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

Commission d'enquête relative aux mesures d'investigation prises à la suite de l'attentat à la bombe commis contre le vol 182 d'Air India

Canadian Association of Chiefs of Police Written Submissions

Association canadienne des Chefs de police Soumission Écrite

Leading Progressive Change in Policing

À l'avant-garde du progrès policier

AIR INDIA INQUIRY

CANADIAN ASSOCIATION OF CHIEFS OF POLICE

CLOSING SUBMISSIONS

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AIR INDIA INQUIRY

CANADIAN ASSOCIATION OF CHIEFS OF POLICE

CLOSING SUBMISSIONS

Commissioner,

While there are very important institutional and legal issues that have emerged from the bombing of Air India Flight #182 on June 23, 1985, it is equally important that the Canadian justice system remain cognizant that the bombing was the most serious criminal offence in Canadian history and has touched the lives of hundreds of citizens. The loss of life and the impact on the families must not be overshadowed or forgotten.

With this in mind, the Canadian Association of Chiefs of Police would like to begin its submissions by offering its sincere condolences to the families of the victims. To quote the testimony of Toronto Chief of Police William Blair, the priority of law enforcement agencies is the protection of Canadians "first and foremost."[1] This holds true for all law enforcement agencies across the country in respect of every investigation and every criminal offence. Protecting the public from tragedy and loss of life is the guiding thread in law enforcement, and this loss has touched law enforcement officials institutionally and personally.

Background

The Canadian Association of Chiefs of Police

a) *General*

The CACP is comprised of a Board of Directors, elected by our membership, and includes Chiefs, Commissioners, and executives from Canada's law enforcement community. The CACP also has, amongst its members, representation from partner and affiliated agencies such as the Canadian Security Intelligence Service and the Criminal Intelligence Service Canada. The Association is national in character and represents over 90% of the police community in Canada. Its interests and concerns have relevance to policing at all levels including municipal, provincial, and federal. The CACP is dedicated to the support and promotion of efficient law enforcement and to the protection

[1] Air India Inquiry transcript, November 26, 2007, vol. 83, at page 10624.

and security of the people of Canada. Much of the work in pursuit of these goals is done through the activities and special projects of a number of committees and through active liaison with various levels of government and departmental ministries. The CACP regularly appears before Parliamentary committees on proposed legislation and Parliamentary reviews of existing criminal law and community safety legislation.

CACP participation and preparation for the Air India Inquiry has involved the collective efforts of the Organized Crime Committee, the National Security Committee, and the Law Amendments Committee.

b) *Evidence by the CACP*

The CACP has given evidence before this Commission on the realities of policing today. The Commission heard from two panels composed of high-ranking police officials representing law enforcement agencies from across Canada.

While these panels spoke on many substantive topics related to law enforcement, the very make up of these panels was an equally significant gesture; they represented law enforcement federally, provincially, and municipally. The explicit message is that policing in Canada is multi-jurisdictional, multi-ethnic, multi-organizational, and highly complex in nature. There is a necessity for law enforcement integration and cooperation across the country and at all levels. Criminal activity no longer affects communities in isolation, but is often provincial, regional, or national in scope and increasingly international.

In addition to the organizational and institutional complexities facing Canadian law enforcement, there has also been a documented increase in the complexity of investigations with significant resulting resource and workload implications. Policing has made significant advances, but much work is required to continue adapting. Attached to these submissions in Appendix A is the Plecas Report on the costs and obstacles facing policing today. The conclusion of this Report is that the demand for police services has increased over the past 30 years while police resources have not increased proportionately to meet this demand. This is more than traditional corporate complaining; it is a documented reality of policing today. Ignoring this reality would not address the underlying problem.

The bombing of Air India flight #182 has also exposed the reality of criminal activity and policing. For 25 years the Air India investigation and prosecution galvanized the attention of Canadians. We have all felt the effects and like all Canadians, the CACP wishes to see that the lessons of Air India are fully understood and not forgotten.

The CACP would like to focus these final submissions on two key points:

1. **The changing nature of crime and the necessity to consider legal changes at all levels.**

2. **The fact that before every mega-trial there is a mega-investigation.**

In order to implement and give effect to these points, the CACP submits that the Commission consider making the following recommendations:

1. **The creation of a Centre or Institute to systematically study mega-trials, mega-investigations, and related aspects of the criminal justice system.**
2. **Enhancement of the pre-trial relationship between the Crown and police.**
3. **Increased security surrounding all aspects of mega-trials and investigations, but especially as it relates to witnesses.**
4. **Legal reforms in the area of disclosure.**
5. **Enhanced case management during mega-trials.**
6. **Legislation in the area of lawful access.**

Further, the CACP suggests legislation as the appropriate means of addressing recommendations 4, 5, and 6.

Submissions

1. *Crime has changed and likewise aspects of the investigation and prosecution of crime need to change*

The CACP submits that this very point requires validation and sanction. The legal system today is based on a historical model of criminal justice when crime itself was localized in nature. Provincial and Superior courts are designed to administer criminal justice based on the notion of one crime and one criminal. Law enforcement is structured on the basis of geographical division, incorporating overlapping jurisdictions at municipal, provincial and federal levels. The *Criminal Code*, investigations, prosecutions, trials and juries are all structured and predicated on this model.

But the model has changed. High-level organized crime today deals with multiple offences and multiple offenders across multiple jurisdictions. It is not just local, but national and international in character, and requires the resources of not just single law enforcement agencies in single jurisdictions, but the participation of allied and quasi-criminal agencies such as CSIS and the Canada Border Services Agency.

The legal system has been adapting. Testimony given by the CACP indicated that law enforcement agencies are increasingly working together and integrating their approaches to high-level organized crime and terrorism. Likewise, prosecution is changing. Scholars and lawyers such as Bruce MacFarlane and research groups such as the Department of Justice Steering Committee on Justice Efficiencies have used the term "mega-trial" to describe the phenomenon in Canadian law where major cases increasingly consist of hundreds of witnesses, warehouses of documents, and trials that span up to several years. The mega-trial is a reality of criminal justice with which we are now faced.

2. *There is no mega-trial without a mega-investigation*

The development of mega-trials has not occurred in isolation. All aspects of the criminal justice system have faced change in order to adapt to the massive undertakings required by mega-trials. The CACP submits that the Commission should acknowledge, and fully consider the implications of the reality, that there is no mega-trial without a preceding mega-investigation. If the challenges associated with these large-scale prosecutions and investigations are not addressed before informations are laid, it is too late. Planning and preparation must occur (including document management, witness management, and other mega-case issues) during the investigative stage in order for solutions to be available at the trial stage.

Recommendations

In order to implement and give force to the submissions as stated above, the CACP submits that the Commission consider making the following recommendations.

1. *The establishment of an Institute for the study of Criminal Justice Administration*

In order for the Canadian justice system to make meaningful and effective reforms, the co-operation of all stakeholders is required including judges, members of the Bar (both Crown and defense), and police agencies.

In order to reflect the reality that the emergence of the mega-trial is a fundamental, high-level development in the Canadian justice system, the CACP is recommending that such co-operation occur at a facility, such as a university with a law school and department of criminology, which would be capable of handling the academic and resource implications of such an undertaking. The systematic study of mega-trials is required at all levels from the investigatory phase to the prosecution phase and as a whole both, practically and philosophically. It would be, in the words of RCMP Assistant Commissioner Raf Souccar, "a think tank."[2] Officials from police agencies, the Bar, the judiciary, intelligence services, and academia must be available to act as directors of such an institute. Such an institute would demonstrate an integrated approach to mega-trials where information can be collected, analyzed, and disseminated between all participants in the justice system including legislators and criminal law policy makers. For example, a number of countries such as Australia and the United Kingdom, have recently codified aspects of both pre-trial and trial procedures, most notably in the area of disclosure. If Canada is to consider similar steps, it should do so in an informed, measured way that addresses both "front end" and "back end" aspects of the criminal justice system.

The CACP therefore submits that the Commission consider recommending the creation of an institute for the study of mega-trials, to be styled The Canadian Institute for the Strategic Study of Criminal Justice Administration, to reflect that such an institute would necessarily encompass more than mega-trials. It would be a "think tank" dedicated to other areas of criminal justice including law enforcement and prosecution.

The CACP submits that this recommendation should address the following:

- **An institute for the study of mega-trials must serve as a repository of information, a library, where police agencies, lawyers, and judges can look collaboratively for best practices on the management of mega-cases and investigations.**
- **Such an institute should be national and international in character, drawing upon experiences from across the country and globally.**
- **Funding options should be explored.**

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[2] Air India Inquiry, transcript, Nov. 19, 2007, vol. 78, at page 10020.

2. *Formalize and clarify the relationship between the Crown and the police*

It has become apparent that there must be Crown involvement from the earliest instances of investigation to ensure that evidence will withstand the rigorous scrutiny demanded by the rights of the accused and the *Charter of Rights and Freedoms*. The CACP submits that a possible solution lies in creating positions for advisory Crowns, as distinct from prosecuting Crowns, who would assist with pre-trial matters. As Sûreté du Québec Director General Steven Chabot put it during testimony, "the availability of [Crown] counsel to provide assistance throughout the investigation is crucial. We absolutely need that to overcome those investigations."[3] The goal of this cooperation, as stated by Chief William Blair, is "to ensure that when we conduct our investigations, we result in a prosecutable case."[4] It is important to be mindful of the independence of Crown and police and the separation of their roles. Careful study and respect for their fundamental roles need to be part of the development of this concept.

As a necessary corollary to the principle that there is no mega-trial without a mega-investigation, the CACP submits that the Commission consider recommending the relationship between the Crown and the police be clarified and formalized. The CACP submits that this recommendation should address the following:

- **Crown involvement from the outset of the investigation.**
- **Availability of Crown counsel to provide assistance in an advisory capacity.**
- **Early assignment and assistance of Crown prosecutors.**
- **The importance of ensuring that experienced Crown counsel take on lead roles in the prosecution of mega-trials and that appropriate resources are available to them.**
- **Safeguarding of Crown independence from police.**
- **The creation of permanent or semi-permanent working teams of police and Crown counsel to avoid the creation of *ad hoc* teams.**
- **Disclosure issues as further discussed below.**

3. *Security*

[3] Ibid. at page 9960.
[4] Ibid. at page 9961.

Security must be considered throughout all aspects of a mega-case from the initial investigation to disclosure and the trial itself. The subjects of security include everyone involved: the public, witnesses, the accused, police officers, lawyers, judges, and juries. The protection of the public is an issue the moment that intelligence is known of criminal activity. Chief William Blair made clear that where an investigation and public safety conflict, the overarching concern must be public safety.[5] For witnesses, as Chief Blair stated, "we have this irony within the criminal justice system that we are unable to protect those people who come forward…and it's really having a significant impact on our ability to keep our communities safe."[6] Lawyers, judges, and juries are also affected by intimidation and threats.[7]

The courtroom itself needs to adapt. Measures are required to provide facilities that can house a mega-trial safely. As Chief Blair testified in relation to one particular prosecution,

> it was explained to me that we had no courtroom where we could sit 44 accused….there was no place we could hold such a trial. It was explained to me that no prosecutor could possibly manage a case of that magnitude. No judge could manage that courtroom…it compelled us to go back and look at how we do our business…We don't pay attention to what type of facilities we are going to require to do this in or what the security implications are…even just where everybody is going to sit.[8]

Security for courtrooms encompasses everything from threats and intimidation against those within the courtroom, even down to the minor details of accommodations to ensure compliance with regulatory codes. This often becomes an overwhelming resource and cost burden for local police and court administrators.

The onus, however, must not be on the police or the Crown to adapt its prosecution methods to the restrictions imposed by the law. The onus must be on the system as a whole to adapt to the needs of law enforcement and prosecution. It is an unacceptable situation where a prosecution or criminal investigation must be abandoned because resources or facilities are inadequate.

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[5] Air India Inquiry, transcript, Nov. 26, 2007, vol. 83, at page 10623.
[6] Air India Inquiry, transcript, Nov. 19, 2007, vol. 78, at page 9997.
[7] Ibid. at page 9969.
[8] Ibid. at pages 9988-89.

The CACP, therefore, submits that the Commission consider recommending a series of security measures to address the following:

- **The creation of secure courtroom facilities.**
- **Clarification of the roles and responsibilities for courtroom security as between sheriffs, special constables, and police agencies.**
- **The creation of a system for the protection of individuals involved with major cases including witnesses, lawyers, judges, and juries.**
- **Clear guidelines for managing the delicate balance between ongoing investigations, prosecutions and disclosure and the need to protect the public.**

4. *Disclosure*

Few cases have had as much impact on policing as *R. v. Stinchcombe*.[9] Disclosure and the expansion of its scope have become an enormous challenge for police services and a source of tension between the Crown and police. These problems are compounded in mega-cases and compounded exponentially when national security is engaged. Mega-investigations produce an extraordinary amount of documentation and it is unrealistic for the parties involved to continue managing such amounts of disclosure under current methods. Chief Blair testified that "almost 40 percent of our resources during the course of the investigation are committed to ongoing preparation of disclosure materials" and as a result, the Toronto Police Service is, in practice, limited to one major investigation a year.[10] The legal framework and practices must evolve and embrace the efficiencies that can be provided by new techniques and methods such as those provided by electronic technology.

Since *Stinchcombe*, the Crown and police have been at odds over their respective obligations and responsibilities in the disclosure process. Subsequent jurisprudence has led to inconsistent and dysfunctional practices over who will bear costs and resources dedicated to disclosure preparation and vetting of documents. Approaches and practices on relevancy and irrelevancy vary widely. Assistant Commissioner Souccar testified that *Stinchcombe* "is now being interpreted differently from court to court across the land."[11] Chief Blair testified that the result has been an "exponential"[12] growth of the burden of

[9] [1991] 3 S.C.R. 326.
[10] Air India Inquiry, transcript, Nov. 19, 2007, vol. 78, at page 9980.
[11] Ibid. at page 9982.
[12] Ibid. at page 9981.

disclosure, to the point where, as the Commission itself has said, "now we have an industry of its own, disclosure."[13]

Complicating matters further is section 38 of the *Canada Evidence Act*, dealing with the disclosure of information related to national defense, national security, and international affairs. This section creates a complicated and specialized extra step in an already complex and lengthy process. Again, there must be a full and ongoing consideration of these issues, which would hopefully lead to a clarification and codification of disclosure standards.

The CACP therefore submits that the Commission consider making recommendations to address the following:

- **A move from the current process of disclosure to a process of electronic disclosure, which would include the standardization of software and indexing to organize disclosure materials.**
- **A clarification of the roles and obligations on both the Crown and police in relation to disclosure, including the responsibility for vetting of documents.**
- **The creation of teams comprised of Crown and police officials dedicated to the management of disclosure from the commencement of an investigation and continuing on throughout the case.**
- **A clarification of *Stinchcombe* and the establishment of guidelines for the scope of disclosure.**
- **Further guidance on section 38 of the *Canada Evidence Act.***

5. *Case management at the trial stage*

Mega-trials are typically marked by pre-trial hearings and motions that take up inordinate amounts of time and place increased burdens on the judiciary to manage the process.

In this regard, the CACP endorses the work undertaken by the Department of Justice Steering Committee on Justice Efficiencies on early crime prevention and mega-trials. The CACP believes that police agencies have useful input to make on the continuing development of these topics.

The CACP therefore submits that the Commission consider making a recommendation for legislation to address the following:

- **The active involvement of a case management judge to deal with pre-trial motions and hearings.**

[13] Ibid. at page 9979.

- **The role of a case management judge to ensure that motion and hearing issues are moved along quickly and efficiently.**

6. ***Lawful access to electronic communications***

Canadian police operate under access laws originally created in 1974. While the principles of these laws are sound, they require modernization. Communications technology has rapidly advanced while the technical ability of police to lawfully intercept electronic communications has not kept pace. This gap between what the 1974 legislation intended and the reality of modern technology poses a significant threat to public safety and continues to impair the effectiveness of policing. Other democratic countries such as Australia, New Zealand, Britain and the Netherlands have adopted legislation aimed at modernizing their lawful access statutes. These countries have recognized that in many respects technology has eliminated borders and geographical restrictions. There must not be "intercept-safe havens" in Canada. Police powers need to be harmonized with the global context in which Canadian law enforcement operates.

The CACP supports the proposals contained in the August 2002 Department of Justice Lawful Access Consultation Document, attached as Appendix B to these submissions. When and to whom police may direct intercepts must always be subject to prior approval of the courts, but the technological capability to actually implement court ordered access must be improved.

The CACP therefore submits that the Commission consider making recommendations to address the following:

- **The circumstances in which police may intercept private communications must continue to be the subject of prior court approval.**
- **The technological ability to implement court ordered access must improve and do so in a manner that will keep pace with future technological changes.**
- **A mechanism to balance the needs of global competitiveness in the communications industry with regulation and public safety.**
- **The cross-border nature of crime.**
- **No persons, whether corporate or otherwise, must be permitted to erode the authority of the court by imposing fees or other financial obligations as a condition of compliance with a lawful order from the court.**
- **On November 15, 2005 in the House of Commons, Bill C-74, the Modernization of Investigative Techniques Act, was introduced. Consideration should be given to re-visiting the principles set out in this Bill.**

Conclusion

For many years, the Canadian Association of Chiefs of Police has been working with all levels of government to address the issues now being considered by this Commission. We welcome the opportunity to share our experience and expertise and to participate meaningfully in the process to move forward on these challenging issues. We wish to thank the Commission, Commission Counsel, and staff for working with our organization and for the respect paid to our contribution.