
THE CONSEQUENCES OF COMPELLED SELF-
INCRIMINATION IN TERRORISM
INVESTIGATIONS: A COMPARISON OF AMERICAN
GRAND JURIES AND CANADIAN INVESTIGATIVE
HEARINGS

*Kent Roach**

INTRODUCTION

The intensification of anti-terrorism investigations in many parts of the world since 9/11 has presented threats to many rights, but the right against self-incrimination has not been at the top of the list. Even with respect to attempts to compel self-incrimination before grand juries, the most immediate concern has been with deprivation of liberty in the form of periods of detention under material witness warrants.¹ The focus has been on harms to liberty and security of the person and not on the consequences of protecting the right against self-incrimination through use and derivative use immunity protections that apply to compelled testimony. Nevertheless, there are some important and interesting conflicts between the right against self-incrimination and the prosecution of terrorism offences.

In the United States, the main venue for compelled self-incrimination is the grand jury. Canada has abolished the grand jury; nevertheless in the aftermath of 9/11, Canada created a new legal procedure, the investigative hearing that provided for judicially-authorized compelled self-incrimination in terrorism investigations.²

* Prichard and Wilson Chair in Law and Public Policy, University of Toronto. I thank Professor Alex Stein and the others responsible for organizing the conference on the Future of Self-Incrimination on May 2 and 3, 2008, where an earlier version of this paper was presented.

¹ *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003). See generally DAVID COLE, *ENEMY ALIENS* (2003); Stacy M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483 (2002); Laurie L. Levenson, *Detention, Material Witnesses, and the War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002); Margulies, *Detention of Material Witnesses, Exigency and the Rule of Law*, 40 CRIM. LAW BULLETIN 4 (Nov. 2004).

² Criminal Code of Canada, R.S.C., c. C-46, ss. 83.28-83.29 (1985). These powers were subject to a five year sunset and Canada's minority Conservative government lost a motion in Parliament in February 2007 to renew them for another three years. Consequently the investigative hearing power has now lapsed in Canada. A new bill to restore investigative

Investigators may wish to compel self-incrimination in terrorism investigations before a grand jury or an investigative hearing, especially in situations where they fear that a terrorist attack is imminent or when they face intense pressures to apprehend perpetrators in the immediate aftermath of a terrorist attack. In such situations, it may be difficult for investigators to resist the shortcut of compelled self-incrimination. An added benefit to prosecutors is that witnesses with information relevant to international terrorism investigations may also be prime candidates for detention as material witnesses because of concerns that they may abscond or because of other difficulties in securing their testimony.³ It may be easier to arrest and detain people as material witnesses than to arrest and charge them for crimes of terrorism.

The investigative shortcut of compelled self-incrimination may come with a high price. The distinction between potential witnesses and potential suspects may often be blurred in terrorism investigations. This is especially true given that many countries, including Canada and the United States, have enacted many broad terrorism offences that apply to various forms of support, facilitation, and planning of terrorism and with respect to participation in terrorist groups.⁴ A person compelled and perhaps detained as a witness in a terrorist investigation may turn out to be a viable suspect. In such cases, it may be difficult if not impossible to prosecute such witnesses for crimes of terrorism because in both Canada and the United States, constitutional protection of the right against self-incrimination will require, as a minimum, that there be use and derivative use immunity should prosecutors

hearings was introduced in Parliament. It passed the Senate but did not come to a vote in the House of Commons before Parliament was dissolved for the 2008 election. *See* An Act to Amend the Criminal Code (investigative hearings and recognizance with conditions), Bill S-3, 39th Parl. (2007-2008). The Conservative government was re-elected in October of 2008 and is expected to introduce a similar bill in the near future.

³ 18 U.S.C. § 3144 (2006); Criminal Code of Canada, R.S.C., c. C-46, s. 83.29 (1985).

⁴ Robert Chesney, *Beyond Conspiracy?: Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007); Kent Roach, *The New Terrorism Offences in Canadian Criminal Law*, in *TERRORISM, LAW & DEMOCRACY: HOW IS CANADA CHANGING FOLLOWING SEPTEMBER 11?* (David Daubney et al. eds., 2002). Two recent convictions in Canada affirm the breadth of its new terrorism offences. A young offender was convicted of knowingly participating in a terrorist group for the purpose of enhancing its ability to facilitate or carry out a terrorist group under section 83.18 of the Criminal Code Code of Canada even though he did not know any details of the alleged Toronto terrorism plot. *R. v. N.Y.*, File No. YC-07-1587 (Ont. Sup. Ct.) (Sept. 25, 2008) (unreported judgment). Momim Khajawa was convicted of the same offence, as well as other offences relating to financing terrorism, facilitating terrorism and instructing a person to carry out activities for a terrorist group even though the judge said a reasonable doubt existed whether he knew that detonation devices would be used by others in connection with bombings in London. *R. v. Khawaja*, File No. 04-G30282, (Ont. Sup. Ct.) (Oct. 29, 2008) (unreported decision). In neither of these cases did the police attempt to use investigative hearings to obtain evidence against the accused or others.

subsequently wish to prosecute a compelled witness.⁵ These protections will have several distorting effects on terrorism investigations and trials.

The state will have an incentive to avoid the burden of use and derivative use immunity. One way to avoid such burdens is to delay calling a witness to testify. Such a delay strategy may not be objectionable if the potential witness is simply kept under surveillance, but it becomes more problematic if that person is detained as a material witness. Many of those who have been detained as material witnesses in American terrorism investigations have actually not been compelled to testify.⁶ Jose Padilla was detained for a month under a material witness warrant, but did not testify before a grand jury. Nor did Oregon lawyer Brandon Mayfield, who was detained for two weeks under a material witness warrant.⁷ The same is true with respect to Terry Nichols, who was eventually charged and convicted for involvement in the Oklahoma City terrorist attack.⁸

Given that no publicly reported investigative hearing has been held, the Canadian experience is scant. Nevertheless, there is a similar danger that Canadian prosecutors will attempt to delay questioning a witness before an investigative hearing while also detaining that person as a material witness who might abscond or otherwise avoid having to testify before the investigative hearing. An important corollary of the right against self incrimination, use and derivative use immunity, can encourage adaptive state behavior that results in deprivations of liberty that can serve as a de facto form of preventive detention.

Another strategy to avoid the burden of use and derivative use immunity is to compel the person to testify, but then transfer the witness to another jurisdiction that is not subject to the requirements of respecting use and derivative use immunity. Jose Padilla was originally detained as a material witness before being transferred to military custody where it was not clear that use and derivative use immunity would apply.⁹ In the context of international terrorism and the frequent assertion of universal jurisdiction over terrorism offences, it may also be

⁵ The leading cases requiring use and derivative use immunity as part of a right against self-incrimination are *Kastigar v. United States*, 406 U.S. 441 (1972), and *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 (Can.).

⁶ HUMAN RIGHTS WATCH, WITNESS TO ABUSE 1-2 (2005) (30 of 70 known cases where material witnesses were never brought before grand jury to testify).

⁷ *In re Federal Grand Jury Proceedings*, 337 F. Supp. 2d 1218 (D. Or. 2004)

⁸ *United States v. Nichols*, 77 F.3d 1277 (10th Cir. 1996); *see also United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999).

⁹ Section 948r of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (amending subtitle A of 10 U.S.C.) only provides that “no person shall be required to testify against himself at a proceeding of a military commission under this chapter,” leaving unanswered the question of whether use and derivative use immunity from evidence compelled at a grand jury would apply to military commission proceedings.

possible for American or Canadian officials to transfer a compelled witness to another country that will not be bound by use and derivative use immunity restrictions. In short, the main protections of the constitutional right against self-incrimination—use and derivative use immunity in the jurisdiction where the testimony is compelled—may be too parochial in an era of global terrorism and the assertion of universal jurisdiction to prosecute terrorism. As will be seen, the Canadian courts have been alive to the danger of end runs around domestic immunity protections and have extended use and derivative use immunity provisions to extradition and deportation proceedings.¹⁰

The use and derivative use immunity protections provided by the right against self-incrimination in both American and Canadian constitutional law do not apply to the use of a refusal to testify as evidence for a contempt charge or the use of false testimony as evidence for a perjury charge. In other words, those who are compelled to testify and incriminate themselves in terrorism investigations may be charged with contempt offences arising from a refusal to testify or perjury offences arising from their testimony, rather than terrorism offences. A person who is actually involved with terrorism may simply refuse to testify before a grand jury or an investigative hearing. If they do testify, such persons may tell lies in order to cover their involvement in terrorism, the involvement of others in terrorism, or to provide authorities with misinformation. In such cases, prosecutors may lay either contempt of court or perjury charges. Perjury charges may be especially attractive because the prosecutor will not have to demonstrate that the state's evidence was not derived from the compelled testimony. The focus of any subsequent trial will be on the decision to attempt to compel the person to testify and on the witness's refusal to testify or whether the witness intentionally lied when testifying.

In both the contempt and perjury scenarios, the witness's right against self-incrimination will be protected, but the distorting consequences may be a prosecution and a conviction that does not reveal the real reason why the witness has been prosecuted. Although perjury and contempt are not minor crimes and may be attractive to prosecutors who are prepared to use collateral "Al Capone" strategies to disrupt and disable terrorists,¹¹ they pale in significance to the seriousness of terrorism crimes. In this way, the consequences of protecting the right against self-incrimination in terrorism investigations may contribute to a flight away from trials that are designed to discover

¹⁰ *Re Application Under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 (Can.).

¹¹ A 2005 report suggests that 20 of 70 people known to be detained as material witnesses in terrorism investigations were charged with non-terrorism crimes, 20 were deported and only 7 were charged with terrorism crimes. HUMAN RIGHTS WATCH, WITNESS TO ABUSE 5 (2005).

the truth about whether serious crimes have occurred. Crimes of contempt and perjury that are generated by attempts to compel self-incrimination may also lead to concerns about harassment of minorities while these system-based charges divert the legal system away from the question of whether the targets actually were plotting a terrorist act.

This paper will provide a brief overview of the right against self-incrimination in Canada as compared to the United States. It will next examine Canada's introduction of an investigative hearing procedure in its 2001 Anti-Terrorism Act that allowed those with information about terrorism to be compelled by judicial order to respond to questions and to produce material subject to statutory protections of use and derivative use immunity that were drafted to ensure compliance with the Canadian constitutional right against self-incrimination. The Supreme Court of Canada's 2004 decision to hold that investigative hearings are consistent with the Canadian Charter of Rights and Freedoms¹² will next be examined. Although the Court upheld investigative hearings as consistent with the Charter because they required use and derivative use immunity, the Court interpreted the statutory protections of use and derivative use immunity to go beyond the constitutional minimum and not to allow the use of derivative evidence even if an independent source for the evidence was established. In addition, the Court extended these statutory protections so that they apply to subsequent immigration and extradition procedures, as well as criminal proceedings, against the target of the investigative hearing. The Supreme Court of Canada's companion decision that investigative hearings will be subject to a rebuttable presumption of openness¹³ also stands in contrast to the secrecy that generally accompanies American grand jury proceedings. Canadian investigative hearings that are presided over by judges with defense lawyers and perhaps the media present emerge as significantly more oriented toward due process than American grand juries.¹⁴

The paper will next examine the tumultuous history of investigative hearings in Canada including Parliament's decision in early 2007 to allow them to expire under a five year statutory sunset and the subsequent introduction of a new bill to reinstate investigative hearings. As will be seen, investigative hearings have been controversial in Canada in large part because they are a novel procedure that was first developed and included in Canada's post 9/11 Anti-

¹² *Re Application Under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 (Can.).

¹³ *Re Vancouver Sun* [2004] 2 S.C.R. 332 (Can.).

¹⁴ On the theme that due process protections under the Canadian Charter of Rights often exceed those in the United States, see Robert Harvie and Hamar Foster, *When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States*, 19 SEATTLE U. L. REV. 497 (1996); Kent Roach & M.L. Friedland, *Borderline Justice: Policing in the Two Niagaras*, 23 AM. J. CRIM. L. 241 (1996).

Terrorism Act. In contrast, the grand jury and the detention of material witnesses were existing legal powers in the United States before 9/11. The use of the grand jury in terrorism investigations has generally not been controversial, but the detention of people as material witnesses has been more controversial and has resulted in some attempts to reform the federal material witness statute.¹⁵ Canada as of yet does not have experience with the detention of material witnesses who have been ordered to testify before an investigative hearing, but this may change should a bill to re-introduce investigative hearings become law.¹⁶ This bill, by applying a general Criminal Code provision for the detention of material witnesses to investigative hearings, could allow a material witness who has evaded service, is about to abscond, or has not attended an investigative hearing to be detained as a material witness for a maximum of 90 days.¹⁷

The conclusion of this paper will assess compelled self-incrimination as an investigative tool in anti-terrorism investigations in light of the restraints imposed by the constitutional protection of the right against self-incrimination in both Canada and the United States. The right against self-incrimination remains an important safeguard and protection for those who may be compelled as witnesses before grand juries or investigative hearings to incriminate themselves. Nevertheless, the very protections of that right have some undesirable distorting effects on terrorism investigations and trials. The main distorting effects are 1) attempts to delay the compelled testimony of a person detained as a material witness and to use compelled self-incrimination to engage in preventive detention, 2) attempts to use the fruits of compelled incrimination in jurisdictions that do not have to respect use and derivative use immunity, and 3) the use of contempt or perjury charges arising from the attempt to compel testimony rather than trials on the merits of the terrorism investigation. Given present constitutional commitments to protections for the right against self-incrimination in both Canada and the United States, as well as the attraction of compelled self-incrimination in terrorism investigations, it is not clear that these undesirable distorting effects can be avoided.

I. THE RIGHT AGAINST SELF-INCRIMINATION

Rights against self-incrimination are contemplated in several parts

¹⁵ S. 1739, 109th Cong. (2005).

¹⁶ Bill S-3, 39th Parl. (2007-2008).

¹⁷ *Id.* s. 83.29 (incorporating Criminal Code of Canada s. 707).

of the Canadian Charter of Rights and Freedoms¹⁸ (henceforth the Charter) which was enacted in 1982 as a constitutional bill of rights in Canada. Section 11(c) of the Charter provides that any person charged with an offence has a right not to be compelled to be a witness in proceedings against that person in respect of the offence.¹⁹ Section 13 of the Charter provides that a witness who testifies in proceedings has a right not to have any incriminating evidence used against him or her except in a prosecution for a perjury.²⁰ The Supreme Court of Canada has held that these two provisions do not exhaust the protections against self-incrimination under the Charter. Section 7 of the Charter, which provides a right against the deprivation of liberty except in accordance with the principles of fundamental justice, has been interpreted to include a residual right against self-incrimination in the form of a limited protection against being compelled to testify if the state's predominant purpose is to obtain incriminating evidence. Section 7 of the Charter has also been interpreted to provide both use and derivative use immunity for any evidence obtained through compelled testimony.²¹

The Canadian law of self-incrimination occupies a halfway house between transactional immunity and the more limited immunities against an accused's being forced to testify or a witness's prior testimony being used as evidence in a subsequent trial of that witness. Section 7 of the Charter will provide the additional protection of derivative use immunity—which will require the prosecution to demonstrate that it obtained information from a source independent of a person's compelled testimony. The Canadian right against self-incrimination will only protect a person from being compelled to testify if the predominant purpose of that compulsion is to incriminate the person. Despite the recognition of a right to silence that includes a right for silence not to be held against the accused,²² as it can be in the United Kingdom,²³ the limited Canadian right against self-incrimination opened up the possibility that a person can be compelled to testify as part of a terrorism investigation so long as the predominant purpose of the questioning was not to incriminate the person and so long as there is use and derivative use immunity for the compelled testimony.

¹⁸ Canadian Charter of Rights and Freedoms as Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.).

¹⁹ *R. v. Amway of Canada, Ltd.*, [1989] 1 S.C.R. 21 (Can.).

²⁰ *R. v. Henry*, [2005] 3 S.C.R. 609 (Can.); *R. v. Noel* [2002] 3 S.C.R. 433 (Can.).

²¹ *British Columbia (Securities Commission) v. Branch* [1995] 2 S.C.R. 3 (Can.).

²² *R. v. Chambers*, [1990] 3 S.C.R. 1293 (Can.); *R. v. Turcotte*, [2005] 2 S.C.R. 519 (Can.).

²³ For an account of how limits on the right to silence introduced in 1988, in response to terrorism in Northern Ireland, became adopted for all crimes in the United Kingdom in Sections 34-37 of the *Criminal Justice and Public Order Act of 1994*, see Oren Gross and Fionnuala Ni Aolain, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 183-87 (2006); Mike Redmayne, *English Warnings*, 30 *CARDOZO L. REV.* 1047 (2008).

II. INVESTIGATIVE HEARINGS UNDER CANADA'S 2001 ANTI-TERRORISM ACT

Like many other countries, Canada responded to the tragic events of 9/11 and to Resolution 1373, issued by the Security Council of the United Nations, with new anti-terrorism legislation. This law created many new crimes relating to the financing and facilitation of terrorist activities and participating in the activities of a terrorist group. It also created new powers of preventive arrest on the basis of reasonable grounds that a terrorist activity will be carried out and reasonable suspicion that the imposition of conditions is necessary to prevent a terrorist activity. A person could be detained for up to 72 hours with conditions being imposed on that person for up to a year.²⁴ As will be seen, detention of a material witness who would be required to testify at an investigative hearing was not subject to the same limits and could potentially last longer.

One of the most controversial provisions of Canada's 2001 Anti-Terrorism Act created a novel procedure of investigative hearings under which a judge could order the examination of a person on the grounds that there were reasonable grounds to believe that a terrorist activity had or will be committed and reasonable grounds to believe that the person examined has information concerning the offence or about the whereabouts of a suspect. Those subject to the investigative hearings had the right to counsel²⁵ and the right to refuse to answer questions or produce things on the basis of "any law relating to non-disclosure of information or to privilege."²⁶

Section 83.28(10) addressed the right against self-incrimination by providing that:

No person shall be excused from answering a question or producing a thing . . . on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

- (a) no answer given or thing produced . . . shall be used or received against the person in any criminal proceeding against that person other than a prosecution under [sections relating to perjury or giving contradictory evidence]; and
- (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any

²⁴ Criminal Code of Canada, R.S.C., c. C.-46, s. 83.3 (1985).

²⁵ *Id.* s.83.28(11); *see also A Mandatory Right to Counsel for Material Witnesses*, 19 U. MICH. J.L. REFORM 473 (1986).

²⁶ Criminal Code of Canada, R.S.C., c. C.-46, s. 83.28(8) (1985).

criminal proceedings against that person other than a prosecution under [sections relating to perjury or giving contradictory evidence].²⁷

This provision recognized the right against self-incrimination by providing for use and derivative use immunity for any statements or material that were compelled at an investigative hearing. Although the Canadian law contemplated immunity from being compelled to testify if the predominant purpose of the questioning was to incriminate the witness, this immunity would presumably not be a factor in the investigative hearing context because the police would be seeking to investigate a future or past act of terrorism. That said, the immunity provisions could make it much more difficult to convict subjects of an investigative hearing of a terrorism offence. One exception would be that the government could prosecute a person compelled to testify at an investigative hearing with offences alleging perjury or the giving of contradictory evidence. Both offences are subject to a maximum penalty of 14 years imprisonment.²⁸

The Canadian investigative hearing was strangely silent on what should be done if a witness refuses to testify before an investigative hearing or to provide requested materials at the hearing. Given the breadth of both terrorism offences and terrorist plots, it could well be possible that the authorities would seek to use an investigative hearing against a person involved with terrorism. Such a person might simply refuse to cooperate. It is also possible that reluctant witnesses might refuse to testify at an investigative hearing for fear that a terrorist group might retaliate against them or their family either in Canada or abroad.

Although these offences were not explicitly mentioned in the investigative hearing provisions, a person who refused to cooperate with an investigative hearing could be charged with the criminal offence of disobeying a court order. This offence is subject to a maximum of two years imprisonment.²⁹ The person could also be charged with the common law offence of criminal contempt of court for disobeying a court order to testify at an investigative hearing. The common law contempt power has been sustained under the Charter and it does not carry a maximum penalty. Nevertheless, use of the contempt power has to satisfy constitutional standards—including requirements that punishments not be grossly disproportionate to the crime.³⁰ In terms of maximum possible punishment, a person would be better refusing to

²⁷ *Id.* s. 83.28(10).

²⁸ *Id.* ss. 132, 136.

²⁹ *Id.* s. 127.

³⁰ *United Nurses of Alberta v. Alberta*, [1992] 1 S.C.R. 901 (Can.).

testify before an investigative hearing rather than testifying and committing perjury.³¹

Canadian investigative hearings also provided for the possible detention of witnesses. Section 83.29(1) provided that a judge could issue an arrest warrant for the subject of an investigative hearing if the judge “is satisfied, on an information in writing and under oath, that the person a) is evading service of the order; b) is about to abscond; or c) did not attend the examination, or did not remain in attendance, as required by the order.” This provision sets a higher standard than the equivalent American provisions for the detention of material witnesses in federal proceedings. The Canadian law requires more than it being impracticable to obtain the witness’s attendance by subpoena. Under the Canadian provision, there has to be an evasion of service, refusal to attend, or a finding that the witness is about to abscond.³²

At the same time, section 83.29(3) provided for the possibility of indefinite detention in custody if a judge concluded that it was necessary “to ensure compliance with the order” for the investigative hearing. The threat of indefinite detention was more theoretical than real because the judge who ordered the investigative hearing would have to approve any delay in the holding of an investigative hearing. Although some delay might be required in order to allow the witness to obtain counsel and for both prosecuting and defending counsel to prepare for the investigative hearing, a judge should not sanction indeterminate delay. Nevertheless, it is possible that a judge could authorize the detention of an absconding or evasive witness ordered to testify at an investigative hearing for longer than the 72 hour limit on detention under the preventive arrest provisions that were enacted at the same time as investigative hearings in Canada’s Anti-Terrorism Act.³³ In this way, compelled self-incrimination and detention of a material witness in an investigative hearing could short-circuit the restraints placed on preventive arrest and detention.

³¹ For concerns that contempt charges might be inadequate to deal with a terrorist suspect who refuses to testify before a grand jury, see Jessica Pae, *The Emasculation of Compelled Testimony: Battling The Effects of Judicially Imposed Limitations on Grand Jury Investigations of Terrorism and Other Ideological Crimes*, 70 S. CAL. L. REV. 473 (1997).

³² Critics of the American law have argued that:

[t]he material witness statute should not be used as a pretext to charging an individual with a crime. Perhaps one way to prevent this would be to require a stricter showing of probable cause by the government. The present standard requires a showing that the testimony of the witness is material, and that it is impracticable to secure the witness’s presence by subpoena. Perhaps a further requirement should be added, such as a showing that the witness will flee the jurisdiction absent arrest and detention.

Stacy Studnicki & John Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN’S L. REV. 483, 531 (2002).

³³ Criminal Code of Canada, R.S.C., c. C.-46, s. 83.3 (1985).

The government's strategy in creating investigative hearings was controversial. Some criticized investigative hearings as an incursion on the right to silence and a conscription of judges into the investigative process. They also stressed the limits of the use and derivative use immunity provisions in the context of international terrorism where a person subject to an investigative hearing could be tried in another country that would not be bound by the immunity provisions.³⁴ Although the provisions had likely been "Charter-proofed" through the judicial authorization, right to counsel, and use and derivative use immunity provisions, they did not provide guidance about what a judge should do if a person subject to an investigative hearing refused to cooperate.³⁵

Investigative hearings were a blunt instrument that could be used to compel reluctant and scared witnesses to testify. At the time that they were enacted, Canada had seen at least two high profile terrorism prosecutions collapse because of concerns about protecting witnesses and informers.³⁶ A third major terrorism prosecution for the 1985 bombing of Air India Flight 182, which killed 329 people, ended in an acquittal in 2005 when the judge found that key witnesses, one who was in a witness protection program and another who had been paid a large amount to come from the United States to testify in part because of concerns about witness protection, were not credible.³⁷ There was, however, little discussion of the relation between investigative hearings and witness and source protection programs that could be used to make it easier for people with information relevant to terrorism investigations to cooperate with the police.

Others defended investigative hearings on the basis that they demonstrated that Canada was serious about the threat of terrorism and that compelled testimony was allowed in other investigative contexts

³⁴ David Paciocco, *Constitutional Casualties of September 11*, 16 S.C.L.R.(2d) 185 (2002).

³⁵ Kent Roach, *The Dangers of a Charter-Proof and Crime-Based Response to Terrorism*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 135-38* (R. Daniels et al. eds., 2001); KENT ROACH, *SEPTEMBER 11: CONSEQUENCES FOR CANADA* (2003).

³⁶ *R. v. Parmar*, [1987] 31 C.R.R. 256 (Ont. Sup. Ct.) (conspiracy prosecution against multiple accuseds, including the person believed by many to be the mastermind of the 1985 bombing of Air India Flight 182, collapses after a confidential informant refuses to allow identifying material used to obtain a wiretap warrant to be disclosed); *R. v. Khela* [1998] 126 C.C.C. (3d) 341 (Que. Ct. App.) (conspiracy prosecution to bomb another Air India plane in 1986 collapses because of persistent non-disclosure relating to an informant who became a participant in the discussions alleged to constitute the conspiracy). For an extended discussion of these cases and Canada's experience with terrorism prosecutions see Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, 4 RESEARCH PAPERS OF THE COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182 (Ottawa: Public Works and Government Services, forthcoming).

³⁷ *R. v. Malik*, [2005] B.C.S.C. 350 (Can.).

such as mutual legal assistance and various regulatory crimes.³⁸ As a concession to critics, the bill containing the Anti-Terrorism Act was amended before it was enacted at the end of 2001 to require annual reports on the use of investigative hearings and to provide that investigative hearings would expire in five years unless they were renewed by Parliament.³⁹

No public attempt to use the novel procedure of investigative hearings was made in the immediate aftermath of 9/11. There have been reports that plans were made to use investigative hearings in the police investigation that included Maher Arar as a person of interest, but no investigative hearing was ever used in that investigation.⁴⁰ Canadian reluctance to use investigative hearings can be contrasted with the frequent use of material witness warrants to detain suspected terrorists in the United States in the aftermath of 9/11.

The reason for the Canadian reluctance to use the new powers of investigative hearings is speculative. The novel procedure was far from costless because it required approval from both an Attorney General and a judge and a subsequent public report. An investigative hearing could also carry many tactical disadvantages for the police. An investigative hearing could alert suspects, if not the public at large, to the interest of the police in the case. In addition, the use and derivative use immunity provisions could make it more difficult for the police to charge a person subject to an investigative hearing with a terrorist crime. There has also been little interest in Canada in the use of "Al Capone" strategies that would use contempt or perjury charges as a means to disrupt suspected terrorists. Finally, much post-9/11 anti-terrorism activity in Canada focused on non-citizens who could be subject to indefinite detention under immigration law, with the first criminal terrorism charges under the new act not being laid until 2004.⁴¹

III. INVESTIGATIVE HEARINGS UPHELD BY THE SUPREME COURT OF

³⁸ Richard Mosley, *Preventing Terrorism: Bill C-36, The Anti-Terrorism Act 2001*, in *TERRORISM, LAW & DEMOCRACY* 167-69 (David Daubney et al. eds., 2002); STANLEY COHEN, *PRIVACY CRIME AND TERROR: LEGAL RIGHTS AND SECURITY IN A TIME OF PERIL* 205-16 (2005).

³⁹ Criminal Code of Canada, R.S.C., c. C.-46, s. 83.32 (1985).

⁴⁰ 1 COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 102 (2006). It should be noted that the Commission reported that it saw no evidence that Mr. Arar was guilty of an offence or a threat to the security of Canada. 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 (2006).

⁴¹ Kent Roach, *Canada's Response to Terrorism*, in *GLOBAL ANTI-TERRORISM LAW AND POLICY* (Ramraj et al. eds., 2005).

CANADA

The first attempt to use an investigative hearing came with respect to a reluctant witness in a terrorism trial stemming from the 1985 bombing of Air India Flight 182, which departed from Canada and exploded over the Atlantic ocean—killing all 329 people on board.⁴² In May 2003, a judicial order was obtained by the Attorney General of British Columbia which ordered the witness to answer questions and produce material in an *in camera* hearing. The judge ordered that the witness not disclose any information about the hearing and that the accused in the ongoing trial not be notified about the investigative hearing. Although such hearings had not been designed for this purpose, the investigative hearing was being used as a discovery device by the prosecution in the middle of a criminal trial.

Both the accused and the media discovered that the proceedings were taking place in the same courthouse as the terrorism trial. The accused's lawyers subsequently were allowed to attend the proceeding, but were prohibited from disclosing information to either the public or the accused.⁴³ The witness sought to be compelled at the hearing challenged the constitutionality of the procedure and the judge, at first instance, upheld the procedure. Because the novel procedure was not subject to ordinary appeal procedures that would have allowed an appeal to an intermediate court of appeal, the Supreme Court of Canada granted leave and heard the appeal at the end of 2003.

In its 2004 decision, the Supreme Court upheld the constitutionality of the procedure in a 6-3 decision. Iacobucci and Arbour JJ., in a joint opinion for the majority, recognized that the investigative hearings provisions affected the right to liberty by compelling a person to attend and speak at the hearing and exposing the compelled person to liability and potential imprisonment for evasion of service, contempt of court for failing to answer questions, and perjury for giving false testimony.⁴⁴ The majority nevertheless concluded that the deprivation of liberty was in accordance with the principles of fundamental justice because it respected the requirements of the right against self-incrimination in Canada—which were described as “use immunity, derivative use immunity, and constitutional exemption”⁴⁵

⁴² For a discussion of this act of terrorism and strategies that might have prevented it, see Kent Roach, *Must We Trade Rights for Security?: The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2203-18 (2006).

⁴³ *Re Application under Section 83.28 of the Criminal Code*, [2003] B.C.S.C. 1172 (Can.).

⁴⁴ *Re Application under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, ¶ 67 (Can.).

⁴⁵ *Id.* at ¶ 70.

from compulsion when the state's predominant purpose was "to obtain evidence for the prosecution of the witness."⁴⁶ Investigative hearings had been drafted in a manner that recognized that the Canadian constitutional right against self-incrimination did not prohibit compelled self-incrimination.

The majority of the Court interpreted the use and derivative use immunity provisions in section 83.28(10) of the Criminal Code in an interesting and somewhat surprising manner. The Court concluded that the provision went beyond the constitutional minimum because it provided an "absolute derivative use immunity" whereas the constitutional jurisprudence provided the state an opportunity "to establish . . . that it would have inevitably discovered" derivative evidence "through alternative means."⁴⁷ This broad interpretation of the statutory immunity provisions could make it extremely difficult for the state to prosecute a person subject to an investigative hearing if the subject matter of the charge relates to the subject matter of the hearing. There is little experience with such a broad form of absolute derivative use immunity in Canada, and it would have been constitutionally possible for the Court to have read the statutory immunity provision as subject to the constitutional jurisprudence that allows the state to demonstrate an independent source for derivative evidence that could then be used in a subsequent terrorism prosecution. That said, the broad interpretation that the Court has placed on the statutory immunity provision will provide robust protections for witnesses in any subsequent prosecution. Indeed, the protection may come quite close in practice to the transactional immunity that was previously used as the American constitutional standard.⁴⁸

Iacobucci and Arbour JJ. also extended the broad statutory immunity provision that applied to the use of derivative evidence "in any criminal proceedings" against the witness to apply to extradition and deportation proceedings. They concluded:

In order to meet the s.7 requirements, the procedural safeguards found in s.82.28 must necessarily be extended to extradition and deportation proceedings. . . . The protective effect of s.83.28(10) would be significantly undercut if information gathered under s.83.28 was used at the state's discretion in subsequent extradition or deportation hearings.⁴⁹

Justices Iacobucci and Arbour based this extension of the statutory immunity provisions on both practical considerations about the nature

⁴⁶ *Id.* at ¶ 71.

⁴⁷ *Id.* at ¶ 72.

⁴⁸ *Brown v. Walker*, 61 U.S. 591 (1896).

⁴⁹ *Re Application under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, ¶ 79 (Can.).

of international terrorism investigations and on principled considerations that Canadian extradition and deportation proceedings are subject to section 7 of the Charter even though the ultimate deprivation of liberty arising from these proceedings would be committed by a foreign country.⁵⁰ The Canadian Supreme Court has recognized that one of the features of the post-9/11 era was the use of various alternatives to domestic criminal law—including immigration law as a response to terrorism. This extension of immunity provisions is an interesting recognition that purely domestic due process protections centered on criminal prosecutions may be inadequate in an era of international terrorism.

The Court's extension of use and derivative use immunity to deportation and extradition proceedings was prompted by criticisms that investigative hearings could be used to produce evidence that would be used in foreign proceedings.⁵¹ As suggested above, the extension is justified by both constitutional principle and practical concerns. Nevertheless, it does not completely guarantee that the fruits of an investigative hearing will never be used in foreign proceedings. A foreign jurisdiction will not be bound to enforce or respect immunity provisions in Canadian constitutional law.⁵² It is possible that Canada could deport or extradite a person subject to an investigative hearing without using any of the fruits of the evidence gathered at the investigative hearing in the Canadian proceedings. If that occurred, a foreign jurisdiction could then use at least the public parts of the Canadian investigative hearing.

The Supreme Court placed other restraints on investigative hearings—restraints that are absent in comparable American grand jury proceedings. The majority stressed that both lawyers representing the witness and the judge presiding at the investigative hearings should be allowed to play their roles in the hearing. This meant that judges would be obliged to apply the rules of evidence, fairness, and relevance with respect to the questioning of the witness⁵³ and that lawyers acting for

⁵⁰ The leading cases held that Section 7 of the Charter would generally be violated by extradition to face the death penalty or deportation to face a significant risk of torture. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (Can.).

⁵¹ *Paciocco*, *supra* note 34.

⁵² For a recent affirmation that the Charter generally does not apply outside Canada, see *R. v. Hape*, [2007] 2 S.C.R. 292 (Can.). *But see Khadr v. Canada* [2008] S.C.C. 28, ¶¶ 21-26 (Can.) (holding that Canadian interrogations of Omar Khadr between 2002 and 2004 while Khadr was detained at Guantanamo Bay Cuba violated the Charter because they involved Canadian officials in violating binding international law such as Common Article 3 of the Geneva Conventions).

⁵³ My colleague Hamish Stewart has made the valid point that the restraining effects of the rules of evidence, including those relating to relevance, will be greatly diminished in the context of an investigative hearing which is open-ended and investigative and not designed to discover

the witness could make objections on the basis of those rules. Even before this decision, section 83.28(8) recognized the right to object on the basis of laws relating to privilege and the non-disclosure of information. A witness at a Canadian investigative hearing will have more immediate and robust protections than a witness at an American grand jury because of the presence of both his or her own lawyer in the investigative hearing and the role of the judge presiding at the investigative hearing.

The Court also held that because investigative hearings were judicial proceedings, they were subject to a rebuttable presumption that they would be held in open court. *Iacobucci and Arbour JJ.* held that the open court presumption applied because an investigative hearing was conducted by a judge.⁵⁴ The open court presumption could be rebutted in a specific case by the demonstration that a publication ban was a proportionate and necessary response to a serious threat to the administration of justice. Nevertheless, the Court ruled that the broad publication bans imposed by the judge of first instance were overbroad. *Bastarache J.* dissented and warned that:

police cannot gather information and act upon it at the same time it is disseminated to the public and the media. . . . The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. Corruption of witnesses' recollections, the potential fleeing of suspects and the risk of pressure being put on future witnesses to give false testimony are but a few examples.⁵⁵

The open court presumption for investigative hearings in Canada is rebuttable, and it is difficult to know how often the state will be able to persuade judges to order publication bans with respect to investigative hearings.⁵⁶

the truth about specific allegations of fact. Hamish Stewart, *Investigative Hearings into Terrorist Offences: A Challenge to the Rule of Law*, 50 CRIM. L.Q. 376, 386-92 (2005). For example, requirements that evidence be material before an American grand jury or a Canadian investigative hearings are not likely to be much of a restraint. It is well accepted in American law that grand juries have a wide investigative remit. *United States v. R. Enterprises Inc.*, 498 U.S. 292, 297 (1991) ("As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. 'A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)).

⁵⁴ *Re Vancouver Sun*, [2004] 2 S.C.R. 332, ¶ 38-39 (Can.).

⁵⁵ *Id.* at ¶ 77.

⁵⁶ One report in the United States suggests only 8 of 70 cases where material witnesses were detained had open court records, and in 3 of those cases, the records were only opened because of government misconduct. HUMAN RIGHTS WATCH, *WITNESS TO ABUSE* 62 (2005). One case involving a material witness went all the way to the United States Supreme Court and remained under seal. *M.K.B. v. Warden*, 540 U.S. 1213 (2004) (cert denied).

IV. THE TUMULTUOUS HISTORY OF INVESTIGATIVE HEARINGS IN CANADA

When they were enacted in the aftermath of 9/11, investigative hearings were subject to a five-year renewable sunset because they were so controversial. In addition, the entire Anti-Terrorism Act was subject to a review by Parliamentary committees that were supposed to conclude at the end of 2005, one year before the sunset of investigative hearings would come up for debate. The 2006 federal election, however, delayed the completion of this review by committees of Canada's elected House of Commons and its unelected Senate. In October of 2006, the commons subcommittee⁵⁷ issued an interim report in which all members unanimously agreed that investigative hearings should be extended until December 31, 2011, but subject to the recommendation that they only be available where there was reason to believe that there was an imminent peril that a terrorist offence would be committed. The committee's unanimous proposal would have prevented the use of investigative hearings to investigate past acts of terrorism such as the 1985 bombing of Air India Flight 182.

This proposed recommendation followed an argument made by the Canadian Civil Liberties Association (CCLA), which had originally proposed this approach in 2001 as a "compromise"⁵⁸ on the basis that the social interest in preventing terrorism was greater than in prosecuting terrorism. The rationale for the CCLA's approach and that recommended by the Commons committee is essentially that investigative hearings, like preventive arrests, should be limited to emergency situations where extraordinary action is necessary to prevent acts of terrorism. Neither Parliament nor the Supreme Court, however, drew any distinction between past and future acts of terrorism. Investigative hearings, as included in the 2001 legislation, specifically applied both to future and past acts of terrorism. In 2004, a majority of the Supreme Court held that investigative hearings could, as procedural legislation, be applied to past acts of terrorism without violating the rule against retroactive offences. *Iacobucci and Arbour JJ.* concluded that:

[w]hile the prevention of future acts of terrorism was undoubtedly a primary legislative purpose in the enactment of the provision, as

⁵⁷ REVIEW OF THE ANTI-TERRORISM ACT – INVESTIGATIVE HEARINGS AND RECOGNIZANCE WITH CONDITIONS PROGRAM, INTERIM REPORT OF THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY, (Oct. 2006), <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=193467>.

⁵⁸ ALAN BOROVY, CATEGORICALLY INCORRECT: ETHICAL FALLACIES IN CANADA'S WAR ON TERROR 97 (2006).

discussed earlier, it does not follow that Parliament intended for procedural bifurcation respecting past acts of terrorism *vis-à-vis* anticipated or future acts. The provision itself provides for judicial investigative hearings to be held both before and after the commission of a terrorism offence. . . .⁵⁹

The government did not follow the recommendation of the committee and instead introduced a motion in Parliament to extend investigative hearings and preventive arrests for a three year period. If passed, investigative hearings could continue to be used both with respect to past and future acts of terrorism.⁶⁰ The government argued that the renewal was necessary for the prevention of terrorism and stressed that the Supreme Court had held that investigative hearings were consistent with the Charter. As it had when investigative hearings were first introduced, the government relied on the argument that investigative hearings were consistent with the Charter largely because they complied with constitutional standards of use and derivative use immunity. Although such arguments reflect the important role of the Charter in policy formation, they focus on the minimum standards of the Charter and avoid the question of whether the policy in question is wise or effective.⁶¹ For example, there was no debate on whether investigative hearings would remain an effective anti-terrorism device in light of the Supreme Court's 2004 decisions which had interpreted the use and derivative use immunity broadly and had imposed a presumption that investigative hearings would be held in open court. These provisions could expose terrorism investigations to publicity and result in *de facto* immunity for those who were compelled to incriminate themselves at an investigative hearing.

There was also no discussion of the fact that the proposed investigative hearing of a reluctant witness in the Air India trial was in fact never held despite the fact that the Supreme Court upheld investigative hearings as consistent with the Charter. The use of investigative hearings to compel a reluctant witness to cooperate raises larger issues about witness and source protection.⁶² Such information

⁵⁹ *Re Application Under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, ¶ 65 (Can.).

⁶⁰ The Parliamentary debates are discussed in Kent Roach, *The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law*, 24 WINDSOR REV. OF LEGAL AND SOC. ISSUES 5, 25-28 (2008).

⁶¹ For my earlier criticism of this "Charter-proofing" strategy, see Kent Roach, *The Danger of a Charter-Proof and Crime-Based Response to Terrorism*, in THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 131 (Daniels et al. eds., 2001); KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA ch. 2 (2003).

⁶² There was no discussion of the fact that the most recent report on Canada's witness protection program suggests that it was run at an annual cost of under \$2 million, that 15 witnesses refused to enter the restrictive terms of the program, and that 21 voluntarily left the

would have been helpful in placing investigative hearings into the larger context of the protection of witnesses and informers.

On February 27, 2007 the government's motion to renew investigative hearings for a three-year period was defeated by a vote of 159 to 124.⁶³ The immediate reason for the defeat of the bill was not related to the merits of investigative hearings. The legislative debate focused on partisan allegations and counter-allegations between the government and the official opposition on matters related to the ongoing investigation of the 1985 Air India bombing more than the merits of investigative hearings.⁶⁴ In any event, on October 23, 2007, the government introduced a bill in the Senate that would revive investigative hearings and preventive arrests subject to a five-year renewable sunset.⁶⁵ The Bill passed the Senate and was expected to be approved by the House of Commons before Parliament was dissolved for a general election held in October of 2008. Canada's Conservative government was re-elected and is expected to introduce the bill again in the near future. Although the government still does not have a majority of seats in the House of Commons, a new bill is likely to pass, especially if the government treats it as a matter of confidence and the opposition is unwilling to defeat the government and have an election over an anti-terrorism measure.

The new bill only makes minor changes with respect to investigative hearings. The requirement that reasonable attempts be made to obtain information before an investigative hearing is used would now apply to investigative hearings in relation to past acts of terrorism as well as to future acts of terrorism.⁶⁶ This change is sensible because it is reasonable to attempt to obtain information by less coercive means when investigating past acts of terrorism if such a requirement can be imposed with respect to future acts of terrorism.

More troubling is a new reference in the bill to the application of section 707 of the Criminal Code to govern the detention of material witnesses before investigative hearings who have evaded service or are about to abscond.⁶⁷ Section 707 is a general provision designed to govern the detention of material witness at trials and preliminary hearings, but it now would apply to the new procedure of investigative

program. See WITNESS PROTECTION PROGRAM ANNUAL REPORT 2005-2006, <http://securitepublique.gc.ca/abt/dpr/le/wppa2005-6-en.asp>.

⁶³ 141 *House of Commons Debates*, 39th Parl., 1st Sess., No. 114, 7405-06 (Feb. 27, 2007).

⁶⁴ For a critical assessment of this debate, see Kent Roach, *The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law*, 24 WINDSOR REV. OF LEGAL AND SOC. ISSUES 5, 25-28 (2008).

⁶⁵ Bill S-3, 39th Parl. (2007-2008).

⁶⁶ *Id.* s. 82.28(4)(a)(iii).

⁶⁷ *Id.* s. 83.29.

hearings. It would allow a witness to be detained for a maximum of 90 days when necessary to ensure that a witness provides testimony. Although there was no limit on detention in the original legislation governing investigative hearings, this new provision underlines that investigative hearings could possibly be used as a device to detain an absconding or evasive witness for periods far longer than would be available under the companion preventive arrest provisions—which only allow detention on reasonable suspicion of involvement in a terrorist activity for a maximum of 72 hours.

The new bill re-introducing investigative hearings strangely only provides for use and derivative use in subsequent criminal proceedings⁶⁸ despite the fact that the Supreme Court ruled in 2004 that the immunity should be extended to deportation and extradition proceedings.⁶⁹ It is not clear whether the government is content with the courts reading in the extended immunity provisions into the law or whether the government is attempting to reject those protections. In any event, it is likely that courts will read in such protections in light of the Supreme Court's ruling that it was necessary under section 7 of the Charter to extend use and derivative use immunity provisions to extradition and deportation proceedings.

The new bill providing for immunity duplicates the language found in the previous legislation. This means that the Supreme Court's interpretation of these statutory use and derivative use immunity provisions as "absolute"⁷⁰ would remain even though the Charter would allow a less absolute standard that would permit the state to use derivative evidence if it could demonstrate that it used an independent source and not the compelled testimony to obtain the evidence.

Investigative hearings will likely be re-introduced into Canadian law, but it remains to be seen whether they will be extensively used given the many distorting effects that they may have on terrorism investigations.

V. COMPELLED SELF-INCRIMINATION AND ITS DISTORTING EFFECTS ON TERRORISM INVESTIGATIONS AND PROSECUTIONS

The ability to compel people to testify in terrorism investigations may be attractive to the state for a number of reasons. The state may be required to act quickly to respond to the threat of a terrorism act or to the aftermath of terrorism. Compulsion may be the quickest way to

⁶⁸ *Id.* s. 83.28(10).

⁶⁹ *Re Application Under Section 82.28 of the Criminal Code*, [2004] 2 S.C.R. 248 (Can.).

⁷⁰ *Id.* at ¶ 72.

induce reluctant and perhaps intimidated witnesses to cooperate. It may also serve as a means for detaining a suspect in cases where there are not sufficient grounds for an arrest.

A number of courts, including the Second Circuit in *Awadallah*,⁷¹ have indicated that the government should not use the detention of material witnesses before grand juries for “other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.” This demonstrates recognition that the detention of material witnesses in grand jury proceedings should not be used as a disguised form of preventive detention. The Second Circuit failed to find that the state was acting for such improper purposes. In contrast, Human Rights Watch concluded in its extensive 2005 report that there had been widespread use of material witness detention for reasons of preventive detention.⁷² It is possible to reconcile these differing conclusions about the law in the books and the law in action by reference to the nature of terrorism investigations. In many cases the state may have a legitimate interest in questioning a person as a potential witness in addition to any interest that it may have with respect to preventive detention. Just as it is often difficult to distinguish witnesses from suspects in terrorism investigations, it will often be very difficult to single out illegitimate purposes for material witness detention from legitimate purposes.

Canadian law seems equally as unable as American law to stop the use of compelled self-incrimination as a vehicle for preventive detention. The Canadian law only allows a court to exempt a person from being compelled to testify and being held as a material witness if the predominant purpose of the compelled testimony is to incriminate that person. Nevertheless, it is very unlikely that such findings of improper purpose will be found in terrorism investigations. Even if the state suspects that the witness is involved in terrorism, it will almost always also have a legitimate investigative purpose in questioning that person before a grand jury or an investigative hearing about the involvement of other people in terrorism.

The nature of cell-based terrorism suggests that terrorism suspects will often be the state’s best witnesses. The nature of broad anti-terrorism offences also means that some of the best witnesses in terrorism investigations may also be suspects in relation to various crimes relating to support for and participation in terrorist groups even if they are not necessarily the main players in a terrorist plot. In short, the state will often have a legitimate interest in questioning terrorist suspects as witnesses, and it will often have a legitimate interest in

⁷¹ 349 F.3d 42, 59 (2d Cir. 2003)

⁷² HUMAN RIGHTS WATCH, WITNESS TO ABUSE (2005).

investigating witnesses as suspects for terrorism crimes.

Once a person is arrested as a material witness in a terrorism investigation, the state will often have an incentive to delay questioning a detained witness to avoid the consequences of use and derivative immunity. In order to counter this danger, the state should have to justify any delay in placing a detained witness before an American grand jury or a Canadian investigative hearing. Reform legislation proposed by Senator Leahy provided that a detained material witness could only be detained for five days or until the witness's testimony could be adequately secured by deposition or appearance before the grand jury or court. The legislation proposed that a government could only seek extension by showing good cause. It would have imposed a maximum period of 30 days detention where the testimony was sought for a criminal case and ten days detention where it was sought for a grand jury proceeding.⁷³ This proposal is more protective of liberty interests than the provision of the Canadian Criminal Code which restricts detention as a material witness for a maximum of 90 days with a requirement for judicial review and justification of the detention every 30 days.⁷⁴ Indeed the Canadian provision is less protective of liberty interests than American Federal Rules of Criminal Procedure which require bi-weekly reports for material witnesses held for more than ten days.⁷⁵ The Canadian 90-day maximum was originally designed to apply to the detention of witnesses who would testify at trial and preliminary inquiries, but a bill before the Canadian Parliament to revive investigative hearings proposes that it also be applied to investigative hearings. Although this is an improvement from the original and now expired provision which had no limit on the detention of evasive or absconding witnesses, it would be improved by following Senator Leahy's proposal and imposing a shorter maximum period of detention than is available in a criminal trial.

Even the ten-day maximum for detention of material witnesses before they testify before grand juries proposed in Senator Leahy's bill could be questioned given the prosecutor's control over such proceedings. If prosecutors arrest material witnesses for genuine investigative purposes, they should be prepared to proceed promptly with the grand jury in the United States or the investigative hearing in Canada. Delay in questioning witnesses may be a signal that prosecutors are using these investigative devices as a form of preventive detention when they do not have sufficient grounds to arrest and charge the witness with a terrorism offence or to employ preventive arrest

⁷³ S. 1739, 109th Cong. (2005).

⁷⁴ Criminal Code of Canada, R.S.C., c. C.-46, s. 707 (1985).

⁷⁵ FED. R. CRIM. P. 46(h)(2).

provisions in Canada.⁷⁶

The right against self-incrimination poses different problems in cases where a person questioned in a grand jury or an investigative hearing subsequently emerges as a terrorist suspect. In such cases, use and derivative use immunity protections provided by the constitutional right against self-incrimination in both Canada and the United States may make it difficult to prosecute compelled witnesses for terrorism offences. Such prosecutions are not impossible, but prosecutors will have to establish an independent source for all the evidence they use. In Canada, they must also establish that the evidence to be used is not derived in any way from the compelled testimony or compelled materials at the investigative hearing. In many cases, it may be more attractive for prosecutors to bring perjury prosecutions in relation to the testimony that was given. Another alternative will be contempt charges if the witness refuses to cooperate with the grand jury or investigative hearing. In both cases, the result may be a guilty plea or a charge and trial that does not relate to the true subject matter of the investigation, namely terrorism.

Another alternative is for prosecutors to avoid the rigors of use and derivative use immunity by extraditing or deporting the witness to another jurisdiction. In such cases, domestic immunity provisions would not apply. The Supreme Court of Canada was alive to this possibility in its investigative hearing decision and extended use and derivative immunity provisions to Canadian extradition and deportation procedures.⁷⁷ This extension of immunity will make it more difficult for Canadian officials to transfer a person compelled in an investigative hearing to another jurisdiction. The only practical way to transfer such a witness may be to use deportation or extradition proceedings that are unrelated to the terrorism allegations that were the focus of the investigative hearings. This may be possible especially in a case of a person who has illegally migrated to Canada or engaged in misconduct that was not the subject of the investigative hearing. At the same time, courts might possibly enjoin Canadian officials from passing the fruits of an investigative hearing to foreign officials on the basis of the Court's conclusion that immunity provisions should be extended. Foreign jurisdictions could, however, use those parts of the investigative hearing that are made public pursuant to the Court's decision that the presumption of an open court applies to such proceedings.⁷⁸

⁷⁶ These provisions require the state to establish reasonable grounds that a terrorist activity will be carried out and reasonable suspicion that an arrest or peace bond on the person is necessary to prevent the carrying out of a terrorist activity and limits detention to 72 hours. See Bill S-3, 39th Parl., s. 83.3 (2007-2008).

⁷⁷ *Re Application Under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 (Can.).

⁷⁸ *Re Vancouver Sun* [2004] 2 S.C.R. 332 (Can.).

The Canadian Supreme Court also interpreted the use and derivative immunity provisions very broadly so as not to allow an independent source exception even though such an exception is consistent with Canadian constitutional standards. The end result is that a witness compelled to testify before an investigative hearing will have even broader immunity protections than a witness compelled to testify before an American grand jury. In practice, the Canadian absolute immunity provisions might result in de facto transactional immunity that makes it virtually impossible to prosecute a person compelled at an investigative hearing for a terrorism offence. It is likely that concerns about immunizing witnesses who might also be terrorist suspects have played some role in the decisions of Canadian officials not to use investigative hearings. In both countries, the shortcut of compelled self-incrimination in terrorism investigations comes with the high price of use and derivative use immunity. Such immunity provisions may leave prosecutors with few options except perjury or contempt charges once a person has been compelled to testify.

CONCLUSION

The comparison between the use of Canadian investigative hearings and American grand juries in terrorism investigations provides a glimpse of the comparative anti-terrorism and self-incrimination laws of the two neighboring countries. Canada has abolished the grand jury, and the introduction of investigative hearings was very controversial. Indeed the provisions allowing investigative hearings into terrorism cases were allowed to expire after five years, though they will soon be re-introduced into Canadian law. In contrast, the role of the American grand jury is well accepted—with only some controversy over the detention of people as material witnesses in terrorism investigations.

Canadian investigative hearings would have much more due process for the compelled witness than American grand juries. The witness could have his or her lawyer present, and the lawyer could object to questions on the basis of relevance and evidentiary privileges other than the privilege against self-incrimination (which has been explicitly abrogated by the Canadian legislation). Although Canada's use and derivative use immunity constitutional protections are similar to those available in the United States, the statutory immunities in the Canadian investigative hearing law have been interpreted to provide an absolute prohibition on the use of evidence derived from the compelled testimony even if an independent source for the evidence could be established by the prosecution. In addition, the Canadian Supreme

Court has interpreted the constitutional immunity provisions to apply not only to subsequent criminal proceedings, but also to subsequent extradition and deportation proceedings. In stark contrast to the secrecy that surrounds the American grand jury, there is a rebuttable presumption that investigative hearings in Canada would be held in open court.

Although there are some significant differences between Canadian investigative hearings and American grand juries, there are some interesting common features and difficulties. Compelled self-incrimination in both Canada and the United States may facilitate detention as a material witness. The protections of use and derivative use immunity give prosecutors an incentive to delay questioning, especially when they can detain people as material witnesses. It will be important for judges to closely supervise the detention of material witnesses to ensure that prosecutors are not allowed to detain people as material witnesses as a substitute for more controversial and perhaps more restrictive preventive detention measures. There is a real danger that detention of material witnesses to testify before grand juries in the United States or investigative hearings in Canada will be used as a disguised form of preventive detention. Unfortunately, neither American nor Canadian law seems able, at present, to respond to such abuses of material witness detention because authorities in both countries will often be able to argue that they are detaining persons for legitimate investigative purposes and will not admit that they are using the detention of material witnesses as a form of preventive detention. Reforms should be undertaken in both jurisdictions to place tighter time limits on detention of people as material witnesses and to ensure that detained witnesses are promptly questioned before grand juries or investigative hearings and then charged or released.

Those who are questioned in grand juries or investigative hearings as part of a terrorism investigation may be witnesses, terrorist suspects, or both. With respect to pure witnesses, there is a danger that compelled self-incrimination may be a coercive band-aid solution to larger problems of witness and source protection. If terrorist groups are well organized and concentrated in certain communities, there are reasons to be concerned that genuine witnesses not be abandoned after being required to provide information. This is particularly true in the context of Canadian investigative hearings—which are subject to the open court presumption.

Caution should also be used with respect to compelled self-incrimination of persons who are not reluctant witnesses, but possible terrorist suspects. Compelled self-incrimination in both countries comes with the high price of use and derivative use immunity. In

Canada, the price is even higher because the courts have interpreted statutory immunity provisions to preclude reliance by the state on an independent source for derivative evidence. It may be practically impossible to prosecute a compelled witness for terrorism, and the public interest may not be well-served by perjury or contempt prosecutions of compelled witnesses who may be guilty of crimes of terrorism.

The answer to these dilemmas is far from clear. Weaker immunity protections, such as protections that only apply to the subsequent use of the compelled testimony, would leave more room for subsequent terrorism prosecutions and avoid the distorting effect of having to rely on contempt or perjury charges. At the same time, however, they would leave compelled witnesses in great jeopardy of being forced to incriminate themselves by clues that will produce incriminating derivative evidence. Such a change in self-incrimination law would provide the state with greater incentives to rely on the shortcut of compelled self-incrimination. In any event, weaker immunity protections would fall below constitutional minimums in both the United States and Canada. Nevertheless, the protection of the right against self-incrimination may contribute to a process where it becomes less likely that there will be trials on the merits of allegations of terrorism.

Prosecutors who seek compelled testimony in terrorism investigations will have to live with the risk that their witness may turn out to have been involved with terrorism and that they may be unable to prosecute the witness for a terrorism offence. Constitutional standards of use and derivative use immunity, as well as the higher Canadian statutory standard that precludes an independent source exception, may amount in practice to transactional immunity. Such a result would leave prosecutors with only the options of perjury or contempt prosecutions. Such prosecutions can disrupt and incapacitate terrorists, but they are second-best strategies because they abandon attempts to discover the truth about terrorism allegations in favor of prosecuting much less serious crimes. Moreover, perjury and contempt charges are produced by the system and, as such, are vulnerable to criticisms that they are being used as harassment strategies.

Although those who are required to testify before grand juries or investigative hearings about terrorism have the protection of the right against self-incrimination, the remedy of use and derivative use immunity may distort any remaining trial. It will also create incentives for prosecutors to attempt to detain the witness without having them testify; to attempt to remove the witness to another jurisdiction that is not subject to use and derivative use immunity requirements; or to

prosecute the compelled witness for perjury or contempt. All of these options will avoid a trial on the merits of whether the compelled witness was actually guilty of a terrorist crime. This is a high price for a society to pay, but it may be the price that has to be paid for respecting constitutional protections against self-incrimination.