Crime Act* and the *Income Tax Act*[100] which received Royal Assent in December 2006[101] represents a concerted effort to increase the monitoring and oversight of the charitable sector and has a significantly negative impact on charities that transfer funds internationally.

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100 R.S.C. 1985, c. 1 (5th Supp.). [*Income Tax Act*]

101 S.C. 2006, c.12 [Bill C-25].

With Bill C-25's expansion of reporting entities, virtually any means used by a charity to transmit funds (for example, banks, money order businesses and securities dealers) may result in reports to FINTRAC. In several situations, a charity may be subject to reporting obligations under Bill C-25. Bill C-25 also significantly expanded the nature of the information concerning the transaction and the parties involved, including "the name, address, electronic mail address and telephone number of each partner, director or officer" of the charity and "any other similar identifying information." The "designated information," which is retained for up to five years, may potentially be disclosed to both foreign and domestic government agencies.

What raises the spectre of investigation under the suspicion of contravening anti-terrorism legislation is not only the expansion of the information collected by FINTRAC, but also the burgeoning domestic and foreign sources to which this information is disclosed. For example, the grounds to disclose information to Canada Revenue Agency (CRA) are now very broad under the Bill C-25 amendments. Under section 55 of the *Proceeds of Crime Act*, the "designated information" would be disclosed to CRA if there are grounds to "suspect" that the information is relevant to maintaining its charitable status or to determining an application for charitable status. Once the report of suspicion reaches CRA, this information could quash an organization's application for charitable status or result in of an investigation under the deregistration process. Under the Bill C-25 amendments, expanded designated information could also be disclosed to the Canada Border Services Agency, CSIS or the Communications Security Establishment.

Increased monitoring and oversight of charities is also evident in the amendments to the *Income Tax Act*. The amendment to subsection 241(4) significantly expands the scope of inter-agency information sharing for enforcement of the *Charities Registration (Security Information) Act.*[102] The addition to subsection 241(8) allows CRA officials to freely disclose information about a charity to the RCMP, CSIS and FINTRAC that would be relevant to investigations under the terrorist activity and facilitation provisions of the *Criminal Code*.

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[102] *Charities Registration (Security Information) Act* (being Part 6 of the *Anti-terrorism Act*), *supra* note 859.

Amongst the information that can now be disclosed to other agencies under the *Income Tax Act*, is "designated taxpayer information," a newly created and defined term. The expansive scope of designated taxpayer information includes the name, addresses and citizenship of current and former directors, trustees, agents and employees of a charity or applicant for charitable status. It also includes information available in broadly defined "commercially available databases."

Although Bill C-25 was purportedly introduced to comply with international obligations, promulgated by The Financial Action Task Force (FATF), the legislation goes far beyond Canada's broad and general international commitments. Many have noted that Canada, currently serving as the head of the FATF, is eager to demonstrate a "tough line" on terrorist financing to the global leaders of the war on terror, predominantly the U.S. and the United Kingdom.

E. *Charities Registration (Security of Information) Act*

The *Charities Registration (Security Information) Act* enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity. Deregistration is initiated by the issuance of a "security certificate" against the charity or applicant for charitable status and could have consequences beyond deregistration for the charitable organization. Investigations under suspicion of "terrorist financing" by a charity could easily lead to initiation of the deregistration process.

The security certificate and deregistration process raises several concerns of basic principles of natural justice and due process, especially in light of the serious consequences of a security certificate. Deregistration entails a charity losing the tax benefits of charitable status. Issuance of a security certificate might expose the charity or its directors to investigation and prosecution under the *Criminal Code.* More importantly there is a strong possibility that the security certificate could lead to freezing or seizure of a charity's assets under sections 83.08 or 83.13-83.14 of the *Criminal Code*. The result could be bankruptcy, insolvency or winding up of the charity, in turn exposing the charity's directors to civil liability at common law for breach of their fiduciary duties for not having adequately protected the assets of the charity.

We have serious concerns about the lack of procedural safeguards in the deregistration process in light of these potentially serious consequences to a charity and its directors. Some specific concerns include:

- No knowledge or intent is required;
- The provision is retroactive - past, present and future actions can be considered;
- Normal rules for the admissibility of evidence do not apply;
- "Confidential" information considered may not be disclosed to the charity, even if it was relied upon in making the determination, which may severely handicap the ability of the charity to present a competent defence;
- No warning is issued or opportunity given to the charity to change its practices;
- There is no ability for appeal or review by any Court;
- The justification for the certificate is based on the low standard of "reasonable belief"; and
- The burden of proof is shifted, requiring the charity to respond and prove its innocence, even where it may not really know what the charges are against it.

The Subcommittee on the Review of the *Anti-terrorism Act* supported the expressions of concern by the CBA and others regarding the impact of the *Charities Registration (Security of Information Act),* and has recommended:

- a "due diligence" defence for charities who avoid the improper use of their resources;
- that CRA develop "best practices guidelines" for charities, in consultation with the charitable sector, to assist applicants and registered charities in developing due diligence assessments;
- that a knowledge (*mens rea*) requirement be added.[103]

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[103] Subcommittee Report on the *Anti-terrorism Act*, *supra,* note 75, at 36-38.

Canadian legislation regulating the financing of charities is amongst the most stringent in the world, with potentially substantial detrimental effect on charities and their operations. The terrorist financing legislative regime highlights the increasing focus on charities and their possible links to terrorism, both domestically and internationally, and leaves charities vulnerable to inadvertent contravention and indiscriminate application of the law.

Canadian charities are subject to the broad powers in the *Proceeds of Crime Act* and the *Charities Registration (Security Information) Act*. *Criminal Code* amendments could bring traditional charitable activities in the definition of "terrorist activities" or "facilitating" those who may have participated in or supported a terrorist activity. Charities are now faced with a compliance regime in financial transactions, record keeping and reporting obligations, with a "one size fits all" approach to due diligence. This will likely impact their ability to effectively carry out their objects. And yet, failure to comply with any aspect of the new regime could result in the loss of charitable status or the issuance of a security certificate, a process devoid of normal legal safeguards and avenues to provide an informed defence. The system, whether by implementation or design, is apt to produce inequitable results, making charities with political, religious or ideological purposes inherently suspect and subject to more scrutiny than others. Charities must now be proactive in their due diligence practices to minimize the risk of an investigation or deregistration because of information collected and distributed through the new powers outlined in Bill C-25. This places an increasing burden on charities that transfer money, both within Canada and overseas. The burden of due diligence and compliance procedures include the vetting of not only the recipient organization, but also its directors and officers, financial institutions and the geographic area in which the recipient organization carries out its operations.

RECOMMENDATION:

In considering the legislative framework constraining terrorist financing, the Commission of Inquiry should consider whether its operational impact upon charities is proportionate to the effectiveness of the measures.

VII. CONCLUSION

The Air India case poses difficult questions for this Commission, for government, and for the Canadian people. Ought we to accept that extraordinary acts of terrorism require a wholesale reconceptualization of what constitutes fair treatment of all of those within Canada, and the scope of our rights and freedoms? As we have conveyed above, the bombing of Air India Flight 182 is without precedent in Canada, but the reasons for the failure of the Crown's criminal case are common to many other criminal cases. What the case does reveal is the need to rethink how CSIS and the RCMP share information in intelligence investigations that turn into criminal trials, to ensure that accurate information is received and the constitutional rights of accused are respected, and whether and how these agencies should be sharing information with agencies of other countries. It also provides the opportunity for this Commission to comment upon the dangers of secret proceedings and secret evidence, the potential for a government who collects information ostensibly for aviation safety and national security to be overly zealous in using that information to exclude passengers or to apply it to ulterior purposes, and the negative implications of enforcing overly broad anti-terrorism legislation with its onerous administrative requirements for charities. While the threat of terrorism is real, we must proceed cautiously to ensure that the measures employed to combat it are effective and do not cast too long a shadow over our way of life. The CBA thanks the Commission of Inquiry for the opportunity to provide its insight into the myriad of policy issues with which it is confronted. We would be happy to supplement our submission with more detailed information on the issues outlined above as additional information and testimony is received by the Commission.

VIII. SUMMARY OF RECOMMENDATIONS

The Canadian Bar Association recommends that:

1. Canada should adopt legislation to control the sharing of intelligence information between intelligence agencies in general, and CSIS and the RCMP in particular.

   This legislation should clearly state when intelligence agencies will be required to gather intelligence information in a fashion consistent with the Crown's disclosure obligations. Further, the legislation should require written reliability assessments and

use of caveats in appropriate cases when such information is provided to other agencies within or outside Canada.

2. The Commission of Inquiry should find that the Air India trial demonstrates no need to change criminal trial process.

3. This Commission of Inquiry should not recommend the creation of a special court system to prosecute terrorism offences. The Commission should recommend that section 38.06 of the *Canada Evidence Act* be amended to preclude the withholding of evidence and the use of summaries of evidence in criminal proceedings.

4. Outside the criminal law context, in any proceedings where the use of secret evidence is contemplated, including those under section 38 proceedings under the *Canada Evidence Act*, a special counsel or special advocate system should be implemented.

   Any special advocate system should provide adequate resources for the special counsel to respond to the Crown case, and should permit communication with the affected party after review of the secret evidence.

5. The Commission of Inquiry should consider whether there are less intrusive and more effective measures than a "no fly" list to accomplish the objectives of increasing aviation safety.

   The Commission should caution the government against relying upon intelligence obtained by foreign authorities when making decisions about whether to add individuals to the "no fly" list;

   If the Commission recommends a "no fly" program, the recommendation should be accompanied by the following recommended safeguards:

   - A mechanism to allow individuals to challenge their inclusion on the "no fly" list by providing sufficient information about the basis for the individual's inclusion to permit him or her to adequately respond;
   - Reasonable provisions to avoid errors or circumstances in which individuals are incorrectly identified based on non-English and non-French names;

- A means by which a misidentified person is subsequently allowed to travel, both at the time the misidentification is made and for subsequent trips;
- Publication of criteria for inclusion on a "no fly" list. The criteria should not permit inclusion simply based on an individual's inclusion on a foreign "no fly" list, without independent verification;
- Explicit provisions constraining the use of information to prevent "mission creep" or the collateral use of personal information;
- A nuanced categorization of passengers, so that those whose risk to aviation safety is not well-determined are permitted to board after additional screening.
- Explicit provision limiting the retention of information collected as part of a "no fly" program to prevent the secondary use of that information.

6. In considering the legislative framework constraining terrorist financing, the Commission of Inquiry should consider whether its operational impact upon charities is proportionate to the effectiveness of the measures.