



**FORMATIVE EVALUATION OF THE DEPARTMENT OF JUSTICE  
PUBLIC SAFETY AND ANTI-TERRORISM (PSAT) INITIATIVE  
Technical Report**

**March 2005**

**Evaluation Division  
Policy Integration and Coordination Section**



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## 1. INTRODUCTION

Following the terrorist attacks on the United States on September 11, 2001, the enhancement of the security of Canadians, particularly through an intensification of the fight against terrorism, was identified as a priority for the Government of Canada.<sup>1</sup> One of the first actions of the Prime Minister of Canada was to establish a Cabinet Committee on Public Security and Anti-Terrorism to review policies, legislation, regulations and programs across the Government of Canada in order to strengthen all aspects of the approach taken by Canada to combat terrorism and ensure public security. The Government identified the following five objectives:

1. **Preventing terrorists from entering Canada** – including improving the security and integrity of identification documents;
2. **Protecting Canadians from terrorist attacks** – including the introduction of key pieces of legislation and the enhancement of public and economic security;
3. **Bringing forward tools to identify, prosecute, convict and punish terrorists** – including taking the necessary steps to deter and detect money laundering and ensuring terrorists are denied access to funding;
4. **Keeping the Canada – USA border secure and open to legitimate trade** – including ensuring the borders are safe and efficient in order to facilitate the \$1.9 billion in daily trade across the shared border; and,
5. **Working with the international community to bring terrorists to justice** – including a military contribution to the fight against terrorism as well as diplomatic activities and humanitarian aid.

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<sup>1</sup> 2001 Budget Speech, December 10, 2001: “Management in Uncertain Times – Enhancing Security for Canadians”

These five objectives are being supported with legislation (including the *Anti-terrorism Act* and the *Public Safety Act*), improved cooperation with partners and the investment of an additional \$7.7 billion over the five-year period from 2002/03 to 2006/07 to fight terrorism and reinforce public security.

The Department of Justice plays an important role in this government-wide commitment to fighting terrorism and ensuring the safety and security of Canadians in the aftermath of the September 11, 2001 terrorist attacks and the resulting global threat of terrorism. For instance, the Department of Justice was actively involved in the development of the key pieces of legislation, Bill C-36, the *Anti-terrorism Act*, and Bill C-7, the *Public Safety Act* and is a key partner in efforts to implement the *Acts* and combat terrorism, both within Canada and abroad.

The *Anti-terrorism Act*, Bill C-36, which received Royal Assent on December 18, 2001, focused mainly on the criminal law aspects of combating terrorism. It established new *Criminal Code* measures, amended a number of other Acts, such as the *Canada Evidence Act*, the *Official Secrets Act*, now known as the *Security of Information Act*, and the *Proceeds of Crime (Money Laundering) Act* and enacted the *Charities Registration (Security Information) Act*. The *Anti-terrorism Act* includes measures designed to:

- ensure that Canadian values of respect and fairness are preserved through stronger laws against hate crimes and hate propaganda;
- provide new investigative tools to law enforcement and national security agencies;
- identify, prosecute and punish terrorists and those groups and individuals that support them;
- deter and punish terrorist financing and fundraising; and,
- provide updated mechanisms to protect information injurious to national security, national defence and international relations while allowing for its use in proceedings and continuing to respect and promote the values reflected in and the rights and freedoms guaranteed by the *Charter*.

The *Public Safety Act*, Bill C-7, which received Royal Assent on May 6, 2004, is intended to increase the Government's capacity to prevent terrorist attacks and to respond swiftly to significant threats or attacks. The *Act* amends 23 Acts, enacts a new Act<sup>2</sup>, and makes

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<sup>2</sup> The *Biological and Toxin Weapons Convention Implementation Act*.

consequential amendments to other Acts. Among the key provisions in this omnibus legislation are those that:

- authorize data collection from air carriers or aviation reservation systems for the purposes of transportation and national security;
- provide for the issuance of interim orders;
- create offences as a means of deterring hoaxes;
- establish tighter controls over explosives, and the export and transfer of technology;
- allow for agreements for the sharing of immigration information with other countries; and
- deter the proliferation of biological or chemical weapons.

In securing its funding under the PSAT initiative, the Department of Justice developed a Results-based Management and Accountability Framework (RMAF) which set out a performance measurement and reporting strategy including annual reporting and periodic evaluation. Evaluation requirements included a mid-term evaluation as well as a final summative evaluation due in 2007. This report represents the mid-term evaluation of the Department's PSAT initiative.

As is usual for mid-term evaluations, this report is intended to focus primarily on the process undertaken to date in implementing the initiative. Given the relatively short period of time that has elapsed since its initial implementation, it is still too early to provide a longer term analysis of results and outcomes. That will be the main focus of the final evaluation in 2007.

The data collection phase of this mid-term evaluation was completed between May and September 2004 and the methodology employed included the following three data collection approaches:

- A selected number of key departmental files and documents were reviewed and analyzed.
- Questionnaires were distributed to all relevant sectors of the Department in an attempt to gather performance related information on key activities carried out under the PSAT initiative. This was expected to include information from Caseview, iCase, IFMS and TKS.
- A series of in-depth interviews were conducted with departmental officials and other "key informants" representing a cross section of interests within the federal government. Most

interviews outside the department were with federal partner departments and agencies. Over 30 individuals were interviewed as part of the evaluation process.

## 2. OVERVIEW OF THE INITIATIVE

In order to combat the threat of terrorism in Canada and abroad, the Department of Justice committed to continue to build on and deepen its expertise in relation to the fight against terrorism. In order to fulfill new and, at times, expanded roles in relation to the fight against terrorism the Department of Justice requested and received additional funding under the Public Safety and Anti-Terrorism (PSAT) Initiative in 2002. This increased PSAT funding was designed to ensure that the Department fulfilled its partnership role in the overall plan to combat and prevent terrorism, particularly in view of the Department's status as legal advisor to the government. However since 2002, more than \$9.5 billion in new investments were made by the Government of Canada in national security initiatives such as the *Smart Border Declaration and Action Plan* in April 2004; *Canada's Security and Prosperity Partnership* in March 2005 and numerous Budgets. With these announcements come expectations that the DOJ will provide timely support in implementing the diverse and complex PSAT initiatives.

The Department of Justice's PSAT resources were restricted by the creation of a special purpose allotment by the Treasury Board. These funds were designated for the following five PSAT activities:

- intelligence and policing;
- screening of entrants into Canada;
- legislation;
- implementation, monitoring, review and reporting of legislative provisions;
- emergency preparedness; and,
- secure borders.

Under these measures, the funds that the Department of Justice received were restricted by the Treasury Board for use for the following five PSAT activities:

## 2.1. Policy and related activities

The Department of Justice is responsible for policy development, legal and legislative services and reviewing the law, especially as it pertains to crime and terrorism. Central to this function is the development and ongoing support and application of legislation such as the *Anti-terrorism Act*, Bill C-36, and the *Public Safety Act*, Bill C-7.

The Security, Terrorism and Governance Team of the Criminal Law Policy Section (CLPS) is the Department's centre of expertise for policy-related activities under the PSAT Initiative. This Team led or participated in the following PSAT related activities:

- Establishing and maintaining a policy development and advisory capacity to remain a centre of expertise in domestic and international anti-terrorism law, to facilitate the development of further initiatives and advise on the interpretation of existing law, including the consistency of these measures with constitutional requirements.
- Developing and delivering broad-based legislative training on the *Anti-terrorism Act* and other terrorism-response legislation to investigators, prosecutors, civil litigators and other court personnel. This includes the development of training materials, directly delivering training, and where appropriate, assisting other jurisdictions in developing training programs.
- Conducting public outreach, consultation and education activities to help ensure the legislation and policies continue to meet Canadians' needs and do not have an undue negative effect on particular communities, particularly from the perspective of the *Charter* guarantee of equality.
- Establishing a significant research, analysis and monitoring capacity to ensure annual reporting and a three-year Parliamentary review are conducted on the *Anti-terrorism Act*.
- Providing international assistance relating to anti-terrorism legislation to international organizations and specific countries that request Canada's expertise, including training, legislative drafting (model provisions), and assistance on how to incorporate human rights protections into anti-terrorism measures.
- Assisting in the development and negotiation of new international instruments related to the prevention and suppression of international terrorism, while ensuring their consistency with



domestic and international human rights principles, and participating in other international efforts in the fight against terrorism, including the sharing of best practices.

- Providing legal and policy advice, including *Charter* advice, and assisting in the development, drafting and implementation of new domestic legislative and regulatory measures to combat terrorism, and of regulations pursuant to the *Anti-terrorism Act* (Bill C-36).

The Public Law Group provides a range of specialized legal services which support each of the five activity areas and are essential to the Department's ability to meet its PSAT commitments as well as its government-wide responsibilities. The Public Law Group was extensively involved in the development of Bill C-36 (the *Anti-terrorism Act*) and Bill C-7 (the *Public Safety Act*) and in the implementation of these *Acts*. Specific roles and responsibilities of the Public Law Group as part of the PSAT initiative include:

- Advising the Minister of Justice in the discharge of his statutory responsibility to scrutinize all legislation and regulations for compatibility with the *Charter* and the *Canadian Bill of Rights*, and in advising on Canada's international human rights law obligations.
- Developing and delivering training and information on the *Anti-terrorism Act* and on Canada's approach to incorporating human rights protections into anti-terrorism measures to audiences that include investigators, litigators, the judiciary, and the general public, as well as representatives from other countries (e.g., China and Indonesia) and international organizations (e.g., the United Nations, the G8, and the Organization of American States).
- Drafting of speeches and presentation materials relating to the incorporation of human rights protections into anti-terrorism measures for use by others, including the Minister and other government officials.
- Providing ongoing litigation support to civil litigators, CIPS Portfolio and federal prosecutors in all litigation matters that have a terrorism component and where human rights and/or *Charter* issues are raised.
- Providing legal and policy advice on all matters related to ongoing public security and anti-terrorism initiatives. This includes advice on how the legislation should be interpreted and

applied and impacts on and need for amendments to other *Acts*, such as the *Privacy and Access to Information Acts*.

- Supporting the Minister of Justice in making his request to Cabinet for financial authority to fill Federal Court positions created in the *Anti-terrorism Act*, demonstrating with objective indicators that such additional judges are required.
- Monitoring and interpreting Canadian and international jurisprudential developments on human rights and terrorism and assisting in the negotiation of new international instruments and agreements related to the prevention and suppression of terrorism.

## **2.2. Federal Prosecution Service (FPS)**

The Federal Prosecution Service, through the National Security Group, is responsible for developing operational policy related to the prosecution of terrorism offences, providing legal advice to investigative bodies (e.g., Royal Canadian Mounted Police, Canada Border Services Agency (CBSA), etc.) in relation to the investigation of terrorism offences, and conducting prosecutions of terrorism offences involving the national interest and supporting prosecutions conducted by the provincial Attorneys General. The *Anti-terrorism Act* specifically provided the Attorney General of Canada with concurrent jurisdiction for the prosecution of all new *Criminal Code* terrorism offences created in the *Act* and exclusive jurisdiction in respect of all offences relating to the *Security of Information Act*. Capacity to fulfill many of these functions is required both at headquarters and in the regional offices. In addition to its involvement in many of the activities identified above under policy development and analysis, specific FPS activities under the PSAT initiative include:

- Developing operational policies and protocols related to: the prosecution of terrorism offences and other provisions of the *Anti-terrorism Act*, the protocol relating to the testimony of Canadian witnesses and production of information in foreign proceedings and providing assistance and support to the deputy head in the notification of persons permanently bound to secrecy under the *Security of Information Act*.
- Conducting prosecutions of terrorism offences involving a national security interest and supporting prosecutions of other terrorism offences conducted by provincial Attorneys General.

- Carrying out new functions assigned to the Attorney General of Canada pursuant to section 38 of the *Canada Evidence Act* involving establishing objections to the disclosure of evidence based upon harm to national security, national defence and international relations, while ensuring fairness of the trial process.
- Carrying out the constitutional challenge defence function, from a litigation and policy perspective, as well as advisory support for parts of the *Anti-terrorism Act*, such as CSE-related provisions of the *National Defence Act*.
- Providing legal advice to investigative bodies such as RCMP, CBSA, and investigative teams such as Integrated National Security Enforcement Teams (INSETs) in relation to terrorism offence investigations.
- International outreach and, in conjunction with other Justice partners, negotiating treaties and intensifying linkages with other countries and international partners as well as conducting extradition and mutual legal assistance hearings in superior courts.
- Reviewing and coordinating extradition and mutual legal assistance requests made to Canada, as well as those made by Canada to other countries.
- Developing and delivering legal training material on current anti-terrorism legislation for investigators, prosecutors and judges.

### **2.3. Civil Litigation**

The Department of Justice works closely with all government departments and agencies in the defence of a broad range of court challenges and actions against the Crown, including the defence of major class-action lawsuits, as well as representing the Crown's interests in public inquiries, judicial reviews and *Charter* challenges.

A number of *Anti-terrorism Act* provisions were expected to result in an increase in the number and complexity of civil litigation actions. While court challenges did not materialize immediately following the passage of the *Act*, civil litigators have provided ongoing legal services, including:

- Developing, in consultation with federal government partners, appropriate civil litigation strategies to potential litigious issues arising from the initiative.
- Developing a web-based reference database housing a repository of information for use by departmental staff in civil litigation and federal prosecutions. The database will also be used during the upcoming Parliamentary review of the *Anti-terrorism Act*.
- Developing training and awareness materials and sessions on civil litigation issues for departmental counsel and client stakeholders.
- Establishing a national capacity to manage and conduct litigation arising from challenges to the Initiative including challenges to designations of terrorist entities, forfeiture and seizure.
- Providing legal advice to federal officials on matters arising from the requirements of the *Canada Evidence Act*.
- Representing the Attorney General in cases pursuant to the *Canada Evidence Act*.

#### **2.4. Legal Aid**

To ensure that economically disadvantaged people in Canada will not have to go without counsel in serious criminal cases, the Department of Justice provides funding for criminal legal aid services to the provinces and territories through contribution agreements and Access to Justice Agreements. A key feature of these agreements is the establishment of a continuing committee of senior federal, provincial and territorial officials to share information and collaborate on legal aid policy development.

As a result of the enhanced border security measures Canada imposed following the 2001 terrorist attacks, various provinces have reported increased costs related to immigration and refugee legal aid. Reasons for these increased costs include (a) increased levels of enquiry related to security issues; (b) additional preparation time for hearings due to increased emphasis on credibility issues; (c) an increased number of complex and lengthier cases being heard by the Immigration and Refugee Board (IRB) which require intervention by the Minister; (d) an increased number of appeals on inadmissibility grounds for exclusion; and (e) a higher number of contested eligibility hearings.

Legal Aid activities by the Department of Justice were expected to include the negotiation and provision of additional legal aid funding to provinces to address the increase in costs they reportedly had been incurring due to these enhanced border security measures. The particular objective was to ensure that various provinces, territories, and/or legal aid delivery entities had the financial resources needed to ensure fair and expeditious trials in public security and anti-terrorism legal cases.

## **2.5. Citizenship, Immigration and Public Safety Portfolio**

On December 12, 2003 the federal government created a new Department of Public Safety and Emergency Preparedness (PSEP) to integrate the safety and security activities of the former Department of the Solicitor General with other activities to protect against and respond to natural disasters and security emergencies. In response, the Department of Justice created the Citizenship, Immigration and Public Safety (CIPS) Portfolio which incorporates the Department's previous Citizenship and Immigration portfolio with the new Public Safety and Emergency Preparedness group. The LSUs in the new CIPS portfolio are the following:

- Canada Border Services Agency (CBSA)
- Canada Firearms Centre (CFC)
- Canadian Security Intelligence Service (CSIS)
- Citizenship and Immigration (CIC)
- Correctional Service of Canada (CSC)
- National Parole Board (NPB)
- Public Safety and Emergency Preparedness Canada (PSEP - includes the former Solicitor General Canada, Office of Critical Infrastructure Protection and Emergency Preparedness and the National Crime Prevention Centre)
- Royal Canadian Mounted Police (RCMP)
- War Crimes and Crimes Against Humanity Program

This portfolio provides legal advisory and litigation services to diverse clients whose mandates include citizenship, immigration, refugee protection, combating war crimes and the promotion of public safety and emergency preparedness. This includes advice on screening procedures at ports of entry and in Canada. The portfolio also provides advice on a range of initiatives such as amendments to current information sharing and privacy agreements and other bilateral or

multilateral agreements, as well as day to day advice to clients in support of public safety and anti-terrorism functions. Specific activities resulting directly from the need for an enhanced public safety schema include:

- Conducting litigation before the IRB and the Federal Court in regard to immigration detention, removals from Canada, security certificates, exclusion and ineligibility cases where there is a likelihood of a public safety concern or terrorism-related issue. In support of these litigation activities, 'national litigation instructions' were prepared on key legal issues.
- Providing legal assistance in the development of policies and procedures related to new initiatives.
- Providing legal advice on initiatives such as the Advance Passenger Information/Passenger Name Record (API/PNR) program, Integrated Border and Marine Enforcement teams and Integrated Intelligence.
- Providing training to client department officials in support of public safety and anti-terrorism activities.
- Providing ongoing advice and legal services to federal officials on matters arising from the government's PSAT activities and interpretation and application of citizenship, immigration and refugee legislation.

## **2.6. Resources**

PSAT resources were earmarked in the fiscal framework pursuant to the 2001 budget at a total of \$77.9 million over the five-year period from 2002/03 to 2006/07 (and then ongoing). TB ministers directed the DOJ to establish special purpose allotments for PSAT for a period of three years within Vote 1 and Vote 5 commencing in 2002-03 with delegated authority to the Secretary of the Treasury Board to cancel the special purpose allotments after three years. In this situation, a special purpose allotment is all money that has been transferred to the Department as a result of approved Treasury Board submissions, which is to be disbursed exclusively for purposes specified in the submissions. Due to the dedicated purposes of these funds, specific accounts are required to be maintained so as to provide an accounting mechanism to ensure the funds are used only for the purposes for which they were received or collected.

The breakdown of the original Treasury Board approved funding for PSAT in comparison with actual spending and available funds after the cuts offered over the first two fiscal years, and the allocated spending for 2004-05, is as follows:

Year	TB Approved Funding*	Reductions as part of the Government Reallocation Exercise	Funds Available	Actual Spending	Surplus/ (Deficit)
Within Vote 1 - Salary and O & M					
2002-2003	\$8.1M	\$0.0M	\$8.1M	\$6.5M	\$1.6M
2003-2004	\$10.1M	\$3.1M	\$7.0M	\$7.0M	\$0.0M
2004-2005	\$11.6M	\$2.1M	\$9.5M		
Within Vote 5 - Grants and Contributions for Legal Aid					
2002-2003	\$2.5M	\$0.0M	\$2.5M	\$0.0M	\$2.5M
2003-2004	\$2.5M	\$2.5M	\$0.0M	\$0.0M	\$0.0M
2004-2005	\$2.5M	\$2.2M	\$0.3M		

\* TB approved funding excluding accommodation (13%) and employee benefits plan costs (20%).

NB: Figures for 2004-05 are based on allocated resources.

There were several reasons that a significant portion of the approved resources for PSAT have remained unspent:

- In 2002/03, the Department lapsed \$1.6 million (20%) of Vote 1 funds and the entire \$2.5 million in Vote 5 Legal Aid funding for a total of \$4.1 million. The lapsed funds were due to receipt of the funding late in the year as well as the failure to satisfy the TB requirement that terms and conditions be developed for the Legal Aid funding program. Programs Branch reports that one of the primary reasons that the terms and conditions were not developed more quickly is that this was not a priority given the lack of cases.
- In 2003/04, the Department contributed \$5.6 million (44%) of PSAT funding to the government's budget reallocation exercise. The Department chose to contribute a substantial portion of the PSAT money to the budget reduction exercise because it had lapsed funds the previous year and because of its nature as a special purpose allotment, which would not allow for the ongoing flexibility of an internal reallocation should the need arise. As well, there was

expected to be a significant demand for legal aid funding (i.e. vote 5) when the TB Submission was developed. This has not occurred. The Department returned \$3.1 million (31%) of its vote 1 PSAT funding for 2003-04 and the entire \$2.5 million of vote 5 funding.

- In 2004-05, the Department is planning to contribute \$4.3 million (30%) of PSAT funding to the TB budget reallocation exercise. This represents \$2.1 million (18%) of vote 1 funds and \$2.2 million (88%) of vote 5 legal aid funding.



### **3. FINDINGS**

#### **3.1. Development of the Legislative Framework**

The two key pieces of legislation that were developed to fight terrorism and ensure the safety and security of Canadians following the September 11, 2001 terrorist attacks, and the resulting global threat of terrorism, were Bill C-36, the *Anti-terrorism Act (ATA)*, and Bill C-7, *Public Safety Act (PSA)*. The Department of Justice played key roles in the development of both pieces of legislation. The Department of Justice led the development of the *Anti-terrorism Act* and was actively involved in the development of the *Public Safety Act*.

The Security, Terrorism and Governance Team of the Criminal Law Policy Section (CLPS) is the departmental centre of expertise on criminal policies related to anti-terrorism and national security. In the months following the terrorist incidents of September 11, 2001, the section was responsible for developing what eventually became the *Anti-terrorism Act, 2001*, which included amendments to the *Criminal Code*, the *Canada Evidence Act* and a number of other statutes. It also replaced the *Official Secrets Act* with the *Security of Information Act*.

In carrying out its responsibilities, CLPS works closely with a number of other entities within the Department and across Government. Within the Department, other key units include: the National Security Group and the International Assistance Group of the Federal Prosecution Service; the Human Rights Law Section, Constitutional and Administrative Law Section, Information Law and Privacy Section of the Public Law Portfolio; and, the Legal Service Units (LSUs) in several departments and agencies. Other departments and agencies include: the Public Safety and Emergency Preparedness Canada Portfolio (includes the former Ministry of the Solicitor General, including RCMP and CSIS, and the new Canada Border Services Agency (CBSA)); Foreign Affairs Canada (formerly the Department of Foreign Affairs and International Trade); the Ministry of Finance (including FINTRAC); the Ministry of Transport; and the Department of National Defence.

Under normal circumstances, the development of legislation is a time-consuming and complex process. The *ATA* was, however, developed under extremely tight timelines. Bill C-36, the proposed *Anti-terrorism Act*, received first reading in the House of Commons on October 15, 2001, just one month after the September 11<sup>th</sup> terrorist incidents, received Royal Assent on December 18, 2001, and largely came into force on December 24, 2001. The speed with which this Bill passed into law is a testament to the importance that it was deemed to have in protecting Canadians.

Development of the *Public Safety Act*, which received Royal Assent on May 6, 2004, was led by Transport Canada and amended 23 *Acts*, enacted a new *Act* and made consequential amendments to other *Acts*. The Department of Justice supported the development of this *Act* through the provision of legal drafting services, and legal advice and assistance at all stages.

Legal Service Units (LSUs) play an important role in the drafting of all pieces of legislation and this was the case in the drafting of the *Public Safety Act* as well. The LSUs provided advice and assistance to the policy sections within the departments and agencies involved in drafting the legislation. Transport Canada (TC) was the lead department for the *PSA* and thus their LSU played a key role in supporting the development of the legislation.

In the process of developing the *PSA*, Transport Canada legal counsel worked closely with their client department (TC) as well as their LSU colleagues in partner departments, such as Solicitor General Canada. The specialized legal and policy advisors at Justice Headquarters, such as the Criminal Law Policy Section (CLPS), the Constitutional and Administrative Law Section (CALs), the Human Rights Law Section (HRLS), and the Information Law and Privacy Section (ILAPS), also worked closely with all concerned to ensure that the *PSA* was on firm legal and constitutional footing.

Client representatives we spoke to noted that they have received timely and high quality support from their legal service counsel at all stages of the development of the legislative framework. Client interviewees indicated that Justice counsel are “part of the team” in discussing legal and policy issues. One interviewee noted that it is not a relationship of just getting legal opinions but rather of working hand-in-hand and getting creative, helpful, real-time suggestions on how to do what needs to be done within the confines of the law. It should be noted that, while Justice counsel may play an important role in helping clients to find solutions to problems, they play an equally important role in providing independent advice and ensuring that clients conform to the

law. This dual role of Justice lawyers is a significant difference between public and private sector lawyers.

The CLPS also plays a key role in coordinating federal legislative activity with law enforcement, prosecution and other officials at the provincial level, who in many criminal law subject-areas represent the lead or “front line” for implementing and administering legislation.

A number of PSAT activities carried out by CLPS are required by international or domestic law, including:

- filing mandatory reports with the Counter-Terrorism Committee of the U.N. Security Council, (a treaty obligation required by the *U.N. Charter*);
- working, in conjunction with other departmental and governmental partners, on the pending review of the 2001 *Anti-terrorism Act*, which is required by the *Act* itself (s.145); and,
- responding to demands for information by ad hoc or standing audit and inquiry bodies pursuant to their legislative authorities.

The Department’s policy work is clearly seen to have played an important part in the Government’s overall effort in the area of counter-terrorism and national security. A key strategic theme is the combination and balancing of measures to ensure that laws and practices maximise effectiveness at identifying and addressing terrorism and security concerns, while at the same time preserving Canadian fundamental values with respect to human rights and human dignity. Within the Government, a number of entities play a human rights role, while others bring to the work expertise in areas such as investigative, information or human security. The role of the CLPS is to integrate all of these in developing, drafting, implementing and following up on legislation and policy. It is the only entity with a mandate and expertise in all of these areas, insofar as domestic policy is concerned. Foreign Affairs Canada plays a similar role with respect to foreign policy, and Justice, Foreign Affairs and Public Safety and Emergency Preparedness share the responsibility for co-ordinating domestic and foreign policy with one another.

## **3.2. Implementation of the Legislative Framework**

Two key activities in implementing the legislative framework were the development of policies and the development and provision of training. This section provides information on findings in relation to these activities.

### **3.2.1. Policy Development:**

The Criminal Law Policy Section (CLPS) has been a key player in the implementation of the legislative framework. In the aftermath of the September 11, 2001 terrorist attacks, the CLPS established and has maintained a national security / anti-terrorism policy development and advisory capacity. Efforts in this area include:

- developing new policy and legislation,
- providing legal and policy advice to assist partner departments and agencies in the development of new policies and legislation,
- monitoring existing law and policy as it is applied by officials and interpreted by the courts, and
- providing advice to the Government with respect to issues and options for reform as they arise.

The importance and high profile nature of laws in this area and the novelty of both the challenges facing Canada and the legislative response brought forward in the *2001 Anti-terrorism Act* have ensured a constant demand for service and a constant need for attention to the criminal law policy area during the assessment period. Elements of several new Bills enacted during the period dealt with terrorism or security-related issues, and required monitoring and/or legal advice from CLPS. As well, it has now been 3 years since the *ATA* came into force and evidence and other materials such as case-law, criticisms or commentaries from Parliament, the media, academics and other sources has begun to accumulate on the effect and effectiveness of the *Act*.

The number of CLPS officials charged exclusively or primarily with security and terrorism policy work peaked in the months immediately after the September 2001 attacks against the United States, as staff were diverted from other projects, and levelled off in April 2002, as the *Anti-terrorism Act* came into force and work in other areas resumed. Work in the security and terrorism policy field began to gradually increase again during 2003-2004 as information about the domestic fight against terrorism began to accumulate and the Criminal Law Policy Section

began to lay the groundwork for the three-year review of the legislation by Parliament, fixed by legislation for commencement in late 2004.

CLPS officials report that they have been directly involved in public outreach, consultation and education activities in relation to security and terrorism. Their involvement includes giving presentations and dealing with the media, academics and others directly, and also in the drafting of speeches and presentation materials for use by others, including the Minister and departmental officials.

### Research:

The CLPS works with the Department of Justice Research and Statistics Division to conduct research, analysis and monitoring of some areas of the *2001 Anti-terrorism Act*. The Department's Results-based Management and Accountability Framework for the PSAT Initiative identified awareness of the *Anti-terrorism Act* within ethnic communities and the impact of the legislation on ethnic communities as two areas of particular interest. The Department has compiled a considerable amount of research and analysis in these areas, much of which has not yet been published. The following bullets provide information on recent research findings in these areas:

- 48% of Canadians surveyed in April 2003 said that they are aware of actions that the Government has taken since September 11, 2001 to improve the safety and security of Canadians. Of those that said they were aware of actions that the Government has taken, the actions most often mentioned were: tighter airport security (54%), tighter border security (37%), new immigration laws (11%) and new anti-terrorism laws (6%).
- Surveys conducted between March and July 2003 indicate that approximately 50% of Canadians think that the anti-terrorism legislation is having a negative impact on ethnic minorities living in Canada while approximately 22% said that it is having no impact and 20% said that it is having a positive impact.<sup>3</sup>
- The Department of Justice commissioned 16 focus groups with 138 participants from approximately 60 ethno-cultural minority backgrounds in March 2003. These focus group discussions revealed:

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<sup>3</sup> Terrorism: Polling Summary on Five Key Areas, created by DOJ Research and Statistics Division, September 2003.

- Consistently low awareness of terrorist-related legislation. However, participants were generally aware of new post-9/11 travel-related security measures, especially at airports and borders.
- General support for the provisions of the *Anti-terrorism Act*, with varying degrees of concern about its application. Participants generally assumed that Canada's anti-terrorism legislation was less severe than that of the United States and the United Kingdom.
- While the financing of terrorism provision made sense, people worried about the potential for misinterpretation, and about certain legislative aspects, which placed responsibility on individuals instead of on the government.
- Overall, there was general acceptance for the new police investigative and preventive powers, despite the possible risks of targeting of ethnic minorities and potential police abuse. Participants generally approved of the wiretapping section, but were confused about the offence relating to the refusal to give information.
- Overall, the majority of focus group participants felt the risk of having the *ATA* and its new police powers were acceptable to protect the country and its population. Most felt safer or the same with the legislation, and most hoped their reservations would not be validated. People adopted a "*wait-and-see*" approach.<sup>4</sup>

### Human Rights:

Human rights issues are reported to have been a primary consideration at every stage in the development and implementation of the *Public Safety and Anti-terrorism Acts*. Most interviewees from the Department of Justice and partner organizations expressed a need to ensure that *Charter* and human rights obligations are respected in the conduct of national security work and seemed to be aware of the impact that this legislation could have on ethnic minority communities.

### Results for Canadians:

The results for Canadians of the Department's work in developing national security and anti-terrorism legislation are considered to be substantial, although hard to quantify because most of the work is either preventive or involves measures that are only used if terrorist activities take

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<sup>4</sup> *Minority Views on the Canadian Anti-terrorism Act (Formerly Bill C-36), Focus Group Report*, prepared for Department of Justice Canada, Research and Statistics Division by Les études de marché Créatec +, March 31, 2003, p. 1-2.

place or if an offence or incident occurs. The difficulty is that nobody notices the good work that is done to protect Canadians from national security threats while mistakes could be tragic. Generally, the results include domestic legislation which contains effective offences, investigative powers and other measures, as well as judicial and other safeguards to protect human rights. These in turn protect the safety and security of Canadians and Canadian political, legal, social and economic institutions and activities, delivering the high standard of governance and individual rights Canadians expect in an atmosphere of safety, security, tolerance and mutual respect.

In addition to equipping Canadian officials with effective anti-terrorism and security tools, this work has also protected Canada's international position, ensuring that Canada can provide appropriate forms of assistance and cooperation with other countries in multi-national investigations and can obtain similar cooperation in return. The policy and legislative expertise established in Canada also:

- enables it to assist other countries in developing effective measures of their own, which reduces the threat to Canada from abroad and the threat to Canadians abroad,
- helps to preserve and protect Canadian trade and economic interests,
- ensures that such countries are willing and able to assist Canada in appropriate cases, and
- promotes Canadian values and influence within the international community.

The National Security Group (NSG) was also responsible for the development of policies in relation to the *Anti-terrorism Act* but their responsibilities were more operational in nature. Operational policies developed by the NSG include policies in relation to the initiation of prosecutions in respect of the new offences created under the *ATA* and the use of the investigative hearing and recognizance with conditions powers. We will touch on these further in the Application of Legislative Framework section.

### **3.2.2. Development and Provision of Training**

The lead in training prosecutors and law enforcement officials in the area of public safety and anti-terrorism rests with the Federal Prosecution Service (FPS) of the Department of Justice and Public Safety and Emergency Preparedness Canada (PSEPC), respectively.

The National Security Group (NSG) of the FPS had the lead in providing training to prosecutors and law enforcement officers on the scope, intent, and limits of the new *Anti-terrorism Act* offences and powers. Between December 2001 and September 2004, the Department of Justice organized three 2-day training sessions on the *Anti-terrorism Act* and criminal law processes as they relate to anti-terrorism, a 1½-day training session on privacy issues and two 1-day national security law conferences to discuss issues relevant to the security and intelligence community. (See Appendix A for further information on training provided.)

The NSG also prepared and presented a law enforcement focused training session for members of the RCMP, the Ontario Provincial Police and la Sûreté du Québec on the *Anti-terrorism Act* and produced and disseminated 2,500 English and 1,000 French CD ROMs of this training presentation to police forces across Canada.

Feedback from the training sessions, as well as interviewees, indicate that the training sessions and materials developed by the Department of Justice have been very well received. Persons interviewed during the course of this evaluation have specifically noted the quality and utility of the CD ROMs. The RCMP uses the CD ROM in all counter-terrorism officer training (over 300 RCMP officers have received specialized counter-terrorism training).

Sections of the Department of Justice that have contributed to the development and delivery of training, in addition to the NSG, include:

- As the primary experts on the legislation itself, members of the Criminal Law Policy Section have provided advice on training programs produced by the NSG and by partner departments and agencies. They have also given presentations as part of training sessions, and hosted a 2-day training session in June 2002.
- Members of the Human Rights Law, Information Law and Privacy and the Constitutional and Administrative Law Sections of the Public Law Group have also contributed their expertise in the development and delivery of training sessions, including giving presentations as part of training sessions.
- Members of the Civil Litigation Branch (CLB) have presented and participated in C-36 training sessions. The litigators we spoke to noted that, while most of these sessions were geared to prosecutors, they provided a valuable opportunity to meet with colleagues working in the national security area in other organizations, including legal service unit personnel from PSEP, CSIS, RCMP, and CSE. The CLB has also done some software training in relation to a reference database that has been created to gather information for PSAT related



litigation cases. This training was provided to a select group of litigation and advisory personnel (a couple of people in each region and at headquarters) that were expected to be involved in any *Charter* challenges to PSAT legislation.

- LSU counsel in the CIPS Portfolio have provided limited training to selected CIC and CBSA officials in support of their public safety and anti-terrorism activities.
- The LSU at the RCMP and the Criminal Law Policy Section worked in conjunction with the RCMP Learning and Development Branch to design a 2½-day counter-terrorism officer training course on the *Anti-terrorism Act*.

Many of the issues being dealt with in relation to the *Anti-Terrorism* and *Public Safety Acts* are new. In some areas we are just beginning to develop jurisprudence in relation to the new legislation and it is not yet clear how the courts will react to elements of the new legislation which some consider to be contentious. As a result, the training that has been developed to date has been largely based on legal opinion as to how the new laws will be applied.

It was interesting to note that many (if not most) of the people working in the national security legal service field have done presentations at training sessions. This provides a sense of the experimental/developmental nature of the national security field, that is to say, expertise is being developed on a day-to-day basis as people deal with the various situations they are encountering. As one interviewee noted, the core of the training in this field is “on-the-job” because people are learning as they go.

### **3.3. Application of the Legislative Framework (Prosecution and Litigation)**

#### **3.3.1. Legal advice on national security issues**

The National Security Group, as the operational expression of the functional responsibility of the ADAG Criminal Law for national security, provides legal advice, in conjunction with legal Services Units and criminal prosecutors in the Department’s Regional Offices for law enforcement matters relating to national security. The September 2001 terrorist bombings, followed by the creation of the new legislation and the sudden surge of interest in counter terrorism and national security generally, resulted in a massively more complex, urgent and visible operating environment for the NSG. All of the previous NSG responsibilities continue, but these have been overlaid with a growing number of tasks and responsibilities that in turn spawn additional responsibilities.

Prior to 9/11, the NSG was essentially an office of three, that is one counsel, one policy analyst and one records clerk, with additional counsel being seconded for finite periods of time to address specific issues. Following the attacks of September 2001 the NSG was expanded to eight, that is one General Counsel, one Senior Counsel, three Counsel, a Senior Policy Advisor, Records Clerk and Secretary. To address the ongoing needs of investigative bodies for legal advice and assistance on PSAT related files. The NSG has also:

- Expanded the legal services they offer by getting involved in nascent national security cases, much earlier than the normal legal advice stage.
- Designated full-time regional prosecutors in each regional office.
- Developed and delivered specialized training materials and courses for counter-terrorism investigators and prosecutors.

The NSG serves as the central focus in advising the Assistant Deputy Attorney General (ADAG) Criminal Law in respect of the approval of the laying of charges and the use of investigative powers, and advising the Attorney General of Canada on whether prosecutions should be conducted by the federal Attorney General rather than a provincial Attorney General. It is also the clearinghouse for all jurisprudence relating to the investigation and prosecution of terrorism offences.

NSG is also the departmental focal point for coordinating the statutory responsibilities of the Attorney General of Canada relating to the new *Canada Evidence Act* provisions applicable to the handling of sensitive information and the potentially injurious information in the course of judicial and other proceedings.

The *Anti-terrorism Act* has generated significant new workload for the National Security Group in a number of areas:

- From the outset constitutional challenges to *Anti-terrorism Act* provisions were anticipated. To date, two decisions of the Federal Court of Appeal have clarified and codified the working of Section 38 of the *Canada Evidence Act*. The use of the investigative hearing procedure (section 83.28 of the *Criminal Code*) by the AG of BC has been upheld by Supreme Court of Canada. NSG has been the engine for the research and preparation of materials, calling on the expertise of Senior General Counsel of the Criminal Law Section as

necessary. There will be future challenges and work has begun to prepare for these eventualities.

- Traditionally, the NSG has provided a focus for the functional responsibility of the ADAG Criminal Law for the provision of advice on matters relating to national security, including to CSE and the PCO on programs, purported unauthorized disclosures of information, etc. Now advice is also required on on-going investigations of terrorism offences by federal, provincial and municipal police bodies. Not only is advice provided, but at the same time there is an educational component. At the time that the *Anti-terrorism Act* was drafted there was no time to sit back and contemplate just how the legislation would work in practice. So, the provision of advice now is, in a sense, establishing precedents as different scenarios are encountered. NSG has assumed the responsibility of providing a focal point for the collection and sharing of corporate knowledge.
- With the laying of the first charges pursuant to terrorism offences, NSG has now had the first experience of compiling the documentation advising the AG as to whether or not terrorism offences should be prosecuted. This was not a simple matter, but one which called upon the hands-on efforts of two Senior General Counsel and a Counsel. The prosecution is managed from the Regional Office, but NSG remains engaged on a day-to-day basis.
- The *Anti-Terrorism Act* prompted the need for a new more coordinated approach for managing legal issues in relation to national security and terrorism cases. The Department of Justice now has more direct involvement in national security issues and investigations and the NSG is involved earlier to ensure that legal strategies are in place.
- The listing of entities pursuant to s. 83.05 of the *Criminal Code* created an immediate and on-going workload for the NSG. This relates to the role of the Minister of Public Safety and Emergency Preparedness to recommend that the Governor in Council list entities where it has reason to believe that they meet the test as being terrorist organizations or individuals. The NSG role in this process is two fold: to ensure that the legal threshold is met, and to challenge some of the facts supporting the application. This role requires that the NSG review the security intelligence report (SIR) prepared by CSIS or the RCMP to ensure that documentation provides the information required to list an entity prior to an entity being considered by the Minister of PSEP and Governor in Council. The NSG and CSIS Legal Services worked together to develop a new format for the presentation of this information and the first entities to be listed were published in the Canada Gazette in July 2002. As of

July 31, 2004, some 35 entities had been listed. Now, as the legislation requires a mandatory two year review of each listed entity, NSG has completed the required reconsideration of the 35 listed entities.

- The notification of persons permanently bound to secrecy (PPBS) pursuant to the *Security of Information Act*. The *ATA* provides each Deputy Head with the ability to determine which employees within his or her department or agency should be PPBS. The NSG worked closely with Treasury Board Secretariat throughout 2002 to develop new Government Security Policy procedures, which include criteria for notification and actual steps for the notification process. NSG was also instrumental in brokering interdepartmental acceptance of the new procedures. NSG continues to work in this area to identify what additional elements of Government should be formally listed in the schedule of the *Anti-terrorism Act* and to clarify elements of the legislation. The NSG also has an ongoing role, within the Department of Justice, to assist the Departmental Security Officer in identifying those individuals whose responsibilities merit individual notification.
- The provision of advice and direction to the AG in relation to the Public Inquiry into the Maher Arar matter routinely demands the full-time attention of one counsel, working/liasing with the Government counsel and LSU counsel. The level of NSG involvement with this Inquiry illustrates interwoven, interconnected nature of the subject matter dealt with in the national security context. Any discussion and consideration of issues relating to national security confidentiality cannot be considered without reference to a protective regime for national security information that appears in S.38 of the *Canada Evidence Act*. NSG is playing a role in both Part I and II of the Inquiry, Part II being the development of a regime to review the national security role of the RCMP.

The National Security Group has focused its resources on immediate operational matters, which provide a heavy volume of day-to-day workload. While these are its areas of highest priority, this focus has often come at the expense of more strategic projects such as training for federal prosecutors and police officers, participation in and organization of interdepartmental coordination events and outreach activities, such as participation in international national security and intelligence gatherings, aimed at developing the network of contacts needed to do the job effectively. One partner organization suggested that the DOJ should be more involved in international security forums to ensure that the Government of Canada has appropriate legal representation. NSG notes that they have participated more frequently in international fora since

September 11, 2001, but when required to choose between domestic operational requirements and international commitments, operational demands receive priority.

Over the course of the past three years the international role of the NSG has gradually expanded, whether through participation on the Cross-Border Crime Forum counter terrorism meetings or participation in the triennial G8 Roma/Lyon meetings of the Criminal Legal Affairs Sub-group. Also on the international front, NSG has developed the protocol to govern the presentation of Canadian evidence and the appearance of Canadian officials in foreign proceedings and serves as the central office for coordination.

Central agency initiatives, particularly PCO initiatives, have added responsibilities and complexity. The roll out of the National Security Policy has brought work in the form of the Cross-cultural Round Table on Security, and the establishment of the Integrated Threat Assessment Centre (ITAC). NSG had taken the lead in trying to find a resolution of information sharing issues in the context of maritime security, and this work has logically led to and merged with efforts to resolve information sharing issues in the larger ITAC context. The NSG is co-chair of a legal issues working group that considers on a case-by-case basis the issues relating to the sharing of information.

Parliamentary activity in relation to national security issues will markedly increase in 2005. Firstly, the mandatory three year review of the *Anti-terrorism Act* will commence in December 2004. Secondly, as the Prime Minister has undertaken to support the establishment of National Security Committee of Parliamentarians, there will be a need to table enabling legislation.

Finally, NSG has sponsored a number of outreach initiatives intended to improve understanding of national security issues. There is now an annual national security conference for counsel with national security responsibilities within the Department. There are triennial meetings of practitioners to discuss particular subjects of national concern. There are monthly lunch seminars for counsel in the NCR on topics of timely interest. The Justice Emergency Team (JET) now meets regularly, rather than being only convened at the time of counter-terrorism exercises and signal events (eg. Bush visit). As such, the JET has also become a means of exchanging information and experiences.

### Changes to Section 38 of the *Canada Evidence Act*

The *Anti-terrorism Act* included significant changes to S.38 of the *Canada Evidence Act*. One of these changes was the identification of the Attorney General of Canada as the independent office of expertise to balance the competing interests in the disclosure of sensitive information in the course of judicial and other proceedings. The NSG manages and coordinates this new process on behalf of the ADAG Criminal Law.

The new section 38.01 requires that participants in a proceeding, or officials, give notice to the Attorney General of Canada (AG) when the participant or official believes that “sensitive information” or “potentially injurious information” may be disclosed during the proceeding. The AG has ten days to consult with relevant federal departments and agencies (usually involving PCO, National Defence, Foreign Affairs, RCMP, CIC, CSIS, PSEPC and CSE) as well as other relevant parties, such as the prosecutor in a criminal proceeding, to assess whether the information can be released, in what form and/or subject to what conditions.

Several interviewees noted that ten days is an extremely brief period of time to initiate and complete consultations with all involved parties in these types of cases, particularly given the intense workload that these notices entail. These interviewees noted that, in practice, it often takes 20 to 30 days to determine whether or not the AG will consent to disclosure.

In cases where the AG has not consented to disclosure, including cases where no decision has been made by the AG, an application can be made to the Federal Court Trial Division. Section 38.06 permits a judge of the Federal Court Trial Division to authorize disclosure of all the information, a part or summary of information or a written admission of facts relating to the information.

The workload occasioned by the new Section 38 notice provisions has proven significant, occupying, on occasion, the full NSG complement. As of February 2004, the NSG has handled some 20 Section 38 notification cases, and provided advice on almost as many other occasions, when notice has been contemplated but not required or where some form of consultation has been necessary. The NSG role in these cases is multifaceted. NSG counsel:

- manage the process,
- facilitate communication,
- educate participants,

- assess whether disclosure would result in injury
- negotiate competing interests,
- provide advice and recommendation to the ADAG Criminal Law,
- instruct litigators on the positions adopted by the AG.

New NSG procedures in relation to section 38 issues require that departments and agencies review and decide what information they can and cannot make public prior to bringing the issue to NSG. Interviewees noted that there are conflicting priorities in this area as CSIS is more protective of its information for fear of identifying its sources while the RCMP would like to release more information to enable prosecutions.

A couple of interviewees raised concerns about the section 38 (*Canada Evidence Act*) provisions of the ATA. The concerns related to the clarity of the provisions and how the various elements interrelate and should be interpreted and that national security cases move back and forth from provincial trial courts to federal trial courts to deal with section 38 *CEA* issues. The concern is that the Federal Court lacks the context to deal effectively with the issues and that this back and forth process could delay the trial and result in *Askov*-related problems (i.e. undue delay in the trial of the criminal case).

#### Issues Raised:

Most people interviewed seemed to feel that the new national security process, with NSG coordinating national security issues, is working well and that central control is important to dealing with these issues. There was, however, an issue raised around the need for the NSG to balance the conflicting roles as facilitators of national security investigations while also playing a challenge function around the quality of security intelligence data, especially in cases related to the listing of terrorist entities. The NSG notes that they address concerns on a case by case basis and they have also prepared detailed explanatory materials for inclusion in the Federal Prosecution Handbook which are designed to facilitate investigations.

Interviewees from all areas of the Department suggested that resources have been allocated to areas of highest priority, often at the expense of requirements in other, non-PSAT efforts. This occurs because PSAT operations are, by nature, high risk and time sensitive. LSU counsel in particular noted that national security issues take precedence over all other files and, as a result, some clients are not getting the timely services they might expect.

Another concern that was raised in interviews is the fact that the *Anti-terrorism Act* does not require that federal prosecutors prosecute national security cases. It was suggested that provincial prosecutors usually do not have the security clearances or the experience required to handle national security cases and that provincial prosecution offices do not have the safeguards necessary to handle national security documents. To date, these concerns have proven theoretical as the first *Anti-terrorism Act* prosecution is being conducted by the FPS Ottawa Gatineau Regional Office

### **3.3.2. Use of key provisions of the *Anti-terrorism Act*:**

This section provides statistics on the use of the anti-terrorism provisions in the *Criminal Code* between implementation of the ATA and September 2004.

- # of terrorism-related investigations – Interviewees indicated that several terrorism-related investigations are ongoing. Actual numbers have not been provided due to the sensitivity of these investigations.
- # of arrests/charges/prosecutions – Only one person has been arrested and charged with a terrorism-related offence in Canada since the implementation of the *Anti-terrorism Act*. The arrest took place in Ottawa on March 29, 2004, and the case is currently proceeding through the courts in pre-trial stages.
- # of convictions – No terrorist-related convictions have been registered to this point.
- # of Federal Court hearings on use of s. 38 of the *Canada Evidence Act (CEA)* – As of February 2004, the NSG had handled some 20 s. 38 notification cases.
- # of judicial investigative hearings<sup>5</sup> – At the time of writing only one (1) judicial order relating to an investigative hearing had taken place. This order was issued in relation to a

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<sup>5</sup> Judicial investigative hearings are provided for in s. 83.28 of the *Criminal Code*, a new provision added to the *Code* in 2001 with the enactment of the *Anti-terrorism Act*. Under this provision a peace officer may, with the consent of the Attorney General, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information. (NB: Ex parte is something initiated on one side only; by one party only; done or performed at the request of one party only.)



proposed Crown witness in the Air India investigation/prosecution at the request of the Attorney General of British Columbia. Prior to the questioning pursuant to the investigative hearing order taking place, a constitutional challenge to the investigative hearing provision was brought to court. On June 23, 2004 the Supreme Court of Canada affirmed the constitutional validity of s. 83.28 as an effective response to terrorism, balanced with fundamental democratic values.

- # of preventative detentions – The recognizance with conditions provision of the *Anti-terrorism Act* (commonly referred to as preventative detention) had not been used as of September 2004.<sup>6</sup>

The statistics reported above highlight the relatively limited use to date of the anti-terrorism provisions in the *Criminal Code*. This reflects the fact that these are exceptional provisions for use in exceptional cases only. One of the roles of the FPS is to educate and advise its partners on the proper use of these provisions. The investigation of potential terrorist activities is also a very time consuming task and some investigations currently underway may lead to charges and prosecutions in the future. In the meantime, it was noted by several of the officials interviewed for this evaluation that the *Immigration and Refugee Protection Act (IRPA)* is another important tool that the Government of Canada uses to exclude, detain or deport individuals deemed to be security risks, thereby protecting the security of Canadians.

The LSU at Citizenship and Immigration Canada (CIC) was heavily involved in the development and implementation of IRPA, which was assented to and came into force soon after the September 11, 2001 terrorist attacks. The Citizenship, Immigration and Public Safety (CIPS) Portfolio, which now includes the CIC LSU, is providing advisory and litigation services for the use of IRPA provisions related to the protection of national security.

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<sup>6</sup> Under the recognizance with conditions provision, which was added to the *Criminal Code* at Section 83.3, a peace officer, with the prior consent of the Attorney General, believing on reasonable grounds that a terrorist act will be carried out and suspecting on reasonable grounds that the imposition of a recognizance with conditions or the arrest of a person is necessary to prevent the carrying out of the terrorist activity, may lay an information before a provincial court judge. That judge may order the person to appear before him or her. A peace officer may arrest without warrant the person who is the object of the information if such apprehension is necessary to prevent the commission of a terrorist activity. Such a detained person must be brought before a provincial court judge within 24-hours, or as soon as possible thereafter. If the judge determines that a recognizance is necessary, the person may be released with conditions for twelve months or could be imprisoned for up to twelve months.

It was noted during interviews that reliance on immigration remedies should be seen in a positive light. They provide effective and practical responses to security threats posed by non-citizens where criminal investigations and prosecutions may not be available. The use of these provisions has, however, raised a number of human rights issues. While the security certificate procedure found in IRPA was held by Canadian courts to be consistent with the Charter, the use of that and other removal procedures is currently being litigated where removal would expose the person concerned to a substantial risk of torture. Among the issues raised by this litigation is whether Canada should consider alternatives, such as detention or supervised release, to address security concerns where removal would result in serious human rights violations. These questions will need to be further examined as the courts clarify the conditions under which immigration law may continue to be used.

Impact of high profile national security cases on the success of ongoing projects:

Several interviewees noted that work in the national security area has been significantly impacted by a few high profile cases. The case most often referred to was the public inquiry into the actions of the Government of Canada in the Maher Arar case, but others such as the Juliet O'Neil/Ottawa Citizen case and the listing of Liban Hussein and the related litigation and international submissions to de-list this individual are also impacting on workloads, particularly for the NSG.

The workload related to the Arar case is extremely heavy given the volume and the high security nature of the information involved. The listing of Liban Hussein highlighted the need to make changes to the *United Nations Suppression of Terrorism Regulations* and extensive policy and legal advice, including *Charter* and constitutional advice has been required. The relatively small group of people who work in the national security environment have experienced a significant increase in workload relating to these high profile cases. In turn this has impacted on their ability to make progress in other areas of national security.

FPS has designated regional PSAT prosecutors who are assigned to Integrated National Security Enforcement Teams (INSETs). These prosecutors, working closely with the National Security Group, provide advice to police during investigations and would prosecute PSAT cases. The intended result of this is to develop specialized expertise within a core group of prosecutors. These prosecutors will be on the front line in providing legal advice to RCMP officers on anti-

terrorism cases. It was suggested that some of these prosecutors come from provincial crown offices and raised concerns that provincial crown prosecutors may not have the background and training needed to advise on and prosecute national security cases.

Interviewees from one partner organization raised concerns that the *ATA* requires that law enforcement agencies go before provincial court justices to obtain approval for wire taps and search warrants for national security investigations. The suggestion was that provincial court justices do not have the training and experience needed to fully understand the delicacy of national security cases. These interviewees suggested that the Federal Court Trial Division would be better positioned to deal with these requests as they have experience in the national security area from dealings with CSIS wire tap and search warrant applications as well as s. 38 of the *Canada Evidence Act*.

### **3.3.3. Civil litigation related to the *Anti-terrorism Act*:**

A number of *Anti-terrorism Act* provisions were expected to result in an increase in the number and complexity of civil litigation actions. While court challenges did not materialize immediately following the passage of the *Act*, amendments to the *Canada Evidence Act*, which are part of the *Anti-terrorism Act*, have generated an important workload for civil litigators.

In addition to this, civil litigators have provided ongoing legal services including:

- Participating in the development of the *ATA* under very tight deadlines by providing legal advice in the working groups and committees and by responding to specific requests for advice stemming from the Department's policy area.
- Providing strategic litigation advice to federal officials for the defence of potential litigious issues by responding to specific requests for advice on issues that touch on *Charter* and the *Canadian Bill of Rights*, the *Canada Evidence Act* and the *Official Secrets Act*.
- Providing training to other departmental staff and to officials in other federal departments by giving presentations at training and awareness sessions organized by the Department.

- Supporting the Department's National Security Group in discharging its responsibilities on behalf of the Attorney General with respect to new provisions of the *Canada Evidence Act* by providing litigation advice and support in the course of Court actions.

In anticipation that there would be several challenges to the *Anti-terrorism Act* legislation when it came into force and that these challenges would be made under the *Charter* and the *Canadian Bill of Rights*, the Civil Litigation Branch took steps to build capacity to address the anticipated demand. In one of the first steps taken by the Civil Litigation Branch was to set up a working group, called the "C-36 *Charter* Evidence Working Group", to identify information that would be useful in defending the *Anti-terrorism Act* from *Charter* challenges. This working group, comprised of some 20 personnel from across the Department of Justice, was formed prior to implementation of the *ATA* and met several times. The Working Group has not been active in recent months, due to the absence of litigation, but can be called back when the need arises.

The information that was identified by this Working Group was collected and put into a database that was developed on Ringtail<sup>7</sup>. The database was developed as a tool to support departmental staff in preparing for potential litigation cases related to *Charter* challenges of the *Anti-terrorism Act*. During interviews we were told that the anticipated workload in this area has not yet materialized as expected and the database had only been used in preparing for two cases as of September 2004.

We spoke to one of the two people known to have used the database in preparing for a case. This person suggested that the usefulness of the database is limited because it has not been kept up-to-date and it needs more effective navigation tools to facilitate data recovery. This person noted that most of the information used in preparing for this *Charter* challenge came from open source content available over the Internet because the Internet provided access to the most current information.

As of September 2004 there had only been two constitutional challenges to *Anti-terrorism Act* provisions.

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<sup>7</sup> Ringtail is a data management system designed to help litigation teams rapidly locate information and make the best use of it in conducting prosecutions, lawsuits or settlement negotiations by assisting counsel and other professional staff to acquire, organize, analyze and present evidence.

- The proposed use of the investigative hearing procedure (s. 83.28 of the *Criminal Code*) by the Attorney General of British Columbia was challenged in the context of the Air India trial. In a 6-3 ruling, the Supreme Court of Canada affirmed the constitutional validity of s. 83.28 of the *Criminal Code* as an effective response to terrorism balanced with fundamental democratic values, and the validity of an order for a judicial investigative hearing.<sup>8</sup>
- A constitutional challenge on the provisions of the former section 4 of the former *Official Secrets Act* had also commenced, concerning the unauthorized disclosure of information. Section 4 was not amended through the passage of C-36, although certain new notions incorporated by the *Security of Information Act* were included. The litigation was commenced as a consequence of a search warrant executed by the RCMP in January 2004 at the office and home of Ottawa Citizen reporter Juliet O’Neil.

While the Department has not faced a large number of constitutional challenges to date, such challenges are anticipated in the future and the continued preparation for this eventuality is required. The research and preparation of materials in relation to these challenges has placed significant resource demands on the Department.

### **3.4. Legal Advice to the Government**

The Department of Justice helps the Government to make the best choices in resolving legal matters related to the laws and policies it administers, including those related to PSAT. It provides high quality, timely, and cost-effective legal and legislative services to some 50 client departments and agencies through a network of 2400 lawyers located across the country. Points of service include approximately 50 Legal Service Units (LSUs), located within client organizations, 13 regional Justice offices, and 40 offices that service clients in the National Capital Region. These include specialized advisory offices providing expertise in areas such as constitutional, international, privacy and human rights law.

Legal staff across the country aim to balance their role as client legal service providers with their role as government-wide guardians of the law. Complex policy considerations, risk management, and priority setting are taken into account. Legal services delivered include legal advice, dispute

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<sup>8</sup> Terrorism offence hearing passes “constitutional muster”: SCC, July 12, 2004, The Continuing Legal Education Society of British Columbia article, [www.cle.bc.ca/CLE/Stay+Current/Collection/2004/6/04-scc-terrorism](http://www.cle.bc.ca/CLE/Stay+Current/Collection/2004/6/04-scc-terrorism)

resolution, legislative and regulatory drafting, negotiation and drafting of other legal documents, litigation, and prosecution services (these relate to statutory programs administered by departments and agencies and enforceable in the courts of criminal jurisdiction).

The NSG, on behalf of the ADAG Criminal Law serves as the Headquarters office of expertise in relation to national security matters. The office is well placed to fulfill the functional responsibility of the ADAG Criminal Law for the provision of advice on legal issues relating to security and intelligence, including the conduct of prosecutions and litigation. It serves as a bridge to facilitate the coordination of issues and advice among the legal service units with client departments and agencies. It also serves as the operational bridge to aid federal prosecutors across the country who are called upon to provide advice to police forces in the context of national security investigations. In matters relating to the disclosure of information in judicial or other proceedings the NSG has an important role to play in the protection of sensitive information.

The LSUs perform an essential task in ensuring that departments and agencies have the legal advice and support needed to fulfill their statutory responsibilities. The PSAT related time demands placed on some of these units in the months following the September 11, 2001 terrorist attacks affected their ability to support non-PSAT related service demands. Several LSU personnel noted that their time was completely monopolized by PSAT activities during the post-9/11 period.

#### The Role of the Citizenship, Immigration and Public Safety (CIPS) Portfolio

As mentioned in section 2 of this report, the Department of Justice created a new Citizenship, Immigration and Public Safety (CIPS) Portfolio in December 2003, which incorporated the Department's previous Citizenship and Immigration Portfolio with the LSUs from the new portfolio of Public Safety and Emergency Preparedness. (See page 11 for a full listing of LSUs in this group.)

As its title suggests, the CIPS Portfolio plays an important role in the Department of Justice's ability to meet its goals in relation to PSAT. In particular, the LSUs at the new Canada Border Services Agency and Public Safety and Emergency Preparedness Canada (PSEPC), as well as CSIS, Citizenship and Immigration, and RCMP all play key roles in providing legal advice and assistance to the departments and agencies they serve on PSAT related issues. This includes legal advice and assistance on:

- Development of policies, procedures and regulations to implement the *Anti-terrorism Act*, the *Public Safety Act*, and the *Immigration and Refugee Protection Act*.
- Negotiation of international agreements related to national security, including the myriad of projects related to the Smart Borders Initiative such as NEXUS (intended to simplify travel), FAST (intended to move goods quickly), and CANPASS (intended to streamline customs clearance).
- Legal risk management and instrument choice in relation to strategic national security issues and on individual cases. This includes use of s. 38 of the *CEA* or the security certificate provisions of *IRPA*.
- National security and terrorism investigations.
- Litigation and litigation support in relation to national security cases and the use of the new legislation. This includes assistance on constitutional challenges and operational decisions related to national security cases, such as decisions to return immigrants or refugees to countries where they may face torture.

During the first two years of the Initiative the CIPS portfolio (the former Citizenship and Immigration Portfolio) accounted for \$5.1 million (37.5%) of the Department's total PSAT spending of \$13.6 million. A significant portion of the PSAT allocation to the CIPS portfolio was transferred to FPS in support of the airport project operated at Dorval airport, and under consideration for the international airports in Toronto and Vancouver. The airport project was operational in 2002/03 but we do not have financial data for that year. In 2003/04, the CIPS portfolio reported expenditures related to the airport project of \$720,000, which amounts to approximately 27% of CIPS expenditures under the PSAT initiative for the year. The forecasted project expenditures for 2004-05 of \$1.24 million amount to approximately 40% of the annual PSAT budget for the CIPS portfolio.

As currently in operation at Dorval airport, FPS counsel (seven lawyers plus support personnel under the supervision of a Senior Counsel) provide advice and legal assistance to partner agencies at the airport (RCMP, CBSA, CIC, Agriculture Canada, and US Immigration and Customs). These services are available 24 hours a day, seven days a week, either on-site or by telephone. The primary point of contact for the team's lawyers is with RCMP officers on behalf

of CIC or CBSA officials. Project counsel have also provided training of partner agency staff. The availability of the telephone advice has recently been extended to CBSA officials working at land border crossings in Quebec.

Since these advisory services were first introduced at Dorval in January of 2001, increases have been observed in the number of persons charged with immigration-related violations at the airport. For the ten-month period ending 22 October 2004, statistics compiled by the Dorval team indicate that 40 persons were charged under the *Immigration and Refugee Protection Act*, and 31 persons were charged under the *Controlled Drugs and Substances Act*. As well, there were 12 seizures of money at the airport pursuant to sections 489(2) and 490 of the *Criminal Code*. These data are consistent with those of 2002 and 2003, and reflect an increase over the period prior to the creation of the airport team in 2001. The proportion of these cases, if any, which could be considered to be specifically terrorism-related is not known, although seizures of money may raise suspicion of terrorist involvement.

Although the Dorval airport project has not been formally evaluated, it is reported to be well regarded by the partner agencies operating at the airport for offering timely and high-quality advice and assistance. In particular, it has allowed Justice lawyers and RCMP members at the airport to collaborate on a daily basis, either to develop a plan for further investigation, laying of charges, and so on, or to quickly conclude those matters which will not go forward. This positive reputation has created interest in expanding this type of service to the airports in Toronto and Vancouver. As of September 2004, however, no such service has been introduced at either of these locations.

#### The Role of the Royal Canadian Mounted Police Legal Service Unit:

The RCMP Legal Service Unit is the primary provider of legal advice to the Royal Canadian Mounted Police, including operational advice to RCMP headquarters in relation to the investigation of terrorism offences involving the national interest. The *Security Offences Act* specifically gives the RCMP primary responsibility to perform the duties that are assigned to peace officers in relation to offences arising out of conduct constituting a threat to the security of Canada. In most cases the new *Criminal Code* offences created in the *Anti-terrorism Act* fall under this category.

In addition to its involvement in many of the activities identified above under policy development and analysis, specific RCMP LSU activities under the PSAT initiative include:



- Developing operational policies and protocols related to: the investigation of offences and other provisions of the *Anti-terrorism Act*,
- Specific advice relating to the investigation of terrorism offences involving a national security interest.
- Advising the RCMP in relation to section 38 of the *Canada Evidence Act* involving establishing objections to the disclosure of evidence based upon harm to national security, national defence and international relations, while ensuring fairness of the trial process.
- Working with FPS on interdepartmental policy development such as the protocol relating to the testimony of Canadian witnesses in foreign proceedings and the notification of persons permanently bound to secrecy under the *Security of Information Act*.
- Reviewing and coordinating extradition and mutual legal assistance requests made to Canada which involve the RCMP, as well as those made by the RCMP to other countries.
- Developing and delivering legal training material on current anti-terrorism legislation for investigators.

#### The Role of the Transport Canada Legal Service Unit:

Transport Canada (TC) was the lead department in the development of the *Public Safety Act (PSA)* and a member of the Transport Canada LSU played a key role in supporting the development of this *Act*. This was a long and at times arduous task as this Bill had to be reintroduced in Parliament several times before finally receiving Royal Assent on May 6, 2004.

Transport Canada's immediate priority after the September 11, 2001 terrorist attacks was improving aviation system security. However, they have also expended a lot of effort to tighten security related to other modes of transportation, in particular, marine transportation.

Marine security was recognized as a weak link and thus soon after 9/11, Transport Canada began to focus on this area and, in November of 2002, the Transport Canada LSU assigned one counsel to work on issues related to marine security. This work is mostly concerned with security in seaports, on ships in Canadian waters, as well as Canadian ships around the world. These issues

fall within the *Marine Transportation Security Act*, legislation that does not entirely respond to the post 9/11 environment. A major milestone in the work related to marine security was the development of a big package of new regulations which took effect in July of 2004. Implementation issues related to these regulations will need to be addressed over the next several years.

The TC LSU role has been to provide legal advice to TC in relation to: instrument choice, administrative law, information and privacy law, human rights and transportation security. The advice provided has been informed by the expertise of other sections within the Department of Justice such as the Public Law Group, the Criminal Law Policy Section and the National Security Group. Some of this work may fairly be described as policy development, although not directly (that is TC's role). It has not been involved any litigation or training of TC officials.

#### Role of the Public Law Group:

The Public Law Group (PLG) provides legal services in relation to public law issues. It also contributes to the management and strategic coordination of public law litigation involving the federal government. Much of the advice provided by the PLG is filtered through the LSUs to ensure that they are up to speed on issues affecting their departments and agencies, and to provide consistency.

The PLG recorded \$1.0 million worth of time against PSAT related activities during 2002/03 and \$550,705 in 2003/04. This represents a decrease of \$475,017 in PSAT related activities by the Public Law Group during 2003/04, compared to 2002/03. In considering the reasons for this reduction in PSAT related activities, we would speculate that the PLG had significantly more work during the early days in support of the new *Anti-terrorism Act* and the development of the *Public Safety Act*. Should constitutional challenges to key aspects of the legislation materialize, this would place a significant demand on PLG resources. In addition, it is anticipated that the upcoming statutorily-mandated three-year review of the *Anti-terrorism Act* will require significant involvement by PLG counsel and this is expected to tax the current resource levels of the Group.

In reviewing the activities of the PLG, it is important to remember that it does not have specific commitments under the PSAT Initiative. Their role is to respond to requests for legal advice from other sections within the Department of Justice or from other government departments, through the LSUs. It was noted that the PLG does not lead or carry through on initiatives but

they provide services that are essential in meeting initiative goals. They are like subcontractors that are brought in to provide specialized assistance for a project. The PLG consists of the following centers of legal expertise:

- The Human Rights Law Section (HRLS)

The HRLS is a specialized unit that advises on matters relating to the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and the *Canadian Human Rights Act*. The Section is also responsible for international human rights law, primarily the domestic implications of treaty obligations and individual petitions to international bodies. Lawyers in the Section generally provide litigation support, prepare legal opinions on regulatory and legislative initiatives, as well as on a wide range of questions referred to them by legal services. HRLS supports the Minister of Justice in fulfilling his statutorily prescribed role to scrutinize all legislation and regulations for the consistency of the provisions with the purposes and provisions of the *Charter* and to report any inconsistencies to Parliament.

The advice provided by the HRLS is always based on a pure legal review of the situation. It is not their role, for example, to address whether laws are good or bad and thus their opinions are drafted based on the need to cover legal bases.

The HRLS has provided the following types of PSAT related advice:

- Advice on the development of legislation, regulations and policies. This includes extensive input into the *Anti-terrorism and Public Safety Acts* as well as work on the Advance Passenger Information/ Passenger Name Record (API/PNR) and Marine Security files. HRLS has done a significant amount of work over the last couple of years in relation to sharing of information issues. The increased desire on the part of government departments to share information since 9/11 has resulted in extensive analysis under section 8 of the *Charter*, which provides the constitutionally protected right to privacy. In particular, the development of the API/PNR system, which requires the collection and exchange of information amongst federal departments and agencies and, in some cases, other countries, required extensive work by HRLS with the Privacy Commission, senior CBSA officials and PCO to address their concerns in relation to amendments to the *Aeronautics Act* which were included in the *Public Safety Act*.

- Advice on case specific issues, often involving litigation support. This involves advising on the arguments which may be made in defence of a *Charter* challenge and identifying evidence which could be utilized to support the government position. Examples of case specific issues that the HRLS has advised on include: the challenge by the Federation of Law Societies to the reporting requirements in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* enacted by the *Anti-terrorism Act*; the Juliet O’Neil/Ottawa Citizen case; the Liban Hussein case; the Arar matter, the Khawaja prosecution; section 38 *Canada Evidence Act* matters; and the proposed use of the investigative hearing provision in the Air India case.
- Advice on the consistency of new international instruments and agreements (including those related to the sharing of advance passenger information) related to the prevention and suppression of terrorism with international human rights law obligations and the *Charter*;

This work is being conducted by an extremely limited number of counsel within HRLS. This work is reported to be extremely time-consuming and resource intensive in that it involves novel issues in an unsettled area of the law. The issues on which HRLS has provided advice are of great significance and importance to Canadians and to international partners.

- The Constitutional & Administrative Law Section (CALs)

The CALs provides specialized legal and policy advice and litigation support in response to requests for statutory or technical interpretations of legislation and has had a number of requests related to public security and anti-terrorism over the last few years. One area that CALs is often called on to provide advice relates to the ability to use Royal Prerogative to provide authority for actions or activities that might otherwise not be permissible. A recent example where Royal Prerogative was used relates to the decision not to issue a passport to a Canadian citizen with reported contacts in international terrorist circles.

CALs officials noted that a complicating element in providing advice in this area relates to the line between an issue being a national security or a regular law enforcement case. They noted that while the line is vague, the difference is important as investigators have significantly broader powers to investigate terrorist organisations, which are classified as enemies of the state, as opposed to criminal organisations.

- The Information Law and Privacy Section (ILAPS)

The Information Law and Privacy Section ensures that the positions of the Department of Justice concerning the interpretation of the *Access to Information Act (ATIA)* and the *Privacy Act (PA)* are established in a coordinated and coherent manner that complies with the intent and the letter of these two *Acts*. It maintains an open relationship with the Offices of the Information and Privacy Commissioners.

ILAPS has done a lot of work over the last couple of years in relation to sharing of information issues. The increased recognition of the need to share intelligence information since the September 11, 2001 terrorist attacks has challenged traditional notions in regard to privacy rights. The development of the Advance Passenger Information/ Passenger Name Record (API/PNR) system requires the collection and exchange of information amongst federal departments and agencies and, in some cases, other countries. ILAPS worked with the Office of the Privacy Commissioner to address concerns in relation to amendments to the *Aeronautics Act* which were included in the *Public Safety Act*.

ILAPS also provides legal advice when federal organisations are developing new regulations and policies that could be impacted on by the *Access to Information Act* or the *Privacy Act*. Recent PSAT related work includes providing advice to the Passport Office on the development of face recognition technology, advice on the implementation of the Marine Security provisions and advice on potential impacts of the *USA Patriot Act*.

- The Judicial Affairs, Courts and Tribunal Policy Section (JACTP)

Bill C-36 amended the *Federal Court Act* to create up to 15 new judicial positions (13 for the Trial Division and 2 for the Appeal Division) to ensure the effective and timely processing of the significant additional caseload that was expected to be generated in relation to Immigration and Refugee Claims, the Canadian Security and Intelligence Service, the Canada Customs and Revenue Agency, the *Official Secrets Act* and *Transport Act* Applications. To date, Cabinet has approved funding for 9 additional Federal Court judicial positions and 8 of these positions have been filled.

To obtain Cabinet approval for the financial authority to appoint any additional judges, the Minister of Justice, in support of his recommendation to Cabinet, must demonstrate with objective indicators that such additional judges are required. To this end, the Department of

Justice has assigned a Senior JACTP Policy Advisor and JACTP Counsel to work with officials from the Federal Court, Treasury Board, Citizenship and Immigration and other departments to develop a quantitative workload model to provide objective data on the impact of anti-terrorism, immigration and refugee, and other security related initiatives on the Federal Court's workload.

Over the last year the Federal Court and the Department of Justice collaborated on the development of the first component, which assesses the Federal Court's Immigration and Refugee workload. Once finalised, this model will form the basis for development of further judicial workload models.

#### Advice on Emergency Preparedness Issues:

Under a separate funding arrangement from the primary PSAT funding envelope, the Department of Justice was allocated \$150,418 per year from 2002/03 to 2006/07 to support the provision of legal advice and assistance to the Office of Critical Infrastructure Protection and Emergency Preparedness (OCIPEP). This funding represented one FTE that was intended to cover legal advice and assistance from across the Department of Justice, but primarily by the Federal Prosecution Service. The types of issues these funds were expected to address included:

- Legal implications of information sharing or failure to share;
- Impact of disclosure obligations arising in criminal proceedings upon information sharing;
- Emerging investigatory issues related to cyber threats.

In general, the Department did not specifically allocate or track these funds to specifically cover the provision of legal advice and assistance on emergency preparedness issues. Instead, these funds were added to the Department's overall PSAT budget envelope and were subject to the same allocation process the Department used to allocate its overall PSAT budget. We were told that the main reason for not specifically tracking the allocation or use of emergency preparedness funds was the small dollar value that represented one FTE, being notionally split across various sectors of the Department.

Despite our inability to specifically track the allocation of emergency preparedness funds, a number of key activities covered by those resources were reported to have been carried out by the Department of Justice, including the Federal Prosecution Service and the Public Law Group.

### **3.5. International Linkages**

Given the international nature of the fight against terrorism, virtually all of the Department's work on the PSAT initiative has significant international linkages. This section of the evaluation focuses primarily on two particular areas of the Department's international efforts: case-specific international assistance and broader policy work that the Department carries out in international fora with international organizations and foreign countries.

#### **3.5.1. International assistance**

Canada is party to some 140 international extradition and mutual legal assistance agreements, which provide two important mechanisms through which Canada can assist the international law enforcement community in the detection and suppression of crime and terrorist activity. A number of these treaties are specifically terrorism-related.

The *Extradition Act* provides that if certain preconditions are met, a person may be extradited for one or more of three purposes: prosecution, imposing a sentence, or enforcing a sentence already imposed.

Under the *Mutual Legal Assistance Act*, Canada may apply to a Canadian court to obtain the following assistance on behalf of a requesting state:

- Seizing evidence by search warrant;
- Obtaining evidence through the execution of other *Criminal Code* warrants;
- Obtaining documentary evidence by production order;
- Compelling witness testimony;
- Lending exhibits tendered in court;
- Transferring a detained person to the custody of a foreign country to give evidence or assist an investigation;
- Enforcing foreign fines and foreign orders for restraint and forfeiture;
- Examination of a place or site.

Within the Department's Federal Prosecution Service, the International Assistance Group (IAG) is the central authority for Canada under the *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act*. The group reviews and coordinates extradition and mutual legal assistance

requests made to Canada, as well as those made by Canada to other countries. The IAG also develops and advises on policy in the area of bilateral and multilateral treaties and participates in the negotiation of such agreements.

Since September 11, 2001, there has been a significant increase in the number of terrorism-related extradition and mutual legal assistance requests that the International Assistance Group has been called upon to handle on behalf of the Minister of Justice. In general, given the sensitivity and urgency of the requests tied to such cases, they are usually treated on a priority basis, reflecting the importance of Canada's commitment to the international effort against terrorism. IAG officials also indicate that such cases tend to be litigious, which results in frequently lengthy and labour-intensive PSAT-related caseloads.

Since September 11, 2001, the International Assistance Group has received twelve extradition assistance requests from other countries. The United States accounted for nine of these requests. In four cases the persons have been extradited, two requests were subsequently withdrawn, one person was discharged from the extradition proceedings by the court and five cases are unresolved. The IAG has recorded having spent 1470 hrs on incoming extradition requests for 2003/04. This represents 70% of the 2106 hours IAG recorded on PSAT files during the fiscal year.

In the same time period, the IAG received 27 requests for mutual legal assistance from other countries. The United States accounted for 16 of these requests. The IAG recorded having spent 470 hrs on incoming MLAT requests for 2003/04. This represents 22% of the 2106 hours IAG recorded on PSAT files during the fiscal year. When cases have had implications for Canadian security and intelligence agencies, or involved potentially sensitive national security information, the IAG has worked closely with the National Security Group.

Since September 11, 2001, the IAG has made eight requests for assistance from other countries in gathering evidence for PSAT-related cases. Four of these requests were made to the United States. The IAG recorded having spent 166 hrs on outgoing MLAT requests for 2003/04. This represents almost 8% of the 2106 hours IAG recorded on PSAT files during the fiscal year.

Canada has not made any requests for extradition in terrorism-related cases during this time.



### 3.5.2. Participation in International Fora

A substantial portion of anti-terrorism work involves international activities in which Canada participates in meetings or conducts projects with bilateral partners or global, regional or sub-regional intergovernmental organizations. Global organizations include the United Nations and subject-specific organizations such as the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO). Major regional or sub-regional organizations in which Canada has been active include the Organization of American States, Council of Europe (official observer), Organization for Security Cooperation in Europe (OSCE), APEC and the G-7/G-8. Unlike formally-constituted intergovernmental organizations, the G-8 does not have an independent secretariat, and the hosting, organisational and support work each year devolves on whichever member holds the rotating chairship of the Group. During the calendar year 2002, these duties were assumed by Canada, and significant resources from the Criminal Law Policy Section and the Human Rights Law Section were devoted to the support of meetings on security and terrorism related issues, particularly the meeting of G-8 justice/law ministers held at Mont Tremblant in May 2002.

At the global level, the most critical work involves the implementation of requirements under Security Council Resolution 1373 of 28 September 2001. Some of these are mandatory under the *U.N. Charter*, and Canada is required to report on its compliance to the Counter Terrorism Committee (CTC) established by the same resolution. Canada is also required by the resolution to ratify and implement all 12 of the global anti-terrorism instruments. Canada was already a States Party to the majority of the instruments prior to the 2001 attacks and the ensuing legislation. The 2001 *Anti-terrorism Act* brought Canada into conformity with the two remaining treaties, and Canada is now a States Party to these as well. Some of the work undertaken under the PSAT initiative involved these treaties, and the law amendments needed for ratification were contained in the *Anti-terrorism Act*. The amendments needed to ratify one further treaty, the Convention against biological and toxin weapons, were contained in Bill C-7, enacted at the end of the assessment period, but, while it has clear national security implications, this treaty was not required by the Security Council resolution and the majority of work in support of its ratification was done by Foreign Affairs.

Other U.N.-related work includes work with the U.N. Office on Drugs and Crime (Terrorism Prevention Branch), which is mandated to promote and assist ratification of the 12 existing global legal instruments against terrorism, and its political oversight body, the U.N. Commission on Crime Prevention and Criminal Justice. Canada supports the work of the Branch both

financially and substantively, in an effort to secure the participation of as many other countries as possible in the treaties.

The third area of U.N. activity is the negotiation of new terrorism treaties. Negotiation of a comprehensive convention is ongoing, but talks have stalled and no significant work beyond the occasional status briefing was undertaken during the review period. Other more subject-specific treaties are being amended (by adding supplementary protocols) to take into account terrorism and security issues. Generally, such activities involve Foreign Affairs Canada (FAC), but Justice officials are required to advise on human rights, criminal justice, and some security issues, and sometimes participate in the negotiations themselves, and they would be involved in the domestic implementation of any requirements in these areas.

Outside of the U.N., work within regional, sub-regional and subject-specific bodies includes the negotiation and implementation of treaties and multilateral and bilateral technical assistance with capacity-building. Work in such fora frequently involves technical and human rights/*Charter* issues in which members of the Department have expertise, and work has been undertaken in the context of the Organization of American States (OAS), the Commonwealth, the Financial Action Task Force (FATF) and the Organization for Security Cooperation in Europe (OSCE).

International activities generally involve the work of many departments under the lead of Foreign Affairs, which coordinates input and generally conducts major negotiations. The role of Justice includes active participation in treaties which raise criminal justice issues and human rights law issues or which may require amendments to legislation for which Justice is responsible. It also includes furnishing substantive expertise in technical assistance projects, most commonly in law-related areas such as the development of legislation, training or assistance of prosecutors, international legal cooperation in criminal matters and human rights issues.

### **3.5.3. United Nations**

Under Security Council Resolution 1373 of 28 September 2001, all UN Member States are required to report on actions taken to implement the counter-terrorism measures required by the resolution. This obligation is open-ended and ongoing. Both compliance and periodic reporting are mandatory. Reports are reviewed by the Counter Terrorism Committee (CTC) established by the resolution and may generate requests for follow-up or progress reports in areas where the Committee questions compliance. The value to Canada was demonstrating Canadian compliance

and leadership with respect to Security Council requirements. Participation of Canada and DOJ in this exercise was not discretionary.

Work in support of Canada's participation in the United Nations Office on Drugs and Crime (UNODC) Terrorism Prevention Branch and U.N. Commission on Crime Prevention and Criminal Justice also took place. Work by the CLPS included organizing and participating in bilateral (Canada-UNODC) meetings, preparation for and attendance at the 2002 and 2003 Sessions of UN Crime Commission, as well as preparations for the May, 2004 session. The Commission is the political oversight body for ODC. Canada is a supporter/donor to the UN programme and is involved in a General Assembly resolution which will expand its mandate with respect to terrorism and the links between terrorism and transnational organized crime. The Commission and ODC deal with a full range of crime issues, but all 3 agendas included a substantial terrorism/security element.

Attendance ensured that Canada was represented in an international policy-making body. It also provides a basis for other international counter-terrorism work under UN auspices, including ongoing and future capacity-building projects, thereby expanding Canadian influence and ensuring the security of Canadians.

Ongoing UN-related work by the Department also included:

- Monitoring of *UN Suppression of Terrorism Regulations (UNSTR)*, which implement requirements of UN Security Council Resolutions 1267 and 1373 dealing with measures against the financing of terrorism and advising on the constitutional and *Charter* vulnerabilities of these regulations and how they could be improved from a human rights perspective.
- Preparation of a response to the U.N. Special Rapporteur on Racism involving research and preparation of elements of the Canadian response to a report dealing with the impact of anti-terrorism legislation on minorities.
- Development of policy, legal and drafting advice on the elaboration of new non-proliferation-related and other terrorist offences and a ship boarding regime for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

- Supported the development of amendments to the two instruments for negotiation at a Diplomatic Conference in 2005 including interdepartmental consultations and other preparatory work and participation in the negotiation of complex and sensitive legal and policy issues of national and international significance (flag state sovereignty, nuclear non-proliferation policy, primary extra-territorial prosecution jurisdiction, etc.).
- Supported amendments to the Convention for the Physical Protection of Nuclear Material (CPPNM) to provide for, among other things, a new offence for sabotage of a nuclear facility and liability for environmental damage resulting from certain Convention offences. Possible inclusion of environmental damage to support a criminal offence is novel and controversial.
- Prepared reports and responded to queries from the bodies monitoring international legal instruments on subjects other than terrorism (e.g., the U.N. human rights treaties) with respect to any conformity or compliance concerns about Canada's anti-terrorism laws and procedures.

#### **3.5.4. Organization of American States (OAS)**

Under the auspices of the PSAT initiative, the Department has also been actively involved in supporting the work of the Organization of American States (OAS) in its anti-terrorism efforts. The OAS Inter-American Committee against Terrorism (CICTE) is the OAS committee with general responsibility for terrorism. Generally, the Department provided substantial support to Foreign Affairs (FAC). DOJ input assisted the OAS and FAC in developing anti-terrorism documents approved by CICTE, including the 4th session of CICTE in Montevideo, Uruguay. Of particular importance was the development of amendments to the CICTE statute, which legally establishes CICTE and sets the terms for most anti-terrorism work by the OAS. These efforts were primarily led by the Criminal Law Policy Section and were supported by Human Rights Law Section. Work included:

- Participation in meetings of CICAD (OAS Committee on Drug Trafficking) to revise money-laundering model laws to include financing of terrorism.

- Review and expansion of the scope of OAS model regulations on money-laundering to include and deal with financing of terrorism. Initial revisions to model laws were approved, but further changes remain under consideration.
- Supported ongoing work on terrorism and the OAS instrument, the *Inter-American Convention against Terrorism* including interdepartmental preparations for Canadian delegations to OAS meetings, and participation in delegations where necessary.
- Preparation of general advice and review of draft texts leading to the *Declaration of Nuevo Leon*, produced by the 2003 Special Summit of the Americas.
- Prepared and attended as Canadian expert at a 2-day OAS event: “Meeting of Governmental Experts to Exchange Best Practices and National Experiences in Anti-terrorism Measures from a Human Rights Perspective.” (Washington DC).
- Attended and advised on the Fourth Regular Session of the InterAmerican Committee against Terrorism (CICTE), Montevideo, Uruguay, January, 2004. Substantive elements of the meeting included country reports on implementation of previous recommendations; hemispheric cyber-security strategy; proposed amendments to the CICTE statute and rules of procedure of CICTE, and drafting of Montevideo Declaration and CICTE workplan for the coming year.
- Participation in general work on mutual legal assistance, extradition and supporting OAS infrastructure.
- Participation in the work of experts on mutual legal assistance and extradition was agreed to by OAS Justice Ministers (REMJA) in April 2004. Work on a secure e-mail system for international legal cooperation communications within OAS community continues. The Department provided general support for the Minister and attended REMJA meetings in this role. Canada hosted and chaired a meeting of experts in Ottawa in April 2003.

Generally, this work is seen to enhance security cooperation within the region, helping to identify areas where Canada might provide assistance, and maintains and enhances Canada’s position within the OAS.

### **3.5.5. G-8 (“Roma” Group, ministerial and summit meetings)**

The G-8 Lyon (organised crime) and Roma (terrorism) working groups meet twice per year, justice and law ministers meet once per year and each year concludes with a G-8 Summit Meeting. During the review period Lyon/Roma meetings took place in May 2002 (Vancouver), October 2002 (Montreal), February and April 2003 (Paris), and February 2004 (Washington). Ministerial meetings took place in May 2002 (Mont-Tremblant), and May 2003 (Paris). Summit meetings took place in June 2002 (Kananaskis, Alta.), and June 2003 (Evian, France).

Normally, the involvement of Justice consists of the preparation of advice on relevant issues, and in the case of working group and ministerial meetings, the attendance of one or more persons as members of the Canadian delegation. Lyon/Roma meetings are normally attended by two members of the Criminal Law Policy Section. The G-8 chairmanship rotates among Member States, and in 2002, during the assessment period, Canada held this position. As is the custom within the organization, Canada hosted the working group, ministerial and summit meetings that year. Specific work undertaken included:

- Preparation of advice and materials, consultation with other departments and other G8 delegations, and attendance at meetings of G8 bodies where necessary: Roma Group, Counter-terrorism Action Group (CTAG), G-8 ministerial meetings and G-8 summit meetings. General participation in G-8 counter-terrorism discussions and programmes brings substantial benefits in influence and cooperation with other G8 members. The work also supports effective Canadian participation in the annual meeting of G-8 ministers of justice and the interior each year.
- Policy support, advice and conference organization was provided for the 2002 G8 Justice and Interior Ministers’ Meeting (Mont-Tremblant 13-14 May, 2002), co-chaired by the Minister of Justice and the Solicitor-General. The Ministers gave their approval to several deliverables on terrorism that were the culmination of the meeting. Canada had the Presidency for the G8 in 2002, and the theme for the Justice and Interior Minister’s Meeting was “Protecting Society from International Terrorism and Crime”. The agenda covered the legal aspects of terrorism financing, the role of law enforcement and intelligence services in Chemical, Biological, Radiological and Nuclear weapons (CBRN) threat assessment and incident response, the appropriate use of technology to ensure public safety, the protection of children on the Internet, and the convergence of international terrorism and crime.

### **3.5.6. Council of Europe (CoE)**

While not a member of the Council, Canada has official observer status and has played an important role in criminal justice areas, including the development of legal instruments such as the 2000 Convention on Cybercrime. Observers are generally allowed to play an active role in proceedings and, following the 2001 terrorist attacks, the CoE established several committees and working groups on which Canada participated. This includes expert committees dealing with: the Protection of Witnesses and *Pentiti* (“PC-PW”) and Special Investigative Techniques in Relation to Acts of Terrorism (“PC-TI”).

A Canadian observer from Justice participated substantively in the work of both committees, as well as the October 2003 meeting of European Justice Ministers (Sofia, October 2003) to which the experts reported. In addition to input on substantive issues, Departmental experts assisted FAC in advancing the Canadian view that Europe should focus its attention on implementing the existing global anti-terrorism instruments and not proceed with a comprehensive Convention of its own which might distract from the other efforts already underway. Officials also participate in a Council committee established to consider the feasibility of further international instruments and its work in this area continues.

The benefits of participation in Council activities are seen as important for Canada. These include gaining general access and influence with major trading and strategic allies, direct participation in specific proceedings, and participation in some treaties. Canada has been invited to ratify the 2001 Convention on Cybercrime and is in the process of doing so.

### **3.5.7. Bilateral and regional capacity-building activities**

The Department has also provided support on a number of other important international initiatives related to anti-terrorism, including:

- Technical and human rights law assistance in the Foreign Affairs-led Canada Counter Terrorism Capacity-Building (CTCB) Program. The purpose of the Program is to provide funding and assistance in building counter-terrorism capacity in other countries. The Department’s work is expected to eventually support the operation of the CTCB Program. The benefits of the Program for Canada include better global and regional security through the assistance of other countries in security matters, promotion of Canadian values and the

essential balance of security and human rights policies, and generally-increased influence for Canada within the international community.

- Technical assistance, policy advice and training activities were provided in the area of cyber-crime /cyber-security. Work included drafting/ negotiation/follow-up on: Council of Europe Convention on Cyber-crime, Commonwealth Model Law on Computer and Computer-related Crime. Legislative framework training was given to OAS/APEC/ Commonwealth States.
- Capacity building regarding measures to counter terrorist financing was provided in the form of training to representatives of a number of foreign nations. This training included training on the human rights law issues associated with measures developed to address terrorist financing.
- Policy and advice for the purpose of drafting effective counter-terrorism legislation was provided to Caribbean Commonwealth countries. This included the facilitation of Commonwealth regional workshop sessions on Legislative Measures to Combat Terrorism and Implement Security Council Resolution 1373 in February 2003. Delegates from 10 Commonwealth countries within the Caribbean participated in the seminar. The purpose of the workshop was to provide an opportunity for detailed consideration of the policy issues and legislative options for the implementation of UN Security Council Resolution 1373 into domestic law. The Commonwealth Secretariat issued its report on the meeting in May, 2003.
- Attendance at a meeting in London, England from January 15-17, 2002, which was convened by the Legal and Constitutional Affairs Division of the Commonwealth Secretariat. The Department attended to provide advice using Canada's *Anti-terrorism Act* as a model. Canada played a key role in preparing drafting instructions for model legislative provisions, as well as guidelines for administrative and other measures, which countries could use as a basis for developing a domestic strategy to fully implement UN Security Council Resolution 1373. Also, the Group was to consider the special recommendations of the FATF (Financial Action Task Force) on Terrorist Financing and make any appropriate recommendations regarding possible legislative or other action for implementation. This led to the *Report of the Expert Working Group on Legislative Measures to Combat Terrorism*, published by the Commonwealth Secretariat in February 2002. This report was the basis for the subsequent Commonwealth Secretariat document *Model Legislative Provisions on Measures to Combat Terrorism*, published in September 2002 and since circulated to all Commonwealth Member



States. These materials have also been used by the UNODC Terrorism Prevention Branch as the basis for its assistance to all U.N. Member States with common-law systems.

- Participation by the Human Rights Law Section with Foreign Affairs Canada in bilateral meetings with representatives from Indonesia (July 2003 and August 2004) and China (April 2004) where presentations were made on how to incorporate human rights protections into anti-terrorism legislation and policies.
- Presentation by counsel from the Human Rights Law Section, on Canada's behalf, at the March 15-16, 2004 Workshop on the Protection of Human Rights While Countering Terrorism sponsored by the Organisation for Security Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR) with respect to how states can ensure the protection of human rights and freedoms while still taking strong measures to combat terrorism. Other countries in attendance at the Workshop expressed the view that Canada provided a model approach for the rest of the world in this area.

### **3.6. Support for Access to Justice**

A component of the Department's PSAT initiative that was expected to support access to justice was the establishment of a PSAT component to the Legal Aid Program. A budget of \$2.5 million per year in contribution funding was originally established for this purpose. The particular objective is to ensure that provinces, territories and/or legal aid delivery entities have the financial resources to ensure fair and expeditious trials in public security and anti-terrorism prosecutions. The Fund is intended to provide legal aid to economically disadvantaged defendants thereby ensuring that judicial processes are considered to be fair and in accordance with Canadian laws and international commitments.

The Legal Aid component of the initiative was originally conceived in 2002 to address expected increases in the demand for legal aid resulting from enhanced border security measures following the September 2001 terrorist attacks. Increased costs in immigration and refugee legal aid were expected due to an increase in the volume and complexity of immigration and refugee cases.

By 2003, prior to the establishment of Terms and Conditions for PSAT Legal Aid, it became clear to departmental officials that border issues would represent only one of several primary causes for increased legal aid costs stemming from the post-2001 environment. The Terms and

Conditions were therefore approved in October 2003, somewhat modified from the original intent of this component of the initiative. Instead of focusing only on borders, the Terms and Conditions also included provision for the likely increase in legal aid costs stemming from the provisions of the *Anti-terrorism Act* as well as for proceedings under the *Extradition Act* where the requesting state alleges the commission of a terrorist act.

Between implementation of the initiative and September 2004, no Legal Aid funding had been expended under PSAT Legal Aid. Departmental officials attribute this to the following factors.

- First, the Terms and Conditions for PSAT Legal Aid were not submitted to, nor approved by Treasury Board until October 2003. The Terms and Conditions were submitted concurrently with those for the new Legal Aid Strategy in October 2003.
- Second, there is a significant lag between the initiation of terrorism-related investigations and the subsequent judicial proceedings that would trigger an application for legal aid. Officials estimate an average lag of 18 to 24 months.
- Third, increases in legal aid costs for immigration and refugee cases have generally been absorbed within the existing legal aid system. Increased funding was provided to provinces and territories under the existing legal aid system starting in 2003-04. This included enhancements to Immigration and Refugee Legal Aid.
- Finally, resources for PSAT Legal Aid were returned to Treasury Board as part of the government-wide budget reallocation/reduction exercise for fiscal year 2003/04.

Departmental officials indicate that while no funding has yet been provided for PSAT Legal Aid cases, there are several known cases that will likely require funding starting in 2004/05.

### **3.7. Departmental Management of the Initiative**

#### **3.7.1. PSAT Steering Committee**

A senior level departmental Steering Committee was established at the outset to oversee the PSAT initiative. The Committee was chaired by an Associate Deputy Minister and membership was drawn from those National Capital Direct Reports to the Deputy Minister who shared in the

responsibility for the initiative including the Policy Sector, Federal Prosecution Service, Criminal Law Policy Section, Public Law Group, Civil Litigation Branch and the Citizenship, Immigration and Public Safety Portfolio. Corporate Services personnel from the Resource Management and Planning group provided secretariat support to the work of the Steering Committee. Terms of Reference were not developed for the Committee.

Despite the lack of Terms of Reference, the Steering Committee did establish a clear, if narrow focus for its role in overseeing the PSAT initiative. The Committee's focus was almost exclusively on resource allocation issues. The first meetings of the PSAT Steering Committee in 2002 were focused on reviewing the business cases that were submitted by groups within the Department and making decisions on resource allocations (for inclusion in the Treasury Board Submission that was being developed) based on the relative priorities that the Committee perceived from those business cases.

We were advised that the Committee did not see a role for itself in leading, overseeing or coordinating any of the ongoing subject matter work being conducted by the Department.

Following the initial allocation of PSAT funds within the department in late 2002, the Steering Committee was dormant for approximately 18 months before being reconstituted in the Spring of 2004. During the period when the PSAT committee was dormant, the Corporate Service Sector assumed additional responsibilities to fill the void and ensure that administrative requirements were met. The dormancy of the Committee was due, at least in part, to the departure of the Associate Deputy Minister who was initially chairing the Committee. During this period the PSAT Steering Committee had little involvement in the management of the initiative and the PSAT business planning process became, essentially, a financial apportioning of costs. That is, there was no overall planning or coordination of PSAT spending; rather the areas received PSAT funding based on the amount of money they spent during the year.

The PSAT Steering Committee was reconvened in the Spring of 2004 to review PSAT Business Plans from each of the areas requesting PSAT funds for 2004-05. The Committee appears to have taken a more hands on approach in reviewing and assessing the plans and this should lead to better control and coordination of PSAT planning and spending in the future.

The PSAT initiative is a highly complex initiative due to the subject matter concerned and the fact that several areas of the Department contribute to the achievement of results. It was noted during interviews that this was the first time that the Department had established a committee of

this nature to oversee an initiative and that the members of the PSAT Steering Committee didn't perceive that they had a role to play in guiding and directing the totality of the Department's PSAT related work.

### **3.7.2. Financial and Performance Management**

The use of business cases in determining allocation at the outset of the Initiative and for the 2004-05 fiscal year helped provide a formula for allocating resources based on needs and priorities. That said, the final decision on allocations for the 2004-05 fiscal year was again allocated relatively late in the year which put managers many months behind in finalising their budgets.

Significant shortcomings were noted in the process for allocating funds during the first two years of the Initiative. This was, at least in part, a result of the PSAT Steering Committee having been dormant during this period and thus not providing timely direction with respect to resource allocation decisions. Over the first two years funds were notionally allocated to the sectors involved in PSAT based on the business cases which were developed in support of the Department's Submission to Treasury Board (TB) and the TB Decision. Managers were told to spend their money on PSAT related activities and their budgets would be reimbursed at the end of the year. Some of the people we interviewed noted that they were uncomfortable with this "cash management" approach and that it made it difficult to plan and budget as they could not be sure that the money would be available at the end of the year. As a result, some sectors did not undertake all of the activities they might have out of concern that it could place them in a financially precarious situation.

For the 2004-05 fiscal year, the PSAT Steering Committee revised the process and the funds were allocated and placed directly into the budgets of the sectors involved based on planned activities for the year. This was expected to make it easier for the sectors to budget and plan their activities as they knew up front exactly how much money was available to spend.

Several Sectors of the Department have experienced significant workload increases that are expected to be permanent and ongoing after 2006-07. Given the Department's central role in providing advice to all of Government, it is crucial that the Department be adequately funded to continue its PSAT-related work.

Given that the Department's spending on PSAT related activities has been well short of the amount of funding it received, we must conclude that the level of resources allocated to the Department was sufficient. However, during interviews we were advised repeatedly of resource constraints for areas of the Department providing "public safety" services. The areas of the Department most commonly referred to were regional offices with a heavy volume of immigration litigation and certain activity areas of the National Security Group (NSG). We have been advised that the Department does not have the flexibility to fund these activities because of the narrow terms of the Department's PSAT funding, as a frozen special purpose allotment.

From a financial standpoint, the Department has also had some difficulty in getting managers to code PSAT related spending in the IFMS (Integrated Financial and Materiel System) which makes it difficult to track spending. Certain groups within the department are reportedly reluctant to enter the information in IFMS because some already enter it in Caseview. The most significant challenge in this area is in tracking salary information due to the fact that the Salary Management System (SMS) needs to have people coded in the system at the start of the year because it can't be coded retroactively. This makes it very difficult to capture the work of people that are not working on PSAT activities on a full-time basis. As well, there is no interface between the Timekeeping System (TKS) and the SMS. In comparison, it is reported to be relatively easy to track operations and management spending (O&M). The end result of this shortcoming is that, while we would have liked to provide more information on PSAT spending by each of the sectors and sections, we have been advised by Financial Services that this is not possible given current system capabilities. We are thus not able to assess efficiency and effectiveness issues.

In general, despite the development of an RMAF in 2003 that set out measurement and reporting commitments for PSAT activities, the extent to which the various PSAT practitioners in the department are able to report was found to be uneven. A number of key groups in the department were unable to report on their activities to any meaningful extent. Some, such as the Criminal Law Policy Section and the Public Law Group, were able to provide complete and thorough information, while others such as Civil Litigation, FPS and CIPS were unable to provide complete information in the four month window provided.

### **3.7.3. Overall Coordination of the Initiative**

As reported earlier, PSAT Steering Committee members did not see themselves as "steering" the PSAT-related activities of the Department. In general, we found that the Department lacked an effective overall coordination mechanism during the first two years of the initiative.

Most key interviewees felt that there were shortcomings in overall coordination of the Department's PSAT related activities. However, some believe that adequate coordination does take place via existing networks and through informal approaches. It must be noted that given the nature of the subject matter there is a natural tendency towards compartmentalisation of information (i.e. information is shared on a need to know basis). It was also suggested that the "departmental ethos" is to pitch in when needed. This ensures that the work gets done and the information gets shared quickly when needed.

More active involvement in ongoing subject matter coordination might strengthen overall governance and horizontal management of the initiative, both departmentally and interdepartmentally. This might reduce the risk of overlap and duplication and help align departmental activities with broader governmental objectives. We noted a lack of clarity among departmental officials of what activities would properly fit within the scope of the PSAT Initiative.

It was further suggested in interviews that there is no forum within the Department to draw together the participants in policy development or to resolve competing or otherwise complex legal issues. An exception to this is that there are regional and national litigation committees which vet and approve the proposed litigation positions which the Attorney General of Canada will be advancing in court in significant court cases.

In general, a common theme arising in discussions with interviewees was the view that the National Security Group (NSG) within the Federal Prosecution Service is seen as a natural logical focal point for coordination of the Department's PSAT related activities. However, it is clear that the NSG lacks the resources to take on all of the responsibilities that this would entail and, as a result, tends to focus on high priority operational matters.

While there have been few formal intradepartmental coordination mechanisms, there have been a number of interdepartmental information sharing committees. The Department of Justice has recently established an interdepartmental committee, chaired by the Criminal Law Policy Section, to share information and prepare for the three-year Parliamentary Review of the *Anti-terrorism Act* (C-36). This committee provides a forum for departments to identify and prepare for any potential issues that could arise during the Parliamentary Review.

## 4. CONCLUSIONS AND RECOMMENDATIONS

The general consensus from interviewees was that the *Anti-terrorism Act* is a very solid piece of legislation and that it has a proper mix of respect for human rights and the need to protect Canadians.

### Coordination of the Initiative

There did not appear to be sufficient coordination of the wide range of PSAT activities being carried out by the DOJ. The PSAT Steering Committee has focused almost exclusively on resource allocation issues and did not see a role for itself in leading, overseeing or coordinating any of the subject matter work of the Department. More active involvement in ongoing subject matter coordination and greater cognizance of the various activities, workloads and results of the PSAT initiative might strengthen overall governance and horizontal management of the initiative. This would reduce the risk of overlap and duplication and help align departmental activities with broader governmental objectives. This would also assist the Steering Committee to prioritize the work being done by the Department, which would in turn assist in the budget allocation exercise.

- **Recommendation #1:** Members of the PSAT Steering Committee should play a greater oversight and coordinating role to ensure that the full implications of the PSAT work of the Department are understood and appropriately funded.

**Management Response:** Agreed. While the Committee recognizes that each sector needs to continue to be responsible for its own PSAT-related activities, the complexity of the PSAT file and the importance of this issue for the Government require that the Committee ensure more effective horizontal management and overall governance of the initiative.

## **Financial Management**

The process for allocating funding needs to be strengthened to ensure that managers can undertake and display stewardship towards planned activities with full confidence that budgeted funds will be available according to set priorities. The “cash management” approach that was used during the first two years of the initiative may have had an impact on the achievement of results. Budgets for the 2004-05 fiscal year were not allocated until several months into the fiscal year.

- **Recommendation #2:** Budgets should be allocated earlier in the fiscal year to allow managers to implement business plans and activities.

**Management Response:** Agreed. An earlier allocation of budgets would improve future forecasting and planning horizon for managers and allow for greater permanency of employment.

## **Financial and Performance Information**

The Department needs to strengthen its capacity to capture and track financial and performance information. The Department does not have an effective initiative-wide reporting system, and is not well prepared to fulfill the reporting requirements of 2007.

- **Recommendation #3:** The Department should ensure that financial information is available by all sectors so that efficiency and effectiveness can be assessed during the final evaluation.

**Management Response:** Agreed. The Committee will work with Financial Services to determine how it could facilitate the work of managers who need to enter PSAT-related information in the Integrated Financial and Material System (IFMS), taking into account other systems used such as Caseview, the Salary Management System and the Timekeeping System.

- **Recommendation #4:** Current and anticipated performance information needs should be examined and addressed to ensure that the Department’s performance reporting obligations can be met in 2007.



**Management Response:** Agreed. The Committee will ensure that all sectors collect and track the information identified in the RMAF to allow for the preparation of the upcoming annual reports in a timely and thorough fashion.

The trouble we had in collecting data for this evaluation exercise is highlighted in the lack of performance information for the pilot project at Dorval airport. The Airport project stands out due to the cost of the project and the fact that, while the project accounts for approximately 20% of the Department's total PSAT expenditures, there is no documentation on what the project is accomplishing in terms of PSAT and because there are plans to expand this project to other airports and some funding has already been allocated for this purpose.

- **Recommendation #5:** A detailed evaluation study should be undertaken to assess the efficiency and effectiveness of the Airport Project at Dorval prior to expanding it to other Canadian airports.

**Management Response:** Agreed. A separate evaluation study will be undertaken to be able to report on the results achieved by the Airport Project.

**APPENDIX A :**  
**List of training provided in relation to**  
**Public Safety and Anti-Terrorism**

When	Where	Number & Type of Participants	Title/Type/Results of Training
Dec. 3-4, 2001	Aylmer, Quebec	Approx. 130 participants from all across the DOJ, including regional offices and LSU	<p><b><u>Bill C-36 Orientation Training Session</u></b></p> <ul style="list-style-type: none"> <li>- Civil Litigation Branch hosted this 2-day training session</li> <li>- Presenters came from all across the Department as well as national security partner organisations.</li> <li>- The objective of the session was to provide basic training/ share information on the <i>Anti-terrorism Act</i> to prepare DOJ personnel for its implementation.</li> <li>- Participants rated the overall conference as very useful.</li> </ul>
December 2001	Ottawa, Ontario	Approx. 100 participants from all across the DOJ, including LSUs	<p><b><u>Lunch and Learn – Bill C-36 Orientation Training Session</u></b></p> <ul style="list-style-type: none"> <li>- Hosted by Professional Development Directorate.</li> <li>- Presenters came from all across the Department. There were specific presentations on <i>Charter</i> issues and the human rights protections incorporated into the legislation.</li> </ul>
April 2002	Ottawa	Members of the RCMP, the Ontario Provincial Police and la Sûreté du Québec	<p><b><u>The Anti-terrorism Act: An Act of Prevention – Law enforcement focused training session</u></b></p> <ul style="list-style-type: none"> <li>- This training session provided an introduction to the key elements of the <i>Anti-terrorism Act</i>. Changes to the <i>Criminal Code</i>, the <i>Canada Evidence Act</i> and the <i>Security of Information Act</i> were covered.</li> </ul>
May 2002		Produced and disseminated 2,500 English and 1,000 French CD ROMs to police	<p><b><u>The Anti-terrorism Act: An Act of Prevention – Training Video</u></b></p> <ul style="list-style-type: none"> <li>- This 64 minute training video was a joint production of the Department of Justice and the RCMP.</li> </ul>

<b>When</b>	<b>Where</b>	<b>Number &amp; Type of Participants</b>	<b>Title/Type/Results of Training</b>
		forces across Canada	<ul style="list-style-type: none"> <li>- The video was recorded during the training session referred to above.</li> <li>- A senior member of the RCMP suggested that this video is the best training recording he has ever seen.</li> </ul>
June 11-12, 2002	Ottawa, Ontario	97 people registered for the session including: <ul style="list-style-type: none"> <li>• 46 from FPS Regional Offices</li> <li>• 5 from FPS Headquarters</li> <li>• 7 from Ottawa/Gatineau Prosecutions</li> <li>• 21 provincial government representatives from across Canada</li> </ul>	<p><b><u>Prosecutor Training Session on the Anti-terrorism Act (C-36)</u></b></p> <ul style="list-style-type: none"> <li>- National Security Group and Criminal Law Policy Section co-hosted this 2-day training session.</li> <li>- Presenters came from all across the Department as well as national security partner organisations.</li> <li>- The objective of this session, was to provide training on the <i>Anti-terrorism Act</i> so that participants may return to their jurisdiction and train other crown counsel and police.</li> </ul>
March 21, 2003	Ottawa, Ontario	Approx. 50 DOJ counsel	<p><b><u>First Annual Department of Justice National Security Law Conference</u></b></p> <ul style="list-style-type: none"> <li>- The LSU at the Communications Security Establishment hosted this 1-day conference</li> <li>- Discussed issues relevant to the security and intelligence community.</li> </ul>
May 26-27, 2003	Aylmer, Quebec	Approx. 200 DOJ employees from across the country	<p><b><u>Privacy goes public: Thinking about Privacy in the 21<sup>st</sup> Century Conference</u></b></p> <ul style="list-style-type: none"> <li>- This 1½ day conference was organised by an advisory committee that included representatives from across the Department of Justice.</li> <li>- The purpose of this conference was to bring</li> </ul>

When	Where	Number & Type of Participants	Title/Type/Results of Training
			<p>together legal and policy decision makers from the Department, academia, and the private sector to discuss and debate critical issues and acquire new insights into privacy challenges which impact both government and the greater society. The issue of Public Safety was of primary interest during the discussions at this conference.</p>
<p>May 25, 2004</p>	<p>Ottawa, Ontario</p>	<p>Approx. 140 Justice counsel from a broad spectrum of headquarters sections, legal service units, and regional offices attended</p>	<p><b><u>Second Annual Department of Justice National Security Law Conference</u></b></p> <ul style="list-style-type: none"> <li>- The National Security Group hosted this 1-day conference and presenters came from all across the Department</li> <li>- The theme of the conference was “Sharing and Protecting Information: Towards a Justice Position”</li> <li>- The mission of the conference was to build linkages and increase cohesion between Justice counsel in the national security and intelligence community in order to provide better legal , advisory and prosecution services and to make greater contributions to policy development</li> <li>- 96% of participants that completed evaluation forms reported general satisfaction with the conference</li> <li>- 83% said that the conference was generally, greatly or extremely successful at building linkages and increasing cohesion between Justice counsel.</li> <li>- 87% said that the conference was generally, greatly or extremely successful at helping to provide better legal and advisory services and to make greater contributions to policy development.</li> </ul>

<b>When</b>	<b>Where</b>	<b>Number &amp; Type of Participants</b>	<b>Title/Type/Results of Training</b>
July 5-6, 2004	Ottawa, Ontario	34 national security law practitioners from FPS headquarters and regional offices, FPS Ottawa/ Gatineau office, and LSUs	<p><b><u>Department of Justice National Security Law Practitioners Meeting</u></b></p> <ul style="list-style-type: none"> <li>- The National Security Group hosted this 2-day Practitioner/Prosecutor meeting</li> <li>- Focused on lessons learned to date in dealing with new ATA and ordinary criminal law processes as they relate to anti-terrorism.</li> <li>- Provided opportunity for free flow of information on current investigations, including those that are not public, and strategic matters.</li> </ul>
<b>RCMP training supported by RCMP LSU</b>			
Ongoing	Various locations, including: Fredericton, Montreal, Ottawa, London, Regina, Surrey, and Abbotsford	Over 300 RCMP Counter-Terrorism Officers	<p><b><u>RCMP counter-terrorism officer training on the Anti-terrorism Act</u></b></p> <ul style="list-style-type: none"> <li>- This 2½-day course was designed by the RCMP Learning and Development Branch in conjunction with the LSU at the RCMP and the Criminal Law Policy Section.</li> <li>- RCMP counter-terrorism officers interviewed noted that this course provides good information on the Act.</li> </ul>
<b>Citizenship Immigration and Public Safety Portfolio training</b>			
Ongoing	Immigration offices around the world, including Moscow, Syria, Columbia,	Front-line CIC/CBSA staff, i.e. visa officers, migration integrity officers, customs officers	<p><b><u>Specialised training on issues related to public safety and anti-terrorism</u></b></p> <ul style="list-style-type: none"> <li>- The CIPS LSU has been involved in development and provision of training designed to raise awareness and tighten controls. Training includes coverage of new information sharing rules.</li> </ul>

<b>When</b>	<b>Where</b>	<b>Number &amp; Type of Participants</b>	<b>Title/Type/Results of Training</b>
	Singapore, Hong Kong		
Ongoing	Dorval Airport	Front-line officials with partner agencies (RCMP, CBSA, CIC)	DOJ lawyers working on the Dorval airport project provide two week full-time training sessions twice yearly on legal issues related to investigative techniques