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Editorial

A Missed Opportunity to Reform Witness Protection

Bill C-51 introduced in December 2012 proposes to amend the *Witness Protection Act*. The government deserves credit for paying attention to this important but often neglected issue. It included witness protection in the mandate of the Commission of Inquiry into the 1985 bombing of Air India Flight 182. The new bill is part of the government's action plan to respond to the Commission's 2010 report. Unfortunately, the bill stops well short of the Commission's recommendations that witness protection be fundamentally reformed.

Witness protection provides an important benefit to the public. A failure to protect witnesses can allow organized criminals, terrorists and other criminals to intimidate witnesses and to act with impunity. One of the key witnesses in the Toronto terrorism prosecution has been reported to be in witness protection. The Air India Commission found that two key witnesses in the failed Air India terrorism prosecution had been threatened and another CSIS source had refused to deal with the RCMP because of fears for his safety. Tara Singh Hayer, the publisher of the Indo-Canadian Times, who provided information to both CSIS and the RCMP about the bombing was shot in 1988 and murdered in 1998.

Unfortunately, witness protection has never been well funded or had a high profile in Canada. As late as 2003-2004, the federal program spent less than \$2 million a year on witness protection. Today the program only costs a still modest \$9 million a year. Most people who are proposed by law enforcement agencies for entry into the program are denied entry by the RCMP commissioner. Provinces and municipalities have been forced to devise their own witness protection programs and to pay for the protection of witnesses including the few that are admitted into the RCMP run program.

About a thousand people are in the federal witness protection program run by the RCMP. The Commissioner of the RCMP controls entry and exit from the program. Section 9 of the *Witness Protection Program Act* S.C.

1996 c. 15, gives the Commissioner a unilateral power to terminate witness protection because of a failure of the witness to disclose information or a deliberate and material violation of the protection agreement.

The Air India Commission concluded that the RCMP Commissioner had too much power over witness protection. Moreover, the RCMP was often in an inherent conflict of interest with those in the witness protection program given its interest in a prosecution and their testimony. A witness in the program can be seen as beholden to the RCMP. Many witnesses in the RCMP program had also been involved in criminality. A different approach was required in terrorism cases where witnesses may less frequently come from a criminal background and may also come from minority communities.

The RCMP has had difficulty in resolving conflicts with protected witnesses and their families. Every year multiple lawsuits have been commenced against the RCMP by protected witnesses. Such litigation can undermine confidence in the program and threaten to expose witnesses who have received identity and location changes.

The new bill rejects the Air India Commission's call for an independent dispute resolution mechanism. Instead a new s. 8.1 of the Act proposed a lump it or leave it solution by allowing dissatisfied witnesses to leave the program after a meeting with the Commissioner. A high profile exit by a disgruntled witness could undermine confidence in what is already a program that requires great sacrifices by protected witnesses. The end result may be that people will not co-operate in important terrorism, organized crime or other prosecutions.

The Air India commission recommended the creation of a new and independent witness protection co-ordinator who would control entry into the program and resolve disputes about the scope of witness protection. This co-ordinator would also be a resource for CSIS and the RCMP and an advocate for witness protection.

The government's refusal to follow this recommendation is consistent with its refusal to adopt other key aspects of the Air India Commission's recommendations including an enhanced role for the Prime Minister's National Security Advisor and a streamlined provision for dealing with secrecy issues in terrorism prosecutions.

The Air India Commission was not alone in thinking that fundamental reform of witness protection was required. A House of Commons committee in 2008 recommended that the program be transferred from the RCMP to an independent office. These recommendations follow international best practices. Quebec has recently acted to take witness protection out of the sole control of the police.

The police, as Minister of Public Safety Vic Toews has suggested, may be in the best position to provide actual protection. That does not, however,

mean that they should resolve disputes about how the program is run. Unfortunately the government's bill rejects both proposals and continues to leave the RCMP commissioner in complete control of the program. Instead of a confidential process to resolve disputes between protected witnesses and the RCMP, it contemplates that unhappy customers can take their chances and leave the witness protection program.

The proposed bill does have some benefits. It allows both CSIS and the military to propose witnesses for protection whereas now only law enforcement agencies can do so. The Toronto terrorism prosecution underlines the importance of fast and effective transfer of confidential CSIS sources into protected witnesses.

It remains to be seen whether CSIS will take advantage of the new opportunity to refer sources to witness protection. CSIS has had trouble adjusting to its new evidentiary responsibilities in terrorism cases and must learn to accept that in such cases confidential sources may have to become witnesses. One of the other recommendations by the Air India Commission was that the Prime Minister's National Security Advisor should be able to resolve disputes between CSIS and the RCMP. Even if CSIS does propose potential witnesses for protection, the RCMP commissioner could still say no. Even under the proposed bill, the RCMP commissioner still calls all the shots in the witness protection program.

K.R.