

# **“The Use of Intelligence Information in Criminal Court Cases”**

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Thank you to ICCT for including me in this  
interesting program.

First I want to mention the Report of the  
ICJ Eminent Jurists Panel “Assessing  
Damage, Urging Action” released two years  
ago. This represents a signal contribution to  
the current debate on accountable national  
security policies. Last evening I read all of

Chapter 6 on the impact of terrorism and counter-terrorism on the criminal justice system, dealing particularly with the principle of an independent and impartial judiciary, and what constitutes a fair trial. In many respects this Chapter was a pre-cursor to the Agenda for this Expert Meeting. I commend it to you if you haven't read it yet. There is valuable information and conclusions, which are available for citation by enterprising lawyers in domestic courts seized with terrorism cases.

Second I want to say something about the importance of an independent judiciary. It strikes me that a country wanting a truly independent judiciary should strive for at least three things:

1. an objective and impartial appointment process based on competence and a reasonable level of experience and

- achievement at the bar prior to appointment;
2. security of tenure for at least 10 years or at a designated retirement age (it is 75 in my country) with a fixed salary and pension arrangements applicable to all judges at a particular level, and made known to the public as a matter of transparency; and
  3. a general consensus that judges, once appointed, will refrain from involvement in politics or from appearing, following retirement, as counsel before courts over which they previously presided

Let me add this thought. In order for the judiciary to properly involve itself in national security matters, certain judges must become specialists on national security questions. Too often in the past, judges have deferred to the Executive based on lack of expertise as compared to the security service

or policing authority of a government. This cannot continue.

In my country, we have nine designated judges of the Federal Court Trial Division who have become specialists under a system I will describe – although they retain normal federal judicial duties for most of their time on the bench. We also have judges in the Superior Courts of the provinces who are regularly assigned to hear terrorist cases by their Chief Justices, usually based on their experience at the criminal bar prior to appointment.

The ICCT may well provide a useful role in educating judges on national security matters in the future. I have submitted copies of the Eminent Jurists Panel Report to several of our Chief Justices in Canada and this may well have a trickle-down effect.

Third I want to share with you a few thoughts regarding the use of intelligence information in criminal cases, our main focus today.

For many years in Canada, certainly pre-dating the creation of CSIS in 1984, there has been a tendency of our national security agencies to over-claim secrecy on the ground of national security and the related ground of international relations. This has occasionally affected adversely the rights of accused persons in terrorism cases – essentially in knowing the case against them. Lawyers for these accused persons have rightly sought disclosure, and government lawyers have resisted on behalf of government agencies, leading to protracted proceedings under section 38 of the Canada Evidence Act. That unique section requires participants in proceedings to notify the Attorney General of Canada if they are required, or expect, to cause the

disclosure of information that the participant believes is “sensitive information” or “potentially injurious information.” Once notice is given, the information cannot be disclosed unless the Attorney General of Canada or the Federal Court authorizes disclosure.

A designated Federal Court judge, **not** the trial judge, must hear the matter *ex parte* and give the Attorney General of Canada the opportunity to make submissions. The judge may consider material that would not ordinarily be admissible under the laws of evidence, provided that the material is reliable and appropriate.

The process to decide national security confidentiality matters under section 38 has three stages. The first stage determines whether the material is relevant information that must be disclosed under our rules. If the information is not relevant, it need not be

disclosed.

If the information is relevant, a second stage involves determining whether the disclosure of relevant information would harm international relations, national defence or national security. In making this determination, the judge gives “considerable weight” to the submissions of the Attorney General of Canada “...because of his access to special information and expertise.” The judge may authorize disclosure of the information, unless he or she determines that disclosure would injure international relations, national defence or national security.

If a determination is made that the disclosure of the relevant information would cause one of these harms, a third stage is involved, with the judge balancing the competing public interests in disclosure and non-disclosure. The judge has a range of

options. These include the authority to place conditions on disclosure, such as requiring the use of part, or a summary, of information, or a written admission of facts relating to the information, in order to limit the injury caused by the disclosure. Orders can be made to allow the admission of redacted documents, even though they would not normally be admissible under the laws of evidence.

Based essentially on the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada has jealously guarded the rights of the accused persons to as much disclosure as possible – the so-called Stinchcombe rule in criminal law. And it has provided similar rights to named persons in security certificate cases under immigration and refugee cases in *Charkaoui I & II*. The concepts of a fair trial and due process have prevailed for the most part.

Interestingly, section 38 itself was found unconstitutional by Justice Dawson of the Ontario

Superior Court in January 2009 in the case of several of the Toronto 18 alleged terrorists, called the *Ahmed* case. The grounds for unconstitutionality were interference with the core jurisdiction of the Superior Courts of the province to try serious criminal cases, and inconsistency with the due process section of our Charter. This decision was appealed by the Crown directly to the Supreme Court of Canada, was argued in March 2010 and a unanimous judgment was issued on February 10, 2011.

The Supreme Court allowed the appeal and supported the constitutionality of section 38 of the Canada Evidence Act and the two court system. But in so doing, it issued a stern warning in the concluding sentence of the judgment: “Trial unfairness will not be tolerated”.

In reality, section 38 has resulted in an inefficient system – inefficient for the government in quickly prosecuting alleged terrorists or quickly removing alleged terrorists trying to enter Canada through our immigration system- and inefficient for defence

counsel in criminal cases who are excluded from section 38 proceedings involving their client and who have to rely on the designated judges or on special advocates occasionally appointed by the presiding judge to challenge the relevance or veracity of national security evidence adduced in camera. All of this takes time and money, and utilizes scarce court resources.

What can we do to make the system more efficient? The Supreme Court in *Ahmed* was quite blunt in its prescriptions: it focused on one provision in section 38 of the Canada Evidence Act empowering the trial judge in a national security prosecution to quash a prosecution where he or she concludes that non-disclosure of the sensitive information may result in an unfair trial. To this end they held that the Attorney General as the chief law officer of the Crown, and the Crown prosecutor, pursuant to duties of fairness, should take all steps available to them within the limits imposed by the legislation to provide trial judges with the information required to discharge both the duty to safeguard the fair trial rights of the

accused as well as the obligation to Canadian society not to grant unwarranted stays of proceedings.

This requirement obliges the timely provision of the sensitive information to the trial judge, either in summary or in full. The Federal Court serves as the intermediary in transmitting this information, and in deciding what information to toss to the trial court. The Supreme Court noted: “[d]isclosure of the information to the trial judge alone, as is the norm in other jurisdictions, and for the sole purpose of determining the impact of non-disclosure on the fairness of the trial, will often be the most appropriate option. This is particularly true in light of the minimal risk of providing such access to the trial judge, who is entrusted with the powers and responsibilities of high public office”.

Subsequently, the trial judge “might conclude that it is not possible to assess the relevance of the withheld material without submissions from a counsel opposed in interest to the prosecution. In such a situation, the appointment of a security-cleared special advocate

could prove to be beneficial if he or she is adequately informed of the matters in issue by authorization of the Attorney General of Canada under section 38”.

As an academic colleague in Canada, Professor Craig Forcese has noted: “Put simply, if the government in the course of the section 38 process, fails to cough up enough information to the trial judge to persuade the latter that a fair trial may continue despite the secrecy, the prosecution will come to an end”. And I would add that the public will be outraged when there are a series of failed prosecutions because security information is withheld, resulting in alleged terrorists walking free.

Retired Justice John Major made a significant contribution to this debate in his Air India Commission Report released last June on the bombing of Air India Flight 182 in June 1985. There were four key recommendations flowing from Chapter VII dealing with Judicial Procedures to

Obtain Non-Disclosure Orders in Individual Cases. I will paraphrase four with which I strongly agree:

Recommendation 19:

The present two-court approach to resolving claims of national security confidentiality under section 38 of the Canada Evidence Act should be abandoned for criminal cases, and the trial court should be allowed to make decisions about national security confidentiality when hearing terrorism cases.

Recommendation 20:

In terrorism prosecutions, there should be no interim appeals or reviews of disclosure matters until after the verdict has been reached, then appeals can be heard by provincial courts of appeal.

Recommendation 21:

Security-cleared special advocates should be permitted to protect the accused interests during section 38 applications, in the same manner as they are used under IRPA for named persons. Either the

accused or the presiding judge should be permitted to request the appointment of a special advocate.

Recommendation 22:

The Attorney General of Canada should exercise restraint and independent judgment when making claims under section 38 of the Canada Evidence Act and avoid using overly broad claims of secrecy.

The Major Commission Report is a gold mine of ideas for the Canadian government to consider in reforming its criminal justice system, particularly in the light of the Supreme Court's decision in *Ahmed*. It's also a valuable source of information and issues in the national security field generally.

Let me say a word or two about Special Advocates (and let me disclose that I am one of them). First, the good news. There are now 23 specially trained Special Advocates appointed by the Minister of Justice under the immigration and refugee protection legislation, from all regions of Canada. All of them are security cleared and there is a modest budgetary

appropriation to support them. So far only 8 have been active in security certificate cases. In short there is capacity for more work if required.

The bad news? The Special Advocates are continually hampered by the communications restraints imposed by the legislation or the courts. Once the secret information is seen, he or she can't communicate with other Special Advocates or counsel for the named person unless authorized by the judge. This is very frustrating when the government counsel do not have such restraints. These restrictions also prolong and increase the cost of the proceedings.

I am optimistic that the creative deployment of Special Advocates can make the criminal justice system more efficient in achieving speedy adjudication of government claims of confidentiality on grounds of national security. For example, Special Advocates could play a role in negotiating with the government and formulating agreed statements of fact. Special Advocates could negotiate the release of some information or agree that the claim of secrecy is

warranted. This would result in a narrowing of the quantity of information over which the claim to secrecy has to be litigated thereby reducing the drain on judicial resources, and reducing the time taken to dispose of cases in a fair and equitable manner.

Let me conclude with an observation regarding courts administration when dealing with national security matters involving sensitive information. For the Courts to maintain the confidence of the security intelligence or policing agencies, and public confidence, there have to be secure facilities for the receiving of or adjudication on sensitive information. That means not only security-cleared special advocates and court staff, but also specially designed courtrooms with storage facilities that are secure, and preparation areas for the judges and lawyers involved, and means for transporting secure documents to major centres. Ad there must be secure word-processing facilities.

In Canada we have some experience in our national capital of Ottawa but it does not always extend to our

major urban centres of Toronto, Montreal and Vancouver where many of the major terrorist trials are held. We do have experience with federal court judges conducting national security hearings by secure telephone facilities, with documents distributed by secure fax machines.

All of this is to say that we have lots on our plate – both judges and lawyers- in developing workable and accountable national security policies.