VOLUME TWO
PART 2: POST-BOMBING INVESTIGATION AND RESPONSE

CHAPTER IV: CSIS/RCMP INFORMATION SHARING

4.0 The Evolution of the CSIS/RCMP Memoranda of Understanding

The Memoranda of Understanding (MOUs), signed between the RCMP and CSIS, are the central instruments used to define the nature of CSIS/RCMP cooperation, especially in relation to the issue of information sharing. The aim of an MOU is to provide additional clarity in defining the distinct mandates of the two organizations, as well as to offer general guidance as to ways in which the organizations need to, and should, share information.[1]

Professor Wesley Wark testified that, historically, RCMP/CSIS MOUs were agreements made solely between these two agencies. There was "…nothing built into them particularly that would provide for ministerial direction," nor was there any other support to make that agreement work,[2] aside from a limited conflict resolution role, which the agencies left to the Solicitor General in the first MOU.[3] Wark stated that the early MOUs reflected the reality that, generally, the intricacies of CSIS/RCMP cooperation were left to CSIS and the RCMP to work out on their own.[4]

The 1984 Memorandum of Understanding

On July 17, 1984, the RCMP and CSIS entered into their first MOU, consisting of 17 separate agreements.[5] The 1984 MOU was in place at the time of the Air India bombing. The most important agreement, at least in relation to the Air India investigation, was the one entitled "Transfer and Sharing of Information."[6] This MOU provided that, "…pursuant to section 12 of the *CSIS Act*," CSIS "shall provide" assessments or information to the RCMP respecting a number of RCMP responsibilities, including the investigation of security offences and various protective duties, as they became available or when they were specifically requested.[7] Section 12 of the *CSIS Act*[8] is the general provision empowering CSIS to collect and report to the Government of Canada information about threats to the security of Canada.

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1 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1465.
2 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1466.
3 Exhibit P-101 CAA0076, p. 4.
4 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1466.
5 Exhibit P-101 CAA0062.
6 Exhibit P-105, Tab 2; Exhibit P-101 CAA0076; Testimony of Henry Jensen, vol. 18, March 7, 2007, p. 1650.
7 Exhibit P-101 CAA0076, p. 2.
8 *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.

The MOU further provided that, pursuant to section 19(2) of the *CSIS Act*, CSIS "shall provide" information to the RCMP respecting the "…investigation and enforcement of alleged security offences or the apprehension thereof," as well as with respect to certain indictable offences where the RCMP was the police of jurisdiction.[9] Section 19(2) is the provision specifying circumstances under which CSIS is permitted to disclose the information it collects, including disclosure as necessary for the performance of CSIS's duties and functions, and specifically including disclosure to peace officers of information relevant to the investigation or prosecution of "…an alleged contravention to any law of Canada."[10]

There were debates between the agencies about the interpretation of the MOU, and particularly the extent of the obligations that it imposed on CSIS.[11] Section 19(2) of the *CSIS Act* provides that "…the Service *may* disclose information" in the enumerated circumstances, leaving a legislated discretion as to whether information would in fact be disclosed [Emphasis added]. In contrast, the MOU used the word "shall" when describing the information that CSIS was to provide to the RCMP.[12] The RCMP interpreted the MOU as making CSIS disclosure mandatory. According to then RCMP Deputy Commissioner of Operations, Henry Jensen, who was involved in the discussions with CSIS leading up to the MOU, the MOU imposed an obligation on CSIS to provide information to the RCMP about security offences. Essentially, he viewed the MOU as converting the discretion to share, conferred on CSIS by section 19 of the *CSIS Act*, into a positive obligation that made sharing mandatory and regulated the manner in which CSIS could exercise its discretion under the law.[13] Jensen explained that this was done pursuant to a Cabinet directive passed on through the Solicitor General to the group who developed the MOU.[14] CSIS disagreed and interpreted section 19 as permitting CSIS to disclose, but leaving the final discretion in the hands of the CSIS Director.

Other contentious issues related to the nature of the materials that CSIS had agreed to provide under the MOU and the timing of disclosure. Jensen stated that the obligations imposed on CSIS to provide information through the MOU applied to both raw materials and analysis.[15] CSIS, however, would often take the position that access to raw materials would not be provided, and that only the resulting information obtained had to be disclosed.[16] Jensen also believed that the MOU imposed an obligation on CSIS to provide information as soon as it was available, in "real time", when it was "live" and "fresh."[17] He stated that this was meant to overcome the delay that could arise if CSIS waited until the information was fully assessed and analyzed before passing it on, as this delay

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9 Exhibit P-101 CAA0076, pp. 2-3.
10 *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 19 (R.S.C. 1985, c. C-23, s. 12).
11 See Section 3.5.1 (Pre-bombing), CSIS/RCMP Relations and Information-Sharing Policies.
12 Exhibit P-101 CAA0076.
13 Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1651, 1654-1656, 1676-1677.
14 Exhibit P-101 CAA0059; Testimony of Henry Jensen, vol. 44, June 18, 2007, pp. 5365-5366.
15 Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1651-1652, 1654.
16 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
17 Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1651, 1664.

would have been unacceptable to law enforcement.[18] Again, however, CSIS did not appear to share Jensen's view, and it generally waited until the information had been assessed in order to make a decision about whether or not it should be passed to the RCMP.[19]

The MOU also made RCMP sharing with CSIS mandatory for information relevant to CSIS's role, in particular information "…relevant to activities that may be suspected of constituting threats to the security of Canada."[20] Though there would be complaints by CSIS about the RCMP's failure to share some of its information,[21] there were no debates about the interpretation of the MOU itself in this respect.

The MOU provided that neither agency would have an "unrestricted right of access" to the operational records of the other, and that the agency receiving information could not "…initiate action based on the information" without the consent of the agency that provided it. One exception to this rule was joint RCMP/CSIS operations, about which the 1984 MOU stipulated that, except for source protection and third-party rule information, all operational information acquired through the joint operation would be shared freely.[22] This resulted in CSIS taking a strong initial position against any joint operations with the RCMP for fear of exposing its employees, methods and sources in a court procedure.[23] This position made the 1984 MOU section on unrestricted sharing of information in a joint operation context irrelevant in practice.

Finally, under the 1984 MOU, the Solicitor General was to be the final arbiter in case of disputes between the agencies.[24] The MOU provided that disagreements respecting the sharing or use of information that could not be resolved between the CSIS Director and the RCMP Commissioner were to be referred to the Solicitor General for resolution.[25]

The 1984 MOU was meant to be the source of the cooperative principles upon which further established procedures would be based. These procedures were to be agreed upon by both CSIS and the RCMP.[26] As of August 1986, however, it was unclear what procedures had in fact been established to implement the MOU.[27] In fact, in preparatory notes written in August 1986 for the Deputy Solicitor General in advance of a meeting with RCMP Commissioner Simmonds and CSIS Director Finn, key issues relating to the transfer of information between CSIS and the RCMP were noted, including: "Is there a need for procedures to facilitate timely CSIS disengagement from investigation and the transfer of information to

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18 Testimony of Henry Jensen, vol. 44, June 18, 2007, p. 5373.
19 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
20 Exhibit P-101 CAA0076, p. 3; Testimony of Henry Jensen, vol. 18, March 7, 2007, p. 1666.
21 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
22 Exhibit P-101 CAA0076, p. 4.
23 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
24 Testimony of Henry Jensen, vol. 18, March 7, 2007, p. 1659.
25 Exhibit P-101 CAA0076, p. 4.
26 Exhibit P-101 CAF0045, p. 3.
27 See, generally, Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.

the RCMP to foreclose or limit the use of s. 36(1) and (2) of the *Canada Evidence Act*?"[28] Wark testified that the Minister of the day, Solicitor General Robert Kaplan, correctly predicted that the MOU itself would be insufficient, and used the associated ministerial directive to underpin the agreement.[29]

Despite the agreement and the directive, however, the inability to find a solution to limit CSIS's potential exposure in court, while still sharing sufficient information with police, continued to plague the Service, and no doubt affected its willingness to share information with the RCMP.

According to Wark, the MOU provided "doctrinal guidance" based on the findings and recommendations of the McDonald Commission, the legislative parameters of the *CSIS Act*, and "…essentially the political will of the day." Though he stated that there were no clear weaknesses and that there was nothing in the agreement that struck him as inherently deficient, Wark concluded that the 1984 MOU created a system that was "…overly rigid, that made sense in theory, but wasn't going to make sense at the end of the day."[30] Indeed, Jensen testified that, according to the RCMP, the MOU did not function "…the way it was intended," especially with respect to the timely sharing of information.[31]

The problem, according to Wark, was that the MOU reflected an understandable desire "…to rigidly separate the mandates of the RCMP and the Canadian Security Intelligence Service," based on the belief that intelligence and police work could easily be distinguished from one another. The MOU lacked sensitivity to the fact that the RCMP might need intelligence in order to properly fulfill its duties, or that CSIS might require a "…significant understanding of law enforcement" to communicate and share usefully with the RCMP.[32]

The 1986 Memorandum of Understanding

In November 1986, CSIS and the RCMP signed an all-encompassing MOU covering 14 areas.[33] This MOU replaced the 17 MOU agreements signed in 1984.[34] Difficulties soon arose in implementing two areas of the new MOU: access by CSIS to the CPIC database,[35] and the transfer and sharing of information. Those areas were targeted for renegotiation.[36] In the meantime, CSIS and the RCMP relied on another MOU, one that had been specifically developed for "Project Colossal," for the principles to guide the transfer and sharing of information in relation to the Air India investigation.

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28 Exhibit P-101 CAF0045, p. 4.
29 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1468.
30 Testimony of Wesley Wark, vol. 16, March 5, 2007, pp. 1469-1470.
31 Testimony of Henry Jensen, vol. 44, June 18, 2007, p. 5373.
32 Testimony of Wesley Wark, vol. 16, March 5, 2007, pp. 1469-1470.
33 Exhibit P-101 CAA0688.
34 Exhibit P-101 CAA0520, p. 1.
35 For a review of the debates surrounding access to CPIC, see Section 3.5.1 (Pre-bombing), CSIS/RCMP Relations and Information-Sharing Policies.
36 Exhibit P-101 CAA0580.

The "Project Colossal" Memorandum of Understanding

In October 1986, CSIS and the RCMP signed a modified MOU on the transfer and sharing of information.[37] The MOU only applied to certain RCMP investigations, collectively named "Project Colossal," which related to the criminal investigation of Sikh terrorism in Canada, including the Air India/Narita investigation.[38]

The agreement contained conditions, the first of which provided that the RCMP would provide to the Minister progress reports on the Task Force investigations. CSIS was to advise the Minister "on issues that arise" only on an "as required" basis, with a requirement to consult with the RCMP first if the issue also was of concern to the RCMP.[39]

The MOU stated that, when targets were shared, the RCMP would attempt to obtain its own wiretap authorizations under the *Criminal Code* in order to protect CSIS sources and methodology and to minimize the risk of CSIS involvement in a court process. If, however, the RCMP required CSIS information for judicial purposes, the RCMP was required to consult with CSIS in advance. If the consultation resulted in an impasse "…the issue will be raised with the Director/Commissioner for resolution."[40]

To avoid duplication, consultation was required on the deployment of physical surveillance units. When CSIS was required to assist the RCMP, its units were to be deployed against "…targets least likely to require court appearances." Similarly, avoidance of duplication was to be practiced when tasking foreign liaison officers. CSIS analysts were also to have a continuous presence in the RCMP Task Force.[41] There was no reciprocal arrangement for an RCMP analyst to be placed anywhere within CSIS.

Most importantly, on the topic of sharing of information, the agencies agreed in this MOU that "…[a]ll information that impacts on, or relates to, the RCMP investigation of Project Colossal shall be fully disclosed to the Force by CSIS." [Emphasis added] The agreement required the RCMP to reciprocate "in a like manner" for information relating to the CSIS mandate. Information so shared would not be further disseminated or reclassified without the consent of the agency providing the information. Consultation between the RCMP and CSIS was required in advance of any involvement by the RCMP of a third party (i.e. another agency, whether Canadian or foreign) in its National Security Offences Task Force.[42]

The MOU specifically imposed an obligation on the RCMP Commissioner and the CSIS Director to "…establish procedures to implement these principles." It also provided for the arrangement to be reviewed at the end of one year.[43]

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37 Exhibit P-101 CAA0500.
38 Exhibit P-101 CAA0457. See also Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation, under the heading "Project Colossal."
39 Exhibit P-101 CAA0500, p. 1.
40 Exhibit P-101 CAA0500, p. 2.
41 Exhibit P-101 CAA0500, pp. 2-3.
42 Exhibit P-101 CAA0500, pp. 2-3.
43 Exhibit P-101 CAA0500, p. 4.

When CSIS Director Finn signed the Project Colossal MOU, he noted that the process of creating project-specific MOUs "…may not be the most expeditious and practical approach" to enable the transfer and sharing of information. He felt that the existing Transfer and Sharing of Information MOU covered everything that was included in the new Project Colossal MOU and that, in the future, a preferable approach would be to provide for the possibility of annexing to existing MOUs particular provisions for "…joint CSIS/RCMP operations such as 'Project Colossal'."[44] The Solicitor General agreed in early 1987 that this was a preferable approach.[45]

Liaison Officer Exchange Agreement

In addition to the Project Colossal MOU, RCMP and CSIS entered into an agreement relating to the exchange of liaison officers which was signed on December 10, 1986.[46] The liaison officer agreement was eventually replaced by clauses 25 and following of the 1989 MOU.[47]

The 1989 Memorandum of Understanding

In April 1988, a notice of intention was forwarded to the Solicitor General by the RCMP Commissioner and the CSIS Director that an all-encompassing MOU would be ready for the Solicitor General's review and signature by June 1988.[48] Proposed changes submitted by the RCMP just prior to the June deadline resulted in renewed negotiations that delayed the MOU.[49] As a result, the MOU was not signed until August 22, 1989.[50]

The 1989 MOU superceded the 1986 MOU.[51] It consolidated the previous MOU and expanded on it in three key areas: exchange of information; provisions of assistance and operational support; and principles underlying cooperation. On November 1, 1989, amendments were made "…to remove sensitive operational information" from the ambit of the agreement, at CSIS's request, and to correct a reference made to the RCMP regulations in an introductory clause. The MOU was slightly revised in April 1990 to permit its public release to the House of Commons Special Committee on the Revision of the *CSIS Act* and the *Security Offences Act*.[52] It then remained in place until 2006.[53]

Wark testified that the 1989 MOU was not designed to make truly radical changes to the landscape of CSIS/RCMP relations. Instead it was meant to strengthen the mechanisms for cooperation, such as through the Liaison Officers Program.

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44 Exhibit P-101 CAA0502, p. 2.
45 Exhibit P-101 CAC0044.
46 Exhibit P-101 CAA0968. See, generally, Section 4.2 (Post-bombing), The Liaison Officers Program.
47 Exhibit P-101 CAA0968, p. 2.
48 Exhibit P-101 CAA0688.
49 Exhibit P-101 CAA0688, CAA0714.
50 Exhibit P-101 CAA0968, p. 2.
51 Exhibit P-101 CAA0580.
52 Exhibit P-101 CAA0968, pp. 2-3.
53 Exhibit P-101 CAA0580.

However, in terms of understanding the relationship between CSIS and the RCMP, the MOU did not represent a significant difference from the earlier MOUs, but rather, a "fine-tuning."[54]

Ongoing Debates

Almost as soon as the 1989 MOU was signed, the RCMP and CSIS began debating what it meant. In particular, the nature and extent of CSIS's obligations to disclose information to the RCMP remained a contentious issue. Notably, this time, the MOU did not use the word "shall" in its information-exchange provisions, using instead the phrase "agrees to," which signified more flexibility for each agency to make information-sharing decisions.[55]

A particular debate arose over the interpretation of Article 7 of the 1989 MOU, which provided for the possible use of CSIS intelligence as evidence in a criminal prosecution. The RCMP felt that information in the hands of CSIS constituted essential evidence in an attempted murder case, and heated discussions between the agencies about the use of the CSIS information followed. A letter dated April 30 1990, from Ian MacEwan, the CSIS DG CT to C/Supt. Pat Cummins, who was in charge of national security investigations at RCMP HQ, highlights the tensions between the two agencies on the use of intelligence as evidence:

> Your interpretation of article 7 of the CSIS/RCMP MOU suggests that the use of Service intelligence as evidence is the norm. Contrary to your inclination, I am of the view that your interpretation does not take into account the discretionary powers awarded to the Service by section 19(2)(a) of the *CSIS Act*. Your reference to the Deputy Solicitor General's briefing before the 5 Year Review Committee fails to point out that he called for "potential" use of Service information and not a right to access it.[56]

In reply, Cummins stated, "For the record, I have never suggested nor ever advanced the interpretation of article 7 of the MOU in the manner you suggest." Although Cummins denied that he felt that the use of CSIS intelligence as evidence was the "norm," he noted that, despite CSIS's particular mandate and the fact that it is not "…in the business of collecting evidence," the fact is "…CSIS sometimes does end up with evidence." The matter was referred to the Senior Liaison Committee for resolution.[57]

Nearly a decade later, no new changes had been made to the 1990 MOU, and the conflicts encountered by the agencies in the sharing of information continued.

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54 Testimony of Wesley Wark, vol. 16, March 5, 2007, pp. 1471-1472.

55 See Exhibit P-101 CAA0758, pp. 8-9.

56 Exhibit P-101 CAA0765, p. 1.

57 Exhibit P-101 CAA0771, p. 1. The Liaison Committee was established in 1986 to resolve issues arising in the counterterrorism liaison arrangements between CSIS and the RCMP. See, generally, Section 4.2 (Post-bombing), The Liaison Officers Program.

In 1999, the National Security Offences Review report was released by the RCMP. This internal examination of the RCMP Security Offences Program was conducted in consultation with CSIS. One of the key issues reviewed was the cooperation with CSIS and, in particular, the MOU. The report noted that problems in the use of security intelligence information threatened to undermine the RCMP/CSIS relationship:[58]

> Senior management of the RCMP attempted to stimulate greater partnership opportunities by creating a separate National Security Investigation Section (NSIS) and a centralized Criminal Intelligence Directorate (CID), but aspects of this attempt actually increased discord between the two agencies. The case law decision of *Regina vs. Stinchcombe* further restricts both agencies' ability to properly share in an open and public environment.[59]

The report went on to state that both agencies could make better use of the mechanisms for conflict resolution in the MOU and that problems could have been avoided or greatly reduced through the "…appropriate application of the processes outlined in the MOU." In particular, the review found "little evidence" that section 29(c) of the MOU, which authorized the HQ liaison officer from each agency to address problems with the RCMP Deputy Commissioner or the CSIS Deputy Director, had ever been used. Section 30 provided for the resolution of conflicts at the Senior Liaison Committee. However, despite the use of that committee to successfully resolve problems in the past, the Senior Liaison Committee was disbanded in 1993 "…in favour of an informal consultation process." In addition, although section 30(e) of the MOU required the Senior Liaison Committee to file an annual report to the Commissioner of the RCMP and the Director of CSIS, this requirement had not been followed since 1991.[60]

The report reviewed the concerns regarding the MOU documented in several memos written by RCMP divisions between 1990 and 1999. According to the review, the memos "…considered the MOU one-sided in favour of CSIS" and recommended four amendments to address the needs of the RCMP, including: the ability to form a joint management team in investigations where the interests of both agencies coincide; mechanisms to designate a lead agency in certain investigations of common interest; problem-solving mechanisms to resolve any issues that arise; and an "MOU escape clause" allowing either agency to refuse to work within the MOU in a particular case. The review noted however that "…all four of these proposed amendments have existed within the present MOU since its revision in 1990." The report stated that few members of either the RCMP or CSIS were aware of the MOU provisions and that, as a result, the MOU's problem-solving and operational guidelines had "…never been fully used, with

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58 Exhibit P-101 CAA0970, pp. 2, 22.
59 Exhibit P-101 CAA0970, p. 7.
60 Exhibit P-101 CAA0970, pp. 7, 25.

the exception of the Senior Liaison Committee meetings held prior to 1993." The report concluded, therefore, that only minor changes were required to make the MOU contemporary.[61] Nevertheless, it would be years before any changes at all were made.[62]

4.1 Information Sharing and Cooperation in the Air India Investigation

Introduction

In 1984, when CSIS was created, the emphasis was on maintaining a separation between CSIS's security intelligence function and the RCMP's criminal investigation function. While this separation made sense in relation to the RCMP Security Service's historical focus on Cold War counter-intelligence issues, it was less relevant in dealing with counterterrorism investigations.

Information sharing between CSIS and the RCMP became an issue early in the Air India investigation, as each agency struggled to develop an understanding of the role and obligations of the other agency and of its own responsibilities. The tangled policy thicket that emerged at CSIS, starting right after the Air India bombing, was the result of CSIS's struggles to differentiate its civilian intelligence mandate from how things were done in the old RCMP Security Service. Prior to the creation of CSIS, if there were unresolved issues in relation to what information could be transferred from the intelligence side of the RCMP to the police side of the RCMP, the problem would be solved by the RCMP Commissioner. Had the bombing occurred prior to the separation of the agencies, the Commissioner would have "…cut down on the bureaucracy," made the decision and – in the words of CSIS DDG CT Chris Scowen – "…that would be that." CSIS felt that, by enacting the *CSIS Act*, Parliament had signalled that that was not to be the system for the future. The transition to CSIS created many issues, as the Service's policy perspective was continually evolving. CSIS and the RCMP were often at odds over what to provide to whom, and on what basis. Regrettably, this struggle occurred at a crucial time for the Air India investigation.[63]

As CSIS continued to pursue its intelligence investigation into the ongoing activities of Sikh extremists after the Air India bombing, the RCMP pressed on with its law enforcement investigation to uncover the perpetrators of the Air India and Narita bombings. Due to the inevitable overlap of the agencies' investigations, a two-way exchange of information was critical. Coordination was crucial to avoid conflicts in investigational strategies and to ensure that the investigations did not overlap in a way that could lead to unnecessary exposure of CSIS information in court proceedings or that could derail the RCMP's case on account of CSIS information that could not be disclosed.

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61 Exhibit P-101 CAA0970, pp. 7, 25.
62 See Section 4.5 (Post-bombing), Recent Cooperation and Information-Sharing Mechanisms.
63 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6137-6139.

CSIS often obtained information of interest to the RCMP's criminal investigation.[64] Yet, in an apparent attempt to civilianize, CSIS initially took overly restrictive positions about the access it would grant to some of its materials and the use that could be made of what the RCMP was allowed to see. The RCMP, for its part, felt entitled to use any information that could further its investigation and was not always sensitive to CSIS's legitimate concern about protecting its operations by avoiding public disclosure of information about its sources, methods and personnel. Tensions between the agencies escalated due to conflicts in information sharing and source sharing, particularly human sources. This had a negative impact on the investigations of both agencies. In some cases, this was an inevitable consequence of the difficulties associated with the use of intelligence in criminal prosecutions. In many other cases, however, the tensions that the agencies allowed to grow created situations that could unnecessarily compromise both their investigations.

Early Days of the Investigation

At the time of the bombing, CSIS had already collected a mass of information about the Sikh extremist movement in Canada, as well as about several potential conspirators such as Parmar, Bagri and Gill. Meanwhile, the RCMP had little in terms of its own independent information on Sikh extremists with which to launch its investigation into this terrorist act of mass murder.

CSIS investigator Neil Eshleman testified that "…CSIS had an advantage over … another organization such as the RCMP who were starting from scratch."[65] Recognizing, at least to some extent, the limits of its own knowledge base, the RCMP E Division received briefings about the major players in the Sikh extremism movement from members of the dedicated community policing unit of the Vancouver Police Department.[66]

According to Eshleman, there was a "…close, informal, constant ongoing discussion" between the CSIS Task Force and the RCMP in BC in the days following the bombing. CSIS was supplying information to individuals within the RCMP "… even before … the RCMP created their own task force to investigate Air India."[67]

Sgt. Robert Wall joined the Air India Task Force in Vancouver on June 25, 1985, as the NCO in charge of operations for the Task Force, a position that made him second-in-command. He testified that, initially, few members the Task Force had any familiarity with Sikh extremism. For that reason, particularly during the early days of the investigation, the Task Force relied heavily on CSIS information for background and details concerning Sikh extremism.[68]

After the bombing, the need for increased liaison was recognized by both the RCMP and CSIS. *Ad hoc* liaison arrangements were implemented, but these often

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64 See Section 3.0 (Post-bombing), The CSIS Investigation.
65 Testimony of Neil Eshleman, vol. 75, November 14, 2007, pp. 9376-9377.
66 Testimony of Don McLean, vol. 21, May 1, 2007, pp. 1986, 2037; Testimony of Don McLean, vol. 35, May 29, 2007, pp. 4143-4144, 4157-4159.
67 Testimony of Neil Eshleman, vol. 75, November 14, 2007, pp. 9376-9377.
68 Testimony of Robert Wall, vol. 76, November 15, 2007, pp. 9657-9658, 9661-9662.

resulted in inconsistent information-sharing practices. On June 27, 1985, LOs from the RCMP and CSIS were assigned to facilitate the exchange of information between CSIS BC Region and the newly formed RCMP E Division Task Force.[69] This arrangement was intended to ensure a timely two-way flow of information passed through the LOs who were both supposed to be fully informed about what was going back and forth.[70]

Supt. Lyman Henschel of the E Division Federal Operations Branch testified at the hearings that his understanding was that the Air India liaison program was intended to allow the RCMP Task Force investigators to take an active role in reviewing CSIS information with the full knowledge of the intricacies of the investigation. He felt it was understood that the RCMP investigators were best qualified to determine the ultimate relevancy to the criminal investigation of the often subtle and obscure information CSIS would be gathering.[71] This understanding differed from that of CSIS personnel, who did not provide the RCMP full access to CSIS information, but rather insisted on the Service being the one to select what it determined was "…all information … that had any even remote connection to the [AITF] investigation to be passed to the RCMP."[72]

The intended role of the CSIS LO, a position filled by Jim Francis, was to gain familiarity with both the avenues of investigation being pursued by the RCMP Task Force and the mass of information being uncovered by CSIS, in order to be equipped to make an intelligent first judgment of the relevance of CSIS information to the RCMP investigation into the Air India and Narita bombings.[73] Francis would deliver relevant CSIS materials to the RCMP LO, Sgt. Michael ("Mike") Roth, on a daily basis. Francis would highlight any information of possible interest to the RCMP and leave the reports with Roth for review.[74]

Roth was responsible for identifying specific information of interest to the RCMP Task Force in the information passed by Francis, after which he was to request CSIS authorization for formal disclosure to the RCMP of this select information. CSIS HQ would consider Roth's requests, in consultation with CSIS legal counsel. The RCMP LO was intended to be the conduit for all CSIS requests for RCMP information.

Immediately after the bombing, CSIS began to pass its Situational Reports (sitreps) regarding relevant Sikh extremist investigations to the RCMP Task Force, a practice that continued from June 26 to November 4, 1985.[75] The sitreps were the daily intelligence reports submitted by the BC Region to CSIS HQ, as well as some reports from other CSIS regions "…on an irregular basis."[76] The sitreps essentially contained daily summaries of the regional investigations. They were

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69 Exhibit P-101 CAA0802, p. 1, CAF0193.
70 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5607-5608.
71 Testimony of Lyman Henschel, vol. 46, September 17, 2007, p. 5538.
72 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6135. AITF is the abbreviation for the Air India Task Force.
73 Testimony of Lyman Henschel, vol. 46, September 17, 2007, p. 5532.
74 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5609-5610.
75 Exhibit P-101 CAA0379(i), CAA0802, p. 1, CAB0447(i).
76 Exhibit P-101 CAA0379(i).

prepared on the basis of the CSIS investigators' review of intercept products, as well as on the basis of the reports produced following community interviews. The investigators extracted the information they felt to be relevant from the original records of intercepts, surveillance reports, or interview notes and provided their analysis and comments. The context in which the information was obtained was not always described exhaustively and the source of the information was not always identified.

Francis brought the sitreps to Roth each day. Roth would informally brief the rest of the AITF on the pertinent details of the sitreps at daily meetings. The reports would then be processed through the Task Force's readers or analysts section. If there was something of interest, the RCMP would generate a "tip"[77] in its filing system for further investigation. Both Roth and the RCMP records analysis section kept copies of the sitreps.[78]

CSIS also provided copies of its surveillance reports to the RCMP Task Force.[79] Surveillance targets were shared and coordinated daily between CSIS and the RCMP in BC and "…all information produced by either organization" as a result of the physical surveillance was shared.[80]

In the days immediately following the bombing, CSIS re-examined its own surveillance information about the Duncan Blast incident on June 4th, when CSIS followed Parmar, Reyat and an associate and heard a loud noise in the woods. After the bombing, CSIS began to understand that the sound heard by its surveillants might have been an explosion – and not a gunshot, as was initially mistakenly believed. This led to speculation that Parmar, Reyat, and their associate might in fact have been conducting tests in advance of the bombing. CSIS "reminded" the RCMP of the Duncan Blast information it had provided prior to the bombing, and suggested that the RCMP visit the Duncan Blast site with one of the CSIS surveillants. The RCMP Explosives Detection Unit (EDU) conducted searches on June 28th, July 2nd and July 4th and uncovered some items that tended to indicate that a blasting cap had been handled at the location. Though the evidentiary value of the items would prove limited in the end, the RCMP searches did serve to orient the investigation towards Reyat early on.[81]

In mid-July 1985, RCMP O Division requested a briefing from CSIS on the organizational structure of the BK and the ISYF "…concentrating on the Sikh members of these organizations who may be described as being the most dedicated extremists."[82] In response, Toronto Region personnel briefed an RCMP O Division analyst on July 17, 1985. In British Columbia, on the other

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77 According to the filing system used by the RCMP, the "tip system," every investigative lead was made the subject of a "tip" or file with its own folder or number. The documentation respecting all initiatives related to the investigation of that particular lead would then be housed in that tip folder: See Section 2.0 (Post-bombing), Set-up and Structure of the Federal Task Force.

78 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5608-5611.

79 Exhibit P-101 CAA0379(i), pp. 1-5.

80 Exhibit P-101 CAA0299(i).

81 See Section 1.4 (Pre-bombing), Duncan Blast.

82 Exhibit P-101 CAB0440.

hand, it was only on August 29th that a similar briefing was requested and that Ray Kobzey consequently briefed the RCMP on Sikh extremism.[83] The length of time it took for the RCMP to take the obvious step of requesting a briefing from an agency with more knowledge of the landscape and of the issues might have been the result of the rapid deterioration of the CSIS/RCMP relationship, particularly in BC, during the period following the bombing. It is clear that by the end of the summer of 1985, relations had soured significantly.

Emerging Issues in BC

Wall testified that he had, early in the investigation, formed the opinion that CSIS had been intercepting Parmar's communications since before the bombing. This was an inference drawn from the fact that CSIS had been conducting physical surveillance on Parmar during this period.[84] Similarly, the Crown prosecutor assigned to assist the Task Force, James Jardine, testified that he had concluded that "…if there were watchers there would be wires," and that he had mentioned this possibility to the Task Force members as early as July 1st.[85]

In a briefing written for the Honourable Bob Rae during his review of the Air India investigation, CSIS took the position that it had been very prompt in informing the RCMP about its intercept activities concerning Parmar:

> The Service informed the RCMP the day after the crash that we had intercepted Parmar's telephone and later provided information relating to some of those interceptions in support of the RCMP obtaining [*Criminal Code of Canada*] warrants.[86]

Deputy Commissioner Gary Bass, who took over the Air India investigation in 1995, testified that he saw nothing in his review of the investigation to indicate that CSIS had notified the RCMP of its telephone intercepts of Parmar the day after the crash.[87] The Commission also saw no evidence of any notification to the RCMP about the CSIS Parmar intercept on the day after the bombing.

What can be ascertained from the evidence is that the RCMP was aware that CSIS was intercepting the communications of Parmar early in July 1985. The RCMP had obtained a CSIS situation report, dated June 27, 1985,[88] which referred to a number of intercepted conversations between Parmar and Surjan Singh Gill, Parmar and Hardial Singh Johal, and Parmar and his brother.[89] The report did not directly mention the existence of an electronic intercept of Parmar's communications. It simply referred to the information as having originated

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83 Exhibit P-101 CAA0313, p. 2, CAD0115, p. 8.
84 Testimony of Robert Wall, vol. 76, November 15, 2007, pp. 9673-9674.
85 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
86 Exhibit P-101 CAA1086, p. 7.
87 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11225.
88 Exhibit P-101 CAB0360.
89 Exhibit P-101 CAB0360, pp. 6-7.

from "a reliable source."[90] However, the report described Parmar's telephone conversations in detail, including verbatim quotes of the language used. It would have left little doubt in the mind of an experienced RCMP investigator that the information must have originated from an intercept. Indeed, Cpl. Robert Solvason, who would join the Task Force in September,[91] immediately noted that the information in the CSIS situation reports appeared to have come from technical intercepts, even though the source was not identified.[92]

It is unknown exactly when the RCMP received the June 27th sitrep document.[93] According to a subsequent report, Roth began his review of the CSIS situation reports on July 5, 1985.[94] He testified that, to the best of his recollection, he received the situation reports in volumes, which were provided in chronological order, beginning with the reports for June 26th, 27th, and 28th.[95] That would make July 5th the earliest date that the RCMP could have seen the June 27th sitrep. From that date onward, though it may not have been officially confirmed by CSIS, the RCMP Task Force would certainly have had reason to believe, with a high degree of certitude, that CSIS had in fact been intercepting Parmar's communications during the pre-bombing and immediate post-bombing period. Wall's notes contain a reference to a July 12th meeting between the RCMP and CSIS where Francis directly mentioned the Parmar intercept.[96] On July 21, 1985, the Task Force explicitly reported that it was aware that CSIS was intercepting communications of at least one target, and that several other intercepts would be put in place.[97]

On July 11, 1985, Roth asked the CSIS BC Region what intercept warrants they had in effect. He renewed that request on July 23rd and asked for information about the intercepts. He was told that the request would be addressed by CSIS HQ.[98] Roth testified that he was never given a direct answer about what warrants CSIS had in place. However, he indicated that he became convinced on July 24th that CSIS had an intercept on Parmar, after Insp. John Hoadley, one of the officers in charge of managing the RCMP Task Force, informed him that arrangements had been made for him to go to CSIS to read the transcriber notes from their intercepts.[99]

In late July 1985, the RCMP E Division Task Force advised its HQ that "Liaison with CSIS continues and we are assured that we will be apprised of any information they surface having a bearing on this investigation."[100] Chris Scowen, who became the Deputy Director of Counter Terrorism at CSIS shortly after the bombing,

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90 Exhibit P-101 CAB0360, p. 6.
91 Testimony of Robert Solvason, vol. 89, December 5, 2007, p. 11549.
92 Exhibit P-101 CAA0797(i), p. 1; Testimony of Robert Solvason, vol. 89, December 5, 2007, pp. 11552-11553.
93 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11231.
94 Exhibit P-101 CAA0379(i), p. 9.
95 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5608-5609.
96 Exhibit P-101 CAA0379(i), p. 9.
97 Exhibit P-101 CAA0282(i), p. 1; Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11230-11231.
98 Exhibit P-101 CAA0802.
99 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5619-5620; Exhibit P-101 CAA0802, p. 2.
100 Exhibit P-101 CAA0294, p. 1.

maintained in his testimony that Roth's access to CSIS information provided "…a very clear statement of the level of cooperation that the Service provided the RCMP very early in their investigation." He stated that CSIS supplied the RCMP with "…many dozen surveillance reports," pages of observation post reports, and "…ten volumes of daily Situation Reports." He noted that the number of investigative leads passed was enormous. According to him, the RCMP Air India Task Force was getting "…virtually everything we knew." He stated that "…it was a litany of activity and cooperation."[101]

Roth did not share Scowen's views on the matter, mostly because of his experience in connection with the access, or lack thereof, he was given, as RCMP LO, to the product of the Parmar intercepts. The process of obtaining access to the CSIS materials proved to be a lengthy one, requiring repeated discussions between the agencies, as well as ongoing policy debates at CSIS HQ concerning the terms and the extent of that access. The end result was often a "revolving door" of access that was marked by intermittent access punctuated by long periods without it. Scowen explained that, for CSIS, the intermittent access was all based on the evolving policy about access to sensitive material and on CSIS's paramount concern for protecting the identities of sources and targets. He stressed that when access to the intercept product was denied, the denial did not extend to intelligence reports.[102] Nevertheless, the process strained the early relationship between the Service and the RCMP significantly.

After Roth started inquiring about CSIS intercepts, the E Division Task Force transmitted a request to CSIS BC Region Director General Randil Claxton in late July for direct access to CSIS intercept product. When Claxton transmitted the request to CSIS HQ, HQ initially granted the request.[103] On July 25, 1985, Roth signed a declaration that indoctrinated him into CSIS so that he could receive CSIS information. Following this step, he was given access to the Parmar intercept "product," meaning the CSIS transcriber and translator notes and logs that had been prepared on the basis of the recorded conversations. There was no discussion at this point about direct access to the recordings themselves.

Roth subsequently prepared a document chronicling the shifting conditions for his access to the intercept product.[104] His July 25th entry reads "started debriefing notes," which meant he had started looking through the Parmar intercept product on that day. He went to CSIS to review the material on two other occasions in July. On August 6th, however, his note states: "Informed by CSIS that I no longer had access to their material and to obtain data from Bob Smith."[105] Roth immediately went to try to speak to Claxton about the change of access, but he was unable to meet with him until the next day, August 7th. Claxton informed Roth that, from then on, he would only receive situation reports, some of which would be based on the Parmar intercepts. Claxton further informed

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101 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6146, 6148.
102 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6148, 6152.
103 Exhibit P-101 CAA0726, p. 4.
104 Exhibit P-101 CAA0379(i).
105 Exhibit P-101 CAA0379(i), p. 6; Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5621.

Roth that if CSIS determined that there was urgency to the information, Roth would be informed right away so that he could determine the evidentiary value of the information.[106]

In his testimony before the Inquiry, Roth explained that there was a difference in being granted access to the transcribers' notes and simply seeing the intelligence reports derived from them. The reports were only a summary of the information in the original notes and were "…cleansed for protection of material."[107]

Roth testified that he was never personally informed as to why his access was refused.[108] Scowen testified that he believed that BC Region had given Roth full access to the intercept product, but that when either BC Region senior management or CSIS HQ became aware of the extent of the access, it was deemed improper and further access was denied.[109]

On September 3, 1985, Solvason joined the Task Force.[110] Solvason began to review the information that the Task Force had collected, including the CSIS situation reports provided to the RCMP Liaison Officer, and he soon pointed out that access to more CSIS information and materials would be necessary to go forward with the investigation.[111]

Hoadley solicited the help of C/Supt. Norman Belanger, the OIC of the RCMP HQ Task Force, to negotiate new terms for access to the Parmar intercept logs with CSIS.[112] Hoadley advised Solvason on September 6th that CSIS had authorized the release, and that Solvason would likely be designated as a person to liaise with CSIS as a result. On September 9, 1985, Roth was once again given access to the intercept product. On September 10th, Solvason was sent to CSIS along with Roth. He signed an "official secrets form" and began to review the Parmar intercept logs with Roth.[113] After that date, the two officers went to CSIS to review the material almost every day until they were again denied access to the logs on September 18th.[114]

The RCMP would later take the position that "meaningful access" to the Parmar intercept notes was obtained only on September 10th.[115] An RCMP report prepared in early September indicated that the Task Force believed that CSIS had been monitoring Parmar since March 1985, but that "…thus far, no substantive information acquired from the surveillance activities has been passed on to the E Division Task Force by CSIS Pacific Region," with the exception of the CSIS surveillance report on the Duncan Blast.[116]

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106 Exhibit P-101 CAA0802, p. 3.
107 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5622.
108 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5612-5613.
109 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6146.
110 Testimony of Robert Solvason, vol. 89, December 5, 2007, p. 11549.
111 Exhibit P-101 CAA0797(i), p. 1; Testimony of Robert Solvason, vol. 89, December 5, 2007, pp. 11552-11553.
112 Exhibit P-101 CAB0551.
113 Exhibit P-101 CAA0797(i), p. 2.
114 Exhibit P-101 CAA0802, p. 4.
115 Exhibit P-101 CAA0335, pp. 22-23.
116 Exhibit P-101 CAA0313, p. 5.

Roth testified that the delay in obtaining access to the Parmar intercept logs impeded the progress and speed of the investigation.[117] The nature of the access provided was also not always considered satisfactory for the RCMP. Both Roth and Solvason signed official secrets forms that indoctrinated them into CSIS prior to receiving access to the Parmar logs. In effect, they signed agreements providing that they would not disclose what they learned without CSIS authorization.[118] Roth could not recall ever having been briefed on what he could do with the CSIS information and testified that no one advised him about restrictions on his ability to pass information to the RCMP.[119] Solvason, on the other hand, documented that on September 10, 1985, Joe Wickie of CSIS advised him that he and Roth were not allowed to make copies of the Parmar intercept logs but could write notes, provided they were written "…in such a way as to disguise or shield source of information."[120] As a result, Solvason reported that all information recorded was referenced as originating from an anonymous source, code E2255.[121]

To speed up the process, however, Roth and Solvason read significant verbatim portions of the translator's notes into a tape recorder, and these recordings were later transcribed and typed into reports for use by the RCMP.[122] Roth testified that when he read information from the Parmar logs into the tape recorder, he read in verbatim extracts, including dates and names.[123] The end result was that the RCMP reports often ended up being identical to the original CSIS logs to which the RCMP was denied copies.[124] Under the circumstances, it would have saved time to have allowed the RCMP to simply make copies rather than verbally recording the material, transcribing it and then writing up a report. It is unknown whether CSIS knew Roth and Solvason were making verbatim recordings of what they read.

HQ-Level Debates between CSIS and the RCMP

While the tensions were rising in British Columbia, relations between the agencies were also difficult in Ottawa.

In late July 1985, a dispute erupted between Archie Barr, the CSIS Deputy Director of Requirements (DDR), and C/Supt. Belanger. While the two agencies were still sharing communications facilities at RCMP HQ, a message sent to CSIS HQ, which dealt with information that still remains classified, was inadvertently picked up by the RCMP. Belanger, making certain incorrect assumptions, wrote to Barr suggesting that CSIS was involved in something that was properly within

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117 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5623.
118 Testimony of Robert Solvason, vol. 89, December 5, 2007, p. 11554.
119 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5633-5634.
120 Exhibit P-101 CAA0335, pp. 22-23, CAA0797(i) p. 2.
121 Exhibit P-101 CAA0797(i), p. 4; Testimony of Robert Solvason, vol. 89, December 5, 2007, p. 11554.
122 Exhibit P-101 CAA0797(i), pp. 2-3, CAA0802, p. 4.
123 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5625.
124 Exhibit P-101 CAA0802; Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5624. For an example of identical RCMP and CSIS notes, see Exhibit P-101 CAD0013, pp. 42-43 (original CSIS notes) and Exhibit P-101 CAA0322 (RCMP transcription).

the RCMP's mandate.[125] Scowen testified that the memo sent by Belanger "… was setting the tone for a relationship that Mr. Barr considered was getting off track."[126] Barr used strong language in his response, accusing the RCMP of improperly accessing classified CSIS documents,[127] and stating that Belanger seemed unaware of CSIS's role. He also dealt with the pressing issue of information sharing between the RCMP and CSIS in relation to Air India:

> We are very conscious of the fact that while carrying out this mandate we may generate information or intelligence which may be of interest to police forces, or may relate to a specific criminal offence. The Act provides authority for us to pass such information to the police of jurisdiction. With specific reference to the recent incidents involving Air India and Canadian Pacific Airlines, our policy has been in keeping with the spirit and intent of the *CSIS Act*. We have offered full cooperation to the RCMP and have kept the Force apprised of relevant information which we have collected.… the nature and tone of your message does little to encourage a continued spirit of cooperation.[128] [Emphasis in original]

Scowen explained that Barr's reaction was the result of what CSIS viewed as the incessant and voracious demand for information and intelligence from the RCMP and from Government in the immediate aftermath of the bombing, and the exceptional pressures faced at the time by both CSIS and the RCMP.[129] The exchange illustrates the fears and the animosity that sometimes existed between the management of the two agencies. Along with other incidents, it paints a picture of mistrust between the two agencies and a struggle to define mandates and their limits.

Another debate occurred on July 28, 1985, when then RCMP Deputy Commissioner of Operations, Henry Jensen, and James ("Jim") Warren, then CSIS DG Foreign Liaison, returning on the same flight from London, stopped for a beer on arrival in Montreal. In a memo written afterwards, Warren stated that Jensen pointed out that CSIS was "…unnecessarily intruding into a police investigation."[130] In testimony, Jensen said that there were serious problems with cooperation, but denied thinking that CSIS was attempting to do police work.[131] He explained that the problems brought to his attention were with regard to the RCMP Task Force access to necessary CSIS information and intelligence.

Warren's memo said that Jensen predicted that the RCMP would soon develop a completely parallel investigative capacity – which Jensen denied in testimony,

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125 Exhibit P-101 CAA0287.
126 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6133-6135.
127 Exhibit P-101 CAA0289, p. 1.
128 Exhibit P-101 CAA0289, pp. 1-2.
129 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6133-6135.
130 Exhibit P-101 CAA0293.
131 Testimony of Henry Jensen, vol. 44, June 18, 2007, p. 5426.

saying that what he actually said was that the RCMP would have to develop its "…intelligence capacity to deal with crime."[132] Regardless of what Jensen said precisely to Warren, CSIS believed that the RCMP was trying to circumvent and undermine the new agency, while the RCMP believed that CSIS was withholding information, sentiments that could only damage the relationship between the two organizations.

CSIS Information Used in Judicial Proceedings: The September 19th Affidavit and Subsequent Tensions

In the months following the bombing, CSIS information was used in RCMP affidavits in support of warrant applications. This use raised the possibility that these warrants would be challenged in court at a later date,[133] and it caused significant tensions between the agencies.

On August 22, 1985, the RCMP had presented an affidavit in support of an application for judicial authorization to intercept the communications of Inderjit Singh Reyat and Lal Singh.[134] At that time, the Task Force did not believe that there was enough information available for the RCMP to obtain a judicial authorization to intercept Parmar's communications.[135] The August affidavit was based mostly on RCMP information, but did make reference to some CSIS information, including the Duncan Blast surveillance, identifying one of the CSIS physical surveillance unit (PSU) members, Larry Lowe, by name.[136] The affidavit made no reference to the CSIS Parmar intercept.

When Solvason joined the Task Force in early September, he was put to work analyzing the information that the Task Force already possessed to determine whether another intercept authorization could be obtained, as he had expertise in wiretaps.[137] Solvason explained in his testimony before the Inquiry that at this point in the investigation, it was important to obtain judicial authorizations to intercept the communications of various suspects, especially given the limited knowledge of the Task Force. Solvason examined the information gathered, and he concluded that the Task Force should seek a new authorization to intercept communications with respect to an expanded set of targets. He also understood immediately that there was no question that "…if there was going to be any application, we would have to get authority to use the CSIS information for that because that was by far the majority of what meaningful information we had."[138]

Solvason advised his immediate supervisor, Sgt. Wayne Douglas, that a "… considerable amount of information and cooperation would have to be

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132 Testimony of Henry Jensen, vol. 44, June 18, 2007, pp. 5426-5427.
133 Exhibit P-101 CAA0480, p. 1.
134 Exhibit P-101 CAA0310.
135 Exhibit P-101 CAA0282(i), p. 5.
136 Exhibit P-101 CAA0310, p. 5.
137 Exhibit P-101 CAA0797(i), p. 1.
138 Testimony of Robert Solvason, vol. 89, December 5, 2007, pp. 11551-11553.

forthcoming from CSIS" if the RCMP were to make any attempt at a wiretap application.[139] He also advised Hoadley and Wall that in order for the RCMP to obtain an authorization to intercept private communications, CSIS information would be necessary and "…authority for use of same in our application" would have to be obtained. In his notes, Solvason wrote that he was advised by Hoadley on September 6th that "…authority had been granted for release of CSIS information," and that Solvason would likely be designated as a person to liaise with CSIS as a result.[140] It is unclear whether this referred to the use of CSIS information in the RCMP intercept application or whether it simply referred to the fact that access to the Parmar intercept logs would resume.

During the next days, Solvason began to work on drafting an affidavit in support of an application for authorization to intercept private communications under Part IV.I (now Part VI) of the *Criminal Code of Canada*, using some of the information that he and Roth had gleaned from the CSIS intercept logs.[141] Cst. Howard D.Walden, another member of the Task Force, swore the affidavit on September 19, 1985. Reyat and Lal Singh were again listed as targets, but this time the list also included Talwinder Singh Parmar, Surjan Singh Gill, Hardial Singh Johal, Gurchuran Singh Reyat, and Amarijit Pawa. Additionally, since Parmar and Reyat were evidently alert to the risk of discussing sensitive matters over the telephone and preferred to speak face to face, the application sought authorization to enter their residences in order to install and operate listening devices to allow for interception of their conversations within the home.[142]

The September 19th affidavit made extensive use of CSIS information. Like the August 22nd application, the document identified covert CSIS personnel, such as Larry Lowe, by name. It also listed details that the RCMP obtained from CSIS intercept logs. The affidavit revealed that CSIS was conducting an investigation into Parmar's activities, as well as those of Johal, Gill, and Reyat, and that CSIS had been intercepting Parmar's communications since March 1985, information that had been provided to Solvason by Joe Wickie of CSIS. The affidavit discussed the purpose of the CSIS investigation, referring to information provided by Claxton, the CSIS BC Region Director General, to RCMP Supt. Les Holmes, which indicated that CSIS was not pursuing an investigation of either the bombing of Air India Flight 182 or the bombing at Narita airport, but was focused on matters of national security and on information relevant to the protection of Indian Prime Minister Rajiv Gandhi and other internationally protected persons.[143]

The September 19th affidavit included a substantial amount of information obtained from the CSIS intercept logs, summarizing over 20 different conversations. For example, the affidavit referred to an April 8, 1985, conversation between Parmar and an individual named Jung Singh, in which the RCMP stated

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139 Testimony of Robert Solvason, vol. 89, December 5, 2007, p. 11553.
140 Exhibit P-101 CAA0797(i), pp. 1-2; Testimony of Robert Solvason, vol. 89, December 5, 2007, pp. 11553-11555.
141 Exhibit P-101 CAA0797(i); Testimony of Robert Solvason, vol. 89, December 5, 2007, pp. 11554-11555.
142 Exhibit P-101 CAA0324(i), pp. 23-26.
143 Exhibit P-101 CAA0324(i), pp. 5, 11-12, 22.

that the two discussed the possibility of assassinating Indian Prime Minister Rajiv Gandhi. Details of the other CSIS intercepts relied upon also included a telephone conversation on June 22, 1985, in which Parmar asked Johal, "Did he mail those letters?" to which Johal replied, "Yes, he did."[144]

The affidavit provided details about the number of Parmar intercept tapes believed to be in CSIS's possession, noting that CSIS had "…only translated a portion of those private communications." The affidavit stated that Solvason had advised that the Parmar intercept materials "…have been released subject to the condition that they are provided for intelligence purposes only and for the purposes of an application to obtain an authorization [to intercept private communications], and are not to be used as evidence at a trial." The affidavit also set out a request by Solvason to CSIS to obtain all material acquired by CSIS during this investigation and stated that CSIS's response to Solvason was that the RCMP Task Force had "…received all relevant material" with the exception of the material pertaining to the interception of Parmar's communications.[145]

The application also made reference to the access the RCMP had received to the CSIS materials. The frustration of the Task Force members was apparent on the face of the affidavit. For example, the application stated that the initial request for the CSIS materials (obviously a reference to the Parmar intercept logs) had been made in July 1985, but that Solvason had only been cleared to receive the materials on September 10th. The affidavit also stated that CSIS "…refuses, on policy grounds, to release copies of the taped private communications" and has reserved to itself "…the decision of what is relevant and what will be released to the Air India Task Force investigation." In another paragraph, the affidavit added that Claxton had informed Holmes, the RCMP Task Force OIC, that CSIS would not disclose the names or telephone numbers of any individuals it had under surveillance for national security reasons, but would provide all relevant material to the Task Force.[146]

At the Inquiry hearings, Crown counsel Jardine, who presented the affidavit to obtain the wiretap authorization to the Justice of the Peace, testified that, from a legal standpoint, it was necessary to set out the sources of the information in detail in the September 19th affidavit so that the judicial officer reviewing the application could come to his own conclusions about the evidence. He explained that the law required the Crown to make "…full, fair, and frank disclosure before the judicial officer at the time of the application for and granting of an authorization." This was important not only to ensure that the authorization was obtained, but also to ensure that it was sustainable "…from a constitutional scrutiny perspective," so that the evidence collected pursuant to the authorization could be used.[147]

According to Jardine, in order to ensure that full disclosure was made and that the grounds for the application were sufficiently established, it was necessary

144 Exhibit P-101 CAA0324(i), pp. 13-17.
145 Exhibit P-101 CAA0324(i), pp. 12-13.
146 Exhibit P-101 CAA0324(i), pp. 12, 22.
147 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5667-5668, 5676-5677.

to set out exactly what information the RCMP investigators had been provided with, how it was provided, in what context and what amount of detail was available in the materials. Jardine explained that the September 19th affidavit, as drafted, contained the degree of information that he considered necessary and appropriate to support the application. Nevertheless, he continued to be concerned about "…whether the judicial officer would grant the authorization on that kind of information," and he would have preferred to have been given access to the intercept tapes themselves or to complete transcripts.[148] His initial position had been that he was not prepared to proceed with the application because of the CSIS involvement,[149] but he testified that after lengthy discussions with the RCMP officers involved, he was persuaded and became satisfied that there were reasonable grounds disclosed within the affidavit.[150]

CSIS reacted badly to the use of its information in the September 19th affidavit. When Roth was denied access to the Parmar intercept logs on September 18th,[151] he testified that although no one from CSIS had ever explained precisely why the conditions of access had changed, he understood that this decision was likely made as a result of the RCMP use of CSIS information in the September 19th affidavit.[152] In its response to the RCMP submission to the Honourable Bob Rae, CSIS stated bluntly that Roth's access to CSIS intercepts was discontinued "…because the RCMP had used CSIS information in a Part IV.I (now Part VI) application, contrary to the Service's caveats, and without permission."[153]

At a meeting between the CSIS Director General for Communications Intelligence and Warrants, Jacques Jodoin, and Belanger, held on September 26, 1985, Jodoin indicated that "…previous intelligence should not have been used to secure [a] Part IV.I (now Part VI) warrant."[154] New and stricter conditions that CSIS would now impose in order to grant the RCMP access to its information were discussed during this meeting.[155]

There is disagreement between the RCMP and CSIS as to whether the use of CSIS information in the September 19th affidavit was in fact authorized by CSIS. The September 19th affidavit itself stated that CSIS had authorized the RCMP to use its information for purposes of an application to obtain an authorization to intercept private communications. This information was said to have been provided by Solvason to the member who swore the affidavit.[156] In testimony before the Inquiry, Solvason indicated that it was not his responsibility to secure CSIS's consent prior to use of the information in an RCMP affidavit.[157] Wall made

148 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5672, 5676-5677, 5799.
149 Exhibit P-101 CAA0797(i), p. 2.
150 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5676-5677.
151 Exhibit P-101 CAA0802, p. 4.
152 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5630-5631.
153 Exhibit P-101 CAA1088, p. 3. This was in response to the RCMP complaints about the denial of access to the Parmar intercepts materials at various times in August and September 1985. See also Exhibit P-101 CAA0335, p. 22.
154 Exhibit P-101 CAA0327, p. 2.
155 Exhibit P-101 CAA0327.
156 Exhibit P-101 CAA0324(i), pp. 12-13.
157 Testimony of Robert Solvason, vol. 89, December 5, 2007, pp. 11555-11556.

a note on September 16th in his notebook indicating that he had been informed by Wickie of CSIS that the information in the Parmar intercept logs could be used by the RCMP for intelligence purposes and for purposes of a wiretap application, and that Holmes had been advised accordingly.[158]

On the other hand, CSIS has steadfastly insisted that it had not granted any such approval.[159] In a 1987 letter to Solicitor General James Kelleher, CSIS Director Reid Morden wrote "…we can locate no record of having been told in advance" that a CSIS surveillance report on Parmar would be used in the September 19th affidavit.[160]

When Belanger had negotiated access to the Parmar intercept product with CSIS HQ in early September, he had specifically indicated that the review of the CSIS materials by the RCMP, if authorized, would "…not be utilized to glean information of an evidentiary nature." CSIS HQ had agreed to grant access, but had advised the CSIS BC Region that certain conditions would have to be respected, including that "Material must not be used as evidence for court purposes."[161]

During a meeting between the RCMP and CSIS on September 18th, the RCMP had advised CSIS that Crown prosecutor Jardine insisted that he would require access to CSIS intercept materials "…in order to properly prepare applications for wiretap warrants against Parmar et al.," and that he would require "…the freedom to use [the CSIS materials] as necessary for evidentiary purposes." Yet the Commanding Officer of the RCMP E Division, Deputy Commissioner Tom Venner, was reported to have stated that he did not agree with Jardine's position, and that the RCMP Task Force was satisfied to receive CSIS intercept materials for investigative leads purposes only. Venner was said to have added that he foresaw further procedural difficulties down the road because of the "…pressures being generated by Crown Counsel Jardine" and that he might attempt to have the case transferred to a federal prosecutor.[162]

The confusion created by the agencies' differing perspectives on whether the use of CSIS information in the September 19th affidavit was authorized is such that even the official position taken by the Attorney General of Canada on the matter has been inconsistent. In its Final Submissions to this Inquiry, the Attorney General of Canada states that, even though it had been suggested that the RCMP improperly used CSIS information in support of the September 19th affidavit, it remained that "…[w]hether due to a miscommunication or not, officers understood that they had permission from Joe Wickie to use the CSIS material in the Affidavit."[163] Conversely, in another part of the same volume of the Final Submissions, the Attorney General of Canada maintains that the RCMP use of CSIS information was clearly not authorized:

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158 Testimony of Robert Wall, vol. 76, November 15, 2007, pp. 9674-9675.
159 Exhibit P-101 CAA1088, p. 3.
160 Exhibit P-101 CAA0609, p. 17.
161 Exhibit P-101 CAB0551, p. 1.
162 Exhibit P-101 CAB0553, p. 2.
163 Final Submissions of the Attorney General of Canada, Vol. I, p. 133, Footnote 401.

> CSIS HQ had not authorized the use of its information in this manner, and on September 25, 1985 made it clear to RCMP HQ that this should not happen again. It is possible that BC Region had indicated a willingness to obtain permission from HQ on behalf of the RCMP to use CSIS information; Bob Wall testified that he believed Joe Wickie of CSIS BC Region had actually given permission.[164]

Regardless of which agency was correct about the actual granting of authorization, or whether all parties, including the various levels within each organization, misunderstood the situation, it is clear that the incident contributed to increasing tensions between the agencies. From this point forward the RCMP had to adjust to new restrictions on the use of CSIS's information as it conducted its investigation. The RCMP E Division Task Force investigators had already experienced significant frustrations as a result of the back-and-forth on access to the Parmar logs and of what they felt was unsatisfactory access to CSIS information, even before the September 19th affidavit. In fact, the day before that affidavit was sworn, Wall had raised the possibility of executing a search warrant against CSIS during a meeting with Crown Counsel Jardine.[165]

After the September 19th affidavit and the suspension of access to the Parmar intercepts materials, negotiations for access to the logs recommenced between CSIS and the RCMP.[166]

On September 27, 1985, RCMP HQ advised the E Division Task Force of the new conditions tabled by CSIS in order for access to its information to be granted to the RCMP.[167] Among the restrictions imposed by CSIS was the condition that "CSIS information is not to be used for judicial purposes such as Part IV.I (now Part VI) authorizations, search warrants, court briefs, etc."[168] CSIS also denied the RCMP access to transcripts or tapes of intercepts, and stated it would only provide information assessed by CSIS as relevant in "…summary form under third-party rule."[169] The Third Party Rule generally requires that information obtained from one agency not be further disseminated or disclosed without the consent of the original agency.[170] Finally, CSIS demanded that its information not be blended with any RCMP data of a criminal nature that would likely be used as evidence, as this would risk disclosure of the CSIS information in judicial proceedings. Scowen testified that he felt these conditions were appropriate "at the time."[171] The conditions outlined were clearly more restrictive than the access that the RCMP had enjoyed previously, at least in terms of access to intercept logs.

Discontent was also growing at CSIS for other reasons. In October 1985, lower-level management personnel at CSIS HQ were complaining about the lack of

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164 Final Submissions of the Attorney General of Canada, Vol. I, para. 368.
165 Testimony of Robert Wall, vol. 76, November 15, 2007, pp. 9675-9676.
166 Exhibit P-101 CAA0802.
167 Exhibit P-101 CAA0331.
168 Exhibit P-101 CAA0331, p. 1.
169 Exhibit P-101 CAA1089(i), p. 2.
170 Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1656-1657.
171 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6144.

any benefit to CSIS from the HQ-level liaison arrangements made in connection with the Air India file. One CSIS personnel official wrote that the assignment of a CSIS LO at the RCMP HQ Task Force had become a "…one-way street giving the RCMP advantage and no return for our effort." He noted that, though liaison itself should continue, the practice of "…having one of our personnel tied up on a daily basis at the 'beck and call' of the RCMP" should stop. He indicated that, when CSIS HQ had suggested to RCMP HQ that it was "…the RCMP's turn" to send someone down to CSIS "for a change," the RCMP had "…scoffed at this suggestion."[172] He also felt that, more generally, the RCMP was taking advantage of CSIS's indecision and unwillingness to take a stand in policy matters as to CSIS's primary role in national security investigations to "…increase its presence in our historical territory," and was using the liaison arrangements to "…expand their wings." He was particularly critical of the CSIS regions, as he felt that, in a spirit of cooperation, they were allowing the RCMP essentially to run their operations.[173] The writer closed the note by stating:

> Maybe some members of CSIS still think they're working for the RCMP. Myself – I say we are an <u>independent</u> org. & should act that way.[174] [Emphasis in original]

Russell Upton, the Chief of the Section responsible for the Sikh Desk at CSIS HQ, agreed and echoed the criticism that the regions were setting up their own independent liaison arrangements, with the result being "…confusion, complications and more alarming, loss of control over CSIS's intelligence."[175] Upton also felt that CSIS was not gaining a great deal from the present HQ liaison arrangement. He indicated that if the RCMP HQ section in charge of the Air India investigation felt a Liaison Officer was needed to facilitate regular RCMP access to CSIS information, then the RCMP, rather than CSIS, should provide all liaison representatives.[176]

It would not be until October 11, 1985, that the RCMP would again be granted access to CSIS intercept materials.[177] At that time, the Service granted access to the Parmar intercept notes, as well as intercept notes on other Sikh extremist targets.[178] CSIS's position was that its material was to be used as investigational leads only, and not for judicial purposes. Access to transcripts and tapes would occur only at the discretion of the CSIS regional directors general in consideration of specific RCMP investigative needs.[179]

Solvason continued to be tasked as a liaison to CSIS along with Roth and to attend CSIS offices to review what material was made available. On November 18th, Solvason was instructed to "…compile and co-ordinate" CSIS information

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172 Exhibit P-101 CAA0338, p. 1.
173 Exhibit P-101 CAA0338, pp. 2-5.
174 Exhibit P-101 CAA0338, p. 5.
175 Exhibit P-101 CAA0341.
176 Exhibit P-101 CAA0341.
177 Exhibit P-101 CAA0802, p. 4.
178 Exhibit P-101 CAA0379(i), CAA0802.
179 Exhibit P-101 CAA0346.

for use in an evidence package.[180] On November 27th, CSIS denied access to physical surveillance reports on Surjan Singh Gill, while continuing to allow access to Parmar physical surveillance reports.[181] According to Solvason's notes, Wickie explained that the RCMP access was being reviewed by CSIS because the RCMP was looking for "evidence," while CSIS believed that the RCMP access was supposed to be for "intelligence purposes" only.[182] CSIS reversed its decision two days later, allowing the RCMP access to reports on Gill.[183]

Meanwhile, the RCMP had to conform to strict conditions when it again wanted to use CSIS information in support of a warrant application, this time to conduct a search of the suspects' residences. In early November 1985, the RCMP executed search warrants on the residences of Parmar and Reyat, as well as Hardial Singh Johal, Surjan Singh Gill, and Amarjit Singh Pawa.[184] Both Parmar and Reyat were arrested.[185] In crafting the affidavit in support of the application for this search warrant, the RCMP sought CSIS's authorization to make use of its intercept materials.[186] Authorization was granted on November 4, 1985,[187] but the affidavit in support of the application sworn by Cpl. Glen Rockwell on November 4th had to be drafted in collaboration with CSIS, and certain conditions had to be observed. These conditions would later be viewed by Crown counsel as having the potential to put the prosecution in jeopardy.[188]

The November affidavit again described the Duncan Blast observed by the CSIS PSU and referred to Parmar's communications. However, the affidavit was written in a way to hide the fact that CSIS was the source of information. Instead of naming CSIS, the affidavit indicated that the affiant was "…informed by a source of known reliability, whose identity for security reasons I do not wish to reveal at this time…."[189]

In spite of the new conditions that were observed in the November search warrant application, when the RCMP Task Force sought later in the same month to renew its September wiretap authorizations against Parmar et al., it prepared an affidavit that reproduced much of the content of the September 19th affidavit. The affidavit once again made reference to CSIS as the source of a considerable amount of information, and again referred to covert CSIS operatives such as Lowe by name.[190] The affidavit disclosed information about the fact that CSIS had been conducting an investigation into Parmar's activities and intercepting

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180 Exhibit P-101 CAA0797(i), p. 3.
181 Exhibit P-101 CAA0802, p. 5.
182 Exhibit P-101 CAA0797(i), p. 3.
183 Exhibit P-101 CAA0802, p. 5.
184 Exhibit P-201.
185 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5683.
186 Exhibit P-101 CAA0354, p. 1, CAA0365.
187 Exhibit P-101 CAA0367.
188 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
189 Exhibit P-201, pp. 5-6, 8.
190 Exhibit P-203, p. 10. This document was used in a motion brought during the trial of Malik and Bagri and portions of this document, referring to CSIS members by name and other private information, had been manually redacted at that time.

his communications since March 27, 1985,[191] and it summarized dozens of CSIS intercepts concerning the named targets. Obviously, having used CSIS information in the September 19th affidavit, the RCMP could not include less information in the application for renewal of the same authorization. However, there is no record of a specific warning to CSIS that its information would again be used or of a request for its use in this context.

The intermittent and delayed access provided by CSIS to the Parmar intercepts, the use of information that CSIS clearly viewed as unauthorized, and the new and changing restrictions on the access to CSIS materials and on the use that could be made of them fuelled significant interagency conflicts and mistrust. By November 1985, tensions had risen significantly. An incident documented by Roth illustrates the level of distrust and animosity that appeared to prevail in BC.[192] Just after charges were laid against Reyat and Parmar in relation to the Duncan Blast,[193] Francis asked Roth for photographs of Parmar, Reyat and the supporters who had attended the court, for use in updating CSIS files. CSIS also requested access to an RCMP report relating the court proceedings.[194] Roth was informed by a member of the Task Force that Wall had instructed that nothing was to be given to CSIS.

When Roth approached Wall about the issue, Wall walked away from Roth and refused to talk to him. As a result, Roth approached Sgt. Bob Beitel, who was in charge of administrative matters at the Task Force, to obtain the material CSIS had requested. Roth explained the reason he wanted the photographs and stated that the information would "…further [CSIS's] files and update their photos and biographical data on whatever we were able to obtain." Beitel indicated that he would identify the photos first and process them, and then make them available to Roth in a couple of days. However, he wanted a letter from CSIS requesting the information, indicating that he would forward it once he received the request. When Roth asked for copies of RCMP interviews of Reyat and Parmar to pass on to CSIS, Beitel responded "no way," adding that "…we did all the work and they get the benefit."[195]

Roth felt that, as the RCMP Liaison Officer, he had been properly contacted by the CSIS Liaison Officer with the request, and that insisting on a written request defeated the purpose of having a Liaison Officer whose job it was to transmit requests in the first place. He noted, however, that this was "a stressful time" and a "…very high pressure environment."[196] Indeed, it is hard to imagine that an investigation into a crime as horrendous as the Air India bombing would not result in stressful times. However, it is precisely because the pressure was so acute and the stakes so high that clear and precise policies for information sharing and cooperation between CSIS and the RCMP would have been required.

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191 Exhibit P-203, p. 18.
192 Exhibit P-101 CAF0207.
193 See Section 1.4 (Pre-bombing), Duncan Blast.
194 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5635.
195 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5637.
196 Testimony of Michael Roth, vol. 46, September 17, 2007, pp. 5638, 5650-5651.

Instead, the lack of clear policies allowed serious tensions and conflicts to fester, and controversy about the incidents that occurred in the months immediately after the bombing continued to rage for years between the agencies.[197]

Debate over Access to CSIS Toronto Information

The growing differences between the agencies' perspectives are well illustrated by a protracted debate, which began in December 1985, about the level of access to CSIS information to be granted to the RCMP.

The RCMP E Division Task Force asked the RCMP O Division Task Force in Toronto to inquire about accessing CSIS Toronto files to review "…any surveillance and intercepts relating to our main players."[198] The O Division Task Force reported in January 1986 that their projected meeting with CSIS Toronto to discuss this request was cancelled by CSIS because of instructions from CSIS HQ that any review should take place in Ottawa rather than at the Toronto Region.[199] On instructions from RCMP HQ, the O Division Task Force resubmitted in writing a request for information about Parmar, Reyat and Bagri. In response, in February 1986, CSIS Toronto Region provided limited materials, consisting of a booklet of 150 pages of handwritten surveillance notes with no covering reports and no photographs. The Region advised that no relevant intercepts were available. In March 1986, O Division formulated another written request, this time for access to all CSIS Toronto files on a list of 18 individuals and businesses that were believed to have connections with Parmar. This request was forwarded to CSIS HQ by the Toronto Region.[200]

During a subsequent meeting between Inkster and Barr in early May 1986, Inkster mentioned that the RCMP had encountered a delay of 45 days without obtaining a response to this latest request from RCMP BC investigators to be given access to CSIS Toronto files. He asked Barr "…whether this was some indication of the service CSIS was prepared to offer them?"[201] Following further discussions at the HQ level, with Scowen indicating that he was "somewhat disturbed" by the long list of individuals covered by the RCMP request, the RCMP narrowed its request to Parmar and ten other individuals.[202]

On May 26, 1986, CSIS HQ provided a response indicating that the Service agreed in principle to provide the requested access.[203] However, CSIS asked the RCMP to refine its request further in accordance with the protocol already in place for the RCMP access to CSIS files in the BC Region:

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197 See, for example, Exhibit P-101 CAA0609, p. 17, CAD0881.
198 Exhibit P-101 CAA0395.
199 Exhibit P-101 CAA0403.
200 Exhibit P-101 CAA0439.
201 Exhibit P-101 CAB0226.
202 Exhibit P-101 CAA0443.
203 Exhibit P-101 CAA0447.

> [I]t is requested that prior to access, the specific nature of your requirements be made known. To ask for "All Seuveillance [*sic*] reports", "All technical intercepts" … and "All information" … as your letter to us states, is not sufficiently specific for us to render assistance.[204]

Two months passed before the RCMP reformulated its request. In correspondence dated July 25, 1986, the RCMP asked that its investigators "…be granted access to all technical and physical surveillance reports in the possession of the Toronto Region which contain information on Parmar's activities, contacts, travels, associations since 1984."[205] This level of particularity was not satisfactory to CSIS. Scowen testified that CSIS would not "…countenance fishing trips through our database in search of information that they thought would be of interest in their investigation."[206] CSIS HQ advised the RCMP in August that the CSIS Toronto Region had been asked to review its holdings to identify relevant material in response to the RCMP request.[207] When this decision was relayed to the E Division Task Force, it wrote to RCMP HQ to complain about the delay in obtaining access to the information and insisted on having its own investigators conduct the review. The Task Force insisted that "…the importance of having our investigators do a hands-on review of the CSIS info to solicit the relevant points cannot be over emphasized" and maintained that the identification of specific information relevant to the investigation would only be possible "… upon gaining access (if ever) to Toronto CSIS info."[208]

After further discussion between the agencies,[209] CSIS finally agreed to grant the RCMP investigators access to the Toronto materials, specifying that the information would be provided for "investigational leads only" and that any use of the information for court purposes would have to be approved by CSIS.[210] In the end, after nine months of negotiations to access the materials, the RCMP did not identify "anything of importance" from its review of the CSIS Toronto files.[211]

Project Colossal

In 1986, Project Colossal became the code name adopted by the RCMP for its investigations of Sikh extremism, including the Air India and Narita bombings, the Montreal Plot investigation (code name Project Scope), the Hamilton Plot investigation (code name Project Outcrop) and the Sidhu shooting conspiracy investigation.[212]

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204 Exhibit P-101 CAA0447.
205 Exhibit P-101 CAA0470.
206 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6162-6163.
207 Exhibit P-101 CAA0472.
208 Exhibit P-101 CAA0477.
209 Exhibit P-101 CAA0478.
210 Exhibit P-101 CAA0489. See also Exhibit P-101 CAA0494.
211 Exhibit P-101 CAA0494, p. 16.
212 Exhibit P-101 CAA0457; Exhibit P-102: Dossier 2, "Terrorism, Intelligence and Law Enforcement – Canada's Response to Sikh Terrorism," pp. 45-48.

The Hamilton and Montreal investigations were largely developed by the RCMP alone. However, some of the RCMP's actions during these investigations, in particular what CSIS perceived as the Force's attempts to open channels of liaison with foreign security and intelligence services, caused concern to CSIS. The Service felt that it could not discourage direct contact between the RCMP and foreign police forces, but that, in cases where security services operated within those police forces, this led "…to confusion as to who in Canada is in fact responsible for the collection of intelligence respecting terrorism." CSIS sent out a memo to its Security Liaison Officers (SLOs) abroad to debunk a rumour that the RCMP had "…full, unfettered access to CSIS data banks." CSIS wanted to ensure that its allies knew that the information they passed to the Service would not end up being made public in criminal proceedings without their knowledge or permission, and was concerned that the RCMP may have misinformed allies about this matter.[213]

On June 2, 1986, CSIS wrote to the RCMP to set out conditions for the passage of information from CSIS to the RCMP in relation to Project Colossal. The new procedures allowed the RCMP to view some CSIS "intercept transcripts" (the notes or logs prepared by CSIS translators and transcribers) with CSIS HQ approval. The possibility that some CSIS information could be used to support applications for judicial authorizations was left open, but the proposed text of such applications had to receive approval from CSIS HQ as well.[214]

On June 23, 1986, the CSIS conditions were replaced by guidelines, agreed upon by CSIS and the RCMP, for information sharing relating to Project Colossal.[215] The agreement included provisions to protect CSIS sources and methodologies as well as third-party information.[216] The guidelines stipulated:

- When advice would be given to the Minister and by which organization;
- That the RCMP would attempt to obtain its own warrants to reduce the possibility of CSIS involvement in court proceedings;
- That the RCMP would consult with CSIS prior to using CSIS information for judicial purposes, with impasses being resolved at the Commissioner/Director level;
- That consultation was to be undertaken to avoid duplication of surveillance;
- That CSIS would disclose all information that impacts on or relates to Project Colossal, with the RCMP to reciprocate;
- That Foreign Liaison tasking would be coordinated to avoid duplication;
- That CSIS would assign dedicated CSIS analysts to RCMP Task Forces;

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213 Exhibit P-101 CAA0456, pp. 1-2.
214 Exhibit P-101 CAA0449.
215 Exhibit P-101 CAA0455.
216 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6171.

- That all information shared would not be further disseminated; and
- That consultation would precede any third-party involvement.

These arrangements were circulated at CSIS on June 27th. The Ministerial Directive received by CSIS on May 29, 1986 was also circulated for CSIS employees to review. This directive stated that CSIS was "…to cooperate with and make available to the RCMP all information that relates to Project Colossal."[217] Retired CSIS Deputy Director of Operations (DDO) Jack Hooper testified that the grouping of Sikh extremism investigations under one project and the negotiation of specific information-sharing agreements was aimed at facilitating cooperation between the RCMP and CSIS on the broad issue of Sikh extremism.[218] A project-specific MOU on the transfer and sharing of information for Project Colossal was signed and circulated in October 1986.[219]

The Kelleher Directive, The Barr Memo and The CSIS Theory of the Case

On January 28, 1987, the Minister issued what has become known as the "Kelleher Directive" about the Air India/Narita investigation. In a letter addressed to CSIS Director Finn, the Minister discussed three major concerns. First, he ordered the development of a "…fully coordinated Ministry approach to the handling of media and other public inquiries" in advance of any arrests in the case. Second, he stated that it was "…essential that both CSIS and the RCMP commence action now to coordinate the preparation of evidence which would be used for court purposes," again in the expectation of a criminal trial. Third, he asked to be updated on certain source development issues.[220]

This Directive signalled a departure from the early days of CSIS in dealing with disclosure of CSIS information that might have evidentiary value.[221] In his reply, Finn stated that CSIS "…fully appreciates the vital importance of bringing those responsible for the crash of Air India before the courts." He noted that he had "…directed that the full cooperation of the Service be placed at the disposal of the RCMP in this regard and that all information that may possibly be relevant is made available to the RCMP to assist in its investigation," and he stated that CSIS would "…develop a chronological timetable of the events the Service believe[d] led up to the commission of the crime."[222]

In a memorandum that Barr authored shortly afterwards, he clarified that CSIS was not responsible for investigating the bombing, and that the investigation would now "…move into the hands of the RCMP." He stated that, in their treatment of the information uncovered by CSIS, the RCMP had agreed that "…everything possible will be done to prevent damage to CSIS sources and operational

217 Exhibit P-101 CAA0457, p. 3.
218 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6218.
219 Exhibit P-101 CAA0500. See Section 4.0 (Post-bombing), The Evolution of the CSIS/RCMP Memoranda of Understanding.
220 Exhibit P-101 CAD0095, pp. 1-2.
221 Testimony of Mervin Grierson, vol. 75, November 14, 2007, p. 9479.
222 Exhibit P-101 CAD0094. See also Section 3.0 (Post-bombing), The CSIS Investigation.

methods and that the Service will be kept fully informed of the progress of the criminal investigation." CSIS personnel were directed to "…continue to be of assistance to the RCMP by providing a comprehensive database against which to test information developed by the police," and to be guided in offering this cooperation by the common goal of convicting those responsible for the crimes.[223]

Within two months of the Kelleher Directive, CSIS had submitted its comprehensive analysis of the intelligence it had collected on the bombing to the Minister and the RCMP. The document included a chronology of events, a summary of new source information, supplementary information, and a link analysis chart. The conclusion set out the CSIS perspective that "…the concept of blowing up a civilian airliner originated in the minds of a small group of men," and that the main protagonist was Parmar. The CSIS analysis also listed persons it felt were the "weakest links" in the conspiracy who could potentially be pressured to provide further information. This list included Surjan Singh Gill and Hardial Singh Johal.[224]

Though the degree of direct CSIS involvement in pursuing avenues of investigation related or directly impacting on the criminal investigation changed somewhat after this period,[225] the information sharing and cooperation problems continued.

Norman Inkster (who was a Deputy Commissioner in March 1987 before being promoted to Commissioner in September 1987) was asked about the level of cooperation the Force received from CSIS in the period from April 1987 onwards. He stated that "…it was certainly a relationship that had its difficulties," but he did not think that it would be fair to characterize it as one involving "…people simply being difficult and not wanting to cooperate." He thought, however, that attempts to obtain documents and information from CSIS in a timely way continued to be a difficult process, partly because of the constraints created by the *CSIS Act* itself and partly because of cautious legal opinions CSIS had obtained regarding the sharing of information. According to Inkster, CSIS "…felt obliged to move very, very cautiously," which caused frustration to investigators who wanted to be "…able to move on it expeditiously."[226] There was always a review process involved, during which CSIS would assess the purpose for which the information was needed and the manner in which it could be used. It was, from Inkster's perspective, never a case of asking for the information and "…simply getting it. There was always a delay of various lengths."[227]

The Reyat Arrest

Even after CSIS had made a decision to follow the ministerial direction and specifically instructed its investigators to stay out of the Air India investigation,

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223 Exhibit P-101 CAB0717.
224 Exhibit P-101 CAB0717, pp. 15, 18.
225 See Section 3.0 (Post-bombing), The CSIS Investigation.
226 Testimony of Norman Inkster, vol. 81, November 22, 2007, p. 10317.
227 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10317-10318.

separating the roles of the agencies did not always prove as easy in practice. It was particularly difficult when CSIS was faced with situations where it perceived that it had better chances of obtaining information from certain individuals than the RCMP had, or when RCMP actions in the criminal investigations risked generating relevant information which would end up in CSIS's hands.

In January 1988, the RCMP was planning to arrest and extradite Reyat back to Canada. CSIS BC Region was advised of the RCMP plans for conducting interviews once the arrest became known, and was asked to avoid contacts with those targets, as such contact "…may jeopardize our criminal investigation." The RCMP also requested that CSIS provide any information in its possession about the targets and advise the RCMP of the interviews it intended to conduct in connection with the arrest, as well as the targets on whom CSIS would be conducting physical surveillance. In reaction, the CSIS BC Region wrote to CSIS HQ, copying all CSIS regions and districts, explaining that the Region remained "… cognizant that the investigations into the Air India/Narita disasters are criminal matters and they are the responsibility of the Royal Canadian Mounted Police (RCMP)," but that the arrest would have an impact on the CSIS investigations, as it was felt that the entire Sikh community would be affected by the arrests. BC Region intended to monitor sources for feedback "…which may prove useful to the RCMP" and to comply with the RCMP requests.[228]

While the Region felt that its intended investigations fell within the guidelines requiring that CSIS participation in the investigation of Air India be restricted to providing investigative leads, it was concerned and asked for guidance from CSIS HQ because, with Reyat's arrest, information about Air India might be obtained. The Region stated it was "…intensely aware of the enormous importance of this criminal case" and that it hoped its actions would contribute "…toward a successful end to the criminal case."[229]

Parmar's Death

Though CSIS had effectively ended its investigation of the Air India bombing, Parmar remained a target of the Service's Sikh extremism investigations. In 1988, however, Parmar left Canada.

On July 15, 1988, a briefing note was written to the Director of CSIS, Reid Morden, asking whether CSIS should notify Indian authorities that, as of July 15th, CSIS was able to place Parmar in Pakistan.[230] CSIS believed that Parmar was attempting to return to India, possibly to commit further acts of terrorism. The conclusion of the briefing note was that it was recommended that "…because of Parmar's stature as a dangerous Sikh terrorist, CSIS notify the GOI [Government of India]."[231] The decision was referred to the Director level due to the fact that CSIS was concerned that, once alerted, Indian authorities might kill Parmar, a

228 Exhibit P-101 CAA0627(i), pp. 1-4.
229 Exhibit P-101 CAA0627(i), pp. 4-5.
230 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8337.
231 Exhibit P-101 CAB0780.

Canadian citizen. The Director made the decision to notify the Government of India. On October 13, 1992, another briefing note was sent to the Director. This note updated the Director on the search for Parmar. The next day Parmar was reportedly killed following a gun battle with Indian authorities.[232]

Bill Turner, who became the head of the Sikh Desk at CSIS HQ in 1990, testified that he did not accept the "official story," that Parmar had been killed in a shootout with Indian authorities. Turner stated that they had sources in the community and within the BK, and that there were indications that Parmar had been captured first. Turner also saw photos of his body and stated, "…there [were] clear indications that he had been tortured prior to being killed."[233]

Turner was not surprised that the Government of Canada had not been informed of Parmar's capture. There had been a prior case where a Canadian citizen had been captured, held in custody and tortured. When Canada was informed, External Affairs Minister Joe Clark travelled to India to make representations on behalf of the imprisoned Canadian citizen. The capture and torture of Canadian citizens became "…a bit of a sticky issue" between the Government of Canada and the Government of India. In order to avoid further tension, Turner believed it was simpler for the Government of India to do what it was going to do along these lines without informing the Canadian government. Turner said this included the case of Parmar.[234]

The death of Parmar, the prime suspect in the Air India/Narita bombings, obviously had an impact on the Air India investigation. There has been no evidence to suggest that CSIS was aware of Parmar's capture prior to his death. Nevertheless, CSIS had occasionally informed the Government of India of Parmar's suspected whereabouts with the full knowledge that such information could lead to his death. Conversely, there was no evidence before the Inquiry that CSIS informed the RCMP of either its knowledge of Parmar's whereabouts or its concerns about the actions the Government of India might take on the basis of CSIS information, including that Parmar might be caught and killed rather than being repatriated to Canada to face charges in the Air India bombing. Finally, there was no evidence presented that the Director informed the Minister of the CSIS decision to inform the Government of India, regardless of the possible consequences for Parmar.

CSIS stated in 1987 that there was "…no higher priority for … this Service, than bringing the persons who perpetrated these crimes, before the courts."[235] In subsequent years, no charges were laid and Parmar slipped out of the country. When faced with information that suggested Parmar was planning to return to India, CSIS needed to balance the threat posed to innocent people abroad from possible terrorist acts by Parmar, against the possible capture and death of a Canadian citizen and a prime suspect in the bombing.

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232 See Section 2.3.3 (Post-bombing), The Purported Parmar Confession.
233 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8339.
234 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8337-8340.
235 Exhibit P-101 CAB0717(i).

It is not known how the ultimate decision to inform the Government of India about Parmar's whereabouts was taken. It is not known whether the Director consulted with the Minister. It is not known whether CSIS's action had any impact on Parmar's capture and death, though the evidence seems to suggest otherwise.[236] But in this age of globalization, including the globalization of terror, a similar situation may arise again. The question of how the Government of Canada and its agencies should react to such a situation is a difficult one, with no easy answers. It does seem, however, that the decision cannot be that of CSIS or of any other single agency alone.

The Disclosure and Advisory Letters Process

A new process for disclosing material to the RCMP was developed in the 1990s. During this period, relations between the agencies continued to be difficult. Ron Dicks, the former RCMP LO in Toronto,[237] became the Officer in Charge of the E Division National Security Investigations Section (NSIS) responsible for the Air India investigation. He testified that, in his interactions with CSIS in his new position, he felt that the flow of information between the agencies continued to be restricted.[238] He described the relationship that NSIS had with CSIS as a very bureaucratic one, characterized by great formality, and far from fluid.[239]

According to the new process for exchanging information devised in the 1990s, CSIS would provide "disclosure" and "advisory" letters to the RCMP. When CSIS gathered information, the intelligence would be written up in an investigator's report. A copy of this report was to be given to the RCMP, usually through the RCMP LO, and was called a "drop copy." If the RCMP was interested in some, or all, of the information, it would request it through the LO. CSIS would then provide the information in the form of a "disclosure letter."

Disclosure letters were typically provided at the regional level. Their purpose was to let the RCMP know that "something is afoot."[240] They contained a refined version of the drop copy report with some analysis. Over the course of the Air India investigation, Turner estimated that CSIS sent 3,000 disclosure letters to the RCMP.[241]

Disclosure letters were not meant to be used in court or in support of judicial authorizations. If the information was required by the RCMP for use in court or for an affidavit, the RCMP had to request its use. In response, CSIS prepared an "advisory letter," drafted by HQ, which would provide "…the information to the extent possible that the RCMP were seeking," available for use in court. Advisory letters were "far more polished" and included a CSIS assessment with additional caveats added.[242] The aim of the advisory letters was to be more probative

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236 See Section 2.3.3 (Post-bombing), The Purported Parmar Confession.
237 See Section 4.2 (Post-bombing), The Liaison Officers Program.
238 Testimony of Ron Dicks, vol. 62, October 16, 2007, p. 7565.
239 Testimony of Ron Dicks, vol. 62, October 16, 2007, p. 7565.
240 Testimony of Ches Parsons, vol. 82, November 23, 2007, pp. 10480-10481.
241 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8313.
242 Testimony of Jack Hooper, vol. 50, September 21, 2007, pp. 6230, 6232.

in nature and of more utility to the police.[243] However, the disclosure letters typically contained a much broader amount of information than the advisory letters.

The RCMP complained that at each level of disclosure, from disclosure letter to advisory letter, the information provided was narrowed and sanitized. Sgt. Laurie MacDonell, who joined E Division NSIS in 1990, testified that the information contained in CSIS advisory letters was generally "…nowhere near the standards that a criminal court would expect." He explained that as a result, it was "…frustrating to obtain information from the Service." MacDonell recalled that, in some instances, CSIS would provide advisory letters in which even the limited information provided would change from version to version. According to him, the release of vague, and at times inconsistent, information was "…not consistent with evidence or full disclosure; it became a little bit confusing."[244]

Indeed, although the agencies could devise protocols between themselves for sharing information, it would ultimately be for the court to decide whether additional information was required if an attempt was made to use the sanitized information in court or in support of a judicial authorization. Pursuant to the habitual rules of evidence, a letter containing a summary of information available from original sources could probably not have been admitted in evidence in a trial without presenting underlying testimony and original materials. As for judicial authorizations, it would always be open to the defence to challenge the lack of detail and to request more information to evaluate the sufficiency of the grounds for the searches or wiretaps.

From his perspective as an investigator, MacDonell emphasized that the RCMP needed "raw data" and the "exact source" of information and that, in order to satisfy disclosure requirements, police officers needed access to the source of the information, and not "a crafted letter."[245]

There were also significant delays in the process. In one particular case, MacDonell had to wait a considerable amount of time while attempting to get direct evidence to support criminal charges on a homicide. The issue had to go to the "highest levels" of CSIS and the RCMP, with RCMP management fully supporting MacDonell's request. Nevertheless, it took well over a year for the issue to get resolved.[246] MacDonell indicated that the delays encountered in obtaining information from CSIS hindered the police investigations.[247]

Despite the legal and practical difficulties in the disclosure and advisory letters system for passing CSIS information to the RCMP in potential criminal cases, this system continued to be used as of the close of the hearings of the Commission.[248]

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243 Testimony of Ches Parsons, vol. 82, November 23, 2007, p. 10481.
244 Testimony of Laurie MacDonell, vol. 76, November 15, 2007, p. 9649.
245 Testimony of Laurie MacDonell, vol. 76, November 15, 2007, pp. 9649-9650.
246 Testimony of Laurie MacDonell, vol. 76, November 15, 2007, pp. 9648-9650.
247 Testimony of Laurie MacDonell, vol. 76, November 15, 2007, pp. 9648-9650.
248 See Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12766-12768.

Post-1995 CSIS/RCMP Relationship

Turner testified that 1995 was a key date in the CSIS/RCMP relationship. Prior to that date, he described the relationship as "difficult."[249] The 1992 SIRC report had noted personality problems, but had concluded, based in part on a less-than-complete briefing from the RCMP,[250] that "…there was no indication that these problems had any long-term effect on the overall conduct of the investigations."[251] According to Turner, mainly as a result of a "change of personalities," relationships between the two organizations improved after 1995.[252] At that time, Insp. Gary Bass (now Deputy Commissioner) was asked to review the Air India investigation and to provide advice about any additional steps that could be taken.[253] A renewed Task Force was assembled to first conduct the review, and then to pursue the new investigative initiatives identified.[254]

Turner stated that the relationship, post-1995, was "…excellent, a sentiment echoed by SIRC in 1998." Turner became the CSIS Liaison Officer to the 1995 RCMP Air India Task Force, and he testified that, as the CSIS representative, he was treated as a full partner.[255] This era saw greater cooperation between CSIS, the RCMP and, notably, the Crown. The use of CSIS intelligence in court proceedings continued to be the primary liaison issue, one that occupied the majority of Turner's efforts, and, though some aspects could never be fully resolved, the situation was much improved when compared to the earlier Reyat trial.[256]

However, some of the problems experienced throughout the earlier years of the investigation continued. The back-and-forth arguments about the scope of RCMP requests for information in light of the risk of exposure for CSIS, as well as the complex logistics associated with the review done by the Service prior to determining the information to be provided, were still present in the late 1990s.[257]

On February 9, 1996, Bass wrote a memorandum to the OIC of the Air India Task Force at E Division headquarters which provided an overview of the challenges faced in preparing an application to intercept the communications of the principals in the investigation, as well as in proceeding with charges. Making reference to the abuse of process concerns expressed by Jardine during the Narita prosecution, Bass noted that there would be "…intense criticism of CSIS" during the process of getting the CSIS wiretap evidence into court at trial, and that "…we can only hope that other relevant information has not been withheld."[258] He concluded that if such a discovery occurred, the prosecution would collapse.

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249 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8271.
250 See Chapter V (Post-bombing), The Overall Government Response to the Air India Bombing.
251 Exhibit P-101 CAB0902, p. 74.
252 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8340-8341. See Section 2.2 (Post-bombing), The RCMP Investigation: Red Tape and Yellow Tape.
253 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11177.
254 See Section 2.2 (Post-bombing), The RCMP Investigation: Red Tape and Yellow Tape.
255 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8270, 8310.
256 See Section 4.4.2 (Post-bombing), The Air India Trial.
257 See, for example, Exhibit P-101 CAA0966, pp. 24-25.
258 Exhibit P-101 CAA0932, p. 2.

In his testimony, Bass took care to emphasize that this was not a criticism of CSIS:

> They're operating in a different environment than we are. We were still growing through disclosure. We could see through our experience in the courts and criminal cases how these things were likely to go. And as it turns out, I think we predicted it fairly accurately. But CSIS didn't have that experience in the courts. And I fully expected and accepted that we didn't know everything at that stage about what they knew about Air India. I mean, that's the nature of the business. And so I'm not saying that as a criticism. But what I was pointing out is that it's something that we need to be aware of, that as this thing progresses, you know, hopefully, there won't be any instance happen that would look like nondisclosure.[259]

When CSIS learned in 1999 about the Bass February 1996 memorandum, a file review was conducted. CSIS noted that the Bass memorandum was written "in a vacuum" and "without balanced views," and believed that Bass relied mostly on "…tribal knowledge from those involved in the Reyat prosecution," and was influenced by those who had deeply negative attitudes towards CSIS. CSIS concluded that if Bass could apply "…the wisdom of 20/20 hindsight," he would "…most likely regret everything he wrote in 1996."[260] In his testimony before this Inquiry, Bass recognized that some CSIS members were of great help in resolving many large disclosure issues in the post-1996 investigation and in moving the case forward. He stated, however, that this did not change the opinions he expressed in 1996 and that therefore he did not regret what he had written.[261]

In February 1996, the RCMP had completed the preparation of a first draft affidavit in support of its wiretap application.[262] The affidavit made extensive reference to CSIS information, in particular from the Parmar intercept logs. The Task Force informed CSIS of the targets for the intended wiretap and soon afterward, CSIS informed the RCMP for the first time that it possessed over 200,000 tapes containing the intercepted communications of Parmar, Bagri, and Malik, among others, recorded between 1985 and 1996.[263] The RCMP investigators had to review 60,000 pages of intercept logs regarding these recordings to determine whether the tapes contained information that would be useful to the case, a task that had to be completed before the Force could satisfy the requirements of the *Criminal Cod*e for the wiretap application.[264]

In the end, the RCMP concluded that the new materials did not contain any substantive evidence that would exonerate the suspects.[265] However, the

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259 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11192.
260 Exhibit P-101 CAA0977, p. 1.
261 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11207-11211.
262 Exhibit P-101 CAA0936(i), p. 1.
263 Exhibit P-101 CAA0952, p. 1, CAD0180, p. 6.
264 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11182.
265 Exhibit P-101 CAD0180, pp. 6-7.

unexpected discovery of their existence and the associated need to conduct a review took "considerable time" and delayed the RCMP's plans for the new wiretap application.[266] This naturally caused frustrations for the Task Force investigators. S/Sgt. Bart Blachford, who was a member of the Task Force at the time and is now the lead Air India investigator in E Division, testified that the RCMP had "no idea" of the existence of the CSIS tapes prior to its own approach to CSIS to advise of its intended targets for the new wiretap. He indicated that the CSIS disclosure effectively "shut down" the RCMP's wiretap application process for months while the material was reviewed, and that the Force simply "…couldn't move forward" until this was done.[267]

Clearly, the post-1995 improvements in the CSIS/RCMP relationship did not resolve all the issues. Indeed, Merv Grierson, former Director General of the CSIS BC Region, testified that until his retirement in 1997, disclosure of CSIS information continued to be a major problem.[268]

Nevertheless, the relations between the agencies did change in the post-1995 era, with fewer back-and-forth and legalistic debates being observed in this period. Having gone through the experience of the Reyat trial, where, after much delay and resistance, CSIS finally agreed to provide some materials for the prosecution,[269] CSIS advised that its approach would be different this time. At a February 1996 meeting between Supt. Rick MacPhee and S/Sgt. Doug Henderson of the RCMP and Grierson, it was made clear that CSIS was ready to assist with the investigation and to provide evidence for use in court. Grierson indicated to the officers that, within the bounds of its guidelines and security concerns, "…CSIS would provide whatever evidence they can with respect to the seriousness of the Air India disaster, and that their position on this has modified over the years."[270] Grierson acknowledged the access and disclosure issues prior to the Reyat trial, but emphasized that these were successfully worked out in the end and resulted in a conviction. The RCMP officers in turn assured Grierson that they would go through the normal disclosure and advisory letters process for any CSIS information that had not previously been disclosed in the Reyat trial or otherwise become part of the public domain.

In September 1996, the authorization to intercept communications sought by the RCMP was finally granted,[271] but the wiretaps put into place did not yield any useful information that could be entered as evidence.[272] In November 1996, Bass sent a memorandum to Grierson to update him regarding the investigation.[273] He acknowledged that CSIS and the RCMP enjoyed a close working relationship at the time and that CSIS's cooperation had been very helpful to the investigation. However, he noted that there were outstanding issues with respect to the CSIS intercept tapes – which the RCMP intended at that time to make use of as evidence

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266 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11183.
267 Testimony of Bart Blachford, vol. 63, October 17, 2007, pp. 7820-7822.
268 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9475-9476.
269 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
270 Exhibit P-101 CAA0942.
271 Exhibit P-101 CAA1127. The application itself can be found at Exhibit P-101 CAD0180.
272 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11214-11215.
273 Exhibit P-101 CAA0958.

– such as continuity and the erasure of many of the tapes. Bass testified that the RCMP still believed that the CSIS intercept materials were the best evidence available at the time, though the prosecution team would subsequently decide not to attempt to enter the material in evidence.[274] In the memorandum, Bass expressed the concern that if defence challenges to the admissibility of the CSIS intercept information were successful and the prosecution collapsed as a result, the failure could be attributed to the erasure of the tapes.[275]

The Recurring Challenges of Information Sharing

CSIS always had concerns about the RCMP's ability to protect CSIS information, regardless of the state of the relationship with the RCMP and of the various agreements reached. Warren testified that, in providing access to its information, CSIS was concerned about losing control of its intelligence. Warren was also concerned about potential loss of protection for CSIS information in the courtroom.[276] He testified that the "bottom line" of the cooperation issue was:

> How does one maintain control? How does one ensure that … responsible control over the disclosure of information relating to Canadians is being maintained by the Service if one invites other organizations into one's midst….[277]

CSIS was always concerned about the ultimate use of its information. If it was eventually introduced in court, this would obviously mean making some information public about CSIS operations and possibly exposing some of its personnel. This, for the most part, is what drove the CSIS resistance to answering certain types of requests and to sharing certain types of information. Turner explained in testimony that the RCMP advised CSIS early on that there would be difficulties in protecting the CSIS information that was passed to the Force from disclosure in a criminal prosecution. In response, CSIS did its own "vetting" at every stage of information sharing, in an attempt to protect the information.[278] Concerned about the extent of its exposure, CSIS sought to restrict the amount of material provided to the RCMP.

CSIS's concern for protecting its information from public disclosure was based on a very real – and legitimate – fear of the consequences that could result from exposure. Jack Hooper explained in testimony that if CSIS sources, methodology or translators were exposed, CSIS would have to start again "…from ground zero" in an attempt to "…reconstitute an inventory of assets." He stated that when a human source became exposed, "…it chills an entire community." He added that once methodologies are exposed, "…you are in real trouble." As an

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274 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11221-11222. See Section 4.4.2 (Post-bombing), The Air India Trial.
275 Exhibit P-101 CAA0958, p. 2.
276 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5909-5910.
277 Testimony of James Warren, vol. 48, September 19, 2007, p. 5910.
278 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8298-8299.

example, he explained that, not long ago, "very important targets" believed that cellular phone communications could not be intercepted. However, once that ability was publicly disclosed, targets became guarded in their communications and CSIS was required to spend a great deal of time and money to develop new methods for the interception of communications.[279]

CSIS was determined to keep secret the details of how technical intercepts were put together, placed, and installed, as well as their capacity and their characteristics. Scowen testified that CSIS needed to protect its methodology in order to do its job effectively, since all fields, not just CT, employed the same methodologies. He stated that "…methodology is a crucial part in the tool bag of any intelligence service and all of us protect it to a maximum degree."[280]

Another important concern for CSIS was the protection of its translators and, to a lesser extent, its transcribers. This was of particular concern because finding translators who could be security cleared was also an ongoing problem for CSIS. The Director General for Communications Intelligence and Warrants, Jacques Jodoin, wrote in a 1986 document that "…cleared and proven translators are a scarce commodity, especially in the people recruited from the visible minority groups."[281] Translators were "…an exceptionally important resource" for CSIS, and often came from, and lived in, the community where the language needs arose. It was generally imperative for translators to keep their involvement with CSIS a secret from their community. Compromising the identity of a translator could lead to that person being ostracized in the community, and could possibly place the person at risk of physical harm. If CSIS was unable to protect translators, it would experience difficulty in recruiting more translators, and its ability to monitor threats to the security of Canada would thereby be compromised.[282]

Despite CSIS's desire not to have its information, methods or sources exposed in a court case, that possibility was at least likely, and perhaps inevitable, in the Air India case. Even where the RCMP felt that it might be able to collect the necessary evidence on its own on the basis of the leads provided by CSIS, the need to use CSIS information in support of the RCMP's warrant applications could also lead to the exposure of CSIS information to public disclosure in judicial proceedings. By gathering its own information, the RCMP avoided the risk of exposing sensitive information regarding CSIS operations, and also improved the chances of successful prosecution by ensuring that the evidence was collected and preserved in accordance with the legal standards. Ironically, however, where the RCMP needed CSIS information in order to gather its own information, CSIS would not be protected. Hence, even when its information was provided to the RCMP as investigative leads only, CSIS risked exposing confidential matters because the information would ultimately be exposed if it turned out to be the only source available, or if it was needed to obtain RCMP warrants.

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279 Testimony of Jack Hooper, vol. 50, September 21, 2007, pp. 6272-6273.
280 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6189-6190.
281 Exhibit P-101 CAF0279, p. 2.
282 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6155-6157.

Norman Inkster acknowledged that the friction between the RCMP and CSIS concerning access to information was very much a product of the "… fundamental differences between the RCMP and CSIS."[283] Each organization had its own mandate and priorities, and was subject to different legal thresholds and constraints regarding the collection and disclosure of information. CSIS itself was frequently bound by caveats imposed by foreign agencies as well as the desire and obligation to protect its sources and personnel, while the interest of the RCMP was on placing as much evidence as possible before a court should an investigation lead to an arrest and charges. These differences were not necessarily irreconcilable, but understandably led to mutual frustration.

In practice, CSIS's fear of exposure led to numerous debates at all stages of the information-sharing process. Not only was CSIS reluctant to grant the RCMP authorization to use its information in judicial proceedings, but CSIS attempted to restrict the extent of the RCMP's access to its materials to ensure that this possibility never materialized. This led to debates about the nature of the RCMP's requests for information, about CSIS's ability to identify independently the criminal relevancy of its information, and, importantly, about the type of materials to which CSIS would grant access. There was a particular difficulty in providing the RCMP with "raw" or original materials, as opposed to summaries of information.

The RCMP, for its part, often failed to distinguish between CSIS's reluctance to have its information exposed in court or to provide raw materials, and a reluctance to share information. As a result, the RCMP made blanket accusations of a lack of sharing, when, in fact, it was being provided with countless investigative leads but simply could not use the information for prosecution purposes.

The increasing tensions between the agencies were also fuelled by CSIS complaints about the RCMP's own lack of willingness to share its information and by particular issues associated with human sources, as well as by structural issues relating to the level of centralization within each agency and the internal responsibility for decisions about the sharing of information.

The Range of CSIS Information Shared: Who Decides?

Specific Requests versus "Fishing Trips"

From the early days of the Air India investigation onwards, CSIS and the RCMP often appeared to be talking at cross-purposes when discussing the access to CSIS information that would be provided to the RCMP. The agencies were continually at odds about the fundamental issue of how much material should be provided to the RCMP, and about who should decide what was relevant to the RCMP investigation. In addressing these issues, CSIS often took initial positions that were very restrictive in terms of sharing, only to acquiesce later and provide at least part of the access or information initially requested.

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283 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10326-10327.

CSIS's general position was that it would advise the RCMP of any information that was obtained that had a bearing on the investigation.[284] When it requested information from CSIS, the RCMP traditionally asked for "…everything CSIS had," apparently assuming that it would then be able to make its own selection of relevant materials. At CSIS, this was viewed as the RCMP's opening "stance," despite the fact that there would inevitably be conditions on any information passed. CSIS replied with the standard response that the RCMP would be supplied with "…all information we had that had any even remote connection to their investigation" – an answer that never satisfied the RCMP, since the selection of relevant material would be done by CSIS. Scowen testified that CSIS was constantly telling the RCMP that their requests had to be more specific, and that it was "…a response that they understood."[285]

The RCMP felt entitled to receive access to all CSIS information that could be of assistance, whereas CSIS felt that it had a responsibility to protect information for long-term intelligence and to provide only "investigative leads" to the RCMP, rather than broad access to its holdings. According to Grierson, when CSIS explained its perspective to the RCMP, "…that wasn't accepted." Grierson testified that the RCMP's perception was "…that our job was to dump – all our stuff to them, give them everything, including sources, identities, whatever it was, and because they had to mount a criminal investigation."[286]

Inkster explained that, from the RCMP's perspective, the difficulty was that the RCMP was interested only in information pertaining to the Air India crash, and he felt that this should have provided a sufficient basis for CSIS to retrieve and review material in line with its requests. He added that it was "disconcerting" when CSIS was looking for more specificity – "…you couldn't be more specific if you didn't know what they had; and that was the challenge."[287] According to Inkster, CSIS's position "…compounded the difficulties that the police had in terms of investigating this and in as speedy a fashion as possible."[288]

The problem with requiring the RCMP to be more specific was that it did not necessarily know what it needed to ask for. CSIS required the RCMP to have a notion of what it was looking for before making the request, but it would be difficult for the Force to know what to look for without knowing what information CSIS had. Hence, the Force made broad requests, and this was viewed by CSIS as an indication that the RCMP was on a "fishing trip" for missed leads.[289]

According to CSIS, there was a logistical problem with blanket requests from the RCMP. Because of the size of its informational holdings, it would be very difficult without a specific request to bring up the actual information being searched

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284 Exhibit P-101 CAA0294, p. 1.
285 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6135, 6162-6163.
286 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9459-9460.
287 Testimony of Norman Inkster, vol. 81, November 22, 2007, p. 10321. An example of the RCMP being required to provide precise, narrow requests can be found at Exhibit P-101 CAD0182.
288 Testimony of Norman Inkster, vol. 81, November 22, 2007, p. 10321.
289 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6164.

for. Further, CSIS was concerned that to allow the RCMP access to its extensive database would have an impact on other areas which were of no proper interest to the RCMP and that were outside the scope of the RCMP/CSIS relationship.

The RCMP, for its part, felt that CSIS could not be relied on for the purpose of "pre-screening" its information to decide what would be of relevance or interest to the RCMP. Inkster testified that having CSIS make the assessment as to what was relevant for the RCMP "…added an area of doubt and concern" that was "a serious one." He explained that it would be the police who would have to continue the criminal investigation and ultimately to appear before court and give evidence or to swear affidavits for search warrants and wiretap authorizations. With these responsibilities, Inkster felt that the officers needed to be in a position to determine, on the basis of their professional training and experience, whether there was information that was relevant and important to the issues that needed to be resolved.[290]

It would seem natural to assume that the criminal investigators would be in the best position to determine what was relevant to their investigation. For CSIS, however, providing the open access requested by the RCMP was inconceivable. It would have meant that the Force would have known more than "…most intelligence officers in the BC Region."[291] The need-to-know principle, as applied at CSIS, meant that individuals were provided access to classified or designated material only to the extent necessary to properly carry out their current duties or responsibilities. Stevenson explained that colleagues working side by side would not necessarily know what the other was working on. Even CSIS agents would have to justify their own legitimate need to know before being given access to restricted information in their own department.[292] CSIS felt justified in applying this need-to-know principle to information passed to the RCMP. The result was that CSIS, rather than the RCMP Task Force, made the decisions on what the RCMP needed to know.

Lack of Trust

There was also significant mistrust between the agencies that impacted on the access debates. As Warren explained:

> I guess one of the other problems – and I think it's just endemic with the nature of the job – it's sometimes really as much a function of the personalities involved as it is any structure you want to put in place. If there's a trust built up between individuals, then information tends to flow a lot quicker than if there is an aura of suspicion that surrounds the relationship.[293]

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290 Testimony of Norman Inkster, vol. 81, November 22, 2007, p. 10322.
291 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7726.
292 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7726.
293 Testimony of James Warren, vol. 48, September 19, 2007, p. 5908.

The RCMP's distrust of CSIS's abilities or good faith led the Force to fail to appreciate the value of some of the CSIS information that was being provided to it, while continuing to suspect that CSIS was withholding other information. CSIS investigator Neil Eshleman explained that in the course of their duties and in order to be informed about community issues and better able to make contacts in the community, CSIS investigators made a significant effort to educate themselves on Operation Bluestar and its consequences, on the views of the community towards the Government of India and on Sikh extremism in general. In Eshelman's experience, the RCMP had little appreciation for the value of this type of information. When he tried to explain to them the nuances of community attitudes about the Sikh separatist movement, Sikh extremism and the bombing, he felt it was "…not appreciated to the degree that [he] thought it would be helpful to them." Instead, the RCMP was focused on the "…immediate criminal investigation" and was not interested in the background or "…the larger picture of understanding the extremism that was in the community."[294]

Eshleman was under the impression that CSIS was passing "…just about everything we had developed" to the RCMP. He felt that this may have contributed to information overload, given that the RCMP was starting at "square one."[295]

Eshleman indicated that there appeared to be a belief within the Force that CSIS was actively withholding important factual information. He felt that this allegation was incorrect. From CSIS's perspective, the RCMP seemed continually dissatisfied with the information it received, yet appeared to make little use of the community and background information which CSIS investigators felt was important.[296]

The lack of appreciation at the RCMP for the knowledge and expertise developed at CSIS is well illustrated by the treatment received by three of the BC Region's main Sikh extremism investigators – Ray Kobzey, William Dean ("Willie") Laurie and Neil Eshleman – when they returned to the RCMP. After six years with CSIS, Eshleman returned to the RCMP. He testified that he was not necessarily welcomed back to the Force with open arms.[297]

This experience was common to all the key CSIS investigators who went back to the RCMP. None of Kobzey, Eshleman or Laurie was assigned to the RCMP Air India Task Force. The RCMP did not see fit to utilize their skills or expertise in the Sikh extremism area. Even when the RCMP received the Ms. E information and was advised that Laurie had been the source handler at CSIS and had developed a good rapport with her, the Force decided not to utilize Laurie's services to continue relations with Ms. E on behalf of the RCMP. Instead, the RCMP treated Laurie with suspicion, making implicit accusations that he had withheld information or that the information he related about what Ms. E had told him was inaccurate.[298] In many respects, the RCMP missed the opportunity to capitalize on the extensive experience of the CSIS investigators.[299]

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294 Testimony of Neil Eshleman, vol. 75, November 14, 2007, pp. 9383-9384.
295 Testimony of Neil Eshleman, vol. 75, November 14, 2007, p. 9384.
296 Testimony of Neil Eshleman, vol. 75, November 14, 2007, pp. 9382-9385.
297 Testimony of Neil Eshleman, vol. 75, November 14, 2007, p. 9452.
298 See Section 1.3 (Post-bombing), Ms. E.
299 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8345.

There was, reciprocally, at CSIS, a lack of confidence in the RCMP's abilities. There was a perception that the RCMP was generally unable to capitalize on the CSIS information it had already been given, because of an apparent lack of "… continuity of knowledge, and their method of retrieving that was more labour-intensive than ours."[300] From CSIS's perspective, extensive turnover in the RCMP investigation only added to the problem by limiting institutional memory.[301]

CSIS investigators felt that the RCMP was not appropriately following up on or investigating some of the leads and information provided by CSIS. There was frustration for the CSIS investigators at having to restrict some of their activities for fear of being accused of contaminating the RCMP investigation, while at the same time they did not see the RCMP pursuing avenues CSIS believed to be worthwhile as vigorously as the CSIS investigators would have or could have. In the message it sent to CSIS HQ and to all CSIS regions and districts, requesting clarification about the best way to proceed when the RCMP requested assistance in connection with the Reyat's arrest, the CSIS BC Region specifically addressed the issue of past cases where it had provided investigative leads which the Region felt "…were not given exhaustive follow-up" by the RCMP. BC Region asked HQ whether, in such cases, it had to continue to stay out of the Air India investigation, or whether it could do its own follow-up where "avenues of investigation" still remained after information was passed to the RCMP. The Chief of the Counter Terrorism Section of the Region explained that on the basis of the RCMP E Division response to some leads provided by CSIS, "…the perception was that these were not exhausted."[302] CSIS HQ provided no further guidance to assist the Region with this matter.[303]

Further, CSIS did not trust that the RCMP would refrain from using its information in judicial processes without authorization, especially after the September 19th affidavit experience. CSIS was also concerned about the RCMP's handling of sensitive material. Some of the information passed to the RCMP was occasionally lost, misplaced or forgotten.[304] This resulted in the need to request missing information from CSIS, even when the information had already been requested and provided in the past.[305] Not only could this cause confusion and delays, but it would obviously do nothing to reassure CSIS that its information was being treated with care.

Security of Information and Risk of Exposure

Another cause of concern for CSIS was the manner in which the RCMP protected the confidentiality of CSIS information internally. Stevenson testified that the need-to-know principle was not relied upon to the same extent in the RCMP as it was at CSIS. Whatever deficiencies the rigid application of the need-to-know principle might create for an effective investigation in terms of the sharing of

300 Testimony of Mervin Grierson, vol. 75, November 14, 2007, p. 9461.
301 See Section 2.0 (Post-bombing), Set-up and Structure of the Federal Task Force.
302 Exhibit P-101 CAA0627(i), pp. 5- 6.
303 Exhibit P-101 CAA0628; See Section 3.0 (Post-bombing), The CSIS Investigation.
304 See, for example, Exhibit P-101 CAA0969, p. 24.
305 See Section 2.0 (Post-bombing), Set-up and Structure of the Federal Task Force.

relevant information, it was nevertheless viewed as very effective in terms of the security of that information. CSIS expected the RCMP to understand its need-to-know orientation and to act in a similar manner. However, Stevenson found the situation in RCMP operations to be in stark contrast with the CSIS approach. On a "daily basis" he found files and information "…left lying on desks." Though this was in a restricted area, cleaners, often of a similar background to individuals the RCMP was investigating, "…were wandering around freely within the working bullpen of the RCMP." Similarly, at the RCMP, Stevenson could "…quite easily figure out who the translator or translators were." He felt this pointed to a security risk for those translators. In sum, he stated, "I didn't think it was good security."[306]

CSIS also repeatedly expressed fear that the RCMP would come to know the identities of CSIS sources and targets through the "mosaic effect," that is "…the possibility that an analyst adding to [CSIS] information their own information would be able, over a period of time, to identify sources."[307] Scowen on the other hand, testified that the threat posed by the mosaic effect "…wasn't an overriding concern, but it was a consequence of our cooperation."[308] It was enough of an issue, however, to be the subject of a high-level memo to the DDR in 1986, in which it was identified as a concern that was not capable of being addressed by an MOU on the transfer and sharing of information.[309]

Information Sharing Issue Left Unaddressed

Overall, the RCMP and CSIS seemed to lack the ability to communicate their needs to each other. The basic assumptions made by each agency about the fundamental issue of who should decide what information was relevant were clearly at odds with each other, but the issue was apparently never addressed directly. No resolution was found for the impasse – at least through the Reyat trial and, arguably, even after that. Miscommunications persisted and the relationship between the two organizations continued to falter. Valuable time was wasted while the agencies repeated the same debates over and over again but never addressed the underlying issues. Both agencies failed to recognize the problem for what it was and to take steps to correct it.

Raw Material versus Information and Leads

While the RCMP Task Force obtained free-flowing access to the relevant CSIS sitreps during the early days of the investigation, requests for raw data, such as underlying surveillance reports, interview notes, or intercept logs were generally met with resistance.

As a matter of policy, CSIS only shared intelligence reports dealing with its intercepts and never the intercepts themselves. What the RCMP got was a document outlining information derived from CSIS wiretaps that CSIS believed

306 Testimony of John Stevenson, vol. 62, October 16, 2007, pp. 7674-7675.
307 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6165.
308 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6166-6167.
309 Exhibit P-101 CAA0415.

would be of assistance to the RCMP. The intercept tapes or the notes prepared by the CSIS transcribers and translators who listened to the tapes were not made available.[310]

On an "exceptional basis," CSIS would allow the RCMP to use its own resources to translate tapes. This expedient was employed when RCMP Cst. Manjit ("Sandy") Sandhu was indoctrinated into CSIS to help review the Parmar Tapes in the fall of 1985.[311] The result was to reduce CSIS exposure, by removing the need for a CSIS translator to appear in court, avoiding the issue of naming the translator in public. However, this solution was only adopted by CSIS when its resources did not allow for the timely translation of the Parmar Tapes and did not appear, at the time, to be intended as a long-term policy solution geared towards avoiding exposure of the translators and transcribers.

CSIS's view of its information-sharing obligations to law enforcement was based on its model of providing investigative leads with possible added CSIS assessment to "…facilitate the RCMP's job."[312] In his testimony, Hooper explained that CSIS's practice, which was generally not to provide "transcripts" (intercept notes), notes or other "raw material" to the RCMP, was based on CSIS's interpretation of what he characterized as the proscriptive nature of section 19 of the *CSIS Act*. Section 19 forbids the dissemination of CSIS information obtained during the course of its duties and functions, but then sets out four exceptions, including disclosure to a law enforcement body. Hooper noted that the exceptions were to be triggered at the discretion of the CSIS Director, and thus, in his view, it was the Director alone who was to decide whether to release certain classes of information to the RCMP.

In considering the possibility of routinely passing information to the RCMP and providing full access to raw materials, a possibility Hooper described as doing a "data dump" on the RCMP, CSIS had to consider whether it was failing to meet the expectations of Parliament by stripping the Director of the discretionary power accorded by the statute.[313] According to Hooper, it was on this basis that CSIS felt that the "…wholesale release of all forms of information to the RCMP would not be in keeping with the law,"[314] and consequently tried to draw a line based on a distinction between original records ("raw materials") and intelligence reports.

As a matter of statutory interpretation, and also as a matter of logic, this argument is difficult to defend. A blanket prohibition on disclosing raw intercept materials is hardly necessary as a means to preserve the Director's discretion. Indeed the initial decision to grant access to the Parmar intercept logs is clearly an example of exercising the discretion granted by section 19. Distinguishing between raw materials and summaries is equally unrelated to ostensible privacy concerns, since it is the content of the disclosure, not its form, that might damage privacy rights.

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310 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6142.
311 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6191; See Section 4.3.1 (Post-bombing), Tape Erasure.
312 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6221.
313 Testimony of Jack Hooper, vol. 50, September 21, 2007, pp. 6220-6221.
314 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6221.

In the end, it appears that CSIS's attempt to control the form in which information was made available to the RCMP was in fact intended to prevent the possibility of future use and disclosure of the information in court. Grierson stated that when leads were provided by CSIS, the RCMP would ask for evidence such as "…notes, tapes of interviews, verbatim, all of the things that they do, in an evidentiary collection model." Grierson testified that, in his view, the Act prohibited CSIS from keeping such material, because Parliament had opted for a civilian service. This is another way of stating that, as a civilian agency, "CSIS does not collect evidence." The result was that the RCMP kept revisiting the issue of CSIS disclosure and persistently complained that CSIS was not giving over everything it had.[315]

Inkster explained that access to original documents or "raw data" – as opposed to summaries of information from CSIS – is important in the policing context because only RCMP officers have a full understanding of all relevant documents and information in relation to the investigation and thus it would be "impossible" for "…a CSIS individual to conclude the relative merits and value of that information" without that background.[316] Roth testified that the raw intercept notes provided much more information than the sitrep summaries which were cleansed to protect CSIS's interests.[317] According to Inkster, direct access to raw materials was necessary since the RCMP investigators on the file were in the best position to understand the subtleties of information and to make connections and understand the significance of information relating to the case.[318] In other words, aside from issues surrounding the possible use of CSIS materials as evidence, the RCMP felt that CSIS was unjustifiably denying access to important information by refusing to provide raw materials. From the RCMP point of view, this was another instance of CSIS unilaterally deciding what information was relevant to the criminal investigation.

An RCMP memorandum, likely written in the fall of 1989, makes clear the RCMP's view of the effect of CSIS policies on the RCMP investigation of the bombing. The document states that "…RCMP investigators should have received any and all surveillance material in the raw data form of surveillance notes, tapes, verbatim transcripts, verbatim translations (if they existed) and the 'final reports' prepared."[319] However, the conversations that were intercepted by CSIS were only "…summarized in a paraphrased manner" and verbatim transcripts were not made available to RCMP reviewers.[320] The document notes that:

> During the Air India investigation CSIS was unwilling to provide to the RCMP complete verbatim transcripts of intercepted private communications or any details

315 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9459-9460.
316 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10322-10323.
317 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5622.
318 Testimony of Norman Inkster, vol. 81, November 22, 2007, p. 10324.
319 Exhibit P-101 CAA0750, p. 1 [Emphasis added].
320 Exhibit P-101 CAA0750, p. 1.

> surrounding how, where and when their information was developed and obtained. These measures required the Force to develop information supplied by CSIS thereby restricting appropriate investigative avenues.[321]

The delay, uncertainty and limited access provided by CSIS to certain materials, as a result of its legalistic and narrow approach and of its inability to devise policies based on common sense in the early stages of the post-bombing period, were perceived as hindering the RCMP investigation. About the changing access to the Parmar intercept logs, Hooper testified that "…in many respects we were trying to be quite reasonable actually."[322] The overall impression for the RCMP, however, was not one of reasonableness, especially in the context of such an immense tragedy. Instead, it appeared that CSIS was acting erratically, without well thought-out policy guidelines, as it kept changing the rules.

The Use of CSIS Information

In its briefing to the Honourable Bob Rae, CSIS pointed to the vast quantity of information it had made available to the RCMP Task Force early on, but noted that frustrations emerged because of the limits which the Service felt had to be placed on the use that could be made of its information:

> Because of its mandate and the requirement to protect the methodologies, targets and sources, and because it does not collect evidence, the Service necessarily placed a caveat on the use to which this information could be put. It is clear that this prompted considerable frustration on the part of the RCMP. The Service understands the frustration that this caused within the RCMP, and how their perception would have coloured any cooperation that did take place.[323]

Certainly, the inability to use CSIS information as evidence or in support of warrant applications by the police – whether because the CSIS raw materials were not provided because they had not been preserved or because CSIS refused to grant authorization – was the cause of significant frustrations for the RCMP investigators in the early days of the Air India investigation and was the most important factor contributing to the escalation of the tensions between the agencies.

Many criticisms have been levelled against CSIS's approach to sharing information with the RCMP. Given the debates about the need for more specific RCMP requests and the refusal to provide raw materials, in many cases these criticisms were not entirely unwarranted. However, the recriminations were taken a step further, with many at the RCMP eventually coming to believe that

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321 Exhibit P-101 CAA0750, p. 2.
322 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6224.
323 Exhibit P-101 CAA1086, p. 7.

the disputes over access to CSIS information, and the delays in obtaining the information, prevented the RCMP from identifying those responsible for the Air India bombing early on and caused the investigators to focus on the wrong suspects. Early on in his review of the Air India file, Bass concluded that, if CSIS had cooperated more fully with the RCMP at the beginning of the investigation, "…the case would have been solved at that time."[324] Bass believed that because of the time it took for CSIS to inform the RCMP about the existence of the communications intercepts, and because of the subsequent erasure of the tapes, the RCMP began its investigation in June 1985 focusing on the wrong targets. In a 2003 briefing note to the RCMP Commissioner, Bass noted that:

> As a result of the Force not being aware of the contents of the intercepted material on Parmar until September [1985], the crucial linkages between Parmar and the key [co-conspirators] went unknown to the Force. In August, the Task Force swore a Part IV.I (now Part VI) affidavit on persons not connected with the offences.[325]

In its submission to the Honourable Bob Rae, the RCMP indicated that it was only when it received access to the Parmar intercept notes in September 1985, two and one-half months into the investigation, and was then able to analyze some of the coded conversations in the intercept notes, that its perspective on the investigation shifted "…to consider Parmar more of a primary suspect rather than as peripheral to Reyat."[326]

In fact, however, the RCMP was aware of Parmar as a prime CSIS target early in July 1985. At the time, all of the CSIS surveillance and intelligence reports were turned over promptly in British Columbia. Those reports contained all of the information that CSIS itself considered relevant to its analysis, and set out CSIS's theories of the case. In particular, the June 27th CSIS sitrep, which would have been available to the Task Force in early July,[327] contained references to some of the Parmar conversations which were later identified by the RCMP as providing serious indications of Parmar's involvement.[328] CSIS also advised the RCMP, as soon as it became aware through its own analysis in August 1985, that coded language was used in some of Parmar's conversations.[329]

The real debate was not about the RCMP being kept in the dark about the CSIS information pointing to the identity of the prime suspects. The root of the problem was the RCMP's continuing focus on access to the underlying, or "raw," materials, and the desired ability to use those materials in support of its own warrant applications, and CSIS's resistance to provide this access and authorization. On the one hand, it appears that CSIS believed that simply informing the RCMP of

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324 Exhibit P-101 CAA0932, p. 5.
325 Exhibit P-101 CAA1007, p. 3.
326 Exhibit P-101 CAA0335, pp. 22-26.
327 Exhibit P-101 CAA0379(i), p. 9.
328 Exhibit P-101 CAB0360, pp. 6-7.
329 Exhibit P-101 CAA0308, CAA0309(i).

what it learned would be sufficient to enable the Force to go off and do its own separate investigation, when in fact, at the very least, the RCMP would have had to include detailed information about what CSIS knew and how it knew it in any application it would have made for the warrants and authorizations needed to conduct its investigation. On the other hand, the RCMP confused CSIS's reluctance to grant access to raw materials and to authorize their use in judicial proceedings with a lack of access to the actual information, even while the information was, for the most part, available from the beginning.

The reason for the Task Force's frustration was that it believed it could not proceed with a wiretap application against its most important suspects without the detailed "raw" information contained within the CSIS translators' notes and intercept logs. Bass explained that the failure to obtain RCMP wiretaps against Parmar much sooner than was ultimately done was a lost opportunity. He believed that the immediate post-bombing period was critical to the investigation in terms of intercepting communications.[330] He testified that if he had been involved in the investigation in 1985 and had been aware of the information obtained via the CSIS pre-bombing intercepts, he would have concentrated more directly on the principals suspected in the conspiracy and would have sought authorizations to intercept communications at the pay telephones within proximity to their places of residence.

The RCMP expected CSIS to be able to provide information that could be used as evidence. Bass believed that had the CSIS Parmar intercept tapes not been erased, a successful prosecution could have been brought against at least some of the principals in the bombing of Air India Flight 182, using the CSIS tapes as evidence.[331] Wall indicated that the sense of frustration amongst the members of the Task Force was caused by the fact that "…we weren't getting what we thought we should in terms of hard evidence or original evidence."[332]

In August 1985, the RCMP did reorient its investigation to focus more on Parmar.[333] This was done on the basis of an analysis at RCMP HQ of the information already in the RCMP's possession, along with the information that was being acquired about Reyat's suspicious purchases. This decision could have been made earlier by the RCMP. The summaries provided by CSIS in its sitreps were sufficient to lead to the conclusion that Parmar and his close associates should be prime suspects. The need for raw data about the CSIS intercepts and the delay in accessing it cannot fairly be said to have "caused" the RCMP to focus on the wrong targets, though it is possible that it may have prevented the Force from being able to support a wiretap application earlier. Even on this last point, Bass could not state with certainty that the other information available to the RCMP would have been insufficient to obtain an authorization to intercept the communications of Parmar and his associates earlier, although he thought it was likely the case.[334]

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330 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11239-11241.
331 Exhibit P-101 CAA0932, p. 3.
332 Testimony of Robert Wall, vol. 76, November 15, 2007, p. 9674.
333 Exhibit P-101 CAA0303; See Section 2.3.4 (Post-bombing), The Khurana Tape.
334 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11241. See, generally, Section 2.0 (Post-bombing), Set-up and Structure of the Federal Task Force.

The real issue which divided CSIS and the RCMP from the early days of the Air India investigation was about the use of CSIS information for court purposes. CSIS was concerned not to be seen to be collecting evidence, while the RCMP, as a police entity, felt it had a need for evidence, not intelligence.

When it provided information to the RCMP, CSIS generally specified that it was provided as "investigative leads" and attached caveats restricting the use that could be made of the information without CSIS's prior consent.[335] The 1984 information-sharing MOU also provided that "…the receiving agency shall not initiate action based on the information provided without the concurrence of the providing agency."[336] All information released to the RCMP would be accompanied with the caveat that it could not be disseminated further without CSIS authorization.

In his testimony, Warren noted that CSIS places caveats on almost all information it passes.[337] The caveat is a boilerplate warning, intended to conceal the identity of the source of the information and to protect sensitive information from further dissemination. Stevenson testified that "…any intelligence service worth its salt will put caveats on its information," particularly information passed to the police, in order to have "…care and control" of the information and to know where it has gone and how it is being used.[338]

Bass testified that he understood why CSIS felt from its perspective that it was important to place caveats on the use of its information, but he did not agree that the caveats were always "necessary."[339]

Deputy Commissioner Henry Jensen wrote to the Assistant Deputy Solicitor General about the issue on July 14, 1988.[340] He noted that CSIS information was heavily caveated, and that this was problematic because it precluded the use of CSIS information in subsequent criminal investigations and prosecutions. Jensen was concerned that while CSIS had committed to passing information on criminal conspiracies as early as possible, this passage would in practice generally only occur after the conspiracy was formulated. At that late stage, Jensen felt that the conspirators would already have become more cautious, resulting in a "catch-22" situation where the RCMP needed to rely on CSIS information to support its investigation. Jensen noted CSIS's fears of exposure of its sensitive information in court, as well as the potential perception that cooperation between CSIS and the RCMP would indicate that CSIS was performing a quasi-police function. While Jensen recognized these fears, he emphasized the seriousness of the conspiracy offences. Jensen noted that the Solicitor General's office had previously recognized the need to develop specific policy guidelines governing the RCMP use of CSIS information, but that no such guidelines had been formulated. Jensen pressed the Ministry to address these issues.[341]

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335 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6163; Exhibit P-101 CAA0447.
336 Exhibit P-101 CAA0076, p. 4.
337 Testimony of James Warren, vol. 48, September 19, 2007, p. 5846.
338 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7657.
339 Testimony of Gary Bass, vol. 87, December 3, 2007, p. 11225.
340 Exhibit P-101 CAC0061.
341 Exhibit P-101 CAC0061, pp. 1-3.

In the absence of concrete policy guidelines from Government, CSIS made its own decisions about whether to authorize the use of its information, based on its own concerns and on its own assumptions about the criminal process. In 1986, CSIS stated in an internal memorandum:

> In the event that intelligence provided is requested for use as evidence or court purposes, then CSIS HQ must be consulted prior to any authorization being granted.… HQ will request a legal opinion and a management judgment will be based on that opinion. While we accept the importance of the judicial system in fighting terrorism, it is not our intention to hand over carte blanche all intelligence required for court by the RCMP.[342]

In testimony before the Inquiry, Scowen commented that the overriding consideration in deciding whether to authorize the use of CSIS information in court was the preservation of CSIS capabilities in the long-term.[343]

As illustrated by the September 19th affidavit episode, the CSIS concern was not only about the attempt to use its information as evidence in a court of law. Using the information in support of intercept or search warrant applications presented by the RCMP could also expose the information to ultimate public disclosure. This possibility was tied to the change in criminal procedure that took place in the mid-1980s whereby the "sealed packets" containing affidavits in support of wiretap authorizations were now routinely "opened" and examined in court.[344] In a 1987 memo, Barr noted that recent court cases had made it a virtual certainty that CSIS information used in *Criminal Code* wiretap affidavits and warrant applications would be disclosed to the defence. As such, the decision to provide CSIS information for any use in the criminal process was a "…very serious one indeed and must be weighed in the light of the competing public interests of successful prosecution and the need to protect the national security of Canada."[345]

For the RCMP, CSIS restrictions on the use of its information were viewed as creating a dilemma and as complicating its legal position:

> The RCMP viewpoint on using CSIS information in judicial affidavits was that if the information was provided for investigative leads only, the RCMP was then seized with knowledge of criminal activity yet was unable to use the information to fulfil its mandate under the *Security Offences Act* when attempting to further the investigation.[346]

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342 Exhibit P-101 CAB0666, p. 3.
343 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6180-6181.
344 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6227.
345 Exhibit P-101 CAF0272, p. 3.
346 Exhibit P-101 CAA0881, p. 13.

As explained by Inkster, "…when someone gives you the information and yet tells you how you can or cannot use it, you're sometimes better off not to have it."[347]

On this issue, James Jardine testified that it was necessary, in order to fulfill the police and Crown's legal obligations, to include information in the September 19th affidavit about the nature of the CSIS materials, the difficulties encountered by the RCMP in accessing them, and the type of access finally provided.[348] About the November search warrant application, which did not reveal the fact that CSIS was a source of the information in an attempt to accommodate CSIS concerns, Jardine testified that he was not consulted before this approach was adopted, and that he felt it made the warrant vulnerable to constitutional attack.[349] This was particularly significant in the Reyat trial, because the Crown's case rested in large part on the forensic analysis of some of the items seized at Reyat's residence pursuant to the search warrant. If the warrant was found to be invalid, defence counsel could seek the exclusion of these items from the evidence as a remedy.[350]

CSIS ultimately authorized the use of much of its information and materials in the Reyat trial in the early 1990s and then in the recent prosecution of Malik and Bagri.[351] Issues arose as to the admissibility of some of the material, and constitutional challenges were mounted because of CSIS's failure to preserve original records,[352] but CSIS nonetheless did authorize the use of its information in court. It would appear, however, that this authorization was largely driven by the view that Air India was a "special case."

Grierson stated that the Air India investigation was an exception and that the public interest dictated that CSIS needed to do everything it could to assist.[353] Scowen also indicated that special exceptions were made from a policy standpoint in the Air India case due to the overwhelming magnitude of the bombings. According to Scowen, Barr made it very clear that if CSIS were to come across the "smoking gun" or uncover investigative leads that would allow the RCMP to close the Air India case, "…all bets are off." The information would be passed directly, regardless of whether it exposed a source, and the consequences would be dealt with later.[354]

Given the constant tensions and debates over every request for CSIS information, one wonders how the RCMP's initial approaches to CSIS for access to raw

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347 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10325-10326.
348 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
349 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
350 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5721-5722; Exhibit P-101 CAA0575(i), p. 6; See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective. Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5721-5722; Exhibit P-101 CAA0575(i), p. 6.
351 See Section 4.4 (Post-bombing), CSIS Information in the Courtroom.
352 See Section 4.3 (Post-bombing), The Preservation of CSIS "Evidence" and Section 4.4 (Post-bombing), CSIS Information in the Courtroom.
353 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9459-9460.
354 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6145, 6160-6162.

material or for the use of CSIS information in judicial proceedings would have been received if CSIS had not considered the Air India case to be exceptional. Most importantly, even where, after much discussion and many difficulties, the disclosure of an important amount of CSIS information was obtained, as was the case in the preparation for the Reyat trial,[355] such robust disclosure was not necessarily a precedent-setting move by CSIS. Grierson testified that the CSIS position in the Reyat case was due to the significance of the Air India bombing, and that in future cases CSIS's willingness to disclose sensitive information would depend on the nature of the crime. He stated, "…in terms of the magnitude of that issue, and the public interest, we did a lot of things that we wouldn't have normally done in the due course of intelligence exchanges in order to support that prosecution, and it was successful."[356]

In June 1987, Barr noted that "…in counterterrorism, the distinction between intelligence and evidence collection will never be absolute and crystal clear."[357] Yet, CSIS's difficulty to come to terms with situations where it did end up in possession of evidence continued. It continued to refuse to use police-like methods for gathering and storing information. It maintained an acutely cautious approach to authorizing the use of any of its information in judicial proceedings. Even the successes eventually achieved in the Air India case cannot be taken as a sign that the problem is resolved.

Human Sources

The issue of protection of human sources was always a central concern for CSIS in its decisions about information sharing and cooperation with the RCMP. According to CSIS, human sources are the "most important resource" for any intelligence service. The protection of these resources is seen as "absolutely paramount" for CSIS, since the ability to protect sources has a direct impact on its ability to keep and recruit other human sources. When recruiting human sources, CSIS would guarantee anonymity "…to the best of their ability" and would "…go to great lengths to ensure that that is the case throughout their relationship with us."[358]

Concerns about the RCMP's ability to protect the anonymity of CSIS sources extended throughout the Air India investigation. In a memo dated November 13, 1986, Warren wrote to all CSIS regions that, due to events demonstrating "… the apparent inability of the RCMP to restrict dissemination of CSIS information relating to human sources," Barr had imposed a temporary moratorium on the sharing of information with the RCMP where that information could lead to human source identification.[359] The memo noted that the issue would be discussed at an upcoming CSIS/RCMP Liaison Committee meeting, where a resolution to the problem would be sought. Whatever the incident that had

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355 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
356 Testimony of Mervin Grierson, vol. 75, November 14, 2007, p. 9481.
357 Exhibit P-101 CAF0272, p. 3.
358 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6154-6155. This promise was not always fulfilled: See Section 1.3 (Post-bombing), Ms. E.
359 Exhibit P-101 CA0682(i), p. 1.

precipitated this particular crisis, CSIS's concern for the protection of its sources continued to influence the nature and the extent of the information it was willing to share with the RCMP. CSIS's belief that its paramount concern for the protection of human sources was not shared by the RCMP, or at least not to the same extent,[360] caused additional tensions between the agencies.

Over the years, CSIS did develop a number of sources who became relevant to the Air India investigation.[361] CSIS agents seemed to have a better sense of the Sikh community and were often able to make better community contacts than the RCMP.[362] Eshleman testified that CSIS had a "…good success rate in utilizing casual sources," who provided CSIS with good intelligence and a useful understanding of the various organizations they were targeting.[363]

As CSIS developed sources, the RCMP responded by demanding access to those sources, often demonstrating a sense of entitlement in pursuing a purported right to "take over" CSIS sources or contacts where it was felt the individuals provided or could provide information relevant to the Air India investigation.[364] Grierson testified that, despite the fact that the RCMP's own policy was not to identify sources, whenever CSIS shared information with them the "first question" they would ask pertained to the identity of the source. Grierson viewed such behaviour as unprofessional. He stated that in a number of cases "…it was almost unbelievable that they would have – take the aggressive nature that they did in terms of demanding it."[365] In a memo discussing Ms. E, Stevenson described the RCMP attitude in these matters as follows: "…these individuals will not rest, or desist until they have interviewed the source or satisfied their curiosity as to the source's identity."[366]

The transfer to the RCMP of information from CSIS sources, and, in some cases, of the sources themselves, led to serious morale problems for CSIS investigators, in particular among the source handlers.

Grierson testified that the BC Sikh unit had five or six very dedicated investigators who had a "…wealth of knowledge" about the Sikh extremism milieu. He stated that "…one after another" they would put their efforts into developing a source, only to lose that source to the RCMP. Grierson stated that this was very discouraging for the investigators and left them asking "…why do we even bother doing this anymore?" It became an immense challenge to try to keep the investigators motivated.[367]

Morale issues and lack of motivation may have contributed to the loss by the CSIS BC Region of three of its most knowledgeable Sikh extremism investigators. Ray Kobzey, Willie Laurie and Neil Eshleman all returned to work for the RCMP in

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360 See Section 1.5 (Post-bombing), Ms. D and Section 1.2 (Post-bombing), Tara Singh Hayer.
361 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8326-8327.
362 See Section 1.0 (Post-bombing), Introduction.
363 Testimony of Neil Eshleman, vol. 75, November 14, 2007, pp. 9402-9403.
364 See, generally, Chapter I (Post-bombing), Human Sources: Approach to Sources and Witness Protection.
365 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9485-9486.
366 Exhibit P-101 CAF0404, p. 5.
367 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9508-9509.

the late 1980s. Eshleman testified that he returned for a number of reasons, "… some personal, some operational." He testified that there was often a "…lack of recognition" at CSIS from senior people for the work done in the field. He stated that a number of the people who testified at the Inquiry "…put their heart and soul" into the Air India investigation, but that their efforts were not appreciated by CSIS.[368] No doubt, being forced to give up sources an investigator had spent long hours cultivating, only to see the RCMP scare the source away or reject their information,[369] would be perceived as a sign that the investigator's work was not being appreciated by senior management. It appears that investigators felt they were at risk of being personally blamed, and not backed up by their organization, whenever the RCMP accused CSIS of interfering with the criminal investigation.[370]

The general sentiment among CSIS investigators appeared to be one of outrage that the RCMP would demand and often obtain access to their sources. They distrusted the RCMP's professionalism in handling its relations with sources, and even questioned its basic competence and ability to recruit sources. In one note written in connection with the Ms. E issue, Stevenson wrote: "…one of these days they will surprise us and develop a source or an asset of their own."[371]

The dissatisfaction among CSIS investigators with the results when the RCMP took over the CSIS sources also naturally made them more reluctant to share information that might enable the RCMP to identify those sources and ask for direct access to them. When the Ms. E information was first received by CSIS, despite its clear relevance to the criminal investigation, the CSIS investigator and his supervisors all concluded that it was better to allow CSIS to continue to develop the information, since the source would most likely provide nothing to the RCMP.[372]

Information Sharing by the RCMP

The difficulties in sharing did not operate in only one direction. The RCMP also was often hesitant to share its information with CSIS. Throughout the post-bombing period, many at CSIS felt that the RCMP, while aggressively demanding access to CSIS information, was reluctant to share its own information. CSIS complaints about information sharing being a "one-way street" from CSIS to the RCMP, both generally and in the context of the LO program,[373] were recurrent.

What can be observed, interestingly, is that the RCMP often adopted practices that were very similar to the CSIS practices which it so consistently complained about. Like CSIS, the RCMP was vetting its information prior to sharing, was providing partial documents in order to tailor its responses to the requests, and was adding caveats to the information it provided.

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368 Testimony of Neil Eshleman, vol. 75, November 14, 2007, p. 9450.
369 See Chapter I (Post-bombing), Human Sources: Approach to Sources and Witness Protection.
370 Testimony of Neil Eshleman, vol. 75, November 14, 2007, pp. 9498-9499.
371 Exhibit P-101 CAF0404, p. 5; Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7692.
372 See Section 1.3 (Post-bombing), Ms. E.
373 See Section 4.2 (Post-bombing), The Liaison Officers Program.

Though RCMP sharing with CSIS was made mandatory under the 1984 information-sharing MOU,[374] the RCMP decided that its files would have to be reviewed prior to providing access to CSIS and that, even after such a review, only the portion of the file specific to the particular CSIS inquiry could be shown to CSIS. Decisions about whether access would be provided to CSIS to materials of mutual interest and if so, to what extent, were described by the RCMP Director of Criminal Investigations as "…subjective decisions that the RCMP member will have to make based on all the circumstances." It was concluded that in some cases it would be impossible to provide the information requested or that the information would have to be transferred to a separate document in order to be sufficiently isolated.[375] RCMP members responding to CSIS requests for RCMP HQ files vetted the materials and provided or shared only "releasable information."[376]

Part of the Project Colossal agreement was that RCMP information related to CSIS's mandate would be shared with CSIS. Scowen testified, however, that the volume of information CSIS supplied to the RCMP always greatly outweighed what the RCMP provided to CSIS.[377] While this may have resulted simply from the fact that CSIS gathered more information than the RCMP, the Service saw indications, in some instances, that there was also a failure on the part of the RCMP to share the information that it did gather.[378] At the same time, some members of the E Division RCMP Task Force got caught up in an attitude of suspicion and competition, and were reluctant to share the product of their work for fear that it would provide CSIS with a "free benefit," while they believed CSIS continued to hold out on providing its own information.

CSIS took issue with "…the RCMP's restrictive use of caveats on the grounds of conducting a criminal investigation," arguing that this was "…hindering the CSIS from fulfilling its responsibilities." In particular, CSIS was concerned about an RCMP practice of putting caveats restricting the use of its information relevant to Air India until the investigation was completed. While CSIS understood that an RCMP caveat could be necessary in some circumstances, for example to avoid jeopardizing the execution of a search warrant, the Service noted that the RCMP "…should not use the caveats frivolously to obtain a competitive advantage."[379]

The Centralization of Information Sharing

Decisions about information sharing between CSIS and the RCMP were often made at the HQ level in both organizations. While this was more conducive to creating and applying consistent policies, this structure contributed to creating tensions within and between the agencies. In CSIS's case, it often operated as an additional pressure militating against sharing with the police.

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374 Exhibit P-101 CAA0076, p. 3; Testimony of Henry Jensen, vol. 18, March 7, 2007, p. 1666.
375 Exhibit P-101 CAC0018, p. 2.
376 Exhibit P-101 CAC0026(i).
377 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6175.
378 See, for example, Exhibit P-101 CAB0590, pp. 4-9, 11-14.
379 Exhibit P-101 CAA0743(i), p. 6.

CSIS policy generally required that if there was a possibility that information to be shared would lead to, or become relevant to, a criminal investigation, the exchange of information had to be pre-cleared with CSIS HQ, which was where the decisions about information sharing with the RCMP were made. Where authorization was sought by the RCMP to use CSIS information in the judicial process, CSIS HQ also insisted on being advised and on making the decision, in light of the risk that its information would be disclosed to the defence.[380]

In practice, this centralized decision-making structure resulted in a delay in the exchange of information while the CSIS regions sought authorization from HQ and waited for a response. This left the RCMP with the impression that CSIS was not providing information fast enough.[381]

During a 1987 meeting about the LO program,[382] the CSIS BC Region cited ongoing problems associated with passing perishable or life-threatening information to the RCMP, noting that often this information surfaced late in the day, or on weekends, when CSIS HQ offices in Ottawa were closed. The CSIS policy at the time provided that the regions had the autonomous authority to pass such information directly to the RCMP, provided HQ was immediately advised of the information that had been passed.[383] In practice, when the regions exercised this autonomy in cases involving time-sensitive information or "immediate threats," internal tensions arose.

During the attempted murder trial of the Sidhu shooters, the CSIS BC Region came into possession of information about an upcoming meeting of Sikh extremists and obtained technical coverage. During the meeting a statement was made with reference to "…a judge, a courtroom and the difficulty of killing people who are afforded some form of security."[384] The Region believed the information constituted a threat to a judge while sitting in court, possibly the judge involved in the Sidhu trial.[385]

Not wishing to make the same mistake that had resulted in the shooting of Sidhu – when information warning of the attack was obtained by CSIS and was not provided to the RCMP[386] – BC Region made the decision to pass the information to the RCMP immediately, without first seeking guidance from HQ. The Region provided extensive access to raw materials. Corporal Don Brost of the RCMP was allowed to review the pertinent verbatim material written by the translators, raw materials usually restricted to CSIS. Brost did not disagree with the CSIS BC Region assessment that a threat to a judge was involved.[387]

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380 Exhibit P-101 CAF0272, p. 3.
381 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9465-9467.
382 See Section 4.2 (Post-bombing), The Liaison Officers Program.
383 Testimony of Chris Scowen, vol. 50, September 21, 2007, pp. 6151-6152, 6154; Exhibit P-101 CAF0272, pp. 2-3, CAF0275, p. 1.
384 Exhibit P-101 CAB0724(i), p. 2.
385 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9467-9469.
386 See Section 3.0 (Post-bombing), The CSIS Investigation.
387 Exhibit P-101 CAB0724(i), p. 2.

BC Region reported the incident to CSIS HQ and was criticized for its actions. The information was assessed at HQ and the Region was advised that it should not have disclosed the information because "…quite clearly they weren't really talking about killing a judge." Grierson, then the Deputy Director CT in the BC Region, testified that the Region could not risk making a mistake. The Region made the decision based on the possible risk and what they perceived to be the immediacy of the threat. Grierson testified that, faced with a similar situation in the future, the Region would have made the same decision and would have incurred the criticism from HQ. This position caused friction because the Region was "…questioning the authority and the wisdom and the analytical ability of our counterparts in Headquarters vis-à-vis our analysis."[388]

In 1988, BC Region was again criticized by HQ for passing an investigative lead to the RCMP without first clearing it with HQ. At the time, the Region intercepted a discussion between Parmar and some of his followers. While discussing a Sikh in the Punjab, who was caught due to a betrayal by other Sikhs, Parmar stated:

> If someone implicates me or gets me arrested for planting the bomb, that person would have been an insider. How any other person can do it who doesn't know anything?[389]

Grierson testified that, considering who was in the room when Parmar said those words, the Region thought the statement was "fairly significant." BC Region passed the information immediately. HQ was critical of the decision to pass the information, as HQ felt that there was no "…immediacy of the threat." Instead, HQ felt the decision could have waited for HQ to weigh in on the matter. Grierson stated that the Region only cared that the statement represented a "significant" investigative lead for the RCMP and hence made the decision to pass it.[390]

Though Grierson testified that he would make the same decisions again, despite having incurred criticism, it must be recognized that the possibility of incurring criticism from HQ if information was shared without authorization could only operate as an incentive not to share at the regional level. With the passage of time, a more relaxed policy was adopted by CSIS HQ that allowed the regions more autonomy and simply urged them to use common sense in deciding what information could be passed.[391]

On the RCMP side, centralizing information sharing was problematic for different reasons. Because of the RCMP's decentralized structure, the HQ members often lacked the knowledge necessary to identify information of interest, to explain the needs of the RCMP divisions, or to know when to push for more access to certain information or sources.[392] This also made it difficult for the Force to

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388 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9454-9455, 9467-9469.
389 Exhibit P-101 CAA0630, p. 2.
390 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9470-9472, 9515-9516.
391 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9467-9469.
392 See Section 2.1 (Post-bombing), Centralization/Decentralization and Section 1.3 (Post-bombing), Ms. E.

provide CSIS with the information it needed. The CSIS Liaison Officer at RCMP HQ received little information because very little was available at HQ.[393] Often CSIS, with its centralized structure, would know about developments at one of the RCMP divisions before RCMP HQ found out about it. Warren testified that he understood that the RCMP had a real logistics problem moving intelligence around because of its decentralized structure. He did not attribute the perceived lack of sharing at HQ to any bad will on the part of the RCMP.[394]

The Overly Legalistic Approach to Information Sharing

CSIS legal services played a key role in determining the appropriate level of access to be granted to the RCMP. Turner testified that all access and disclosure decisions were made in consultation with the legal branch. In the early years after the creation of CSIS, the Service relied heavily on its legal counsel to interpret the effect of the *CSIS Act* on its operations. In the early stages after the bombing, all information-sharing decisions were made in consultation with the CSIS legal branch. CSIS was concerned about second-guessing the Federal Court, which had been assigned a new oversight role over CSIS information and warrants. It felt unsure of how the Court would react to the sharing of CSIS information in light of the new civilian mandate.[395] In 1987, Barr noted that the decision to authorize the RCMP to use CSIS information in support of judicial applications for warrants or wiretaps had to be made in consultation with CSIS legal counsel, the Solicitor General and in some cases, the Department of Justice, considering the "virtual certainty" that it would lead to the disclosure of CSIS information to the defence.[396]

This focus on legal aspects, while arguably necessary at times, often led to unnecessary debates and delays. The lawyers who were consulted about information-sharing decisions would naturally exercise as much caution as possible to protect CSIS interests and did not always have a full understanding of the requirements of the criminal process.[397] The ultimate decisions on information sharing had to be made on the basis of broad public interest considerations and had to take practical factors into account. They could not be based solely on legalistic arguments. The over-reliance on legal advice tended to narrow the scope of information shared by CSIS.

Leaving information-sharing decisions to CSIS HQ could also result in an overly legalistic focus. When Parmar's statement about the fact that only an insider could implicate him or get him arrested was intercepted by the CSIS BC Region, HQ was stuck in a debate as to whether the statement was inculpatory or exculpatory and as to its ultimate interpretation if revealed in a court of law. CSIS did have reason to be concerned about the potential exposure, if its information was used in court. It is understandable that it might, for that purpose, attempt to assess the risk that the information would indeed be so used if passed. It does, however, appear well beyond its role, expertise or qualifications to attempt to determine

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393 See Section 4.2 (Post-bombing), The Liaison Officers Program.
394 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5907, 5915.
395 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8297-8298.
396 Exhibit P-101 CAF0272, p. 3.
397 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.

the substantive interpretation that a court might make of the information and whether the information would assist in prosecuting a certain individual or not. In this case, the Region took a more appropriate approach, one that was more pragmatic as would be expected from those working closer to the ground and having more operational interactions with the RCMP. Grierson testified that the Region saw the information as "…a significant potential investigative lead for the RCMP," while HQ "…chose to look at it from a legalistic" approach. He argued that the "bigger question" was the significance of the information and that the legal ramifications could be determined later, and hence his decision to pass the information directly to the RCMP.[398]

Overlap and the Lack of Coordination

While CSIS was concerned about the RCMP's use of its information and wished to see the RCMP develop its own information, at times there were also concerns about potential overlap in the information-gathering activities of both agencies. Grierson testified that the RCMP did not entirely appreciate CSIS's role as intelligence collector, but often took the position that, in order to assess and interpret investigative leads, it needed to collect its own intelligence. This could make CSIS's work in the community more difficult in instances when the RCMP conducted its own community interviews and community members became confused about the role of each agency and about the risk of being required to testify in court.[399]

The overlap created by the necessity for the RCMP to conduct its own enquiries separately – whether resulting from the RCMP's inability to use CSIS's information or from the Force's mistrust in CSIS's ability to gather information or in its willingness to share it – was also viewed as inefficient. Grierson testified that it was counterproductive, because two federal departments were "…working in the community with a tremendous amount of overlap." He stated that the overlap went beyond the interviews and stretched into all of the professional resources used by both CSIS and the RCMP to collect information. There was overlap on community interviews, targets and surveillance – all of which made each agency's tasks more difficult.[400]

The overlap problem also went further for CSIS. Because of the risk of contaminating the RCMP investigation and, at least after the Kelleher Directive, the explicit requirement not to get involved in or to interfere with the criminal investigation, CSIS had to refrain from "…actively or aggressively" pursuing certain of its interests in the BK players suspected of being involved in the bombing. In the summer of 1987, the CSIS DG CT advised the RCMP E Division Commanding Officer that if the RCMP investigations were completed, CSIS would begin to pursue its interests aggressively. BC Region was left in a difficult position: if it got "…actively involved in 'pro active' investigations surrounding the RCMP's operations," it risked interfering with the criminal investigation or

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398 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9470-9472, 9515-9516.
399 See Section 1.0 (Post-bombing), Introduction.
400 Testimony of Mervin Grierson, vol. 75, November 14, 2007, p. 9459.

getting "…dragged into a criminal prosecution." However, given the breadth of the RCMP list of targets, that did not leave CSIS "much room to [manoeuvre]."[401]

The Possibility of Joint Operations

One possibility – to avoid some of the negative consequences of overlap and to achieve better coordination that would have allowed both agencies to work more efficiently – might have been the conduct of joint operations.

CSIS investigator Laurie testified that the possibility of having himself and his colleagues Kobzey and Eshleman seconded to a unit where they could work with the police was discussed within the Region. It was thought that this could help to make "some strides" towards solving the Air India case, given the knowledge that the CSIS investigators had acquired and their familiarity with the community. It seemed as though CSIS had information and expertise that the police did not have, and vice versa.[402] BC Region hoped that CSIS HQ could grant authority to disclose source information without jeopardizing source identity and that if they did not have to deal directly with police, CSIS sources such as Ms. E could be convinced to participate in operations to obtain incriminating statements from the suspects.[403]

In the end, however, the secondments did not occur and no true joint operation took place in the Air India case, although physical surveillance was at times coordinated.

The 1984 information-sharing MOU contemplated the possibility of joint RCMP/CSIS operations, and specifically provided for a broader sharing of information in this context.[404] CSIS, however, generally believed that involvement in a joint operation with a police force would run the risk of exposing its assets.[405] Grierson stated that, in the early years of CSIS, suggesting a joint operation was "…like horrors of horrors for operational people." He explained that police forces are able to combine for "true joint operation[s]" that involve a "…structured, formalized agreement" and full sharing, including full sharing of sources. However, when CSIS considered the possibility of such joint operations or task forces, it was felt that this type of operation would be unacceptable. If all sources and information were shared, it was thought that CSIS assets and long-term collection goals would be compromised by making CSIS operations known publicly and thereby limiting its ability to continue its covert activities and to recruit more sources. Grierson explained that even the limited coordination for physical surveillance exposed CSIS to court proceedings: "…when we did that, we knew there was an associated risk to that because those surveillances could uncover something that would take them into court and in fact, that did happen."[406]

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401 Exhibit P-101 CAA0627(i), p. 6.
402 Testimony of William Laurie, vol. 61, October 15, 2007, pp. 7433-7434.
403 Testimony of William Laurie, vol. 61, October 15, 2007, pp. 7434-7435. See Section 1.3 (Post-bombing), Ms. E.
404 Exhibit P-101 CAA0076, p. 4. See also Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1656-1659.
405 Testimony of Robert Simmonds, vol. 74, November 8, 2007, p. 9335.
406 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9476-9477, 9491-9492.

Over the years, CSIS modified its initial stance of opposing any joint operation with the RCMP. Jim Warren, when he became Deputy Director of Operations, was more open to the possibility of joint operations and rejected the sentiment that a joint operation would cause "…the sky to fall in." Rather, he felt that the risks associated with involvement in a joint operation could be dealt with "… down the road."[407] While joint operations would clearly entail risks of exposure for CSIS, Warren's position shows that the Service's initial categorical rejection was at least as much the product of CSIS's preconceptions as of the real added risks which could result from such operations.

Despite later changes in CSIS, and its purported newfound willingness to involve itself in joint operations, the flexibility required to deal with the Air India investigation was not present in the immediate aftermath of the bombing, when it was most needed, and the consequences of CSIS's stubborn, legalistic adherence to its interpretation of the Act and of its attempts to minimize all risks reverberated throughout the rest of the investigation.

Conclusion

While some people at CSIS were attempting to solve the Air India case more or less directly,[408] others felt it was their responsibility to support the RCMP investigation, a task which they completed with varying degrees of success. The evidence shows that, even within CSIS, there were differing views as to the appropriate level of support to offer the RCMP. Some felt the pressure of the McDonald Commission and advocated an austerely legalistic view of what could and could not be shared, to the point that the discussion and debate slowed down the transfer of information to the RCMP and created tension between CSIS HQ and the regions. Others felt that Air India was a case where exceptions to the rules could be made in the public interest, a sentiment that became more prevalent in later years.

Throughout, one significant failure was CSIS's blanket refusal to make any attempt to collect its information in a manner that would improve the prospect for its admissibility in court if necessary.[409] Ultimately, in its determination to avoid becoming a "cheap cop shop," CSIS lost sight of its legitimate role in support of the RCMP investigation. While it insisted that the collection of national security intelligence was a clear part of its mandated powers, it failed to recognize that the RCMP would then need to rely on CSIS for such intelligence in national security investigations.

Another failure was CSIS's inability to share its information effectively with the RCMP. This was often exacerbated by the RCMP's own actions, which often showed a lack of understanding for the role of CSIS and a lack of respect for CSIS's most important concerns. At times, the manner in which the RCMP pursued (or failed to pursue) the leads provided by CSIS, and the manner in

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407 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9491-9492.
408 See Section 3.0 (Post-bombing), The CSIS Investigation.
409 See Section 4.3 (Post-bombing), The Preservation of CSIS "Evidence."

which it interacted (or failed to interact) with CSIS sources, caused the CSIS investigators to propose making their own attempts to pursue criminal leads and to attempt to avoid turning sources over when they felt better positioned to obtain information of benefit to both agencies.

This is not to say that every RCMP complaint about CSIS information sharing was well-founded. In particular, it is not clear that the RCMP was in fact held back from pursuing Parmar, and other principal suspects, early in the investigation because of information-sharing failures by CSIS. For all of the difficulties experienced by the RCMP in obtaining access to the Parmar intercept materials in order to include them in an affidavit for purposes of obtaining a wiretap, it cannot be said that the RCMP was misled as to who the key suspects would be.

The security of CSIS human sources, translators and methods was, and is, of great importance. The Air India investigation, however, raised the question of the limits of the protection CSIS could legitimately invoke in the face of the imperative of prosecuting those involved in the murder of 331 persons. Because of the numerous problems in the CSIS/RCMP relationship, and because of the overly rigid and legalistic approach often adopted by CSIS, information-sharing disputes often prevented this balancing act from being properly carried out. Information was refused or delayed because CSIS did not – and in some cases legitimately could not – trust that it would not be used without authorization. Information sharing was also affected by the fear not only of losing sources to the RCMP, but also of the manner in which the RCMP would handle those sources and follow up on CSIS information. A legalistic distinction between "raw material" and information was sometimes invoked to refuse access to certain types of materials. In the back-and-forth debates about the breadth of RCMP requests, some questions were obviously never answered because they had not been asked in a sufficiently specific manner. All of this occurred quite aside from the rational and objective examination that should have been conducted by the agencies about the value of the information to the investigation and/or the importance of the prosecution in light of the extent of the potential damage to CSIS operations.

Each agency had a tendency to exaggerate the public interest that corresponded to its particular interests in any given situation. Hence, the RCMP generally claimed that every piece of information was essential to the investigation/prosecution, while CSIS often took the initial position that disclosing the requested information was too dangerous to its operations, without any real analysis having yet been conducted on either side. Not surprisingly, the agencies came to have little respect for each other's broad claims and assertions, creating a context where they could hardly have the type of dialogue that would have been necessary to balance fairly the interests involved. To this day, the sharing and use of CSIS information in the criminal process remains a complex problem.[410]

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410 See discussion and recommendations in Volume Three of this Report: The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions.

4.2 The Liaison Officers Program

Introduction

The RCMP Commissioner and the CSIS Director discussed the possibility of a permanent and more formalized Liaison Officers (LO) Program, shortly after the creation of the new agency. Based on the experience of the Air India, Narita and Turkish embassy investigations, in July 1985, Commissioner Robert Simmonds and Director Ted Finn jointly recognized the need for "…good and strong liaison" between the organizations. They discussed proposals to exchange personnel on a permanent basis in the main regions and divisions, as well as to exchange liaison officers between the CSIS HQ CT Unit and RCMP HQ.[411]

Initial Discussions and CSIS Opposition

By July 1985, Finn was of the view that both agencies could benefit from the exchange of liaison officers at HQ in the counterterrorism area.[412] However, Finn's enthusiasm for an LO Program was not shared by all senior CSIS executives and the creation of a formal program was put on hold.

On April 17, 1986, the CSIS DDO Ray Lees and CSIS DG CT James ("Jim") Warren met to discuss the wisdom of an exchange of liaison officers between RCMP and CSIS in the area of counterterrorism. Warren concluded that "…no useful purpose would be served" in implementing an LO Program. He felt that there were already two excellent daily liaison channels, one involving RCMP NCIB (including the HQ Coordination Centre for the Air India investigation) and CSIS HQ CT, and the other, RCMP P Directorate and the CSIS Threat Assessment Unit. Warren noted that problems in cooperation between the agencies were, more often than not, based on personality differences and deep-rooted competition over turf, issues that would not be helped through an exchange of liaison officers.[413]

In his testimony before the Inquiry, Warren added that he was concerned that an LO Program would result in CSIS losing control of its intelligence, specifically through erosion of the CSIS Director's discretion to pass information to the RCMP that had been granted by section 19 of the *CSIS Act*.[414]

Simmonds, for his part, felt that difficulties in cooperation were based on flaws in policy that failed to allow CSIS intelligence to be available to the courts as evidence, rather than on personality problems. In his opinion, it was never a problem of personalities or people. He reported that he had a good relationship with Finn.[415] However, Simmonds's viewpoint was necessarily that of a high-level official not personally exposed to any of the daily frustrations experienced by members working at the local level.

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411 Exhibit P-101 CAD0035, p. 4.
412 Exhibit P-101 CAD0035, p. 4.
413 Exhibit P-101 CAA0432.
414 Testimony of James Warren, vol. 48, September 19, 2007, p. 5909.
415 Testimony of Robert Simmonds, vol. 74, November 8, 2007, pp. 9360-9361.

Chris Scowen testified at the Inquiry that one of the reasons that the LO Program was not embraced early on by CSIS was opposition to the idea (espoused by CSIS BC Region) that CSIS should embark on an LO Program simply to prove to the RCMP that CSIS was not withholding relevant information from the RCMP. The feeling at HQ was that this was not a sufficient rationale, as CSIS was already acting in good faith with the RCMP. CSIS felt that it was acting professionally with the RCMP and should not have to prove its good faith by participating in an LO Program.[416]

In June 1986, Finn suggested that the possible exchange of liaison officers be postponed in order to allow the deputies of both agencies to discuss it at a later date.[417] However, on August 6, 1986, Simmonds reiterated to the Solicitor General, James Kelleher, the ongoing RCMP recommendation for the formal exchange of LOs.[418] Simmonds held the firm view that the best, and most effective, way to enhance the agencies' complementary roles in counterterrorism investigations would be through the exchange of liaison officers. He felt the exchange should occur at a "reasonably senior level" and on a permanent basis. Simmonds felt that the underlying principle behind the program would be open and free access to all information held by each agency in areas of common interest.[419] He had been advised that the liaison arrangement with the RCMP's National Security Offences Task Force investigating Air India was working well and he felt this provided evidence that the liaison concept could work elsewhere. Simmonds considered such an exchange "vital and necessary" to ensure that the RCMP and CSIS could "…capitalize on the strengths each can bring."[420]

The Solicitor General Directs the Implementation of the LO Program

On August 14, 1986, Kelleher wrote to Finn and Simmonds to propose initiatives intended to improve cooperation between the two agencies in the counterterrorism area. A main feature of these initiatives was the implementation of a formal LO Program, with LOs given full access to the other agency's files in the counterterrorism area:

> [L]iaison officers with specific mandates in the counterterrorism area, will be exchanged in key operational offices across Canada and in the Headquarters of your two organizations. This arrangement will be for an initial period of one year and will be evaluated at the end of that period. Throughout the one year period liaison officers will have <u>full access</u> to information, discussions and briefings in the counterterrorism area to the same extent as officers of equivalent rank in the host organizations are accorded.[421] [Emphasis added]

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416 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6197.
417 Exhibit P-101 CAC0029, p. 2.
418 Exhibit P-101 CAA0474, p. 11.
419 Exhibit P-101 CAC0030, p. 4.
420 Exhibit P-101 CAA0474, p. 11.
421 Exhibit P-101 CAA0484.

Kelleher also called for the creation of a Standing Liaison Committee, made up of HQ liaison officers and such other senior officers as considered appropriate by the CSIS Director and RCMP Commissioner, to review ongoing CT investigations of common interest, to review and eliminate any irritants in the CT liaison arrangements and to superintend the evaluation of the liaison exchange experience. Finally, Kelleher recommended the creation of a committee to review and update the existing ministerial directions and MOUs related to liaison and information sharing.[422]

Kelleher called for the implementation of these initiatives as soon as possible. In fact, he requested a progress report regarding the exchange of LOs, the establishment of the Standing Liaison Committee, and the review of existing policies by September 15, 1986. A major impetus expressed by Kelleher for these initiatives was their potential to alleviate public concerns about the CSIS/RCMP relationship, as well as the concerns expressed by SIRC in its second annual report.[423]

Early Doubts and Criticisms

When Ronald ("Ron") Atkey, the Chairman of SIRC at the time, learned of Kelleher's call to implement a CSIS/RCMP LO Program, he wrote on his copy of the letter:

> Until someone defines the difference between security intelligence and criminal intelligence in this area of common concern; especially what the role of liaison officers is about, all this will represent is a papering over of the cracks.[424]

At the Inquiry hearings, Atkey testified that, in spite of his concerns about the logistics of the program, he felt the Kelleher measures were good ideas overall. He testified that they were not unanimously approved by RCMP and CSIS officials, but nevertheless may have been in the public interest and certainly were well-received by SIRC.

The LO Program met with opposition almost as soon as the Solicitor General directed its implementation. On September 5, 1986, Archie Barr, Deputy Director of National Requirements, registered his objections against the LO Program. Barr felt that the program was bad policy, both for CSIS and more importantly for the Solicitor General. Barr felt that the rationales behind the LO Program were based on unwarranted allegations against CSIS, and that the LO Program would fuse the two agencies together against the intention of Parliament.[425]

Barr noted that, on the surface, the program "…seems to paper over the cracks" [426] in CSIS's dealings with the RCMP, language coincidentally similar to that used

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422 Exhibit P-101 CAA0484.
423 Exhibit P-101 CAA0484.
424 Exhibit P-101 CAA0484. See, generally, Section 3.4 (Pre-bombing), Deficiencies in RCMP Threat Assessment Structure and Process.
425 Exhibit P-101 CAA0492.
426 Exhibit P-101 CAA0492.

by Atkey in his personal notes at the time.[427] Barr felt that the initiative would give Kelleher something to say in the House about directions he had given to improve that relationship, but felt that the LO Program was ultimately a short-term public relations solution that ignored the real problems.[428] In his testimony before the Inquiry, Warren explained that there was a concern at CSIS that the RCMP was advocating for authorization to recreate a security service within the Force and that the type of "data transfer" that would be done under the LO Program would represent one more step towards achieving this aim.[429]

At a minimum, Barr asked that the Terms of Reference for any liaison agreement be made much tighter and more clearly defined than the Kelleher's directive for "…full access to information, discussions and briefings." He recommended that Kelleher be made aware that the directive to grant the RCMP "full access" to CSIS information would conflict with previous ministerial directives providing that neither agency was to have "…an unrestricted right of access to the operational records of the other agency." Barr also noted that the media and CSIS's intelligence partners would be highly critical if they learned that the police had complete access to CSIS intelligence.[430]

According to Scowen, the implementation of the LO Program put an end to the evolving policy dynamics at CSIS that had resulted in RCMP officers experiencing continually changing access to CSIS material.[431] However, while it apparently allowed CSIS to adopt more consistent positions, the program did not put an end to the difficulties associated with the sharing and use of CSIS information, nor to the tensions in the RCMP/CSIS relationship – far from it.

Terms of Reference for the Liaison Officers Exchange Program

Negotiations about the specific implementation of the LO Program took place between the agencies in the fall of 1986,[432] and Terms of Reference (TOR) for the RCMP/CSIS Liaison Officers Exchange Program were signed in December 1986.[433] The TOR provided means to limit information sharing between the agencies in order to accommodate CSIS's concerns. For instance, Warren had insisted that the identity of sources had to remain off limits to the RCMP LO, despite Kelleher's direction for "full access."[434] In contrast, Deputy Commissioner Inkster initially persisted in asserting that the RCMP LO should be present at all CSIS operational meetings, including at discussions regarding CSIS sources.[435] Eventually, however, faced with strong CSIS opposition, Inkster agreed that the LO would not be included in such meetings.[436]

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427 Exhibit P-101 CAA0484.
428 Exhibit P-101 CAA0492.
429 Testimony of James Warren, vol. 48, September 19, 2007, p. 5912.
430 Exhibit P-101 CAA0492, pp. 3-4.
431 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6192.
432 Exhibit P-101 CAA504.
433 Exhibit P-101 CAA0511, p. 1.
434 Testimony of James Warren, vol. 48, September 19, 2007, p. 5914.
435 Exhibit P-101 CAA0504.
436 Testimony of James Warren, vol. 48, September 19, 2007, p. 5914.

Under the TOR, CSIS was required to consult the RCMP LO where it perceived that a crime falling under RCMP jurisdiction was being planned or had taken place. In turn, the RCMP was required to consult the CSIS LO when it uncovered information of interest to CSIS activities in the CT area. Each agency was directed, with some exceptions, to grant the respective LO access, upon request, to all information relevant to "identified" investigations and interests. The TOR provided that the respective LOs had to be invited to attend CT internal operational meetings held by the host agency.[437]

While the disclosure of information to the LO was said to constitute sharing with the LO's agency, the TOR specifically provided that, before the LO could actually give the information to his agency, approval from the host agency was necessary.[438] When such approval was sought by the LO, the source agency could apply caveats and the receiving agency was required to treat the material in accordance with the need-to-know principle. The receiving agency was prohibited from disseminating or using the information received without again requesting the approval of the source agency.[439] Key to responding to some of CSIS's concerns was a provision that called for full protection to be afforded to RCMP and CSIS sources, methods of operation and targets, meaning that this information would not be routinely shared.[440]

The TOR also explicitly specified that "all possible steps" were to be taken to avoid the need to expose CSIS information or witnesses in court.[441]

Implementation of the Liaison Officers Program

The exchange of LOs was to commence on November 1, 1986 for a one-year period, after which the program would be evaluated.[442] The LO Program was duly implemented at HQ offices, and duplicated in each of the major regions, namely BC, Toronto, Quebec and Ottawa.[443] Those who first filled the LO positions found that the program was difficult to implement and that relations between the agencies continued to be problematic.

RCMP Liaison Officer Experience

S/Sgt. Ron Dicks was the first RCMP LO at the RCMP O Division in Toronto.[444] He had an office at CSIS in Toronto[445] and reported directly to the Officer in Charge of the RCMP O Division Intelligence Branch.[446]

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437 Exhibit P-101 CAA0511, pp. 1-2.
438 Exhibit P-101 CAA0511, p. 2.
439 Exhibit P-101 CAA0511, p. 2. Conflicts about this last issue were to be referred to the Standing Liaison Committee and ultimately to the Director of CSIS and the Commissioner of the RCMP.
440 Exhibit P-101 CAA0511, p. 3.
441 Exhibit P-101 CAA0511, p. 3.
442 Exhibit P-101 CAA0511, p. 3.
443 Testimony of James Warren, vol. 48, September 19, 2007, p. 5915.
444 Testimony of Ron Dicks, vol. 62, October 16, 2007, pp. 7549-7550; Exhibit P-101 CAC0052, p. 1.
445 Exhibit P-101 CAC0052, p. 1; Testimony of Ron Dicks, vol. 62, October 16, 2007, p. 7563.
446 Exhibit P-101 CAC0052, p. 1.

CSIS had decided to accept requests for information only from the RCMP LO, so RCMP detachments were instructed to channel their requests for CSIS files through the LO.[447] While the main focus of the program was on CT investigations, the RCMP LO, at least in Toronto, could request access to CSIS material relevant to other RCMP criminal investigations.[448]

In Toronto, CSIS decided not to maintain a "permanent on-site presence" at RCMP offices. CSIS requests for RCMP information were to be channeled through the CSIS LO, who would in turn make his requests from Dicks.[449]

Dicks testified at the Inquiry about his experience as the LO in Toronto. It was his understanding that the LO Program was meant to remedy a problem in communication between CSIS and the RCMP. Dicks felt that the program was a useful "initial effort" to try to improve communication, but that the CSIS/RCMP relationship was evolving. Overall, he felt that his access to CSIS material as RCMP LO was "constrained and restricted." He testified that there was not a free flow of information coming from CSIS.

The process of information exchange was almost exclusively triggered by Dicks's requests. He never had free access to CSIS records nor to entire investigational files to peruse at his leisure. Instead, he was able to review only the material brought to his attention by CSIS following his general requests, and his requests had to be tied to a particular RCMP investigation in O Division. Dicks was never involved in any CSIS operational meetings, in spite of the Terms of Reference for the LO Program. He could not recall any circumstance where CSIS came to him to request his expertise regarding whether the criminal threshold for passing information over to the RCMP had been reached. In general, Dicks described the RCMP/CSIS relations at the time as "difficult", "not fluid" and, on occasion, "strained."[450]

In terms of the practical application of the LO Program, Dicks explained that he was kept informed of the ongoing RCMP investigations in the Division in order to know what to focus on. For him to review CSIS material, there had to be some criminality involved. Dicks had to identify in advance for CSIS the documents or information he was looking for before receiving any materials. He would then review what was brought to his attention and identify pieces of information to be excised from the CSIS documents and provided to the RCMP. The "need-to-know" principle required that Dicks refrain from disclosing information, even within the RCMP, outside of those members involved with the particular investigation for which the CSIS information had been exchanged.[451]

Dicks explained that the caveats that were commonly imposed on the flow of information from CSIS to the RCMP generally put the RCMP in a position where the only possible purpose for the Force in reviewing the information was "…

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447 Exhibit P-101 CAC0052, pp. 1-2.
448 Testimony of Ron Dicks, vol. 62, October 16, 2007, p. 7551.
449 Exhibit P-101 CAC0052, p. 2.
450 Testimony of Ron Dicks, vol. 62, October 16, 2007, pp. 7553-7554, 7563-7564, 7628, 7637-7638.
451 Testimony of Ron Dicks, vol. 62, October 16, 2007, pp. 7552, 7555-7556, 7562-7563.

to see if the RCMP could develop other investigative leads."[452] For example, in April 1987, Dicks presented a written request to CSIS for the release to the RCMP of surveillance information about Ripudaman Singh Malik during a visit to Toronto.[453] CSIS provided a copy of their surveillance report to Dicks with the following caveat:

> It is requested that no investigative action be taken by the RCMP 'O' Div, based on the information contained in this surveillance report without prior consultation with Toronto Region. The reason being we have an ongoing interest in Malik's activities in Canada as we do not wish to see your ongoing investigation conflict with our investigation.[454]

According to Dicks, the restrictive nature of the caveats could often prevent the RCMP from using the CSIS information – even as investigative leads – without going back to CSIS for approval. Dicks commented "…we never had a liberty to simply use the information as we pleased in other judicial processes or to be overt in our investigative approach to people."[455]

Dicks explained that the process in place provided for him as LO to have discussions with his CSIS counterparts to ensure that investigations did not conflict and to obtain authorization for the RCMP to use CSIS information in more overt investigative initiatives. He commented, however, that it was a difficult process in that "…discussions would have to go back and forth," there were additional "time lags" and "…many more persons would get involved in the discussion at various levels of the management of the two organizations."[456]

The process in place for Dicks to review CSIS materials and to request the release of information to the RCMP also required protracted discussions and created delay. For example, Dicks was provided with a second CSIS surveillance report on Malik at the end of April 1987. According to the usual procedure, he was expected to select extracts of interest to the RCMP and to request their production. However, Dicks concluded that because Malik was "…suspected of conspiracy in most if not all BK Terrorist Canadian activities," and because his activities were "…a constant concern to the RCMP," no portion of the CSIS report could be disregarded.[457] He explained in testimony that, in light of the conspiracy investigation, he believed it was important that the RCMP receive the whole report and "…not just snippets of information."[458] CSIS agreed to provide the entire report after retyping it to remove the identification numbers of its surveillance employees, but this did not occur until late September, five months after Dicks's request.[459]

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452 Testimony of Ron Dicks, vol. 62, October 16, 2007, pp. 7559, 7565-7566.
453 Exhibit P-101 CAF0416, pp. 1-2.
454 Exhibit P-101 CAF0416, p. 2.
455 Testimony of Ron Dicks, vol. 62, October 16, 2007, pp. 7559, 7565-7566.
456 Testimony of Ron Dicks, vol. 62, October 16, 2007, p. 7560.
457 Exhibit P-101 CAF0417, p. 2.
458 Testimony of Ron Dicks, vol. 62, October 16, 2007, p. 7562.
459 Exhibit P-101 CAF0417, p. 2, CAF0419.

CSIS Liaison Officer Experience

The first CSIS LO in BC Region, John Stevenson, also testified that his experience was difficult. Stevenson had undertaken informal liaison duties in June 1986. Stevenson was tasked with liaising directly with a spokesman representing each of the three RCMP investigative units looking after the major Sikh extremism investigations, including the Air India investigation. Stevenson continued in a liaison role upon the implementation of the formal LO Program called for by Kelleher.[460]

Stevenson testified that he was responsible for transporting the daily investigative reports from CSIS up to the RCMP units. The RCMP LO would read this information and could request disclosure to the RCMP of any of that material.[461]

Stevenson testified about the problems he encountered early on in his liaison duties, remarking that, in general, he felt run off his feet. He explained that many RCMP officers regarded him with suspicion. There were constant assertions on the part of the RCMP that CSIS was withholding information. Stevenson indicated that he was constantly being told, "This isn't good enough, you must have more than this." He even heard that the RCMP was so convinced that CSIS was withholding information that it had considered obtaining a search warrant for CSIS premises. The RCMP members also complained about CSIS caveats, indicating that they rendered the information that was passed to them essentially useless. Stevenson was of the view that part of his job was to explain to the RCMP members, who seemed to expect that CSIS would be handing over everything, that, in accordance with the liaison agreement, only select relevant information would be passed, and only as investigative leads.[462]

Stevenson noted that there were "331 very tragic reasons" why CSIS and the RCMP had to make the LO Program work, and he felt CSIS did its best to make the program work, bringing a tremendous number of investigative leads to the RCMP. Though he was of the view that the LO Program "…for the most part" did "…work overall quite well," Stevenson testified that friction nevertheless remained, which he attributed mainly to certain personalities within the RCMP who would never be satisfied. He explained that certain personalities on the RCMP side were not that well disposed towards CSIS, and seemed to have trouble grasping what the mandate of the intelligence service was all about.[463] He stated:

> Certain personalities in the RCMP were self-professed CSIS bashers. That is how they described themselves. We dealt with them. I was ignored by them but I dealt with them because CSIS was determined to make it work.[464]

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460 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7655.
461 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7655.
462 Testimony of John Stevenson, vol. 62, October 16, 2007, pp. 7657, 7673.
463 Testimony of John Stevenson, vol. 62, October 16, 2007, pp. 7658-7659.
464 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7723.

Stevenson also had his own complaints about the RCMP information-sharing practices. He felt that information sharing was "…essentially a one-way street," and he recalled giving the RCMP subtle reminders to look for information germane to CSIS investigations.[465] Warren received the BC Region complaints about the lack of RCMP information, and he went out to the Region to tell them "…that they had to be a little bit more aggressive in going over and looking at the RCMP stuff." The CSIS Liaison Officer at RCMP HQ also received little information, since most of the RCMP information was available in the divisions only and not at HQ.[466]

Attempts to Clarify the Terms of the LO Program

The problems encountered in the implementation of the LO Program were brought to the attention of CSIS management early on. At a February 5, 1987 meeting, Barr noted the RCMP complaints about lack of access, and called on all CSIS regions to ensure adequate access was being provided to RCMP LOs:

> RCMP raised the issue of access by the RCMP LO to operational information held by CSIS. It appears this access has been severely limited, likely resulting from too strict an interpretation of advice from CSIS legal counsel. While it was agreed that the RCMP cannot be given full and unfettered access to CSIS databanks, it was agreed that when a matter is raised that might have relevance to the responsibilities of the RCMP under Part IV of the *CSIS Act*, the RCMP LO is to be given all related info, short of identifying sources.[467]

On June 17, 1987, Barr issued another memorandum to dispel continuing confusion that existed in the regions, and, to some extent, at HQ, about the CSIS/RCMP LO Program. He noted that the LO Program was in place to assist the Service in deciding specifically what parts of its information could be relevant to the mandate of the RCMP and thus ought to be reported to the Force. He explained that the transfer of CSIS information to the RCMP could be triggered in two ways. First, the RCMP could make a request for information. Second, and far more commonly, CSIS itself could decide its information was possibly relevant to an RCMP investigation. The information being passed to the RCMP LO at this stage could include technical intercepts and human source information. In both cases, the information would be shown to the RCMP LO, whose role would be to assist CSIS in determining what parts of the information could be relevant to an RCMP investigation and should be released to RCMP investigators as investigative leads.[468]

Barr went on to explain that once the RCMP LO had identified the relevant information requested for release, the request was to be submitted to the

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465 Testimony of John Stevenson, vol. 62, October 16, 2007, p. 7656.
466 Testimony of James Warren, vol. 48, September 19, 2007, p. 5915.
467 Exhibit P-101 CAF0270.
468 Exhibit P-101 CAF0272, pp. 2, 5.

appropriate CSIS HQ Desk. The CSIS HQ Desk was to consult with Human Sources and/or Legal Services. The release of sensitive information that might put in jeopardy a human or technical source could be restricted based on consultations with the DDR, Director and/or Solicitor General. CSIS HQ was to release the information to the RCMP HQ and the requesting RCMP LO with the "…clearly understood caveat that it is for the purpose of investigative leads only." Technically, it was only at this point that the RCMP LO would be able to discuss the information with other members of the RCMP.[469]

Barr addressed situations in which the RCMP might want to use CSIS information in the criminal process, emphasizing the importance of having HQ make the decision on whether to authorize this or not, in light of the risk that the CSIS information could be disclosed to the defence.[470] Barr also noted that after the commission of a specific criminal act, interviews and investigations into the act should be conducted by the RCMP. In such cases, CSIS was to be kept updated on the investigation through the LO, rather than by conducting its own direct investigation.

In addition to providing needed clarification for CSIS Regions, Barr's memo noted that it had become clear that CSIS was not taking full advantage of the LO Program and had not received adequate access to police information.[471]

One-Year Review of the LO Program

The Terms of Reference for the LO Program called for a review within one year after its implementation. Both the RCMP and CSIS held consultations in relevant regions and divisions across the country in preparation for the one-year review. On the morning of August 27, 1987, RCMP E Division and CSIS BC Region held internal meetings to discuss the LO Program in BC. A joint RCMP/CSIS meeting was held in the afternoon of the same day.

The internal RCMP E Division meeting was documented in a memorandum by the RCMP HQ LO, J.J. Paul Ouellet, who visited the Division in connection with the LO Program review. The general consensus was that cooperation and liaison between the agencies was very good, but there was a growing awareness that CSIS was bound by stringent guidelines. While informal disclosure was almost immediate, the formal disclosure process through CSIS HQ was very time-consuming. Continuing personality clashes were also noted.[472]

The internal CSIS BC Region meeting, which included Jim Warren from CSIS HQ, was recorded in a memorandum by John Stevenson.[473] CSIS HQ requirements for specificity in RCMP requests, as well as the delays caused by the need for HQ approval before passing information to the RCMP, were discussed. Warren agreed that the Region did not have to require as much specificity, but simply

469 Exhibit P-101 CAF0272, p. 2.
470 Exhibit P-101 CAF0272, p. 3.
471 Exhibit P-101 CAF0272, pp. 3-4.
472 Exhibit P-101 CAC0057, pp. 1-3.
473 Exhibit P-101 CAF0275.

had to be satisfied that RCMP requests were connected to the performance of police duties. Concerning the delays, it was agreed that the Region could make its own decisions in certain emergency situations and, in other cases, could pass information to the RCMP when an HQ response was not received after a certain period. In terms of CSIS access to RCMP information, Warren asked the Regional LOs to adopt a "tougher" stance in demanding intelligence files on targets of common interest. He also requested that any reluctance by the RCMP to share information be immediately relayed to CSIS HQ.[474]

At the joint RCMP/CSIS meeting, the agencies conveyed the concerns raised at their internal meetings. The meeting concluded favourably, with both agencies confident that the LO Program should continue. CSIS's fear that its information, once passed to the RCMP, would be exposed in court proceedings, remained unresolved and was noted as a restraint with which both agencies would have to continue to work.[475]

A senior-level CSIS/RCMP HQ meeting was held on September 23, 1987 in Ottawa to evaluate the LO Program, to discuss means of improving liaison, and to ensure that each organization's mandate and responsibilities were understood. The agencies agreed to allow access as broadly as possible and to use a "… more common-sense approach" to the sharing of information. CSIS agreed to provide information of a criminal nature at the earliest possible juncture. In cases of joint interest, the agencies agreed to have operational discussions at the working level or to exchange complete case-related information at a senior level. Importantly, they recognized the continuing problem of the use of CSIS information in court proceedings. Ultimately, the agencies agreed that the LO Program was beneficial and should be continued.[476]

On April 20, 1988, CSIS Director Reid Morden and RCMP Commissioner Norman Inkster wrote to Solicitor General Kelleher to report on the implementation of the initiatives he had directed in August 1986. They reported that the measures were very successful, and specifically that the LO Program helped to facilitate trust between the organizations.[477]

Conclusion

Some of the witnesses who testified at the Inquiry also made positive comments about the program. Warren concluded that the program had worked by easing, somewhat, the tensions between the two organizations. He stated that the program ultimately did help, despite his initial strong opposition.[478] Simmonds testified that the early liaison arrangements and the LO Program led to better discussions at HQ and in the divisions, and was useful because it solved many of the cooperation problems.[479]

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474 Exhibit P-101 CAF0275, pp. 1-2.
475 Exhibit P-101 CAC0057, pp. 4-7.
476 Exhibit P-101 CAF0277, pp. 2-4.
477 Exhibit P-101 CAA0641, pp. 1-2.
478 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5915, 5921.
479 Testimony of Robert Simmonds, vol. 74, November 8, 2007, pp. 9344-9345.

However, the evidence also shows that CSIS often appeared to view the LO Program as an unnecessary and cumbersome process, set up in response to concerns on the part of the RCMP and of the public about a perceived resistance to information sharing by CSIS. CSIS officials concluded that the program was a success, but this assessment was largely due to the fact that it alleviated the police and public perceptions about CSIS's lack of sharing. When asked during his testimony about his overall conclusions about the LO Program, Warren stated that, as the program unfolded and the two organizations got more used to working with one another, it started doing what the Minister had hoped it would do, which was to reassure the public that CSIS and the RCMP were working together.[480] Scowen stated that the benefit of the LO Program was that it curtailed the criticism that CSIS received about withholding information from the RCMP.[481]

The full potential of the LO Program was limited by a number of recurring problems, including structural issues surrounding the centralization of information sharing and issues relating to personality conflicts.[482]

Overall, even when individuals were cooperating and the LO Program was being used as intended, the program still failed to address the main hurdle in RCMP/CSIS cooperation, the use of CSIS intelligence in court proceedings. The program did little to change CSIS's information-sharing practices, as the Service maintained the discretion to decide what information would be shared with the RCMP and continued to limit the use of the information passed, to protect its sources, its methodology and third-party information.

Initially, the RCMP appeared to view the LO Program as an opportunity to access the counterterrorism intelligence it felt it required to carry out its policing operations.[483] Through the years, the RCMP attempted to use the LO Program to gain unfettered access to CSIS's intelligence information, but these attempts were continuously rebuffed by CSIS's insistence on protecting its categories of sensitive information and limiting the use of its information.

In the end, perhaps because the agencies themselves were unable to resolve the disclosure issues to their satisfaction, the Liaison Officers Program was quietly discontinued in 2002 and replaced with a secondment program that abandoned the historical focus on improving specific information-sharing practices in favour of an arrangement set up to facilitate an understanding of each other's mandate for the agencies.[484]

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480 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5921-5922.
481 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6182.
482 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5921-5922.
483 Testimony of Robert Simmonds, vol. 74, November 8, 2007, p. 9345.
484 See Section 4.5 (Post-bombing), Recent Cooperation and Information-Sharing Mechanisms.

4.3 The Preservation of CSIS "Evidence"

4.3.1 Tape Erasure

Introduction

On December 14, 1987, the Canadian public learned from a CBC interview of then CSIS Director, Reid Morden, that CSIS had destroyed intercept tapes on the prime Air India suspect, Talwinder Singh Parmar. Those tapes were recorded between March 27 and July 1, 1985, which spans, roughly, the period from two months prior to the terrorist attack on Air India Flight 182 to one week after the attack.[485] About three-quarters of "the Parmar Tapes" recorded during that period were destroyed, with only about 25 per cent retained and made available for review to the RCMP and BC Crown counsel. The news prompted shock across the nation.

Questions and allegations began to surface immediately about possible reasons for the destruction of the Parmar Tapes. Did CSIS erase the tapes to destroy information indicating that it had advance knowledge of the bombing? Did the erasures destroy critical information that could have led to the successful prosecution of the Air India conspirators? Or, as CSIS has long claimed, were the erasures done in accordance with established tape retention policy after Service personnel had diligently ensured that no incriminating information had been recorded?

Despite investigations by CSIS, the RCMP and SIRC,[486] the controversy arising from the erasure of the Parmar Tapes continued unabated.

The Commission undertook a comprehensive review of the erasures of the Parmar Tapes, focusing on not only on what happened and why, but also on the effect that the erasures had on the investigation and eventual prosecution.

There are certain facts about the erasure of the Parmar Tapes that are beyond controversy:

a. CSIS applied to wiretap Parmar's phone. Archie Barr testified under oath before the Federal Court that Parmar posed a threat to national security.[487] Barr described Parmar as a terrorist who is "…expected to incite and plan acts of violence including terrorism"[488] against Indian interests and Hindus. He also told the Federal Court that wiretapping his phone was important and necessary because all other investigative means had failed or were likely to fail;
b. The warrant to intercept Parmar's telecommunications was issued, and the interceptions began, on March 25, 1985;

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485 Exhibit P-198.
486 These investigations include Security Intelligence Review Committee, "CSIS Activities in Regards to the Destruction of Air India Flight 182 on June 23, 1985: A SIRC Review," November 16, 1992: Exhibit P-101 CAB0902.
487 Exhibit P-101 CAA0333: Affidavit in support of the application for the warrant.
488 Exhibit P-101 CAA0333, p. 6.

c. In total, approximately 210 tapes were recorded between March 27 to July 1, 1985;
d. Approximately 156 of these tapes were erased;
e. 54 were retained and made available for review to the RCMP and Crown counsel for use during the investigation of the terrorist attack on Flight 182.

While it seems inconceivable that CSIS would destroy any of the Parmar Tapes, the systematic destruction of the Parmar Tapes after the terrorist attack on Flight 182 is particularly disturbing.

The RCMP, despite learning about the existence of the Parmar Tapes after the terrorist attack on Flight 182, knowing the importance of Parmar, and knowing – at least a few members of the Air India Task Force knew – of the existence of CSIS's erasure policy, failed to take any concrete steps to request the preservation of the original intercepts. No one from the RCMP bothered to write a letter demanding that the tapes be preserved. It appears that the RCMP just assumed that the Service was retaining the intercepts.

CSIS continued to record Parmar's communications and to erase the tapes until February 1986, when the Department of Justice lawyer who defended the Government in the civil litigation launched by the families asked that the tapes be retained. It was only then that the erasure stopped.[489]

How did this state of affairs come to be? Why did CSIS behave with "unacceptable negligence," as found by Justice Ian Josephson?[490] How could our national police force fail to gain access to all of the Parmar Tapes or, at the very least, to write a letter to prevent CSIS from destroying them?

James Jardine was the BC Crown counsel who prosecuted Reyat for the Narita bombing. He began requesting information from CSIS in connection with that case in the spring of 1986.[491] The first time he received clear confirmation of the destruction of the Parmar Tapes was in December 1987, while watching Morden admit their destruction to the CBC.[492] Jardine summed up his feelings at that moment in an internal note which read:

"Inconceivable, incomprehensible, indefensible, incompetence."[493]

The Key Questions

The controversy surrounding the destruction of the Parmar Tapes essentially involves the following key questions:

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489 Exhibit P-101 CAA0549, CAA0609, p. 15, CAA0913(i).
490 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864.
491 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
492 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5702; Exhibit P-198: CBC videotape dated December 14, 1987.
493 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5703.

- Should the Parmar Tapes have been retained based on CSIS policy?
- Should the Parmar Tapes have been retained for use as evidence in the RCMP investigation?
- Was any information of significance lost due to the erasure of the Parmar Tapes?
- What effect did the destruction of the Parmar Tapes have on the criminal prosecutions?

To answer these questions it is important first to understand what in fact happened.

What Happened?

Tape Processing Standard Operating Procedures

In 1985, CSIS lacked clear, accessible policies for the physical handling, monitoring and processing of intercept tapes.[494] As a consequence, each region developed its own system.[495] In BC Region, the Communications Intelligence and Warrants (CI&W) Unit was responsible for the technical processing of tapes, and had established a standard procedure.

Communications Intercept Operators (CIOs) were responsible for ensuring that the tapes were running and recording correctly. CIOs would watch and replace tapes as needed. Each tape was marked with the line number and the date, as it was removed. At 11:00 PM each day, a new tape was placed on each line to record the overnight activity. The tapes were then stored in a separate room where the transcribers could retrieve and listen to them.[496]

Each morning, the transcribers would collect the tapes recorded the previous day. Each transcriber was responsible for making a log of each reel, showing the time of each call, the identity of the caller and a transcription of the English portion of the tape. The reel and log would then be passed to a translator, who would translate those portions that were in a foreign language. The translator would then return the translation and logs to the transcriber, who would put the relevant information into a report for submission to the investigator.[497] The transcribers would return the tapes when they were finished. After a short holding period, the tapes would then be erased by the CIO on duty.[498]

Throughout this process, the transcriber was to meet with the investigator to discuss the investigation and to obtain updates in order to better understand the orientation of the investigation. It was thought that, as time went on, the

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494 Exhibit P-101 CAB0902, p. 79.
495 Exhibit P-101 CAB0902, p. 70. It was believed that a BC Region Head was responsible for administering the local tape retention and erasure program: Exhibit P-101 CAB0902, Annex F, p. 11.
496 Exhibit P-101 CAD0003, p. 3, CAD0096, p. 4.
497 Exhibit P-101 CAD0096, p. 4.
498 Exhibit P-101 CAD0003, p. 3, CAD0096, p. 4.

transcribers and translators would gain familiarity with the target, including the target's use of coded language and secretive approaches,[499] as well as with the subject matter of the investigation, and that this would lead to higher-quality reporting.

In 1985 CSIS employed analog recording techniques.[500] Warranted interceptions of private communications were recorded on large analog tapes. Unlike modern digital recording methods, the use of analog equipment created significant storage issues, which constituted a practical reason for the erasure and reuse of tapes. Intercepted conversations could not be reduced to a digital computer file, meaning that the entire reel of analog tape would have to be indexed and stored. Access to the content of these reels was by manual means alone, and there were no automated or digitized search capabilities.

Actual Processing of the Parmar Intercepts

CSIS BC Region had been unable to hire a security-cleared Punjabi translator to coincide with the authorization to intercept communications which commenced March 25, 1985.[501] Thus, the standard tape processing procedures could not be followed and interim procedures were developed.

Throughout the pre- and post-bombing period, the English communications on the Parmar intercept were processed by a single transcriber in BC Region, Betty Doak. Doak transcribed the English portion of the tapes on a daily basis, with the exception of weekend material which was processed two to four days later.[502]

Meanwhile, the Punjabi communications recorded on the Parmar intercept during the pre-bombing period were processed by three different Punjabi translators. The translation of individual tapes was often delayed, sometimes for several months from the date of the interception.

The initial Parmar Tapes were sent to CSIS HQ in Ottawa for translation. CSIS HQ had a large pool of translators, and thus Ottawa Region often received tapes from the other regions. This arrangement was less than ideal, as the BC Region investigators were unable to brief the translators properly and keep them updated on the progress of the investigation. The tapes were processed and returned to the BC Region investigators in batches, inevitably resulting in investigators reviewing material weeks after it was recorded. This made it impossible to conduct the security investigation with real time knowledge of Parmar's activities.

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499 Testimony of James Warren, vol. 48, September 19, 2007, p. 5857.

500 Analog recording stores audio signals by physically storing a wave – for example by grooves on a record or changing magnetic field strength on magnetic tape. Digital recording, by contrast, stores audio in the form of discrete numbers.

501 See Section 3.2 (Pre-bombing), The CSIS Investigations into Sikh Extremism, for more detail about the search for a Punjabi translator.

502 Exhibit P-101 CAB0613, p. 3, CAD0003, p. 3.

BC Region sent a total of 82 tapes to Ottawa for translation during the pre-bombing period.[503] The first 14 tapes were sent to Ottawa on April 4th and transcriptions were sent back to Vancouver on May 8th. The next 15 tapes were sent on April 11th, with transcriptions returned to Vancouver on May 29th. Subsequent shipments were sent, but Ottawa translators were able to process only three more tapes.[504]

Eventually, a translator was hired in Vancouver, who immediately commenced work on June 8, 1985.[505]

By the time of the terrorist attack, 82 of the approximately 191 tapes recorded between March 27th and June 23rd had been transcribed and translated: 32 by the Ottawa translator (covering March 27th to April 9th) and 50 by the BC Region translator (covering June 8th to June 21st). All processed tapes were erased except for four tapes, recorded from May 6th to 7th, which had been set aside for voice print purposes.[506] Tapes recorded after the bombing were processed as soon as possible after interception.[507]

Processing the Backlog of Parmar Intercepts

On July 5, 1985, Ottawa returned 50 unprocessed tapes (covering April 9th to April 25th) to add to the backlog of pre-bombing tapes already in existence at BC Region. In the meantime, CSIS had obtained warrants to intercept the communications of several other Sikh extremist targets, which meant that the Punjabi translators were fully occupied processing current intercepts.[508] By September 1985, a full two months after the attack, a backlog of 80 to 85 pre-bombing tapes (covering April 9th to May 7th) remained.[509]

The backlogged tapes were finally processed in late September, and into October, 1985.[510] BC Region translators processed 33 of the backlogged tapes covering the time period between April 26 and May 7, 1985. The 50 tapes returned by Ottawa Region were processed by Cst. Manjit ("Sandy") Sandhu of the RCMP Vancouver Task Force, who was indoctrinated[511] into CSIS for the task.[512] The RCMP and CSIS agreed that Sandhu would transcribe the 50 tapes, identifying

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503 The tapes were sent in a number of shipments. 14 tapes covering March 27th to April 2nd were sent on April 4th, 15 tapes covering April 3rd to 7th were sent on April 11th, 15 tapes covering April 8th to 13th were sent on April 18th and 12 tapes covering April 14th to 18th were sent on April 19th. Additional tapes (likely 16) from April 19th to 22nd were sent on April 25th and 10 tapes covering April 23rd to 25th were sent on April 26th. See Exhibit P-101 CAA0625, p. 1, CAB0613, p. 3, CAD0003, p. 11.

504 Exhibit P-101 CAA0625, pp. 2-3, CAD0003, p. 6. Ottawa translators were able to work on the Parmar intercepts intermittently. During this period, they processed Parmar tapes only on April 19th, 30th, May 6th, 24th, and July 3rd.

505 Exhibit P-101 CAB0613, p. 3.

506 Exhibit P-101 CAA0625, pp. 2-3.

507 Exhibit P-101 CAB0902, p. 84.

508 Exhibit P-101 CAB0613, p. 3.

509 Exhibit P-101 CAB0613.

510 Exhibit P-101 CAA0609.

511 Meaning that he swore an oath of secrecy and acknowledged that he could face penalties should he divulge the information improperly.

512 Exhibit P-101 CAB0613, p. 3.

portions of interest to the RCMP, and that CSIS would then summarize and package the product for RCMP use. Sandhu was also given access to the CSIS logs for the Parmar intercepts for the period May 5th to September 19th to identify anything of interest to the RCMP.[513] Sandhu completed his review of the tapes on October 7th, and reported that he did not uncover any significant criminal information.[514] Other RCMP investigators had been provided some access to the logs for the pre-bombing tapes in September 1985 and had identified information they found to be of interest. This information was included in an RCMP application for authorization to intercept the communications of Parmar and his associates, presented on September 19, 1985.[515] CSIS retained the 50 intercept tapes reviewed by Sandhu with the intention that CSIS personnel would review them at a later date to assess their intelligence (as opposed to criminal evidence) value.[516] By the fall of 1985, the backlog of Parmar Tapes was finally processed.[517]

The 33 backlogged tapes processed by the BC Region translator were erased by early November, except for the four tapes retained for voice-identification purposes.[518] By early November 1985, CSIS had erased all Parmar Tapes recorded between March 27 and July 1, 1985, as well as most of the tapes recorded after July 1st, except for the 50 tapes reviewed by Sandhu and the four tapes retained for voice-identification analysis.[519]

Should the Tapes Have Been Retained Based on CSIS Policy?

CSIS Policies on Tape Retention

The relevant policies and instructions relating to the handling and processing of electronic intercepts evolved over time. In 1985, the newly-formed Service had not developed a uniform, written policy governing the handling and processing of electronic intercepts. James ("Jim") Warren testified at the Inquiry that, at the time, CSIS was less than a year old and was operating under policies inherited from the RCMP Security Service (SS). There was little time to think through the inherited policies comprehensively to determine their continued suitability in light of the new mandate.[520] Indeed, one would have thought that this exercise would have been undertaken in the year prior to the creation of CSIS, as part of the preparation for the launch of the new agency. CSIS, by not having considered the suitability of various RCMP SS policies, was faced with four relevant policies and instructions governing retention of intercepted communications, which were inconsistent with one another and served to confuse rather than to provide clarity. The four seminal documents were:[521]

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513 Exhibit P-101 CAA0329.
514 Exhibit P-101 CAA0578, CAB0902, p. 99.
515 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
516 Exhibit P-101 CAB0613, pp. 2-3.
517 Exhibit P-101 CAA0609.
518 Tapes were retained for voice identification purposes in the event that an intelligence monitor needed to listen to a voice whose identity had already been confirmed to compare it with an unknown voice.
519 Exhibit P-101 CAB0902, p. 85.
520 Testimony of James Warren, vol. 48, September 19, 2007, p. 5875.
521 Exhibit P-101 CAD0184.

- A Ministerial Directive issued on July 14, 1980;
- The Technical Aids Policy and Procedures (TAPP) Manual – an operational manual inherited from the former RCMP Security Service, issued in 1981;
- An internal memorandum by Archie Barr, then Director of Security Policy Development in the Security Intelligence Transition (SIT) Group, issued on April 5, 1984;
- An internal memorandum issued by Jacques Jodoin, then Director General, Communications Intelligence and Warrants (CI&W), on February 18, 1985.

Ministerial Directive: July 14, 1980

The Ministerial Directive set out guiding principles governing tape retention.[522] The Minister had reviewed a draft version of the TAPP Manual[523] sent by RCMP Commissioner Robert Simmonds, and set out the following objectives:

- "Innocent" third-party and any other "non-target" intercepts inadvertently picked up, would be destroyed except in relation to the preservation of Master Evidentiary tapes, in accordance with the protection of individual rights.[524]
- The maximum time for tape retention would be one month.

TAPP Manual: 1981

The TAPP Manual incorporated the objectives of the Ministerial Directive and set out a comprehensive policy governing the handling and processing of electronic intercepts for the RCMP Security Service. Chapters 16 and 21 of the TAPP Manual outlined the policy specifically dealing with the erasure and retention of tapes.

Chapter 16 outlined the procedures for processing and reporting intelligence information derived from intercept operations.[525] Three categories of information for which tapes should be immediately erased were defined: privileged communications (solicitor-client), communications of confidence and third-party information. Methods of reporting (e.g., in summary or verbatim form) for time-sensitive and non-time-sensitive information were canvassed and coordination between the intelligence monitors (transcribers and translators) and investigators was encouraged. The need for future evolution of these policies

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522 Exhibit P-101 CAA0010.
523 Exhibit P-101 CAA0009.
524 Master Evidentiary tapes were intercepts in investigations deemed likely to result in prosecution with communications intercept information likely to form a vital part of the case. Exhibit P-101 CAA0008: Chapter 10 of the TAPP Manual outlined the procedure for the processing and retention of these tapes designed to ensure their conformity with the rules of evidence.
525 Exhibit P-101 CAA0013.

was recognized and there was an expectation that the operational branches would continually provide updated lists of requirements and guidelines.

Chapter 21 governed the retention of intercept tapes.[526] The importance of retaining tapes for a reasonable period of time after processing was emphasized, as this would permit investigators to access the original communication if necessary. The policy was to retain relevant tapes for a minimum of 10 days after they had been listened to, and preferably after the submission of the transcriber's and/or translator's report to the investigator. The maximum retention period was set at one month, in accordance with the 1980 Ministerial Directive.

There were three exceptions to the retention policy:

- the immediate erasure of non-relevant and confidential communications as defined in Chapter 16;
- the retention to an evidentiary standard of Master Evidentiary tapes; and
- indefinite retention of "communications that significantly incriminate a target subject in subversive activity."

The TAPP Manual was a Top Secret document distributed on a need-to-know basis.[527] Whether because it was felt that they had no "need to know" or because reading the TAPP manual was simply not a part of formal training procedures, analysts and investigators who dealt with the actual content of the intercepts were not generally provided direct access to the Manual. Often, senior personnel within the CI&W Unit[528] had access to the TAPP Manual and were responsible for passing on information about relevant portions to other Service employees.[529] Personnel at HQ had not generally reviewed the TAPP Manual.[530] The intelligence

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526 Exhibit P-101 CAA0014.

527 Exhibit P-101 CAA0614, p. 1: The introduction to the TAPP Manual states that "The sensitivity of the information contained in the TAPP Manual dictates that it be classified as TOP SECRET.… Access to the TAPP Manual is governed by the "need to know" principle as explained in the Operational Manual…. This principle must be practiced at all times in the area of communications intercept operations. Persons involved in such operations must ensure that this principle is being following at all times."

528 See Exhibit P-101 CAD0162: The CI&W Unit was responsible for the processing of communications intelligence and its transmission of that information to operational units. The CI&W unit included the monitors, transcribers and translators, along with the management staff.

529 See Testimony of Jacques Jodoin, vol. 49, September 20, 2007, p. 6036: Jodoin had a copy of the TAPP Manual in his office; Exhibit P-101 CAD0163: Richard Wallin, Vancouver Chief, CI&W had read the TAPP Manual and had it explained to him by his predecessor; he believed that his subordinates within CI&W would have read the TAPP Manual and trainers would have passed on the relevant procedures to other personnel; Exhibit P-101 CAD0152, p. 5: Eugene John Pokoj, second in charge to Jim Laking, Deputy Chief, Communications Intelligence Production in Ottawa, had gone through the TAPP Manual and his staff passed on relevant portions to other employees. The CIP Division had a copy of the TAPP Manual.

530 At HQ, see Exhibit P-101 CAD0154, p. 6: Russell Upton, Chief of the Western Europe and Pacific Rim desk at CSIS HQ, had never read the TAPP Manual at that time but was aware of the need to set aside raw material if there was information that could be used by a police force; Exhibit P-101 CAD0157, p. 5: Mel Deschenes, Director General, Counter Terrorism at HQ, was familiar with the policy in general terms but felt that HQ personnel would not need to know the specifics as they were not handling the tapes. In the BC Region, see Exhibit P-101 CAD0115, CAD0138: Neither of the two Sikh extremism investigators in the BC Region read the TAPP Manual.

monitors and the people who transcribed the Parmar intercepts never personally reviewed the TAPP Manual and only knew about the policy through word of mouth.[531]

Barr Memorandum: April 5, 1984

During the transition from the RCMP Security Service to CSIS, the Security Intelligence Transition (SIT) Group recognized the need to modify the TAPP Manual to meet the civilian mandate of the new security service. Archie Barr, then Director of Security Policy Development, issued a memorandum intended to reflect CSIS's new identity as a civilian, rather than police, agency.[532] It stated:

> As the *CSIS Act* contains no requirement for collection by the Service of information for evidentiary purposes, no such capacity will be provided for within CSIS facilities.

Soon after the creation of CSIS, Minister Robert Kaplan issued a Directive (the Kaplan Directive) that stated "…since information provided by a CSIS investigation is unlikely to be usable in law enforcement work, the RCMP would be required to investigate and collect the evidence required."[533] Employees of the new civilian intelligence service were reminded that they were no longer police officers. As of July 16, 1984, CSIS did not collect evidence, but only intelligence.[534] Accordingly, CSIS ceased handling recordings of intercepts to an evidentiary standard.[535]

The Barr memorandum radically altered the Service's tape retention policy by ending the practice of retaining Master Evidentiary tapes to assist in court prosecutions. The memorandum reversed the policy set out in the 1980 Ministerial Directive and made a clear statement that the role of the new Service was to collect intelligence, not evidence.[536] The Barr memorandum became the accepted operating standard despite the fact that he did not have the authority to reverse the 1980 Ministerial direction.[537]

Jodoin Memorandum: February 18, 1985

After CSIS was created, Jacques Jodoin, the DG CI&W at CSIS HQ (the unit responsible for the processing of communications intelligence and the transmission of that information to operational units), recognized the need to adjust the warrant policy to reflect the new Federal Court warrant process. On February 18, 1985, he issued a memorandum to all regions intended to

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531 See Exhibit P-101 CAD0148, CAD0151, CAD0166, CAD0167: The Vancouver intelligence monitors and transcribers never read the TAPP Manual but knew about the policy through word of mouth.
532 Exhibit P-101 CAA0636, p. 2.
533 Exhibit P-101 CAA0081, p. 12.
534 Testimony of James Warren, vol. 48, September 19, 2007, p. 5829.
535 Exhibit P-101 CAA0453.
536 This policy included Chapter 10 (Evidentiary Recordings) and paragraph 3 of Chapter 21 (Tape Retention) of the TAPP Manual.
537 Exhibit P-101 CAF0260.

ensure that details of significant information were available for inclusion in CSIS's warrant renewal applications for consideration by the Federal Court.[538] The memorandum called for the retention of tapes containing information that "…significantly incriminated a target subject in subversive activity or was contentious in nature or open to interpretation." The tapes were to be retained for one year or up to the renewal date of the warrant, whichever came first.

The memorandum requested that the regions inform all employees involved in investigations and in the processing of communications intelligence of this requirement. However, the regional offices did not interpret Jodoin's memorandum as a policy directive, but rather as a suggested approach. In fact, as of 1988 no region had adopted the procedures set out by Jodoin.[539]

Applying the Policies to the Parmar Tapes

The four different policies under which CSIS personnel who processed the Parmar Tapes were notionally operating were ambiguous, outdated and in conflict with one another. However, as a minimum common standard, tapes were to be retained for at least 10 days and a maximum of 30 days after having been listened to, and preferably until after submission of a report to the investigator (as specified in the TAPP Manual and the 1980 Ministerial Directive). The criteria for further retention were vague and unclear. Two separate notions can be extracted from the policies reviewed:

- Indefinite retention of communications that "…significantly incriminate a target subject in subversive activity" (TAPP Manual); and
- Retention for one year or up to the renewal date of the warrant (whichever came first) of communications that "…significantly incriminate a target subject in subversive activity or are contentious in nature or open to interpretation" (Jodoin Memorandum).

CSIS employees had inconsistent interpretations of CSIS policies on retention of intercepts.[540] They held differing views about the criteria for retention, the identity of the individuals responsible for making the determination about retention and the availability of CSIS information for evidentiary purposes.[541] This resulted in general uncertainty as to what information to retain, with everyone appearing to rely on others to make that decision. The consequence was that there was virtually no consideration given to the importance of retaining the Parmar Tapes to assist the police in their investigation of the terrorist attack on Flight 182.

What Is "Significant Subversive Activity"?

At the time of the Air India bombing, the emphasis was on erasing tapes to respect privacy and to protect innocent parties and privileged communications.

538 Exhibit P-101 CAA0125.
539 Exhibit P-101 CAD0037.
540 Exhibit P-101 CAB0902, Annex F.
541 Exhibit P-101 CAB0902, Annex F, pp. 173-174, 182-183. See also Exhibit P-101 CAB0902, p. 79.

This is best understood in light of the McDonald Commission's severe criticism of the RCMP Security Service for retaining too many files with questionable or no security intelligence value. Solicitor General Kaplan was concerned that the RCMP Security Service files be retained in accordance with a clear policy based on security need and under properly constituted authority.[542]

Despite that sentiment, no such clear policy existed in 1985. While the TAPP Manual required retention of communications which "…significantly incriminate a target subject in subversive activity," there was no guidance given on how to apply that criterion.

The term "significant subversive activity" in the TAPP Manual was developed in the early 1980s, when the RCMP Security Service was focused on counter-intelligence and counter-subversion targets. It was of marginal utility when the CSIS focus turned to counterterrorism targets. Warren noted that in the old RCMP Security Service days, "subversive activity" would have referred to membership "in the Communist Party." He noted that in the CSIS days, the term was understood to include a broader range of activities, but admitted that, for people on the ground, the criterion was "very imprecise," which was one of the faults of the policy that existed at the time.[543]

As revealed in interviews conducted in 1990 in preparation of the Reyat trial, CSIS personnel had varying understandings of the meaning of the term "significant subversive activity." Some understood it to mean "…trying to overthrow the government by violent means,"[544] while others included terrorism-related activities within the definition.[545] Still others admitted to having a vague understanding of the term, offering general definitions such as "…any activity that is subversive to Canada,"[546] and "…something that has a derogatory impact on an individual's freedoms and rights."[547] Most expressed the view that the term would be satisfied only by clear, blatant information relating to an act of political violence or a serious criminal act.[548]

The confusion over the meaning of the term can be illustrated by the controversy over the "Jung Singh" intercept. The following conversation was recorded on April 8, 1985 and reported to both CSIS HQ and BC Region on May 31, 1985:

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542 Exhibit P-101 CAA0011.
543 Testimony of James Warren, vol. 48, September 19, 2007, p. 5938.
544 Exhibit P-101 CAD0148, p. 5: Doak, Transcriber, BC Region.
545 Exhibit P-101 CAA0453, p. 2: Jodoin, Director General, CI&W, CSIS HQ.
546 Exhibit P-101 CAD0155, p. 5: Ottawa translator, CSIS HQ.
547 Exhibit P-101 CAD0154, p. 6: Upton, Chief, Western Europe and Pacific Rim Unit, CSIS HQ.
548 Randy Claxton defined the term as "…any information that would offer an investigative lead to the Air India/Narita incidents" (See Exhibit P-101 CAD0156, p. 5) and "…any indication that a violent unlawful act would be about to be committed or entertained" (See Exhibit P-101 CAD0127, p. 12); Bob Smith felt it would have to be a "…blatant confession that the individual … has committed or is about to commit a serious act" (See Exhibit P-101 CAD0130, p. 8); Ken Osborne defined the term as activity on which a serious prosecution could be based (See Exhibit P-101 CAD0191, p. 3); Ray Kobzey looked for material that would blatantly suggest that "…someone was about to commit a significant act … an act of political violence" (See Exhibit P-101 CAD0115, p. 13).

J. SINGH: I have heard that that woman's (Indira Gandhi) son is coming on the 6th of June. I am presenting all my … on the 9th of April, now if you can do something….

PARMAR: Keep quiet. Everything will be taken care of.

J. SINGH: Well, he is arriving, and how do I contact you … and … somehow or other you have to …

PARMAR: I said I understand, now shut up, I shall get everything done.

J. SINGH: I am willing to serve in any way.

PARMAR: Don't require this kind of service, but things will somehow work out.

J. SINGH: Something should be done…. I beg you from all my family he should not be allowed to go back … those in India, we can hope that they will do something.

PARMAR: No, they cannot do anything.

…

J. SINGH: I beg you send somebody or something, there are three us here, one of us can have the killer number (a number to kill).

PARMAR: Do you have a passport? Can you move around easily?

J. SINGH: Yes sir, there is no problem, I can come and go freely.

PARMAR: Good then, maybe you'll be able to do something.

J. SINGH: Give me this chance to serve, if you can do this, because I don't think I can have any success in India. The … I had thought about has already been taken by God (referring to Indira Gandhi's death) … this is the only thing you are lacking.

PARMAR: O.K.; O.K., don't worry, everything will be alright. Find out about his complete plan.

J. SINGH: But you tell me, who and when and where I have to meet somebody for instructions …

> **PARMAR**: I said keep quiet, if somebody wants to meet you, they will find you.
>
> **J. SINGH**: I am very happy to have talked to you.[549]

The translator felt this was significant, as it was a threat to Gandhi during his planned visit to Germany in early June 1985. The translator prepared a verbatim transcript and passed it on to the investigators for consideration and further distribution.[550] Both CSIS HQ and BC Region were notified. Neither ordered retention of the tape.

CSIS claimed that, while the communication was seen as being of significant intelligence value, it was not regarded as "…significantly incriminating a target subject in subversive activity."[551] Bob Smith, Chief of CT at BC Region, stated that it was believed that the caller was "not all there," that Parmar did not pay any attention to it, and that therefore it was not a *bona fide* call.[552] In any case, CSIS argued that its intelligence requirements were met with the summary reporting of the Jung Singh/Parmar conversation and the retention of the verbatim transcripts.[553]

Meanwhile, the RCMP Air India Task Force investigators and some CSIS personnel felt that the Jung Singh intercept was obviously "significant subversive activity."[554] Dave Ayre, one of CSIS BC Region's two main Sikh extremism investigators, noted that he was not even aware of the Jung Singh comments at the time.[555] Warren, in his testimony at the Inquiry, stated that the conversation was something he probably "would have kept."[556] If the Jung Singh conversation was not considered to be significantly subversive, it is difficult to imagine what sort of information would qualify as such.

Since CSIS personnel had no uniform understanding of what constituted "significant subversive activity," it is not possible to rely confidently upon CSIS assurances that its personnel were capable of properly identifying critical information and able to ensure that such information was not lost through the erasure of the Parmar Tapes. In fact, not only was there no clear understanding of the policy, but personnel like Ayre, with the most knowledge of the file, and who may have been best able to identify information of interest, were not even always aware of the contents of the intercepts.

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549 Exhibit P-101 CAD0013, pp. 42-43.
550 Exhibit P-101 CAD0117, p. 5, CAD0155, p. 7.
551 Exhibit P-101 CAD0003, p. 13, CAD0117, p. 5.
552 Exhibit P-101 CAD0003, p. 13.
553 Exhibit P-101 CAD0117, p. 5, CAD0124, p. 6.
554 Exhibit P-101 CAD0003, p. 13.
555 Exhibit P-101 CAD0183, p. 16.
556 Testimony of James Warren, vol. 48, September 19, 2007, p. 5938; Exhibit P-101 CAD0003, p. 13.

Who Was Responsible for Requesting Retention?

The TAPP Manual did not identify which official or officials had the power to order the indefinite retention of "…communications that significantly incriminate a target subject in subversive activity."[557]

Warren outlined the responsibility to request retention within CSIS in a November 30, 1987 letter to the RCMP:

> The determination of "information to significantly incriminate a target in subversive activity" … is the responsibility of the investigator(s) assigned to the case, the analyst at HQ in Ottawa and the supervisors in the chain of command. The investigator coordinates all information about a target including that from interviews, electronic intercepts and physical surveillance, and submits the intelligence report to HQ. There, it is read and put into a broader national context. If any one piece of information is thought to be particularly significant within the context of the mandated responsibilities of this Service, or alternatively, if a piece of information is felt to require clarification, the investigator, the analyst or the supervisor may request a verbatim transcript and/or that the tape or, at least, the relevant portion of it, be kept beyond the maximum 30 day period.[558]

R.H. Bennett, DG CT at CSIS HQ in 1988, admitted that BC Region investigators were in the best position to make the determination to retain, bearing in mind that they had access to the raw product and, in most cases, direct access to the translator.[559] At the time of the terrorist attack on Flight 182, BC Region DG Randy Claxton stated that he was satisfied that all investigators were cognizant of the need to identify significantly incriminating subversive activity, together with the requirement to preserve the tapes and to immediately notify their respective supervisors.[560]

Despite Warren's November 30, 1987 letter to the RCMP, neither investigators Ayre nor Ray Kobzey were familiar with the tape retention policy.[561] Both were BC Region investigators on the Sikh extremism file.[562] Neither had ever read the TAPP Manual. They described it as a "need to know" policy and, as investigators, they were of the view that HQ did not feel that investigators had a "need to

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557 Exhibit P-101 CAA0009, p. 5.
558 Exhibit P-101 CAA0595(i), pp. 3-4.
559 Exhibit P-101 CAD0124, p. 3.
560 Exhibit P-101 CAD0139, p. 4.
561 In 1985, Kobzey was not familiar with the term "significant subversive activity." In fact, he did not become familiar with this phrase until March 1988: See Exhibit P-101 CAD0002, p. 12.
562 Exhibit P-101 CAD0112.

know" the policy.[563] Ayre and Kobzey thought that decisions about the retention of tapes were not their responsibility, but rather that of the technical support section. In fact, most surprisingly, Ayre believed that the Parmar Tapes were being retained.[564]

This confusion about roles is a direct result of the need-to-know compartmentalization employed by CSIS. Investigators responsible for retention were not fully cognizant of the tape retention policy. Meanwhile the technical personnel with access to the TAPP policy were not aware of the investigative details of the case.

Ayre and Kobzey understood that they were responsible for moving significant information up the chain of command. In deciding what was significant, the investigators had to rely on the transcribers and translators to identify information relating to "significant subversive activity." CSIS translators were generally civilians hired out of the community with no background in policing or intelligence matters. Despite this, Ayre relied heavily on the translator's innate knowledge to identify information on "significantly subversive activity." So complete was his reliance on the translator and transcriber – who had no police or intelligence background and little familiarity with Parmar – that Ayre never read all of their notes, but rather relied on them to apprise him of conversations containing evasive or peculiar language.[565]

Ayre and Kobzey were responsible for reporting any such information to Jim Francis, the Desk Supervisor. From there it would go to the Chief, Bob Smith, who was aware of all investigative activities in BC and signed all outgoing final reports,[566] and from him to the Deputy Director General Operations, Ken Osborne, who coordinated and directed the activities of the investigators, read incoming and outgoing reports, and ensured appropriate dissemination of intelligence at the regional level. The CI&W Section, headed by Joe Wickie, would be brought in, and a decision would be made about what to do with the information, whether tapes would be retained, and to whom the information would be reported. An investigator's recommendation to retain would not be final,[567] but would require the approval of BC Region investigative and technical supervisors, as well as Claxton, the Director General of the BC Region. Claxton stated that even he did not have the authority to order the retention of tapes and that he would have had to obtain the authority from the CSIS HQ policy centre.[568] However CSIS HQ was never called upon to consider such an order, as BC Region never sought retention.

A similar reporting structure existed at HQ, with incoming and outgoing reports on the Parmar Tapes channelled through Glen Gartshore, the Supervisor of the

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563 Exhibit P-101 CAD0115, pp. 4, 12-13, CAD0183, p. 12.
564 Exhibit P-101 CAD0138, p. 5.
565 Exhibit P-199, p. 69; Exhibit P-101 CAD0138, p. 4.
566 Exhibit P-101 CAD0002, p. 12.
567 Exhibit P-101 CAD0115, pp. 2, 12-13.
568 Exhibit P-101 CAD0002, p. 12.

Sikh Desk. Gartshore brought all intelligence that he felt was significant to the attention of the Unit Chief (Russell Upton before the bombing and Chris Scowen after the bombing) who reported directly to Mel Deschenes, the Director General, CT. None of these personnel had direct access to the TAPP Manual, but all were aware of a general duty to bring "significant" information to the attention of their supervisors.[569]

In theory, the final decision to retain intercept tapes appears to have been a joint responsibility between Deschenes and Jodoin, the CI&W DG, with approval from the CSIS Director.[570]

At the Inquiry, Warren offered his perspective on why no one had asked for retention of the Parmar intercept tapes.

> Why it happened, I don't know, but it was [an] oversight. Nobody gave the order and things just kept rolling on as if nothing had happened and the people who were at very junior levels were actually in this process of destroying the tapes. In the absence of any instructions from up above, [they] kept doing what they had always been doing.[571]

It is true, in theory, that anyone in the chain of command at BC Region and CSIS HQ could have requested retention. It is equally true is that no one individual was assigned that responsibility. The reality is the decision could not have been made by a single individual, but rather it would have required approval by both investigative and technical personnel in BC Region and at CSIS HQ. Ultimately, if somebody had sought the retention of the Parmar intercepts, they would have had to engage an approval process involving the BC investigators right up to the CSIS Director, a cumbersome process that few, if any, CSIS personnel appear even to have been aware of.

The Jodoin Memorandum: "Contentious in Nature or Open to Interpretation"

The Jodoin memorandum purported to expand the class of communications to be retained to include those "contentious in nature or open to interpretation." To be sure, Jodoin stated that the purpose of his directive was to maintain the intercepts to assist in wiretap renewals by advising the Federal Court about what information had been obtained to justify the renewal. Nevertheless, Jodoin understood that intercepts rarely reveal the "smoking gun" conversation that ties a conspiracy together. The process of understanding intercepted conversations is incremental and requires an integrated assessment of the content with other known investigative facts.[572] In light of the translators' lack of familiarity with

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569 Exhibit P-101 CAD0120, p. 5.
570 Exhibit P-101 CAD0003, p. 9.
571 Testimony of James Warren, vol. 48, September 19, 2007, p. 5818.
572 Testimony of Jamie Jagoe, vol. 82, November 23, 2007, pp. 10478-10479.

Parmar and with Parmar's use of veiled language and guarded conversations, the adoption of Jodoin's directive would have been especially useful to them in the interpretation of Parmar's communications.

The expanded criteria for retention recommended by Jodoin were never employed by any CSIS region. Even though a verbatim report was made and used on subsequent warrant renewals, BC Region did not retain the tape of the intercepted Jung Singh conversation, in direct contradiction of the Jodoin memorandum.[573]

Jodoin testified at the Inquiry that, as DG CI&W, he had authority to issue guidelines but not to rewrite policy – a role reserved for the CSIS Director. However, Jodoin issued the memorandum with the intention that all regions would follow his instructions. Jodoin did not realize that no region had followed his instructions and felt that, although the regional DGs had autonomy in directing their region, it was wrong of them not to notify him of their disagreement with his recommendations.[574]

It is not clear why Jodoin's memorandum was generally ignored. According to SIRC, the wording of the Jodoin memorandum and the explicit request that the instructions be forwarded to all responsible personnel contradict the notion that it was only meant as a "suggestion." Had the suggestion been heeded, it might have resulted in the retention of some Parmar Tapes.[575]

CSIS Failures

Any assessment of whether CSIS ought to have retained the Parmar Tapes has to take into account two important considerations. On the one hand, CSIS had intelligence that Parmar was a dangerous terrorist. The Service described him in as someone who is "…expected to incite and plan acts of violence including terrorism" against Indian interests and Hindus.[576] On the other hand, there is the reality that CSIS was a new agency, intent on making a break with its previous Security Service orientation.

Prior to the bombing of Flight 182, the failure to have maintained the tapes might be understandable (except in cases which present clear "significantly subversive activity," like the Jung Singh intercept, which should have been preserved under CSIS's own policies), particularly in the wake of the McDonald Commission's recommendations about the privacy abuses perpetrated by the RCMP Security Service. Wishing to respond to those concerns, CSIS rightly sought to chart a path distinct from law enforcement. This entailed a greater respect for the privacy of their targets than that employed by the RCMP Security Service.

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573 Exhibit P-101 CAA1032.
574 Testimony of Jacques Jodoin, vol. 49, September 20, 2007, pp. 6034, 6051.
575 Exhibit P-101 CAB0902, pp. 72-73.
576 Exhibit P-101 CAA0333, para. 3(g): Affidavit of Archie Barr filed in support of the application to obtain a warrant to intercept Parmar's communications.

While the Jodoin memo sets out an approach which is more in tune with our present-day understanding of the utility of intelligence information, it would be inappropriate to suggest that the Service had failed in the pre-bombing era. It is the Commission's view that that conclusion would unduly favour hindsight.

Hindsight, however, is not the sole reason for believing that the tapes obtained following the bombing of Flight 182 should have been retained. Once the bombing had occurred, there was no excuse for the continued systematic destruction of the tape recordings. That the terrorist act was rooted in the Sikh extremist movement was immediately suspected by the Service, and as the leader of the most dangerous group in Canada,[577] Parmar was immediately suspected.[578] The fears of terrorist violence outlined in the Barr affidavit in support of the warrant to intercept Parmar's conversations literally came to pass. The failure to put a stop to the destruction of the tapes represented a failure on the part of the Service to perform its function in the public interest. It was a triumph of blind adherence to a practice that could not then and cannot now be justified.

CSIS adopted a policy that its information would not be available as evidence out of an interest in protecting privacy, as well as from a desire to distinguish itself from the former Security Service. Warren, in his testimony at the Inquiry, stated that the pendulum had swung too far at the time of the creation of CSIS, and perhaps CSIS was being overly sensitive to the issue of being more attentive to the privacy rights of Canadians.[579] In an overzealous effort to ensure that the new agency followed the recommendations of the McDonald Commission, it failed to consider the shift in paradigm from counter-intelligence to counterterrorism, or to recognize the critical role that CSIS intelligence would play in the investigation and prosecution of the Air India and Narita terrorist attacks.

In the aftermath of the terrorist attack on Flight 182, CSIS should have preserved all the tapes in its possession. This applies not only to the backlogged tapes from the pre-bombing period, but also to the tapes of the conversations CSIS continued to intercept after the bombing, and which it continued to translate, summarize and erase until February 1986.

Should the Tapes Have Been Retained as Evidence?

While it is clear from the foregoing that CSIS did not consider that it had a mandate to collect and preserve information as evidence for subsequent use by law enforcement, it was certainly the mandate of the RCMP to collect evidence for use in a criminal prosecution. The focus therefore now shifts to what the RCMP did to preserve the Parmar Tapes for their criminal investigation of the terrorist attack on Flight 182.

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577 Exhibit P-101 CAB0144.
578 Testimony of Ray Kobzey, vol. 33, May 24, 2007, p. 3812.
579 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5814, 5941.

CSIS justified its lack of retention for criminal purposes on the basis that the responsibility to request retention for evidentiary purposes lay with the RCMP. Warren noted that the BC Region practice in the immediate aftermath of the bombings was to provide copies of final intercept reports to the RCMP members involved in the Air India Task Force. He emphasized that the RCMP should have been aware of the existence of the Parmar intercept, and thus the onus was on the RCMP to indicate its opinion on the evidentiary value of any intercept.[580] CSIS found absolutely nothing in its files to suggest that a request for retention had ever been made or that anybody had even considered saving all the Parmar Tapes.[581]

In October 1987, the RCMP learned that CSIS was claiming that it had not received a request to preserve potential evidence. The RCMP E Division Task Force performed a cursory search of its own files and failed to identify any written correspondence recording such a request.[582] Given the importance of this fact in the face of a potential abuse of process motion in the planned prosecution of Reyat for the Narita bombing, the RCMP undertook efforts to verify whether and when it had made a request for retention to CSIS.

Sgt. Robert Wall contacted members who had liaised with CSIS after the bombing to enquire about their recollection of "…when, how, how often and by whom we requested of CSIS that they preserve any potential evidence they might possess."[583] In the months following the bombing, CSIS and the RCMP had met regularly to negotiate access for the RCMP to CSIS information. The RCMP claimed that it made various representations to CSIS expressing its interest in the preservation of CSIS information of evidentiary value.

Henschel-Claxton: Days after the Bombing

Supt. Lyman Henschel was the OIC of Support Services with the RCMP E Division in 1985. He was responsible for the RCMP units in charge of physical surveillance, communications intercepts and the gathering of criminal intelligence in the Division. In the aftermath of the Air India bombing, Henschel took on the responsibility of coordinating intelligence in support of the Air India Task Force investigation. On June 26, 1985, Henschel was contacted by Chief Superintendent Gordon Tomalty, the OIC of RCMP Federal Operations in the Division, who inquired whether there was a problem of disclosure of information from CSIS to the RCMP. Henschel recalled that the issue was raised as one that should be clarified at an early date in the investigation, without anticipation of difficulty.[584] Henschel contacted Claxton and made the following notes of the meeting:

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580 Exhibit P-101 CAA0466.
581 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5819-5820.
582 Exhibit P-101 CAA0585, CAA0606, p. 3.
583 Exhibit P-101 CAA0583(i).
584 Testimony of Lyman Henschel, vol. 46, September 17, 2007, pp. 5518-5520, 5523.

> Discussed disclosure problem with Randy Claxton – disclosure to Force no problem as per Sec. 19(2)(a) *CSIS Act* – CSIS to RCMP. Problem of vital evidence being secured on a CSIS intercept discussed. Agreed that where there is indication of likelihood the intercept may yield evidence we will proceed with separate Part IV.I (now Part VI) authorization. CSIS may have continuity problem – as only one tape produced. In event of capture of crucial evidence, best effort would be made to introduce notwithstanding continuity problem.[585]

Claxton endeavoured to obtain CSIS HQ's official position on the procedure that was to be employed if the Service were to obtain "crucial evidence."[586] Henschel, at the time of his meeting with Claxton, was not aware that CSIS had been intercepting Parmar's conversations or those of any other targets relevant to the terrorist attack on Flight 182. He thought that the situation discussed was intended to apply in the future, to ensure that arrangements were in place to facilitate CSIS's sharing of information of evidentiary value with the Air India Task Force.[587] Henschel informed the Task Force members and the RCMP Liaison Officers of this tentative arrangement.[588]

The following day, Claxton contacted Henschel with CSIS HQ's official position, recorded in Henschel's notes as follows:

> Any incriminating evidence off CSIS installation will immediately be isolated and retained for continuity with advice to ourselves. Told him where criminal activity appears likely we will parallel with separate Part IV.I C.C. (now Part VI) authorization. He asked that we touch base with his office … before this is done as they have one or two very sensitive installations which they would want to consider very carefully. If they are asked to tender evidence Randy will seek ministerial approval.[589]

On June 27, 1985, Henschel advised Inspector John Hoadley, who was in charge of managing the E Division Air India investigation, of this CSIS position.[590]

Several years later, on November 18, 1987, Hoadley reviewed his notes of his conversation with Henschel. Hoadley recalled that they had discussed the need to preserve all wiretap information that came into CSIS's possession, and that Henschel had subsequently called Claxton to secure his concurrence.[591]

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585 Exhibit P-101 CAF0166, pp. 2-3.
586 Exhibit P-101 CAF0166, p. 3.
587 Testimony of Lyman Henschel, vol. 46, September 17, 2007, p. 5525.
588 Exhibit P-101 CAF0166, p. 3.
589 Exhibit P-101 CAA0260.
590 Exhibit P-101 CAA0260.
591 Exhibit P-101 CAA0592.

Henschel, in his testimony at the Inquiry, disagreed with Hoadley's recollection. Henschel testified that there was no request to retain non-evidentiary material, as he was not aware that any relevant tapes were in existence.[592]

On November 4, 1988, in response to a request from CSIS HQ for an explanation of Henschel's notes about the conversations, Claxton set out in a telex his own recollection of his conversations with Henschel. Claxton wrote that he agreed to preserve any incriminating evidence, to isolate the vital information, to advise the RCMP Division immediately and to refer the matter to CSIS HQ for direction.[593] His position was that what would be retained pursuant to this agreement, if a need ever arose, were particular pieces of information only, not the entirety of the CSIS holdings.[594] He stated that there were no specific requests to retain any/all non-evidentiary wiretap material from any RCMP officer.[595] Certainly, Claxton was of the view that unless there was value to a piece of information, it would not be retained. According to him, it was clear that his agreement with Henschel was not meant to result in the retention of the Parmar Tapes.

Henschel's recollection was that Claxton committed to retain possession of and to isolate any relevant material. In his opinion, any intercept activity on a prime suspect in the bombing should probably have been considered "relevant" and resulted in a decision to retain all tapes and related material on that person.[596] Therefore, while he agreed with Claxton that the agreement was not meant to provide specifically for the retention of the Parmar Tapes, he felt that the Parmar intercepts were in fact "vital evidence," and that CSIS should have recognized them as such and retained them pursuant to the general agreement with Claxton.

The Commission's review of the Henschel-Claxton exchange revealed that the language used was ambiguous and open to interpretation. Henschel noted that the agencies were operating on trust at the time and they did not go into details about specific warrants.[597] He felt confident that CSIS would interpret his request properly and retain relevant intercepts, which he felt should have included all of the Parmar Tapes. However, it appears that CSIS did not have a similar understanding. The arrangement on this important matter should have been clearly understood and committed to writing to achieve clarity and to avoid disagreements.

The Jardine Request to Retain Information

James Jardine testified that he asked the RCMP to request retention of all relevant CSIS material, including intercepts, during the week of July 1, 1985. Jardine was involved in a number of briefings that week, which included discussion of

592 Testimony of Lyman Henschel, vol. 46, September 17, 2007, pp. 5537, 5549.
593 Exhibit P-101 CAD0002, p. 4.
594 Exhibit P-101 CAD0003, p. 9.
595 Exhibit P-101 CAD0019(i).
596 Testimony of Lyman Henschel, vol. 46, September 17, 2007, pp. 5539, 5561.
597 Testimony of Lyman Henschel, vol. 46, September 17, 2007, pp. 5563-5564.

whether the Crown would have access to CSIS information. Jardine asked that all evidence or information or tapes or surveillance be retained for use in the prosecution, if possible.[598]

Jardine referred to his notes in his evidence and stated that he met with Hoadley and other members of the Task Force on July 1, 1985. Jardine said that, at that time, he asked for any information CSIS may have obtained relevant to the case.[599] Jardine had just finished prosecuting the "Squamish Five" case, in which he had experienced the reluctance of the Security Service to make its information available for use as evidence. As a result, he told the RCMP Task Force to make sure to obtain all relevant information from CSIS.[600] By then, the Task Force knew that CSIS had been conducting physical surveillance on Parmar – as a result of the Duncan Blast information.[601] Jardine recalled that CSIS would neither confirm nor deny that it was intercepting Parmar's conversations, but Jardine suspected that it was.[602] Jardine was confident, and the Commission accepts, that in July 1985 he made his desires to have all CSIS information clearly known to the officers in charge of the RCMP Task Force, though neither agency had any such recollection.[603]

Negotiations over Access to the Parmar Tapes

Following the destruction of Air India Flight 182 in June 1985, and throughout the summer and fall, CSIS continued to erase the Parmar Tapes. CSIS personnel indicated that they assumed that the RCMP knew of the Service's tape retention policy, as it was developed during the time of the RCMP Security Service.[604] Indeed, early drafts of the TAPP Manual had been sent to the Solicitor General in 1980 and had been signed by RCMP Commissioner Simmonds.[605] In addition, some of the RCMP Air India Task Force members were former RCMP Security Service officers, including Hoadley and the RCMP Liaison Officer, Sgt. Michael ("Mike") Roth. As such, it was thought that they would have knowledge of the TAPP Manual.

Though the TAPP Manual was a Top Secret document, not widely circulated within the Service, and not known to some of CSIS's own Sikh extremism investigators (e.g., Ayre, who thought that the Parmar Tapes were preserved), Roth testified that he did have an understanding of the RCMP Security Service's tape erasure policy from his days with the RCMP Security Service. He recalled that tapes would be maintained for 30 days and then recycled. When serious information came up, requiring action by the RCMP or local police, Roth's understanding was that the tape would be marked and a "slave tape" made.[606]

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598 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5663.
599 Exhibit P-101 CAA0578.
600 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5662-5663.
601 See Section 1.4 (Pre-bombing), Duncan Blast.
602 Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
603 Exhibit P-101 CAA0578; Testimony of James Jardine, vol. 47, September 18, 2007, p. 5663.
604 See Exhibit P-101 CAD0002, CAD0003, p. 9.
605 See Exhibit P-101 CAA0009.
606 Testimony of Michael Roth, vol. 46, September 17, 2007, p. 5633. According to Roth, a slave tape, or copy, was made off the "master slave" and kept for use by the RCMP.

RCMP Task Force members were aware of the existence of the CSIS Parmar intercept early in July 1985, and by July 12th at the latest. During the first weeks after the bombings, CSIS provided the Task Force with summaries of pre-bombing intercepted conversations pertaining to Parmar. This material included information contained in a June 27th CSIS report, sent to the RCMP in early July 1985, which reported coded conversations about "delivering papers," "that work," and "mailing letters," recorded on June 21 and June 22, 1985, during two separate calls between Parmar and his brother, Kulwarn Singh, and Hardial Singh Johal, respectively.[607] It was quickly clear to the RCMP that the CSIS reports about such conversations were based on intercepts.[608]

Wall's notes contain a reference to a meeting between the RCMP and CSIS on July 12, 1985, at which Francis mentions the Parmar intercept.[609] He did not, however, ask for specific retention of the Parmar Tapes at that time.

On July 25, 1985, Roth was given access to some of the Parmar intercept logs. He stated that the first time he knew that CSIS had an intercept on one of the RCMP targets was the previous day, when Hoadley instructed him to go to CSIS to review the logs.[610] Roth did not submit a request for specific retention of the Parmar Tapes.

RCMP Gains Access to Parmar Tapes

Over the fall of 1985, the RCMP gained increased access to the Parmar intercept logs, and RCMP personnel were eventually made aware of the fact that the Parmar Tapes were being erased. On September 6, 1985, C/Supt. Norman Belanger, the OIC in charge of the Air India investigation at RCMP HQ, requested that members of the E Division Task Force be given access to CSIS intercept logs on major Sikh targets for investigative leads and intelligence. Barr approved the request on the basis that the RCMP officers would be indoctrinated into CSIS, the material would be viewed on CSIS premises and it would not be used as evidence in court.[611] During the following days, Roth and his colleague Cpl. Robert Solvason reviewed the Parmar intercept logs and took extensive notes.[612] Though the information uncovered was considered to be of interest to the RCMP investigation, and was eventually used in an affidavit in support of an RCMP authorization to intercept private communication, access to the Parmar Tapes themselves was not discussed with CSIS at the time and the officers did not request that the tapes be retained.

In early October, after Constable Sandhu had completed his review of the 50 backlogged Parmar Tapes, he requested access to the tapes recorded in June. Betty Doak, the CSIS transcriber, informed him that a CSIS translator had already

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607 Exhibit P-101 CAB0360.
608 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
609 Exhibit P-101 CAA0379(i), p. 9.
610 Exhibit P-101 CAA0802, p. 6.
611 Exhibit P-101 CAB0551.
612 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.

processed these tapes. Even so, Sandhu pressed his request – to which Doak replied that she thought the tapes had been erased. A few days later, Sandhu returned to CSIS and requested access to the Parmar Tapes. He was told by John Stevenson that the tapes were unavailable.[613]

One month later, awareness of the Parmar Tape erasures appears to have reached the highest levels of the RCMP. On November 13, 1985, Mel Deschenes, CSIS DG CT, sent a telex to CSIS BC Region,[614] following a request from RCMP Assistant Commissioner Norman Inkster, asking whether tapes pertaining to all Sikh targets were still available since the Air India explosion, or had been erased after processing. CSIS HQ requested that if some tapes had been erased, BC Region should specify which tapes were still available. BC Region replied to CSIS HQ that only tapes recorded from November 4th onward, along with the tapes translated by Sandhu and four tapes retained for voice-print analysis, remained.[615] All other tapes had been erased, in accordance with the usual 10-day retention period set out in CSIS policy. BC Region offered to hold the remaining and future Parmar Tapes for a further period of up to 30 days or until advised not to retain.[616]

Inkster testified that there were "…frequent requests, perhaps oral in large measure to retain the tapes," and that this was a "preoccupation of Chief Superintendent Belanger." Inkster indicated that, when he learned from Belanger that CSIS was still erasing the Parmar Tapes, he called CSIS Director Ted Finn to say, "Ted, if that is occurring it has to stop." Inkster was not able to recall the date of his discussion with Finn on this matter, but he stated that he became Deputy Commissioner of Criminal Operations in August of 1985 and that the conversation occurred very early in his new mandate.[617] No written record of this exchange appears to have been made, nor was this request distributed to the CSIS personnel handling the Parmar Tapes.

Even after these direct exchanges, CSIS could locate no record of the RCMP having asked CSIS to retain intercept material from November 4th forward.[618] CSIS continued to erase the Parmar Tapes until the Department of Justice ordered a stop to erasures on February 6, 1986 only in order to defend the Government against the civil damages claim filed by the victims' families.[619] Beginning in late September 1985, the RCMP had its own intercept of Parmar's communications and could conduct its investigation without the CSIS tapes. For the period preceding this, however, the CSIS tapes that were now erased had been the only original records of Parmar's conversations in the months preceding and following the bombing.

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613 Exhibit P-101 CAA0583(i).
614 Exhibit P-101 CAA0374.
615 Exhibit P-101 CAA0376.
616 Exhibit P-101 CAA0376.
617 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10338-10340.
618 Exhibit P-101 CAA0609, pp. 14-15.
619 See Exhibit P-101 CAA0549, CAA0609, p. 15, CAA0913(i).

On September 18, 1985, RCMP Deputy Commissioner Tom Venner requested a meeting with CSIS BC Region to convey Jim Jardine's insistence that he be given access to the Parmar intercept information, as well as the freedom to use it as evidence in an eventual prosecution and in support of RCMP judicial applications for search warrants and authorizations to intercept communications. Jardine feared that, unless he could access and cite the intercept material, any RCMP warrant affidavit would be challenged and the resulting case could be imperilled. Jardine was under the impression that an agreement already existed between CSIS and the BC Provincial Government to ensure that CSIS would release this information for evidentiary purposes. Venner, on the other hand, stated that he did not accept Jardine's concern that CSIS intercept material would be required as evidence and affirmed that the RCMP Task Force was satisfied to receive CSIS technical information for "investigative lead" purposes only. Venner even suggested that it might be necessary to transfer the prosecution away from Jardine to avoid further difficulties on this issue.[620]

At the meeting on September 18, 1985, Claxton addressed the existence of "…an underlying suspicion in some RCMP quarters that CSIS was withholding relevant information." Assistant Commissioner Donald Wilson reassured Claxton that no mistrust existed between the agencies, and that these suspicions would be due to "…intense pressures being placed on Task Force investigators by Headquarters, Crown Counsel, etc. for results."[621] In the spirit of cooperation, CSIS BC Region recommended that the RCMP Task Force be given full access to intercept material on other Sikh extremist targets.[622]

On September 19th, the RCMP made use of CSIS information in an application for authorization to intercept the communications of Parmar and his associates. CSIS HQ denied that this use was authorized. As a consequence, CSIS took this opportunity to restrict access to further intercept material.[623]

While some RCMP members agreed with CSIS that its information should be used only for investigative leads, others, like Belanger, clearly felt that the information, including the original intercept tapes, should be available for prosecutorial purposes.

Throughout this period, while the RCMP continued to negotiate access to the Parmar transcripts, there was no written request or demand of CSIS to retain the actual tapes.

RCMP Failures

After the terrorist attack, members of both the RCMP and CSIS appreciated the need for cooperation. RCMP and CSIS members communicated frequently and

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620 Exhibit P-101 CAB0553, p. 2.
621 Exhibit P-101 CAB0553, p. 3.
622 Exhibit P-101 CAB0553.
623 Exhibit P-101 CAA0327, CAB0554; See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.

agreed to general information-sharing arrangements.[624] However, no specific details were discussed. The agencies were apparently confident that they would do everything in their power to assist in each other's investigation.

This confidence failed to take into account the differing understanding of their mandates by the two agencies. There was a surprising lack of clarity to the arrangements and to the understanding of the arrangements by senior personnel, given the importance of the investigation. At times it appeared as if each were relying upon unspoken and incorrect assumptions about the other agency's understanding.

While CSIS continued to insist that its information was not to be used as evidence and to refuse access to its raw materials to the RCMP,[625] the RCMP position was captured by Chief Superintendent Frank Palmer, OIC Federal Operations, who wrote to Commissioner Simmonds in October 1987:

> It's possible we, involved as we are in evidence preservation in our day to day activities, assumed the same of C.S.I.S. & thus never specifically requested they not destroy any tapes. Certainly it would be our expectation that such destruction of tapes if it was being done, would have ceased after the events of 22/23 June 85.[626]

In other words, the RCMP expected that CSIS would voluntarily decide to retain the Parmar Tapes. Nevertheless, when the RCMP became aware of the existence of the tapes, it ought to have made a clear request for retention.

Was any Significant Information Lost?

CSIS has consistently claimed that no incriminating evidence was lost due to the erasure of the Parmar Tapes.[627] CSIS noted that Parmar was very surveillance conscious, often making calls from phone booths or driving several hours for a meeting rather than talking on his home phone. Significantly, even after the bombing, Parmar continued to plot attacks, and neither CSIS nor the RCMP obtained information of real probative value from their intercepts.[628] CSIS also points to the fact that Sandhu found no incriminating evidence in his review of the 50 backlogged Parmar Tapes.

However, from the perspective of Assistant Commissioner Gary Bass, the information that had been retained from the pre-bombing tapes presented a clear picture of a conspiracy between Parmar and his associates. He felt

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624 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
625 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
626 Exhibit P-101 CAD0102, p. 4.
627 See Exhibit P-101 CAD0115, p. 13, CAD0138, pp. 4-5. The lead Sikh extremism investigators in the BC Region, Ray Kobzey and David Ayre, have both stated that there was nothing in the material that would have triggered a request for tape retention. Exhibit P-101 CAD0136, p. 4: Similar claims have been made by Jim Francis, Unit Head, Counter Terrorism Section.
628 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8308.

that, had the tapes not been erased, they would have been used as evidence in the trial. The Crown ultimately decided not to attempt to rely on the logs due to the likelihood that the prosecution would not withstand the inevitable abuse of process motion by the defence. Bass also stated that, if he had had the information in CSIS's intercepts, he would have put up intercepts on payphones immediately after the bombing. He felt that the delay in acquiring the CSIS information meant that valuable information that would have been communicated after the bombing was lost.[629]

Over the years, concerns have been raised about whether CSIS properly processed all the Parmar intercepts and whether, despite the Service's claims, information of significance was in fact lost. Were all the intercepts listened to? Were the translators and transcribers properly briefed to detect "significantly subversive activity"? Was CSIS aware of the need to be mindful of the use of coded language by Parmar and his associates? In short, was CSIS in a position where it could reasonably conclude that nothing of value had been intercepted?

Were all the Tapes Listened to?

The 1992 SIRC Report attempted to address this issue and concluded that, due to incomplete processing records, it was impossible to determine whether all the Parmar Tapes were reviewed prior to erasure.[630] Ronald ("Ron") Atkey, Chairman of SIRC from 1984 to 1989, testified that, to this day, it is his belief that some tapes were erased without being listened to.[631] When Jardine was asked whether he was able to conclude, on the basis of the information he had obtained from CSIS over the years, that all the Parmar Tapes had been listened to prior to being erased, he answered: "I don't know."[632]

By contrast, Warren testified that BC Region had assured him that every tape had been listened to.[633] It is impossible to confirm BC Region's assertion, given the confusion over the erasure policy and the fact that CSIS failed to keep accurate records of the processing of the Parmar Tapes. Indeed, in his correspondence with the RCMP on the topic, Warren was, on several occasions, obliged to retract previous statements about the intercepts and their erasure, including the number of tapes that had been recorded.[634] In short, a reliable and proper accounting does not exist, including a complete log of the dates of erasure.[635]

It is plausible that tapes may have been erased prior to processing due to the fact that some CSIS personnel held the view that tapes were to be erased 10 days after interception, not 10 days after transcription. This is a rather surprising view, given that Chapter 21 of the TAPP Manual stressed the importance of intercepted

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629 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11184, 11240, 11249.
630 Exhibit P-101 CAB0902, p. 78: 1992 SIRC Report.
631 Testimony of Ronald Atkey, vol. 49, September 20, 2007, p. 5988.
632 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5763.
633 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5826, 5858.
634 See Exhibit P-101 CAA0581, CAA0595(i). See, generally, Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
635 Exhibit P-101 CAD0159, p. 3.

communications to the investigators.[636] For this reason the Manual called for retention for a reasonable time after processing. The Manual provided:

> …that tapes be held at least ten working days after having been listened to and preferably for ten working days after submission of the C-237 (the transcriber's and/or translator's report on the intercept's contents).

However, in a July 14, 1986 memo, Warren wrote that CSIS policy was to erase "…10 days following the intercept."[637] This interpretation raises the alarming possibility that tapes would be erased before they would be transcribed and translated.[638]

In 1989, CSIS undertook a review of the processing of the Parmar intercept tapes. The document describing the review outlines estimated dates of recording, translation, transcription and erasure, as well as the personnel involved and other relevant notes. The May 1, 1985 record notes that a reel appears to have been erased without being processed. The record also shows discrepancies between the number of tapes processed for certain days, as noted by the transcriber on the one hand and the translators on the other.[639]

In 1991, the RCMP interviewed several CSIS employees involved in the processing of the Parmar Tapes. The RCMP concluded that CSIS personnel interviewed did not have a clear and consistent understanding of the tape erasure policy. The CIOs, who were responsible for erasing tapes, stated that the actual process they followed was to erase the tapes 10 days after the recording date.[640] Claxton admitted that erasure of tapes 10 days after recording could have occurred in BC Region, despite the fact that it was contrary to policy.[641]

The number of actual tapes processed has been reported differently at different times. In an October 19, 1987 letter, CSIS claimed that, during the period between March 27 and July 1, 1985, there were 169 tapes processed with respect to the Parmar intercept.[642] On November 30, 1987, Warren corrected that estimate, reporting that CSIS had collected 210 tapes, rather than 169.[643]

CSIS made subsequent attempts to clarify the total number of Parmar Tapes processed. In a 1991 review, CSIS estimated that 203 to 207 tapes were processed.[644] In 1998, CSIS again attempted to account for the number of processed tapes, concluding that the number was 207.[645]

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636 Exhibit P-101 CAA0014.
637 Exhibit P-101 CAA0466, p. 3.
638 Testimony of James Warren, vol. 48, September 19, 2007, p. 5826.
639 Exhibit P-101 CAD0159, pp. 9, 15, 19, 24, 34.
640 Exhibit P-101 CAF0250, p. 2.
641 Exhibit P-199, p. 10.
642 Exhibit P-101 CAA0581.
643 Exhibit P-101 CAA0595.
644 Exhibit P-101 CAD0159.
645 Exhibit P-101 CAD0184.

CSIS explained that the lack of precision was due to discrepancies between the number of reels in the translator and transcriber logs. CSIS alleged that these discrepancies were related to tapes not passed to the translator because they contained no Punjabi content.[646] However, there is no record to substantiate this theory, and no mention in the transcriber notes of any tapes not being passed on to the translators.

In light of this confusion and the lack of reliable records or record keeping, the Commission cannot rely on CSIS's claim that all tapes were listened to prior to erasure. The available evidence appears to point to a different conclusion. Moreover, it is astonishing that something as simple as a proper accounting of the processing of intercept tapes was not undertaken and is therefore not available.

Lack of Appropriate Briefings for the Transcriber and Translators

The role of transcribers and translators was critical in determining if Parmar was engaged in "significant subversive activity." Ayre, the lead investigator in charge of reviewing the Parmar intercept reports, admitted that he relied heavily on the translators' innate knowledge and experiences to capture the nuances of Parmar's communications.[647] However, it is clear that the Punjabi translators working on the Parmar Tapes were ill-equipped to provide meaningful intelligence information in the period preceding the bombings.

Transcribers and translators were generally civilians with no police or intelligence background, and no specific training in national security matters.[648]

CSIS has admitted that, in the case of the Parmar warrant, any briefing provided prior to the bombings would have been "necessarily skimpy," as little was known about Parmar at the time, due to the newness of the intercept itself.[649] Doak, who could not understand Punjabi, was the lead transcriber. To prepare herself, she read the Parmar warrant and affidavit to become familiar with the target.[650] The Ottawa translator, although familiar with some Sikh extremist targets, did not recall being provided any specific briefing or instructions with respect to the Parmar investigation. She was never provided with, nor did she read, any material regarding the investigation prior to undertaking the translation. She never interacted with the transcriber or with the investigators in the BC Region.[651] The Vancouver translator was given a briefing by Ayre, including an overview of the Sikh extremism investigation in Canada, and was provided with detailed instructions on what to look for. However, as work began on the Parmar intercepts on June 8, 1985, there was little time to gain familiarity with the nuances of his communications.[652]

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646 Exhibit P-101 CAD0159, pp. 9, 15, 19, 34.
647 Exhibit P-101 CAD0138, p. 2; Testimony of Ray Kobzey, vol. 33, May 24, 2007, pp. 3842-3843.
648 Exhibit P-199, p. 69.
649 Exhibit P-101 CAA0597, p. 3.
650 Exhibit P-101 CAD0184, p. 17.
651 Exhibit P-101 CAA0595(i), CAD0003, p. 11, CAD0184, pp. 18-19.
652 Exhibit P-101 CAA0595(i).

The transcribers and translators were asked to log only calls of value to the investigators, looking for calls indicating all types of planning, meetings and travel involving Parmar and his associates – Gill, Bagri and Malik. They were also instructed to log any conversations indicating criminal activity, such as plans to kill or beat people, explosions, bombings or destruction of property.[653] Any information identified by the transcriber or translators as relevant was generally summarized. Occasionally, significant communications were recorded verbatim.[654]

The lack of coordination between the Ottawa-based translator and BC investigators likely resulted in translators failing to appreciate what was significant in any particular case.

A further complicating factor was the suspicion that the translators might have been sympathetic to the Khalistani movement and might have allowed this bias to affect their translations. At one point Warren was reported to have made comments to the effect that he did not trust the translators 100 per cent because of this suspicion.[655] Claxton was aware of this possibility, but felt that he had no reason not to trust them.[656] Jodoin was not familiar with any questions about the loyalty of the translators and stated that he had no reason to doubt their loyalty and integrity.[657]

With minimal experience in national security matters and little knowledge about Parmar in particular, the transcribers and translators could not effectively undertake the critical responsibility of identifying information of significance. The practice of reporting in summary form meant that relevant details that might have been missed by the transcriber or translators would not be caught by the investigators, who had the most knowledge to form an understanding of the actual words spoken.

Coded Language

Initially nothing was known about the use of coded language by Parmar. As CSIS began to build a picture of Parmar, however, it became clear that he was "phone conscious" and, from time to time, resorted to coded language to disguise his true meaning.[658]

On June 19, 1985, shortly before and immediately after the call to book the Air India tickets, the intercept recorded conversations between Hardial Singh Johal and Parmar.[659] In the first conversation, Parmar asked Johal whether he "wrote the story." Johal replied that he had not and Parmar suggested that he write it. In the second conversation, which occurred minutes after the Air India tickets

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653 Exhibit P-101 CAD0016, p. 2, CAD0184, p. 17.
654 Exhibit P-101 CAD0184, pp. 17-18.
655 Exhibit P-101 CAF0815, p. 85.
656 Exhibit P-199, p. 86.
657 Testimony of Jacques Jodoin, vol. 49, September 20, 2007, p. 6072.
658 Exhibit P-101 CAA0308, CAA0309, CAA0595(i).
659 Exhibit P-201, paras. 48-50. See also Exhibit P-203, paras. 59(e), 59(f); Exhibit P-101 CAD0180, paras. 269, 276.

were booked, with Johal's former phone number left as contact information, Johal (who was also seen at the airport on the day the suitcases were checked in) told Parmar that he "wrote the story" and suggested that Parmar "come over and see it." Shortly afterwards, Parmar was observed by CSIS leaving his home and driving in the general direction of Johal's house. A short time later, another call was made to CP Air to make changes to the reservations.[660] The RCMP, in an Information to Obtain in 1985 and in a 1996 Affidavit, indicated that, on the basis of these intercepted conversations, they believed that the reservations for the Air India tickets were made by Hardial Singh Johal and that Johal then informed Parmar of what he had done.[661]

On June 20, 1985, an unidentified man went to CP Air to pick up the tickets. The following day, Parmar telephoned Surjan Singh Gill and asked whether he had delivered "those papers." Gill confirmed that he had, and Parmar instructed him to deliver "the clothes" to the same place.[662] The RCMP subsequently concluded that the "papers" referred to the tickets and the "clothes" to the suitcases to be checked in on the flights. A few days before the tickets were picked up and paid for in cash, Parmar asked Surjan Singh Gill to convert a cheque into cash in the form of one hundred dollar bills.[663] On June 22, 1985, shortly after the bags were checked in at the airport, Parmar asked Johal if he had "mailed the letters" and the two men agreed to meet in person to discuss the mailing of the "letters." Earlier that same day, Parmar's brother Kulwarn called Parmar and asked "… whether that work has been done yet." Parmar replied "not yet."[664] In addition, conversations intercepted on June 6, 1985, respecting airline ticket reservations for a person visiting from Toronto, were believed by the RCMP to be relevant to the identification of Mr. X, the person who accompanied Parmar and Reyat during the June 4th Duncan test blast.[665]

CSIS and the RCMP officially became aware of Parmar's use of coded language on August 22, 1985, when Charlie Coghlin at CSIS HQ wrote to Belanger at RCMP E Division indicating that the Narita suspects were using coded language.[666]

With the tapes erased, only the translators' and transcriber's original notes were available to check for the use of coded language. This is another reason why the retention of the original tapes would have been useful, as investigators could have reassessed their contents for the use of codes.[667] A review of the original intercept tapes would likely have yielded a better understanding of how Parmar employed coded language.

To this day, CSIS continues to claim that, while it is true that Parmar used coded language, there remains no reason to suspect that the erased tapes contained

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660 Exhibit P-101 CAD0180, paras. 278-279.
661 Exhibit P-201, para. 51; Exhibit P-101 CAD0180, para. 284.
662 Exhibit P-101 CAD0180, para. 301. This conversation is also mentioned in the September 19, 1985 Affidavit: Exhibit P-101 CAA0324(i), para. 50(s).
663 Exhibit P-101 CAD0180, paras. 228, 301.
664 Exhibit P-101 CAA0324(i), paras. 50(t), 50(u), CAD0180, paras. 307, 318.
665 Exhibit P-101 CAD0180, paras. 196, 199-200.
666 Exhibit P-101 CAA0308, CAA0309.
667 Exhibit P-101 CAA0595(i).

information about the planning of the Narita/Air India terrorist attacks.[668] The fact that CSIS maintains this position is surprising, as there is a complete absence of adequate evidence on the point. In this respect, the most that can be said is that it is not known, and likely never will be known, whether the intercepts captured the planning of the terrorist attacks.

It is impossible to determine what information was lost due to the Parmar Tape erasures or its potential importance to the investigation and prosecution of the Air India and Narita bombings. It is clear that CSIS did not take the necessary steps to properly educate and train the translators and transcribers for this investigation, and this leaves the quality of CSIS's analysis of the intercepts in a state of uncertainty. We cannot conclude that CSIS preformed its functions in this respect in a competent manner.

Effect on the Prosecution

Jardine considered the information erased by CSIS to be critical to the prosecution of the Air India and Narita matters. It was his view that, through the destruction of the Parmar Tapes, the court lost a major piece of evidence that would have been essential to the unfolding of the narrative at any subsequent trial.[669]

In a letter to Warren, dated November 3, 1987, Jardine expressed his opinion that CSIS intelligence could be admissible as evidence:

> One need only use the words "information" that they were involved in a subversive activity, or "intelligence" that they were involved in subversive activity or "evidence" that they are involved in subversive activity to realize that we are talking about degrees of relevance and evidence of potential admissibility in a court room in order to make the determination. The words are almost interchangeable.[670]

Jardine felt that, after the bombings, the test for retention should have been the possible legal use of the tapes in a prosecution rather than the normal CSIS test of "significantly incriminating." Throughout the protracted negotiations with CSIS in preparation for the Reyat prosecution, Jardine emphasized the need to make disclosure to the defence of the relevant information, and the impact of the tape erasure on the prosecution's ability to fulfill its obligations in this respect.[671] If CSIS would not admit that a mistake was made in erasing the tapes, Jardine hoped that the Court would find that CSIS was in error in not retaining the tapes rather than concluding the alternative – that CSIS wilfully destroyed evidence – a finding that had the potential to stay the prosecution as an abuse of process.[672]

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668 Exhibit P-101 CAD0117, p. 2.
669 Exhibit P-101 CAF0168, p. 6.
670 Exhibit P-101 CAD0106, p. 6.
671 See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective.
672 Exhibit P-101 CAD0121, p. 3.

At the Reyat trial, the Crown made no attempt to introduce any evidence obtained in the form of the summaries that CSIS had provided regarding the content of the erased Parmar intercept tapes. The defence, however, did launch an abuse of process motion based on the erased tapes, which the Crown successfully resisted. In his March 1991 decision on the matter, Justice Paris stated: "As to the erasure of the tapes, it is clear that that occurred strictly as a result of the then-existing administrative routine. There was obviously no question of improper motive in that regard." He also noted that it was unlikely, on the basis of the evidence before him, "…because of the way Parmar was acting," that there was "anything of significance" on the tapes which could have assisted the defence.[673]

In the Malik and Bagri trial, the Crown decided that the CSIS intercept logs could not be used as evidence, and did not attempt to introduce them to support the prosecution.[674] The Crown also considered whether the remaining CSIS intercept tapes could be used as evidence, and decided that they could not because the CSIS warrant regime was not consistent with Part IV.I (now Part VI) of the *Criminal Code*. This was a conclusion based on a CSIS research paper but never tested in court,[675] and one that is arguably incorrect, as discussed in Volume Three of this Report.

The defence brought a motion claiming that the destruction of the Parmar Tapes violated the accused's rights under section 7 of the *Charter* because the erasure deprived the accused of essential evidence compromising the right to a fair trial. The Court agreed with the defence submission, as conceded by the Crown, that the erasures amounted to "unacceptable negligence."[676] The trial judge was not called on to craft a remedy for this *Charter* breach, as both accused were acquitted on the merits.

Certainly, the destruction of the tapes had a negative impact on the Malik and Bagri trial, as the Service was found to have violated the accused's right to a fair trial. Viewed in that light, the destruction of the tapes was a most serious error.

Another consequence of the destruction of the tapes was that the Crown was deprived of information that it could have attempted to use to prosecute the crime. What may not have appeared to be significant in July of 1985 may very well have been significant in the hands of a skilled prosecutor. Again, the destruction of the tapes minimized any possible advantage for the prosecution.

Conclusion

The Parmar Tapes were erased by CSIS personnel operating during the infancy of CSIS, a period characterized by a lack of clear policies and direction. Warren testified that there was little time to sit back and comprehensively think through

673 Exhibit P-101 CAA0808, pp. 2, 6-7.
674 Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11214-11215.
675 Exhibit P-101 CAA1086, p. 8.
676 Exhibit P-101 CAA0335, p. 18. See Section 4.4.2 (Post-bombing), The Air India Trial.

the appropriateness of the policies inherited from the RCMP Security Service. CSIS personnel handling the Parmar intercepts seemed to have been operating in "default mode."[677] Thus the Parmar Tapes were routinely erased without considering whether that was a sound practice in light of terrorist attacks on Air India Flight 182 and at Narita.

Both the RCMP and the BC Crown appear to have recognized the importance of the Parmar intercept material to the eventual prosecution of the bombings: as an important possible source for inculpatory and/or exculpatory information. At the core of this conclusion is the belief that, intrinsically, all that Parmar may have said is relevant and important, given the central role he played in the Sikh terrorist movement. Yet there was no written request to preserve this information. It is surprising that the RCMP did not demand that CSIS retain intercepts on all Sikh extremists in the immediate aftermath of the terrorist attacks or, at a minimum, as soon as the RCMP knew of the Parmar Tapes. It is also unfortunate that the Department of Justice only ordered the retention of the intercepts in preparation for the civil litigation months after the bombing, though one of its prosecutors was involved in assisting the RCMP Task Force early on in the criminal investigation.[678]

By contrast, CSIS has continued to justify the erasure of the Parmar intercepts on the basis that it was simply following policy. In 1988, R.H. Bennett, Director General, Counter Terrorism at CSIS at the time, described the situation this way:

> The requirements of the *CSIS Act* and CSIS's tape erasure policy were not necessarily fully compatible with the requirements of a police agency to build a criminal case. However this reflects a deliberate choice by Parliament to separate these two functions.[679]

Bennett noted that, although with hindsight one might conclude that the system is not perfect, it will not change these events as they happened. He wrote: "Hindsight will also not alter the professional analysis and determination required by the ministerial policy."[680]

In effect, CSIS was defending its erasure of the Parmar Tapes as conforming to policy, regardless of whether the policy was appropriate to the circumstances.

Over the years and continuing into testimony at this Inquiry, while various CSIS personnel have expressed regret that the Parmar Tapes were erased, the Government would not acknowledge that this was an error, since it was done pursuant to a valid policy.[681]

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677 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5817, 5875.
678 See Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5662-5664; Exhibit P-101 CAD0005, p. 6.
679 Exhibit P-101 CAD0124, p. 7..
680 Exhibit P-101 CAD0124, p. 7.
681 See, for example, Final Submissions of the Attorney General of Canada, Vol. I, para. 353.

At the Inquiry hearings, for the first time, a former CSIS employee admitted the erasure was an error. Warren candidly testified that:

> [The tape erasure was] not done in an attempt to obstruct justice or maliciously or an attempt to deprive the defence of a defence. It was done in error. [682] [Emphasis added]

The Commission found no evidence that CSIS erased the tapes for ulterior motives. CSIS simply failed to appreciate its potential role in assisting in the prosecution of terrorism offences. There was also no apparent understanding that preserving the Parmar Tapes could have been an element of an ongoing intelligence operation, given the threat to national security that Parmar posed.

The failure to have properly educated and trained transcribers and translators made it impossible to 'mine' the intercepted communications for valuable intelligence. The failure to retain the tapes in the aftermath of the terrorist attacks is inexcusable, and represents a key failure of the intelligence agency, regardless of the presumed value of those intercepts. To appreciate the staggering incompetence displayed in handling the Parmar Tapes, one need only recall that, in securing the warrant to intercept Parmar's conversations, CSIS told the Federal Court that Parmar was a terrorist who would likely commit overt acts of terrorism. The affidavit was accurate in its prediction, yet once the terrorists exploded the bombs at Narita and on Air India Flight 182, CSIS, for some reason, failed to change its habitual operational methods and continued erasing tapes as if nothing had happened. The Commission is satisfied that there is no convincing explanation, let alone acceptable excuse, for CSIS to continue to erase the Parmar Tapes in the aftermath of the bombings
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4.3.2 Destruction of Operational Notes

Introduction

During the Air India investigation, CSIS at times received information that might have been relevant to an eventual prosecution, or that could have significantly assisted the RCMP's criminal investigation. In those cases, CSIS would provide to the RCMP access to CSIS official records, generally intelligence reports held on NSR.[683] However, the RCMP often insisted on accessing the "raw materials,"[684] or the original notes and reports prepared when the information was received, as they felt that these contained the most complete and accurate record. Such notes were often not provided to the RCMP, at least not immediately, or in some cases, not at all. During the early years of the Air India investigation, the official

682 Testimony of James Warren, vol. 48, September 19, 2007, p. 5895.
683 Testimony of Chris Scowen, vol. 50, September 21, 2007, p. 6146.
684 Testimony of Norman Inkster, vol. 81, November 22, 2007, pp. 10322-10325. See also Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1651-1652; Testimony of Robert Simmonds, vol. 74, November 8, 2007, pp. 9338-9339. See, generally, Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.

policy in force at CSIS recommended that contemporaneous notes be taken, and it provided for the preservation of notes in cases which might result in court appearances by CSIS personnel. However, in practice, CSIS employees often did not make contemporaneous notes and, when they did, those notes were destroyed after reports were prepared.

Where original notes or reports were not provided to the RCMP, or no longer existed, problems could arise because the information received by the RCMP did not always contain all the details. In fact, the information could easily be inaccurate in those cases where the original notes or reports were incorrectly reproduced.[685] Where CSIS investigators or surveillance personnel were the only ones who might be able to provide evidence about important facts, they could be required to testify. In such cases, their testimony would be less accurate and less credible, as they did not have access to memory-refreshing contemporaneous notes. In the case of the Ms. E information, which the Crown sought to introduce in the Air India trial through the CSIS reports and the testimony of the CSIS investigator involved, the unavailability of contemporaneous notes recording CSIS's interactions with Ms. E weakened the weight that the trial judge was able to place on the CSIS reports as evidence of Ms. E's out-of-court statements.[686] The destruction of notes also gives rise to disclosure issues in criminal prosecutions. An instance of that occurred in the Air India trial when the trial judge found that Bagri's *Charter* rights had been violated because of the destruction of the notes and recordings of CSIS interviews with Ms. E.[687]

Initial CSIS Note-Taking Policy

When the decision was made by the Government to create CSIS, it acted quickly. The *CSIS Act* was passed and put into force almost immediately. There was no time to devise an adequate set of operational policies for the new agency. As a result, it was decided that the Security Service policies that governed day-to-day operations would be transferred to CSIS, and revised as necessary over time.[688]

The Security Service policy entitled "Investigator's Notebook and Notetaking" provided that where there was "reason to believe" that an investigation would "…result in court appearances being necessary," investigators were to keep a separate notebook and securely retain it.[689] The policy also stated that it was "sound practice" to keep notes in all cases, even if most of the Security Service investigations would not result in legal proceedings.[690] This policy was not reassessed or strictly followed by CSIS. In September 1987, the CSIS Policy Task Force reviewed the policy and concluded that it was "…in the RCMP format" and would need to be rewritten "to CSIS standards," with possible additions or

685 See, for example, Section 1.4 (Pre-bombing), Duncan Blast and the discussion about the phone number dialed by Parmar.
686 See Section 1.3 (Post-bombing), Ms. E.
687 See Section 1.3 (Post-bombing), Ms. E.
688 Exhibit P-101 CAA0812. See Section 3.3.1 (Pre-bombing), The Infancy of CSIS.
689 Exhibit P-101 CAA0007, p. 2.
690 Exhibit P-101 CAA0007, p. 4.

deletions.[691] It was not until 1992 that CSIS finally replaced the Security Service policy with its own policy on Operational Notes.[692]

Note-Taking Practices

Despite the written policy in place, a completely different practice was used at the Security Service and then at the newly-created CSIS. In most cases, notes were not taken contemporaneously, but were written shortly after interviews or meetings.[693] Surveillance personnel only began to take notes, albeit in an unstructured way, after the 1983 incident known as the "Squamish Five" case.[694] Further, at least in the case of notes made after interviews or meetings, the general practice adopted by the intelligence officers was to shred the notes after they had written and submitted their intelligence reports.[695]

Deputy Commissioner Henry Jensen testified that it was his impression that, prior to the creation of CSIS, RCMP Security Service members had been following the regular police protocols in terms of note-taking when faced with "…material that had criminal evidentiary value"[696] in order to be able to legitimately refresh their memories if called to testify.[697] He thought that the Security Service members kept two notebooks, in accordance with the policy.[698] However, as former RCMP Commissioner Robert Simmonds explained in his evidence, the Security Service operated, in many respects, separately from the rest of the RCMP. It was no longer embedded in the regular command structure of the Force and "…really all the Commissioner knew was what this new Director General would choose to tell him."[699] While it is natural that Jensen would assume that Security Service members followed the policies found in their operations manual,[700] he would not necessarily have had access to information about the actual practices that had developed within the Service in the years preceding the creation of CSIS.

In reality, employees of the Service were not made aware of the existence of the "Investigator's Notebook and Notetaking" policy, before or after the creation of CSIS. CSIS BC Region investigator William Dean ("Willie") Laurie explained that, not only was he never informed about the policy, but that he had "…never known a member of the Security Service or the CSIS that either was aware of this or practiced this."[701] On the contrary, CSIS employees viewed the practice of shredding the notes as the "policy".[702]

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691 Exhibit P-101 CAA0007, p. 1.
692 Exhibit P-101 CAA1057, p. 2.
693 Testimony of Ray Kobzey, vol. 32, May 23, 2007, p. 3735.
694 Testimony of Lynne Jarrett, vol. 22, May 3, 2007, p. 2158.
695 Testimony of Ray Kobzey, vol. 32, May 23, 2007, p. 3738. See also, Testimony of William Laurie, vol. 61, October 15, 2007, pp. 7431-7432.
696 Testimony of Henry Jensen, vol. 44, June 18, 2007, p. 5355.
697 Testimony of Henry Jensen, vol. 18, March 7, 2007, p. 1637.
698 Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1637-1638; Exhibit P-111 or P-101 CAA0007.
699 Testimony of Robert Simmonds, vol. 74, November 8, 2007, pp. 9317-9318.
700 Testimony of Henry Jensen, vol. 18, March 7, 2007, pp. 1640-1641.
701 Testimony of William Laurie, vol. 61, October 15, 2007, pp. 7468-7469.
702 Testimony of Ray Kobzey, vol. 32, May 23, 2007, p. 3738.

When Laurie interviewed Ms. E in 1987 and received information about a request by Bagri to borrow her car to take luggage to the airport the night before the Air India bombing, he was never instructed to preserve the notes he had made immediately after the interviews. He did not preserve them, even though it was clear to him that the information received related to a criminal investigation and that he would most likely be called to testify about it.[703] Laurie's supervisors at the BC Region were also aware of the possible implications of the Ms. E information, yet took no steps to have the materials preserved,[704] apparently also unaware of the official Security Service policy that was supposed to be applied in such a situation.

Laurie explained that it would have appeared contrary to the general philosophy prevailing at CSIS to follow a new procedure or policy requiring the preservation of notes in a manner similar to police procedures:

> The Security Service, and later the CSIS, did not commonly work in areas where criminal cases arose and they behaved differently. Now after CSIS was created – it was created because there was – and I'm paraphrasing but there was a need to do things differently from the police, and that was something that was constantly brought up. We are not them. We don't have peace officer status. We don't do things that the police do. We don't have to do some of the things that they have to do and we can do things that they can't do.
>
> So the notion – in retrospect that we have to adhere to this policy that the police had for keeping notes is pretty far removed, especially considering the amount of work that was being done and … the atmosphere at the time.[705] [Emphasis added]

The inconsistency between the note-taking practices of CSIS employees and the official policy was not addressed by CSIS until 1990, when the office of the Deputy Director of Operations (DDO) noted that it was "not clear" to all CSIS employees "…whether operational notes, personal notes" and other documents constituted official CSIS records, and that "…some employees are therefore uncertain as to the procedures regarding the maintenance and destruction of such records."[706] The DDO requested that interim guidelines be drafted pending the adoption of a new policy on operational notes.[707] The DDO believed that guidelines were necessary because of what he described as the "existing void", and he instructed that a draft be prepared after consultation with CSIS personnel to establish current practices and possible legal issues.[708]

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703 See Section 1.3 (Post-bombing), Ms. E.
704 See Section 1.3 (Post-bombing), Ms. E.
705 Testimony of William Laurie, vol. 61, October 15, 2007, p. 7537.
706 Exhibit P-101 CAA0801, p. 1.
707 Exhibit P-101 CAA0801, p. 1.
708 Exhibit P-101 CAA0801, pp. 5-6.

Evolution of Note-Taking Policies and Practices

In November 1990, draft interim guidelines were transmitted to the DGs and the CSIS regions, along with a message indicating that the "Investigator's Notebook and Notetaking" policy inherited from the Security Service was now obsolete and that existing copies needed to be destroyed.[709] The interim guidelines were to replace that policy, and they were specifically meant to apply to CSIS investigators as well as to other employees.[710]

The draft guidelines provided that "…CSIS is not an evidentiary collecting agency."[711] As a result, the employees were not required to keep notes that "withstand evidentiary rules," and operational notes were to be destroyed after reports were written. An exception was provided for cases in which, "…in exceptional circumstances, some of the information collected may be required for evidentiary purposes and when such information has not already been included in a report."[712] Where a CSIS regional DG was of the view that notes had to be retained in this context, the DG was to direct that only those notes relevant to the "specific incident" be retained and that the notes be kept in the operational file and classified according to government policy.[713]

The draft interim guidelines were based on instructions from the DDO, who had suggested that notes did not need to be kept and "should/could" be destroyed once reports were prepared.[714] However, as was the case under the previous Security Service policy, the DDO had specified:

> When an investigation has been identified as one leading to possible prosecution, PSU/investigators should be required to maintain a separate notebook.[715]

The draft guidelines that were actually prepared took a more restrictive view of the nature of the material that had to be retained than did the instructions from the DDO. Notes containing information otherwise included in reports did not have to be retained under any circumstances. Even when the information was not included in a report, only the notes containing the information that could be required for evidentiary purposes had to be retained, as opposed to the retention of a separate notebook for entire investigations that could lead to possible prosecution, as had been suggested by the DDO.

The policy on operational notes adopted by CSIS in 1992, which was in force, in a slightly modified form, as of the completion of the Inquiry hearings, again

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709 Exhibit P-101 CAA0801, p. 1.
710 Exhibit P-101 CAA0801, p. 1.
711 Exhibit P-101 CAA0801, p. 2.
712 Exhibit P-101 CAA0801, p. 2 [Emphasis added].
713 Exhibit P-101 CAA0801, p. 2.
714 Exhibit P-101 CAA0801, p. 5.
715 Exhibit P-101 CAA0801, p. 5.

changed the criteria for the retention of notes.[716] The notes now had to be destroyed, except where the information they contained "may be crucial" to the investigation of unlawful acts of a "serious nature" (defined as criminal acts posing a threat to life or property and constituting indictable or possibly indictable offences[717]), and where CSIS employees "may require" to refer to the notes to refresh their memories prior to recounting the facts.[718] The policy stated that CSIS "…does not normally collect evidence for criminal investigations," but recognized that information relating to unlawful activity of a "serious nature" could be obtained by CSIS employees and, in "exceptional circumstances" where the "…police of jurisdiction is unable to obtain their own independent evidence," the CSIS information could be "…crucial to the successful prosecution of a serious criminal case," and employees could be required to provide evidence about such matters, supported by their notes.[719]

Where CSIS employees uncovered information "…of possible evidentiary value," they were to advise their supervisor.[720] The ultimate decision about whether police would be advised and whether notes would be retained was left to the regional Director General.[721] Where a decision was made to retain notes, they were to be placed in a sealed envelope on file, and efforts were to be made, in cooperation with the police or Crown, to protect non-related information found in the notes.[722]

The new policy provided that, in order to prepare "accurate and complete reports" about the information CSIS investigators were expected to gather, it might be necessary to "…temporarily record information as it is received," including while conducting interviews or debriefing human sources.[723] The policy expressly recognized that audio or video recordings made by a CSIS employee for the purpose of being used in the preparation of CSIS reports constituted "operational notes" subject to the retention policy.[724] Notably, had the policy been in force – and applied – when Laurie interviewed Ms. E, the tapes and transcripts of those interviews would have been required to be retained.[725]

In June 2008, the Supreme Court of Canada ruled that the CSIS policy on operational notes was contrary to the *CSIS Act* as well as to the "…case law on the disclosure and retention of evidence."[726] The Court found that CSIS has a duty to retain operational notes and to disclose them (subject to national security confidentiality claims), even in cases not involving information relevant to the

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716 See Exhibit P-101 CAA0889 for the 1992 policy. It was slightly modified in 1994 (see Exhibit P-101 CAA0917), in 2002 (see Exhibit P-101 CAA0994) and in 2006, when the current version was produced (see Exhibit P-101 CAA1061), but the substance remained unchanged. See, generally, chart of Operational Notes policy evolution: Exhibit P-101 CAA1057, p. 2.
717 Exhibit P-101 CAA0889, p. 14.
718 Exhibit P-101 CAA0889, p. 12.
719 Exhibit P-101 CAA0889, pp. 8, 14.
720 Exhibit P-101 CAA0889, p. 14.
721 Exhibit P-101 CAA0889, p. 14.
722 Exhibit P-101 CAA0889, pp. 14, 16.
723 Exhibit P-101 CAA0889, p. 10.
724 Exhibit P-101 CAA0889, p. 4.
725 See Section 1.3 (Post-bombing), Ms. E.
726 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 64.

investigation of criminal offences. LeBel and Fish JJ. noted that section 12 of the *CSIS Act* does not require CSIS to destroy the information it collects in order to ensure that it is retained only "…to the extent that it is strictly necessary."[727] The Court ruled that the section requires that CSIS collect information to the extent strictly necessary and then analyze and retain it. As a result, the Court found that CSIS officers have a legal duty to retain their operational notes when conducting investigations that are targeted at a particular individual or group.[728] The Supreme Court of Canada noted that this duty would have a practical benefit in proceedings involving CSIS information since the original notes – being a "… better source of information, and of evidence" than CSIS summaries or reports – would allow officials to verify the summaries, and would allow CSIS witnesses to refresh their memories should they have to testify.[729]

The case that was heard by the Supreme Court of Canada related to security certificate proceedings that were not criminal in nature. In such cases, the CSIS policy in place did not provide for retention of notes under any circumstances. In contrast, a large portion of the information that CSIS passed on to the RCMP in relation to the Air India investigation would have qualified for retention under the Service's various policies, other than in the period between 1990 and 1992, under the interim guidelines, as this information related to the investigation and prosecution of a "serious" criminal offence. The issue of the destruction of materials, raised in court with regard to the Ms. E notes, resulted from the fact that existing policies were not applied within the Service.

However, even in cases involving criminal information, the fact that all the CSIS policies always provided for the destruction of notes as a default position is in itself problematic. Even if the post-1992 policy had been applied, it would still have been possible for original records relevant to the Air India investigation and to an eventual prosecution to have been destroyed, if the information had not been viewed as "crucial" to the investigation or to a successful prosecution, or if its importance to a criminal matter were only to have come to light subsequently, after the default routine erasure of the notes had already taken place.

When CSIS agent Nicholas Rowe met with Ms. D in 1997 over a period of two weeks, before CSIS "…determined that she should be handed over to the RCMP," he prepared detailed notes during the meetings, including verbatim quotes and summaries. These notes were not preserved by CSIS.[730] In the Air India trial, Ms. D was one of the main witnesses in the case against Ripudaman Singh Malik.[731] Yet, as Justice Josephson indicated, the notes for her meetings with CSIS were "…destroyed as a matter of policy" after the CSIS reports were prepared.[732] Whether this was because in 1997 CSIS employees continued to not follow or be aware of the note retention policy, or whether it was because it was not realized

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727 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at paras. 36-38.
728 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 43.
729 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 39.
730 *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 378-386.
731 See Section 1.5 (Post-bombing), Ms. D.
732 *R. v. Malik and Bagri*, 2005 BCSC 350 at para. 386.

in time that Ms. D's information could be crucial to the investigation of "serious" unlawful activity (although she had been quickly handed over to the Air India Task Force[733]), it appears that CSIS's own written policy on operational notes was not sufficient to prevent the ongoing destruction of the materials.

Rowe was called to testify in the Air India trial and he did not have notes to refresh his memory of events which had occurred over a period of two weeks, more than five years earlier. He could only rely on his intelligence reports, which were admittedly not prepared for use in court and not exhaustive.[734] Malik did not follow Bagri's example and argue that the destruction of the notes violated his *Charter* rights. However, based on the reasons provided by Justice Josephson when he allowed Bagri's application,[735] there is little doubt that an application similar to Bagri's could have led to a similar judgment that Malik's rights were violated, posing an additional challenge for the prosecution.

Conclusion

CSIS had a policy in place that could have prevented the destruction of original notes containing information relevant to the Air India investigation and eventual prosecution. This policy, while it had been inherited from the RCMP Security Service and (in the haste to create the new agency) may not have been adapted to its needs in all respects, was consistent with the policy that CSIS itself would ultimately adopt eight years later. The policy provided that notes had to be preserved in cases that might result in prosecutions where CSIS evidence would be necessary.

Because of a failure to enforce policy dating back to the Security Service days, CSIS was unable to apply its own policy – or even to inform its own employees of its existence. It took six years for CSIS to revise its inherited policy and to address the issue, ultimately devising a policy consistent with the old policy that the Service had failed to follow. When Laurie interviewed Ms. E between 1987 and 1989, had an updated and well-distributed policy been available within CSIS, it could have made a difference in the Air India case.

This failure on the part of the intelligence agency to follow its own policies is reminiscent of some aspects of the infamous tape erasure incident, where some of the Parmar intercept tapes might have been retained had the applicable policy actually been applied.[736] By 1987, the RCMP and the BC Crown prosecutor were already signalling in clear terms to CSIS that the tape erasure was a problem, and were asking pointed questions about applicable policies.[737] It is unfortunate that CSIS did not take this opportunity to ensure that its other policies, which could have an impact on the criminal investigation, were updated and applied. It is even more unfortunate that, even after these policies were revised, sufficient steps were still not taken to enforce them, with the result that, in 1997, CSIS was

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733 *R. v. Malik and Bagri*, 2005 BCSC 350 at para. 383.
734 *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 386, 390, 397.
735 *R. v. Malik and Bagri*, 2004 BCSC 554. See generally, Section 1.3 (Post-bombing), Ms. E.
736 See Section 4.3.1 (Post-bombing), Tape Erasure.
737 See Section 4.3.1 (Post-bombing), Tape Erasure and Section 4.4 (Post-bombing), CSIS Information in the Courtroom.

still destroying its notes for interviews with an individual whose importance to the Air India criminal investigation was quickly understood and who eventually became one of the main witnesses in the Crown's case against Malik in the Air India case.

The Supreme Court of Canada has recently recognized that, particularly in relation to the investigation of terrorism, CSIS activities often converge with those of the RCMP, and the division of work between the agencies is not always clear.[738] As a result, the Court noted:

> In this light, we would qualify the finding of the Federal Court that CSIS cannot be subject to the same duties as a police force on the basis that their roles in respect of public safety are, in theory, diametrically opposed. The reality is different and some qualification is necessary.[739]

Indeed, throughout the Air India investigation, many individuals who were to become RCMP sources or witnesses spoke with CSIS, often before speaking to police.[740] The evidence at the Inquiry demonstrated that CSIS destroyed all notes and recordings for interviews with Ms. E, Ms. D and Mr. A. Given the generalized practice of destruction adopted at CSIS, it is fair to assume that CSIS also destroyed any notes or recordings for interviews with Tara Singh Hayer and Mr. Z. All of these individuals eventually spoke with the RCMP, but the RCMP had no access to accurate and complete records of their interactions with CSIS. They all provided information relevant to the Air India investigation and were all potential witnesses in an eventual prosecution.

Under the circumstances, it was a serious deficiency for CSIS to continue to destroy its notes and recordings, either ignoring its own policies or not taking care to ensure that its policies would not hinder criminal investigations and prosecutions for terrorism offences. The Supreme Court of Canada has now made clear that CSIS has a duty to retain notes and recordings prepared in investigations targeted at specific individuals or groups, and that CSIS's belief that destroying such materials was necessary under the *CSIS Act* was simply inaccurate. CSIS must now enact and enforce the appropriate policies in order to prevent a recurrence of what happened in the Air India investigation. Volume Three of this Report addresses the nature of the policies that are needed.

4.4 CSIS Information in the Courtroom

4.4.1 The Reyat Trial and the BC Crown Prosecutor Perspective

Introduction

James Jardine (now His Honour Judge James Jardine of the Provincial Court of British Columbia) became Crown counsel at the Ministry of the Attorney

738 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 26.
739 *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 28.
740 See Chapter I (Post-bombing), Human Sources: Approach to Sources and Witness Protection.

General for British Columbia (AG BC) in 1974. Between July 1, 1985 and October 1, 1991, he was involved in the Air India investigation and the Narita investigation and prosecution.[741] He assisted the RCMP Air Disaster Task Force in seeking authorizations for wiretaps and in obtaining search warrants in the early days after the bombing, and he was involved in the prosecution of Parmar and Reyat in connection with the Duncan Blast charges and, subsequently, in the prosecution of Reyat in connection with the Narita bombing.

During the years he worked on the Air India case, Jardine often had to work with CSIS information and provide advice to the RCMP about the materials that had to be obtained from the intelligence agency. In preparation for the Narita prosecution, he transmitted numerous requests to the RCMP for access to CSIS information and for explanations about CSIS policies and procedures. He eventually attended high-level meetings involving representatives of CSIS, the RCMP, the Department of Justice (DOJ) and the Solicitor General, in order to resolve differences of opinion about the level of access to CSIS information that was necessary for the Crown and the extent of disclosure of such information that had to be made to the defence. In his testimony, Jardine summarized these interactions with CSIS succinctly:

> **MR. FREIMAN**: Mr. Jardine, you … dealt throughout this period of time with the Canadian Security Intelligence Service, CSIS. Would you describe your relationship with CSIS as open and cooperative?
>
> **MR. JARDINE**: No.
>
> **MR. FREIMAN**: And would you describe their attitude towards you as being forthright?
>
> **MR. JARDINE**: No.[742]

Initial Stages of the Investigation

Jardine was advised early on by the members of the RCMP Air Disaster Task Force in British Columbia that CSIS might have information relevant to the investigation.[743] According to his notes, on July 1, 1985 he met with Insp. John Hoadley and others from the Task Force and specifically requested that the RCMP obtain any information that CSIS had.[744] He explained in testimony that, given that CSIS had been conducting surveillance on Parmar and, as a result, had observed the Duncan Blast, he advised the Task Force that there might be CSIS intercepts in existence, pointing out that "…if there are watchers there will likely be wire." He testified that he asked accordingly that any evidence or information, including intercept tapes, be retained for use in an eventual prosecution.[745]

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741 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5657-5658.
742 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5657.
743 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5662-5663.
744 Exhibit P-101 CAA0578, p. 2.
745 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5653; See Section 4.3.1(Post-bombing), Tape Erasure.

From the very beginning of the investigation, Jardine felt that accessing CSIS materials was crucial. During a September 1985 meeting with CSIS, the RCMP conveyed Jardine's position as follows:

> [Crown Counsel Jim Jardine] is fearful that unless he has access to and can evaluate all relevant information in possession of Crown Agencies (ie: CSIS), he runs the eventual risk of having any warrant he might obtain being challenged and possibly invalidated on grounds of inadequate disclosure – with the Crown's case thereby being imperilled.[746]

Jardine was under the impression that an agreement was in place between CSIS and the BC Government for CSIS to release information for evidentiary purposes in a case like Air India. During their meeting, CSIS and the RCMP both said that they were not aware of such an agreement. The CSIS BC Region sought direction from CSIS HQ about Jardine's "…access to and use of CSIS evidence for evidentiary purposes."[747] CSIS HQ responded that CSIS legal representatives would discuss the issue of full disclosure with Jardine.[748]

At that time, Jardine was assisting the RCMP Task Force in preparing an application to intercept private communications which he then presented to a judicial officer.[749] He was told by the investigators that they had not been given access to the CSIS materials, in particular to intercept tapes or transcripts.[750] In the end, the CSIS information that could finally be accessed was set out in the affidavit in support of the authorization (the "September 19th affidavit"). The affidavit summarized 21 of Parmar's conversations during the months of May and June 1985 which were believed to constitute grounds for suspecting the involvement of Parmar, Reyat, Surjan Singh Gill, Amarjit Pawa and Hardial Singh Johal, the intended targets of the RCMP intercept, in the Air India and Narita bombings. It also mentioned a number of the targets of the CSIS investigation and specifically discussed the processing of the Parmar intercept, detailing the requests for access made by the RCMP, the status of the CSIS translation efforts and the nature of the materials provided to the RCMP in the end.[751]

Jardine testified that he had been making "…repeated requests for access to the Canadian Security Intelligence Service information" since July 1985. He commented that, as of the end of November 1985, no progress had been made in terms of accessing the materials, except for the information made available to the Task Force about the Parmar intercepts which was used in the September 19th affidavit, information that was third or fourth-hand hearsay, as it was based on RCMP notes made while reviewing CSIS intercept logs summarizing the gist of intercepted conversations.[752]

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746 Exhibit P-101 CAB0553, p. 2; Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5677-5678.
747 Exhibit P-101 CAB0553, pp. 2-3.
748 Exhibit P-101 CAB0554.
749 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5667-5677; See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
750 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5675.
751 Exhibit P-101 CAA0324(i); See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
752 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5687-5688; Exhibit P-101 CAA0324(i).

In early November 1985, the RCMP executed search warrants on the residences of Parmar and Reyat and arrested both suspects.[753] In order to accommodate CSIS concerns, prior to submitting the Information to Obtain sworn in support of the application for the search warrants, RCMP HQ had communicated with E Division suggesting the language to be used to avoid revealing CSIS involvement.[754] As a result, unlike the September 19th affidavit, the Information to Obtain did not name CSIS as a source of information and did not reveal the nature of the materials the RCMP had access to in connection with the Parmar intercepts.[755] Instead, when referring to CSIS information about the Duncan Blast and about Parmar's conversations, it identified the source of the information as "…a source of known reliability, whose identity for security reasons I do not wish to reveal at this time."[756]

The AG BC had not been consulted about the wording of the Information to Obtain,[757] and Jardine was not even aware of the RCMP decision to arrest Reyat and Parmar and search their homes. In reviewing the materials in the possession of the RCMP after the searches, he agreed with his colleagues at the AG BC's office that there was not a body of evidence capable of supporting a charge of conspiracy against Parmar and Reyat in the Air India or Narita bombing cases, a charge that some RCMP officers wanted the Crown to approve.[758] As a result, Reyat and Parmar were at that time only charged in connection with the Duncan Blast.[759] Jardine explained that the AG BC had to be careful in approving discrete charges to ensure that no double jeopardy issues would later preclude the Crown from prosecuting Reyat and Parmar in connection with the actual Air India bombing if sufficient evidence was eventually obtained.[760]

Duncan Blast Prosecution

Though he was not involved in the November 1985 RCMP decision to arrest Parmar and Reyat, Jardine soon became responsible for the Duncan Blast prosecution.[761] To prepare for that case, the RCMP requested authorization to disclose CSIS information to Jardine.[762] CSIS's initial response was that information that the Service had already authorized for use in judicial proceedings (for the purposes of search warrant applications or wiretap authorizations), including the surveillance reports for the Duncan Blast, could be disclosed to Jardine, but that any requests for additional information would be considered by CSIS HQ on a case-by-case basis.[763] Jardine explained that this type of disclosure was clearly insufficient for the purposes of the prosecution, as he needed access to CSIS

753 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5683.
754 Exhibit P-101 CAA0836, p. 23.
755 Exhibit P-201, paras. 46, 48-49, 53.
756 Exhibit P-201, paras. 23, 46, 48, 53; Exhibit P-101 CAA0575(i), p. 6; See, generally, Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India investigation.
757 Exhibit P-101 CAA0836, p. 22.
758 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5683, 5685, 5689.
759 See Section 1.4 (Pre-bombing), Duncan Blast.
760 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5689.
761 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5686.
762 Exhibit P-101 CAA0384, CAA0385.
763 Exhibit P-101 CAA0388, CAA0393, CAB0575.

personnel who could appear as witnesses, and not just access to CSIS reports.[764] Jardine advised the RCMP that the testimony of members of the CSIS surveillance team would be necessary in the Duncan Blast case.[765] He was already aware that there might be controversy about this because of his previous experience with the "Squamish Five" case. In that case, which took place in 1983 prior to the creation of CSIS, an issue had arisen when the prosecution requested the attendance of a Security Service surveillance team.[766]

In December 1985, the RCMP requested access to the members of the Duncan Blast surveillance team for interviews to determine which of the CSIS surveillants would be required to testify.[767] CSIS authorized the interviews, but specified that the issue of the potential testimony of its personnel had yet to be addressed.[768] Jardine commented in his testimony at this Inquiry that the interviews were a first step, but would not be sufficient for court purposes.[769]

In late February and early March 1986, members of the RCMP Task Force met with representatives of the CSIS BC Region and wrote to CSIS to request authorization for some members of the surveillance team to testify.[770] Discussions were then held about CSIS's concern that its methodology, training, policy and practices be protected when the surveillants testified. Jardine's view was that he would object to questions only where they were not relevant to the proceedings. A meeting was scheduled with Department of Justice counsel representing CSIS to discuss the Service's concerns.[771]

Jardine explained that, at this time, it was still uncertain whether the CSIS witnesses would be permitted to testify, and under what conditions. There were issues about whether they could be identified publicly, whether some form of in camera hearing would be sought or whether screens would be used to hide their appearance.[772] It was also anticipated that objections to the disclosure of information relating to CSIS's investigative techniques would be made by counsel for the Attorney General of Canada on behalf of the agency.[773] In the end, agreement was reached with CSIS about which witnesses would be allowed to testify and what they would be allowed to say.[774] But the case did not proceed, as Reyat pleaded guilty to two of the four counts and the Crown called no evidence against Parmar.[775]

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764 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5692.
765 Exhibit P-101 CAF0187; Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5689-5690.
766 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5690.
767 Exhibit P-101 CAA0391.
768 Exhibit P-101 CAA0392.
769 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5693.
770 Exhibit P-101 CAA0417, CAF0213.
771 Exhibit P-101 CAF0213; Testimony of James Jardine, vol. 47, September 18, 2007, p. 5698.
772 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5699; See also Exhibit P-101 CAA0425(i), CAF0215.
773 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5698; See also Exhibit P-101 CAA0425(i), CAB0669(i), CAF0215.
774 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5700.
775 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5686; Exhibit P-101 CAA0421, CAA0422, CAF0168, p. 7; See, generally, Section 1.4 (Pre-bombing), Duncan Blast.

Preparation for the Narita Prosecution

Jardine's Questions about the Parmar Tapes

In March 1986, before the Duncan Blast case was resolved, Jardine wrote to the RCMP Task Force about his view that the weaknesses in the evidence against Parmar in the Duncan Blast case might be cured by "…ascertaining with certainty all of the evidence currently in the hands of the Canadian Security Intelligence Service, which has not been disclosed to the Royal Canadian Mounted Police or to me as Crown Counsel during the course of this investigation from June 22, and 23, 1985 onward." Jardine felt that the evidence about the Parmar conversations intercepted by CSIS would assist in the Duncan Blast prosecution and, most importantly, could disclose the intentions and knowledge of those associated with Parmar around the time of the Air India and Narita bombings.[776]

Given the destruction of the Parmar Tapes,[777] Jardine had serious doubts about whether this evidence could be admissible, but he nevertheless attempted to find out more about the tapes in order to provide a more informed opinion.[778] In addition to pointing out that neither he nor the RCMP had received written confirmation from CSIS that the Parmar Tapes had indeed been erased, Jardine asked five questions about the CSIS intercepts that would become the object of protracted discussions for the following months and years:

> (i) By what methodology were the private communications intercepted?
>
> (ii) How were the private communications transcribed?
>
> (iii) What was the exact methodology used to translate the private communications?
>
> (iv) In what way were notations made of the translations, and how much of the translation was verbatim and how much a summary or précis of the conversation?
>
> (v) What were the dates of interception, of transcription, of translation, and destruction of the evidence?[779]

Jardine testified at the Inquiry that he did not receive a response to his questions in time to make a more informed decision about the strength of the evidence against Parmar in the Duncan Blast case. Nevertheless, he explained that obtaining an answer was still important after the Duncan Blast prosecution ended because the investigation of the Air India and Narita bombings was continuing.[780]

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776 Exhibit P-101 CAF0168, pp. 4-5.
777 See Section 4.3.1 (Post-bombing), Tape Erasure.
778 Exhibit P-101 CAF0168, pp. 5-6.
779 Exhibit P-101 CAF0168, p. 6.
780 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5707-5708.

In the spring of 1986, Jardine was assigned on a full-time basis as standing counsel to the RCMP Air Disaster Task Force. At that time, a decision was made by Canadian authorities to engage in diplomatic discussions with Japan to obtain the release of the physical evidence found at the scene of the Narita bombing so that prosecution could be pursued in Canada.[781] In addition to providing advice to the RCMP investigators as required, Jardine began to examine the file to determine what charges could be brought in connection with the Narita bombing, now that it was known that physical evidence would likely be obtained. He subsequently determined that Reyat could be charged with manslaughter, and an indictment was signed in 1988.

In the context of his review of the Narita evidence, Jardine felt that it was important to obtain a response to his questions about the Parmar Tapes because, whether the conversations would have served to prove the intent of Parmar and Reyat or to exonerate them, "…their existence would have enabled the investigators and the prosecutors to assess the evidence in light of all of the other evidence acquired in the investigation."[782]

Jardine explained in testimony before the Inquiry that, throughout the preparation of the Narita bombing case, "…there was a sense of frustration both in the investigators and in the prosecution side of the house" as they were getting information from CSIS "…in dribs and drabs, piecemeal" and they wanted to advance the investigation. He added that CSIS continued to provide information "…in bits and pieces" between 1986 and 1991, with new information being received by the Crown even as the trial was taking place.[783]

The then Deputy Director of the CSIS Counter Terrorism Branch, James ("Jim") Warren, who was involved in attempting to formulate responses to Jardine's requests, testified that dealings with Jardine in relation to the Air India investigation quickly became the "number one priority" at CSIS when Jardine began sending questions in 1986. This remained the case as Warren, who had joined the RCMP Security Service in 1960, rose through the ranks of CSIS to become in 1987 the Assistant Director of Requirements, overseeing the day-to-day operations of the Service, and then, in 1990, the Deputy Director of Operations, with overall responsibility for CSIS operations and policy.[784]

Over this period, Warren was extensively involved with the conundrum of CSIS evidence in the courtroom. He testified that the McDonald Commission recommendations, spurred by "…when a little barn got burned," influenced his approach to CSIS operations. He remained constantly aware that a balance had to be found between the need to further the Service's investigations and the need to protect the rights and freedoms of Canadians.[785] Warren testified about where he felt this balance lay in the case of the Air India investigation:

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781 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5686.
782 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5709.
783 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5695, 5742, 5805.
784 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5812, 5815.
785 Testimony of James Warren, vol. 48, September 19, 2007, p. 5814.

> I think we had come to realize from day one that at the end of the day when push came to shove, we would have to lay out – whatever it took to achieve a successful prosecution.
>
> What we were trying to do in – perhaps our own fumbling way, was to find some way of protecting the covert assets that we had so that we could continue to go on and do our job after this prosecution was over.[786]

Jardine's March 1986 questions about the Parmar Tapes were transmitted to CSIS on May 6, 1986.[787] Supt. Les Holmes, the Officer in Charge of the E Division Task Force, provided explanations to CSIS when he passed on the request, stating that Jardine wished to obtain the information even though he was aware that the tapes probably had little evidentiary value, in order to "…be in the position to state for the record that he had evaluated the Parmar intercepts and duly considered their worth when making his decision as to whether or not to proceed with prosecution" in his evaluation of the overall case against Reyat.[788] Warren testified that, on the basis of this explanation, it appeared at the time that there was agreement between the RCMP and CSIS that CSIS intelligence would have little, if any, evidentiary value. Warren admitted that he was unsure to what extent Jardine shared this consensus, but felt that "…everyone [was] onside and recogniz[ing] what [was] happening."[789]

In response to Jardine's five questions, the CSIS BC Region did provide some information to CSIS HQ.[790] However, the Region's responses were not transmitted to the RCMP or to Jardine.[791] On May 16, 1986, the Officer in Charge of the Air India investigation at RCMP HQ, C/Supt. Norman Belanger, met with Chris Scowen of CSIS HQ and discussed Jardine's questions. Scowen stated that he did not understand the purpose of the request, and Belanger agreed that it might seem obscure to someone not familiar with the issues. He provided Scowen with some background information and advised the E Division Task Force to put the enquiry on hold at the BC Region level.[792] On May 22, 1986, CSIS made a note in its file that Belanger had indicated that Jardine's request for information about the intercepts could be "put on hold" until further notice.[793]

On July 29, 1986, the RCMP E Division Task Force wrote to RCMP HQ, indicating that no response had been received to the Jardine questions and requesting that HQ undertake to obtain a response from CSIS HQ. On August 6, 1986, RCMP HQ transmitted to the E Division Task Force a draft letter for CSIS, which requested a response to the Jardine questions and attached a list of conversations from the CSIS intercepts that the RCMP considered relevant. HQ asked the Division to

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786 Testimony of James Warren, vol. 48, September 19, 2007, p. 5838.
787 Exhibit P-101 CAD0070.
788 Exhibit P-101 CAB0613, p. 2.
789 Testimony of James Warren, vol. 48, September 19, 2007, p. 5959.
790 Exhibit P-101 CAB0613, pp. 3-4.
791 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5710-5711.
792 Exhibit P-101 CAF0188, pp. 2-3.
793 Exhibit P-101 CAA0559, p. 1, CAF0188, p. 3, CAF0278, p. 1.

provide comments about the draft and to add relevant conversations to the list.[794] However, the issue was apparently not pursued with CSIS during the following months, though numerous discussions took place about access to CSIS materials and the use of CSIS intercepts in other Sikh extremism prosecutions.[795]

In September 1986, the RCMP requested intercept tapes from CSIS in connection with the prosecution of Parmar and others for the Hamilton Plot.[796] CSIS replied that no tapes were available, and that the only way to obtain the evidence would have been to have CSIS translators testify, which CSIS was not prepared to allow.[797]

Apparently, no discussions about Jardine's request took place between the agencies during the following year. Then, on September 16, 1987, shortly after the Director of CSIS resigned when the Atwal prosecution collapsed because of inaccurate information in a CSIS warrant application,[798] RCMP HQ wrote to E Division to advise that the Solicitor General had requested a full briefing on the information provided by CSIS in relation to the Air India investigation. HQ asked a number of questions, including whether the Division could identify information received from CSIS "…which could hinder any future prosecution."[799] In response, E Division explained the use that was made of CSIS information in its investigation, and noted that no written confirmation had yet been received from CSIS about the erasure of the Parmar Tapes, but went on to note that Jardine was of the view that, if evidence had been destroyed in this manner, there was a real possibility that the accused in an eventual prosecution would present abuse of process arguments. The Division reminded HQ of its July 1986 request to obtain answers to Jardine's questions about the CSIS intercepts, noting that no response had been received as the request had been "blended" with requests from other Divisions for CSIS material in connection with other Sikh extremism investigations.[800]

On September 21, 1987, RCMP HQ wrote to CSIS HQ, indicating that no response had been received by the Force to the May 6, 1986 correspondence listing Jardine's questions about the Parmar intercepts.[801] In a letter written by Warren on September 24th, CSIS responded that the Service had been told by Belanger to wait until further notice before providing answers and had never received any additional request. The letter went on to note that the issues raised by Jardine's questions had already been discussed at length with the RCMP in the context of other Sikh extremism prosecutions where the Crown sought to use CSIS intercepts (including the Atwal and the Hamilton Plot cases). Warren

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794 Exhibit P-101 CAA0471, pp. 1-3.
795 Exhibit P-101 CAF0188, pp. 3-5.
796 See, generally, Exhibit P-102: Dossier 2, "Terrorism, Intelligence and Law Enforcement – Canada's Response to Sikh Terrorism," p. 46.
797 Exhibit P-101 CAA0496, CAF0188, pp. 6-7, CAF0261.
798 See Section 1.6 (Post-bombing), Atwal Warrant Source.
799 Exhibit P-101 CAF0262.
800 Exhibit P-101 CAA0554, pp. 1-3.
801 Exhibit P-101 CAA0558.

stated that the Service did not understand which conversations were at issue, especially since it was of the view that the Parmar intercepts were unlikely to have any relevance, since only Reyat, not Parmar, was under prosecution.[802] At the Inquiry hearings, Warren noted that he could not recall what led him to this "…very curious paragraph,"[803] as he was aware that Parmar and Reyat were often intercepted in conversation. In the September 1987 letter, Warren indicated that the Service was aware that some information from the Parmar intercepts had been used in the application for the November 1985 search warrant for Reyat's residence, but that he failed to understand how the defence could have found out that this information came from CSIS, since that fact was not stated in the application, and there was, according to him, only a limited risk that the law would allow access to this information.[804]

From a file review of the CSIS/RCMP correspondence and meetings between May 1986 and September 1987, the RCMP C Directorate concluded that the Force had not failed to pursue its request for responses to Jardine's questions after it was put on hold following the CSIS conversation with Belanger. On the contrary, numerous discussions about access to CSIS intercepts and transcripts were held in the context of the Sidhu shooting (Atwal) and the Hamilton Plot prosecutions, and it was clear to the RCMP that CSIS was refusing to provide information of the nature requested by Jardine. C Directorate further noted that one of the problems in obtaining a response from CSIS was the Service's apparent perception that the Parmar Tapes and information about them could not be relevant.[805]

Warren, in his testimony, confirmed this perception. He testified that he felt that the evidentiary value of the Parmar Tapes was always suspect, and that preservation would have been useful only for their potential intelligence value in the future.[806] Warren noted that CSIS early on was concerned about the issue of disclosure. Upon receipt of Jardine's initial May 1986 request, CSIS legal counsel had warned that disclosing CSIS information to the police – if the information was ultimately considered admissible in court – could lead to the exposure in open court proceedings of CSIS personnel who had handled the information.[807] CSIS understood that this sensitive information would go over to the defence, a result that Warren called "…handing the keys to the church … to the devil." Warren testified that, throughout this period, CSIS was trying to find some way to avoid or limit this exposure, but ultimately that it cooperated with the RCMP in light of its understanding that a successful prosecution of those responsible for the Air India tragedy was in the interests of the greater public good.[808]

Warren explained that he ordered a review of the CSIS files in order to provide answers to Jardine's questions. Following this review, Warren concluded that,

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802 Exhibit P-101 CAA0559, pp. 1-2.
803 Testimony of James Warren, vol. 48, September 19, 2007, p. 5842.
804 Exhibit P-101 CAA0559, p. 2.
805 Exhibit P-101 CAF0188, pp. 8-10.
806 Testimony of James Warren, vol. 48, September 19, 2007, p. 5817.
807 Exhibit P-101 CAF0278, p. 1.
808 Testimony of James Warren, vol. 48, September 19, 2007, p. 5839.

despite Jardine's allegations that he had asked for retention of the Parmar Tapes, no such requests were received by CSIS from the RCMP or Jardine. Warren also found that there had been no deliberate destruction of the Parmar Tapes and that there was nothing nefarious in the decision to erase the tapes. Rather he concluded that the tapes were simply destroyed by people following CSIS policy in default mode.[809]

Following further discussions between CSIS and the RCMP, CSIS HQ provided a first response to Jardine's March 1986 questions on September 28, 1987.[810] The letter provided information about CSIS's methodology for recording, transcribing, translating and erasing the Parmar Tapes, as well as some information about the general time frame in which this took place. However, with respect to the questions about the exact number of verbatim transcriptions and the dates of interception, transcription, translation and destruction, CSIS advised that it would not be able to provide a response until it obtained a more accurate description of the tapes at issue, which CSIS described as the "…interceptions the Crown intends to rely upon."[811] Warren testified that the methodology outlined in the letter described the general CSIS policy on tape processing rather than the actual process that CSIS followed in relation to the Parmar Tapes.[812] Indeed, the letter omitted details about the deficiencies in the processing of the Parmar Tapes, including the absence of the transcriber during the key period immediately preceding the bombings.

Jardine recalled receiving the response and trying to ascertain whether the information it contained provided a foundation for the defence to mount an abuse of process argument. He explained in testimony that some issues remained unclear: for example, the dates when the backlog of tapes from April 9 to July 7, 1985 was translated, and when the tapes were destroyed. In particular, there was a suggestion in the CSIS reply that this may have happened in the fall of 1985, which, to Jardine, raised questions as to why the tapes would have been erased, given the timing of the explosions.[813]

On September 29, 1987, the day after the CSIS response was received, Jardine met with members of the RCMP Task Force to discuss it. It was quickly concluded that the CSIS reply contained "…little in the way of specifics from which an informed evaluation might be drawn re possible probative merit." In order to avoid any misunderstandings on CSIS's part about Jardine's request for access to its materials, Jardine drafted a letter to the RCMP, which was passed to CSIS on the same day. The letter noted that CSIS did not appear to appreciate the "…directness and specificity" of the AG BC concerns. Jardine asked to receive raw materials about all CSIS surveillance and intercepts, indicating that the Crown could not specifically point to a particular tape or conversation as being relevant without knowing details of the surveillance and intercepts, and that CSIS itself, not being aware of the details of the Narita investigation, could not possibly determine the relevance of the material. The CSIS raw materials, Jardine

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809 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5816-5820.
810 Exhibit P-101 CAA0563.
811 Exhibit P-101 CAA0553, pp. 3-4.
812 Testimony of James Warren, vol. 48, September 19, 2007, p. 5845.
813 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5716-5717.

noted, would be used by the AG BC to determine the relevance of the CSIS intelligence as evidence. Jardine stated pointedly that the Attorney General of BC had requested to be fully briefed by October 2nd in order to decide whether to contact the Solicitor General of Canada directly to obtain "the evidence."[814]

In that same letter, Jardine went on to state that, with respect to "…the issue of destruction of evidence," it was clear that the Crown could face an abuse of process attack and therefore needed to know which tapes had been destroyed, when, why, under whose direction and pursuant to which policy, as well as which tapes still existed. Finally, Jardine noted that the Deputy Attorney General of BC had received assurances from the Deputy Solicitor General of Canada that CSIS "…would provide absolute cooperation and full exchange of documents and information in this case."[815]

After transmitting Jardine's letter to CSIS, the RCMP E Division wrote to RCMP HQ:

> It is clear that Jardine and senior staff of A.G.'s office including the Attorney General himself are distraught at apparent inability or unwillingness of CSIS HQ to respond to the specific questions raised by him through us, approximately 1 and ½ years ago.[816]

Jardine explained in testimony that the matter was becoming urgent, as Canada was having discussions with Japanese authorities to release some of the physical evidence, and charge approval decisions could not be made by the AG BC without knowing whether there would be access to the CSIS evidence.[817]

On October 1, 1987, the Honourable James Kelleher, the Solicitor General of Canada, wrote to RCMP Commissioner Norman Inkster to advise that he had been made aware of Jardine's letter about obtaining the CSIS materials. The Solicitor General explained that he anticipated being contacted by the Attorney General of British Columbia and that he had requested a full report from the Director of CSIS. He also requested a report from the RCMP about its cooperation with the AG BC and whether there were any requests from the AG BC to which the RCMP was not able to respond fully.[818]

The October 1987 Meetings

Meetings were held in Ottawa to attempt to resolve the issues.[819]

On October 2, 1987, almost 18 months after the initial request by Jardine, a first meeting took place between representatives of the RCMP, CSIS and the

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814 Exhibit P-101 CAF0169, pp. 1-3.
815 Exhibit P-101 CAF0169, p. 3.
816 Exhibit P-101 CAA0567(i).
817 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5719-5720.
818 Exhibit P-101 CAA0572.
819 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5717; See also Exhibit P-101 CAA0567(i).

Solicitor General. The RCMP advised of the nature of Jardine's request, and other participants expressed concern about its scope and the potential for conflict with the *CSIS Act*. The RCMP indicated that Jardine was prepared to add parameters to his requests. The Solicitor General's "bottom line" was that there would continue to be full cooperation within the legal framework. This would require that both the RCMP and CSIS be satisfied that the material was transferred in a manner that addressed all concerns, both safety-related and operational.[820]

A second meeting was held on the same day, this time with Jardine present.[821] The representative from the Solicitor General's office, Ian Glen, began by reaffirming a commitment "…to do anything possible" to ensure a successful prosecution.[822] Jardine explained that he was aware of CSIS's concerns because of his previous experience with the "Squamish Five" case and his discussions with the prosecutor in charge of the Sidhu shooting case. He "…went on to ensure all in attendance that it was not his nor his Minister's intention to destroy CSIS or unduly hamper its operational abilities."[823] Jardine explained in testimony before the Inquiry that concerns had been raised about the AG BC's motivations for "pushing so hard" for the CSIS information, and that he wanted to reassure CSIS. He also wanted to make it clear that the AG BC was only trying to make an informed decision, and that it would treat the CSIS information in keeping with its sensitivity and would not disclose information that CSIS did not want disclosed.[824]

Warren explained in his testimony that he never concluded that Jardine was trying to "…destroy the Service." He did find that Jardine was making his life difficult from time to time, but he understood that he was simply "doing his job."[825] Warren described CSIS's relationship with Jardine. He admitted the meetings with Jardine were not easy, as Jardine was a tough negotiator with whom Warren had differences. Warren understood their different roles: Jardine's job was to prosecute and Warren's job was to help Jardine understand that the Service had the responsibility to continue its own intelligence investigation after the prosecution.

At the meeting, Jardine explained two reasons why obtaining answers to his requests for information was important.[826] The first reason related to the fact that CSIS information had been used in the application for the search warrant that authorized the search of Reyat's home in November 1985. As some of the items seized during the search would be entered into evidence during an eventual prosecution, the Crown wished to avoid a challenge to the warrant in order to ensure that the evidence was admitted. This was particularly problematic because the Information to Obtain, while it referred to CSIS information, did not identify CSIS as the source. This fact could leave the warrant open to an attack

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820 Exhibit P-101 CAA0575(i), p. 1.
821 Exhibit P-101 CAA0575(i), p. 2.
822 Exhibit P-101 CAA0574(i), p. 5, CAA0575(i), p. 5.
823 Exhibit P-101 CAA0575(i), p. 5.
824 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5720-5721.
825 Testimony of James Warren, vol. 48, September 19, 2007, p. 5848.
826 Exhibit P-101 CAA0575(i), pp. 5-7.

by the defence based on an argument that full disclosure was not made to the judicial officer who issued it.[827] At the Inquiry, Jardine explained that this was a matter of some urgency because counsel for Reyat and Parmar, David Gibbons, was already seeking the release of some of the items seized pursuant to the search warrants and, for this purpose, had petitioned the courts for access to the materials supporting the warrant application.[828]

The November Information to Obtain contained information about the Parmar conversations intercepted by CSIS, but was silent on a number of matters. It did not reveal the nature of the CSIS materials reviewed by the RCMP nor the fact that no verbatim transcripts of the tapes existed. It did not disclose that the RCMP investigators had not been permitted to take copies of the CSIS logs containing the notes made about the tapes.[829] Many of these facts had been revealed in the September 19th affidavit in support of the RCMP's application for authorization to intercept private communications.[830] That affidavit was about to be unsealed, and this would have allowed Gibbons to see the difference in the extent of the disclosure made in support of each application and perhaps thereby attack the validity of the search warrant.[831] The fact that the CSIS tapes had been erased was not mentioned in the Information to Obtain, but might now be raised by the defence to challenge the grounds for the search, as the application relied in part on the destroyed materials.

In a presentation he gave at a seminar in 1991, Jardine, who was at that time a private member of the bar and no longer Crown counsel,[832] discussed his concerns about the possible weaknesses of the search warrant.[833] He explained that "…the full, fair, and frank disclosure expected of the Crown in the application for and obtaining of search documents had been frustrated" by the concern for security that was reflected in the RCMP HQ correspondence providing instructions about the language to be used in the Information to Obtain. Jardine was of the view that the manner in which the CSIS information was described did not provide sufficient disclosure to the justice issuing the warrant because it did not provide a "…full description of the nature of the communications referred to." He felt that the warrant could nevertheless remain valid as it related to Reyat, since the rest of the information included in the application provided sufficient grounds for a search. However, according to Jardine, the warrant could not have been upheld as it related to the search of Parmar's home.[834] Had items of interest been found and Parmar been charged, the warrant would have been susceptible to attack and any evidence gathered as a result may have been excluded. Even as it related to Reyat, there was a risk that the correspondence from RCMP HQ

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827 Exhibit P-101 CAA0574(i), p. 3, CAA0575(i), p. 6.
828 See Exhibit P-101 CAA0417, pp. 2-3; Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5721-5722.
829 Exhibit P-201, paras. 46, 48-49, 53.
830 See Exhibit P-101 CAA0324(i); Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
831 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5721-5722.
832 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5769-5770, 5804-5805.
833 Exhibit P-101 CAA0836, pp. 21-37.
834 Exhibit P-101 CAA0836, p. 22.

dictating the language to be used could be viewed as "…a considered attempt to keep the true nature of the information from the judicial officer," hence opening the warrant to attack on the ground that there was an intentional attempt to mislead.[835]

The second reason raised by Jardine at the October 2, 1987 meeting for why the AG BC needed the CSIS information related to the disclosure that had to be made to the defence in advance of the eventual trial and to possible abuse of process arguments that could be raised.[836] Jardine explained that defence counsel would learn through disclosure that the CSIS intercepts had been erased and would argue that they might have proved the innocence of his client. In this context, it was "paramount" to show that the tapes were disposed of in the normal course of events, pursuant to the policies in place, and that, therefore, no deliberate breach of the accused's right to full answer and defence had been committed.[837]

Having explained his need for the information, Jardine then agreed in discussions with CSIS to delineate his requests and restrict them in time.[838] The surveillance and intercept information requested in the end was confined to material related to Parmar, Reyat and a short list of their associates. Information about the Parmar Tapes was requested only for the period from March 27, 1985 to July 1, 1985.[839] It was also understood that any other information held by CSIS that the Service believed might be relevant to the Air India/Narita investigation would be provided.[840] It was agreed that this would be accomplished by providing the information to the RCMP E Division investigators, who would take appropriate steps to "…protect the various interests."[841] The material was to be fully identified before October 19, 1987. Glen indicated that the Solicitor General was concerned about the use that could be made of this information, and it was accordingly agreed that further discussions could be held about that issue once the material was identified and obtained.[842]

Overall, Jardine explained in testimony that he left this meeting with a sense of relief, as he had understood from Glen that there would be full cooperation. He advised his Attorney General accordingly. He testified, however, that these hopes did not materialize.[843]

On October 19, 1987, CSIS provided materials to the RCMP about Parmar, Reyat and their associates as agreed during the October 2nd meeting. CSIS specified in the cover letter that, in line with what the Service had understood was agreed to during the October 2nd meeting, the information was provided as investigative

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835 Exhibit P-101 CAA0836, p. 23. This argument was made by Reyat during the Air India trial in 2002, but Justice Josephson rejected it: See Section 4.4.2 (Post-bombing), The Air India Trial.
836 Exhibit P-101 CAA0574(i), p. 3, CAA0575(i), p. 6.
837 Exhibit P-101 CAA0575(i), pp. 6-7.
838 Exhibit P-101 CAA0574(i), pp. 1-2, CAA0575(i), pp. 7-8.
839 Exhibit P-101 CAA0575(i), pp. 7-9.
840 Exhibit P-101 CAA0577, p. 2.
841 Exhibit P-101 CAA0575(i), p. 8.
842 Exhibit P-101 CAA0574(i), pp. 5-6, CAA0575(i), p. 8.
843 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5723.

leads only, and that any use Jardine wished to make of the materials for judicial authorizations or as evidence would have to receive prior approval from CSIS. CSIS also provided information in response to some of Jardine's questions about the destruction of intercept tapes, outlining that since the Service was "…not mandated to collect evidence nor are its members peace officers," the intercepts were destroyed according to the policy which was, and continued to be, applied at CSIS. Information was provided about the number of tapes recorded and destroyed, and about the retention period provided for in the policy, but CSIS stated that it could not, "…at this late date," determine exactly when any specific tape was erased.[844] CSIS provided information about the process for translating and transcribing the tapes,[845] but denied having received a request to retain the tapes in July 1985.[846] It did provide intercept logs containing the notes made by the transcribers and translators who listened to the Parmar Tapes.

On October 27, 1987, Jardine wrote to the RCMP with his comments on the recently received CSIS materials. He outlined many of the issues about the Parmar Tapes that, in his view, still remained outstanding, in particular: the manner in which they were translated, the manner in which decisions were made to destroy them, and the timing of their destruction. He noted that some of the questions set out in his March 1986 letter were still not answered. He also pointed out that pages were missing from the translation notes and translators' notebooks, and that "…in some instances the sanitization has destroyed the context of conversations." He requested that CSIS provide the full text of the conversations and suggested that, if the issue could not be resolved, another meeting with Glen might be necessary. Jardine asked when specific conversations of interest were translated, when the tapes were erased and when the determination was made that they contained no significant information to incriminate a target in subversive activity (the threshold which, according to the policy applied by CSIS at the time, would have required that the tapes be retained).[847] Jardine noted that, while CSIS was an intelligence-oriented agency, "…the facts indicated they had evidence from which the intentions of Parmar, Reyat and others could be inferred." He explained that it was likely that an abuse of process argument would be raised, and that in this context, issues of competence, negligence or bad faith would have to be investigated. For this reason, full particulars would be needed for each tape, particularly since some of the tapes that had been destroyed recorded conversations which were used in RCMP applications for search warrants and intercepts, indicating that they contained evidence which could have been led in Reyat's case.[848]

The RCMP met with Jardine on October 28th to discuss the CSIS materials and the outstanding issues. C/Supt. Frank Palmer, the Officer in Charge of Federal Operations in E Division, felt that the information provided by CSIS had failed to comply with the RCMP request and was "most unsatisfactory."[849]

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844 Exhibit P-101 CAA0581, p. 2.
845 Exhibit P-101 CAA0581, pp. 3-5.
846 See Section 4.3.1 (Post-bombing), Tape Erasure.
847 Exhibit P-101 CAF0170, pp. 1-4; See Section 4.3.1 (Post-bombing), Tape Erasure.
848 Exhibit P-101 CAF0170, pp. 4-6.
849 Exhibit P-101 CAA0584, p. 1.

Continuing Discussions Regarding Jardine's Requests

On November 3, 1987, C/Supt. Palmer wrote to CSIS to express his concerns and to pass on Jardine's October 27th enquiries.[850]

On November 30, 1987, CSIS responded with a letter providing additional details about the Parmar Tapes. Warren, who authored the letter, provided information about the total number of tapes recorded and destroyed, correcting an earlier estimate sent in the October 19th letter. Where possible, he included information about the dates of translation and transcription, as well as about the processing of the backlog of 80 to 85 tapes, which were only reviewed in the fall of 1985. He reiterated that CSIS was unable to provide information about the dates of erasure by interviewing its personnel or consulting its records, other than to state that the tapes were kept between 10 and 30 days, according to policy. Warren noted that erasing the tapes was important in view of the *CSIS Act* which only empowered the Service to collect information "…to the extent strictly necessary." He provided explanations about the briefings and instructions received by the translators, and about the determination of whether conversations contained information to significantly incriminate a target in subversive activity, which he stated was made by the investigators, the HQ analysts and their supervisors. The letter also provided specific details about the Parmar intercepts, including the fact that the transcriber was on leave during the week of the bombings, and admitted that there were areas where CSIS could not answer "with precision," including every date of erasure, translation or transcription and the total number of backlogged tapes.[851]

Warren denied that pages were left out of the transcribers' and translators' notes, except for two pages overlooked in photocopying, or that the materials were sanitized, indicating that the notes provided contained the conversations exactly as set down by the translators and transcribers at the time. He reiterated CSIS's intention to cooperate fully with the AG BC and assured that there was nothing that CSIS was "…deliberately withholding or failing to disclose that we know or even suspect may be relevant to this case." Warren then added that there was not only one, but two public interests at stake in this case: the administration of justice and the protection of national security. Raising the stakes somewhat, he pointed out that courts had shown a willingness in the past to curtail the extent of disclosure necessary in order to protect national security secrets, and that he was counting on the RCMP's cooperation and assistance in balancing the conflicting interests.[852]

The CSIS response was transmitted to Jardine,[853] who then wrote to the RCMP on December 11, 1987 with more questions for CSIS. Jardine indicated that he had analyzed the CSIS information and that some of the questions posed in his October 1987 correspondence still remained unanswered.[854] He noted

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850 Exhibit P-101 CAA0589(i).
851 Exhibit P-101 CAA0595(i), pp. 1-4.
852 Exhibit P-101 CAA0595(i), pp. 5-6.
853 Exhibit P-101 CAA0602.
854 Exhibit P-101 CAF0189.

that it was necessary, in light of the potential abuse of process argument, to find out who had made the determination that there was no "…information to significantly incriminate a target in subversive activity" on the Parmar Tapes, and to know when that determination was made, adding that the person responsible would have to be interviewed and would have to testify.[855] In light of the concerns raised by Warren about national security secrets, Jardine also asked that CSIS be approached to find out its position with respect to any objections to disclosure of information under the *Canada Evidence Act*, as the issue needed to be addressed before charges were laid against Reyat in order for the AG BC to properly assess the proposed prosecution.[856]

At the Inquiry, Jardine explained that the November 30th CSIS letter was perplexing to him in many respects. First, the information earlier provided about the total number of tapes collected by CSIS was corrected and a different number was now provided. Second, the Service still could not provide exact information about the dates of erasure of the tapes, but did confirm that there was a backlog of tapes which had been erased in the fall of 1985. Jardine explained that, at that stage, the prosecution team needed to obtain information about the dates of erasure in order to respond to the anticipated abuse of process argument, and needed to understand why there was a backlog and why the tapes were erased in the fall after Parmar and Reyat were already targeted in the Air India investigation. The prosecutors felt that if the erasure had been done before the end of July 1985, it would most likely have been done pursuant to policy and not because CSIS failed to identify significant subversive activity. However, after that time, when a clear connection between Parmar and Reyat was beginning to emerge, the prosecution's case that the erasure was not an abuse of process would be more difficult to make.[857]

Warren commented on Jardine's two concerns at the Inquiry.[858] He testified that he was "very chagrined" about BC Region's error in the initial estimate of the total number of tapes collected. He anticipated that Jardine, who had already expressed suspicions that CSIS was not being totally forthcoming, would interpret this necessary correction as reinforcement of these suspicions. Warren admitted that due to a lack of records, there could never be complete certainty about the number of tapes collected nor their processing. However, he justified the lack of records on the basis that once an intercept was processed, CSIS assumed that the intelligence information had been extracted and that there was no further use for the raw intercept tape.

Jardine commented further on the CSIS letter, testifying that it provided information about the Parmar Tapes that was "…in effect, third party,"[859] meaning that it contained a clause stipulating that the information could not be further disclosed or used as evidence without CSIS's consent.[860] To Jardine, this signaled

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855 Exhibit P-101 CAF0189.
856 Exhibit P-101 CAF0189.
857 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5725-5727.
858 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5854-5855, 5859-5861.
859 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5728.
860 See Exhibit P-101 CAA0595(i), p. 6.

an assertion that CSIS viewed the national security interest as outweighing the needs of the prosecution, and that he was not going to be able to use the information in the prosecution.[861]

On December 15, 1987, Roger McMeans, who was assisting Jardine with the preparation for the Reyat prosecution, wrote a memorandum explaining why the Crown needed access to information about the CSIS tapes and why it needed to be able to disclose the information to the defence and to use it in Court. He noted that, because the Parmar Tapes were erased, both evidence that could have assisted in the prosecution of Reyat and evidence that could have assisted the defence might have been lost. The only remaining trace of the conversations was in the translator and transcriber notes, which McMeans described as "sketchy" and, most importantly, as specifically not covering innocuous conversations consistent with the innocence or non-involvement of Parmar or others, since it was not the purpose of the CSIS operations to gather this type of intelligence. As a result, the destruction of the tapes opened the door to an abuse of process argument by the defence or to a motion for a stay of proceedings on the basis that the unavailability of the evidence breached the rules of fundamental justice. From a review of the applicable law, McMeans concluded that, in order to respond to such arguments, the Crown would have to show that the tape erasure was done innocently, with no ulterior purpose to deprive the accused of the right to full answer and defence and with no intention to "…bury evidence of a badly conducted investigation." This required knowledge of who ordered destruction (or failed to order retention), when and why.[862]

Further, since the issue of the impact of erasure had to be determined by the Court and not by the Crown, this meant that the Crown would have to disclose to the defence the facts known to it about the CSIS erasure. If CSIS were to prevent this disclosure, the prosecution could not go ahead with the Crown having knowledge of a possible defence and withholding it, since this would breach the prosecutors' ethical obligations and duty to act fairly. If CSIS allowed disclosure to the defence, but then invoked the *Canada Evidence Act* to object to the presentation of evidence on the issue, this could also lead to a stay of proceedings. It was therefore necessary for the Crown to obtain complete information about the CSIS tape erasure and to know what information the Crown would be allowed to disclose to the defence and to use in Court. McMeans noted that, should CSIS refuse to allow the information to be disclosed to the defence, the AG BC's intentions at the time were nevertheless to proceed with the laying of the charges, and then to bring a motion "…to cause CSIS to disclose this information."[863]

In testimony before the Inquiry, Jardine explained that the question of whether the destruction of the tapes was done inadvertently and in good faith remained central to the prosecutors' understanding "…of whether it was proper for us

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861 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5728.
862 Exhibit P-101 CAF0171, pp. 1-7, 10.
863 Exhibit P-101 CAF0171, pp. 8-10.

to proceed with a criminal prosecution against Mr. Reyat." He added that the questions that were being asked by the AG BC were aimed at understanding whether the prosecution could comply with its duties and responsibilities to provide disclosure to the defence.[864]

The Officer in Charge (OIC) of Special Projects at RCMP HQ relayed Jardine's concerns about the responses received from CSIS to the RCMP Deputy Commissioner of Operations, in preparation for a meeting between the RCMP Commissioner and the CSIS Director on December 18, 1987, suggesting that the issues could be addressed by the RCMP Commissioner. He explained that one of the issues that would soon arise out of Jardine's efforts would be the need to find out who had made the decision that there was no information to significantly incriminate a target on the Parmar Tapes, and when that decision was made. Most importantly, the possibility of CSIS making an objection to the disclosure of its information, as hinted at in Warren's latest correspondence, was of concern. In this respect, the OIC noted that "…Jardine cannot in good conscience proceed with a direct indictment if he knows this is what CSIS may well do which in effect would conceivably scuttle the prosecution."[865] In testimony, Jardine explained that he needed to advise his Attorney General about the possibility of preferring a direct indictment (thereby taking the case directly to trial in the Superior Court without a preliminary inquiry), and that the Attorney General "…wanted to know whether or not he was going to be on solid ground if he was going to sign an indictment." Jardine explained that, at the time, the Japanese had indicated that they were willing to release the Narita evidence and that, as a result, the AG BC's office anticipated that they would be able to proceed with charges against Reyat if they received an assurance from CSIS that the full cooperation that had been promised by Glen at the October 1987 meeting would be forthcoming.[866]

On December 18, 1987, C/Supt. Frank Palmer wrote to Warren at CSIS HQ to seek further clarifications on behalf of Jardine. He first asked exactly who had made the determination that there was no information that would significantly incriminate a target in subversive activity on the Parmar Tapes, and when, noting that this person would have to be interviewed in order to determine his or her potential testimony. About the issue of possible objections by CSIS to disclosure of its information under the *Canada Evidence Act*, which had been specifically raised in CSIS's most recent letter, Palmer explained that, though Jardine and the RCMP would request permission prior to using CSIS information, Jardine needed to know whether he could proceed on the assumption that the information disclosed to him could be used as evidence and, if not, what specific information would be protected by CSIS. As Jardine was to seek approval to proceed with a criminal charge, he needed to know whether he would be able to use the CSIS information in his possession, since the whole exercise might prove to be futile if it turned out that he could not use the information. Palmer therefore requested that the questions posed "…be answered forthrightly and conclusively" by CSIS.[867]

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864 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5731.
865 Exhibit P-101 CAA0606, pp. 1-2.
866 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5731-5734.
867 Exhibit P-101 CAA0612(i), pp. 2-4.

R.H. Bennett, who had recently taken over as DG CT, since Warren had assumed the role of Assistant Deputy Director, Operations, provided a response on behalf of CSIS on December 24, 1987. He explained that CSIS would continue to cooperate, but that the Service simply could not give Jardine "carte blanche" to use all CSIS information as evidence. He stated that CSIS retained the right to object to disclosure and would seek ministerial guidance as soon as Jardine had identified the specific information he wanted to use as evidence. Bennett also indicated that CSIS was prepared to identify the person who had made the determination that there was no significant information to incriminate a target in subversive activity on the Parmar Tapes, and had requested the advice of its BC Region for this purpose.[868]

Warren testified that, at that time, CSIS knew that the needs of the prosecution were paramount to CSIS's own interests, and thus, it would not have objected to disclosure of its information under the *Canada Evidence Act* to frustrate the Crown.[869] However, CSIS did want to preserve the option of using the Canada *Evidence Act* protection to prevent a "fishing expedition" by the defence. For example, if the Crown agreed to allow CSIS personnel to testify behind a screen but the defence objected, Warren noted that CSIS might have considered the use of *Canada Evidence Act* protection to thwart the defence objection only. The official positions taken by CSIS in the early stages of the discussions, including in Warren's own November 30, 1987 letter, which raised a "distinct possibility" of CSIS making an objection to disclosure,[870] did not clarify the limited scope of the objections that CSIS in fact intended to make.

After reviewing the December 24, 1987 CSIS response, Jardine advised the RCMP that he could not pinpoint the pieces of information required for court, as it would be for the defence to decide "…what issues it wishes to make of the destroyed evidence." Further, some CSIS methodology would necessarily have to be revealed in order to make a "good faith" argument. At the time, Jardine had received instructions from his Assistant Deputy Minister to present a motion to the Court for full disclosure of the CSIS information if it was not forthcoming voluntarily.[871] Discussions were held between CSIS and the RCMP to arrange a meeting between Jardine, the senior RCMP officers involved and the CSIS HQ executives in charge.[872] The Solicitor General's office was favorable to such a meeting and there was a possibility that it would send a representative.[873]

The Assistant Deputy Solicitor General, Ian Glen, met with CSIS on December 31, 1987, to discuss the Service's concerns about Jardine's requests. Glen assured CSIS that the Minister would not "…take an all or nothing stance on the issue of disclosure of CSIS information" and that he was quite sensitive to concerns for the safety and security of individuals and their families. Glen had discussions

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868 Exhibit P-101 CAA0618, pp. 1-2.
869 Testimony of James Warren, vol. 48, September 19, 2007, p. 5872.
870 Exhibit P-101 CAA0606, p. 2.
871 Exhibit P-101 CAF0190, pp. 1-2.
872 Exhibit P-101 CAA0617, CAA0622.
873 Exhibit P-101 CAA0617.

with Jardine and indicated that some information would not be available for trial. Glen felt that a motion from the AG BC for disclosure of the CSIS information could be avoided as a result of the planned meeting between CSIS, Jardine and the RCMP. He urged all parties to meet in order to see how CSIS could satisfy the prosecution's needs without providing a "blank cheque" to use all of its information.[874]

The January 1988 Meeting

On January 4, 1988, a meeting was held in Vancouver between Jardine and his colleague McMeans, on behalf of the AG BC; Bennett and Joe Wickie, on behalf of CSIS; Palmer, Insp. Terry Hart, Sgt. Robert Wall and Cst. O'Connor, on behalf of the RCMP; and Harry Wruck and Dan Murphy, Department of Justice (DOJ) counsel for CSIS.[875]

Jardine indicated that he was "…not prepared to state categorically that he has now received all 'relevant' materials from CSIS," given the discrepancies in some of the materials reviewed.[876] At the Inquiry, Jardine explained that, not only were there discrepancies in the material provided, but that he had only received a summary instead of statements from the persons involved, and hence could not acknowledge that he had received everything.[877] As a result, Jardine stated at the meeting that if the defence claimed that CSIS had further information which was not being made available, he would not be able to deny it. Bennett asked if the RCMP felt that CSIS was holding back material. Wall indicated that, since he did not know what CSIS had available, he would not say the RCMP had received everything. This prompted Bennett to ask what CSIS could do to assure the RCMP that the Service had provided everything, and to ask whether there were specific files the Force wanted to see. The RCMP did not request to review specific files for the time being.[878]

Bennett reiterated the CSIS position that the Service could not grant "carte blanche" access to its materials, and requested copies of all documents passed to the RCMP on Air India in the past. Jardine explained that it was not possible to predict exactly what materials the defence would/could ask for, but that he anticipated that the areas pursued would relate to: the gap in physical surveillance on Parmar at the time of the bombing; the intercepted conversation about Reyat's bow and arrows; CSIS's knowledge of code words in the intercepted conversation; and, most importantly, the erasure of the Parmar Tapes. He added that, at trial, the Crown would be seen to represent both CSIS and the RCMP, and would have to answer the defence attack that CSIS was selective in the material it kept, or that it intentionally destroyed evidence relevant to the defence. Bennett and Jardine discussed the issue of tape erasure and Jardine stressed that, as it was already in the public domain, it could not be avoided and had to be dealt with up front.[879]

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874 Exhibit P-101 CAF0009, pp. 1-3.
875 Exhibit P-101 CAF0172.
876 Exhibit P-101 CAF0172, p. 2.
877 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5735-5736.
878 Exhibit P-101 CAF0172, pp. 4, 8.
879 Exhibit P-101 CAF0172, pp. 1-3.

Bennett stated categorically that CSIS would simply not allow disclosure of certain facts, including the names of the translators and documents identifying human sources or cooperating community members. Jardine explained that the Crown would not present the intercept notes or logs in evidence, but might want to call the translators to testify in response to an abuse of process motion, as they were the only ones who could explain their notes about the tapes. Bennett reiterated that CSIS would not identify translators, but would make supervisors available.[880] At the Inquiry hearings, Warren testified that Bennett's strong position was a "bluff," and that it did not reflect the policy of the Service at the time. Warren reiterated that, as per Archie Barr's direction in the spring of 1987, CSIS was committed to cooperating to ensure a successful prosecution and certainly would not have taken a national security certificate against the Crown.[881]

At the January 4, 1988 meeting, Jardine explained that the destruction of the tapes that took place after the crash, at a time when CSIS was fully aware of the RCMP investigation, would be analyzed differently from the erasures done prior to the bombing. Bennett indicated that CSIS had not been officially requested by the RCMP to retain the tapes and had never been provided with materials that convinced the Service that there was significant information on the tapes, and that the lack of such information was the reason they were destroyed in accordance with CSIS policy.[882] Bennett expressed concern about the language used by Jardine and the RCMP to describe the erasure of the Parmar Tapes:

> Bennett states that his people are quite concerned about RCMP references in letters that CSIS "destroyed evidence." CSIS feel this is not accurate and puts them into a bad position for future civil proceedings. He requests that we [the RCMP] refrain from using reference to destruction of evidence in future correspondence.[883]

Bennett indicated that, while the Service did erase tapes, they did not contain evidence of a specific crime and CSIS considered they were not significant to its inquiries. Jardine disagreed. He felt that evidence was in fact erased by CSIS, either intentionally or not, as the tapes of conversations with Reyat and others around the time of the bombing would be relevant as evidence of association. Jardine added that "…we will never know if 'evidence' was destroyed," but that he felt that it was. CSIS counsel requested to be present when the RCMP interviewed CSIS employees involved in decisions about the Parmar Tapes.[884]

At the conclusion of the January 4th meeting, Jardine requested a letter from CSIS as soon as possible advising of exactly what material would be exempt

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880 Exhibit P-101 CAF0172, pp. 4-5.
881 Testimony of James Warren, vol. 48, September 19, 2007, p. 5880.
882 Exhibit P-101 CAF0172, pp. 5-6.
883 Exhibit P-101 CAF0172, p. 8.
884 Exhibit P-101 CAF0172, pp. 7-8.

from disclosure.[885] Overall, Jardine explained in testimony that his recollection of this meeting was that it was simply one where he had to explain again the type of argument the defence was anticipated to make at trial. At the end of the discussions on that day, Jardine testified that there was still no "meeting of minds" or agreement between CSIS and the police and prosecution about the next steps.[886]

The CSIS Policy Review

While the discussions about disclosure of CSIS information in the Reyat prosecution continued, there was a growing recognition within the Service that efforts needed to be made to avoid the "intelligence into evidence" conundrum that had arisen in the Air India case.[887]CSIS was interested in looking for ways to help the police, while providing the fullest protections possible to CSIS information. On January 9, 1988, Warren sent a letter internally within CSIS stating that the CSIS Director, after consultation with the Deputy Solicitor General, had called for a policy review with respect to the handling of electronic intercepts. Warren emphasized that the review did not signify a fundamental change in CSIS's tape retention policy, but rather that it was intended to come to grips with the reality that the Service, from time to time, would be seized with information of potential probative value in a criminal investigation.[888]

Warren testified that the review allowed the Service to consider how it might have handled things differently, and what could be done to mitigate the damage that inevitably occurs when CSIS intelligence is required as evidence in an open court. Effectively, CSIS was looking for a way to "flip a switch" for information relating to criminal matters, to enter into an information-retention mode that complied with rules governing continuity of evidence, while minimizing the number of CSIS employees who could be potentially identified publicly.[889]

Receipt of CSIS Materials and Ongoing Debates

On January 28, 1988, the AG BC signed an indictment charging Reyat with two counts of manslaughter and six counts of acquisition, possession and use of explosive substances in connection with the Narita bombing.[890] Shortly afterward, the indictment was filed in Court. The RCMP travelled to England, where Reyat had been living, to interview him, following his arrest by British authorities at Canada's request. Proceedings then began for Reyat's rendition to Canada to stand trial for the Narita bombing.[891]

On March 29, 1988, CSIS provided the RCMP with a package of its materials identifying the portions for which there would be disclosure objections by CSIS and setting out the reasons for those objections. Another copy was provided

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885 Exhibit P-101 CAF0172, p. 9.
886 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5737-5739.
887 Testimony of James Warren, vol. 48, September 19, 2007, p. 5874.
888 Exhibit P-101 CAF0264.
889 Testimony of James Warren, vol. 48, September 19, 2007, pp. 5874-5875.
890 Exhibit P-101 CAF0218, p. 1; *R. v. Reyat*, 1991 CanLII 1371 (BC S.C.).
891 Exhibit P-101 CAF0218, p. 1; See also Testimony of James Jardine, vol. 47, September 18, 2007, p. 5743.

with the passages blacked out for use in court or for disclosure to the defence. Further, CSIS asked to be advised if any of the material it planned to refuse to disclose was seen as vital to a successful prosecution or essential for disclosure purposes, as CSIS would be willing to reconsider its objections on a case-by-case basis in such an event. About the erasure of the Parmar Tapes, CSIS noted that the names of three members involved in the handling of the intercepts had already been provided, and that the RCMP could also interview Wickie of the BC Region to find out about CSIS operations and policies on the destruction and retention of intercepts.[892]

On April 25, 1988, Jardine drafted a memorandum outlining his impressions after reviewing the CSIS materials. He reviewed many of the intercepted conversations that tended to show Parmar's involvement in a conspiracy, and pointed out the numerous conversations with Reyat that were recorded in the notes, particularly around the time of the Duncan Blast. Jardine expressed concern about the fact that there was no exact translation of the initial material, the consequence being that a proper analysis of the information was not possible at the time that the determination of whether the intercepts contained information about significant subversive activity was made. Most importantly, he was concerned that many of the conversations were actually erased in September 1985, after the bombing and after it was known that Reyat had purchased a tuner that could tie him to the Narita crime scene. Since the intercepts appeared to contain material that went beyond simply raising suspicion about Parmar's involvement in a conspiracy, Jardine felt that the defence would ask when the tapes were destroyed, at whose direction and "…how can the Crown argue good faith destruction when all of this information was available to review by the Canadian Security Intelligence Service by the second week of September 1985?" According to Jardine, the defence would also argue that any investigator, in the interest of accurate information and given the totality of the information available, would have wanted to know the exact words spoken in the conversations recorded.[893]

Shortly after, McMeans wrote a supplementary memorandum containing further observations about the problems raised by the CSIS materials. He noted that, given that the defence would most likely raise the point that the destruction of the CSIS tapes prevented the accused from making full answer and defence, evidence would have to be heard about CSIS procedures, and CSIS witnesses would have to testify. Once it heard this evidence, the Court would have to "…ascribe a reason for the destruction of this evidence which will range from incompetence and negligence to possibly a finding of a cover-up attempted by CSIS."[894] McMeans then went on to examine the information that was available to CSIS in order to anticipate the possible conclusions the Court could draw about the tape erasure. He noted that CSIS was already aware of significant information prior to the bombing, and that, after the bombing, the Service learned of important facts that should have alerted it to the possible need to retain at least some of the Parmar intercepts:

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892 Exhibit P-101 CAA0637, pp. 1, 3.
893 Exhibit P-101 CAF0173, pp. 1-9.
894 Exhibit P-101 CAF0174, pp. 1-2, 7.

> By August 22, 1985 CSIS should know that Parmar, a militant terrorist leader of the B.K., who is expected to conduct a terrorist act against an Indian interest, is acting on a highly secret project. He is scheming and apparently conspiring, taking great pains to ensure his conversations with other radical Sikhs cannot be intercepted. He attends Duncan June 4 to view a test explosion conducted by another radical Sikh, Reyat. Reyat has sought dynamite and fuses to help his countrymen. On June 22, Air India and Narita explosions occur. Very quickly these are attributed to Sikh extremists because of the L. Singh and M. Singh tickets. Fragments of a Sanyo Tuner and can of liquid fire are found at the Narita explosion site. Reyat purchased the same model of tuner the day after the test explosion. The company Reyat works for distributes liquid fire. 'E' Division identified Reyat and Johal [whose suspicious conversations with Parmar in the days preceding the bombing had been intercepted] as suspects.[895]

McMeans concluded that it was therefore possible that the Court would rule that CSIS should have retained its intercepts after the bombing, and was absolutely required by legislation and common sense to retain them after August 22nd (the date on which CSIS was advised of all of the information gathered by the RCMP that pointed to Parmar's and Reyat's involvement in the bombing), which made the issue of the exact date when tapes were translated and erased particularly relevant. Since CSIS refused to make its translators available as witnesses, McMeans wondered how these facts could be proven, and concluded that it would assist the prosecution if CSIS could provide "…some answers relating to the dates the tapes were ordered not to be retained."[896]

Jardine explained in testimony that, at this stage of the proceedings, in the spring of 1988, there was still information which he anticipated would be required for trial, and that had not been provided by CSIS.[897]

On May 3, 1988, Jardine wrote to the RCMP to request that the Force again approach CSIS to obtain answers to the outstanding questions. In particular, Jardine asked who in the chain of command at CSIS determined that there was no "…information to significantly incriminate a target in subversive activity" on the Parmar Tapes and therefore failed to retain the tapes; who had authority to make that determination; and when the determination was made. Jardine noted that the questions had already been asked in a December 1987 letter, and that the AG BC's intention was not "…to embarrass or to conduct a witch hunt," but rather that the issue of CSIS's "good faith" required answers. He indicated that the two investigators CSIS had made available for RCMP interviews had not been the persons who had made the determination and were not even

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895 Exhibit P-101 CAF0174, p. 7.
896 Exhibit P-101 CAF0174, pp. 8-9.
897 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5741-5742, 5746-5747.

aware of the term "…significant subversive activity." He added that Wickie, the BC Region DDG of Services, who supervised the individual in charge of technical operations relating to intercept warrants and to the processing of the tapes, had told the RCMP investigators that the tapes were erased pursuant to policy; that five persons were involved in the determination; and that he would have to "… deal with Ottawa" before revealing their identities. As a result, Jardine requested that CSIS be asked to determine who was involved and to provide statements from these individuals.[898]

On May 4, 1988, during a meeting between CSIS and RCMP HQ representatives, CSIS members voiced the concern that some of the material provided to the RCMP for possible evidence or disclosure in the pending Reyat trial "…had no relevance to the prosecution and should not be disclosed."[899]

On May 16, 1988, Palmer transmitted Jardine's May 3rd letter to the CSIS BC Region, emphasizing that answers to Jardine's questions were necessary because the issue would most likely be raised at trial and the prosecution needed to know the answers in advance and be able to produce witnesses to explain the facts.[900]

On June 9, 1988, the BC Region transmitted an interim response from CSIS HQ, which identified some of the CSIS members involved in the decisions surrounding the Parmar Tapes,[901] and, on June 15, 1988, an official letter from CSIS HQ was provided. The letter reported the results of interviews conducted by CSIS HQ personnel with three CSIS BC Region members, Jim Francis, Bob Smith and Ken Osborne, who were part of the chain of command of individuals who would have been in a position to order the retention of some or all of the Parmar Tapes. An explanation was added specifying that tape retention was "…not a common practice within the Service" and that the opinion of senior managers would therefore have been sought if this step had been considered for the Parmar Tapes. The letter also specified that, while CSIS HQ would have had the authority to request the retention of some of the tapes, in this case it did not do so, and the BC Region "…was in the best position to make that determination bearing in mind they had access to the raw product and the translators for clarification."[902] Finally, in answer to Jardine's question about the time when the determination to erase the Parmar Tapes was made, CSIS HQ explained that the process of erasure was automatic and ongoing, with the determination also being an "…ongoing daily process" as information was brought to the attention of the members involved.[903]

On June 14, 1988, having received the interim response from CSIS, Jardine again wrote to the RCMP, indicating that the "…CSIS reply does not answer the questions."[904] Jardine noted:

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898 Exhibit P-101 CAA0643, pp. 1-3.
899 Exhibit P-101 CAA0645.
900 Exhibit P-101 CAA0646.
901 Exhibit P-101 CAA0649.
902 Exhibit P-101 CAA0654, p. 3.
903 Exhibit P-101 CAA0643, p. 4.
904 Exhibit P-101 CAF0175.

> The general references to policy do not indicate whether J. S. Francis, R. W. Smith or K.G. Osborne determined there was no significant subversive activity. Francis points to Smith, Smith says he was not aware of anything significant, Osborne says nothing was brought to his attention by Smith, which would warrant retention. Who is going to testify about this?[905]

Jardine appeared exasperated by the difficulty in obtaining clear answers from CSIS. He indicated: "…if no one can answer then please tell us no one can answer." He noted that the person who would testify on behalf of CSIS would have to be prepared to say when the material was destroyed and who made that determination. He proposed a different formulation of his questions to see if answers could be obtained, drawing attention to: the issue of who was coordinating and analyzing the Sikh information; whether the material was ever "…analyzed by that person with the total picture (translations) known"; and whether a complete analysis was done by the Sikh Desk after the Air India bombing, since tapes were still in existence as a result of the backlog. Jardine explained that an early response was required, since the extradition hearing for Reyat was to commence in July 1988, and the defence might raise the tape erasure issue there. Jardine requested that CSIS be asked "…again whether they can answer the questions posed" and, if not, who the witness would be to testify on behalf of CSIS that the questions could not be answered.[906] The RCMP transmitted Jardine's letter to CSIS on June 20, 1988.[907]

Meanwhile, CSIS HQ personnel met with CSIS legal counsel Harry Wruck on June 14, 1988. Wruck stated that, in his opinion, Jardine's hope was that CSIS would admit that it was an error not to retain the Parmar Tapes which were still in existence after the bombing. Wruck explained that, if CSIS did not admit a mistake, Jardine hoped that the Court would find that one was made, since the alternative, in Jardine's view, was that "…the Court will find that CSIS willfully destroyed evidence that would clear the defendant through an abuse of process."[908]

On June 22, 1988, Bennett wrote to Wruck in response to several questions that had been raised about the Parmar Tapes in early May 1988. Bennett's responses set out familiar CSIS themes, focusing on the differences between CSIS's mandate as an intelligence agency and the way that law enforcement agencies worked. In response to why CSIS had not seen fit to retain information and tapes falling within its own mandate of political threats, Bennett wrote that, for CSIS's purposes, retention requirements are met by retaining translators' notes, verbatim transcripts and/or final reports compiled from the transcripts.[909] Bennett pointed out that the conditions under which CSIS was operating

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905 Exhibit P-101 CAF0175, p. 1.
906 Exhibit P-101 CAF0175, pp. 1-2.
907 Exhibit P-101 CAA0656(i).
908 Exhibit P-101 CAD0121, p. 1.
909 Exhibit P-101 CAD0124, p. 4.

immediately after the Air India and Narita bombings had to be borne in mind. He noted that Parliament, following the recommendations of the McDonald Commission, had decided to separate security intelligence work from criminal investigations. CSIS information was to be used as intelligence only. He specifically cited the SIT Group instruction issued by Archie Barr in April 1984 that called for the removal of all facilities on CSIS premises for the collection of information for evidentiary purposes as proof of CSIS's "intelligence only" mandate. Notably, the authority of Barr's memorandum was later challenged by the Solicitor General's office, which raised doubts that a decision of the SIT Group could be used to modify a Ministerial direction.[910] While this challenge called into question the basis upon which CSIS justified the Parmar Tape erasures, it does not appear that Jardine was notified.

On June 23, 1988, Bennett provided answers to Jardine's latest questions.[911] He described the functions of those responsible for coordinating and analyzing the Sikh information, and discussed the nature of the ongoing analysis performed from the intelligence reports.[912] He specified that the post-bombing analysis was done on an ongoing basis, and that tapes were not retained for the purpose of performing a complete analysis, as it was thought that this could be done on the basis of the reports. Bennett also reiterated that CSIS could not determine the date of the erasure of the individual Parmar Tapes.[913]

Nevertheless, on June 28, 1988, a chart was transmitted to the RCMP containing a list of approximate dates of erasure based on the dates when the tapes were translated and on the policy of retention for 10 to 30 days.[914] A contemporaneous briefing note to Bennett provides some insight into CSIS thinking at the time. It states that, having granted the RCMP Task Force access to the CSIS personnel who had been involved in the review of the Parmar Tapes at the time of the bombings,[915] CSIS felt that it had "…successfully laid the TAPP policy issue to rest." Despite this, CSIS expected that Jardine would continue to be unsatisfied with the decision to erase the tapes "…as a result of his hindsight review of the intercept logs and reports."[916]

The briefing note did raise a new concern about CSIS's justification for the Parmar Tape erasures. CSIS found a memorandum dated February 18, 1985 from Jacques Jodoin, Director General, Intelligence Communications and Warrants, at the time, which called for retention of tapes when a verbatim was prepared.[917] This instruction was problematic, as the RCMP Task Force members and Jardine had been asserting in their interviews with CSIS personnel that the tapes of certain conversations that had been reported verbatim by CSIS should

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910 Exhibit P-101 CAF0260.
911 Exhibit P-101 CAF0221.
912 Exhibit P-101 CAF0221. See also Exhibit P-101 CAD0126.
913 Exhibit P-101 CAF0221, pp. 3-4.
914 Exhibit P-101 CAA0658.
915 The investigators, David Ayre and Ray Kobzey, and management, J.S. Francis, R.W. Smith and K.G. Osborne.
916 Exhibit P-101 CAA1032, p. 1. The acronym TAPP stands for Technical Aids Policies and Procedures.
917 See Section 4.3.1 (Post-bombing), Tape Erasure.

have been retained. The CSIS BC Region personnel interviewed had disagreed that the conversations met the threshold of "…significant subversive activity," and therefore denied that retention would have been justified. However, the briefing document noted that this position was in direct contradiction with Jodoin's memorandum.[918]

The October 1988 Meeting

On September 7, 1988, Jardine wrote to the RCMP to advise that a decision had been rendered in London providing for Reyat's rendition to Canada to stand trial in the Narita matter. He noted, however, that "…on the CSIS issues, it would appear we have made little or no progress." He therefore requested that a meeting be arranged in Ottawa with the appropriate persons to decide on the next steps, since he felt that the evidence available so far was not credible and would not be found credible by the Court.[919] Jardine noted:

> We are concerned about the possible impact on our case and our position should be predetermined to control the potential damage and minimize its impact on the trial and in the public forum.[920]

The RCMP made arrangements in preparation for the meeting, which was to bring to the table representatives of CSIS, the AG BC, the RCMP and the DOJ.[921] RCMP Deputy Commissioner Henry Jensen initially expressed an interest in being present and requested that senior personnel from CSIS also attend, as in his view, "…the lesser levels are the problem so there is no point in trying to work it out there."[922] In the end, Jensen could not attend,[923] but the meeting proceeded as planned on October 4, 1988, with six CSIS representatives, three RCMP representatives and seven DOJ lawyers, including CSIS counsel and counsel representing the Government in the civil lawsuit launched by the families of the Air India victims.[924] Jardine provided an update on the status of the case and explained the purpose of the meeting. He indicated that, though the cooperation that had followed the October 1987 meeting had allowed him to receive a great deal of information from CSIS, the current situation was one of a lack of communication. He indicated that further dialogue was necessary to preclude "…the continued lack of understanding exhibited by the responses" received from CSIS to recent questions transmitted via the RCMP.[925]

Several issues were discussed and some were resolved, or at least appeared to be. Reyat was expected to be returned to Canada in March 1989, if his appeal on the rendition was not successful. The AG BC had to prepare a package for

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918 Exhibit P-101 CAA1032, pp. 1-2.
919 Exhibit P-101 CAF0176, p. 1.
920 Exhibit P-101 CAF0176, p. 2.
921 Exhibit P-101 CAA0671, CAA0673.
922 Exhibit P-101 CAA0673, p. 2.
923 Exhibit P-101 CAA0676.
924 Exhibit P-101 CAA0707(i), p. 2.
925 Exhibit P-101 CAF0177, pp. 1-2.

disclosure to the defence upon Reyat's return, and Jardine explained the AG BC's policy to disclose "…all relevant material which the accused may use as relevant to a defence or which the accused may use as relevant to the investigation of the investigation." In Reyat's case, the disclosure package would include CSIS information. It was agreed at the meeting that the AG BC would meet with the DOJ counsel in the civil litigation and with CSIS officials to review all of the CSIS materials and prepare a disclosure package that would be provided both to the plaintiffs in the civil litigation and to Reyat in the criminal prosecution.[926]

On the merits of the tape erasure issue, spirited exchanges took place, with CSIS counsel objecting strenuously to the analysis in the memoranda prepared by Jardine and McMeans and maintaining that there was nothing in the intercepted material that connoted "…significant subversive activity." CSIS counsel advised that this would be CSIS's official position and the position taken by CSIS witnesses. The positions of the parties in the civil litigation and the Narita prosecution were discussed, and Jardine pointed out to CSIS counsel that "…a defensive hostile attitude" would be of no assistance to the Crown in the criminal prosecution, to the DOJ in the civil litigation, or to CSIS in the preservation of its public image when the information was revealed publicly.[927] Jardine emphasized the object of the meeting:

> The point of the October 4, 1988, meeting was to establish lines of communication and positive dialogue with a view to developing strategy to lead evidence in the most favourable light in both the criminal and civil cases.[928]

Jardine explained the attacks that the defence was anticipated to make in the Reyat prosecution, noting that, because the erasure of the Parmar Tapes was disclosed on public television in December 1987, when CSIS Director Reid Morden admitted it had taken place, the defence would most likely raise the failure to retain evidence. This would require the Crown to present evidence about the reasons for failing to retain the tapes and the good faith of CSIS throughout the erasure process. This, in turn, would require an examination of the information which was in CSIS's possession at the time.[929]

In the end, it was decided that CSIS's position on whether the translators would testify would have to be the subject of further discussions, as CSIS would take no firm position until the defence position was ascertained. In the meantime, other avenues to avoid the necessity of their testimony would be explored. Explanations were to be provided by CSIS about whether BC Region Director General Randy Claxton had received a request to preserve the Parmar Tapes during a conversation with RCMP Supt. Lyman Henschel shortly after the bombing, as well as about Mel Deschenes's early return from Los Angeles

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926 Exhibit P-101 CAF0177, pp. 3, 9.
927 Exhibit P-101 CAF0177, pp. 4-5, 8.
928 Exhibit P-101 CAF0177, p. 5.
929 Exhibit P-101 CAF0177, pp. 6-7.

immediately before the bombing.[930] Finally, at least six CSIS witnesses would have to testify about the timing and reasons for the erasure of the tapes, but further discussions were to be held once the witnesses were identified.[931]

Overall, Jardine felt at the time that the meeting was successful in that "…the logjam had been broken and much progress had been made." According to him, it was clear from the previous correspondence that the respective positions of the various agencies involved had not been understood in the past.[932]

Immediately after the meeting, Jardine reviewed over 200 pages of CSIS material with DOJ counsel and a CSIS representative. Agreements were reached about some pages, paragraphs and information which would be removed or blacked out in the package that would be provided to the defence.[933] On October 6, 1988, CSIS advised that it would agree to allow the dates of reports to be disclosed, but requested that the page numbering be removed from the package disclosed to the defence, as it would allow Reyat's counsel to see that pages had been removed and would make it more likely that he would request access to this material.[934] In the end, it was agreed that page numbers had to remain because of concerns related to civil disclosure issues.[935] CSIS noted that, like Jardine, the Service felt that the October 4th meeting was "…successful in clearing up certain misunderstandings between the RCMP, CSIS and the B.C. Crown Attorney."[936]

However, though an initial disclosure package was prepared in the fall of 1988 and the winter of 1989,[937] Jardine still did not obtain the complete information he was looking for from CSIS until 1991.[938] Additional information and documents continued to be requested and provided. CSIS advised in late October 1988 that there were errors in its earlier chart of approximate erasure dates for the Parmar Tapes and corrected some of the information.[939] In November 1988, Jardine had to clarify the type of statements he needed from CSIS witnesses, explaining that, to date, the correspondence provided by CSIS had "…generated a corporate response rather than the individual witness statements the prosecution sought." Jardine asked for individual statements about the witnesses' personal knowledge and recollection.[940] In March 1989, Jardine wrote to the RCMP to request that CSIS be reminded about its undertaking to provide these statements, as he had learned from DOJ counsel that statements were taken from the employees involved in December 1988.[941] In testimony, Jardine explained that he did not receive the witness statements he needed for another two years.[942]

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930 Exhibit P-101 CAF0177, p. 10; See also Section 4.3.1 (Post-bombing), Tape Erasure and Section 1.8 (Pre-bombing), Rogue Agents (Deschenes).
931 Exhibit P-101 CAF0177, p. 10.
932 Exhibit P-101 CAF0177, p. 10.
933 Exhibit P-101 CAA0708(i).
934 Exhibit P-101 CAA0708(i), p. 2.
935 Exhibit P-101 CAA0710, p. 1.
936 Exhibit P-101 CAA0708(i), p. 2.
937 See Exhibit P-101 CAA0710, CAF0179, CAF0181, CAF0224, CAF0225, CAF0226, about the discussions which took place during this process.
938 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5754-5755.
939 Exhibit P-101 CAA0713.
940 Exhibit P-101 CAF0182, p. 1.
941 Exhibit P-101 CAA0732.
942 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5756.

In 1989, Jack Hooper was transferred from CSIS HQ to the BC Region in order to actively oversee the CSIS disclosure that was to be made in connection with the Reyat trial. The process at the time involved a "…comprehensive review of all BC Region's holdings in respect of Reyat and associates." BC Region was the principal repository for the information involved in the trial and so the majority of the work was to be done there. Hooper had a number of dedicated full-time personnel reviewing file holdings and identifying material for disclosure to the RCMP. During that process they would also flag sensitive material. The teams would also inform CSIS HQ of the disclosure, which enabled HQ to conduct damage assessments for the sensitive information released in support of the Reyat trial.[943]

A disclosure package was provided to the defence on December 20, 1989.[944] In August 1990, Reyat's counsel requested disclosure of the edited portions of the CSIS materials, as well as of the transcripts and tapes of "…all intercepted communications referred to in CSIS materials."[945] Jardine responded that, as he did not have access to the edited portions of the CSIS materials, he could not provide them to defence counsel. As for the request for transcripts, he advised that the notes or "gist translation" were already provided in the disclosure package and that, to his knowledge, there existed no transcripts of the Parmar/Reyat communications intercepted by CSIS. Finally, in response to the request for tapes, Jardine noted that he had learned, as a result of media disclosures in 1987 which were subsequently confirmed by letter, that the tapes had been erased.[946]

The Reyat Trial

Inderjit Singh Reyat's trial began in September 1990 and the Crown presented its evidence until the end of the year.[947] While the trial was proceeding, the defence continued to make disclosure requests about the CSIS information. An RCMP member who provided information to Jardine in September to assist in responding to those requests noted that CSIS had not authorized the release of the 54 Parmar Tapes remaining in existence as part of the disclosure package, and that the tapes could not be disclosed beyond the RCMP and the AG BC without CSIS's consent.[948] Disclosure of those tapes was ordered by Justice Raymond Paris, who was presiding over the trial, following a disclosure motion by the defence.[949]

In October 1990, Jardine was advised that the defence would be bringing an abuse of process motion at the close of the Crown's case. He advised the RCMP that the process would most likely "…not cast CSIS in a favourable light" and would "…reflect a certain level of incompetency." Jardine also advised that evidence would have to be presented about the RCMP's efforts to secure evidence

943 Testimony of Jack Hooper, vol. 50, September 21, 2007, pp. 6219-6220.
944 Exhibit P-101 CAF0255, p. 2.
945 Exhibit P-101 CAA0774.
946 Exhibit P-101 CAA0775, p. 1.
947 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5756.
948 Exhibit P-101 CAF0227, p. 3.
949 Exhibit P-101 CAF0255, pp. 6-7.

about the Parmar Tapes over the years, and that once this area was opened, he expected it would "…eventually lead to the political arena as to who knew what, when and what they did about it."[950] Jardine suggested a high-level meeting with CSIS and RCMP representatives in order to keep all involved informed of the Crown's planned strategy in the response to the abuse of process motion.[951] He indicated that a representative from the Solicitor General's office should attend, as a policy decision maker from that office would most likely have to testify in the proceedings about CSIS's tape destruction policy.[952] However, the Ministry wanted to avoid the appearance of such a witness.[953]

Meanwhile, the RCMP continued to seek additional information and documents from CSIS to enable Jardine to prepare for the response to the abuse of process motion. On November 21, 1988, the RCMP wrote to CSIS to request witness statements from six of the BC Region CSIS employees involved in the processing of the Parmar Tapes. The RCMP also inquired about identifying a senior CSIS official who could testify about how the tape retention/destruction policy was formalized as a CSIS policy.[954]

Tensions were rising as the interagency meeting, scheduled for November 24, 1990, approached. On November 16th, Ian MacEwan, who had replaced Bennett as DG CT, prepared a memorandum outlining the history of the CSIS tape erasure policy and of its application to the Parmar Tapes. He then reviewed the explanations provided by CSIS and the statements of the CSIS employees involved, indicating that the Service made numerous attempts to provide explanations and clarifications, but that confusion remained.[955] MacEwan commented:

> In spite of the Service's best efforts, I doubt that the Crown, and possibly the RCMP to this day "accept" the reasons for, and the application of the Service's tape retention/destruction policy. I think that this lack of acceptance has nothing to do with shortcomings in their comprehension abilities, nor in the clarity of the explanation that has been delivered. Rather, I am of the opinion that there are 'none so blind as those who will not see'.
>
> I think it apparent that the BC Crown Attorney's office is looking for a 'fall guy' in the event the Reyat prosecution ultimately fails. This belief is reinforced in Attachments O and P, where the suggestion is made that the tapes were destroyed as a result of a CSIS 'mistake'."[956] [Emphasis added]

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950 Exhibit P-101 CAF0259, p. 1.
951 Exhibit P-101 CAF0186, CAF0233, CAF0234.
952 Exhibit P-101 CAF0186, p. 1.
953 Exhibit P-101 CAD0146, p. 7.
954 Exhibit P-101 CAA0720(i), pp. 1-2.
955 Exhibit P-101 CAD0146, p. 5.
956 Exhibit P-101 CAD0146, pp. 5-6.

MacEwan then went on to state that "CSIS did NOT make a mistake," but only followed established policy. He indicated that admitting a mistake would have left the Service open, "…once again, to accusations of operating without proper control and management" which would then be cited as the reason for the failure of the Reyat prosecution. As a result, MacEwan suggested that CSIS take the position at the upcoming meeting that the Crown "…MUST, no matter the cost, demonstrate to the Court that the Service did nothing wrong."[957]

At the Inquiry, Warren testified that he did not agree with MacEwan's position and felt that, to some extent, MacEwan's suggestions were inappropriate.[958]

The RCMP, in a briefing note dated November 21, 1990, noted that there would be obvious difficulties with the CSIS evidence indicating that the Parmar Tapes were erased pursuant to policy because they contained no indication of significant subversive activity, especially since some of the intercept information provided to the RCMP, that had been used in support of applications to intercept private communications, indicated that Parmar and others were involved in activity suspected to be related to the Narita explosion. The Force noted that Jardine would attempt to cast the RCMP's effort to obtain information and evidence in a positive light in response to the abuse of process argument, but that there was "…definite potential for CSIS to endure a negative image."[959]

Jardine, in a legal memorandum dated November 21st analyzing the anticipated Crown response to the abuse of process argument, noted:

> The facts are not clear. The administrative system in the Canadian Security Intelligence Service does not allow the Service to ascertain exactly when the tapes were erased, nor does it allow them to ascertain who determined there was no significant subversive activity.[960]

Jardine hoped to be able to show that the destruction of the Parmar Tapes had been inadvertent and not done for an ulterior purpose. At the time, he still did not know whether CSIS would object to the disclosure of its policies and procedures in Court – an objection he felt would be detrimental to the Crown's case – and he still required answers to a number of questions about the witnesses who would testify on behalf of CSIS.[961] In an agenda he prepared for the November 24th meeting, Jardine noted that the position of the Crown in response to the abuse of process argument would have to be that administrative policy, translation delay and the administrative system, structure and procedures at CSIS "…precluded discovery of overt criminal activity or significant subversive activity" until after the Parmar Tapes were erased.[962]

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957 Exhibit P-101 CAD0146, p. 6 [Emphasis in original].
958 Testimony of James Warren, vol. 48, September 19, 2007, p. 5901.
959 Exhibit P-101 CAA0798(i), pp. 1-2.
960 Exhibit P-101 CAF0240, p. 2.
961 Exhibit P-101 CAF0240, pp. 21-23.
962 Exhibit P-101 CAA0800, p. 2.

The meeting took place as planned on November 24, 1990. As a result of the discussions held, CSIS provided a list of personnel involved in the processing of the Parmar Tapes and allowed RCMP investigators to conduct interviews.[963] The CSIS representatives who attended the meeting made it clear to Jardine, as had been outlined in MacEwan's memorandum, that the Service would take the position that no mistake had been made in erasing the Parmar Tapes. Jardine testified at the Inquiry that at that time, he had updated materials based on charts prepared by CSIS which indicated dates of erasure in July 1985 for many of the conversations considered potentially important in Reyat's case. The prosecution team had decided that it would argue that, given the facts known in July 1985, there was nothing that would justify retention of the intercept "… for the purposes of Inderjit Singh Reyat (note Parmar is different)."[964]

Jardine explained that Reyat's position was different from Parmar's, since there was much inculpatory evidence against Reyat, including forensic evidence gathered in Narita, and Reyat had made a confession about his involvement in testing explosive devices for Parmar. Under the circumstances, the Crown could argue that any conversations on the tapes would have incriminated and not exonerated Reyat, such that there was no factual foundation for the defence's abuse of process allegation. As there was no real evidence against Parmar, the impact of the tape erasure in case he was eventually charged might well be different, especially since he was the actual target of the CSIS intercept. However, as far as the Reyat prosecution was concerned, Jardine was ultimately convinced that the defence attack "…should not impact" the prosecution. In any event, the Crown's argument would be that the erasure was done innocently in July 1985.[965]

In December 1990 and January 1991, the RCMP interviewed many of the CSIS employees involved in the processing and erasure of the Parmar Tapes and prepared witness statements in anticipation of the abuse of process motion.[966] In January 1991, the Reyat trial was adjourned until February 18, 1991, at which time the defence was expected to present its abuse of process motion. On January 22, 1991, CSIS wrote to the RCMP to express concern about the materials to be disclosed to the defence in this context. The Service requested that no CSIS witness statements or "will says" be disclosed to the defence until they were reviewed by CSIS HQ, and asked to receive a copy of the intended disclosure package.[967] On January 24, 1991, the RCMP responded, explaining that the December 1990 and January 1991 statements had not yet been provided to Jardine. The Force indicated that the defence had not yet filed its motion, and that disclosure would not be made until the content of the motion was known.[968]

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963 Exhibit P-101 CAF0250.
964 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5758-5759, 5761-5762.
965 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5759-5760.
966 Exhibit P-101 CAF0242, p. 1.
967 Exhibit P-101 CAF0263.
968 Exhibit P-101 CAF0242, p. 1.

On February 5, 1991, counsel for Reyat transmitted a Notice of Motion for a judicial stay of proceedings to Jardine.[969] On February 8, 1991, the RCMP wrote to CSIS to advise that, now that the motion had been filed, the Crown would be disclosing to the defence a booklet of 10 witness statements that had been provided to Jardine in 1989 for disclosure purposes. As for the most recent RCMP interviews of CSIS personnel, the investigators were still completing their interviews and would be turning over all of the notes and statements to Jardine shortly. The RCMP promised to advise CSIS if Jardine felt that these materials had to be disclosed to the defence.[970] The 1989 booklet of witness statements was disclosed to the defence on February 12, 1991.[971]

On February 14, 1991, the RCMP wrote to CSIS again, attaching 18 witness statements obtained between December 1990 and February 1991 by its investigators. The Force advised CSIS that the statements were being provided to Jardine, and asked the Service to advise of any information contained in them which CSIS would object to being disclosed to the defence "…should that become a requirement."[972] Following conversations with Jardine, the RCMP learned that he intended to disclose the additional materials to the defence on the following day, and advised CSIS verbally when the package was delivered.[973] In the cover letter accompanying the copies of the statements sent to Jardine, the RCMP noted that the latest interviews had revealed that the document provided by CSIS with approximate erasure dates might be incorrect, since the CSIS monitors had indicated that, rather than waiting 10 days after the tapes had been processed, they generally erased them 10 days after the recording date.[974]

Having received the information contained in the latest witness statements, and all the other information he obtained from CSIS, Jardine was asked at the Inquiry whether he was able to conclude on that basis that all the Parmar Tapes had been listened to prior to being erased. His answer was: "I don't know." Jardine explained that until the very end of the proceedings, there was always information outstanding that he thought CSIS could provide and did not provide.[975] He testified:

> **MR. JARDINE**: Sir, that continued right to the close of the Crown's case. We still did not know exactly what evidence would be tendered from the Canadian Security Intelligence Service until the evidence was tendered at trial.[976]

On February 15, 1991, CSIS advised the RCMP that it had no objection to the disclosure of the most recent CSIS witness statements to Reyat's counsel.[977] The

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969 Exhibit P-101 CAF0244.
970 Exhibit P-101 CAF0246, pp. 1-2.
971 Exhibit P-101 CAF0255, p. 8.
972 Exhibit P-101 CAF0249.
973 Exhibit P-101 CAF0248, p. 1.
974 Exhibit P-101 CAF0250, p. 2.
975 Testimony of James Jardine, vol. 47, September 18, 2007, pp. 5742, 5763.
976 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5742.
977 Exhibit P-101 CAF0251.

18 statements were disclosed to the defence on the same day.[978] The Crown made a decision not to call any of the CSIS witnesses, but to let the defence call the witnesses and to cross-examine them.[979] The defence conducted its own interviews with some of the CSIS witnesses and advised Jardine that the attack would be based on the allegation that the tapes were erased in bad faith by CSIS and that they might have contained evidence that might have assisted the defence.[980] On February 26th, the Court ordered CSIS to disclose the Parmar warrant to defence counsel, who then learned for the first time that the Parmar intercept continued until 1990, whereas the material previously disclosed only extended to July 1985.[981]

On March 5, 1991, after only a few of the CSIS witnesses had testified, counsel for Reyat read into the record a 30-paragraph document containing the admissions of facts on which he would rely for his abuse of process motion. He then indicated that he would not be presenting other evidence.[982] As the Crown did not present evidence,[983] most of the CSIS witnesses who had provided statements did not testify.[984] The admissions of fact recounted the extent of the disclosure received by the defence throughout the proceedings, documented the disclosure requests and the responses received and insisted on the fact that counsel had only learned recently about the ongoing interception of Parmar's communications by CSIS during the last six years.[985]

Ultimately, Justice Paris accepted the Crown's arguments and dismissed the defence motion for a stay of proceedings.[986] He stated:

> As to the erasure of the tapes, it is clear that that occurred strictly as a result of the then-existing administrative routine. There was obviously no question of improper motive in that regard.[987]

On May 11, 1991, Justice Paris found Inderjit Singh Reyat guilty of manslaughter for his role in assembling the bomb which exploded in Narita.[988]

Conclusion

In the end, the Reyat prosecution was successful. After much correspondence, many requests leading to unresponsive answers, followed by further requests,

978 Exhibit P-101 CAF0251, CAF0252.
979 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5757; Exhibit P-101 CAF0248, p. 1.
980 Exhibit P-101 CAF0253.
981 Exhibit P-101 CAF0255.
982 Exhibit P-101 CAF0255, p. 1.
983 Exhibit P-101 CAF0255, p. 1.
984 See Exhibit P-101 CAF0255, p. 12, CAF0256.
985 Exhibit P-101 CAF0255.
986 Exhibit P-101 CAA0808; See also Testimony of James Jardine, vol. 47, September 18, 2007, p. 5760.
987 Exhibit P-101 CAA0808, p. 2.
988 *R. v. Reyat*, 1991 CanLII 1371 (BC S.C.).

heated discussions and high-level meetings, CSIS ended up providing most of the information sought by Jardine. In fact, CSIS would later point out that none of the "doom and gloom" predictions made by the BC Crown came to pass and that Reyat's conviction was a sign of success in the RCMP/CSIS relationship. Grierson testified that CSIS declassified material and provided the defence with "…five boxes of highly sensitive reports." He indicated that when the problem of full disclosure came to a head, "…CSIS disclosed information to the provincial Crown, and indirectly to the RCMP, of issues that originally we wanted to protect."[989] This was largely driven by the particular circumstances of the Air India case, which was viewed as a "special case" by CSIS.[990] However, despite the exceptional circumstances of the case, it took years of efforts and debates to achieve the "success."

When asked about comments he made that the CSIS cooperation and disclosure in the Reyat case was unprecedented, Jardine stated:

> **MR. JARDINE**: Mr. Brucker, timing is everything. The unprecedented disclosure took place in 1991, sir.
>
> **MR. BRUCKER**: All right.
>
> **MR. JARDINE**: It did not take place in 1985.[991]

Delay in obtaining necessary information, whether for the purpose of introducing it into evidence as part of the Crown's case or for the purpose of making full disclosure to the defence pursuant to constitutional obligations, can have an impact on the prosecution. As Jardine explained, "…time doesn't usually help prosecutors," because "…it doesn't help the witnesses." The less fresh the events are in the witnesses' minds, the more difficult the prosecution will be.[992] Obtaining information in a timely manner is important for the prosecution, and it also prevents the possibility of defence attacks on the grounds of untimely disclosure.

The difficulties experienced by Jardine in obtaining disclosure of CSIS information illustrate the difficulties that can be encountered in converting intelligence into evidence. Some of those difficulties are inherent in the nature of the functions of intelligence agencies, others are not. In this case, CSIS's initial reluctance to disclose materials and to provide information and complete explanations was not on the whole a necessary consequence of the nature of the Service's work.

The fact that by 1991, CSIS ended up providing most of the information that had been requested since 1986 shows that the material was in fact capable of being provided without jeopardizing national security. The reasons why it took so long

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989 Testimony of Mervin Grierson, vol. 75, November 14, 2007, pp. 9480-9481.
990 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
991 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5805.
992 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5768.

and required such extraordinary efforts are to be found, in part, in what appears to be a "turf war." Misunderstandings and a lack of communication were often observed – for example, when CSIS and the RCMP argued about whether the initial 1986 request had, by agreement, been put on hold for a year and a half. Also, because of the lack of a uniform understanding of the tape erasure policy at CSIS and because of the inconsistency in its application, CSIS had difficulty providing explanations about its own practices and needed to conduct an internal investigation in order to understand how the events leading up to the erasure of the Parmar Tapes had unfolded.[993] More fundamentally, CSIS's understanding of its mandate and of the requirements of criminal prosecutions, coupled with an attitude of defensiveness in the face of criticism directed at the tape erasure episode, contributed to the delay and the difficulty. CSIS's tendency to provide narrow answers, and to advance broad National Security Confidentiality (NSC) claims initially, was also evident throughout its dealings with Jardine and contributed to the dysfunction.

Warren admitted in his testimony that relations with the BC Crown could have been improved had CSIS had clearer policies to deal with the handling of intelligence relevant to criminal matters, and better training of the operational personnel on the policies that did exist.[994] He felt that CSIS personnel at the time lacked rigour in the examination of intelligence, and that this led to the inconsistent responses to Jardine's requests. Warren stated that more face-to-face discussions might have eased the process and reduced the amount of time it took to come to an agreement. However, he did note one remaining and pervasive issue, "…how one squares the circle between evidence and intelligence." Warren felt that this was an intractable sort of problem that would continue to arise.

CSIS appeared to perceive its role and mandate as one that prevented it from providing information for use in a criminal prosecution; this was a view to which CSIS adhered rigidly in the early years. Jardine challenged this view. He noted that "…there is little value in gathering intelligence for intelligence purposes."[995] Since the purpose of CSIS information is to inform government so that action can be taken,[996] Jardine felt that in the case of criminal offences related to the security of the country, it was not contrary to CSIS's mandate to pass on its information to police in a form that would be useable for purposes of prosecution:

> The preservation and security of the "evidence" for potential court purposes must also be considered. Does this change the "mandate" of the Service? I submit it does not. The very offences outlined in the legislation are of such a serious nature they demonstrate the requirement for such an approach. The fact the legislation provides the Service may call in the RCMP

993 See Section 4.3.1 (Post-bombing), Tape Erasure.
994 Testimony of James Warren, vol. 48, September 19, 2007, p. 5903.
995 Exhibit P-101 CAA0836, p. 38.
996 Exhibit P-101 CAA0836, p. 38.

> for the purpose of investigative assistance does not diminish the need that the Service pass the information in a useable form to the "police" investigative arm. If this was not the intent at the time the civilian intelligence service was created now is the time to change the perspective of those who have the power to enable such policy changes.[997] [Emphasis in original]

For Jardine, the most important issue in the discussions relating to the availability of CSIS information for the Reyat prosecution was that "…there was no understanding at the beginning and there was little understanding at the end" by CSIS of the requirements of the prosecution or of the legal and ethical obligations of the Crown prosecutor.[998] CSIS often challenged the Crown's assessment of the relevance of its information for the prosecution, and initially failed to understand that the information might be required for disclosure purposes, even if the Crown did not intend to tender it as evidence.

In the initial stages, CSIS appeared reluctant to provide information, unless it was convinced of the necessity of the information for the criminal process. Without sufficient information about the legal issues involved, CSIS had difficulty making the determination of what might be necessary, and constantly requested specifics about the prosecution's intentions. As Jardine later put it in his 1991 presentation:

> It is my view that CSIS should consider the development of the Service to include the capacity to pass information, intelligence and evidence to the appropriate police agency in a form which will allow the police agency to use the information in evidence gathering for prosecution. To do that the Service must come to grips with the thorny issues created by the disclosure requirements for full answer and defence in criminal prosecutions.[999] [Emphasis added]

Jardine testified that, throughout the course of his efforts to obtain information from CSIS, the agency did not generally volunteer any information, and only responded to precise questions. The Honourable Ronald ("Ron") Atkey, the former chair of the Security Intelligence Review Committee (SIRC) which had the mandate to report about CSIS's activities, also noticed this same tendency, indicating that "…CSIS were very good at responding to your questions but only to your questions."[1000] Jardine understood some of the CSIS concerns behind this attitude, but felt that the prosecution's need for information became more urgent as time passed:

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997 Exhibit P-101 CAA0836, p. 38.
998 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5772.
999 Exhibit P-101 CAA0836, p. 38.
1000 Testimony of Ronald Atkey, vol. 49, September 20, 2007, p. 5969.

> **MR. FREIMAN**: Was it your experience throughout your dealings with CSIS that questions were answered in a full, broad way or that they were answered only to the extent of the precise question and the precise words?
>
> **MR. JARDINE**: I believe that the persons trying to answer the questions that were brought to my attention during the course of all of this period of time were providing information pursuant to their policy and pursuant to their interpretation of their Act and that the concerns that they had with respect to the privacy interests of the targets, at least in their minds, precluded them from being open. So it was not open to them, at least in my understanding, to be voluntarily forthcoming. So I understood that reticence and from whence it came and I was sensitive to that – at least I tried to be sensitive to that – during the course of 1986-1987 and certainly during 1988. It became more urgent as we got to the abuse of process argument in 1990 and 1991.[1001]

The initial objections to disclosure and the NSC privilege claims were often very broad, but these positions were regularly revised during the negotiations. In the end, most of the requested information was released with few NSC claims, making it clear that the initial positions adopted by the Service were not necessarily based on an accurate evaluation of any harm to national security that might have resulted from disclosure. At the very least, the CSIS perception and attitude in this respect evolved, albeit slowly. In some respects, this Commission has had a similar experience in dealing with the Attorney General of Canada's NSC claims on behalf of all government agencies involved.[1002] Apparently, it remains difficult for CSIS and other government agencies to make information public, even when on closer examination, no risk to national security is found to exist that might justify withholding the information. The reflex of making broad NSC claims as an opening position seems slow to subside, even after the lessons that should have been learned from the Reyat and the Malik/Bagri prosecutions.

The fact that the information being sought by Jardine dealt with tape erasure, an issue that had attracted significant public criticism and carried with it the potential for civil liability for CSIS, did not do anything to simplify matters. The Service was naturally protective of its own policy choices and practices, and this prompted it initially to provide "corporate position" explanations in response to Jardine's inquiries rather than the detailed facts he needed for court preparation purposes – facts that were eventually provided. Though the Government did make a policy choice to prioritize the Reyat prosecution over its own litigation interests, in some instances, the Service was openly concerned about the impact of its discussions with the AG BC and the RCMP on its position in the civil litigation, notably in its request that no reference be made to the "destruction of evidence" in the correspondence.

1001 Testimony of James Jardine, vol. 47, September 18, 2007, p. 5713.
1002 See Volume One of this Report: Chapter II, The Inquiry Process.

Jardine undoubtedly faced what he perceived to be serious challenges in the Reyat prosecution as a result of the CSIS tape erasure. Regardless of one's view on the legal significance of the tape erasure issue, it is difficult to understand how it could have taken years for CSIS simply to provide the information and documents that still existed, and to account for and explain its own procedures. This delay and reluctance created unnecessary difficulty and led to a significant expenditure of resources in the preparation for the Reyat prosecution. It also provided a foretaste of the tape erasure issues that would bedevil the Bagri/Malik prosecution.

4.4.2 The Air India Trial

Soon after the RCMP Air India Task Force was renewed, in late 1995, a decision was made to "…proceed to prosecution" and "…leave the matter to the courts and a jury," whether or not "fresh evidence" was uncovered.[1003] By November 1996, the RCMP had begun to have meetings with the BC Crown office. A prosecution team was assembled and a review of the file began for purposes of charge approval.[1004]

Ripudaman Singh Malik and Ajaib Singh Bagri were charged in connection with the Air India and Narita bombings on October 27, 2000 and Inderjit Singh Reyat was subsequently added as a defendant in June 2001. The proceedings lasted almost five years in total. Reyat pleaded guilty to the manslaughter of the Air India Flight 182 victims in 2003, and Malik and Bagri were both acquitted in 2005.[1005] CSIS information was introduced in evidence during the trial and present and former CSIS investigators were called as witnesses.

Cooperation with CSIS in Trial Preparation

Extensive cooperation with CSIS was necessary in preparation for the trial. It was clear early on that CSIS information would be required in the process, and that much more information would need to be disclosed than even Jim Jardine had envisioned during the Reyat trial in the Narita case, due to the changes in the law following the landmark Supreme Court of Canada decision concerning disclosure in *R. v. Stinchcombe*.[1006] According to Deputy Commissioner Gary Bass, who was in charge of the renewed RCMP Task Force, the extensive disclosure obligations meant that a large amount of embarrassing information would be disclosed, including "…thousands of pages of memos and telexes wherein our Force and CSIS argue over the release of information between 1985 and 1990."[1007]

Bill Turner was a member of the CSIS BC Region who had extensive experience in the Sikh extremism investigation as a result of his previous positions as head of the Sikh desk in both the BC Region and at HQ. In 1997, he became the CSIS

1003 Exhibit P-101 CAA0958, p. 2; Testimony of Bart Blachford, vol. 63, October 17, 2007, pp. 7815-7816.
1004 See Chapter V (Post-bombing), The Overall Government Response to the Air India Bombing.
1005 *R. v. Malik and Bagri*, 2005 BCSC 350.
1006 [1991] 3 S.C.R. 326.
1007 Exhibit P-101 CAA0932, p. 4.

representative at the Air India Task Force and began to work with the RCMP and Crown counsel in advance of the trial. He became a "…fully integrated member of the Task Force."[1008]

On January 20, 1997, there was a significant meeting of the Crown, the RCMP and CSIS. Turner was in attendance. The meeting focused on a review of the case as it was understood at that point. The view was expressed that there was a very strong case against a few individuals, including Ajaib Singh Bagri, Inderjit Singh Reyat, Hardial Singh Johal, Ripudaman Singh Malik, Surjan Singh Gill and the deceased Parmar.[1009] There was also discussion of potential use of CSIS information at trial. Other matters were discussed, including the need for a "…good clean source who is willing to turn witness," critical gaps in the surveillance of Parmar, the validity of the Parmar Warrants, and destruction/erasure of the Parmar intercept tapes,[1010] as well as the difficulty in obtaining statements from CSIS employees whose work was covert. This meeting appears to have marked a turning point. Turner stated that, from then on, every issue was discussed jointly amongst CSIS, the RCMP and the Crown. According to Turner, this marked an evolution in the CSIS/RCMP relationship. It also marked a change in the relationship between CSIS and the Crown. Unlike the situation which had prevailed when Jardine was preparing for the Reyat trial, when communications were always channelled via the RCMP, there was now frequent direct contact between CSIS and Crown counsel. By 1999, Turner had moved into the Crown's office for the duration of the trial to be of greater assistance.[1011]

Defence Undertaking

A key mechanism employed in the Air India trial to facilitate the disclosure of sensitive information was a defence undertaking. This mechanism allowed the disclosure of CSIS material on the basis that defence counsel undertook not to share that information with their clients.[1012] This unusual arrangement was the result of an attempt to resolve all disclosure issues prior to the start of the trial in order to complete the trial with as little delay as possible and without the interruption that would have resulted from CSIS resorting to objections to disclosure under the *Canada Evidence Act* which would have had to have been resolved in the Federal Court.[1013]

Turner explained how the decision to adopt the undertaking approach was made.[1014] He indicated that the defence announced early on that one of the alternate theories they planned to present on behalf of the accused was that it was the Government of India who was responsible for the bombing. In a February 1996 memorandum that was disclosed to the defence, Bass noted that

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1008 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8269, 8271.
1009 Exhibit P-101 CAB0913, p. 4.
1010 Exhibit P-101 CAB0913, p. 5.
1011 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8270-8271, 8315-8317.
1012 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8323.
1013 For more on the use of the undertaking see Volume Three of this Report: The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions.
1014 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8323.

"…some serious concerns regarding possible Indian Government involvement" remained, that this possibility had not been investigated in depth by either CSIS or the RCMP, and that this could open the door for the defence to explore the knowledge of the Canadian agencies about this matter.[1015] When the defence asked for disclosure of all information related to "…certain Government of India individuals prior to the bombing," CSIS took the position that providing the material would endanger national security. Since neither side would budge, Turner explained that there was a risk that the proceedings would be stayed due to non-disclosure "…of what they said was clearly relevant material."[1016]

Instead of litigating the stay of proceedings issue, all parties agreed to a process that allowed defence counsel to view the material, with the vetting or redactions lifted in order that they could satisfy themselves that the information was not relevant and not needed as part of the defence at trial. The disclosure was made on the condition that counsel would not reveal what they saw to anyone, including their own clients. The accused persons agreed to this condition.

As a result of the undertaking, though there was other litigation relating to CSIS information and methods, there was no litigation during the Air India trial relating to objections to disclosure under the *Canada Evidence Act* and no need to interrupt the trial to take such issues to the Federal Court. Turner testified that this was a "band-aid" fix, and that it worked due to "…very capable, competent defense counsel who went along with it." He cautioned that he was quite sure that this arrangement would not work in every instance.[1017]

Indivisibility of the Crown and the Kelleher Directive

At various times during the trial, Bagri argued that his *Charter* rights had been violated as a result of a failure by CSIS to preserve and disclose certain materials.[1018] Based on *Stinchcombe*,[1019] the general rule is that, in any criminal case, the defence is entitled to disclosure of any relevant materials in the possession of the Crown or the police. The Crown is therefore obliged to disclose anything that it has, or that the police have, that is not clearly irrelevant. Where materials have been destroyed, a legal test has been devised to determine when their unavailability constitutes a violation of disclosure obligations.[1020] The nature of the disclosure obligations, and of the legal test to be applied in case of destruction, can vary significantly if the material is in the possession of a third party rather than the Crown and the police.[1021] In the Air India trial, this raised the issue of whether CSIS was to be considered an "indivisible" part of the Crown for purposes of disclosure obligations, or whether it was, for these purposes, simply a third party.

1015 Exhibit P-101 CAA0932, p. 4.
1016 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8323-8324.
1017 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8324.
1018 See *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864 and *R. v. Malik and Bagri*, 2004 BCSC 554.
1019 [1991] 3 S.C.R. 326.
1020 *R. v. La*, [1997] 2 S.C.R. 680.
1021 *R. v. O'Connor*, [1995] 4 S.C.R. 411.

Initially, the Crown took the position that CSIS was to be viewed as a separate entity, but ultimately conceded that it was subject to the full *Stinchcombe* disclosure obligations in the circumstances of the case because of an "access agreement" between CSIS and the RCMP.[1022]

In 1987, the Solicitor General, James Kelleher, issued what has become known as "the Kelleher Directive," which ordered the full cooperation of CSIS with the RCMP in the "preparation of evidence" for an eventual prosecution in the Air India case.[1023] CSIS Director Ted Finn's response stated:

> I have directed that the full cooperation of the Service be placed at the disposal of the RCMP in this regard and that all information, that may possibly be relevant, is made available to the RCMP to assist in its investigation.[1024]

Following the Crown's concession, despite the fact that the Crown later attempted to change its position, Justice Josephson ruled that the exchange of correspondence between CSIS and the Solicitor General crystallized an agreement between the agencies which gave the RCMP "…unfettered access to all relevant information in the files of CSIS."[1025]

Having found that the Crown was indivisible for the purposes of the Air India case, Justice Josephson ruled that the destruction of CSIS materials would be judged by the standards applicable to the destruction of materials in the possession of the police. He also added in passing that "…all remaining information in the possession of CSIS is subject to disclosure by the Crown in accordance with the standards set out in *R. v. Stinchcombe*…."[1026] This meant that, even if it had been collected for a different purpose, everything in the possession of CSIS that was related to the Air India bombing was part of the Crown's material for the purposes of the trial and needed to be disclosed to the defence.[1027]

Turner testified that the implications of the decision on indivisibility were "devastating" for CSIS and resulted in a massive undertaking. CSIS "…had to start from square one now" to try to document what had and had not been disclosed over the past 17 years. In order to accomplish this, CSIS suspended its training class and put together a team of 25 to 30 people working full-time on the disclosure package. Turner stated that it was a "…far from perfect process," due to the fact that new recruits with no intelligence experience were making the determination about what documents would be passed. It was a process that Turner admitted led to mistakes in the vetting of information for National Security Confidentiality concerns.[1028]

1022 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864 at para. 10.
1023 See Exhibit P-101 CAD0095 and Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.
1024 Exhibit P-101 CAD0094, p. 3.
1025 See *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864 at para. 10 and *R. v. Malik and Bagri*, 2004 BCSC 554 at paras. 4, 16-17.
1026 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864 at para. 14.
1027 Testimony of Bill Turner, vol. 66, October 25, 2007, p. 8321.
1028 Testimony of Bill Turner, vol. 66, October 25, 2007, pp. 8321-8322.

Parmar Tapes Revisited

The issue of the erasure of the Parmar Tapes was revisited during the Air India trial. The Crown decided that the intercept tapes that remained in existence, as well as the intercept logs for the tapes that were erased, could not be used as evidence and therefore did not attempt to introduce them to support the prosecution.[1029] Meanwhile, the defence brought a motion arguing that the destruction of the Parmar Tapes violated Bagri's Section 7 *Charter* right to disclosure. In contrast to Justice Paris's finding in the Reyat trial, Justice Josephson ruled, following a concession by the Crown, that the erasures amounted to "unacceptable negligence."[1030] However, no *Charter* remedy was awarded since both accused were acquitted of all charges.[1031]

Destruction of Operational Notes

During the trial, Bagri also brought a motion arguing that the destruction by CSIS of the notes and recordings for interviews with Crown witness Ms. E violated his *Charter* rights.[1032] Absent any concessions from the Crown this time, Justice Josephson ruled that CSIS's behaviour did amount to unacceptable negligence. He accepted the evidence showing that the CSIS investigator involved, William Dean ("Willie") Laurie, was simply following his normal practice, but found that "CSIS appears to have failed at an institutional level to ensure that the earlier errors in the destruction of the Parmar tapes were not repeated."[1033] He noted that a "…procedure should have been in place" at CSIS to preserve "…this clearly relevant evidence for the criminal investigation."[1034]

Challenge to the November 1985 Search Warrant

As had been the case in the earlier Narita trial, the evidence against Reyat in the Air India trial rested in large part on the items seized at his residence in November 1985, pursuant to the warrant then obtained by the RCMP. The application presented to obtain this warrant made reference to CSIS information, including the Duncan Blast surveillance and information from the Parmar intercept logs. In order to accommodate CSIS concerns, and at CSIS's request, the application did not name CSIS as a source of information and did not reveal the nature of the materials to which the RCMP had access.[1035] Instead, the Information to Obtain sworn in support of the warrant application referred to the source of the CSIS information as "…a source of known reliability, whose identity for security reasons I do not wish to reveal at this time."[1036]

1029 Exhibit P-101 CAA1086, p. 8; Testimony of Gary Bass, vol. 87, December 3, 2007, pp. 11214-11215.
1030 *R. v. Malik, Bagri and Reyat*, 2002 BCSC 864.
1031 For detailed examination of this issue, see Section 4.3.1 (Post-bombing), Tape Erasure and Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective, as well as Volume Three of this Report: The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions.
1032 See Section 1.3 (Post-bombing), Ms. E.
1033 *R. v. Malik and Bagri*, 2004 BCSC 554 at paras. 19, 22.
1034 *R. v. Malik and Bagri*, 2004 BCSC 554 at para. 21. See, generally, Section 4.3.2 (Post-bombing), Destruction of Operational Notes.
1035 Exhibit P-201, paras. 46, 48-49, 53; Exhibit P-101 CAA0836, p. 23.
1036 Exhibit P-201, paras. 23, 46, 48, 53; Exhibit P-101 CAA0575(i), p. 6. See Section 4.4.1 (Post-bombing), The Reyat Trial and the BC Crown Prosecutor Perspective and Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.

Before he pleaded guilty to reduced charges in February 2003, Reyat challenged the validity of the RCMP search warrant. In his December 2002 ruling on this motion, Justice Josephson found that the officer who swore the Information to Obtain did not deliberately mislead the Justice of the Peace who issued the warrant by concealing the identity of the source of the CSIS information. He concluded that the Information clearly indicated that the source was concealed for security reasons, allowing the issuing judge to inquire further if necessary, and that it distinguished the concealed source from other sources of information, such as human sources and RCMP wiretaps. Justice Josephson added that, if he was wrong on this point, he still would find that the use of this "deliberate deception" by the RCMP did not invalidate the warrant, since it was a condition imposed by CSIS in order to allow the Force to use its information. He noted that the RCMP was "…at the mercy of CSIS" and had little choice but to accept the condition. Justice Josephson indicated that he could not assess the reasonableness of CSIS's insistence on concealing its involvement. He did add that, as the Information was sworn during the early years of CSIS's existence, and since the Air India case was unique, the issue was both "unprecedented" and "unlikely to re-occur."[1037]

Though the November search warrant was held to be invalid for unrelated technical reasons, Justice Josephson held that the evidence found at Reyat's house was admissible under the *Charter*.[1038]

Conclusion

The Air India trial preparation marked a new era of greater cooperation between CSIS and the RCMP, though all issues were far from resolved.[1039] Most importantly, the cooperation between CSIS and the Crown improved significantly. Despite this cooperation, however, the use of CSIS information in the courtroom remained problematic. Numerous legal challenges resulted from CSIS's involvement, many of which could not be successfully defended. It is only due to exceptional circumstances that a defence undertaking could be entered into and that this *ad hoc* solution could prevent the disclosure issues from disrupting the trial even further by requiring Federal Court litigation. Volume Three of this Report, The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions, discusses the underlying difficulties in using CSIS information in criminal prosecutions and proposes policy solutions for achieving longer-term resolution of some of the issues encountered in the Air India trial.

4.5 Recent Cooperation and Information-Sharing Mechanisms

The mechanisms recently devised for the exchange of certain types of information differ in some respects from the manner in which such information was shared in the past.

1037 See *R. v. Malik, Bagri and Reyat*, 2002 BCSC 1731 at paras. 69-71.
1038 See *R. v. Malik, Bagri and Reyat*, 2002 BCSC 1731 at paras. 81-96.
1039 See Section 4.1 (Post-bombing), Information Sharing and Cooperation in the Air India Investigation.

CSIS appears to be showing a greater willingness to discuss some of its operations with the RCMP, whether or not information relevant to a criminal investigation has been uncovered. Meanwhile, the RCMP has apparently adopted the motto of "less is more" rather than attempting to obtain and use as much CSIS information as possible. Fearing unwanted evidentiary issues if it were to rely on CSIS information, the RCMP tries to make as little use as possible of such material. Once alerted to the existence of possibly relevant information uncovered or likely to be uncovered by CSIS, the RCMP will attempt to conduct its own investigation separately, relying as little as possible on the CSIS information.

The aim of the "less is more" approach is for both agencies to avoid having to deal with the implications of having to introduce CSIS information into evidence or of having to disclose it to the defence in a trial. The Commission has serious doubts about the effectiveness and utility of such a strategy.[1040]

National Priorities

The national priorities for counterterrorism, counter-proliferation and counter-intelligence are set on a yearly basis by the Privy Council Office, with input from CSIS as well as from other departments such as Foreign Affairs and the RCMP. Priorities are first identified by the Government. CSIS, as well as other involved organizations, then advises the Government on the status of those threats and on other threats that it considers should be priorities. The Privy Council submits the priorities to Cabinet, to be reviewed by the Cabinet Committee which is chaired by the Prime Minister. When approved, the national priorities are then transferred back to CSIS through the Minister of Public Safety as direction from the Government. CSIS then sets its internal priorities at HQ based on that direction.[1041]

These national priorities are general in nature and assist in the allocation of resources. These may or may not be directly related to what the RCMP is investigating. Assistant Commissioner Mike McDonell, in charge of National Security Investigations at the RCMP, testified that, in a reversal of how the priorities used to be set, in recent years the RCMP has been taking its strategic priorities from CSIS.[1042] Within these priorities, at the level of the investigation of specific groups and organizations, the RCMP becomes much more involved.[1043]

New Structures

Integrated National Security Enforcement Teams

The Integrated National Security Enforcement Teams (INSETs) are RCMP units located in major centres throughout the country and charged with preventing

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1040 See Volume Three of this Report: The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions.
1041 Testimony of Luc Portelance, vol. 88, December 4, 2007, p. 11470.
1042 Testimony of Mike McDonell, vol. 95, December 13, 2007, p. 12628.
1043 Testimony of Luc Portelance, vol. 88, December 4, 2007, p. 11472.

and disrupting national security offences in Canada.[1044] The INSETs were formally launched on April 1, 2002.[1045]

The INSETs are made up of members seconded from different agencies, including federal partners such as the Canada Border Services Agency (CBSA) and CSIS, and provincial and municipal police services, such as Peel Regional Police Force, Toronto Police Services and the Vancouver Police Department. Lawyers from the Department of Justice as well as from the Provincial Attorney General's office are also involved in the INSETs.[1046]

The INSETs remain RCMP units. They are subject to the RCMP chain of command for national security investigations, operate within the structure of the RCMP and are managed by RCMP officers. The members from other agencies who join an INSET are seconded to the Force.

The majority of the RCMP national security investigations are conducted out of INSETs in the major city regions of Vancouver, Toronto, Ottawa and Montreal. In other jurisdictions, National Security Criminal Investigations Section (NSCIS) units exist, but these units are not integrated with members of other agencies.[1047]

Integrated Threat Assessment Centre

The Integrated Threat Assessment Centre (ITAC) was founded following the release of the National Security Policy by the Government in 2004. A Memorandum of Understanding signed between the National Security Advisor and CSIS sets out the ITAC operating structure and the agencies it can deal with. ITAC gains its authority from the *CSIS Act*.[1048]

The role of the Integrated Threat Assessment Centre (ITAC) is to centralize security intelligence in the counterterrorism domain for the purposes of helping to "… prevent and reduce the effects of terrorist incidents on Canada and its people, both at home and abroad."[1049] ITAC is housed at CSIS, and incorporates members from participating departments including CSIS, CSE, CBSA, Foreign Affairs, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), Transport Canada, Public Safety Canada, PCO and the RCMP. ITAC may also include members with "specialized knowledge" from other federal government departments as needed.[1050]

1044 Online: Royal Canadian Mounted Police <http://www.rcmp-grc.gc.ca/secur/insets-eisn-eng.htm> (accessed February 11, 2009); Testimony of Jamie Jagoe, vol. 82, November 23, 2007, p. 10445.

1045 Testimony of Jamie Jagoe, vol. 82, November 23, 2007, p. 10505.

1046 Online: Royal Canadian Mounted Police <http://www.rcmp-grc.gc.ca/secur/insets-eisn-eng.htm> (accessed February 11, 2009); Testimony of Jamie Jagoe, vol. 82, November 23, 2007, pp. 10445-10446.

1047 Testimony of Mike McDonell, vol. 95, December 13, 2007, pp. 12622-12623.

1048 Testimony of Daniel Giasson, vol. 89, December 5, 2007, pp. 11751-11752.

1049 Online: Integrated Threat Assessment Centre <http://www.itac-ciem.gc.ca/bt/rl-eng.asp> (accessed February 11, 2009).

1050 Online: Integrated Threat Assessment Centre <http://www.itac-ciem.gc.ca/bt/rl-eng.asp> (accessed February 11, 2009); Testimony of Daniel Giasson, vol. 89, December 5, 2007, pp. 11752-11753.

ITAC's mandate is to "…produce comprehensive and authoritative threat assessments on terrorism mainly in Canada, and make those analyses and those assessments available to a wide range of leadership in the Government of Canada," as well as to international partners and first responders across Canada.[1051] ITAC assessments are also important for the development of threat assessments for Canadian missions, interests, and persons abroad.

ITAC does not collect intelligence, but rather analyzes it. To that end, members of ITAC review databases and finished threat assessment products from partner agencies. ITAC applies its own analysis and produces its own threat assessment products for release to relevant government departments.[1052]

ITAC today produces threat assessments relevant to the RCMP Protective Services unit in charge of the safety of diplomatic missions and VIP persons in Canada. This is a change from the time of the Air India bombing when these threat assessments were produced by the CSIS Threat Assessment Unit with the aid of the relevant desk at CSIS HQ.[1053] CSIS still maintains a threat assessment function, however its threat assessments are considered to be more long term, with ITAC producing the more immediate TAs.[1054]

CSIS Intelligence Assessment Branch

The CSIS Intelligence Assessment Branch (IAB) conducts intelligence assessments regarding threats to Canada, such as terrorism. The IAB sees these intelligence assessments as distinct from threat assessments, emphasizing that the intelligence assessments are focused on "the bigger picture" of how threats are progressing or changing.[1055] It is a strategic view, and the IAB distributes its assessments on a need-to-know basis. On request, however, the IAB conducts threat and risk assessments pertaining to the entire range of threats to a particular government department, in conjunction with other agencies such as the RCMP and the CSE.[1056] ITAC and the IAB are housed in the same facilities and work closely together.

RCMP Role in Threat Assessments

National Security Threat Assessment Section

The RCMP National Security Threat Assessment Section (NSTAS), which is housed within the National Security Criminal Operations Support Branch, monitors events and prepares threat assessments pertaining to criminal threats that may impact Canada or Canadian interests abroad.[1057] The role of the Section is primarily to support protective operations, though on occasion

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1051 Testimony of Daniel Giasson, vol. 89, December 5, 2007, p. 11750.
1052 Testimony of Daniel Giasson, vol. 89, December 5, 2007, p. 11758.
1053 Testimony of Kim Taylor, vol. 89, December 5, 2007, p. 11764.
1054 Testimony of Daniel Giasson, vol. 89, December 5, 2007, p. 11774.
1055 Testimony of Louise Doyon, vol. 96, February 14, 2008, pp. 12844-12855.
1056 Testimony of Louise Doyon, vol. 96, February 14, 2008, p. 12846.
1057 Exhibit P-101 CAA0335, p. 47.

it will provide assistance to national security investigations.[1058] The Section is roughly equivalent to the P Directorate unit at Headquarters in 1985, which was a non-operational unit that serviced the needs of its on-the-ground protective operations across Canada. The primary clients of NSTAS are the RCMP Protective Services and Major Events Branch, the Prime Minister's Protection Detail Branch, the International Operations Branch, and the Canadian Air Carrier Protective Program (CACPP).[1059] The assessments produced by the RCMP unit are described as being "tactical" in nature, meaning that they are oriented towards assessing specific intelligence regarding one event, person, or set of circumstances.[1060]

At the outset of the threat assessment process, the NSTAS opens an occurrence file and tasks the divisional INSETs, or the NSCIS in jurisdictions where there is no INSET, with providing information in support of the threat assessment. The INSETs have their own dedicated threat assessment resources to accomplish these tasks for the NSTAS.[1061] The NSTAS also contacts CSIS, and will approach other agencies such as DFAIT and Transport Canada, and request that they provide any relevant information they may possess.[1062] The goal is to make use of an "all source" approach – that is, to look to all possible sources of information when assessing a threat.

The limited evidence before the Inquiry showed that the RCMP still faces some ongoing challenges in its Threat Assessment (TA) mandate, some reminiscent of the issues observed during the period preceding the Air India bombing.

The focus of the NSTAS TA process has been described as centered on bringing matters of potential criminality to the protective unit's attention.[1063] This orientation is reminiscent of the unsuccessful RCMP attempts at distinguishing "criminal intelligence" from "security intelligence" in the pre-bombing period, and is difficult to understand. The protective mandate of the RCMP requires that protectees be kept safe from harm – whether or not the harm arises from criminality. According to Supt. Reg Trudel, the OIC of National Security Criminal Operations Support Branch and head of the NSTAS, a NSTAS threat assessment, despite its criminal focus, may "on occasion" mention a large gathering or protest which could eventually have an impact on the safety and security of a protectee.[1064] Indeed, sensitive protective operations may require that measures be put in place in response to a potential threat, even if the threat falls far short of the threshold that might be required to launch a criminal investigation. Especially given the placement of NSTAS within the national security structure, it is unclear whether the focus on "criminality" affects the utility of RCMP threat assessments for protective operations.

1058 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12801.
1059 Exhibit P-101 CAF0717, p. 7.
1060 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12836-12837.
1061 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12820.
1062 See Exhibit P-101 CAF0717, p. 8, for a chart describing the threat assessment process.
1063 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12826-12827.
1064 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12807.

Despite its stated focus on criminal aspects, the NSTAS is not viewed as a resource by the criminal operations side of the RCMP. When an INSET begins to look at a particular national security problem, it does not generally consult NSTAS to help assist it in understanding any particular phenomenon. In fact, national security operational units generally resort to the NSTAS in the course of an investigation only if a target in the investigation is also a protectee. In such a case, NSTAS will prepare a TA on that person and then provide it to the protective units to allow them to respond appropriately.[1065]

NSTAS does not perform any ongoing analysis or monitoring of national security threats, and acts proactively only to the extent that a domestic or international incident may cause concern due to the potential impact on the protection of a protectee or embassy.[1066]

Risk Assessment

The NSTAS members testified that they do not conduct risk assessments, but rather attempt to produce "criminal threat assessments." The threat assessments generated specifically include the caveat that they are not intended to direct protective security operations or measures,[1067] making it clear that the operational side of RCMP protective policing is free to provide the level of protection it judges most appropriate, regardless of the threat level assigned in the assessment.[1068] NSTAS does no analysis of the vulnerability of the target or of the impact that a threat may have should it come to fruition.[1069]

The current definitions of threat levels used by NSTAS contain terms that are subjective and incapable of definition – reminiscent of the use of the undefined and subjective term "specific threat" during the pre-bombing period. The highest level of threat is the "imminent threat," which is defined as a threat in the "immediate future." However, as explained by Trudel, to qualify under this description, a threat would generally be received "…sometime during the event or close to the event…. It's again very subjective."[1070] "Imminent" also requires that there be a "specific target." Again, the level of particularity does not seem reducible to a definition. Of note is the fact that the June 1st Telex[1071] would not have qualified as "specific," and thus would not have been considered as an "imminent" threat under the definitions currently in use, as corroborated by the testimony of NSTAS members before the Commission.

In 1985, P Directorate did not incorporate risk analysis into its operations, and threat levels ended up taking on operational significance that was never intended. One would hope that if the June 1st Telex was received today in a context similar to that of 1985, it would receive a highly robust on-the-ground response, whether or not it met the definition of an "imminent threat," given

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1065 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12807-12808.
1066 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12807-12808.
1067 Exhibit P-101 CAF0717, p. 13.
1068 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12832.
1069 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12814.
1070 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12817.
1071 See Section 1.2 (Pre-bombing), June 1st Telex.

the magnitude of the possible consequences. As NSTAS does not conduct a risk analysis that includes an assessment of vulnerabilities and a calibration of the protective resources in light of the potential harm, it must be assumed – and hoped – that this analysis occurs somewhere within protective operations.

Distribution of Threat Assessments and Sharing of Information

Unnecessary compartmentalization of threat information in the pre-bombing period limited the ability of participants at all levels of the RCMP's threat-response system to identify and report potentially relevant information. Some of these issues continue today. As a general rule, the NSTAS TAs are sent only to the requesting unit. The threat assessments are usually classified at the Secret level, but they may be classified as Top Secret if relying on sensitive foreign intelligence. The "need-to-know" principle is "…applied at all times" when distributing threat information. This applies even within the RCMP, as caveats restrict a TA's dissemination outside the section or unit to which it was provided without the consent of the originator.[1072]

On a case-by-case basis, the NSTAS assesses whether the threat assessment should be shared with another unit or agency.[1073] NSTAS members explained in testimony that, as the information contained in the threat assessments is often sensitive and heavily caveated, it is necessary for them to approach the originating agencies for all information provided in order to obtain clearance to disseminate the assessments further.[1074] This can be a time-consuming exercise, though Trudel was confident that the process could be conducted very quickly if there was an urgent need.

Before the Air India bombing, the limited distribution of RCMP threat assessments deprived RCMP units and other agencies of information which could have assisted them in recognizing activities on the ground that were relevant to threat assessment. This limited distribution appears to continue today.

It is in the sole purview of the NSTAS to assess who may benefit from a threat assessment and to take steps proactively to distribute it. Given that the section does not generally perform any type of ongoing threat monitoring function and has limited access to, and understanding of, investigations outside, and perhaps even within, the national security context, its ability to make this determination may be limited. The only information automatically shared between HQ and the divisions is that which is uploaded to the Secure Police Reporting Operating System (SPROS), which is a computer system that allows updates to shared national security investigation files in real time.[1075] From a threat assessment perspective, the information in this Top Secret national security database arguably constitutes only one small part of the potentially relevant information.[1076]

1072 Exhibit P-101 CAF0717, p. 13.
1073 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12809.
1074 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12831.
1075 Testimony of Trevor Turner, vol. 82, November 23, 2007, pp. 10450-10451.
1076 Testimony of Dan Mayer, vol. 96, February 14, 2008, p. 12830.

The NSTAS TAs are entered onto SPROS, but this database is not generally accessible to units outside of the national security investigative sphere.[1077] This means that the RCMP members in charge of implementing the protective measures necessary to meet a given threat do not have SPROS access, since it is limited to national security investigations.[1078]

Members of local police forces have testified about the importance of their front-line officers being sensitive to the signs of potential threats.[1079] It is the INSETs that are generally left to provide the information that may foster that awareness.[1080] The INSETs are also relied on to provide training and other information necessary to non-INSET RCMP units and detachments to assist them in providing information to support threat assessments, with the expectation "…that if there is something that surfaces of national security interest, then it would be passed on to the INSET…."[1081] There is no formal national structure for this relationship; each divisional INSET or NSCIS has its own method of working with, and educating, local forces in order to obtain relevant security information.

Given that NSTAS is entirely dependent on the INSETs and NSCIS to liaise with other divisional RCMP units and local forces, the quality of the relevant information gathered by these units will depend on how well they understand and are able to explain the scope of relevant information to these other units and agencies.

The NSTAS threat assessments are retained pursuant to guidelines.[1082] In general, they are kept on file for 24 to 48 months after the conclusion of an event, after which they are purged.[1083] It is unclear to what extent the purging of past threat information could affect the ability of the NSTAS to properly situate and assess any new threat.

Overlapping Functions

As was the case in the pre-bombing period, there appears to be significant potential for overlap in the work of the players in the threat assessment field in the current regime.[1084]

ITAC's role is to centralize security intelligence in the counterterrorism domain.[1085] Trudel distinguished the RCMP's product from the type of assessment that

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1077 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12818-12819.
1078 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12831.
1079 See for example Testimony of the Provincial and Municipal Police Forces Panel, vol. 83, November 26, 2007, pp. 10579-10652.
1080 Testimony of Dan Mayer, vol. 96, February 14, 2008, pp. 12822-12823.
1081 Testimony of Dan Mayer, vol. 96, February 14, 2008, pp. 12824-12825.
1082 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12818-12819.
1083 Testimony of Dan Mayer, vol. 96, February 14, 2008, p. 12829.
1084 See Section 3.4 (Pre-bombing), Deficiencies in RCMP Threat Assessment Structure and Process. As demonstrated in the pre-bombing period, overlap not only wastes resources but it can also create confusion and the risk that existing gaps may remain unaddressed.
1085 Online: Integrated Threat Assessment Centre <http://www.itac-ciem.gc.ca/bt/rl-eng.asp> (accessed February 11, 2009).

would be done by ITAC, stating that the RCMP product is primarily tactical, more focused on protective operations, and is distributed to protective personnel (rather than being geared towards the whole of government).[1086] However, members of ITAC create both "tactical" and "strategic" threat assessments. ITAC's tactical threat assessments were described as being designed to provide "… forewarning of an incident or a threat to an event," or in advance of a state visit. Moreover, ITAC members indicated that ITAC does "a lot" of threat assessment work directly in support of the RCMP's protective operations.[1087]

When ITAC is tasked directly by NSTAS in support of its threat assessments,[1088] the seconded RCMP member will consult RCMP databases, including SPROS, in support of ITAC's assessment. It is therefore unclear what additional value the NSTAS itself adds to the process – other than perhaps adding its own assessment of the threat level to the information provided.

The potential overlap with ITAC's products does not end with the "tactical" type of assessment. The RCMP also creates its own more "strategic" product – the "threat scan" – which is done in advance of a threat assessment. A threat scan is produced 28 days before an event and is a "…high-level scan of the environment to see if there's any threats existing." It is done using open-source material and basic database searches as well.[1089] This type of product would seem to duplicate precisely what ITAC produces.

Members of the NSTAS agreed in their testimony that there was "slight overlap" between the assessments produced by the agencies,[1090] but stated that the RCMP was in "constant" coordination with ITAC and CSIS during the production of a given threat assessment in order to minimize duplication and conflict.

Potential for overlap also exists between ITAC and the IAB. When asked to distinguish between the roles of ITAC and the IAB, Louise Doyon, the Director General of the IAB, testified that the difference was primarily one of expertise and breadth.[1091] In contrast to the ITAC analysts, who are secondees, the IAB analysts are CSIS personnel with graduate degrees in relevant areas, who produce broader assessments with a longer-term view. The distinction appears to be one of degree rather than kind, however, since ITAC members also emphasized the strategic nature of its threat assessments and the fact that ITAC draws on a wide range of intelligence sources, including CSIS databases[1092] and, through its RCMP members, SPROS.

The members of the ITAC Panel testified, however, that they believed the IAB was focused on threat and risk assessments beyond simply terrorism, and that

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1086 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12812-12813.
1087 Testimony of Kim Taylor, vol. 89, December 5, 2007, pp. 11763-11765.
1088 Testimony of Kim Taylor, vol. 89, December 5, 2007, p. 11780.
1089 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12812-12813.
1090 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12813-12814.
1091 Testimony of Louise Doyon, vol. 96, February 14, 2008, p. 12850.
1092 Testimony of Daniel Giasson, vol. 89, December 5, 2007, p. 11755.

their strategic assessments were even longer-term than those of ITAC. The CSIS assessments were also provided in the context of advising government, whereas ITAC did not see itself as specifically providing advice but rather factual assessments of the threat. The features identified by ITAC as distinguishing its mandate from that of the IAB only serve to reinforce the similarities between the role of ITAC and the RCMP NSTAS. Ultimately, it was admitted that there is potential for overlap and duplication between ITAC and the IAB. ITAC members testified that communication between the agencies is intended to minimize this phenomenon.[1093]

What is clear from all of this is that while the agencies often distinguish their mandates from one another using the terms "tactical" and "strategic," these are not sufficiently precise markers to delineate their respective responsibilities, given the ambiguity in the meaning of the terms.

Protection of Critical Infrastructure

In 1985, the threat-response system was set up to fight hijacking, and had not yet been adjusted to detect and prevent the phenomenon that was known would increasingly pose the greater danger to civil aviation: sabotage. Today, the vulnerability of critical infrastructure (such as the electrical grid, nuclear power plants, telecommunications networks, the financial system, and municipal water systems) to sabotage, terrorist attacks, or "cyber attacks" is well understood, and has been identified as a priority in Canada's National Security Policy.[1094] Professor Martin Rudner referred to this critical infrastructure as "…the things upon which we live or we die."[1095] Rudner's opinion was that Canada's critical infrastructure was highly vulnerable, and that protective efforts were moving much too slowly.[1096]

Most critical infrastructure is owned by the private sector or by different levels of government, and much of it is connected to international networks. Such infrastructure systems are generally large and decentralized, and are therefore difficult to protect. As a result, critical infrastructure components pose tempting targets for terrorist attacks.

Canada's threat assessment capacity with regard to critical infrastructure is not necessarily ready to meet these daunting challenges. The RCMP Critical Infrastructure Criminal Intelligence group is a relatively new group; its focus is currently limited to rail and urban transit, and, even then, only in the form of pilot projects being rolled out in "…certain cities of our country." ITAC, meanwhile, is under-resourced for the task at hand. While the intention of the RCMP Critical Infrastructure Criminal Intelligence group is to work with public and private partners across Canada to exchange information about threats, there will be

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1093 Testimony of Daniel Giasson, vol. 89, December 5, 2007, p. 11776.
1094 Exhibit P-101 CAF0539, pp. 18, 35-36.
1095 Testimony of Martin Rudner, vol. 92, December 10, 2007, p. 12278.
1096 Testimony of Martin Rudner, vol. 92, December 10, 2007, p. 12278.

a need for MOUs and a secure information-sharing structure before this can be implemented.[1097] Security clearance issues pose obstacles in working with parties outside of the RCMP, particularly in the private sector, although the RCMP has worked to provide security clearances to a number of officials within these companies to permit the exchange of information where appropriate.[1098] The fact that as of the date of the panel's testimony, the RCMP had yet to roll out its pilot project or to execute MOUs in this area,[1099] raises questions about the preparedness of the RCMP, and therefore of Canada, to deal with the current threat to critical infrastructure.

MOU Negotiations and the 2006 RCMP/CSIS MOU

Following the 1999 RCMP National Security Offences Review report, which noted that many of the problems between CSIS and the RCMP resulted from the fact that the MOU provisions were not widely known and were not being applied, the agencies embarked on negotiations to modify the MOU.[1100] Issues relating to the disclosure of CSIS information in judicial proceedings and the objections that could be made, in particular, were discussed.[1101] Despite the earlier belief that only minor amendments to the 1989 MOU would be necessary to make it current, the review of the MOU soon encountered problems. In one CSIS memo, written in late September 1999, the Head of CT Litigation discussed the issue of the "…general misunderstanding of how, or even if, intelligence can be used by the RCMP." CSIS felt that the RCMP was misinterpreting the *Stinchcombe* decision rendered by the Supreme Court of Canada, which first imposed the obligation upon the Crown and police to disclose materials to the defence. CSIS believed that this misinterpretation could have an impact on the negotiations between the agencies for new MOU provisions. The CT Litigation Head concluded that, given the current state of legal matters related to disclosure, "…extreme care and attention" needed to be paid to the redrafting of the RCMP/CSIS MOU, and that "…it should probably not be attempted without extensive legal counseling."[1102]

Negotiations about control of CSIS information once disclosed to the RCMP[1103] seemed to have been resolved by late November 2000, when a draft of the new RCMP/CSIS MOU was produced.[1104] For unknown reasons, the draft was not approved. After a pause of two more years, the revision of the MOU process began again in 2002. At that time the RCMP reviewed the 2000 proposal and noted the areas in which the proposal was outdated. A new 2002 draft was tabled, but again the negotiations were not successful and the 1989 MOU remained in effect.[1105]

1097 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12815.
1098 Testimony of Reg Trudel, vol. 96, February 14, 2008, p. 12827.
1099 Testimony of Reg Trudel, vol. 96, February 14, 2008, pp. 12827-12829.
1100 See Section 4.0 (Post-bombing), The Evolution of the CSIS/RCMP Memoranda of Understanding.
1101 Exhibit P-101 CAF0281.
1102 Exhibit P-101 CAA0973, pp. 2-3.
1103 Exhibit P-101 CAF0313, p. 2.
1104 Exhibit P-101 CAA0982.
1105 Exhibit P-101 CAA0985, pp. 1, 3-9.

After the Honourable Bob Rae was asked to conduct a review of the Air India file to determine whether a public inquiry was merited, RCMP Commissioner Giuliano Zaccardelli and CSIS Director Jim Judd began a "modernization" process to address ongoing issues in the RCMP/CSIS relationship.[1106] At a meeting on October 17, 2005, senior members of both organizations met to discuss a number of issues, including the MOU. The members agreed that the 1989 MOU was out of date and inaccurate. Discussion ensued as to whether a new MOU was necessary, "…as really the ideal situation is about changing behaviour versus the creation of a legal document," but consensus was reached to proceed with a new MOU anyway.[1107] Later, Zaccardelli and Judd wrote to Rae to inform him that work on a renewed MOU had begun, with the objective of creating a document that would "…refine the existing framework for sharing, handling and use of information and intelligence, and for the provision of operational support between the two agencies."[1108]

On July 2, 2006, Judd wrote to the Minister of Public Safety, the Honourable Stockwell Day, asking for approval of the new MOU. According to Judd, the MOU "…reflects the reinvigorated structures and mechanisms established by CSIS and the RCMP for the purpose of cooperation and consultation between the two organizations," though it was noted that the principles guiding cooperation between CSIS and the RCMP remained unchanged.[1109] The new MOU was signed on September 12, 2006.[1110]

The 2006 MOU contained some provisions about information sharing that were similar in substance to the ones found in the previous MOU. Again, the word "shall," which some thought would impose a positive obligation on CSIS to share information with the RCMP (even though the *CSIS Act* gave CSIS discretion in the matter), was not used.[1111] Instead, the new MOU expressly recognized the CSIS discretion.[1112]

The new MOU specifically provided that CSIS would advise the RCMP in cases where it became aware "…that its investigative activities may adversely affect an RCMP investigation." A high-level committee in charge of managing such conflicts and resolving operational issues was established. The provisions governing the Liaison Officers Program that were found in the previous MOU were replaced with provisions dealing with secondment programs.[1113]

According to Professor Wesley Wark, the result of the negotiations between the agencies (the 2006 MOU) was a "…fairly radical departure, in terms of how they expressed the nature of the CSIS/RCMP relationship." Notably, the comments on the distinctiveness of the mandates of CSIS and the RCMP, and "…the old

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1106 See Chapter V (Post-bombing), The Overall Government Response to the Air India Bombing.
1107 Exhibit P-101 CAA1043(i), p. 3.
1108 Exhibit P-101 CAA1110, p. 2.
1109 Exhibit P-101 CAA0152, p. 1.
1110 Exhibit P-101 CAA1073.
1111 Section 4.0 (Post-bombing), The Evolution of the CSIS/RCMP Memoranda of Understanding.
1112 Exhibit P-101 CAA1073, pp. 10-11.
1113 Exhibit P-101 CAA1073, pp. 7-9, 11, 14.

language that described how they would cooperate as distinctive and separate agencies," were eliminated. These were replaced with "…a new concept of partnership … meant to reflect the thrust of the 2004 National Security Policy document" which called for an integrated national security effort.[1114]

Wark felt that the change reflected "…more than a semantic shift" from institutional distinctiveness towards partnership, backed by "…some fairly significant departures, in terms of how that partnership should be brought into being" – the most important being the need for CSIS and the RCMP to develop an "…entirely new way of operating together," via the introduction of joint management committees. These committees would be comprised of senior members of both organizations, who would, in theory, work together and foster the cultural shift deemed necessary for proper cooperation.[1115]

Additionally, a new officer exchange program, involving the secondment of officers, had been created to replace the earlier Liaison Officers Program. Wark noted that the importance of the secondment program was that greater knowledge of the other organization was to be gained through the exchange of senior operational officers, as opposed to employees simply being charged with ensuring the passage of intelligence.[1116]

The 2006 MOU expressly recognized the implications of the *Stinchcombe* decision and the concerns regarding the disclosure of CSIS information to the defence in the event of a criminal prosecution, by adding a provision specifically stating that the agencies recognized that information provided by CSIS to the RCMP "…may be deemed for purposes of the prosecution process to be in the control and possession of the RCMP and the Crown and thereby subject to the laws of disclosure…." The specific procedure set out to address such circumstances was reliance on the ability to claim national security privilege under the *Canada Evidence Act* to protect information.[1117] Wark explained that the MOU attempted to create a cultural mechanism for dealing with disclosure, whereby the RCMP and CSIS would "…understand disclosure matters using a similar language and a similar set of concerns."[1118]

Wark concluded that the 2006 MOU reflected the new thinking that partnership, integration and a closer relationship between CSIS and the RCMP were required. One example of such partnership was the introduction of joint training programs. According to Wark, the MOU also called for an abandonment of the "initial worries" and "…concern with distinctiveness of mandates" of the RCMP and CSIS which, even in 1984, were backward-looking. Replacing those concerns were new concerns about effectiveness of mandates and about "…translating cooperation into effectiveness."[1119]

1114 Testimony of Wesley Wark, vol. 16, March 5, 2007, pp. 1472-1473.
1115 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1474.
1116 Testimony of Wesley Wark, vol. 16, March 5, 2007, pp. 1474-1475.
1117 Exhibit P-101 CAA1073, p. 13.
1118 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1476.
1119 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1477.

In offering his analysis of the new MOU, Wark cautioned that the problem with the new MOU was that, as a fundamental departure from the previous MOUs, "…we're going to have to watch very closely how it is translated from words on a page and doctrine into practice."[1120] The evidence heard in this Inquiry has shown that the new cooperation mechanisms appear to have brought some improvements in the relationship, but have not been adequate to resolve the fundamental issues faced by the agencies in terrorism investigations.[1121] Neither a reliance on section 38 of the *Canada Evidence Act* nor an RCMP policy of "less is more" have been able to accomplish what James ("Jim") Warren described as "squaring the circle" in converting intelligence into evidence.[1122]

Current Information-Sharing Mechanisms

Target "Deconfliction"

The term "deconfliction" refers to the mechanism by which CSIS and the RCMP exchange information about their respective operations (or targets) in order to avoid conflicts in the event that both agencies are investigating the same target. The process of deconfliction of targets is accomplished by the use of a matrix at the regional level, whereby the RCMP and CSIS reveal their CT targets to one another. This procedure began in late 2005 in an effort to identify CSIS investigations that had reached a criminal threshold. During the deconfliction process, the RCMP and CSIS reveal their targets to each other and then enter into more specific discussions regarding those targets who appear on both lists in order to avoid conflict. Superintendent Jamie Jagoe of O Division INSET testified that these formal deconfliction meetings occur on an ongoing basis, approximately every two months. At these meetings case inventories are compared and all CT investigations are outlined with a short background for both agencies. Any unresolved conflicts are referred to HQ, where a Joint Management Team will solve any issues that may remain.[1123]

Jagoe explained that the deconfliction process does not preclude parallel investigations of similar targets, nor does it attempt to descend to a level of detail that would involve each organization in fine-tuning its investigation to avoid any overlap. Instead the aim is simply to avoid "…tripping over each other." The deconfliction process does not prevent either CSIS or the RCMP from conducting investigations within its mandate. Neither CSIS nor the RCMP attempts to direct the activities of the other organization.[1124] While targets are discussed at the deconfliction meetings, the identity of sources is not divulged, nor is information that could identify a confidential human source.[1125]

1120 Testimony of Wesley Wark, vol. 16, March 5, 2007, p. 1502.
1121 See Chapter V (Post-bombing), The Overall Government Response to the Air India Bombing.
1122 Testimony of James Warren, vol. 48, September 19, 2007, p. 5903. See, generally, Volume Three of this Report: The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions.
1123 Testimony of Jamie Jagoe, vol. 82, November 23, 2007, p. 10459.
1124 Testimony of Jamie Jagoe, vol. 82, November 23, 2007, pp. 10459-10460.
1125 Testimony of Ches Parsons, vol. 82, November 23, 2007, p. 10461.

Luc Portelance, DDO of CSIS at the time of the Inquiry, explained that CSIS made the decision to approve CT investigations only after they have been discussed with the RCMP to determine whether or not there is an opportunity to pursue a criminal investigation rather than a national security investigation. To that end, CSIS discusses its intended investigations in terms of the activities the target is involved in and the threats involved. These discussions are held at the regional level, and are meant to determine whether the activities of the intended CSIS target meet the threshold for criminal investigation. If the activities do not meet the threshold, then CSIS pursues its investigation.[1126]

The Joint Management Team

Senior members of CSIS and the RCMP also meet at the HQ level on a regular basis through the Joint Management Team (JMT), a structural arrangement created by Luc Portelance and A/Comm. Mike McDonell that was also launched in late 2005. The JMT does not manage individual cases, but instead is aimed at "…joint management of the relationship" between CSIS and the RCMP. The goal of the JMT is to outline and share all CT investigations the organizations are conducting in order that each may know in general what the other is doing. The JMT also serves as an opportunity to discuss whether or not investigations are progressing and to re-evaluate them in that light. The JMT meetings do not occur as often as the regional deconfliction meetings, but are held periodically to review what is occurring across the country.[1127] McDonell testified that the JMT, for the most part, looks at "…commonalities amongst the files that may serve as impediments or impairments to investigations." He added that the deconfliction at the regional level is more robust and that the JMT serves to make the transfer of information work more effectively.[1128]

According to Portelance, the launch of the JMT and of the regional deconfliction process has been "…a significant departure" from the past. Previously, CSIS would disclose information to the RCMP when it believed a criminal threshold had been reached. While this sort of exchange still occurs, the deconfliction and JMT meetings deal with all the CSIS counterterrorism investigations and thus involve the Force in the discussion of whether a specific investigation meets the criminal threshold.[1129]

CSIS Decisions to Share Information

The information collected by CSIS "…is collected to be shared," and for the purpose of advising the Government of Canada. Often, it will be relevant to other government agencies that are not involved in law enforcement. In order to carry out its role of advising the Government, it is to the advantage of CSIS to know its clients, to have an understanding of their mandates and what they require and to exchange information on that basis.[1130]

1126 Testimony of Luc Portelance, vol. 88, December 4, 2007, pp. 11472, 11474-11475.
1127 Testimony of Luc Portelance, vol. 88, December 4, 2007, pp. 11478, 11481.
1128 Testimony of Mike McDonell, vol. 95, December 13, 2007, pp. 12629-12631.
1129 Testimony of Luc Portelance, vol. 88, December 4, 2007, pp. 11479, 11482, 11486.
1130 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12780.

The decision about whether to share information, and with which department, is made exclusively by CSIS. It is based on CSIS's analysis of who is best equipped to deal with the information.[1131] In cases where the information may be of interest to law enforcement, a special decision-making process has been devised at CSIS to determine the nature and the extent of the information that will be shared in each case.

CSIS generally launches an investigation when there is suspicion of a threat to the security of Canada. Supt. Larry Tremblay, the RCMP manager currently seconded to CSIS, explained that CSIS investigations often span a lengthy period of time and are aimed at assessing the intent, the ability and the means for a given group or individual to actualize the threat. Tremblay testified that suspicion of a threat is a broader concept than suspicion of criminal activity, which is the threshold used to launch a police investigation.[1132] However, as discussed in Volume Three of this Report, in the age of the *Anti-terrorism Act*, the overlap between CSIS counterterrorism investigations and instances where police investigations could be conducted is not as limited as Tremblay perceived it to be.

At CSIS, the decision about when information is to be passed to the police is triggered at the point when there is activity in support of a threat, such as when a group or individual starts to physically acquire the ability to act on the threat. There is no attempt by CSIS at this stage to identify the exact elements of an offence, to specify the *Criminal Code* offence implicated, or to address the admissibility of the information in court. Instead, when the activity of an individual or group indicates that "…there is something going on" that is serious in relation to a threat to the security of Canada, or that is criminal in nature, then that activity triggers the decision-making process about whether the information will be passed on to law enforcement.[1133]

In order to determine whether to advise the police or another government institution, CSIS employs a 13-step vetting process, used by Tremblay while he was working in the CSIS Litigation Unit. The 13 factors are intended to help assess the various types of jeopardy that could result from sharing CSIS information. Of concern are decisions to share information that would jeopardize ongoing investigations, methodology, third-party information, human sources, and CSIS employees. The public interest is a main consideration, as well as the risk for CSIS if disclosure is made, and, conversely, if disclosure is not made.

The decision to share information varies in accordance with the seriousness of the threat or crime. Information indicating a threat to life will be treated differently from information implicating credit card theft. In cases where the offence implicated is not seen as serious by CSIS, such as a facilitation offence, disclosure to the police may not always be forthcoming. For such offences, disclosure will be considered on a case-by-case basis, with more consideration given to the jeopardy to CSIS should the information be shared.[1134]

1131 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12780.
1132 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12769-12770.
1133 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12769-12770, 12779.
1134 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12772, 12779.

One of the factors considered to decide whether information will be passed is the likelihood of CSIS being able to protect the information through an application under section 38 of the *Canada Evidence Act*. This analysis is done in consultation with the CSIS legal team and the Litigation Unit.[1135] Once the information has been fully vetted and approved for initial passing to law enforcement, CSIS will place a caveat on the information, retaining the ability to apply for protection from disclosure under section 38.

CSIS always caveats the information passed to try to retain some control should circumstances change when the matter goes to court, and should CSIS conclude that it needs to protect its assets. CSIS will continue to reassess its position prior to its information being made public through a judicial proceeding, even though the information has already been shared outside of CSIS.[1136]

According to Tremblay, whether the discussion in relation to the transfer of information is internal at CSIS or takes place after sharing with the RCMP, the *Stinchcombe* decision and its effect on disclosure at trial "…is at the forefront of every discussion."[1137]

> The Service is well aware of the obligation under *Stinchcombe* and well aware of what could be the outcome, what are the outcomes when disclosure requirement kicks in, and it does factor on what information is or can be shared, understanding that that information, one day, depending on the nature of the threat, could be made public.[1138]

At CSIS, the decision on whether to share information with a law enforcement or other agency is viewed as an operational one. Operational managers are expected to identify information that could be of interest to law enforcement. The information is then sent to the Litigation Unit and Legal Department for an assessment of the jeopardy to a CSIS interest should the information be shared. Where the release of an "advisory letter" authorizing the use of CSIS information in court is contemplated, the Litigation Unit and Legal Department prepare a recommendation on the basis of their assessment of jeopardy, and the final decision to authorize release rests with the executive at CSIS. Where it is contemplated to pass information to law enforcement without authorization to use it in court, the assessment of jeopardy prepared by the legal departments is provided to the operational units, who then have authority to make the ultimate decision about sharing the information.[1139]

1135 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12774.
1136 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12773.
1137 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12776.
1138 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12777.
1139 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12764-12765, 12768-12769.

Secondment Program

In 2002, the secondment program replaced the RCMP/CSIS LO program. The goal of the secondment program is to facilitate an enhanced understanding in CSIS and the RCMP of each other's "…mandate, responsibilities and methodologies" and to allow each agency to benefit from the skill and expertise of the other agency's members.[1140] The secondments are instituted on both a permanent and an ad hoc basis.

Professor Wark saw the creation of the secondment program as an example of the "…cultural shifts in attitude" that have taken place since 1985. Previously, the liaison officers acted as channels for the passage of information. The seconded members fulfill an entirely different purpose; they immerse themselves in the institution and help foster knowledge of the partner institution at a senior level so that the agencies have a way to "…personally exchange concerns on a daily and ongoing basis about the development of operations and the nature of threats."[1141]

The secondment agreement stipulates that RCMP officers are to be seconded to each of the four CSIS regional offices and to Headquarters. These officers do not report back to the RCMP. Similarly, CSIS agents are to be seconded to each of the INSETs. Again, these agents do not report back to CSIS.[1142] As of February 2008, none of these secondments were active, which leads the Commission to question their value.

In addition, a similar management secondment program currently involves the secondment of a CSIS manager to RCMP HQ to be in charge of the RCMP Threat Assessment Section and of an RCMP inspector to a management level position within CSIS HQ.[1143] These secondments have been active for several years, and the current individuals involved from CSIS and the RCMP testified before the Inquiry about their experience.

RCMP Manager Secondment to CSIS

Supt. Larry Tremblay, who was seconded to CSIS as part of the management secondment program, discussed the program in his evidence at the Inquiry. Jack Hooper, who served in the position of Deputy Director of Operations at CSIS from 2005 until his retirement in 2007, stated in his testimony that Tremblay is a "…highly talented RCMP inspector who is managing our highest priority CT target program and he is doing an amazing job of that."[1144]

1140 Exhibit P-101 CAA1073, p. 14, CAA1081.
1141 Testimony of Wesley Wark, vol. 16, March 5, 2007, pp. 1474-1475.
1142 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Policy Review: The RCMP and National Security – A Background Paper to the Commission's Consultation Paper* (Ottawa: Public Works and Government Services Canada, 2004), p. 67 [*Policy Review: The RCMP and National Security*].
1143 *Policy Review: The RCMP and National Security*, p. 67.
1144 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6253.

Tremblay is an RCMP officer experienced in drug investigations and major organized crime investigations.[1145] In late November 2004, Deputy Commissioner Garry Loeppky and Assistant Commissioner John Neily asked Tremblay to take the management secondment position at CSIS, based on his background and experience.

Tremblay was assigned a position within operational support at CSIS. His initial position was at the CSIS Counter-Proliferation (CP) branch at the level of Chief. At the time, the CP branch housed the Threat Assessment Unit, the Immigration Assessment Unit and the Litigation Unit. In May 2006, CSIS underwent a restructuring, at which time the International Terrorism (IT) branch was formed. Tremblay was moved to the IT branch for a two-year secondment as a fully operational manager responsible for part of the national program.[1146]

During the first part of his secondment with the CP branch and the IT branch, Tremblay was involved in the determination of what information, if any, ought to be passed to the RCMP. The duties of the Litigation Unit, which reported to Tremblay, included providing the assessment of the jeopardy for CSIS in sharing information. The Litigation Unit also had a role in the management of disclosure and advisory letters, the formal documents that provide the RCMP with CSIS information.[1147]

In 2006, Tremblay moved to an operational position. It became his responsibility to make the ultimate decision as to whether information that CSIS believed could be of interest to law enforcement would in fact be shared.

Tremblay testified with regard to his experience with CSIS's current ability to identify criminal information. About his work at CSIS, Tremblay stated that the "…scope of what I look at presently is far wider from an intelligence perspective than what I would look at from a criminal perspective."[1148] He explained that, in his experience, when CSIS uncovers information that could be of interest to law enforcement, because it indicates that something serious is happening or that targets are acquiring the ability to act on a threat, the information is passed to the RCMP at such an early stage that there have been occasions where the information disclosed by CSIS did not yet meet the threshold that would allow the police to commence their own investigation. Tremblay testified, however, that the vetting process which he developed during his secondment at the Litigation Unit, operates to reduce the amount of information shared,[1149] because the evaluation of the possible jeopardy to CSIS will at times lead to decisions not to share information of potential interest.

Tremblay gave his personal opinion that if there was a mechanism in place whereby the CSIS information could be introduced but the sensitive information – essentially CSIS methods, human sources and third-party information – could

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1145 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12764.
1146 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12764-12765.
1147 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12764-12766, 12768.
1148 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12769.
1149 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12769, 12771-12773, 12779.

be held back, then the problems with the use of CSIS information in the judicial process would be alleviated. He did not view the current legal protection provided under the *Canada Evidence Act* as sufficient. Tremblay noted that a mechanism that ensured that the sensitive information would not have to be disclosed would increase the likelihood of CSIS sharing its information with law enforcement, particularly with regard to offences perceived as less serious, such as terrorist financing and facilitation.[1150] The current system militates against CSIS sharing information about such offences where there is potential for jeopardy to CSIS assets and investigations.

Tremblay offered his opinion about the RCMP's sensitivity towards CSIS's concerns for the protection of its assets that highlights some of the difficulties faced by CSIS and the RCMP in relation to sharing information. Tremblay stated that as an RCMP officer with a law enforcement perspective, he would always want more information. As a police officer, he is tasked with continuously trying to obtain the best possible evidence in court. In his words, "I still have [yet] to meet a Crown that tells me to stop my investigation; they have enough to go to trial."[1151] From a law enforcement perspective then, the task is to obtain as much relevant information as possible. Tremblay contrasted this outlook with the CSIS perspective that he gained through the secondment program, which is that the ideal amount of information to share with law enforcement is the minimum amount required to allow the police to proceed with their investigation without jeopardizing Service interests. These two viewpoints are inherently in conflict.

CSIS Manager Secondment to RCMP

The Inquiry also heard testimony from the CSIS management secondee to the RCMP, Neil Passmore. As of April 2007, Passmore was seconded to the position of Acting OIC of the National Security Threat Assessment Section. As with the RCMP secondee, his role was not to act as a liaison for the passage of information.[1152] Rather, he was expected to use his years of experience at CSIS to benefit the RCMP Threat Assessment Section.

In that position, Passmore applied his experience at CSIS to the management of the Threat Assessment Section and the improvement of its threat assessment product. He implemented enhanced quality control measures. His goal was to make it easier to produce an assessment product through the development of templates with standardized wording. He also implemented a timeline procedure that allows the tracking by date in the threat assessments of specific tasking and of the corresponding response.[1153]

Passmore liaised with ITAC in order to provide his colleagues at the RCMP with an improved understanding of the mandate and role of ITAC. Part of his role was to harmonize the information produced by the RCMP Threat Assessment Section and that produced by the multi-agency ITAC. His work involves ensuring

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1150 Testimony of Larry Tremblay, vol. 96, February 14, 2008, pp. 12782-12784, 12788.
1151 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12776.
1152 Testimony of Neil Passmore, vol. 96, February 14, 2008, pp. 12799-12800, 12833.
1153 Testimony of Neil Passmore, vol. 96, February 14, 2008, pp. 12833-12834.

that both agencies are reaching the same conclusions, as well as avoiding the historic problem of duplication of threat assessment products. Passmore's section is provided with the ITAC schedule of assessments and, in response, tasks ITAC with the information needs of the RCMP.[1154]

Improving Relationships versus Sharing Information

Representatives of both CSIS and the RCMP have indicated that the secondments contribute to strengthening CSIS/RCMP relations.[1155]

Jack Hooper testified that the management secondment program had been "…a tremendously successful experiment." He credited the senior executive group within CSIS and their RCMP counterparts with the creation of the program as a replacement for the LO Program. Hooper stated that, as a result of the management secondment program, CSIS benefited from two "…very talented RCMP officers who both came in at the inspector level and who we put into management positions within CSIS."[1156]

Hooper believed that the need for the secondment program arose because there were fewer and fewer ex-RCMP members populating CSIS ranks and that therefore the Service was losing its understanding of the RCMP and how it worked. The goal was that, following the secondment, RCMP officers would go back to the RCMP with a very extensive understanding of CSIS's mandate and how it operates. With regard to the management and working-level secondment programs, Hooper stated that the benefit derived from the secondment program "…far outweighs those benefits that accrued [from] the old liaison officer program."[1157]

The RCMP, for its part, felt that the secondment program would help address a deficiency in the Force's understanding of the Service's "…standard operating procedures and investigative processes."[1158]

The secondment program is vastly different from the LO Program that preceded it. While secondment may enhance each institution's understanding of the other, it is not an information-sharing mechanism and, as such, it cannot replace the LO Program that was focused on transferring information. The personnel exchanges are intended to foster cooperation and understanding on a personal level. While these are worthwhile goals, they do nothing – as Tremblay admitted – to resolve the problem encountered when CSIS decides not to share information in order to protect its own interests, thereby causing the RCMP to lose relevant information.[1159]

1154 Testimony of Neil Passmore, vol. 96, February 14, 2008, pp. 12834-12835.
1155 Exhibit P-101 CAA1035; Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6253.
1156 Testimony of Jack Hooper, vol. 50, September 21, 2007, pp. 6252-6253.
1157 Testimony of Jack Hooper, vol. 50, September 21, 2007, p. 6253.
1158 Exhibit P-101 CAA1043(i), p. 9.
1159 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12776.

Regardless of whether the secondment program is an effective replacement for the LO Program, the program does have merit in fostering greater understanding that can assist in effecting cultural changes that will improve cooperation. However, Tremblay has yet to return to the RCMP to share his new insights with his law enforcement colleagues, and concerns have been raised about the level of enhanced understanding that is achieved through the secondment of CSIS managers to the RCMP under the current circumstances.

CSIS managers seconded to the RCMP are assigned civilian roles only, with no peace officer status. In 2005, CSIS raised concerns about the "…inconsistent use by the RCMP of CSIS managers," and questioned the value for the Service of seconding its managers to the RCMP under those circumstances.[1160] Indeed, being seconded to the management of a threat assessment unit at the RCMP does not provide CSIS managers with many opportunities to observe the day-to-day issues that arise when the RCMP needs to rely on CSIS information in the context of criminal investigations. While Passmore attempted to use his experience at CSIS to benefit the RCMP, and did devise some improved procedures for threat assessments, he was not able to gain the level of understanding of the current information-sharing problems that Tremblay acquired through his secondment experience as an operational manager at CSIS.

Relying on just one management secondment each to foster cooperation and understanding throughout two large organizations is problematic. The secondment program could have had further impact through implementation of the agreed upon secondments at the working level. For unknown reasons, as of the end of the Commission's hearings, those secondment arrangements had not been put in place.

Less Is More

The concept of "less is more" is increasingly used by both CSIS and the RCMP in decisions about information sharing and about cooperation mechanisms. Tremblay explained in testimony that "…law enforcement took the position that, at times, it's preferable for their prosecution to have less than more information."[1161] Mike McDonell testified that he was a "firm believer" in the philosophy of "less is more."[1162] In practice, the concept means that both CSIS and the RCMP aim at the minimal amount of CSIS disclosure to the RCMP that is necessary for the RCMP to proceed with its own investigation.[1163] McDonell explained his belief that, if the police can gather information themselves on the basis of limited initial information from CSIS, then the issues of how the CSIS information will impact on the criminal process can be avoided.[1164] The "less is more" approach is used in an attempt to protect as much CSIS information as possible from potential disclosure, while also protecting the prosecution from potential collapse should the presence of sensitive CSIS information in the RCMP's possession make full disclosure to the defence impossible.[1165]

1160 Exhibit P-101 CAA1043(i), p. 12, CAA1081, p. 3.
1161 Testimony of Larry Tremblay, vol. 96, February 14, 2008, p. 12777.
1162 Testimony of Mike McDonell, vol. 95, December 13, 2007, pp. 12634-12635.
1163 Testimony of Jamie Jagoe, vol. 82, November 23, 2007, pp. 10467-10468.
1164 Testimony of Mike McDonell, vol. 95, December 13, 2007, pp. 12634-12635.
1165 Testimony of Jamie Jagoe, vol. 82, November 23, 2007, p. 10467.

The prevalence of the "less is more" philosophy in shaping the recent cooperation mechanisms is obvious. The RCMP no longer seeks full access to CSIS information for its LO to review and to select all relevant materials. Instead, the secondment program is aimed at fostering better understanding, while ensuring that seconded members cannot bring information back to the host agency. While deconfliction discussions can serve incidentally as the basis for identifying a need to share information about a specific matter, they are mostly aimed at ensuring that investigations do not overlap and that the RCMP can gather for itself the information and evidence it deems necessary. The insistence on advising the RCMP early on of the existence of a CSIS investigation serves to ensure that the Force can proceed on its own and advise CSIS of the potential conflict.

In fact, there are serious questions surrounding the necessity and the effectiveness of "less is more" as a strategy for allowing CSIS to share some information with the RCMP while avoiding legal issues surrounding disclosure to the defence. It is also clear that the "less" that CSIS and the RCMP contemplate that CSIS will pass to the RCMP, diminishes to "nothing" when CSIS decides that the potential criminal offence involved is not serious enough to outweigh the perceived jeopardy to CSIS operations that might result from disclosure.[1166]

Conclusion

The events of 9/11 led to a renewed interest in issues of national security. Both CSIS and the RCMP again looked to improve their relationship. In 2005, partly in anticipation of the Rae review, renewed effort by the agencies produced new changes aimed at overcoming the difficulties that still remained in the cooperation between CSIS and the RCMP.[1167] The current situation remains challenging, especially in terms of the effective transfer and sharing of information and of the use of CSIS information in support of criminal prosecutions. Volume Three of this Report addresses some of the legal and procedural recommendations that aim to solve the problems that remain.

1166 For an in-depth discussion of these issues and of the manner in which they can be addressed, see Volume Three of this Report: The Relationship between Intelligence and Evidence and the Challenges of Terrorist Prosecutions.

1167 See Chapter V (Post-bombing), The Overall Government Response to the Air India Bombing.