Commission of Inquiry
Concerning Certain Activities of the
Royal Canadian Mounted Police

Second Report — Volume 2

Freedom and Security under the Law

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PART VI

A PLAN FOR THE FUTURE: MANAGEMENT, PERSONNEL, AND STRUCTURE OF A SECURITY INTELLIGENCE AGENCY

INTRODUCTION

INTRODUCTION

1. Having concluded that Canada needs a security intelligence organization at the federal level, and having decided on the basic functions of this organization, we are now in a position to discuss two difficult and related issues: first, the management and personnel practices of a security intelligence organization and, second, its appropriate structure within the Canadian government.

2. The first issue demands our consideration of the following questions:

> What overall approach to management is most likely to produce effectiveness and encourage behaviour which is both legal and proper?
>
> What should be the role of the Director General and the organization's senior management? What qualities should they possess?
>
> What kinds of people should this organization attract and how should they be recruited, trained, supervised, and rewarded?
>
> What procedures are appropriate to govern such areas as internal security, discipline, and complaints?

Our answers to these questions will lead logically to a discussion of the second issue, that of appropriate structure. In that regard, we shall tackle one of the most complex questions facing our Commission: should the security intelligence organization remain part of the R.C.M.P., or should it, or at least part of it, be separated from the Force? And if separation appears preferable, should a security intelligence organization be a separate department of the federal government, part of an existing department, or an agency with a distinct set of relationships to the central management bodies of the Federal Government — the Treasury Board, the Public Service Commission and the Privy Council Office?

3. These management, personnel and structural issues have a long history. Indeed, as we shall illustrate in the next chapter, R.C.M.P. senior management and, to a lesser extent, Ministers and other senior officials within the Federal Government, have been wrestling with these problems for at least 25 years.

CHAPTER 1

THE HISTORICAL CONTEXT

4. Our objective in this chapter is to describe how management and structure have been dealt with in the past — the major studies, the recommendations which these studies made, and the impact they had on the R.C.M.P. Security Service. We end this chapter by summarizing briefly the major conclusions we have reached on these issues.

A. POST WORLD WAR II TO THE ROYAL COMMISSION ON SECURITY, 1968

5. As we noted in Part II, Chapter 2, which traces the history of the Security Service, its management and structure developed along a relatively stable pattern in the three decades following World War II. A large increase in staff during this period accompanied a series of organizational changes. These changes had the dual effect of enhancing the status of the security intelligence function, as well as giving it an organizational form which became increasingly separate from the criminal investigation side of the Force. There were also a number of changes which were premised on the specialized needs of security intelligence — for example, the hiring of civilians in research and analytical capacities, and the development of training courses on security intelligence matters. Two internal studies, one by Superintendent Rivett-Carnac in 1947 and another by Assistant Commissioner Harvison in 1956 (both of whom became Commissioners), were instrumental in pointing the Force in these directions.

6. There was, in addition, a third internal study of the Force's security intelligence function, completed in 1955. This study put forward recommendations which broke sharply with the relatively stable development pattern we described above. Its author was a civilian member employed by the R.C.M.P. in a senior research capacity, who was asked by Commissioner Nicholson for proposals as to the most effective use of civilians in the Special Branch.[1] Interpreting this request broadly, the Report called for a radical reorganization of the security intelligence function. The major recommendation was for the establishment of a "two team organization" comprised of a Special Branch under a Deputy Commissioner and a parallel Internal Security Service (ISS) under a Director with the equivalent rank of a Deputy Commissioner. Both the

[1] Special Branch was the name then given by the R.C.M.P. to the organizational unit responsible for the security intelligence function. For a description of how the name of the Security Service evolved, see Part II, Chapter 2 of this Report.

Deputy Commissioner and Director would report to the Commissioner of the R.C.M.P. The ISS would be fully civilian in nature, with complete responsibility for counter-espionage, research, policy development, and foreign liaison. It would share responsibility with the Special Branch (each would have complementing "specialties") in the following areas:

— counter-subversion

— security screening

— governmental and public liaison

— emergency planning

In counter-subversion, for example, the Special Branch would do the day-to-day "detailed coverage" activities, while ISS would "select from this coverage those cases requiring long term specialized attention". In a summing up analogy, the Report compared the Special Branch to an army, with its high visibility and systematic activities performed across Canada; the ISS, on the other hand, would be more like a guerrilla force, covert in nature, and capable of concentrated sudden strikes against specific targets.

7. The Report preferred this two-team approach to an upgraded Special Branch for two reasons. First, it judged that the Special Branch was not doing its job, and, given the likelihood of an increasingly dangerous international environment (the Report was written at the height of the Cold War), the Special Branch did not have the time required to shore up its weaknesses. Second, a police force could not perform the duties of a fully specialized security service. For example, recruiting, training, and career planning practices of police forces were inappropriate, the author said, for a security service which required professionals from a broad range of disciplines, with a sophisticated understanding of revolutionary processes.

8. That the R.C.M.P. did not implement those recommendations was not surprising. Two R.C.M.P. historians, Carl Betke and S.W. Horrall, summed up the Force response this way: "Not surprisingly, that comprehensive advice from a civilian newcomer of no operational experience was rejected". In our view, the rejection of some of the recommendations was justified. But it was unfortunate that the Force and the government took little or no action to deal with other issues raised in the Report, including the following:

— whether or not police recruiting, training, and staffing procedures are appropriate for a security service;

— the differences between the role of a police force and that of a security service;

— the necessity for legal advice as a component of security service decision-making;

— the question of whether or not a security service is required to do illegal or improper acts and the problems this dilemma created for its members;

— the capabilities required of a security service for policy development and governmental liaison;

— the need for a legislative charter for the security intelligence function.

9. As we shall see, these issues would return to haunt the R.C.M.P., and indeed are still current today.

B. THE ROYAL COMMISSION ON SECURITY, 1968, AND ITS AFTERMATH

10. The Royal Commission on Security, chaired by Mr. Maxwell Mackenzie, completed its report in 1968.[2] Of relevance to this chapter was the Commission's recommendation calling for "the establishment of a new civilian non-police agency to perform the functions of a security service in Canada."[3] The Commissioners based this recommendation on three arguments:

(i) The differences between police and security duties are wide. Consequently, a security service should not orient its recruiting and training practices, its career patterns and its organizational structures towards the requirements of a police force.

(ii) The R.C.M.P. had failed to play an effective role in taking "desirable initiatives", or in stating the case for necessary security measures at high level policy-making forums within the federal government.

(iii) The association of the security function with the police role tended to make the work of both the Security Service and the rest of the R.C.M.P. more difficult. On the one hand, inquiries made by civilians in connection with security clearances would be received with more understanding than would similar inquiries made by policemen. On the other hand, it is not appropriate for a police force to be concerned with activities that are not crimes or suspected crimes. Moreover, a security service might be involved in actions "... that may contravene the spirit if not the letter of the law"[4] and that may infringe on individuals' rights. Such activities are not appropriate police functions.

11. From our study of R.C.M.P. file material, we know that the reaction of R.C.M.P. senior officers to this recommendation was one of shock and disbelief. For example, Assistant Commissioner W.L. Higgitt, who at the time was the officer in charge of the Security and Intelligence Directorate and became Commissioner in the following year, in an address to the Security Panel (a senior interdepartmental committee of officials), termed the recommendation for a separate civilian service "a travesty of justice," and added that "the Soviet Intelligence would be jubilant. They could never hope to duplicate the accomplishment".

12. Once the initial shock had subsided, the senior management of the R.C.M.P. put together a detailed rebuttal of the Royal Commission's Report. The Force's critique was threefold. First, the Royal Commission had done its job poorly: it had failed to assess the effectiveness of the Security Service, had

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[2] For a description of the events leading up to the establishment of the Royal Commission on Security, see Part II, Chapter 2 of this Report.

[3] *Report of the Royal Commission on Security*, paragraph 297.

[4] *Ibid.*, paragraph 57.

made numerous errors in fact, had ignored other areas of importance, and had not taken into account evidence supplied by the R.C.M.P. Second, creating a separate security service would be a serious mistake, in the Force's view, for the following reasons:

— a new civilian agency would be easily penetrated;

— the advice was, where possible, to establish a security service as part of the national police;

— only the R.C.M.P. was spread sufficiently widely across Canada to constitute an adequate service;

— the R.C.M.P. had built up meaningful liaison with foreign agencies and these relationships could not be readily developed by a new service.

Finally, if the recommendations concerning the Security Service were ever to be published, the Force believed that severe damage would result to the Canadian security community.

13. The documents relating to the treatment of the Report by the Cabinet Committee on Security and Intelligence and its various committees of officials indicate that much of the consideration focussed on the question of whether or not to publish even an abridged version of the Report. There appeared to be little support, either at the ministerial or the official level, for the new civilian agency proposed by the Royal Commission.

Prime Minister Trudeau's 1969 Statement

14. After a lengthy debate, the Cabinet Committee on Security and Intelligence agreed to publish an abridged version of the Royal Commission's Report. In tabling the Report in the House of Commons on June 26, 1969, the Prime Minister rejected the Commissioners' recommendation for a separate security service and announced, instead, that the security intelligence function would remain within the Force but become ". . . increasingly separate in structure and civilian in nature". The following are the key paragraphs in which Mr. Trudeau outlined this new policy:

> After careful study of the considerations put forward by the commissioners in support of their recommendation, we have come to the conclusion that current and foreseeable security problems in Canada can be better dealt with within the R.C.M.P. through appropriate modifications in their existing structure than by attempting to create a wholly new and separate service.
>
> We are keenly aware that the R.C.M.P. are one of the most honoured and respected of Canadian institutions. The force has come to be recognized as one of the finest national police forces in the world, whose members, as the commissioners rightly state, are "carefully selected, highly motivated, and of great integrity." The government also recognizes that no organization is perfect, and that there is some validity in the view of the royal commissioners that some basic differences do exist between police and security duties, by their very nature.
>
> It is therefore the government's intention, with the full understanding of the R.C.M.P., to ensure that the Directorate of Security and Intelligence

will grow and develop as a distinct and identifiable element within the basic structure of the force, and will be more responsive, in its composition and character, to the national security requirements described by the commissioners. The basic aim will be to develop the security service so as to draw on the police services for personnel of suitable qualifications and character, and to retain administrative, research, documentation and other services in common with them. The security service, under the Commissioner of the R.C.M.P., will be increasingly separate in structure and civilian in nature.

New and more flexible policies in relation to recruiting, training, career planning and operations will be calculated to ensure that Canada's security service will be capable of dealing fairly and effectively with the new and complex security problems which we will undoubtedly face in the future, and also to ensure that it clearly reflects the nature of our cultural heritage. Under the new arrangements it will be possible, for example, for an increasing number of university graduates from all parts of Canada to join the Directorate in a civilian capacity and to aspire to positions at the top of that organization, thereby making the kind of contribution referred to by the commissioners. Nothing in the proposed changes will unfairly prejudice the career expectations of people already in the service.[5]

15. The Prime Minister's statement was, in essence, a compromise. What Mr. Trudeau was attempting to achieve was a Security Service similar to the one envisioned by the Royal Commission, but located within the R.C.M.P. The statement made no mention of any implementation scheme.

16. In replying to Mr. Trudeau's statement, both the Honourable Robert Stanfield, the Leader of the Opposition, and Mr. T.C. Douglas, Leader of the New Democratic Party, expressed reservations about the government's decision not to form a civilian non-police agency. Mr. Stanfield wondered "... whether the mounted police, as it is presently constituted and organized, lends itself very readily to the sort of modifications to which the Prime Minister refers." He went on to add:

> My initial reaction might be that we are more interested in considering the proposal for a special agency, though I can see certain difficulties in this regard. But I look forward to hearing a further explanation in the house by the government when we have our discussion, presumably in the fall.[6]

Mr. Douglas based his support for a separate agency on what he believed to be "... a difference in the type of training required, the form of recruitment and the structure of a police force on the one hand, and a security agency on the other."[7]

17. After a thorough study of relevant R.C.M.P. files, and after questioning numerous witnesses including Ministers and senior officials on this topic, we conclude that the R.C.M.P. has not sufficiently implemented the policy announced by the Prime Minister in his 1969 statement, nor has it made a concerted effort to do so. For the better part of the last decade, the successive Commissioners of the Force and their senior managers who were not part of

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[5] House of Commons, *Debates*, June 26, 1969, pp. 10636-10637.

[6] *Ibid.*, p. 10639.

[7] *Ibid.*, p. 10640.

the Security Service have endeavoured to ignore the policy statement whenever possible. When circumstances forced them to deal with the statement, they have tended to misinterpret it by concentrating on the "increasingly separate in structure" aspect of the policy, showing insufficient concern for what has come to be called "civilianization" of the Security Service. A careful reading of the Prime Minister's statement reveals that increasing separation was only a means to achieving more flexible personnel policies so as to facilitate civilians' joining the Service and rising to senior positions. The Prime Minister, as we shall see later in this chapter, made this abundantly clear to the Force several years later.

18. The use of appropriate statistics is one way of assessing what has happened to the government's policy since 1969. Before introducing these statistics, we refer again to a basic feature of the R.C.M.P. Security Service which we explained in the introductory chapter of this Report. The Service has four different types of employees:

— public servants, who fill mainly clerical or support staff positions;

— special constables, who perform specialized roles in such areas as security screening;

— civilian members, who were first hired in the early 1950s to perform research analyst roles and who now, in addition, perform specialized functions in translation and in technical areas dealing with computers and sophisticated surveillance technology;

— regular members, who first joined the R.C.M.P. as policemen, and who, after receiving basic training, usually spend several years in regular policing before joining the Security Service.

Since 1969, there have been no substantive changes in the methods of recruiting regular members into the Security Service. They must still train and serve first as police officers. Consequently, to judge the progress in implementing the policy enunciated by the Prime Minister in 1969, we must examine what has happened to the civilian member category of employee.

19. The statistics we have compiled lead to three conclusions. First, the civilian member component within the Security Service has increased in both absolute and relative terms, but it is significantly smaller than the regular member component. Second, civilian members are heavily concentrated in lower ranking jobs. Third, most of the senior positions held by civilians are not in the key operational sectors of the Service but rather, they are in service branches. Moreover, since 1969, there is evidence that there has been a relative decline in the civilian component making up the operational units within the Security Service.

20. The growth in civilian members has been about 125 per cent since 1969. Table 1 illustrates how the civilian component has grown in relative terms.

Table 1

Established Positions As a Percentage of the Total Security Service Strength

	1969	1979	Change
Regular Members	53.3%	46.1%	-7.2%
Special Constables	9.8%	13.2%	3.4%
Civilian Members	9.9%	17.2%	7.3%
Public Servants	27.0%	23.5%	-3.5%
Total	100.0%	100.0%	

In relative terms, the civilian member component as a percentage of the total Security Service has grown from 9.9 per cent to 17.2 per cent. Even with this growth, the civilian member component is still significantly smaller than the regular member component. These figures, if anything, overstate the growth in the civilian member category.

21. Table 2 is the basis for the second conclusion that the large majority of the civilian component is in the lower ranks. To help the reader interpret this Table, we note that civilian members do not have ranks as do regular members. In comparing civilian positions to those of regular members, salary ranges have been used as the basis of comparison. The ranks of regular members are as follows (proceeding from the most junior to the most senior): constable, corporal, sergeant, staff sergeant, inspector, superintendent, chief superintendent, assistant commissioner, deputy commissioner and commissioner. Corporals are called junior non-commissioned officers (Jr. NCOs). Sergeants and staff sergeants are called senior non-commissioned officers (Sr. NCOs) and those with the rank of inspector and above are called officers.

Table 2

Distribution of Regular Members (RMs) Positions and Civilian Members (CMs) Positions By Rank - March, 1980

	Senior Officers	Senior NCOs	Junior NCOs	Constable & lower	Total
RMs who are	9.4%	31.9%	44.3%	14.4%	100%
CMs who are equivalent to	2.4%	28.6%	17.5%	51.5%	100%

22. Finally, Table 3 illustrates that civilian members holding relatively senior ranks within the Service are significant in service sectors but not in operational sectors.

Table 3

Comparison by Rank of Established Positions of Civilian Members and Regular Members - March 1980

A. In Service Sectors: Percentage of Established Positions Held

	Civilian Members	Regular Members	Total
Officers	22.9%	77.1%	100%
Senior NCOs	50.5%	49.5%	100%
Junior NCOs	44.7%	55.3%	100%
Constable & Lower	96.9%	3.1%	100%

B. In Operational Sectors: Percentage of Established Positions Held

	Civilian Members	Regular Members	Total
Officers	1.9%	98.1%	100%
Senior NCOs	5.5%	94.5%	100%
Junior NCOs	4.3%	95.7%	100%
Constable & Lower	36.4%	63.6%	100%

23. The fact that not one civilian member, with the exception of the Director General, now holds an officer-equivalent position with operational responsibilities is perhaps the best single indicator that the type of security service envisioned by Prime Minister Trudeau has not materialized. In particular, this statistic should be looked at in the light of the Prime Minister's statement that "... it will be possible, for example, for an increasing number of university graduates from all parts of Canada to join the Directorate in a civilian capacity and to aspire to positions at the top of that organization, thereby making the contribution referred to by the commissioners." Moreover, there is some evidence to suggest that since 1969 the situation of civilian members in the operational sectors of the Service has actually deteriorated. Table 4 below compares their position in 1968/69 with that of 1977. More up-to-date comparisons are difficult because of at least one organizational change which has removed an operational unit from the Security Service. We have no reason to believe that the situation has improved significantly in the last three years.

Table 4[8]

Percentage of Positions Held by Civilian Members in Operational Sectors by Rank

	1968/69	1977
Officer	8.7%	.0%
Senior NCOs	5.4%	.4%
Junior NCOs	6.8%	1.9%
Constable & Lower	14.1%	25.9%

[8] This Table is slightly adapted from a similar one developed by civilian members in preparing a brief for the Special Committee on the Review of Personnel Management and the Merit Principle, commonly referred to as the D'Avignon Committee. Unlike Tables 1 to 3, this one is not based on established positions, but rather uses actual numbers of people employed at a given point in time.

24. In our discussions with members of the R.C.M.P. about the Prime Minister's 1969 policy statement, many have pointed to the improvement in formal education levels of those within the Service as indicating that the Force has taken the policy statement seriously. Table 5 below demonstrates that formal education levels, especially among regular members, have indeed improved.

Table 5

Percentage of Security Service Employees with University Degrees

	1969	1979
Regular Members	5.5%	21.4%
Civilian Members	13.8%	26.3%
Special Constables	.7	1.6%

25. Several policies have been responsible for producing these changes: sending regular members of the Security Service to university as full-time students; offering reimbursement of tuition fees for part-time university study; and adopting several Force-wide programmes, now discontinued, to encourage university graduates to join the Force. But none of these programmes was really directed at the main objective of the Prime Minister's policy, that is, "for an increasing number of university graduates... to join the Directorate in a *civilian* capacity and to aspire to positions at the top of that organization". (Our emphasis.) Moreover, we believe that there is an important difference between, on the one hand, recruiting people with university backgrounds and, on the other, sending existing members of the Security Service to complete university degrees. We concur with Mr. R.D. French, an associate professor at the Faculty of Management, McGill University. After submitting a brief to this Commission, he had this to say in the question period during the public hearing:

> I would like to observe that the kinds of social experience and breadth of acquaintanceship and catholicity or variety of background, that you find at the University level, and that you experience as a young generally single student, are not comparable to going to University and getting a B. Com. in management or a B.A. in Political Science, or whatever, at the age of thirty or twenty-eight. I think they are fundamentally different things. I think it is highly desirable that R.C.M.P. officers who can benefit from University education get one. That's first class. But it is not a substitute for a broader net at the point of initial recruitment into the organization.
>
> (Vol. 95, pp. 15533-15534.)

26. While there is little evidence of "new and more flexible policies" aimed directly at implementing the June 1969 policy statement, there is evidence in at least one personnel area — classification — of the Force's having adopted policies which point in the opposite direction to that intended by the Prime Minister. The Security Service, along with the rest of the Force, began developing a new classification system in 1971 under the general direction of

the Treasury Board. The new system, which was finally implemented on April 1, 1975, had the important feature of including "police training and experience" as a prerequisite for most of the senior and middle management jobs in the Service and for all officer equivalent jobs in the operational area with the exception of the Director General's position. Including such a prerequisite was not forced on the R.C.M.P. by the Treasury Board. The result of this classification system has been to provide virtually no career path for civilians in the operational side of the Service.[9] For those in the technical services areas of the Service, the most senior job a civilian can assume is at the Superintendent level (Chief Superintendent, Assistant Commissioner and the Director General are three levels above the Superintendent rank.)

27. The adoption of the classification system has also had an unintended effect on the status of civilians within the Service. Until 1975, civilian member salaries were tied to salary levels of regular members. With the adoption of the new classification system, civilian member salaries were tied to equivalent jobs in the Public Service, and did not keep pace with the more rapid rise in police salaries. Thus, civilian positions within the Security Service for the last five years have been gradually downgraded when compared to regular member positions.

28. We should note one recent change to the career paths of civilian analysts within the Service. In 1979, the Security Service created eight additional "dual" staffing positions (such positions can be filled by either regular members or civilians) in certain operational branches at Headquarters. One of these positions is at the inspector level (the first rank in the officer category); five are at the senior NCO level. This change is part of a longer term plan with two objectives: first, to enhance gradually civilian career paths within the Service itself, and second, to provide civilians with government-wide career paths by converting civilian member positions into regular Public Service positions.

29. We view this longer term plan with substantial reservations. It is clear, for example, that civilians within the Service will still remain in basically "support" roles. As the authors of one recent document outlining this new plan put it:

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[9] The R.C.M.P. is not unique among Canadian police forces in failing to provide meaningful career paths for civilian members in operational areas. In a 1977 report reviewing the Criminal Intelligence Service of Canada — a confederation of major police forces across Canada to provide a co-ordinated approach against organized crime — the authors had this to say:

> 11.6 There was one area in which the views of the members interviewed by both Audit Teams approached unanimity. It was in regard to non-police participation in the intelligence network at any level where they can exert authority or control. Their loyalties, discipline and methods are invariably suspect just by virtue of not being members of the police community. This drains support for the program and undermines confidence in the security and integrity of the system.

> It is questionable whether a command structure which proposes other than regular members in command positions would be accepted. The perception is that it would not make for a smooth functioning situation within the Force.

Thus, the civilian career paths will remain stunted, resulting in the same second-class status that has characterized the civilian component of the Security Service for 25 years. This continuing irritant, coupled with greater mobility within the Public Service, will likely mean that the better civilian analysts will soon leave the Security Service to pursue more promising careers elsewhere. The effectiveness of the Service will suffer accordingly.

30. Statistics and personnel policies, however, do not tell the whole story. To appreciate fully why the 1969 statement was never satisfactorily implemented, we now describe the actions taken, or not taken, by some of the key individuals — the Solicitors General, the Commissioners of the R.C.M.P., the Directors General of the Security Service.

C. THE ERA FOLLOWING THE ROYAL COMMISSION ON SECURITY: 1969-80

The early 1970s

31. The drafts of the Prime Minister's statement to the House of Commons on June 26, 1969, in the preparation of which senior members of the Force participated, contain an early hint about the Force's attitude to what was to be proposed. In the penultimate draft, the government was intending to announce this new direction "... with the full agreement and understanding of the Force..." When Prime Minister Trudeau finally read the statement to the House of Commons, it was only "... with the full understanding of the Force".

32. Even "full understanding" may have been an overstatement. On June 27, 1969, the day following the Prime Minister's statement, Assistant Commissioner Higgitt, who was then the officer in charge of the Security and Intelligence Directorate and who would soon be named the new Commissioner of the R.C.M.P., wrote to his counterparts in foreign security services, enclosing a copy of the Prime Minister's statement and a copy of the abridged report of the Royal Commission on Security. He summed up his reaction to the new policy this way:

> Naturally, we have welcomed this renewed statement of confidence in us and *will now be able to carry on as before* with really only the mildest of organizational adjustments.
>
> (Our emphasis.)

Mr. Higgitt wrote a similar letter to his senior staff in the Security and Intelligence Directorate and included the above sentence unaltered.

33. In testimony before us, Mr. Higgitt has also indicated that he was opposed to the appointment of a civilian from outside the R.C.M.P. as the new Director General of the Security and Intelligence Directorate:

> The change that was then made was that the Director General should become a civilian and a person who had not had the advantage of coming through, of gaining the experience of coming through the Force, and indeed, coming through the Security Service side of the Force. Now, I objected in principle to that . . .and made my objections very well known to those in government circles at the time. But I did not object to the person involved.
>
> (Vol. 84, pp. 13732-13733)

34. The "person involved" was Mr. John Starnes, a career foreign service officer, who left a senior position in the Department of External Affairs to become the first civilian to head the security intelligence function within the R.C.M.P. His appointment, effective January 1, 1970, was the first and most significant step taken by the government to implement the June 26th policy statement.

35. Testifying before us, Mr. Starnes stated that he was never shown Mr. Higgitt's letter to the senior staff of the Security Service and the heads of foreign agencies referred to above (Vol. C32, pp. 4016-4019). In hindsight, he noted that he was not surprised by the letter. By his own admission he was successful in effecting only a few minor changes in the management of the Service: a change in the name of the agency to the Security Service; civilian dress for Service employees; and separate identity cards (Vol. C33, pp. 4205-4215). He was not successful in his attempts to gain autonomy for the Service in three main areas — operations, personnel policy, and financial administration — a step he felt essential if the Prime Minister's statement was to be translated into a reality (Vol. C29, p. 3512).

36. Just before leaving the Service in March 1973, Mr. Starnes met with the Prime Minister to tell him about a study by a group of management consultants on the management and structure of the Security Service. (This study will be discussed later in this chapter.) He also told the Prime Minister, according to his testimony, that ". . . in fact we really hadn't done very much up to that point. . . by the time I left, there was no — we did not have control over our personnel resources or financial resources, in effect" (Vol. C33, p. 4223).

37. We have found no evidence that successive Solicitors General took initiatives to develop an implementation plan, or that they systematically monitored the R.C.M.P.'s progress in this area. For example, the Honourable Jean-Pierre Goyer, who served as Solicitor General from December 1970 to November 1972, testified that he left the implementation of the government's 1969 policy totally up to Mr. Starnes:

> Q. Did you deal with the question of structural changes, that is to say, recruiting more members or more non-members or non-constables into the Security Service so as to meet certain objectives which had been established? More civilians?
>
> A. No, no. That was up to Mr. Starnes. And it was not a subject with which I dealt in detail. My concerns were of a more general nature: recruitment policies; training policies and so on.
>
> (Vol. 122, p. 19062. Translation.)

38. The elements of the failure in implementation are clear: the policy statement itself, which contained no specific targets or dates and which was not followed up with a more detailed set of instructions; the absence of a clear implementation plan; the lack of any strong ministerial initiative on the part of the successive Solicitors General to ensure that implementation was proceeding; and, perhaps most important, concerted opposition to the policy statement from the senior management of the Force. As we shall see, these contributing factors remained more or less constant for the remainder of the decade.

39. In many discussions we have had with senior members of the Force about the Prime Minister's statement, they have used the statement's alleged imprecision as their primary defence for inaction. "What does '... increasingly autonomous in structure and civilian in nature' mean?" they have asked us. There are three rejoinders to this question: first, senior members of the Force were involved in lengthy discussions on the recommendations of the Royal Commission and the drafting of the Prime Minister's statement. Their own file material reveals this. Second, the R.C.M.P. has been unable to give us any instances in which their senior managers asked the government to clarify the policy statement. Third, while the statement lacks specifics, its general direction is clear, particularly in the last portion of the policy statement quoted earlier in this chapter. The Prime Minister was not ambiguous in announcing that there would be "new and more flexible policies in relation to recruiting, training, career planning and operations" so that an increasing number of university graduates from all parts of Canada could join the Service "in a civilian capacity" and "aspire to positions at the top of the organization". Relevant to this discussion about the alleged imprecision of the policy statement is the following question and answer sequence from the testimony of Mr. Dare, the current Director General of the Security Service:

> Q. Mr. Allmand, in his testimony... refers to a meeting when you were appointed, at which... the Prime Minister emphasized the need to continue with civilianization of the Security Service. Was that, in fact, suggested to you?
>
> A. That is correct, Mr. Chairman.
>
> Q. And do you consider that in the years before the Commission began, the policy of civilianization of the Security Service was carried out?
>
> A. No, Mr. Chairman.
>
> (Vol. C90A, pp. 12474-12475.)

Mr. Dare's unequivocal response indicates that he clearly understood the policy. The inaction within the R.C.M.P. in implementing it, therefore, boils down to one factor: the Force's senior management strongly opposed it.

The Bureau of Management Consulting's Report, 1973

40. As part of his attempt to effect change along the lines of the June 1969 policy statement, Mr. Starnes obtained agreement from Commissioner Higgitt in June 1972, to employ the Bureau of Management Consulting (B.M.C.), a component of the Department of Supply and Services, to undertake "a study of

organization and classification". Mr. Starnes, in his testimony before us, noted that he expected "... very far reaching proposals for change" (Vol. C33, pp. 4220-22).

41. A short summary of the report's major findings was presented to Mr. Starnes in March 1973. The actual report was not ready until Mr. Michael Dare, a former military officer, had become Director General. In July 1973, Mr. Dare wrote the senior administrative officer of the Force, advising him that the senior managers of the Security Service had reviewed the report and had accepted in principle its major findings and recommendations.

42. The most controversial recommendations concerned the relationship of the Service with the rest of the Force. The B.M.C. recommended that the Security Service be given managerial control over both its operations and the administration of its resources — human, physical, and financial. The B.M.C.'s concept of managerial autonomy was reflected in the following key paragraph from the report:

> In the concept of managerial autonomy we propose, the managerial link would be confined to the Commissioner, Director General level. There would be no influence from the administrative arm of the R.C.M.P. as to how the Service administers its resources in the execution of its mandate. Also, there would be no influence from R.C.M.P. Divisional Commanding Officers over both operational and administrative actions of Security Service field components. Control would be exercised by the central agency of the Security Service.[10]

43. The rationale behind this recommendation rested on two crucial premises:

(i) the mandate of the Security Service is intrinsically different from that of a police force and requires that "policies and programs must be controlled and monitored from within the Service."

(ii) the Director General of the Security Service lacks the delegated authority to manage this operation effectively.

44. The B.M.C. noted, however, that several factors support a concept of "managerial autonomy" *within the R.C.M.P.*: the excellent reputation of the Force; the need for the Service to maintain a secret budget; the utilization of services common to both activities; and the need for close liaison in regard to activities of interest to both the Security Service and the law enforcement side of the Force.

45. Other recommendations made in the B.M.C. report included adopting the principle of "centralization of policy and program control and decentralization of execution," revamping the planning process along "management by objectives" lines, flattening the organizational pyramid by reducing the number of supervisory levels, improving training programmes, and upgrading selection criteria for entry into the Service. The B.M.C. also noted that "morale could be considerably improved" and made several suggestions to accomplish this.

46. In contrast to their counterparts in the Security Service, senior managers from the rest of the Force were highly critical of the B.M.C. report. There was

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[10] Bureau of Management Consulting's Introductory Report, 1973, p. 81.

virtually no support for its major recommendation concerning operational and administrative autonomy for the Security Service. Rather, both divisional commanding officers and senior administrative staff argued for the reverse situation for some of the following reasons, as noted in a record of the discussion:

— 95% of the Security Service want to remain with the Force;

— by becoming more autonomous, the Security Service could be easily "snipped away" from the Force by a "stroke of the pen" of some politician;

— commanding officers of field divisions complained of getting all the problems relating to the Security Service but none of the benefits (no consultation and information or none of the better personnel);

— there was a need for closer relationships between the criminal investigation side of the Force and the Security Service because of changing internal conditions within Canada (i.e. increased terrorism);

— there would be problems of "internal relativity and compatibility";

— costs would increase at a time of fiscal constraint;

— it would be difficult to establish responsibility if problems arose (who, for example, would be in charge of classification for the Force as a whole?).

47. In December 1974, Commissioner Nadon, his Deputy Commissioners, Mr. Dare, and several Assistant Commissioners, met to make decisions with respect to matters raised in the B.M.C. study. The minutes of that meeting indicate that the major recommendation concerning Security Service autonomy was rejected, that the Security Service was to be linked even more closely to the Force, and that few of the remaining recommendations relating to internal management and personnel of the Security Service were even recorded as having been discussed. At this point, the B.M.C. study would appear to have had an effect opposite to that intended by Mr. Starnes.

National division status

48. Following these discussions of the B.M.C. report by the Force's senior management, Commissioner Nadon received at least two requests to clarify the organizational changes he was contemplating for the Security Service. The first came from Mr. Gordon Robertson, the Clerk of the Privy Council, who directed his request to Mr. Roger Tassé, the Deputy Solicitor General. The second came from Prime Minister Trudeau who wrote to the Solicitor General, the Honourable Warren Allmand, in September 1975. The Prime Minister went immediately to the heart of the matter by noting that

> ...I have not had any report for several years on the progress that has been made to implement the government's decision that the Security Service of the R.C.M.P. should be made more autonomous in its structure and more civilian in its character. From information that has reached me, I have the impression that not much progress has, in fact, been made and if this is so, it disturbs me.

He ended his letter by asking Mr. Allmand to

> . . . let me have a report on this matter at your earliest convenience — both concerning the situation as of the present time and concerning the further measures that are in contemplation to achieve the result decided upon in 1969.

49. The Force's senior management began drafting replies to both requests, based on the results of the R.C.M.P.'s deliberations concerning the B.M.C. report. Basically, they were developing two proposals:

1. that no further steps be taken to separate the Security Service from the rest of the Force;
2. that there be greater integration of technical support and administrative functions with the rest of the Force.

50. A handwritten note by Commissioner Nadon to his senior administrative officer is indicative of the reaction he received from the Solicitor General's Department to these proposals:

> Solicitor General returned this to me today stating he believes we will have a hard time selling this to the P.M. He suggests we prepare a memorandum to P.M. along the lines of memo to Cabinet and that I should go and defend my position before P.M. personally. . .

51. Not surprisingly, the structural changes that were eventually approved in 1976, first by a committee of senior officials and then the Prime Minister, appeared — at least on the surface — to be quite different from the R.C.M.P. proposals. The Security Service became a "national Division" within the R.C.M.P. It was to have administrative responsibilities similar to those delegated to an R.C.M.P. geographical division (with a few exceptions, there is an R.C.M.P. division for each province) but it would be unlike other divisions in being national in scope. To create this "national division", Commissioner Nadon delegated additional authorities — both operational and administrative — to the Director General of the Security Service. Under the new operational authorities, the Security Service units in the field, which up to this point had reported to the head of their R.C.M.P. geographic division, began reporting to a Security Service officer based at Headquarters in Ottawa. This change formalized a situation which, in fact, was already largely in place. As Commissioner Simmonds noted in testimony before us:

> Right up until 1976 . . . the Security Service personnel in the field were underneath the divisional commanders for the purposes of administration and discipline, and so on, but their operations were to a very large extent centralized under the Director General at Headquarters, and thus there was a split. Operations reported one way, and yet for administration and discipline, it was another way, and it was not, in any view a very sound structure at that point.
>
> (Vol. 164, p. 25182.)

52. In commenting on the administrative changes, Commissioner Nadon explained in the documentation that went to the government in July 1976 that, "As a guide, the general administrative structures and authorities of the Security Service will be patterned along those of a Division of the Force with

the necessary adjustments to take into account the special needs and national character of the Security Service." How, in fact, the Force was going to interpret this broad statement became clear in an internal memorandum. Commissioner Nadon noted that any administrative policies that the Security Service would henceforth adopt would still have to be "in accordance with the legislation, regulations, policies, directives and guidelines applicable to other components of the Force". An article in the R.C.M.P.'s in-house newspaper, *Pony Express*, in December 1976, also tended to down-play the importance of these structural changes. A particularly telling question and answer sequence in the article was the following:

> Q. Where will the main impact of the reorganization occur?
>
> A. The reorganization will mainly affect the administrative side of Security Service, especially at the Headquarters level. Quite simply, Security Service Headquarters will be establishing administrative units to attend to these needs of members of the Service. The membership of Security Service can expect to see, in fact, very little change in what they have to do, administratively. The change will be that material formerly sent to each Divisional Headquarters will now be sent to Security Headquarters. In this way, there will be uniformity of policy and direction for all Security Service members. Also, Security Service members will be looked after by those who have knowledge of the needs of the Service.

53. Mr. Michael Pitfield, the new Clerk of the Privy Council, wrote to Commissioner Nadon in August 1976, a few weeks after the National Division changes had been approved by the committee of senior officials. Mr. Pitfield indicated that the Prime Minister had approved these changes and had noted that "... the arrangements which you have recommended provide the necessary authority for the Director General of the Security Service to work towards a greater emphasis on the civilian character of the Security Service".

54. The Security Service went to work immediately in August 1976, to implement National Division Status. Implementation was not completed until early 1978. We have no evidence, however, that these changes have resulted in any greater emphasis being placed "on the civilian character" of the Service. If anything, the current period can be characterized as one of increasing integration of the Security Service with the rest of the Force. The current Commissioner, Mr. Robert Simmonds, whose term as Commissioner began in September 1977 after the formation of this Commission, instituted a number of changes that are noteworthy in this regard. For example, the senior executive committee of the Force, consisting of the Commissioner, his three Deputy Commissioners and the Director General, must now approve all major operational policies of the Service. In addition, the Commissioner has established an operational audit unit specifically for the Security Service in order to give him another "window" into what is happening within the Service. Recommended changes resulting from these audits are discussed by a Force-wide Audit Committee. Finally, the Commissioner has made a number of senior appointments which have moved several officers with no prior Security Service experience into several of its most senior positions. As for the question of increasing the civilian character of the Security Service, Commissioner Sim-

monds testified before us that no progress is being made at the moment and that in his view what has already been done "may have gone too far..." (Vol. 165, p. 25377). According to Commissioner Simmonds, the Security Service, in future, should have ". . . a stronger peace officer connotation..." on the assumption that certain analytical functions now performed by the Service would be done elsewhere in the government.

The current situation

55. There is at least one other aspect of the current situation with regard to the management and structure of the Service which we find particularly noteworthy. On the basis of our experience in the hearings, the numerous informal meetings we have had with a great variety of Security Service members ranging from some of the most junior to the most senior, our own examination of Security Service files, and research done by our staff, we conclude that a desire for significant change exists at virtually all levels within the Security Service. Levels of dissatisfaction with current personnel policies within the Service are high, and often those holding these views see structural solutions (either more autonomy within the Force or complete separation) as the ultimate answer.

56. Our assessment of the current situation within the Security Service, summarized above, is not based on any research study which attempted to determine the opinions of a scientifically chosen sample of Security Service members. Having said this, we find it noteworthy that our assessment is compatible with two recent studies of the Security Service which produced statistical results. One such study was conducted by an R.C.M.P. audit team in March 1976 and the other was carried out by our researchers. In the R.C.M.P. study, questionnaires were distributed to members of the Security Service, and an impressive 80% were returned. The opinions and those favouring each were as follows:

	Option	Percentage of Respondents Favouring Each Option
1.	Remain an integral part of the Force and continue to function as it does now, retaining the current operational and administrative policies and practices.	21
2.	Remain an integral part of the Force and be governed by common Force administrative policies and practices.	6
3.	Remain an integral part of the Force, retain the current operational practices and be given more administrative autonomy than now exists.	47
4.	Become a completely separate entity outside the Force.	26
		100%

Thus, 79% of the respondents favoured changes from the status quo. While 6% favour closer integration of the Security Service into the R.C.M.P., 73% favour

change in the opposite direction. The most popular option, favoured by 47%, was greater autonomy within the R.C.M.P. 26% supported complete separation from the R.C.M.P.

57. The second study was an interview programme conducted by our own research staff in late 1978 and the early part of 1979. Participants in this study expressed nearly unanimously a desire for far-reaching changes. In all, our staff interviewed 38 members of the R.C.M.P., chosen on the advice of the R.C.M.P. unit responsible for liaising with the Commission so as to represent a cross-section of knowledgeable opinion. Each interview lasted between two and three hours. Of those interviewed, nine were civilian members and one was a special constable. The remaining interviewees were regular members of the Force, the large majority of them officers. Six participants were not members of the Security Service, but four of these had served in it for long periods. The average length of service within the R.C.M.P. was slightly over 21 years.

58. Those advocating significant change identified three possible directions:

1. *The Security Service should remain within the R.C.M.P. but have the necessary autonomy to fashion a management approach and personnel systems in keeping with its role.*

   This approach was favoured by slightly less than half of those interviewed.

2. *The Security Service should separate from the R.C.M.P.*

   This option was also favoured by slightly less than half of those interviewed, including a number of senior officers.

3. *The Security Service should remain within a significantly changed R.C.M.P.*

   This argument, put forward by three participants, was based on the premise that the management and personnel systems of the Force are as inappropriate to the rest of the Force as they are to the Security Service. Thus, they concluded, significant and dramatic change is needed in all areas within the R.C.M.P.

This interview programme was not based on any scientifically chosen sample. The results are nevertheless noteworthy because the desire for change was intensely felt and shared by a large number of long-serving and quite senior Security Service members.

59. The interview programme conducted by our researchers and our own interviews have disclosed that one group within the Security Service is particularly dissatisfied, even bitter, about the current situation. These are civilian members, especially those holding analytical jobs. One civilian went so far to describe the second-class status of civilians within the service as "administrative apartheid". Others feel just as strongly. Indeed, in the latter part of 1978, a number of civilian members prepared a brief for the committee chaired by Mr. Guy D'Avignon on the Review of Personnel Management and the Merit Principle in the Public Service. This brief was highly critical of R.C.M.P. practices towards its civilian members. The civilian members agreed not to

submit the brief on the undertaking of senior management of the Force to review and reply to the points raised in the brief. Nearly everyone we talked to in the Service acknowledged the need to find some solution to a problem which has been well known to the Force's senior management since 1955. This level of employee dissatisfaction, especially among civilian members, would be an unhealthy situation in any organization: but in a security service, which is especially vulnerable to "leaks" and — even more serious — penetration attempts by hostile foreign agencies, it is an intolerable and dangerous situation.

60. In the next two chapters we shall spell out the extensive changes we believe necessary to put the Security Service on a sound managerial and structural footing. We shall recommend these changes with two objectives in mind: first, to improve its overall effectiveness, that is, to help the Service provide more timely information of higher quality to government about the security threats facing Canada; and second, to reduce the risks of Security Service members committing illegalities and improprieties in the performance of their duties. To give the reader an overall sense of our basic directions in these matters, we shall summarize our views briefly in the final section of this chapter.

D. CONCLUSIONS

Understanding the past

61. All four attempts to change the Security Service reviewed in this chapter — the study conducted by the senior civilian member in 1955, the Report of the Royal Commission on Security in 1969, the Prime Minister's policy statement in the House of Commons in 1969, and the study of the Bureau of Management Consulting in 1973 — had a similar essential logic. Each recognized, to varying degrees, that there are significant differences between the functions of a security intelligence organization and the basic functions of a police force. These differences imply that a security intelligence organization requires a different set of managerial and personnel policies. In particular, a more experienced, better educated, broader type of individual is needed for security intelligence work. Consequently, to develop these different policies, the Security Service should either separate from the R.C.M.P. (the Royal Commission on Security) or have a significant degree of autonomy within the Force (the 1955 study, the Prime Minister's statement, the B.M.C. study.)

62. In addition to the similarity of their arguments, these attempts at change met with much the same fate. They had little or no impact, primarily because of stiff resistance from the senior management of the Force. Even the publicly announced policy statement given by the Prime Minister of Canada in 1969 was largely ignored by the Force over a ten-year period. The policy has not been substantially implemented, nor has the Force made a concerted effort to do so.

63. Why has each of these attempts at change met with so little success? Hearing the testimony of a large number of Force personnel, studying the

Force's management and personnel systems, seeing at first hand the recruit training programme in Regina and studying the curriculum, have all given us important insights in answering this question. To implement any of the major recommendations flowing from these studies would have been a wrenching experience for the Force. It would have meant a denial of what many in the R.C.M.P. hold to be the essence of the organization and the basis for the wide measure of support it has among the Canadian public. Let us enlarge on this proposition.

64. In the course of our inquiry, several people have compared the R.C.M.P. with a religious Order. One such person was the former Solicitor General, Mr. Goyer, who testified as follows:

> Q. Did Mr. Starnes tell you of any difficulties or reluctance he encountered in properly managing or administering the Security Service?
>
> A. I think Mr. Starnes was faced with the same problems which I explained I had, that is to say, when you are not a Mountie, you are strictly an outsider. The same thing is true of R.C.M.P. clerical staff, who are not Mounties, or of certain people who work in laboratories. They definitely feel that they have second-class status. It is unfortunate. What can you do to improve that situation? I don't know. It's a matter of establishing communication, confidence and, eventually, perhaps friendship. But I do not think that — I did not notice that Mr. Starnes was incapable of doing his work for that reason.
>
> Q. Did he tell you that he had difficulty establishing this communication of which you speak?
>
> A. Yes, but once again, in this sense: the same difficulty that I encountered at the beginning, which decreased but never really disappeared. You never become a member of the R.C.M.P. if you haven't been through Regina. You have to accept the mould. When you do, you are one of them. The same is more or less true in the Armed Forces, I think. And that is surely the way it is with the Jesuits, to draw the same comparison. (Vol. 122, pp. 19063-5. Translation.)

65. Certainly some of the primary characteristics of the R.C.M.P. are those normally associated with a religious Order. Force recruits are young, with few exceptions they enter the organization at only the lowest level, gradually work their way up a well-defined rank structure, and pursue a "generalist" career path. Thus, there is a significant degree of homogeneity in the membership of the organization. In addition, the recruit training of the Force is designed to be a mentally and physically rigorous experience — it is an "initiation rite", a process which moulds the individual in the image of the Force, an experience which develops an *esprit de corps*.

66. Loyalty to the organization is a norm of the Force. As far as possible the R.C.M.P. arranges for the training of its own members in needed disciplines, rather than recruiting professionals, so that their first loyalty is to the organization rather than to their profession. Moreover, joining the Force is meant to be, if not a lifelong commitment, at least one which spans the best part of a person's working life. The Force pension scheme, for example, discourages officers from leaving until they have served, usually, 35 years.

67. There is also an extensive and well-defined set of rules governing the conduct of members both on and off the job. For those who demonstrate disloyalty by deviating from the accepted norms of the organization the disciplinary procedures are harsh. Even now, the Commissioner has the power to arrest a member and to hold him in custody without trial for up to 30 days for certain Service offences, ranging from disobeying lawful orders to engaging in "any activity in which his involvement is not in the best interests of the Force". As Commissioner Simmonds noted in testimony before us: "I doubt if there is any organization that has set higher standards for itself and exacts more out of its members than this organization, if they go wrong" (Vol. 164, p. 25237).

68. Finally, the R.C.M.P. possesses a definite quality of insularity. It has difficulty accepting and working with "outsiders", as the testimony of Mr. Starnes, Mr. Bourne, and Mr. Goyer so amply demonstrates. Accompanying this insularity is a certain self-satisfaction which manifests itself in a variety of assumptions: that the organization is headed in the "right" direction; that the managerial ingredients that have worked so well in the past will continue to work in the future; and that staff members who are not regular members of the Force can, with few exceptions, perform only peripheral roles.

69. None of the characteristics we have outlined above is unique to the R.C.M.P. All organizations have at least some of these to varying degrees. But it is their combination and special emphasis within the Force which makes the R.C.M.P. distinct from the rest of the federal government departments and agencies, and the vast majority of non-governmental organizations. Given the importance of these characteristics, which have a long history within the R.C.M.P. and are essential elements in its traditions, it is not surprising that the four attempts at organizational change described in this chapter met with so little success. To have accepted these changes would have implied an influx of civilian members in middle and senior management positions, none of whom shared the Force's traditions and work experiences, and all of whom would be reducing opportunities for regular members. Such attempts at change are an anathema. To accept them would be akin to a religious Order allowing those who had not gone through the arduous process leading up to the taking of religious vows to influence an essential part of the Order's operations.

Our position on managerial and structural matters

70. In the following chapter on management, we shall be making recommendations which, in several respects, are similar to proposals that have been made in the past. We shall recommend that Canada's security intelligence agency be staffed with more experienced, better-educated personnel, with a wide variety of backgrounds in government, universities, police forces and the private sector, and that many of the other personnel policies of the current Security Service (those, for example, dealing with training and development, remuneration and career paths) be altered to "fit" this type of employee. But we shall also be departing from past studies in some important ways. We believe strongly that changes in internal management practices are a critical element in the package of reforms we shall be proposing to reduce the risks of future illegalities and

improprieties. Past studies paid little, if any, attention to this aspect of management, whereas for us it is a dominant theme which colours many of our recommendations in this area.

71. Following the chapter on management, we shall turn to questions of structure. Our major recommendation here will call for a security intelligence agency which is separate from the R.C.M.P. We shall weigh carefully the arguments for and against this structural change, but for us, a compelling argument in its favour is our belief that the managerial reforms which we think are necessary and achievable have little likelihood of being implemented, should the Security Service remain within the Force. Past history, and our understanding of what many within the R.C.M.P. cherish about their organization, strongly support this conclusion. We realize that there are costs involved in separating the Service from the rest of the Force — certainly in human terms and possibly in financial terms. (We shall examine this latter point in more detail in Part VI, Chapter 3.) But our judgment is that the benefits of a separate security intelligence agency outweigh these costs.

CHAPTER 2

MANAGEMENT AND PERSONNEL

INTRODUCTION

1. A security intelligence agency is a complex organization and managing it is no easy matter. The international and national dimensions of its work present challenges ranging from liaison with foreign agencies to communicating, sometimes under demands of secrecy, with a staff that is dispersed widely. To this broad spectrum of relations with provinces, states, and other agencies are added factors that, while more intangible, still pose challenges to management. These include: the need to control carefully the use of intrusive and secret investigation methods, with their potential for damage to Canadian liberal democratic values; the false romance with which spy novelists have glossed the public image of intelligence work, ignoring the methodical drudgery of day-to-day investigations; the lack of public recognition of success, coupled with the quick condemnation of error; the moral pressure on individuals of work that relies to some extent on deceit, manipulation and other practices inherent in the collection of intelligence about espionage and subversion; and finally, the constant fear of the penetration of the agency by a foreign agent, thereby spurring protective measures that may themselves offer complex challenges to management.

2. In sum, the management of a security intelligence agency is not a job for amateurs. But, paradoxically, there is a danger in describing it as a job solely for professionals. There are some connotations of the term 'professional' which we find attractive — for one, it suggests a high level of competence — but there are two aspects to 'professionalism' which are potentially dangerous to a security intelligence agency operating within a liberal democratic country. The first is that non-professionals (those not belonging to the agency) are seen to have little basis for making useful comments on important aspects of its work. Mr. Robin Bourne, a former assistant deputy minister in the Solicitor General's Department, in testimony before us, gave a good example of this tendency, when speaking of the Police and Security Planning and Analysis Branch of the Department.

> We did not interfere with operational policy. Now, the recruitment of sources — I am not saying we should have or shouldn't have. I am trying to explain why, even though you would interpret the terms of reference that way, we did not nor were we asked to involve ourselves in this kind of policy. If we had tried to in an unsolicited way, we would have been accused of interference in operations which are the business of professionals.
>
> (Vol. 142, p. 21768.)

In an area of government fraught with difficult political decisions and moral dilemmas, this tendency to exclude others because they are not professionals is both wrong and dangerous. Ministers and senior government officials must play an enlarged role in governing the affairs of the agency. Our second misgiving about professionalism arises from the tendency of professionals to give their first loyalty to their profession. We believe that security intelligence staff should give their primary loyalty not to their profession, nor to their employing agency, nor, especially, to the political party in power, but to Canada's liberal democratic principles which the agency has been established to protect. For these reasons, we do not recommend this kind of 'professionalism' as a distinctive quality of the staff of a security intelligence agency.

3. In this chapter, we concentrate almost exclusively on the 'human' side of managing. We say nothing about property management or computer management, and have only some brief comments to make on financial management. The basic principles put forward in this chapter should apply no matter where the security intelligence agency is placed within government. They are as relevant to a Security Service within the R.C.M.P. as they are to an agency separate from the Force.

4. We address first the question which is central to this Commission's work: why did people behave illegally and improperly, and what are the best approaches that an organization can adopt internally for preventing, as far as possible, the recurrence of such behaviour? Following discussion of this general question, we shall specify the requirements for the positions of Director General and other senior management and examine the appropriate personnel policies for the agency by considering such matters as recruitment, training and career paths. Recommendations in both of these initial sections aim at ensuring that the right people are doing the right jobs. In the latter sections, we shall turn our attention to how people relate to each other within the agency. We shall develop recommendations on leadership style, on approaches to organization, on how the agency should provide its legal and auditing services, and finally on internal security procedures.

A. THE IMPORTANCE OF INTERNAL MANAGEMENT

5. Our recommendations on the management of Canada's security intelligence agency will have two equally important objectives in mind: first, to enhance the agency's capacity to provide government with timely, high-quality information about security threats to Canada; and second, to ensure that the agency, in providing this information to government, acts in a manner which is both legal and proper. Because so many of our recommendations are coloured by concerns for reducing the risks of future wrongdoings, it is appropriate that we begin this chapter by explaining our basic approach to this matter.

6. What sort of internal policies can an organization such as a security intelligence agency adopt to minimize the risks of its members behaving illegally or improperly? Answers to this question depend upon assumptions about the causes of wrongdoings in organizational settings. One assumption is that people who do these acts are 'evil', and it leads usually to a 'battening

down the hatches' approach aimed at discouraging or uncovering deviant behaviour. Thus, the organization relies heavily on such approaches as auditing mechanisms, placing 'good' people in key positions, centralizing decision-making, and prescribing acceptable behaviour in great detail through the use of standardized routines and manuals.

7. There are costs involved in an over-reliance on such 'watchdog' or 'policing' type control mechanisms. They can produce a rigidity in the functioning of the organization and apathy in performance of individuals and, worse, their very existence may spur employees to try to counter or circumvent them. But our deeper concern is that the assumption on which they are founded — that wrongdoings are caused solely by, or even primarily by, 'evil' people — simply is not supported by the evidence before this Commission. We were not investigating acts of 'police corruption'. Most of those involved in wrongdoing would probably be considered exemplary citizens in their private lives — law-abiding, morally sensitive, public-minded, and so on. Why did these men act in the way they did?

8. There is no simple answer to this question, but our testimony does reveal that several factors were important. One of the most common rationales we heard was that the "ends justified the means". Consider the following testimony by a former Commissioner:

> Q. Am I correct to understand that the general rule of ethics is that the end does not justify the means?
>
> A. Yes, I think that is true, yes.
>
> Q. But when we come to security matters, there are situations where the end will justify the means?
>
> A. Yes, I think there are occasions when, as I have just explained, actions, all of which must always be reasonable — there are cases where actions are taken in the pursuance of Security Service, delicate investigations where actions that would not be justified under other circumstances can be justified.

And later:

> Q. So would you put a brake to your principle that the end does at times justify the means within the confinement of legality?
>
> A. No, I don't think I would be able to put that brake on it. It has got to be within the confinements of reasonableness.
>
> Q. And reasonableness can stand beyond legality?
>
> A. Yes, indeed, I think it can in certain circumstances.
>
> (Vol. 113, pp. 17457-17462.)

9. Those who put forward this rationale for acting illegally or improperly tended to emphasize the grave threats to national security which appeared to call for extraordinary means.

10. Another common justification used by many who appeared before us was that their actions were not based on a "guilty mind", that is, they argued that they had no criminal intent. The following, for example, are the comments of a

Security Service officer who authorized the publication of a false communiqué in the early 1970s.

> So, I don't believe that the publication of that communiqué would have been an offence under that section [of the Criminal Code dealing with forgery]. I don't know whether I would have been convicted of an offence under that section. I concede that because of the terminology, I might have been charged with such an offence; but I think that the intent — the intent to make a forgery, for example, which is important, was not there.
>
> (Vol. 65, p. 10705.)

11. Yet another common refrain which we heard in our hearings was that "I was only doing my duty". Thus, many witnesses saw themselves as not responsible for their actions. They were obeying the orders of their superiors, or, in some cases, conforming to policy approved at the Force's most senior levels. Here is a constable involved in an incident in which material was taken without the consent of its owner:

> Q. Did you ever consider whether the operation in which you were asked to participate was lawful?
>
> A. I considered it and felt that due to the reason explained to me by my superiors, that it was necessary, and it was needed at all costs.
>
> Q. What do you mean by that?
>
> A. Well, I felt in my mind it was necessary. . . . * had a source to establish in the milieu. What that source was involved in, or how sensitive his position was, I don't know. I presumed it must have been quite important for such an operation, and I was satisfied that if . . . *instructed . . . *and I to get a hold of such a thing, that it was necessary. I was not in a position to question it, sir.
>
> Q. Why were you not in a position to question it?
>
> A. Because I am a constable and . . . *is a Staff Sergeant. That's the reason.

12. Constables were not the only R.C.M.P. members to use the rationale of superior orders to justify their actions. Even a former Commissioner believed that he had faced the dilemma of superior orders:

> But, you know, I was a Commissioner and I was sitting in on some very high councils of this land when things were very difficult, and I was being told exactly what was necessary and what ought to be obtained if that were possible. Now, whether you take it as an instruction or a wish, I don't know, but as a Commissioner, I would not have remained in office very long if he [sic] had said, "There is no way". There has to be a way.
>
> (Vol. 87, p. 14358.)

13. Testimony before us on several occasions has pointed to the difficulty facing a member of the R.C.M.P. who might have questioned the orders of a superior. Former Commissioner Higgitt, for example, told us that a member was not forced to obey an unlawful order, but that refusal to follow such an order might result in an undesirable transfer. Commissioner Simmonds took a different approach to this question. He refused to accept the premise that

*Name deleted made pending disposition of possible legal action.

"... in this organization, a member would be afraid to question an unlawful order" (Vol. 165, p. 25521). But he went on to acknowledge the difficulties facing a junior member who might wish to question the orders of a superior, and suggested that the member's career would not be impeded *as long as he was right* (Vol. 165, p. 25525). (Our emphasis.)

14. Finally, we heard from a number of Security Service members who stated that questions of legality and propriety never entered their minds. Consider the following testimony on the matter of the letter sent to Mr. Allan Lawrence, M.P., concerning R.C.M.P. mail opening practices:

> Q. Well, had you had any discussion or concern with the senior officers about the legality or propriety of this operation?
>
> A. No.
>
> Q. Did it ever occur to you that it would be necessary or desirable for you to have such a discussion?
>
> A. I cannot say that it did, Mr. Thomson.
>
> Q. Why not?
>
> A. Well, I assumed — perhaps I was wrong to have done so — that the officers of the Force that would approve this sort of operation understood fully what it was about, and the ramifications of it and that it must be sanctioned by someone in authority at least. This is all retrospective analysis, because I cannot say that I really ever addressed my mind to the question at the time.
>
> (Vol. 159, p. 24309.)

Captured in the testimony is a troublesome aspect of modern organizations: long chains of command that separate the person who makes the decision from the one who executes. Who is to bear the consequences?

15. Another factor peculiar to a security intelligence organization which may help explain why so little attention is paid to these issues, is that the nature of the work, at times, dulls an individual's sensitivity to moral issues. Nowhere is this more graphic than in the development of informants or 'sources'. To be successful here, some contend, requires the condoning of ethically questionable activities. As one former member of an intelligence agency explains:

> ... the highest art in tradecraft is to develop a source that you "own lock, stock and barrel." According to the clandestine ethos, a "controlled" source provides the most reliable intelligence. "Controlled" means, of course, bought or otherwise obligated. Traditionally it has been the aim of the professional in the clandestine service to weave a psychological web around any potentially fruitful contact and to tighten that web whenever possible. Opportunities are limited, but for those in the clandestine service who successfully develop controlled sources, rewards in status and peer respect are high. The modus operandi required, however, is the very antithesis of ethical interpersonal relationships.[1]

[1] E. Drexel Godfrey, Jr., "Ethics and Intelligence", *Foreign Affairs*, Vol. 56, (April/July 1978), p. 630.

16. In pointing out some of the motivations which led to the allegations of wrongdoing investigated by us, we are neither condoning the behaviour nor suggesting that motives, no matter how noble, provide a legal defence for questionable behaviour. In Part IV, Chapter 1 of this Report, we have made our position quite clear on this point. What we are suggesting, however, is that motivations provide relevant clues for designing ways to prevent such acts in the future. The evidence before us suggests that the reasons for committing wrongdoings are complex and have at least as much to do with 'systems' failures — that is, failures in the systems of law, management, and governmental relationships affecting the Security Service — as they do with human failings. This conclusion leads to another: that to rely *solely* on control mechanisms which 'police' behaviour or require approval for action from some organization or individual outside the agency would lead to a system of controls which is less effective than it could be. We, therefore, stress a variety of approaches: some admittedly are of a watchdog type, but others aim at reducing or eliminating the characteristics within an organization that lead 'good' people to act improperly or illegally. These latter approaches are usually inexpensive, tend to operate more or less automatically in the day-to-day operations of the agency, and, if properly designed, will not produce organizational rigidities, or behaviour aimed at subverting their intent. One disadvantage of such approaches, however, is that they cannot usually be implemented in a short time period.

17. The recommendations we have developed on the mandate of Canada's security intelligence agency illustrate our belief in the need for a variety of approaches to encourage behaviour that is legal and proper. For example, we have recommended increased ministerial and judicial involvement in the process of approving the use of intrusive investigative techniques. But it is clear to us that such approval is no guarantee that those within the agency will use these investigative methods properly with due regard for the law. Therefore, it is equally important that there be no ambiguity as to how legality and propriety relate to other agency goals. For agency employees, it must be crystal clear that breaking the law will not be condoned or ignored in any circumstances, even if other agency goals are being met. Thus, clarifying the type of behaviour which is expected of agency employees is perhaps as important as changing the approval processes affecting the use of intrusive investigation methods. In this chapter, and those which follow, we shall continue to stress a variety of approaches, tailoring a particular approach to the likely motivations which might cause wrongdoings.

B. THE DIRECTOR GENERAL AND SENIOR MANAGEMENT

The Office of Director General

18. The very nature of a security intelligence agency — its operations shrouded in secrecy, its highly intrusive investigative techniques, and its interests in the political arena — explains why the relationship between the agency and the government has a high potential for abuse. On the one hand,

there is the danger that politicians or their senior officials will pressure the agency into providing information to be used for partisan purposes. For example, they might ask the agency to collect information about the private lives of certain political opponents in the hope that some of the information will be derogatory and therefore useful in discrediting these opponents. There is also the potential for the reverse kind of abuse: the security intelligence agency acts autonomously, with no effective direction and control of it by government. An extreme manifestation of this latter abuse occurs when the agency uses its covertly collected information to pressure politicians to achieve certain ends, such as increasing the agency's power within government, ensuring that the head of the agency is not fired, obtaining certain changes in policy, or preventing public disclosure of questionable operations. One of the major findings of the Church Committee in the United States was that both kinds of abuse had occurred:

> The Committee finds that information has been collected and disseminated in order to serve the purely political interests of an intelligence agency or the administration, and to influence social policy and political action.[2]

19. Choosing an appropriate person to be Director General of the security intelligence agency is one important means by which the likelihood of these abuses can be reduced. What are the desirable characteristics that a Director General should possess? First, he should be a person of "... high capacity and probity, and be accepted by the public and by others in government as having those qualities."[3] Second, in making this appointment, consideration should be given to individuals from outside the agency, although promotion to this position from within should not be barred. The following assessment in the study of the Central Intelligence Agency, conducted in the United States under the Chairmanship of then Vice-President Rockefeller, is relevant to Canada: "Experience in intelligence service is not necessarily a prerequisite for the position [of Director of the C.I.A.]; management and administrative skills are at least as important as the technical expertise which can always be found in an able deputy."[4] Third, the Director General should be knowledgeable about the various political and social movements in our society, should have a good grasp of international affairs, and should be experienced in the functioning of government. Moreover, he should value highly what the security intelligence agency is, in the end, securing — that is, the liberal democratic principles embedded in Canada's Constitution. And finally, it is important that the Director General's judgment on political matters be sound and unbiased.

20. In addition to choosing a Director General wisely, we believe it is important that certain aspects of his position should be structured to reduce the possibility of abuses. Our approach here is twofold. First, we shall make several

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[2] United States Senate, *Final Report of the Select Committee to Study Governmental Operations*, Book II, 1976, p. 225.

[3] Australia, *Fourth Report of the Royal Commission on Security and Intelligence* (The Hope Report), Canberra, 1978, paragraph 385.

[4] United States, *Commission on C.I.A. Activities Within the United States*, June 1975, p. 93.

recommendations concerning how the Director General is appointed, his term of office, and how he can be dismissed. The point of these recommendations is to make it easier for the Director General to resist improper pressures from politicians and their advisors. Second, we shall recommend a series of checks and balances on the Director General's performance with the aim of ensuring that what his agency does is under the control and direction of government. In our discussion of the agency's mandate, we have already recommended one such device: the formation of a committee including several officials from outside the agency with responsibilities for controlling the use of highly intrusive investigative methods. In this section of the Report, we shall consider briefly the reporting relationship of the Director General as another check on the agency's operations.

21. In our opinion, the office of the Director General should be provided for in the legislation which creates the agency. That legislation should state how the Director General is to be appointed, to whom he is responsible and what his duties are. We shall deal with these three subjects in order.

22. Because of our strong belief that the government's activities in security matters should be removed from the realm of partisan politics, we feel that the Director General of the agency should be acceptable to all parties in the House of Commons. To accomplish this we consider that the statute should provide for the appointment of the Director General by the Governor in Council after consultation with the leaders of all opposition parties. We hope that an appointment made in this fashion will remove any taint of partisanship and will engender a degree of confidence which will facilitate the development of an effective relationship of the agency to Parliament. (We shall have more to say on this topic in Part VIII of this Report.)

23. We believe that the non-partisan appointment of the Director General will more likely help to avoid the kinds of abuses that we noted above by enhancing his office and thus providing him with the necessary strength to resist any improper pressures. We propose that his position be further strengthened by having his appointment extend for a term of years rather than "at the pleasure" of the Governor in Council. During that term he should be dismissable only for cause, and the grounds for dismissal should be set out in the Act. The Australian legislation has handled the matter as follows:

> 13. (1) The Governor-General may terminate the appointment of the Director-General by reason of physical or mental incapacity, misbehaviour or failure to comply with a provision of this Act.
>
> (2) If the Director-General
>
> (a) absents himself from duty, except with the leave of the Minister, for 14 consecutive days or for 28 days in any 12 months; or
>
> (b) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit,
>
> the Governor-General shall terminate his appointment.[5]

[5] Australian Security Intelligence Organization Act 1979, s.13.

We would recommend that dismissal for cause be defined to include physical or mental incapacity, insolvency or bankruptcy, misbehaviour or failure to comply with the provisions of the Act establishing the security intelligence agency.

24. The very strength of this proposal — that is, the difficulty the government would have in proving proper grounds for dismissal — also carries with it an inherent weakness. The government might find itself wishing to remove a Director General whom it regards as incompetent but without sufficient evidence to meet the statutory test. To reduce the likelihood of this, we propose that the Director General be appointed for a fixed term of five years. Such a provision has the additional advantage of providing a signal to both the media and the opposition parties, should the Director General resign or be dismissed before completing the full five-year term. In this situation, the government would likely be subjected to persistent questioning on what, if anything, has happened to explain his premature departure.

25. A final statutory condition on the appointment of the Director General is that the maximum period for which one person can serve in this position should be 10 years. Thus, the five-year term would be renewable only once. There are several advantages to this proposal. Ten years is long enough for any one person to head such an organization, since the Director General's job is a wearing one. A new Director General will bring new ideas and new approaches, and this fresh infusion will likely be healthy for the agency. A second advantage is that the Director General, after 10 years as head of a security intelligence agency, may know or be thought to possess much knowledge of a derogatory nature about politicians, senior officials and others in Canada. He might be tempted to use this knowledge as a lever to prolong his stay in office or for other questionable purposes.

26. We believe that the legislation, having thus established the office of the Director General, should then deal with his reporting relationships and the extent of his responsibility. Both the Australian and the New Zealand legislation have covered this question. The New Zealand Act states quite simply:

> (3) The Director of Security shall be responsible to the Minister for the efficient and proper working of the Security Intelligence Service.[6]

The Australian Act is somewhat more elaborate in its approach. It provides:

> 8. (2) In the performance of his functions under this Act, the Director-General is subject to the general directions of the Minister, but the Minister is not empowered to override the opinion of the Director-General —
>
> (a) on the question whether the collection of intelligence by the Organization concerning a particular individual would, or would not, be justified by reason of its relevance to security;
>
> (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security; or
>
> (c) concerning the nature of advice that should be given by the Organization to a Minister, Department or authority of the Commonwealth.[7]

[6] New Zealand Security Intelligence Service Act 1969, s.5(3).

[7] Australian Security Intelligence Organization Act 1979, s.8(2).

27. We do not favour giving the Director General independent powers, as has been done in the Australian legislation. As mentioned earlier, we do not wish to give the Director General authority outside of a system of effective governmental control. Nor do we favour having the Director General responsible directly to the Minister. All the evidence before us leads inescapably to the conclusion that Ministers, although willing to exercise control over the R.C.M.P. Security Service, were unable to do so because they had no effective means of finding out what the Security Service was doing. In most cases members of the Security Service would no doubt have been willing to provide the Minister with whatever information he requested, although we have referred to cases earlier in this Report where members were less than forthcoming, and, in certain instances, intentionally misled the Minister — but the real difficulty is that the Minister has not known enough about the Security Service to know what questions to ask. He has been completely at the mercy of the Director General and the Commissioner of the R.C.M.P. With an agency whose operations are essentially secret we think this is not a healthy situation and we shall have more to say on this subject in Part VIII in dealing with ministerial direction. At this point we simply wish to deal with the lines of the reporting relationship.

28. The legislation should provide that the Director General is responsible directly to the Deputy Minister rather than to the Minister. The Deputy Minister would have the right to give direction to the Director General on all matters. Our purpose in recommending this structure is to counterbalance what would otherwise be the tremendous power in the hands of the Director General, given his control of a secret agency, the special method of approval of his appointment, and his tenure of office for a term of years.

29. The third area which should be covered in the legislation in relation to the Director General is the nature of his responsibilities. Once again it is instructive to turn to the Australian and New Zealand Acts. Each of them deals with the matter very simply. The Australian Act states:

> 8. (1) The Organization shall be under the control of the Director-General.[8]

The New Zealand Act states:

> 5. (1) There shall be a Director of Security who shall control the Security Intelligence Service.
>
> (3) The Director of Security shall be responsible to the Minister for the efficient and proper working of the Security Intelligence Service.[9]

We favour the very simple Australian statement, with the addition of the provision mentioned above that the Director General be responsible to the Deputy Minister and subject to the Deputy Minister's direction. Our recommendations on the responsibilities and the reporting relationships of the Director General will be found in Part VIII, Chapter 1.

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[8] *Ibid.*, s.8(1).

[9] New Zealand Security Intelligence Service Act 1969, s.5.

30. Throughout our recommendations in this Report we have proposed that aspects of the security intelligence agency's functions be dealt with in legislation. We anticipate that the legislation would refer to the Director General as the person having certain duties and rights. For example, it would be the Director General who would contract on behalf of the Crown for the employment of staff. We think that this language is appropriate providing that there is the overriding clause that everything that he does is subject to the direction of the Deputy Minister. We should enter one *caveat* here. That is that in certain exceptional circumstances the Director General should have the right to go to the Minister 'over the head' of the Deputy Minister, or to the Prime Minister 'over the head' of both the Deputy Minister and the Minister. We do not consider that it is necessary to include this provision in the legislation. The circumstances in which we consider it to be appropriate will be set out in Part VIII.

A team approach to decision-making

31. We believe that no one person can possess all the qualities necessary to run such a complex organization as a security intelligence organization. Many factors make one-man rule obsolete, among them: the impact of new technology, both on the investigative side and in the area of information storage, processing, and communication; the increase in employee demands to influence decisions affecting them; the size of the agency's operations; the increasing need to 'work things out' with other government departments. Consequently, we believe it important to focus on the Director General and his team of senior managers — that is, the heads of the operational branches, the financial and personnel services, and the technical services of the agency.

32. We use the word 'team' quite deliberately. Because of the ever-present danger of an agent of a foreign power penetrating a security intelligence agency, the agency adheres to the 'need-to-know' principle. The effect of this principle is to restrict the flow of sensitive information within the agency. One problem, as the Rockefeller Commission pointed out, is that the application of the principle can easily lead to extremes:

> The compartmented nature of C.I.A. operations and the adherence to 'need-to-know' principles has restricted communication to lines of authority within each directorate. One directorate generally does not share information with another. The Director of Central Intelligence is, as a consequence, the only person in a position to be familiar with all activities. Therefore he is the focal point for formal internal control of the C.I.A.[10]

33. Having only one person in the agency familiar with all of its activities is undesirable for at least two reasons. First, there is a greater likelihood of the agency's embarking on activities of questionable legality and propriety. It is imperative, in our view, that the Director General receive advice from several sources on difficult decisions facing the agency — especially from those whose interests differ from the person initiating the proposed course of action.

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[10] United States, *Commission on C.I.A. Activities Within the United States*, June 1975, p. 85.

Second, the quality of decisions is likely to be higher if taken with the assistance of a group of senior managers.

34. We have seen little evidence of an effective senior management team functioning within the Security Service. The Director General and his senior managers do not have regularly scheduled meetings, nor is there any indication that they as a group are the focal point for significant policy or operational decisions. In October 1979, the Commissioner of the R.C.M.P. approved the terms of reference for the Operational Priorities Review Committee (O.P.R.C.), a group whose existence was acknowledged two years earlier in November 1977. The O.P.R.C. is composed primarily of managers from operational branches along with a Department of Justice lawyer and an officer from the criminal investigation side of the Force. While the formation of this group is potentially a positive development, it cannot adequately replace a senior management team whose members should encompass all of the major areas of the Service. There are many policy questions, which, because of the operational orientation of the O.P.R.C.'s mandate, will not likely be tackled by this group. As well, significant operational decisions should not be left primarily in the hands of operational managers, nor similarly should administrative issues be dealt with solely by administrative staff. A senior management group drawn from various sectors ensures that countervailing pressures are brought to bear on major decisions.

35. In recommending the formation of a senior management team, we are not advocating the abolition of the need-to-know principle, at least as it applies to the senior managers of the agency. Rather, we are suggesting that common sense should prevail. The senior managers should direct their collective attention to only the most sensitive operations, and even here they can make informed decisions without knowing certain highly confidential information — for example, the actual names of informers.

36. One of the important tasks of the Director General is to ensure that he and his senior managers function as an effective team and that the make-up of this team reflects the strengths and experience necessary for making important agency decisions. Thus, several senior managers should have wide experience in other government departments and agencies, particularly those whose functions are relevant to security intelligence work, in order to encourage the infusion of new ideas and fresh approaches. Several should have an extensive investigative background, especially in counter-intelligence work. It would be desirable if at least one of the team members were a lawyer. (This person would not act as the legal adviser to the agency, a role which we shall explain later in this chapter.) All of the team members should place a high priority on effectiveness, on conducting agency operations legally and with propriety, and on upholding liberal democratic principles. Finally, at least one of the senior management team should have extensive knowledge of modern management methods and theories.

WE RECOMMEND THAT

(a) the Director General should be a person of integrity and competence; he should have proven managerial skills but need not have prior

working experience in security intelligence matters; he should be knowledgeable about political and social movements, international affairs and the functioning of government; he should have a high regard for liberal democratic principles; and he should have sound political judgment, not affected by partisan concerns;

(b) the appointment of the Director General of the Security Intelligence Agency be made by the Governor in Council;

(c) the Prime Minister consult the leaders of the opposition parties prior to the appointment of the Director General.

(69)

WE RECOMMEND THAT the following conditions of employment for the Director General should be included in the statute establishing the security intelligence agency:

(a) the Director General can be dismissed only for 'cause';

(b) 'cause' includes mental or physical incapacity; misbehaviour; insolvency or bankruptcy; or failure to comply with the provisions of the Act establishing the agency;

(c) the Director General should be appointed for a five-year term;

(d) no Director General may serve for more than 10 years.

(70)

WE RECOMMEND THAT the Director General and his senior managers act as a team in dealing with important policy and operational matters affecting the security intelligence agency.

(71)

WE RECOMMEND THAT Canada's security intelligence agency encourage the infusion of new ideas and fresh approaches by ensuring that a reasonable number of its senior managers, prior to joining the agency in a middle or senior management capacity, have worked in other organizations.

(72)

WE RECOMMEND THAT the senior management team of Canada's security intelligence organization have a wide diversity of backgrounds, reflecting experience in both governmental and non-governmental institutions, in the law, in investigatory work, and in management. All of the agency's senior managers should place a high priority on effectiveness, on conducting the agency's operations legally and with propriety and on upholding liberal democratic principles.

(73)

C. PERSONNEL POLICIES

37. In this section, we use the term 'personnel policies' to encompass the following matters:

— the kind of personnel required in a security intelligence organization;

— methods of recruiting personnel;

— policies relating to secondments;

— career paths within the organization;

— training and development procedures;

— whether or not agency employees should be members of the Public Service of Canada;

— whether or not agency employees should be allowed to form a union;

— counselling, discipline and grievance procedures;

— procedures for dismissing employees.

These matters do not exhaust the possible list of personnel policies relating to a security intelligence agency, but, in our view, they are the most important. We deal with each in the order given above.

Required personnel for a security intelligence organization

38. The R.C.M.P. is predominantly a career service. By this we mean that new members, with few exceptions, enter the organization at the lowest rank, and then proceed to work their way up the various levels of the organization, through a combination of seniority and merit. Thus, all the senior managers of the Force, including those within the Security Service with the exception of the Director General, have 'come up through the ranks'. Within a career service, there is little or no recruitment of middle and senior managers from outside the agency.

39. This system, as applied to the Security Service, has some obvious strengths. It ensures, for example, that the Service has a very experienced group of senior managers — nearly all have spent at least 25 years in the Force, some even longer. Until recently, those who have joined the Security Service have tended to remain in it for most of their career. The fact that all the senior managers and a large majority of middle managers of the Service have police backgrounds enhances cooperation with other police forces and ensures that investigative experience is brought to bear in decision-making. In addition, the common set of work experiences and traditions creates an *esprit de corps* amongst regular members of the Service, and this is an important asset.

40. Nonetheless, a career service concept as applied by the R.C.M.P. to the security intelligence function does not appear to us to provide the Security Service with the type of personnel required to perform its responsibilities effectively. Some commonly shared weaknesses among Security Service personnel are the following: a lack of knowledge of international affairs, a poor capacity for legal and policy analysis, a lack of sufficient experience in working with Ministers and other government departments and a serious deficiency in management skills and expertise. In addition to these weaknesses, R.C.M.P. career service employees tend to allow their powerful, inbred loyalty to the organization to overshadow other important responsibilities. Each of these points requires further elaboration.

41. Of the commonly shared weaknesses among members of the Security Service, the lack of extensive knowledge of international affairs is one of the most serious. In our research on the Service's relationships with foreign agencies we have found considerable evidence of this weakness. For example, on a number of occasions the Service has not demonstrated sufficient concern

about the foreign policy implications of its relationships abroad, nor has it, until very recently, shared sufficient information with External Affairs officials about these relationships. Lack of knowledge of international affairs or sensitivity to its implications also manifests itself in the analysis by the Service of activities of foreigners in this country. In paper after paper that we have examined, the Security Service analysts have not paid sufficient attention to the foreign policy context of what they are reporting on, nor have they demonstrated a sufficiently well-developed conception of what constitutes proper and improper diplomatic behaviour. The long history of poor relations with the Department of External Affairs is one legacy of this weakness in the international area. An uneasy relationship between a security intelligence agency and External Affairs may be an inevitable consequence of the difference in functions of the two organizations; nonetheless, the relationship has been far worse than it needs to be. The Security Service senior managers must bear their share of the responsibility for this.

42. Another shared weakness among members of the Security Service over the past decade has been an inadequate capacity for legal and policy analysis. The Royal Commission on Security pointed out this basic weakness in 1968, and we have seen little evidence of any marked improvement in this area. In the numerous meetings we have had with Security Service personnel on issues with clear policy and legal implications, we have been struck by the general absence of truly creative thinking. Policy papers by the R.C.M.P. which we have examined have been, with few exceptions, poorly structured and one-sided. They do not present the issues in a coherent and compelling fashion, and they demonstrate a lack of sensitivity to points of view other than those current within the Force. The papers have not analyzed clearly and cogently the powers required by an intelligence agency. In addition, there is little evidence of an attempt to balance the requirements of the agency with the important values of a liberal democratic society.

43. An insufficiently high level of managerial skills is yet another common weakness we have observed in the senior management and, indeed, in others within the Service. Extreme dissatisfaction among Security Service personnel, especially civilian members, is one indicator of this weakness. Another is the lack of any systematic, continuing programme within the Service to evaluate the 'products' in terms of the costs of producing them. We have seen, for example, no careful evaluation of any operations on a cost/benefit basis. Finally, as in our other discussions with R.C.M.P. members on policy matters, we were not impressed with the level of analysis brought to bear by senior people within the Service and the Force as a whole in meetings we held on management issues. There was little creative thinking on their part about the range of options a security intelligence agency might employ to ensure behaviour that is proper and legal. Moreover, we heard few worthwhile suggestions as to ways to deal with several serious problems facing the Security Service in the personnel area (for example, the lack of continuity of staff in the operational branches).

44. So far, we have been stating the case that members of the Service have, over the past decade, shared a number of common weaknesses which have

reduced the effectiveness of the Service. There is an important corollary to this argument. When a career service like the R.C.M.P. finally perceives a weakness in its staff make-up, it takes a long time to correct, especially in the senior management ranks, simply because the most expeditious solution — hiring someone from outside the agency — cannot be used. Two illustrations will help make this point more cogently. The first is the small number of francophones in senior positions within the Service. As of January 1980 there were only three officers above the rank of inspector whose first language was French. Given that one of the most complex and potentially volatile problems facing the Service may well originate in the Province of Quebec, this statistic indicates a serious myopia. Yet within a career service it is difficult to correct easily. The only option is to move francophones from the criminal investigations side of the Force, but the problem with that is that these individuals will not likely have any experience in security intelligence work.

45. A second illustration concerns women. The Force began recruiting women for the first time in the mid 1970s. Under current personnel practices, this means that no woman can reach a senior management position within the Service until well into the 1990s.

46. In addition to the inherent costs of a career service concept already noted above, there is at least one other, namely the tendency of career service employees to demonstrate an excessive loyalty to the organization. Indeed, recruiting and training practices are geared to foster this. The senior officer at the R.C.M.P. recruit training centre at Regina told us that underlying the emphasis at the training academy on physical conditioning and mental awareness was the objective of having the recruit "identify with the Force....":

> The whole of those first six months for a new member is an admixture of physical exertion, mental exercise, emotional testing and conditioning. Long days that start at six in the morning and end at ten at night. It is totally exhausting particularly during the first several weeks but it serves to test the strength of his commitment. It can be seen as his initiation into the Force. Its successful completion gives the candidate a sense of having accomplished what others before him have done, hence it is his license to belong. That is perhaps the strongest identity factor we have. Most members will tell you they were proud of having done it but would not want to do it again.

47. While building this type of organizational loyalty has its advantages, a significant cost, at least in the Security Service, is that the commitment to liberal democratic principles, including the rule of law, may become secondary. As we have made abundantly clear in other chapters of this Report, the disregard of these principles by Security Service members has been the most worrisome aspect of the Service's performance over the last 10 years. We are not suggesting that the career service concept was the sole or even primary cause of the illegal and improper acts which we have investigated. Rather, it simply did not provide any kind of check on these activities. Thus, there should be no equivocation in the future on this point. The primary loyalty of the senior managers (and indeed other staff) of Canada's security intelligence agency should be to the liberal democratic principles embedded in our constitutional

system rather than to the organization itself or to the security intelligence profession.

48. Given the costs which we believe are associated with having senior and middle managers with little or no experience in other organizations, we do not find it surprising that few organizations outside the police community adhere to such a system. Even some police forces have changed their thinking. In the United Kingdom, for example, no one can be appointed chief constable of a district police force without having served in another force.

49. We have recommended that a reasonable number of the agency's senior management, prior to joining the agency in a middle or senior management capacity, should have worked in other organizations. In making this recommendation, we wish to make it clear that it would still be possible, and indeed desirable, that some people who join in a relatively junior capacity have a full career within the agency. Once the implementation phase for creating the new agency is completed, we would envisage that the large majority of those entering the agency with experience in other organizations would do so at middle management levels and only occasionally at senior levels. This practice would ensure that those within the agency are not discouraged from seeking full careers within it, and would still make it possible for the agency to have a senior management team with a diversity of backgrounds. What are desirable work experiences for agency employees to have? Many should have experience in other government departments and agencies such as External Affairs, Industry, Trade and Commerce, Employment and Immigration, Solicitor General, Privy Council Office, and the Treasury Board. Police experience, while it should be a prerequisite for only a small number of specialized positions, should continue to be valued within the agency. Still others should have experience in universities, business, or labour unions.

50. Having a university degree should not be a requirement for joining the agency. University training is no guarantee of competence in the analytical, investigative or other types of skills required in security intelligence work. Nor is attending university the only means of obtaining these skills. Nonetheless, the agency should actively seek university graduates on the assumption that many who have attended university will have both the inclination and ability required for security intelligence work. At the very least, it should not restrict recruitment primarily to a pool of police candidates, 90 per cent of whom did not have university degrees upon entering the Force. Tables 1 and 2 below give some indication of those members of the Security Service who now have degrees:

Table 1

Percentage With Degrees — 1979

Regular Members	21.4%
Civilian Members	26.3%
Special Constables	1.6%

Table 2

Percentage of Regular Members With Degrees by Rank — 1979

Officers	42.8%
Staff Sergeants	13.2%
Sergeants	17.8%
Corporals	18.7%
Constables	26.3%

In our view these percentages should be substantially higher.

51. In addition to hiring more people with university degrees, a security intelligence agency requires people with training in a wide variety of disciplines, including languages, social sciences, physical sciences, liberal arts, administration, and law. Indeed, no particular degree should be declared irrelevant to the agency's work: an essential requirement is rather a capacity to obtain and weigh evidence, a capacity which may be developed in any of the intellectual disciplines. The Table below indicates to us that there has been far too much emphasis on degrees in political science and not enough on other disciplines — in particular law, administration, economics, and languages.

Table 3

Disciplines in Which Regular Members Obtained Degrees (As of 1979)

	% of total degrees
B.A.s	
Political Science	50
Sociology	7
History	8
Psychology	6
Economics & Commerce	4
Other	12
B.Sc.s	
Geology	1
Engineering	1
Chemistry	1
Physical Education	2
Public Administration	2
Zoology & Biology	2
Post Graduate Degrees	4
Total	100%

52. The question of language skills requires further exploration. Below is a breakdown of members of the Security Service who have a second language capability in other than the two official languages.

Table 4

Language Capability by Function — 1979

	Percentage with Language Capability in other than the Two Official Languages
Translators/monitors	48.4%
Investigative Roles	10.2%
Analytical Roles	17.42%

The statistics may overstate the situation. The language capability is self-assessed, and thus the statistics are likely to be on the high side. Even more important, those with a language capability, especially in the analytical and investigative roles, are not likely to use this capability for long because of the rate of mobility within the Service. (We shall provide more details concerning this problem in the next section of this chapter).

53. While attempting to attract people with a variety of work backgrounds and educational experiences, the agency should be looking for some characteristics common to all of its employees: discretion; emotional stability; maturity; tolerance; the capacity to work in an organization about which little is said publicly; no exploitable character weaknesses; a keen sense of, and support for, what the security intelligence agency is ultimately securing (i.e. democratic processes, structures and values); and political acumen. Perhaps patience should be added to this list as well, given the long-term nature of security intelligence targets. Security intelligence work can be frustrating for action-oriented individuals, who become bored with the slow pace at which investigations sometimes move.

Recruitment procedures

54. To recruit the experienced well-educated type of staff with the variety of backgrounds outlined above, the security intelligence agency will need to modify substantially its present recruiting procedures. In particular, it will need to make three important changes: first, the agency must widen the pool from which it recruits its staff; second, it should have only one category of employee, apart from support staff; and third, the agency should employ a wide range of recruiting techniques to determine those best suited for security intelligence work. Before developing each of these themes further, we shall summarize briefly current Security Service recruiting procedures.

55. Four distinct categories of employees work for the R.C.M.P. Security Service — regular members, civilian members, special constables and public servants. In addition, within the regular member category there are two distinct sub-categories, non-commissioned officers (N.C.O.s) and officers. For reasons never satisfactorily explained to us, N.C.O.s receive full pension benefits after 25 years service whereas officers must serve longer — usually 35 years — to receive full pension benefits. N.C.O.s are eligible for overtime pay while officers are not, and have separate eating and social facilities.

56. Briefly, the current recruitment policies for each of these four categories are as follows. The Security Service acquires all of its regular members from within the ranks of R.C.M.P. regular members serving with the criminal investigation side of the Force. Interest in the Security Service is identified through a computerized system which is updated regularly. When vacancies occur, the Security Service staffing branch reviews the list of all regular members who have signified such an interest and interviews those who, among other things, have "a balanced political perspective", above-average performance rating, "a demonstrated interest and capability in pursuing post-secondary education", and no restrictions on mobility. Candidates who complete the interview successfully must then have a security clearance interview prior to joining the Service. The Security Service rarely recruits corporals, sergeants or officers. Almost all the regular members coming into the Service have three to five years experience and are at the constable level, the lowest R.C.M.P. rank. The one exception to this general rule is in the centralized functions — administration, finance and personnel. Thus, to a large extent, the Security Service is a career service within a career service.

57. We shall now describe the procedures by which regular members are recruited by the R.C.M.P. itself. The procedure is essentially as follows:

- initial contact with an applicant is usually made by members stationed at detachments across the country;
- the detachment determines if the applicant meets minimum requirements for engagement;
- if so, the applicant is required to write a 3-hour general knowledge test;
- if successful up to this point, the applicant is interviewed by Division staffing and personnel branch (the interview includes a second test — this time a psychometric test);
- if the interviewer recommends engagement, then a thorough background investigation is conducted;
- if no information of a serious derogatory nature turns up, the applicant's name is added to the waiting list.

58. There are several salient points about this recruiting process. First, it is geared for entry into the R.C.M.P. at the constable level. Over the past decade, only a very small percentage of members have entered the R.C.M.P. at other than the lowest rank. (An example of an exception was the hiring of a band leader who was immediately promoted to inspector.) Second, only a small percentage of those recruited through this process are university graduates. In May 1979, of 770 people who had successfully met the minimum requirements and who were on the waiting list, only 77 (or 10%) had university degrees. Another 100 had some post-secondary training. Third, R.C.M.P. recruits tend to be young. The minimum age for joining the Force is 19. The average age of those on the waiting list in May 1979 was just over 22 years. Fourth, candidates must meet a certain combination of physical and educational standards to qualify. For example, a male under 5 feet 6 inches in height, with a university degree, but no prior police experience, could not become a regular member of the R.C.M.P. And finally, the recruiting process is based on

meeting minimum standards, not on achieving the highest scores in the recruiting process. Thus, an applicant who achieved the minimum standards as of January 1, 1980, would be chosen for training before a candidate in the same geographic area who scored higher but who went on the waiting list as of January 10, 1980. As one staffing officer explained to a member of our staff, the Force does not want "all race horses".

59. The recruitment procedures for civilian members and special constables are more easily explained. The selection criteria are quite general, reflecting the diversity of employees covered by these two categories (they range from clerical employees to highly skilled specialists in the computer and research/analytical fields). The only common qualifications are that all candidates must be Canadian citizens and at least 19 years of age. Personal acquaintance with a serving member appears to be the primary means of identifying prospective employees in these categories. Advertising and recruiting visits to universities are secondary methods. For specialist or technical jobs, candidates are interviewed by a board comprised of Force members expert in the field. Security Service staffing personnel also interview all candidates and administer two selection tests used by the R.C.M.P. for regular member recruiting. Finally, recommended candidates are subject to a security clearance.

60. Recruitment procedures for public servants, who are employed by the Security Service primarily in clerical jobs, are the same as those for the Public Service as a whole. These procedures are administered by the Public Service Commission and are subject to the Public Service Employment Act.

61. The above description of current Security Service recruiting procedures leads to several conclusions. The most obvious is that the recruiting base from which the Security Service draws its employees is far too narrow. In our view, it is ludicrous for a security intelligence agency to limit its primary source of recruits to those who have joined a national police force, generally at a young age with little or no experience in other organizations and with limited educational achievements. Over the past 25 years, the R.C.M.P. has recognized the inherent weakness of these recruiting practices in a variety of ways. One of the most important was creating a civilian member category for specialized jobs in technical and analytical areas. This solution, as we noted in the last chapter, has created additional managerial and morale problems which have plagued the Force for two decades. Similar problems exist because of the creation of a special constable category. There are even serious problems associated with the Force's having two types of regular members, officers and N.C.O.s. This is illustrated by the following testimony of a senior officer in the Security Service:

> Q. So, to put it bluntly and admittedly rather simply: you get a Staff Sergeant (an N.C.O.) who is looking at a possible promotion (to the officer ranks). It is going to cost him money in his pocket. You let him do another ten years before he can go on pension and subject him, at a time when his family may require his attention, to the probability of many moves, and at the same time, he knows full well that he can go out into the civilian sector and get a very attractive monetary offer.
>
> R. Yes.

Q. And I suggest to you that the result of that is, you said: you lose a lot of good people when they are becoming particularly effective?

R. Yes, that's generally in the time of their career when they are most productive because of their expertise.

(Vol. C20, pp. 2599-2600.)

In our opinion this problem requires very careful consideration by government, not only from the point of view of the Security Service, but with regard to the whole Force. We will look at this further in Part X, Chapter 1.

62. Apart from support staff, the security intelligence agency should have only one category of employee, which we shall refer to as intelligence officers. In keeping with the type of individual we hope the security intelligence would attract, we also recommend that intelligence officers not be given ranks used by the military or police, such as sergeant and inspector.

63. One purported advantage of current recruitment procedures, cited by several Security Service members in discussions with us, is that they reduce the risk of penetration — that is, of a foreign intelligence agency having a spy within the Security Service. Indeed, this argument, as the reader may recall from the last chapter, was put forward by the Force as a rebuttal to the recommendation of the Royal Commission on Security that there be a Security Service separate from the R.C.M.P. In essence, those making this case cite the uncertainty which a spy joining the R.C.M.P. would face as to whether he would even be successful in gaining entrance to the Security Service. He first must serve up to three years in a general policing role and, at that point, might find that instead of being admitted into the Security Service he is reassigned to other general policing duties. Thus, instead of penetrating the Security Service, he might well end up on traffic duty in a remote provincial town.

64. In our view, it is difficult for anyone, even those within the Security Service, to make this argument (or indeed, the counter-argument) with any degree of certainty. The reason is obvious. We are not likely to know the extent to which foreign intelligence agencies have penetrated the Security Service until well after the event, and even then the histories of spying activities are usually shrouded in doubt. The best one can do with this argument, therefore, is to make a judgment supported by what evidence there is. Our judgment is that current recruiting practices for the Security Service do not significantly reduce the risk of penetration. Regular members of the Security Service can be recruited as spies by foreign agencies. In an age when there are few illusions about East Bloc Communism, this method of recruiting spies, based usually on blackmail or bribes, would appear to us to be potentially more fruitful than first recruiting an agent on ideological grounds, and then having the agent attempt to join the R.C.M.P. and be transferred to the Security Service.

65. The experience of the Security Service over the past 30 years would appear to support this point. The Security Service has advised us that during this period the Service was penetrated. In a case which we examined closely, it was a regular member who, after joining the Security Service, was recruited to spy for a foreign intelligence agency.

66. A second point is that the penetration argument applies to less than half of Security Service employees, for civilians, special constables and public servants enter the Service by other routes.

67. Finally, it is significant to us that many experienced Security Service personnel do not take this argument seriously. As one senior staffing officer told us, a foreign agent with a university degree and a language capability who joins the R.C.M.P. is very likely to be accepted into the Security Service within three to five years. Another very senior officer summed up his views this way in a speech to his colleagues during a commanders' conference in 1974:

> We have a large number of employees of various categories. Some of those employees are not well paid; some have left themselves open to compromise; some may have sold out for purely venal reasons; some may have been recruited prior to employment with us. I do not differentiate between the various categories of employees. I disagree with the very dangerous assumption held by some to the effect that Regular Members recruited from the Law Enforcement side are more or less immune to coercion.

68. The thrust of our recommendations concerning recruitment thus far has been to enlarge the pool of people from which to draw suitable candidates for security intelligence work. The question now centres on how agency recruiters should attract candidates from this enlarged pool. We believe that an 'old boy network' should not be the primary means of recruitment: events in other countries have shown that such a network is no protection against spies — indeed, it can lull the agency into complacency about its employee-screening procedures. Moreover, this method of recruitment may not ensure the fresh infusion of new ideas and perspectives which we believe to be important for an organization prone to insularity. This is not to argue that the agency should discourage its employees and ex-employees from giving advice on recruitment matters. Rather, we are proposing that such advice be supplementary to a more open process of recruitment, much like that employed by other organizations looking for the same type of mature, experienced, well-educated individual. Thus, agency recruiters should visit university campuses, should encourage applicants from police organizations, provincial governments, and of course federal government departments, and, from time to time, should advertise in the newspapers. (Both the Australian and New Zealand security intelligence agencies have recently advertised for candidates through newspapers.)

69. To accompany this more open approach to recruitment there will need to be more rigorous security screening procedures (this topic will be expanded in a later section of this chapter) and a well-developed process for choosing those candidates best suited for security intelligence work. Currently, in the Security Service, staffing officers rely almost exclusively on a two- to three-hour interview to judge candidates. We believe that other means should be employed as well. For example, psychological testing should be used to help identify those who are clearly not suited for this type of work, although it will be of little help in determining who would be successful intelligence officers. Techniques like discussion groups can be used to assess a candidate's attitudes towards dissent, deviant behaviour and minority groups. In addition, the agency should develop means of testing the writing and analytical capabilities of its potential new

members. As another example, agency personnel should discuss with prospective employees, perhaps along with their spouses, the types of constraints which working in a security intelligence agency places on a person's life, such as the problem of not being able to say much to friends or spouses about the nature of the work.

70. We make one final comment on the process for recruiting agency personnel. In our view, one of the deficiencies of the Security Service's current approach to recruitment is the lack of involvement of senior operational officers. Experienced intelligence officers from the main areas of activity should be involved with staffing 'specialists' in both the process of designing recruiting policies and the process of deciding who should become members.

Secondments

71. The use of secondments (temporary interchanges of personnel with other institutions) is another way in which the security intelligence agency can develop a staff with diversified work experiences. At the same time, it can benefit from those who have spent a significant portion of their working lives in other institutions. Mr. Starnes, the former Director General of the Security Service, testified before us as to the difficulty of achieving an interchange of personnel between the Security Service and the rest of government:

> . . . I thought that there should be a lot more interchange between members of the Security Service and individuals in other government departments. And, in particular, having members of the Security Service assigned to other government departments, to give them some feeling for the scope of the government's work as a whole, and some knowledge how other government departments faced their various problems. In this area, I would, perhaps, get an agreement in principle, but then when it came to actually assigning someone to another government department, that agreement wouldn't be forthcoming in a concrete way; and, so, I would say that that would be an example of a step forward and then a couple of steps backward. Eventually, after a good deal of pushing and shoving, we did, in fact, get a number of people assigned to other government departments, but it was not a readily accepted thesis.
>
> (Vol. C33, p. 4205.)

72. The number of secondments actually achieved during the last 10 years appears to support Mr. Starnes' testimony.

Table 5

Secondments to and from the
R.C.M.P. Security Service 1971-1980

Secondment to the Security Service from	
— External Affairs	3
— Department of Justice	1
— Other (outside the Government of Canada)	5
TOTAL	9

Secondments from the Security Service to	
— Solicitor General's Dept.	7
— External Affairs	3
— Privy Council Office	2
— Other (outside the Government of Canada)	5
TOTAL	17

Both the number of secondments and the the number of institutions with which secondments are arranged should increase. In addition to exchanges with other agencies, federal government departments, and the R.C.M.P., the security intelligence agency would benefit from an interchange of personnel with such organizations as provincial governments, businesses, universities, and provincial police forces. Secondment arrangements with other agencies should be approved by the Minister.

Career paths

73. Like most police forces in Canada and in other western countries such as the United States and the United Kingdom, the R.C.M.P. has adopted a 'generalist' approach in developing the careers of its members. Regular members are not encouraged to become specialists. Rather, after spending two or three years in one type of policing, they are often transferred by the Force to another geographic location, often to assume quite different duties. Nor is it unusual to find members who, after spending all of their careers in operational roles, are appointed to an administrative job, for example in the personnel or financial area.

74. Here is the actual career path of an inspector now serving in the Security Service, who has been with the Force since 1959. It may well be typical.

10 months	— recruit training in Regina (this is now 6 months)
2 years, 9 months	— general detachment duties first in Prince Rupert, B.C. and then in Terrace, B.C.
2 years	— highway patrol duties in Ottawa
1 year	— Security Service - counter-subversion branch in Ottawa
3 years	— university training at Carleton University, Ottawa, (summers spent in counter-espionage and counter-subversion in Ottawa)
4 months	— security screening duties in Ottawa
5 years	— counter-espionage branch in Ottawa
1 year	— research role, first in central research branch, then in counter-espionage branch in Ottawa
5 years	— personnel administration role in Ottawa

75. The inappropriateness of the Force's generalist career model was a recurring criticism among Security Service members. The problems identified are of three kinds. First, needed continuity is not built up and maintained in areas requiring in-depth knowledge and experience. Second, a significant

number of people in the Service are doing jobs they do not enjoy. And third, people in the Service appear to be less willing to move their families as often as the generalist career model dictates.

76. The Security Service conducted a detailed study of two of their largest branches to document some of these problems more fully. This study confirms that Security Service employees change jobs frequently; the Tables below summarize the results.

Table 6

Percentage of Branch employees (not including Support Staff) who changed jobs

	Branch 1	Branch 2
1975/76 (12 months)	56.3	33.8
1976/77 (12 months)	44.9	54.1
1977/78 (12 months)	68.2	47.9

Table 7 gives an idea of how devastating this type of movement can be on job continuity.

Table 7

Effects of Movement on Job Continuity 1975/78

	Branch 1	Branch 2
Percentage of total branch employees remaining in the Branch for the 3-year period 1975/78	23.1	21.6
Percentage of total branch employees remaining in the same job over the 3-year period 1975/78	6.2	6.8

The extent of the movement within the Service and the resulting lack of job continuity, as illustrated by the above Tables, is extremely harmful to the effectiveness of the Security Service. It also has a bad effect on the morale and well-being of employees and, consequently, on their families.

77. Other government departments, facing somewhat similar problems, have adopted approaches that may be worth emulating. External Affairs, for example, has attempted to create 'broad' specialties. Each foreign service officer, at some point early in his or her career, chooses two such specialties — usually one of these is a functional specialty (for example, economics), and the other a geographic specialty (perhaps Southeast Asia). This broad specialties notion could be modified and applied to the Security Service. One such specialty could be East Bloc countries, resulting in a career path, something as follows:

2 years in H.Q. in Counter-espionage Branch

3-4 years as an analyst in a regional office

3-4 years in H.Q. in Counter-espionage Branch

1-2 years as a liaison officer in a European country

1-2 years secondment to another government department with an interest in East Bloc relations

several more years in Counter-espionage Branch.

78. Some intelligence officers may join the agency without a specialty in mind. These individuals might embark on a career path which would expose them to a variety of work experiences in the early years of their career. Following this period when they are 'generalists', their careers should be built around a specialty or specialties. The high frequency of transfer from one area to another must be avoided in the new agency if a satisfactory level of effectiveness is to be achieved by taking advantage of specialization. Specialization may allow an intelligence officer to obtain employment more easily outside the agency, thus avoiding the problems associated with an employee being locked into his employment.

79. Implicit in an approach stressing greater specialization is the need for an improved career-planning capability — a capability which does not exist within the Security Service at the present time. Moreover, we believe that such a career-planning capability can function only with the close collaboration and support of those in operational jobs, who should be involved in both the design of this new career-planning approach and its implementation.

80. An implication of more specialized career paths is that not all those in research roles within the agency would have to become investigators at some point in their career, or vice versa. In our view, these functions, while they both have an analytical component, are different and consequently attract people with different skills and inclinations. Some investigators and researchers might profitably exchange roles, but the agency should not build its staff on the assumption that all members are generalists who can move from role to role every two or three years and be proficient in each area. What the agency must pay very close attention to, however, is how the researchers and investigators coordinate their work. It would be very damaging for two distinct streams to develop within the agency — one for 'thinkers', and another for 'doers'.

81. Besides adopting a more specialized approach to career planning, there are at least two other ways in which the security intelligence agency can enhance job continuity in key areas of its work. The first is to reduce the number of job levels within the organization. There are currently nine levels of regular members, ranging from constable to Director General, within the Service. Special constables and civilian members below the rank of constable would add to this total. What we suggest is reducing the number of levels, perhaps to five or six. This change would have several advantages. It would allow incumbents to remain in a position for longer periods and, at the same time, receive successive pay raises. (By reducing the number of levels, the pay band for each level will widen.) In addition, reducing the number of levels will also tend to 'flatten' the organizational pyramid, and this flattening should facilitate better communication within the agency. The Church Committee Report made a similar comment about the large number of bureaucratic layers in the C.I.A., and the resulting filtering problems as information moved up the organizational pyramid, often losing something at each level. As the Committee noted, ". . . there are too many people writing reports about reports."[11]

[11] United States Senate, *Final Report of the Select Committee to Study Governmental Operations*, Book I, p. 269.

82. Another approach that will help to provide opportunities for more specialization and job continuity is to create a number of senior positions throughout the agency which do not have heavy administrative responsibilities. Currently within the Security Service, a promotion invariably means accepting responsibility for managing more people. Thus, it is difficult for senior people within the Service to develop any degree of specialized knowledge. As an example of what we are proposing, the agency might establish several senior analyst positions in the counter-espionage area with no administrative responsibilities. Experienced analysts could be promoted to these jobs without loss of continuity and without wasting the specialized knowledge they have built up.

Training and development

83. A description of the training and development opportunities available to Security Service members must begin with the recruit training which a regular member receives on first joining the Force. Since 1969, all recruit training has been done at the R.C.M.P.'s Regina Academy. The course lasts for six months and costs approximately $18,000 per recruit. Following completion of this course, a new recruit is given an additional six months on the job training at a regular Force detachment.

84. The Regina Academy relies mainly on instructors who are regular members from operating divisions, and who come to Regina for a three-year period. Outside resource people are employed as instructors as well, but they teach less than 6% of the formal periods. The curriculum is a mixture of physical conditioning and academic subjects encompassing some 858 formal periods. (One of the officers at the Academy told us that the average student would work approximately 75 hours per week.) About half of these formal periods are devoted to the academic side of recruit training, made up of law, human relations (history of policing, human behaviour, criminal justice system, and effective speaking), operational techniques (typing, report writing, care and handling of prisoners), and technical devices (fingerprinting, photography and so on). The other half of the curriculum is more physically oriented — driver training, drill, physical training, self-defence, swimming, and small-arms training. Equestrian training is no longer given at the Regina Academy. Training in the law is only a small part of a recruit's curriculum, accounting for approximately 15% of the formal periods of instruction.

85. According to the non-commissioned officer in charge of the academic section, the Academy employs a "systems approach" to training. This approach is one behavioural psychologists would feel comfortable with. Trainers define as precisely as possible "terminal behaviours" or "end of course behaviours". These desired behaviours provide the basis for building course standards, deciding on teaching methodologies, and evaluating the effectiveness of courses. To be useful, these "terminal behaviours" have to be specific and concrete — for example, "identifying traffic violations", or "understanding criminal trial procedures". Using less technical language, the officer in charge of the Academy gave us a similar explanation of the underlying philosophy of recruit training. Of all the training available to a member, he noted, recruit training is perhaps the most critical "... in terms of molding the new member

in the image of the Force." Another senior officer at the Academy emphasized the importance of barracks living as an ingredient in recruit training. The effect of living at close quarters with 31 others, all of whom are enduring the same demanding activities, is, he explained, to create a surrogate family for a new recruit.

86. Once a regular member enters the Security Service, the bulk of his training occurs within the Service itself until he reaches the senior officer levels. Before 1945, members of the Security Service received no formal training. The first formal course was given in 1947 when members were provided with a series of lectures related to their investigative duties. By 1979, the Security Service's Training and Development Branch offered four major courses:

— *Intensive Basic Parts I & II*, which are aimed at newly appointed analysts and investigators.

— *The Intermediate and Senior Courses*, which are management oriented, and aimed at N.C.O.s, junior officers and their equivalents. These courses are each of two weeks duration.

The legal content in these courses is limited. In the Intensive Basic Course, there is one session of two hours devoted to the legal basis of the Security Service. This same session was added to the Intermediate Course in the fall of 1978.

87. Three new courses have been under development during the life of our Commission and will likely be operational when this Report is published. The first is a new induction course for those entering the Security Service who are not eligible for the Intensive Basic Course. The second new course about to be offered is aimed at improving analytical skills. The assumption behind the course is that although analysts are 'born not made', a course can improve analytical skills by exposing people to analytical tools such as critical-path diagramming and data-collation techniques. Finally, the Training and Development Branch, with the cooperation of the R.C.M.P. Legal Branch, is developing a more intensive 15-hour course on legal issues relevant to the Security Service. The aim is to present this course to all area commands.

88. The 18 staff members of the Training and Development Branch rarely teach courses. Rather they are course 'coordinators' who rely on resources both within and outside the Security Service to do the actual teaching. In 1979, five of these 18 staff members had university degrees. Few, if any, had any teaching experience prior to coming to the Branch. In addition to this Headquarters staff, there are full-time training personnel in Ottawa, Toronto and Montreal. Other area commands have staff members in part-time training capacities.

89. In addition to developing new in-house courses during the last decade, the Security Service began placing more emphasis on sending members to university on a full-time basis or subsidizing part-time university attendance. Table 8 demonstrates this trend.

Table 8

Year	Number Graduated from Full-Time University	Year	Part-Time University Attendance
1969	5	1972/73	257
1970	2	1973/74	544
1971	13	1974/75	491
1972	10	1975/76	412
1973	17	1976/77	486
1974	19	1977/78	311
1975	19	1978/79	336
1976	17	1979/80	437
	102		

90. We are favourably impressed with some aspects of the current approach to Security Service training. The greater emphasis now being placed on discussing legal issues is one example. Another is the Branch's identification of its future priorities: the more systematic development of on-the-job training and development; improving post-course follow-up to assess changes in the work performance of trainees; and the introduction of operational training at more senior levels.

91. Nonetheless, we believe significant changes are required in this area of personnel policy. A number of these changes flow from earlier recommendations, which called for a more experienced, more mature, and better educated person, who would enter the agency at a variety of levels. Thus, the current introductory course for analysts and investigators (the Intensive Basic Course) should be substantially modified. The emphasis should be on developing a much more sophisticated skill in dealing with the legal, political and moral contexts of security intelligence work and mastering 'tradecraft' techniques. Similarly, the existing six-month R.C.M.P. recruit training programme at Regina is inappropriate for those individuals wishing to work for a security intelligence agency. There is too much emphasis on 'parade square' discipline and on molding behaviour, and the course content is understandably oriented to police work rather than to the more specialized and politically oriented aspects of security intelligence. Finally, we find many of the aspects of the Regina programme authoritarian in tone, and likely unacceptable to the range of university graduates from which we think the security intelligence agency should draw many of its recruits in the 1980s.

92. The training and development programmes also reflect a general tendency within the Security Service towards insularity. We propose a variety of training approaches that will counteract this tendency by constantly exposing its members to ideas from persons outside the agency. We have the following approaches in mind: relying more on outside advice about curriculum, particularly in the areas of law, management, and the social and behavioural sciences; designing training experiences that will combine security intelligence members with people from other departments to examine areas of common concern (e.g. the covert intentions of a particular country); having intelligence officers attend two- to six-week management courses, especially designed by certain universities for middle and senior managers in the private and public sectors; and developing a security intelligence course aimed at an international audience of 'friendly' agencies.

93. We voice one note of caution concerning future efforts of Canada's security intelligence agency to collaborate with foreign agencies in developing training programmes. The mandates of these agencies may differ markedly from that of the Canadian agency. Consequently, collaboration runs the risk of introducing to Canadians a set of ideas and techniques which, if applied, could be outside the Canadian agency's mandate. Cooperation with foreign agencies on training should not be approached lightly. As we recommended in an earlier chapter on the international dimensions of the Security Service's work, exchange of personnel for training courses should be part of the agreement drawn up between Canada's security intelligence agency and foreign agencies with which it co-operates. In addition, the Minister should be informed when training exchanges actually occur.

94. Finally, as in other important areas of personnel policy, managers in operational branches should play a more active role in the design of training programmes and in their implementation. Furthermore, while it is important to continue to recruit people with operational experience into training roles, this should not be the exclusive means of staffing this function. Training and development personnel, like others in the security intelligence agency, can benefit from increased specialization.

Unionization

95. Until recently, members of the R.C.M.P. (the "member" category does not include public servants) did not appear to have the right to unionize. The R.C.M.P. Administration Manual, which derives its authority from subsection 21(2) of the R.C.M.P. Act, provided that a member could not

> Engage in activities which involve joining a union, association or similar collective bargaining group.

This prohibition has been rescinded but other restrictions on collective bargaining in the R.C.M.P. are also found in the Public Service Staff Relations Act.[12] That Act is the central piece of legislation governing collective bargaining in the federal public sector. The Act applies generally to all the Public Service, but expressly excluded from the provisions of the Act is

> . . . a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof. . . (Para. 2(e)).

Thus, non-member (Public Service) employees of the R.C.M.P. Security Service have the right to bargain collectively under the Public Service Staff Relations Act, but not those employees who are regular, civilian or special constable members of the Force. There has been no test in the courts as to whether other legislation in the field of labour relations would permit a group of R.C.M.P. members to be certified as a union and to acquire collective bargaining rights. That possibility therefore remains uncertain.

96. The R.C.M.P. does have a "Division Staff Relations Representative Programme" which allows the R.C.M.P. member some participation in management decisions that affect him. The members of each division elect a

[12] R.S.C. 1970, ch.P-35.

full-time representative "... to present problems, concerns and recommendations on behalf of the members to management". The R.C.M.P.'s Administration Manual under Chapter II.16, provides:

> The Division Staff Relations Representatives will participate in the decision-making process whenever practicable, i.e., Headquarters benefits studies; pay discussion; kit and clothing design; division boards on transfers and promotions; succession planning; grievances and all meetings where policy directly affecting the welfare, dignity and operational effectiveness of the members is being discussed.

97. We believe it is imperative that members of a security intelligence agency should not be allowed to unionize. Indeed, we would extend this prohibition to cover public servants who are now employees of the R.C.M.P. Security Service. We base this recommendation on internal security considerations. Union negotiations involving a security intelligence organization run the risk that information of considerable value will become known to a foreign intelligence agency — information such as the number of employees, their duties, the command structure of the agency, and recruiting practices. In addition, we worry about the possibility of union-management relationships becoming so embittered that the risks of damaging leaks of information, or even an enemy penetration, become unacceptably high.

98. As an alternative to granting unionization rights to agency employees, we propose the following three-point approach. First, the security intelligence agency should fashion a managerial style which stresses employee participation in decision-making. (We shall describe such a style in more detail in a later section of this chapter.) Secondly, the agency should encourage the formation of an employee association which would make representations to the management of the agency with respect to salaries and working conditions. This association would provide another means for allowing employees to communicate with the management of the agency and to influence important decisions of the agency. We see this association playing only a secondary role in ensuring good management/employee relations. The more successful the agency is at establishing a participatory management style, the less important the role of this association will be in that regard. Finally, the salary and benefits of agency employees should be tied to those of the Public Service of Canada through a pre-determined formula. This arrangement will ensure that agency employees receive at least the major benefits of the collective bargaining process.

Agency employees and the Public Service of Canada

99. We now consider the question whether or not agency employees should belong to the Public Service of Canada as defined by the Public Service Staff Relations Act. We believe it essential that agency employees not belong to the Public Service. By virtue of section 5 of the Public Service Employment Act, the Public Service Commission has the authority to appoint and dismiss public servants. Given the special nature of the threat of penetration facing a security intelligence agency, we believe strongly that the agency itself, rather than the Public Service Commission, should have this authority. The agency requires the flexibility to develop a more stringent set of screening procedures for its employees than those pertaining to the Public Service. Conversely, it also

requires a less stringent set of conditions for releasing an employee for security reasons. We know of no security or intelligence agency which does not have the authority to hire and dismiss its own employees.

100. A major disadvantage of agency employees not belonging to the Public Service is that movement of personnel between the agency and federal government departments will be more difficult to effect. We propose several ways to reduce this disadvantage. To facilitate the transfer to and from the Public Service, staff benefits for agency personnel should be similar to those enjoyed by federal public servants. Furthermore, the benefits should be 'portable' between the agency and the federal government, and should be covered by portability arrangements between the federal government and private sector organizations and other levels of government. Finally, we propose that agency employees have the same rights now enjoyed by members of the R.C.M.P. and the Canadian Armed Forces,[13] who, for the purposes of being eligible to enter Public Service competitions, are deemed to be persons employed in the Public Service. Such a provision would also facilitate movement from the agency to the Public Service.

Counselling

101. Estimates of the portion of any employee group suffering from emotional problems severe enough to affect job performance range as high as 15 per cent. Emotional problems can be triggered by a variety of causes — marital difficulties, alcoholism, physical sickness, or job-related factors. In a 1977 study of R.C.M.P. health services, the author, Dr. M.L. Webb, gave evidence illustrating that Force employees, and, in particular, certain categories of Security Service employees, have more significant stress problems associated with their work than the average population.

102. Troubled employees are a significant cost to any organization, in shoddy work, serious mistakes, high rates of absenteeism, danger to other employees in certain cases, and in the expense of hiring and training replacements. For an intelligence agency, however, there is the added danger of penetration. Emotionally troubled employees may become prime targets for agents of unfriendly foreign intelligence organizations, who are highly trained in both detecting and exploiting such employees. Given the serious consequences of such a penetration, it is not an unreasonable expectation that a security intelligence agency would be highly skilled at dealing with this type of problem.

103. During the interview programme that our staff conducted of some Security Service employees, most interviewees were unfamiliar with the term 'counselling' and were not fully aware of what programmes existed within the Security Service. One participant who was aware of existing programmes called them "primitive". Another described them as "fragmented".

104. One approach to employee counselling, which has been adopted by a number of organizations both in the private and public sector, involves the hiring of staff especially trained in counselling to help emotionally troubled employees. The success of such a programme in a security intelligence agency would appear to depend upon several factors. The programme should for the

[13] Under section 2(2) of the Public Service Employment Act.

most part be voluntary. In addition, confidentiality must be maintained. Only in exceptional circumstances should those in counselling roles report information about employees which has been received in confidence. Two such exceptions, of which employees should be aware, are information about participation in illegal acts, and information given to counsellors which suggests that there is a serious risk of penetration by hostile intelligence agencies.

105. We note that Dr. Webb, in the study we referred to above, recommended a similar programme for the Force as a whole. The Force has accepted this recommendation and, subject to Treasury Board approval, plans to implement it in the fiscal year 1981/82.

Grievances

106. Like many organizations, the R.C.M.P. has both a formal and an informal means of dealing with employee grievances. The 1976 Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the R.C.M.P. (commonly known as the Marin Commission) strongly supported informal approaches for dealing with grievances, prior to resorting to more formal means:

> ... we strongly approve of the current practice of seeking local and informal avenues of resolution of grievances before resorting to formal procedures. In our view, this practice should be encouraged and strengthened wherever possible as it constitutes the most efficient method of resolving grievances.[14]

107. We concur with the Marin Commission's emphasis on informal approaches and believe that this philosophy should be adopted by a security intelligence agency. Indeed, senior managers within the agency should closely monitor the use of more formal grievance procedures. A rising number of formal grievances is a likely indicator of a problem area — recruiting errors, poor internal communications, an autocratic managerial style, or insufficient supervisory training programmes.

108. The current R.C.M.P. formal grievance procedure involves a four-stage process, starting with the officer commanding a subdivision and moving up through the Force hierarchy to the Commissioner. We do not think that such a cumbersome process is required for a security intelligence agency. We favour a simpler two-stage procedure. The first stage would involve submission to a three-member grievance board appointed by the Director General. The board would investigate the grievance, hear the parties concerned, and make a ruling. The second stage would be an appeal procedure, whereby any of the parties to the grievance could ask the Director General, or a deputy appointed by him, to review the Board's decision. Following the Marin Commission (and current R.C.M.P. policy) we propose that no member should be penalized directly or indirectly as a result of lodging a grievance.

Remedial action for improper behaviour

109. The R.C.M.P.'s approach to improper conduct on the part of its members continues to reflect the origins of the Force — a paramilitary

[14] *The Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within The R.C.M.P.*, 1976, p. 182.

organization with responsibilities for frontier policing. As the Marin Commission report stated, "Discipline within the R.C.M.P. was developed and has evolved under the influence of the military character of the Force and the operational requirements of law enforcement."[15] The Force originally relied on the rules of discipline of the Royal Irish Constabulary, which, in turn, duplicated many of the military procedures in use in England and Canada at the time. The Force was also originally staffed with men who served as officers and non-commissioned officers in the Canadian Militia and the British Army.

110. "Police service on the frontier", explained the Marin Commission Report, "required that the majority of the members of the Force serve independently or in groups of two or three, far removed from direct supervision. Given the authority and discretionary power of a police officer, it was imperative that he exercise self-discipline and self-control".[16] But balancing the Force's trust that its officers would exercise self-restraint and control were "provisions which exemplified a strict and summary approach to breaches of discipline". The Report went on to note that minor misconduct by a member of the Force "constituted more than a misdeed; it gave evidence of a breach of trust and characterized the member as unreliable. When self-discipline failed, punishment was swift and severe".[17]

111. Sections of the R.C.M.P. Act establishing the penalties for serious offences are an indication of the potential harshness of the current approach to improper behaviour. Penalties for major service offences — for example, refusing to obey the lawful command of a superior — range from a year's imprisonment, to a fine not exceeding $500.00, to a reduction in rank, to a reprimand. For minor service offences, — for example, immoderate consumption of alcohol or using profane language, — punishment ranges from confinement to barracks for up to 30 days to a simple reprimand.

112. In addition to being unduly harsh, the current disciplinary system of the R.C.M.P. is characterized by a multitude of regulations governing the conduct and performance of members. The impression is one of a great web of rules touching every facet of a member's on-duty life and many parts of his private life. Moreover, the process of determining disciplinary steps is laid down in great detail and tends to be very adversarial in nature. Thus, there are procedures for launching an investigation, for laying of service charges, for formal quasi-judicial hearings to determine the member's culpability, for determining penalties, and finally for appealing the verdict.

113. The Marin Commission Report was highly critical of the present disciplinary system of the Force. The Commissioners found the procedures too formal, the control too centralized, the member's rights ill-defined, and the exercise of disciplinary authority too arbitrary. We concur with these criticisms. That such a system should still exist in the latter part of the 20th century, and that the impetus for changing it had to come from an outside body like the Marin Commission, are additional evidence of a weakness in the managerial expertise existing within the Force. Bill C-50, An Act to Amend

[15] *Ibid.*, p. 111.
[16] *Ibid.*, p. 31.
[17] *Ibid.*, pp. 111-112.

the Royal Canadian Mounted Police Act, which was introduced in April 1978, and which would have substantially modified the Force's disciplinary procedures along many of the lines recommended by the Marin Commission, died on the order paper.

114. The approach for dealing with improper behaviour which we recommend for the security intelligence agency is a system based on a different set of philosophical principles. First, we believe that the cornerstone of such a system should be self-discipline and self-control, based on more positive motivations than fear of punishment. The great majority of employees will exercise a high degree of self-discipline and control if they have taken an active part in working out with their superiors the conduct and performance expected of them, or are in very substantial agreement with the standards because of a thorough understanding of the need for the standards. We shall be developing this theme much more fully in the next section of this chapter. Here we want to emphasize that the collegial management style we are recommending is not in any way incompatible with a highly disciplined security intelligence agency which acts legally, properly, and in concert with government policies. Quite the contrary, collegiality can and should be structured in such a way that security intelligence officers 'going off on their own' in disregard of government and agency policies, is simply not tolerated within the agency.

115. Second, primary emphasis on correcting inappropriate behaviour should be through remedial action, rather than by punishing individuals. Moreover, the remedial action may not be directed solely or primarily at individuals. Rather, improper behaviour may indicate faults in certain organizational practices: communication may be poor, supervisory patterns inadequate, or training programmes too skimpy. When remedial action is directed toward individuals, the key, in our view, is to avoid a highly formalized adversarial process. Supervisors may need to rely on expert staff resources to help them work out remedial programmes with certain employees. The stress should be on creatively working out joint solutions to problems rather than on punishing people. Only in rare circumstances should formalized disciplinary procedures be launched against an employee.

116. We propose one important exception to the above approach: where there is evidence of an illegality on the part of an employee. The procedure to be followed in handling such cases is described in Part V, Chapter 8. The employee should be suspended with pay, pending the outcome of this procedure.

117. In a few extreme cases, the best solution may appear to be dismissal. Such a decision should not be made lightly and it should be made only after supervisors and others have made considerable effort in applying remedial measures. The actual decision should be made by the Deputy Solicitor General, on the advice of the Director General and his senior management team. The Director General may wish to consult others outside the agency, both to test the soundness of his recommendation to dismiss an employee and to explore possible employment options for the individual elsewhere. As in most other private and public organizations, the decision to terminate employment should be based on 'cause'. In some instances, it may be appropriate for the agency to

pay the costs of a termination counsellor for the employee and to make a sustained effort to help the dismissed employee find suitable work elsewhere. Avoiding the problems of disgruntled ex-employees of the security intelligence agency will be well worth the effort as such persons can do great harm to a country's security system.

118. We should make one other point about dismissal procedures. That concerns dismissals based on security grounds. The dilemma here is that the Director General must tolerate a much lower level of risk than would the heads of most other government departments and agencies, and yet, at the same time, individual employees must have some sense of job security upon agreeing to work for the agency. There are no easy answers here. The best approach we can think of is as follows. The Director General should have the power to suspend a person with pay while a security investigation is conducted. If the evidence would not warrant dismissal from another government department and yet leaves some doubt as to the employee's reliability within a security intelligence agency, then the employee should, if possible, be given work of comparable status in a non-sensitive area in another federal government agency or department. The Director General should work out a procedure for handling such cases and seek the approval of the appropriate interdepartmental committee.

WE RECOMMEND THAT the security intelligence agency adopt the following policies to help it determine who should work for the agency:

(a) the agency requires staff with a wide variety of backgrounds in governmental, non-governmental, and police organizations;

(b) police experience should be a prerequisite for only a small number of specialized positions;

(c) the agency should periodically hire persons from outside the agency for middle and senior management positions;

(d) having a university degree should not be a prerequisite for joining the agency. Nonetheless, the agency should actively recruit those with university training;

(e) the agency should hire individuals with training in a wide variety of academic disciplines;

(f) the agency should seek employees with the following characteristics: patience; discretion; emotional stability; maturity; tolerance; no exploitable character weaknesses; a keen sense of, and support for, liberal democratic principles; political acumen; and the capacity to work in an organization about which little is said publicly.

(74)

WE RECOMMEND THAT the security intelligence agency adopt the following recruiting procedures:

(a) it should widen its recruiting pool in order to attract the type of personnel we have recommended, rather than rely on the R.C.M.P. as its primary source of recruits;

(b) apart from support staff, it should have only one category of employee, to be known as intelligence officers. Intelligence officers should not be given military or police ranks;

(c) it should not rely primarily on referral by existing or former employees to attract new recruits but rather should employ more conventional methods, including recruiting on university campuses and advertising in newspapers;

(d) in addition to the personnel interview, it should develop other means, such as psychological testing and testing for writing and analytical ability, to ascertain the suitability of a candidate for security intelligence work;

(e) it should involve experienced and senior operational personnel more actively in the recruitment process.

(75)

WE RECOMMEND THAT

(a) the security intelligence agency initiate a more active secondment programme, involving federal government departments, the R.C.M.P., provincial police forces, labour unions, business, provincial governments, universities, and foreign agencies;

(b) secondment arrangements with foreign agencies should be approved by the Minister responsible for the security intelligence agency.

(76)

WE RECOMMEND THAT the security intelligence agency:

(a) develop an improved career planning capability in order to effect greater specialization in career paths;

(b) ensure that there is close collaboration between line and staff personnel in the design and implementation of specialized career paths.

(77)

WE RECOMMEND THAT the number of job levels for intelligence officers within the security intelligence agency be reduced.

(78)

WE RECOMMEND THAT the security intelligence agency establish a number of positions designed for senior intelligence officers who would have no administrative responsibilities.

(79)

WE RECOMMEND THAT security service training be redesigned so that it is more suitable for better educated, more experienced recruits. There should be less emphasis on 'parade square' discipline and 'molding' behaviour and more emphasis on developing an understanding of political, legal and moral contexts and mastering tradecraft techniques.

(80)

WE RECOMMEND THAT the security intelligence agency initiate a variety of training programmes with an aim to exposing its members to ideas from persons outside the agency.

(81)

WE RECOMMEND THAT

(a) managers in operational jobs take an active role in the design and implementation of training and development programmes;

(b) opportunities for increased specialization be available for training and development staff.

(82)

WE RECOMMEND THAT

(a) security intelligence agency employees not be allowed to unionize, and this be drawn clearly to the attention of each person applying to join the agency;

(b) the security intelligence agency

(i) adopt a managerial approach which encourages employee participation in decision-making,

(ii) encourage the formation of an employee association, and

(iii) tie agency salaries and benefits by a fixed formula to the Public Service of Canada.

(83)

WE RECOMMEND THAT

(a) employees of the security intelligence agency not belong to the Public Service of Canada;

(b) the employee benefits of the security intelligence agency be the same as those enjoyed by federal public servants;

(c) portability of employee benefits exist between the agency and the federal government;

(d) pension portability arrangements between the federal government and other organizations including other levels of government encompass the security intelligence agency;

(e) for the purposes of being eligible to enter public service competitions, employees of the security intelligence agency be deemed to be persons employed in the Public Service.

(84)

WE RECOMMEND THAT the security intelligence agency establish an employee counselling programme based on the two principles of voluntary usage and confidentiality of information given to the counsellors.

(85)

WE RECOMMEND THAT the senior management of the security intelligence agency

(a) emphasize the practice of seeking local and informal avenues of resolution of grievances before resorting to formal procedures;

(b) monitor carefully the use of formal grievance procedures as a possible indicator of problem areas in current personnel policies;

(c) establish a two-stage formal grievance procedure, involving a three-person grievance board at the first stage, and an appeal to the Director General at the second stage;

(d) ensure that no member be penalized directly or indirectly as a result of lodging a grievance.

(86)

WE RECOMMEND THAT the security intelligence agency develop a program for dealing with improper behaviour which

(a) emphasizes remedial action rather than punishment;

(b) requires the Director General, in the case of an alleged illegality, to suspend an employee with pay and to refer the case to the Solicitor General;

(c) places responsibility for dismissal with the Deputy Solicitor General, subject to the advice of the Director General and his senior management team;

(d) emphasizes the necessity of the security intelligence agency expending every effort, in appropriate instances, to help dismissed employees find new work;

(e) provides for a procedure for relocating employees who are suspected of being security risks to non-sensitive areas in other federal government departments.

(87)

D. APPROACHES TO LEADERSHIP, ORGANIZATION AND DECISION-MAKING

119. To this point, we have concentrated on describing the kind of people who should work in a security intelligence agency, and the appropriate set of personnel policies — recruiting, training, career paths, and so on — so that the 'right' people are doing the 'right' jobs. For some, this is the essence of good management: problems of effectiveness, propriety and legality simply will not arise as long as the organization has good people and keeps them productively occupied. Unfortunately, the management of an organization is more complicated than this view suggests. People who are exemplary citizens in their private lives — law-abiding, morally sensitive and public-minded — frequently find it extremely difficult to withstand organizational pressures either to participate or acquiesce in improper or illegal acts of other members of the organization. Thus it is important to examine those features of an organization which lead to illegalities and improprieties.

120. In this section, we examine two dimensions of management: leadership style, and some related principles of organization. The focus of both these topics is how people within a security intelligence agency relate to one another in making day-to-day decisions.

Leadership style

121. For many, the word 'leadership' conjures up images of strong-minded, clear-thinking individuals giving incisive orders. We shall leave it to others to argue whether such a leadership style is appropriate in any organization, even an army in battle. We can state with some certainty that such a style, with its reliance on obedience, is inappropriate for the kind of security intelligence organization we are proposing. The thoughtful, mature, well-educated individual who, we believe, is needed for security intelligence work is not likely to tolerate such a style. Moreover, advocates of this approach to leadership ignore an increasingly important aspect of modern organizations: they are complex and their parts are highly interdependent. To function effectively

within a security intelligence agency often requires getting things done by working with other people with whom no superior/subordinate relationship exists. In sum, a leadership style based on giving orders must give way to a team approach where the emphasis is on shared decision-making, and where control by superiors is largely replaced by self-control and self-direction, based on a common understanding of shared goals. This is not to argue that giving orders is never appropriate, only that there are often more effective means of getting things done.

122. A reading of the opening section of the Force's four-volume Administrative Manual would suggest that it is committed to the kind of leadership approach we have recommended above. Section 6 of the chapter on "The Principles of Policing and Management in the R.C.M.P." is as follows:

> 6. Police personnel at all levels should be given the opportunity to participate in the setting of goals and deciding the means of achieving them. Managers should set an atmosphere wherein they can carry out their responsibilities on the basis of mutual confidence, respect and integrity, without simply relying on their authority or position.

123. The evidence we have heard in our hearings, the numerous informal meetings we and our staff have had with members of the Force, and our examination of file material all suggest that this principle is not as widely followed within the Security Service, nor within the Force as a whole, as it should be. For example, the descriptions we have given in this chapter of current personnel policies in such areas as discipline and recruit training indicate an 'obey or else' philosophy of leadership which is at odds with the above principle. And consider this testimony from an officer in the Security Service:

> . . . we knew we were confronted, among other things, with severe. . . hierarchical authority problems. Younger members were very loath to express their honest opinion when their seniors were present, because if they were disagreeing with their seniors, some of whom thought we were in the best of all possible worlds. . . they would be told off.
>
> (Vol. 53, pp. 8620-8621.)

124. We have found some evidence that a team approach to decision-making is taken seriously within the Security Service. For example, we were impressed by recent developments in the Service's planning process, which has evolved into a well-integrated process offering opportunities for participation in planning and detailed target setting throughout the organization. And we have spoken to a number of officers who were trying to develop a more participatory approach in their units. Nonetheless, we believe considerably more progress in this direction is required throughout the Security Service. In particular more emphasis needs to be given in training courses to practising small-group decision-making techniques so as to support such a leadership style.

125. A review of Security Service files has illustrated the problems faced by a source and his Security Service 'handler' and gives a strong hint of the kind of filters which can develop in an organization — filters which can distort the flow of information to senior management. That such communication distortions should develop to reduce the effective operation of a security intelligence

agency affords sufficient grounds for concern. That such distortions could, in addition, keep from senior management information about existing or potential improprieties and illegalities is intolerable. The adoption of the leadership style we have advocated in this section — a style which assumes that conflict within an organization can be a positive stimulus provided it is faced openly and creatively — is one way to minimize the occurrence of communication problems within the agency. Creation of only one category of employee, a recommendation we made earlier in this chapter, is another means to achieve this end. In addition, there are other managerial policies which move in the same direction. For example, the agency should not have separate eating and social facilities for its various levels as is now the case in the R.C.M.P. In our view, such separate facilities tend to accentuate communication barriers within the agency. Moreover, senior management should develop regular opportunities for discussions with lower ranking employees whom they might not normally see in the course of their work.

126. Yet another device to facilitate communication is to encourage *ad hoc* groups established to examine particular problems, to include, when appropriate, staff from several management levels within the agency. Finally, when senior managers deal with the work of an individual, that person, however junior, should be present in the meeting where feasible.

Organizing principles

127. Most who work in large organizations are struck at some point by the inadequacy of an organization chart in showing how things really work. All employees, even at low levels, have working relationships with others in addition to their superiors, and these relationships shape and modify their own role and responsibilities to such an extent that behaviour within organizations cannot be described solely in terms of the formal organization chart. At middle and senior levels, interdependencies among organizational units become very pronounced and require managers to spend significant portions of their time working with others either 'across' the pyramid or belonging to another organization.

128. On several occasions in this and earlier chapters, we have recognized the importance of these interdependencies and recommended specific structures to deal with them. In our discussion of the security intelligence agency's mandate, we recommended the formation of a revamped O.P.R.C., whose composition would include both members of the security intelligence agency and others outside the agency, and whose function would be the review of proposals for 'full' investigations. In a similar vein, we have proposed that the Director General and his senior managers act as a team so that agency decisions may be tested against all the major viewpoints within the organization. These examples illustrate the importance we place on the security intelligence agency's conscious structuring of its key decision-making forums so that countervailing perspectives are brought to bear on important problems. The creative resolution of differences in viewpoint can produce decisions of high quality. There will be less likelihood of poorly considered operations and policies.

129. As a final illustration of this organizing principle of countervailling forces, we shall now consider how a security intelligence agency might go about developing and implementing policies relating to personnel matters. One of the dominant themes which arose in Commission interviews with R.C.M.P. personnel on personnel policies affecting the Security Service was the existence of a high degree of acrimony, tension and frustration in the relationship between those doing the operational work of the Service (i.e. those in 'line' jobs) and those responsible for Force-wide personnel policies (i.e. those in 'staff' jobs). Line personnel believed that those in staff positions lacked a proper understanding of Security Service work, were overly narrow and specialized, were too concerned with bureaucratic procedures and enforcing compliance, and, in general, were unsympathetic about helping line people solve some serious and pressing problems. Those in staff positions, on the other hand, tended to view line personnel as parochial, unconcerned with broader Force-wide interests, overly concerned with maintaining their independence, and guilty of a tendency to blame staff people for problems they should solve themselves.

130. The antipathy in this staff/line relationship has manifested itself over the last decade in a variety of ways which go beyond angry memos and long frustrating meetings. For example, we found several instances of outright non-compliance with certain personnel policies. An even more common phenomenon was the expenditure of large amounts of employee time in devising ingenious ways to get around or defeat certain policies (for example, Security Service branches putting forward numerous proposals for organization changes in order to deal with constraints imposed by the classification system). The situation we have described here is by no means unique to the R.C.M.P. Many organizations, both in the private and public sectors, experience a similar 'guerrilla warfare' between staff and line employees.

131. What can be done to minimize such problems? There appear to us to be a number of ways in which much closer collaboration can exist between staff and line components within a security intelligence agency. The most important is the recognition throughout the organization that developing and implementing personnel policies must be a joint responsibility of both line and staff managers. Moreover, there must be structures to reflect this sharing of responsibility. Responsibility for personnel policy should be vested in a senior committee composed of both line and staff managers. The advantage of this arrangement is that it begins to remove the staff personnel from an enforcement role, and yet provides them with a forum for exerting considerable influence on the direction of the organization's personnel policies. For line managers, such an arrangement means that they must become more active in thinking about and formulating personnel policies and consequently more committed to the end result.

WE RECOMMEND THAT the security intelligence agency develop

(a) a leadership style which relies less on giving orders and obedience and more on participation in decision-making, and

(b) training courses, especially in small group decision-making techniques, which will support such a leadership style.

(88)

WE RECOMMEND THAT, to minimize the likelihood of internal communication barriers developing, the senior management of the security intelligence agency should

(a) eliminate separate eating and social facilities based on job levels within the agency;

(b) develop a regular forum for communicating with staff they would not normally meet in the course of their work;

(c) encourage ad hoc problem-solving groups, when appropriate, to include staff from a variety of levels within the agency;

(d) encourage the attendance of junior ranking members when their work is discussed.

(89)

WE RECOMMEND THAT the security intelligence agency include in its key decision-making forums individuals who, because of their function, have different perspectives on the problems to be considered.

(90)

E. LEGAL ADVICE

132. An essential element in the structure of any government department or agency is its legal services. The part played by the legal adviser is more or less important depending on the role assigned to the department or agency. Because of the delicate and sensitive work to be performed by the security intelligence agency, as we have outlined it earlier in this part of our Report, and the potential for infringement of legal rights of individuals and organizations, it is of the utmost importance that the agency receive independent legal advice of the highest order and that it follow that legal advice scrupulously.

133. In the past the Security Service of the R.C.M.P. obtained its legal advice from the same sources as the rest of the Force, i.e. the Department of Justice or the Legal Branch of the R.C.M.P. In Part X, Chapter 3, we shall outline briefly the history of the Legal Branch of the R.C.M.P., and the current status and role of that Branch, and set out some recommendations for its future. Because we shall recommend a security intelligence agency separate from the R.C.M.P., we propose here to deal with how that separate agency should obtain its legal services.

134. For legal advice to be reliable, the lawyer providing it must be as free as possible from any external influence or pressures. This touchstone is a basic tenet of the legal profession. A lawyer must be free to express his opinion without fear that the content of that opinion might have an adverse effect on him personally. This principle applies equally to private practitioners and lawyers employed by the government. Recognition of this principle underlay the recommendations of the Royal Commission on Government Organization (1962) (the Glassco Commission). That Commission stated:

> Rotation of Justice lawyers into departments and back to the Department of Justice should bring a fresh touch of reality to the oft-times academic tone of Justice opinions and, at the same time maintain in the departments

the appropriate aura of neutrality required in rendering impartial legal advice.[18]

135. There are characteristics of a security intelligence agency which give a uniqueness to its legal requirements. Much of what it does is secret and in many cases very few people have any knowledge of its operations. Of even greater significance, most of the operations involve an intrusion into the lives of others which goes beyond what is normally encountered or permitted in our society. Earlier in this Report we defined the role of the agency and the powers that we think should be given to it. We also dealt with the mechanisms we think ought to be put in place to control the agency's activities. Underlying our recommendations is the principle that the agency must act within the law at all times. If the law is not adequate to allow the agency to perform its role it should seek to have the law changed. It should not under any circumstances knowingly or negligently break the law. This has two consequences for the legal services requirements of the agency. First, the agency requires legal advice, in advance, with respect to certain aspects of its operations to ensure that they are in conformity with the law; and second, it requires legal advice as to the best way to change the law if the law is not adequate to permit it to perform its assigned duties. We will now consider these two legal functions separately.

136. The secrecy associated with operations gives a particularity to the advice required. The 'need to know' principle, which we shall discuss in greater detail in a later section of this chapter, can result in a down-grading of the importance of questions of legality by those involved in the operations, who are not experts in the law and who may be facing a set of pressures to collect certain information. In addition, the number of people outside the agency having knowledge in advance of operations must be limited because of the risk of compromise of the operations. Any examination of the legalities of operations carried out prior to the execution of such operations must, therefore, be performed within the agency. We are strongly proposing to the government that the legal advisor be placed in a key position to advise on legal matters. The agency's legal adviser should be a member of the committee which authorizes the agency to use the full range of its investigative methods against a proposed target. The legal adviser should also examine each specific request for the granting of a warrant to perform an intrusive technique, so as to ensure that the application is in conformity with the law and the agency guidelines. Further, he should scrutinize specific proposals for using certain other investigative techniques to ensure that those proposals meet agency guidelines. As well as having a formal involvement in the approval process for sensitive operations, the legal adviser should be available to give advice in the planning of such operations, prior to the approval stage. Members at every level in the agency should be encouraged to consult with the legal adviser on all matters, with full candour. In this way, potential legal problems may be avoided and the morale of operational people will not suffer because of rejection of their proposed operations at a later stage due to legal considerations. The advice of

[18] *Royal Commission on Government Organization*, Queen's Printer, Ottawa, 1962, Vol. 2, p. 420.

the legal adviser as to the legality of an operation must be binding on the agency unless a contrary opinion is given by the Deputy Attorney General of Canada. Any knowledge by the legal adviser, either before or after the fact, of any illegal act by the agency must be reported by him to the Deputy Attorney General of Canada.

137. The second requirement of the agency for legal advice as to how inadequate laws ought to be changed, while in some respects similar to the provision of such advice to any government department or agency, again has some aspects unique to a security intelligence agency. The agency's legal adviser requires a detailed knowledge of the agency's operations and techniques to ensure that legislation which is drafted does not destroy the efficacy of the agency's clandestine activities. Later in this Report we shall be recommending that there be a special group of parliamentarians who would be kept informed by the government with respect to security matters. The details and reasoning behind some of the more sensitive aspects of legislative changes would be one of the areas in which they would be so informed. In this area of legislative change the legal adviser should counsel senior management of the agency in its dealing with Ministers, senior officials in other government departments and Parliamentary Committees, but he should not become the advocate for the agency. Such a role would be consistent with the role played by Department of Justice lawyers in other departments and agencies of the government.

138. In our opinion the legal advisers of the agency must be intimate with all aspects of the agency's activities. This means that they must have several years of continuous association with the agency. Because of the degree of secrecy required we consider it advisable that such lawyers attempt to handle as much as possible of the legal work without reference to any 'outside' lawyers. For the reasons mentioned previously about the benefits accruing from independent legal advice, we think that the legal advisers to the agency should be members of the integrated legal service of the Department of Justice. Since there will be little or no review by other lawyers of the legal advice given by the agency lawyers in advance of the execution of operations, it is imperative that such lawyers be well-qualified and of mature judgment. We think it would not be wise for a lawyer to make a career of being a legal adviser to the agency; however, we think it would be reasonable to expect that any lawyer spend from five to ten years in such a position. Obviously, he must be housed at the security intelligence agency's Headquarters and must be in full-time attendance there. The clear danger in these circumstances is that if he were to consider it a lifetime career, notwithstanding that he is a member of the Department of Justice, he might tend to lose his independence, either by being co-opted to the agency's way of thinking through long-term association, or because his career would be dependent upon the approval of him by the senior management of the agency. For this reason we think that there should be a limit on the duration of his services.

139. Until recently, one member of the Legal Branch of the R.C.M.P. worked full-time advising the Security Service of the R.C.M.P. In addition, much of the time of the Department of Justice lawyer assigned to the

R.C.M.P. was taken up with Security Service matters. (In Part X, Chapter 3, we discuss recent developments concerning the R.C.M.P.'s Legal Branch.) We are sure that more than one lawyer will be required by the security intelligence agency, and no doubt over time a system of staggering the appointments could be worked out which would ensure that there would always be one lawyer available in the agency who would be experienced in its work.

WE RECOMMEND THAT the legal services of the security intelligence agency be provided by the Department of Justice, and that the Department of Justice assign to the security intelligence agency well-qualified lawyers of mature judgment in sufficient number to provide all of the legal services required by the agency.

(91)

WE RECOMMEND THAT the lawyers assigned to the agency serve from five to ten years in that assignment and that there be a gradual staggering of the appointments so as to ensure that there is always at least one lawyer at the agency with several years' experience in its work.

(92)

WE RECOMMEND THAT the agency's legal advisers provide the agency with advice on the following matters:

(a) whether actions are in conformity with the law and agency guidelines;

(b) the legality of each application for a warrant to perform an intrusive technique and whether such application is in conformity with those agency guidelines with respect to its use;

(c) whether a proposal to use certain other investigative techniques is in conformity with the agency's guidelines.

(93)

WE RECOMMEND THAT the advice of the legal adviser be binding on the agency unless a contrary opinion is given by the Deputy Attorney General of Canada.

(94)

WE RECOMMEND THAT the legal adviser report to the Deputy Attorney General of Canada any knowledge he acquires of any illegal act by any member of the agency.

(95)

WE RECOMMEND THAT the legal adviser counsel senior management of the agency in its dealings with senior officials, Ministers or Parliamentary Committees with respect to the proposed legislative changes affecting the work of the agency.

(96)

F. INTERNAL AUDITING

140. The R.C.M.P. defines audits as "official systematic examinations" to "... assure senior managers that their policies are being observed". The practice of having audits conducted throughout the Force by a group on behalf of the Commissioner began in 1953. By the summer of 1977, an Audit Branch with three units — a Management Audit Unit, Financial Audit Unit, and an

Administration and Personnel Audit Unit — was in place. The officer in charge of this Branch reports to the Commissioner. Following the revelations which gave rise to this Commission, Commissioner Simmonds and the Solicitor General, Mr. Fox, announced the formation of an Operational Audit Unit, which was added to the Audit Branch in early 1978. Unlike the other units in the Branch which have Force-wide responsibilities, this latter unit focusses solely on the Security Service. In addition to the four audit units which form the Audit Branch, the Security Service has its own audit unit, which began its first audit in May 1978. Of these five audit units, three are important for our purposes — the Management Audit Unit and Operational Audit Unit in the R.C.M.P.'s Audit Branch and the Security Service's own audit unit.

141. The Management Audit Unit is the largest unit within the Audit Branch. In 1979 it had a complement of 14 full-time regular members — 2 Superintendents, 2 Inspectors, and 10 Staff Sergeants. The objective of the unit is to "assist all levels of management in the effective discharge of their responsibilities". To do this, the unit examines among other things the following: the use made of resources — personnel, financial, material; administrative and operational efficiency; internal control mechanisms; quality of communication; and morale levels. This unit completed an audit of the Security Service in 1976 and another in 1979. The aim is to have these audits done eventually on a two-year cycle.

142. The Operational Audit Unit, established in early 1978 by the Solicitor General and the Commissioner, has a mandate to examine all aspects of the Security Service to ensure that its activities are

(a) legal;

(b) within the mandate of the Security Service;

(c) consistent with Force policy;

(d) ethical and morally acceptable, and

(e) efficient and effective.

This unit has four full-time staff members — a Chief Superintendent, a Superintendent and two Staff Sergeants. Commissioner Simmonds, in testimony before us, explained the rationale for establishing this unit. The Security Service, unlike the other geographically based divisions within the Force, is both a policy centre and an operations centre. It does not have a number of Headquarters-based policy directorates 'riding herd' over it as do the other divisions. Hence, Commissioner Simmonds felt the need for ". . . a small audit team that reports directly to me and looks at the operations of the Director General, because my responsibilities are large and I am busy and I can't be spending every day looking at what he is doing..." (Vol. 164, p. 25188). The unit is authorized to have unrestricted access to Security Service files, but is not allowed to contact other agencies, police forces, or foreign governments. It began its work by auditing several of the Headquarters branches in a very extensive manner. In auditing the one operational branch, for example, the auditors looked at over 700 files at the outset, choosing some randomly and others by asking for specific policy files and sensitive operational files. After

this file review, they then conducted a number of interviews. This audit took a long time, some seven months, to complete. The audit of another Headquarters branch took close to four months. The heavy emphasis on file review is in contrast to the management audit, which relies almost entirely on interviews.

143. Commissioner Nadon authorized the establishment of the Security Service's own audit unit in August 1976 as part of the changes resulting from the Security Service's achieving divisional status. The unit is headed by an Inspector, who has two Staff Sergeants reporting to him. Its mandate falls into three areas: operations, administration and planning. In the first area, operations, there is a clear overlap with the Operational Audit Unit described above. For example, the staff in the Security Service unit asks all those interviewed the following two questions concerning legality:

> Are you involved in or do you know of any investigational practices which might be of questionable legality?
>
> Are you certain that these practices have been suspended?

In addition to asking these general questions, the audit unit samples files and conducts interviews on the process of identifying groups and individuals to be investigated and on the use of intrusive investigative techniques. The auditors rely heavily on the intelligence collection goals established by the planning process. Of particular concern to the auditors would be an investigation of a group which does not relate to the yearly plan, and for which there is no written authorization from Headquarters.

144. In examining an investigative technique, the audit unit when auditing a large area command might spend up to one day going through every fifth file and then following up with interviews. The function of the auditors is to identify what appear to be questionable situations and ask for a second look, often from the officer in charge of the particular head office branch. The auditors do a similar combination of file reviews and interviews concerning the use of intrusive techniques.

145. In the planning and administration areas, there is considerable overlap between the Security Service Audit work and the management audit of the Audit Branch. The major difference is that the Security Service audit is more detailed. For example, the Security Service auditors interview some 40 to 50 per cent of the members within a unit — almost double the corresponding figure for the Audit Branch. Also, the Audit Branch does only a sample of the various area commands and headquarters units. Consequently, the frequency of these audits would be less.

146. There are several positive features to the Force's approach to auditing. The subject of the audit always has an opportunity to respond to the auditors prior to their submitting a report. The auditors do no more than identify problems, and thus do not force solutions onto the unit being audited. Finally, the audit reports are designed to identify positive as well as negative points. Nonetheless, we have some serious misgivings about the current auditing system as it affects the Security Service. Our approach to auditing has three elements: first, the major responsibility for operational auditing should be with

an organization independent of the security intelligence agency; second, there should be a small investigative unit within the security intelligence agency with responsibility for handling complaints and for reviewing agency operations on a more selective, less mechanical manner than is now the case; and third, managerial auditing should be replaced by more promising approaches to organizational improvement and change. We shall enlarge on each of these elements.

147. In the next section of the Report, we will be recommending the formation of an independent review body (the Advisory Council on Security and Intelligence) with broad responsibilities for auditing and reviewing the activities of all agencies within the intelligence community, including the security intelligence agency. We shall be elaborating on the role of this agency and the reasons for establishing it. Briefly, for our purposes here, there are two fundamental reasons for our preferring the major operational auditing responsibility to rest with an outside agency. The first is independence. During the course of our inquiry, we have heard evidence about many questionable practices — some of which we believe are contrary to, or at least not provided for by the law — which were approved by the most senior levels within the Force. We have little confidence that an audit unit based within the Force would have necessarily identified these questionable practices. We have no confidence that the work of an audit unit within the Force would have resulted in the practices, if identified, necessarily being brought to the attention of the appropriate Ministers and officials. The lack of comment by any of the audit units on the Force's handling of the Prime Minister's 1969 policy statement adds weight to our concern. So does the following testimony of a former senior Security Service officer on the audit group's access to documents relating to mail opening practices:

> Q. Would there be any way that the Audit Group, which, I assume, has the continuing function, visiting various units — is there any way in which it would have access to Exhibit B-22? [a telex dated September 23, 1977, containing Headquarters instructions to Area Commands as to the permissibility of the examination of the outside of mail and forbidding the opening of mail]
>
> A. I would expect it would have access to it if it had asked to see it; but like many things in the Security Service, and again, as I think I explained yesterday, we operate on a need-to-know basis; and because of the very sensitive nature of the CATHEDRAL operation, not only in terms of its sensitivity security wise, but, quite honestly, because it is a sensitivity in terms of illegalities, I would doubt very much whether it would have been brought to the attention of the audit people, unless they had asked for it.
>
> (Vol. 7, p. 969.)

148. A second reason for preferring an outside agency to be responsible for operational auditing is that clearly many of the problems we have been investigating had very much to do with the relationship of the Force to other parts of government. An organization which is independent of the security intelligence agency, its Minister, and the other major agencies making up the

intelligence community would be in a position to monitor these relationships and point out problem areas.

149. While urging that most of the operational auditing responsibility be lodged in an independent body, we believe that the security intelligence agency should have a small investigative unit to carry out in-depth studies of operational activities which appear to involve questionable positions. This investigative unit should also be responsible, in most instances, for investigating public complaints against members of the security agency. However, the independent review body should be informed of all complaints and the agency's response to them. Also, based on evidence before this Commission of several poorly conducted R.C.M.P. internal investigations, we believe strongly that the independent review body should be empowered, in exceptional circumstances, to investigate a complaint itself.

150. As for the management audits, we believe that the benefits simply do not match the costs. Senior management's involvement in such audits is generally confined to reviewing the final report, and perhaps following up on a small number of points. Thus, fundamental issues facing the organization seldom get addressed. We also believe that most of those being audited view management audits as nuisances, and are consequently not strongly motivated to take the results seriously.

151. One positive feature, however, of managerial auditing which should not be lost, is having 'outsiders' periodically come into an organization as catalysts for change. But rather than performing the role of an expert who examines a situation and prescribes changes for senior management, the 'outsider' (either an outside consultant or a member of some internal consulting group) would have the task of helping those within the organizational unit identify their pressing problems, understand why these problems exist, and develop solutions. To be successful, such an approach has to reverse the conditions under which auditing in the management area is unsuccessful. That is, senior management has to be involved in a substantial way, committing both time and resources; there has to be a motivation to learn among those involved in the exercise; and the learning of those within the organization requires progression, a series of opportunities to explore and experiment with new concepts.

WE RECOMMEND THAT

(a) **major responsibility for auditing the operations of the security intelligence agency for legality and propriety should rest with a new independent review body. (The functions of this body will be described in a later chapter of this report.)**

(b) **the security intelligence agency should have a small investigative unit for handling complaints and for initiating in-depth studies of agency operations on a selective basis; and**

(c) **the security intelligence agency should not allocate resources for managerial auditing, but instead should experiment with other approaches to organizational change.**

(97)

G. INTERNAL SECURITY

152. As we noted in the introductory section of this chapter, a feature which distinguishes a security intelligence agency from other government organizations is the degree to which those within such an agency are preoccupied with maintaining internal security. There is good reason for this preoccupation. As one writer on intelligence organizations puts it,

> ... an insecure service is not merely useless; it is positively dangerous, because it allows a hostile agency to manipulate the penetrated organization, as the British, for example, manipulated German intelligence during World War II. MI5 turned German agents in Britain, used them to feed false information to Germany, and thereby thoroughly confused the Germans as to the probable site and nature of the invasion of Europe. The Germans would have done better with no agents in Britain at all. At the very least they would have been jumpily alert, not knowing where the blow was to land, rather than falsely confident. It might almost be said that the better a service is, the more it is trusted by those for whom it works, the greater the potential danger it represents to its own masters. It is simultaneously the first line of defense, and the weakest link. It is an instrument perfectly designed for deception; an intelligence service is as close to a nation's vitals as a vault is to a bank's. There are enough horrible examples of manipulation in the history of espionage to guarantee that intelligence services will always look first to their own defenses.[19]

153. The primacy of security explains many of the more unusual characteristics of security intelligence work — the extreme sensitivity to what becomes public about the organization, the tendency toward insularity and distrust of those outside the organization, the intrigues of doubling and redoubling enemy agents, and the clandestine meetings in 'back alleys'. Moreover, the security question lends an important psychological feature to relationships within the organization. A fundamental assumption of all security services is that they have been penetrated. To assume otherwise is to leave themselves vulnerable to a high degree of manipulation. But this assumption leads those within the agency to spend their lives suspended between doubt and trust, suspicious of everyone including their friends, and making conscious choices about whom to trust. Most people in other fields are never obliged to make such judgments about their colleagues. In the security field the necessity to make these judgments results in the development of strong bonds among colleagues.

154. The defences erected by a security intelligence agency to protect itself are of various kinds. Perhaps the most important is the compartmentalization of knowledge. Only those with a need to know should be privy to sensitive information. A second line of defence is to screen carefully new employees entering the agency and to provide some system for ensuring the continued reliability of existing employees. And third, there are security procedures for protecting the area in which the agency is housed, its information, and its

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[19] Thomas Powers, *The Man Who Kept the Secrets*, Alfred A. Knopf, New York, 1979, p. 66.

communications. We examine each of these defence systems in turn below. We also review current Security Service procedures for conducting internal security investigations.

The 'need to know' principle

155. An employee of the Security Service has a need to know, if he requires access to particular classified material in order to carry out his duties properly. The following factors are relevant to deciding if an employee requires access:

1. Is there an absolute operational and/or administrative necessity to have access?
2. Can the person contribute to the objective or operation by virtue of his experience, rank special qualifications or attributes?
3. Can anyone else who is briefed to have access in the operation be used in order to limit the number to a minimum?
4. Is the person conversant with the security procedures devised to safeguard classified information?
5. Does he require further education on security procedures before being granted access?

156. Of the reasons cited for applying the 'need to know' principle, by far the most important is the need to minimize the damage of an unknown penetration by an enemy agent. Other reasons for applying the principle include reducing the likelihood of leaks, and lessening the danger that sensitive information may become known through carelessness.

157. Those within the Security Service made clear to us that the principle applies primarily to continuing operations and to current intelligence gained from continuing operations. It would not appear to apply so strictly to information about certain other facets of the Service — which could be generally known by members of the Service but which should not be made public.

158. The above description of the 'need to know' principle gives little hint of the difficulties in applying it and indeed, the potential abuses the principle can lead to. The evidence before us and our own research of Service files suggests that these can be substantial. Some of the more significant problems are outlined below.

— The principle assumes that files are classified correctly. Our impression, gained over the course of three years, is that Service files tend to be overclassified. The result is that the principle is not rigorously applied because many regard the Secret and Top Secret designations as not necessarily signifying highly sensitive information.

— There are difficulties in applying the principle consistently in matters affecting several departments. We had one good example of this problem in a matter affecting the R.C.M.P. and the Department of National Revenue. (Vol. 50, p. 7995.)

— The application of the principle can lead to feelings of frustration and mistrust from employees who are excluded from knowing certain information. They may feel their exclusion was based not on security reasons but on other factors, such as a deliberate attempt to reduce their influence in the agency.

— Cooperation between two organizational units may be hampered by the 'need to know' principle. Security Service members cited several examples of two units working at cross purposes because vital information was not shared between them.

— Teamwork may be curtailed because of the principle.

— The 'need to know' principle may reduce the quality of training and development within the agency. More junior members within a branch will not be aware of many sensitive operations underway, and consequently their experiential learning will not be as rapid. Similarly, certain types of instructive case material will not be available for formal training reasons.

— The quality of decisions may be lessened in certain instances because the number of people who can comment on an operation is minimized.

— The restrictions in the horizontal flow of information may mean that normal peer pressure is not brought to bear on questionable acts.

— Persons whose function it is to oversee or inspect operations may be denied complete access to the necessary information to perform this function. For example, as we noted earlier in this chapter a senior Security Service officer testified before us that, because of the 'need to know' principle, certain audit groups within the Force did not likely know about mail openings. (Vol. 7, p. 969.) The Church Committee in the United States uncovered a similar set of examples.

— The principle may be abused by some who use it as a rationale for ignoring normal control procedures. One Security Service member, for example, who was involved in the taking of dynamite, told us that he did not tell his superiors about the incident because of the 'need to know' principle. (Vol. 77, pp. 12404-5.)

159. What this list of difficulties, costs, and potential abuses suggests is that a security intelligence agency should pay a great deal of attention to how the 'need to know' principle is being applied. In our view, such is not the case in the R.C.M.P. Security Service. We have found little written about the principle and there appears to be only passing attention given to it in training courses. Moreover there does not appear to us to be sufficient sensitivity within the Service to the potential problems associated with the application of the principle. We asked the Security Service to examine the 'need to know' principle with particular emphasis on its impact on managerial functions. A key paragraph in the reply to this request was the following:

> Our review of the subject indicates that in our mind what you are raising is essentially a "non question". Managers must manage, and in doing so must adequately supervise the work of subordinates. To properly supervise, they have a right to know what the subordinate is working on, how he is proceeding and what he is gaining. "Need to Know" does not, therefore, impact on the managerial function.

160. This reply appears to us to ignore a rather delicate set of judgments which must be made constantly in the day-to-day workings of the agency. On the one hand, an overzealous application of the principle will likely result in reduced effectiveness and greater risks of questionable activities both being undertaken and going undetected. On the other hand, if the principle is taken too lightly, risks of security breaches are increased. The impression we have gained through numerous discussions with Security Service members is that over the last decade the balance has been gradually redefined within the Service to stress an increasingly less rigid application of 'need to know'. The impact of our recommendations may continue this shift by involving more people outside the agency, including Ministers and senior officials, in decisions which affect agency operations. Having said this, we believe it important that certain very sensitive agency information continue to be subject to a very strict application of the principle. In our view, Ministers and senior officials should be given this type of information only in the most exceptional circumstances.

Security screening for agency employees

161. Responsibility for the Security Service's current screening for its own employees rests with the Internal Security Branch established in 1971.

162. In addition to the Headquarters staff, there are security coordinators connected with the area commands. Their duties mirror those of their Headquarters' colleagues: security screening interviewing; conducting investigations; ensuring that adequate security standards are maintained and so on. There is a yearly conference of area representatives and their Headquarters' counterparts.

163. As with the rest of the federal government, the Security Service's procedures for screening its employees are governed by Cabinet Directive 35 (CD-35). Approved in 1963, this directive outlines the security criteria for rejecting applicants for employment in sensitive jobs and the procedures for doing so. In a subsequent chapter of this Report we shall describe CD-35 in more detail and the changes we propose to the system for screening public servants. Suffice it to say here that three principles should apply to the security intelligence agency: first, it should have a more stringent set of screening procedures for its employees than the Public Service; second, the agency should have a less stringent set of conditions for releasing an employee for security reasons; and third, the appeal process for the agency, while recognizing the differences in its screening standards, should be the same as that of the Public Service. These principles are premised on the belief that a security intelligence agency is one of the most important targets within government for hostile foreign intelligence agencies to penetrate.

164. In addition to recommending these three broad principles, we can make in this section a number of other, more specific recommendations concerning screening procedures for Canada's security intelligence agency. We begin by noting the emphasis the Security Service now places on interviewing the candidate for security clearances. Indeed, a portion of what the staff of the Internal Security Branch do is security interviewing. This is not common practice with the rest of the Public Service, and in a later chapter of this Report, we shall be recommending that it become so.

165. Despite the heavy emphasis on interviewing within the Branch, none of its employees has any special training in this area (although a course now exists for enhancing this skill), nor were they chosen for the job with this skill in mind. This is another example of the inadequacy of the heavy reliance on a generalist approach to careers within the Service. The qualities of a good interviewer — perceptiveness, sensitivity, the ability to probe without appearing offensive, a capacity for empathy — are not common to everyone, nor can they necessarily be taught. Selection for these jobs should be done with much greater care.

166. Another concern we have about current Security Service screening procedures focusses on the decision-making process for rejecting applicants for employment on security grounds. CD-35 can be interpreted to mean that refusal to hire an applicant (from outside the Public Service) on security grounds must be made by the head of the agency or the Deputy Minister. A decision to fire an existing public servant on security grounds must be made by the Governor in Council. In contrast, in the Security Service, a relatively junior officer, has the responsibility for refusing on security grounds to hire a new employee transferring from the Public Service or from within the Force. In addition, the procedure in CD-35 for dealing with a security problem related to an existing public servant is quite elaborate. Among other things, the Deputy Minister or head of agency must personally interview the employee in question. Furthermore, the employee must be "... advised to the fullest extent possible without jeopardizing important and sensitive sources of security information, why doubt continues to be felt concerning his his loyalty or reliability". In spite of the provisions of CD-35 in the case of the Security Service, it is not Force policy to disclose reasons for rejection on security grounds.

167. We believe that the Deputy Solicitor General, on the advice of the Director General, should take responsibility for refusing to grant a security clearance. Such a decision can have a great impact on an individual's life and should not be made lightly. Furthermore, the security intelligence agency should comply with the provisions of CD-35 with respect to disclosure to the employee as to the grounds for his rejection.

Other internal security procedures

168. The Security Service's approach to other aspects of internal security — protecting the area in which the Service is housed, its information and its internal communication systems — is similar to what we have documented above. That is, the Service appears to place insufficient priority on these matters and the quality of the analysis and innovative thinking which go on is rudimentary at best.

169. Complaints we have examined simply reinforce many of the recommendations we have already made in the sections on need-to-know and security screening. The security intelligence agency must assign greater importance to internal security matters; it should staff its Internal Security Branch with more senior, better qualified personnel; and it should improve its capacity for analysis in matters relating to internal security. To do otherwise is to forfeit the agency's claim of being the government's experts on security matters.

Investigating breaches of security

170. By breaches of security we mean the following: 'leaks' of security intelligence information to someone who will make the information public (media employees, or a Member of Parliament); evidence of a possible spy or spies within the security intelligence agency; and a variety of other acts resulting from carelessness on the part of agency employees, such as losing a sensitive document. Of these, leaks of agency information present some difficulties which we now examine. Some leaks from public institutions have likely been in the public interest, some, on the other hand, have been made on the basis of self-serving motives. Moreover, leaks are an unreliable method of controlling an institution like a security intelligence agency. They often involve great risk and consequently tend to be sporadic. More importantly, leaks sometimes force individuals to make difficult moral judgments, often in emotionally charged situations. In essence, those contemplating leaking information must decide themselves, often with incomplete knowledge, whether the benefits of publicizing certain information might outweigh the potential damage. Finally, a security intelligence organization with a reputation for susceptibility to leaks is likely to become less effective. It will have more difficulty recruiting informers who may fear unexpected publicity. Also, foreign agencies may become less willing to give the agency information.

171. Our approach is to encourage employees to disclose questionable activities of the security intelligence agency to the independent review body whose make-up and functions we shall cover in more detail in a later chapter. Provided with a convenient depository for such information, the individuals involved in the disclosure will not be forced to make the difficult judgment themselves about whether public disclosure is in the best interests of Canada. (How the independent review body would deal with such information will be covered in another chapter.) Moreover, we propose that no agency employee should be punished or have his career retarded for disclosing information to the independent review body. In this way, the personal risks of disclosure are lessened.

172. For those disclosures not made to the independent review body, we recommend that the security intelligence agency launch an investigation which, in cases involving very sensitive information, should include the police. As well as attempting to discover those responsible for the leaks within the agency, the investigators should seek to learn why these leaks occur. Such leaks are likely signs of something unhealthy about the agency — poor recruiting practices, employees at lower levels in the organization feeling cut off from senior management, or other ineffective management and personnel practices.

173. At this point, we should note another questionable facet of the Security Service's current approach to internal security. That is the lack of clarity concerning the role of the Internal Security Branch in investigating and resolving breaches of security. The Branch is not fully informed about nor does it not take an active role in many security investigations. Rather, responsibility for initiating such investigations lies with the operational branches. The Chairman of an R.C.M.P. task force, in the fall of 1979, recognized this same problem

and recommended that a unit be created with substantial authority and responsibility to oversee all security related matters. This unit should have the capability and responsibility of research and it should investigate all matters considered to be a threat to the security of the Security Service including penetrations, leaks and personnel misbehaviour.

174. We concur with this recommendation, and see no reason why the unit referred to by the task force should not be the Internal Security Branch, but staffed with more senior people with specialized skills. We especially like the idea that the Branch should assume a research capability.

WE RECOMMEND THAT the security intelligence agency

(a) review regularly how the 'need to know' principle is being applied within the agency and whether the balance between security on the one hand and effectiveness on the other is appropriate;

(b) ensure that the principle is being applied to primarily operational matters;

(c) ensure that the principle is not used as an excuse to prevent either an auditing group or a superior from knowing about questionable acts;

(d) improve its training programmes with regard to the rationale behind and the application of the 'need to know' principle.

(98)

WE RECOMMEND THAT screening procedures for security intelligence agency employees

(a) be more stringent than those employed for the Public Service;

(b) ensure that the Deputy Solicitor General, on the advice of the Director General, is responsible for denying a security clearance to an individual;

(c) specify that the agency has a responsibility to advise an individual who is not granted a security clearance why doubt exists concerning his reliability or loyalty so long as sensitive sources of security information are not jeopardized.

(99)

WE RECOMMEND THAT the security intelligence agency have a less stringent set of conditions than the Public Service for releasing an employee for security reasons.

(100)

WE RECOMMEND THAT the security screening appeal process for agency employees be identical to that of the Public Service, except for the application of more demanding screening standards.

(101)

WE RECOMMEND THAT the security intelligence agency's internal security branch

(a) be staffed with more senior people who have the necessary interviewing and analytical skills;

(b) develop a research and policy unit which would keep track of and analyze all security incidents of relevance to the agency;

(c) participate in or be kept fully informed of all investigations relating to security.

(102)

WE RECOMMEND THAT agency employees be encouraged to provide information about questionable activities to the independent review body (the Advisory Council on Security and Intelligence), and that any employees who do so should not be punished by the agency.

(103)

CHAPTER 3

STRUCTURE OF THE SECURITY INTELLIGENCE AGENCY: ITS LOCATION WITHIN GOVERNMENT

A. OUR APPROACH TO THE QUESTION

1. Our major recommendation in this chapter will call for a security intelligence agency which is separate from the R.C.M.P. This new agency will be markedly different from what the Security Service has been in the past. It will be more closely integrated with the rest of government. It will be civilian in character in that its members will not have the usual "peace officer" powers nor will they necessarily be recruited primarily from the national police force. Its management and personnel policies will be significantly altered so as to attract a well-educated, widely experienced staff and keep them productively occupied. As outlined in our discussion in Part V, the new agency will have a comprehensive mandate approved by Parliament. It will have responsibilities similar to those of the present Security Service, but with some important differences. For example, there will be a shift in emphasis in the work of the new agency: there will be less concentration on the writing of routine reports, more emphasis on advising government about policy matters relating to the agency's mandate, and on providing longer term 'strategic' analyses concerning security threats to Canada. In addition, the new agency will not have a mandate to disrupt domestic political groups, either through "dirty tricks" or through other measures with the same objective.

2. We have not approached this question of where the security intelligence agency should be located in government in any doctrinaire manner or with preconceived ideas. None of us had any views on this issue before commencing our work as Commissioners. Nor, during the course of our work, did we discover an overarching principle which made our decision inevitable. What, then, is our rationale for preferring a security intelligence agency outside the R.C.M.P.? Very soon after we began our work as Commissioners, it became obvious to us that, if we were to fulfill our terms of reference, we had to propose to government a *system* for Canada's security intelligence function — a system made up of several parts, including a mandate for the agency, an approach to personnel and management issues, and a set of policies and organizational structures to ensure that the agency would be directed and controlled by government. As our work progressed and as the main parts of our proposed system took on increasing clarity, the question of the location within government of the security intelligence agency came into sharper focus. In

essence, the question was: Where within government should the security intelligence agency be located so that the security intelligence system which we were proposing would best function? Our answer, based on several reasons, no one of which is necessarily predominant, is that the agency should be under the direction of the Solicitor General and his Deputy, but not within the R.C.M.P.

3. In the section which follows, therefore, we develop the case for a separate and civilian agency. Following this, we review the arguments that have been made over several decades for retaining the security intelligence function within the R.C.M.P. We isolate those factors which are potential problem areas for a separate agency and suggest ways in which these can be overcome successfully. In the final section, we advance several recommendations on how our structural recommendations might be implemented.

B. THE CASE FOR A SECURITY INTELLIGENCE ORGANIZATION OUTSIDE OF THE R.C.M.P.

4. In this Report, we are advocating a myriad of changes to the security intelligence function of government — changes which will affect every facet of the Security Service's operations. We believe that a significant number of these changes will be resisted by the R.C.M.P. if the Security Service remains within the Force. As we demonstrated in Chapter 1 of this Part, the R.C.M.P. in the past has vigorously resisted proposed changes which run counter to its deeply held traditions and beliefs. Of the changes which the R.C.M.P. will have great difficulty in accepting, there are two which we consider to be absolutely crucial if the security intelligence agency is to perform effectively in a lawful and proper manner. These are:

(a) implementing management, recruiting and other personnel policies appropriate to a security intelligence agency; and

(b) developing suitable structures and procedures to ensure that the security intelligence agency is under the direction and control of government.

Implementation of change in these two areas would result in a new philosophy emerging — a philosophy which would affect both the internal operations of the agency and its relationships with the rest of government. It would be a philosophy based on respect for the law and for other liberal democratic principles which the agency was created to secure. It would also be a philosophy based on a high regard for effectiveness in providing government with good quality advice and information about security threats to Canada. We examine the required changes in more detail below and explain why we are convinced there is a better chance to achieve them in a separate agency.

Appropriate management and personnel policies

5. In the last chapter, we recommended significant departures from current management and personnel policies governing the Security Service, including the following: the recruitment of more mature, more experienced, better-

educated personnel with a variety of backgrounds in other institutions; a new approach to career paths; a more participatory, less authoritarian style of management; and substantially different training and development approaches. What are the prospects for implementing these appropriate personnel and management practices, if the Security Service were to remain within the R.C.M.P.? We have considered several approaches. The first is changing the Security Service along the lines we are proposing, but keeping it within the Force together with the largely unaltered criminal investigation side. Attempts over the past 25 years to fashion a Security Service substantially different from the rest of the Force, documented in Chapter 1 of this Part of our Report, leave us highly skeptical about this option. The Force's failure to achieve substantial implementation of the "separate" and "civilian" programme announced by Prime Minister Trudeau in 1969 is particularly revealing. This history demonstrates the difficulties which any government would face in attempting to introduce changes which run counter to the long tradition of the R.C.M.P. It is noteworthy that the current trend of the management of the Force appears to be in the opposite direction from what we consider to be desirable. The Security Service is being integrated more closely with the rest of the R.C.M.P., and for that reason we think that attempts to create the necessary changes within the Force would face almost insurmountable hurdles.

6. Some might argue that establishing a senior implementation team of 'outsiders', perhaps directed by a Minister, would overcome any resistance within the Force to the changes we have outlined in the previous chapter. Such an implementation effort would probably help, but we doubt that much would be accomplished without the enthusiastic support of the criminal investigation side of the Force. For example, it would be difficult, if not impossible, for an implementation team to impose a change in managerial approach upon the Force's senior management, given that what is at stake is not so much a matter of organization as a change of perceptions, attitudes, and values. Without such a change, good experienced people from other parts of government would not be attracted to jobs in the Security Service, nor would secondment arrangements with other institutions be easily effected and maintained. If the implementation team should manage to effect a number of senior appointments within the Security Service, the result would likely be an intensification of the frustrations and, indeed, acrimony which now surround the relationship between the Security Service and certain units responsible for administration within the Force.

7. Let us consider a second case — one in which the senior management of the Force is enthusiastic about creating a Security Service substantially different from the rest of the Force. What are the prospects for successful implementation under this scenario? The probability is remote that two quite different organizations, one many times larger than the other, could co-exist and prosper within the R.C.M.P. The Commissioner would be constantly buffetted by pressures and complaints from members of the larger organization, and by their demands to know why certain aspects of the security intelligence agency — more rapid promotions, lateral entries from other organizations, a more youthful management team, different attitudes towards

career paths and so on — could not be introduced into the criminal investigations side of the Force. Thus, enthusiasm about dramatically changing the Security Service inevitably implies an equal willingness to change other significant portions of the Force. It is always difficult for two quite different organizations to co-exist within a single structure for any length of time. Co-existence within the R.C.M.P. of two organizations such as we have been describing is virtually impossible. Only if the senior management of the Force were strongly to support the introduction of change, not only to the Security Service but also to a significant portion of the criminal investigation side of the Force, would we think it likely that appropriate personnel and management policies could be successfully implemented. We have seen no evidence of such support. Even if there were such a commitment, the very size of the organization, and its long traditions, would make the period of change a long and painful one.

Direction and control by government

8. A key aim in the system of reforms we are proposing is to improve the relationship between the security intelligence agency and other parts of government including Parliament, the Minister responsible for the agency, his Cabinet colleagues, the Deputy Solicitor General and other senior officials in various departments and agencies concerned with security intelligence matters. In Part V of this Report, dealing with the agency's mandate, we developed a set of recommendations designed to place the agency's use of intrusive investigative techniques under closer scrutiny of the Solicitor General and senior government officials from several departments. In Part VIII, where we focus on how the security system is to be directed and reviewed, we further develop this theme of integrating the security intelligence agency more closely with the rest of government. In addition, we place great emphasis on a security intelligence agency being independent of partisan politics. The challenge for any liberal democracy is to achieve an effective security intelligence agency which is simultaneously responsive to valid government direction and review, and yet not used for partisan purposes.

9. We believe that our proposed system of governmental direction and review would work more effectively for a separate and civilian security intelligence agency than for a Security Service within the national police force. We base this belief on two reasons. First, there is an important difference in ministerial involvement required for a security intelligence agency as compared with a police force. This difference could lead to complications and abuses, should the security intelligence agency remain within the R.C.M.P. Second, the traditional, and we believe unhealthy, semi-independent relationship which the R.C.M.P. has enjoyed with government will not easily be changed. Consequently, a security intelligence agency, if it were not part of the R.C.M.P., would come under effective direction and control by government more quickly with far less difficulties. We deal with each of these reasons in turn.

10. It is clear that there are some similarities in the way in which a police force and a security intelligence agency should relate to the rest of government. These similarities are far from trivial. For example, the responsible minister

and his colleagues, in the case of both a security intelligence agency and a police force, should provide direction and guidance in at least the following areas: legislation and general policy regarding the mandate and powers of these agencies; the level of resources allocated to these agencies, and how the agencies propose to divide these resources among competing priorities (in the case of a security intelligence agency, for example, between counter-subversive, anti-terrorist and counter-espionage activities); policies and procedures concerning the use of intrusive investigative methods; the liaison arrangements which these agencies have within the Federal government, with other domestic police forces and with foreign organizations; and policies relating to internal management and personnel.

11. However, there is at least one fundamental difference in the way a police force and a security intelligence agency should relate to government. It lies in the manner in which Ministers and senior officials should be involved in decisions regarding the groups and individuals to investigate and how such investigations should proceed. In the case of a security intelligence agency, we believe that Ministers and senior officials should be actively involved in such decisions because of the ramifications these decisions can have on Canada's system of government and on its relationships with other countries. Indeed, we have proposed a formal, continually active, committee structure to deal with such decisions, and we shall make other recommendations in Part VIII on the role of Ministers. In the case of a police force, however, involvement by Ministers and senior government officials in decisions about whom to investigate and how these investigations should be conducted should be on an advisory basis only and limited to matters with significant policy implications. There are not the same political and international concerns to dictate a need for continuous governmental scrutiny. In addition, there are often more checks and balances than in security intelligence work; the courts, for instance, provide one such check, albeit an imperfect one. Moreover, the degree of secrecy is not nearly so pronounced, and this allows more scrutiny from news media sources and pressure groups.

12. In our view this fundamental difference in the relationship to government causes a potential for unnecessary complications and increasing risks of abuse if a security intelligence agency is included within a national police force. The complications may arise because of the dual role the Commissioner of the R.C.M.P. must play in dealing with Ministers and senior officials. It is not difficult to envisage situations in which it would be unclear where security intelligence interests end and police interests begin. Furthermore, Ministers and officials who deal closely with the Commissioner on security intelligence matters may find it tempting to extend this relationship into those police matters where they ought not to be intruding.

13. There is a second reason for believing that a security intelligence agency separate from the R.C.M.P. will more likely develop the relationship recommended in this Report with both the executive and legislative branches of government. The testimony before us of numerous Solicitors General, Deputy Solicitors General and Commissioners has indicated that the R.C.M.P. has had a semi-independent relationship with the Solicitor General's Department. It is

our view — and we shall be making this argument in more detail in Part X, Chapter 4 — that such a relationship should be changed. The present relationship is unhealthy for the R.C.M.P., which could benefit greatly from the added help which those outside the Force could bring in dealing with difficult problems facing the police, and it is unhealthy for the executive and legislative branches of government, which should be holding the police more accountable than is now the case. Changing the R.C.M.P.'s relationship with government will not be a simple matter. As we noted in Chapter 1 of this Part, past history suggests that the R.C.M.P. is not an organization that can be changed easily, especially in matters involving Force traditions and deeply ingrained attitudes. By separating the security intelligence agency from the R.C.M.P., we believe that the type of relationship which the agency should enjoy with government can develop more quickly with far fewer difficulties.

14. We have an additional reason for advocating a separate and civilian security intelligence agency. A police organization, especially one as large as the R.C.M.P. (it is one of the largest police forces in the western world) with responsibilities in municipal, provincial, and federal policing, is a powerful institution in a liberal democratic country. The Force's senior managers have access to sensitive information about many hundreds of thousands of Canadians. The investigative techniques for collecting this information, by their very nature, impinge on personal freedoms. Then, too, a police force makes thousands of decisions each day, — about, for example, whom to investigate, and whom to charge — which are of immense importance to the individuals concerned. When a national police force is combined with a security intelligence agency, which operates more secretly and has even more potential to damage the liberal democratic fabric of the country, it appears to us that far too powerful an organization has been created. There is a latent danger that the public will perceive such a relatively large organization, which has acquired the status of a national symbol, as part of the essence of the state. If the members of the organization come to share this perception, the myth may become reality and its members may see their authority as autonomous from and independent of Cabinet and Parliament, and thus set apart from the law. Separating the security intelligence agency from the R.C.M.P. will reduce, but not eliminate, the potential for abuse that comes with sheer size. The effect of separation will be even more significant than the reduction in numbers would imply because the Security Service presents problems of democratic control which are disproportionate to its size.

Trust in the R.C.M.P.

15. There is an important corollary to our arguments thus far for a security intelligence agency separate from the R.C.M.P. We believe that the questionable actions which we have been investigating — and these have been actions by both the Security Service and the Criminal Investigations side of the Force — have diminished significantly the trust that Canadians and their governments have in the R.C.M.P. The litany of such actions is a long one and has been discussed fully elsewhere in this Report. The events include the following. Since 1969, the Force has virtually ignored a publicly announced government

policy concerning the Security Service. It has been far too secretive about its liaison arrangements with foreign agencies. It has misled Ministers, causing them, in turn, to mislead Parliament. Perhaps most seriously, although the Force must not bear total responsibility, it tolerated, and indeed encouraged through official policy, the widespread breaking of laws. Moreover, there is evidence to suggest that senior members of the Security Service held back information from Ministers and senior officials about questionable operational practices.

16. In our opinion, the current Commissioner of the R.C.M.P. and many others in the Force are working hard to restore this trust. Nonetheless, we believe that the changes of the kind we are proposing in this Report — changes which, in particular, will dramatically alter the Security Service — are essential if the R.C.M.P. is to be restored to the high level of trust it enjoyed in the past. Some of these changes are also required on the criminal investigation side. Thus, in arguing that the R.C.M.P. will not satisfactorily implement the necessary changes affecting the security intelligence side of its operations, we are in essence saying that the Force, irrespective of the good intentions of its current senior managers, will not succeed quickly enough in regaining the requisite high level of trust to allow the new approach to security intelligence activities to get off to a satisfactory start. A fresh start is needed, one based on the establishment of a security intelligence agency separate from the R.C.M.P.

An ancillary benefit

17. An ancillary benefit of a security intelligence agency separate from the R.C.M.P. is the potential for checks and balances to develop between these organizations. One way in which those checks and balances can develop is to make one organization dependent upon the other to perform an important function. Thus, we have recommended that the security intelligence agency not have the powers of arrest, search and seizure normally granted to police personnel; and in addition, we have recommended that police personnel must accompany security intelligence personnel in surreptitious entries under judicial warrant. Before performing such actions, police personnel will need to assure themselves that the security intelligence agency is acting legally.

18. Yet another important balancing between these agencies may occur at both the policy and operational levels. Ministers and senior officials will have the experience of one investigative agency to assess requests for increased powers made by the other organization. For example, should the security intelligence agency ask the Solicitor General to press his Cabinet colleagues to widen the practice of using informers, then the Solicitor General can ask how the national police force is managing without similar powers. The interests of both organizations may sometimes coincide on these policy matters, but they need not in all cases. At the operational level the Solicitor General will have another channel of information to check the veracity of certain allegations against either the R.C.M.P. or the security intelligence organization. If one organization is involved in systematic law-breaking or improper acts, it is likely that the other organization either will know about it or at least will have heard rumours to that effect.

An invalid reason for separation

19. We believe that the case for separating the Security Service from the R.C.M.P. is a formidable one. However, there is at least one prominent, but in our view invalid, reason for a separate Security Service which has been advanced over the past 25 years. This argument can be summarized as follows. To be effective, a Security Service must perform illegal acts. A police force, because its primary function is the enforcement of laws, should not be in the position of having to break the law. Thus, the Security Service should not be part of a national police organization like the R.C.M.P. Some believe that the Royal Commission on Security in 1969 advanced this argument when it said the following:

> ... there is a clear distinction between the operational work of a Security Service and that of a police force. A Security Service will inevitably be involved in actions that may contravene the spirit if not the letter of the law, and with clandestine and other activities which may sometimes seem to infringe on individual's rights; these are not appropriate police functions.[1]

We shall leave it to others to argue whether or not the Royal Commissioners were saying in this passage that the Security Service must inevitably break the law. Indeed, we have some reason to believe that the Royal Commissioners were not aware of the ambiguity in the phraseology. Suffice it to say here that a number of people over this past decade, including a former Deputy Minister of Justice, have invoked the Royal Commission when contending for a separate Security Service (Vol. C66, pp. 9178-9200).

20. This argument is totally unacceptable, in our view, as a basis for creating a separate and civilian security intelligence agency. As we argued in an earlier chapter of this Report, there are certain principles, of which the rule of law is one, that cannot be compromised for security reasons. A security intelligence agency which does not feel itself bound to obey the law tends to destroy the liberal democratic society it was created to protect. For this reason, this argument for a separate security intelligence agency should be categorically and publicly rejected.

C. REASONS ADVANCED FOR MAINTAINING THE STATUS QUO

21. Up to this point, we have described the major benefits to be gained from separating the Security Service from the R.C.M.P. In this section we shall canvass the main arguments advanced over the last decade for keeping the Security Service within the Force. In summary form, these arguments are as follows. A separate security intelligence agency

- will be more easily penetrated;
- may become a 'political' police;
- will be less likely to act within the law;
- will provide no stimulus for 'reforming' the R.C.M.P.;

[1] *Report of the Royal Commission on Security* (1969), paragraph 57.

— will lessen, if not help destroy, the R.C.M.P.'s contribution to national unity;

— will cut the close police-security link which is the envy of other countries;

— will no longer have the advantages of belonging to a geographically dispersed R.C.M.P.;

— will result in extra financial costs;

— will have difficulties gaining the level of co-operation from the public now enjoyed by the R.C.M.P.;

— will have difficulties building up effective liaison arrangements with domestic and foreign police and security agencies;

— will have difficulties in gaining the required co-operation from the R.C.M.P.

Our objective in reviewing these arguments is to distinguish those with some substance from those which we feel to be either unsound or insignificant. In addition, we suggest how the effects of the substantive problems might be minimized. We begin by examining a number of arguments, cited by others, which we believe to be unsound.

Penetration of a separate civilian agency

22. As the reader may recall from Chapter 1 of this part of the Report, the R.C.M.P., as part of its critique of the report of the Royal Commission on Security, argued that a separate civilian agency would be more easily penetrated than a Security Service within the R.C.M.P. The Force put this argument as follows:

> It is also a fact that most western security and intelligence services have been penetrated by the Communist bloc services. The R.C.M.P. attributes the fact that the Directorate of Security and Intelligence is not penetrated (a fact that is borne out by defector sources) largely to its attachment to and recruiting from the R.C.M.P.

There are at least two problems in the way in which this argument is worded. The first is that we believe it is dangerous in the extreme for a security intelligence agency to assert that, at any given point in time, it is not penetrated. It is impossible to substantiate such an assertion. Second, and perhaps more serious, the argument as stated misleads the reader by failing to mention that the R.C.M.P.'s Directorate of Security and Intelligence has been penetrated. In the case that we examined closely, it was a regular member who became an agent of a foreign service.

23. Despite these problems, the R.C.M.P.'s argument clearly had an important impact in 1969. Thus, Senator McIlraith, who was Solicitor General at the time the Royal Commission's Report was being considered by government, testified as follows:

> Q. . . . my question is why did you not agree with the recommendation of the Royal Commission [calling for a separate and civilian security intelligence agency]?

A: We gave it very careful consideration. It would mean an impossible task in assembling in this country the number of civilians required to do the job.

It would mean a shocking risk of penetration of the [Security and Intelligence] service, and there are other reasons. . . That could be more refined perhaps, but those are the main ones — personnel and staffing and penetration.

The penetration item was very serious. In fact — well, those were my views and that was very carefully considered, and the decision taken as set out on June 26th [1969] to meet — to try to meet what seemed to be back of what was bothering the Royal Commission and at the same time cut off this awful risk of penetration and the awful difficulty of getting adequate numbers of properly trained civilian persons.

(Vol. 119, pp. 18603-18604.)

24. In the previous chapter, when we recommended the broadening of the recruiting base for the Security Service much along the lines proposed by the Royal Commission, we concluded that it had not been demonstrated that there would be a significant increase in the risk of penetration. We noted, however, in coming to this conclusion, that it is impossible to be definitive on this point one way or the other. Current evidence, including the known penetration record of the Security Service and the fact that many senior officers within the Service do not take seriously the argument that penetration risks increase with a civilian agency, suggests to us that this is an unsound argument for maintaining the status quo.

The dangers of a 'political' police

25. Some who oppose a security intelligence agency separate from the R.C.M.P. argue that such an agency will be susceptible to becoming a partisan arm of the political party in power. The result would be serious damage to our liberal democratic society. According to this view, a security intelligence organization within the R.C.M.P. will be less susceptible to this kind of abuse because of the arm's length relationship to government which police forces have traditionally enjoyed.

26. The main problem with this argument is that the solution — a police force with an arm's length relationship to government — may produce problems as serious as the partisan misuse of the security intelligence agency. As we have argued several times in this Report, the need is to have a security intelligence simultaneously under the direction and control of government, but not used for partisan purposes. Our recommendations regarding the appointment and term of office of the Director General, the role of Parliament in the governance of the security intelligence function, and the establishment of an independent review body, all have been designed to provide safeguards against partisan abuse. On the other hand, we have gone to great lengths, as witnessed by our recommendations calling for a legislative mandate and a system of controls of intrusive investigative techniques, to ensure that the security intelligence agency is effectively controlled and guided by government. We

shall have much more to say on this topic in Part VIII of our Report when we examine in more depth the roles of the legislative and executive branches in the security area.

27. The system we are proposing, in which the security intelligence agency receives guidance and direction in a non-partisan manner, is as relevant to an agency within the R.C.M.P. as it is to an agency outside the Force. It would be a grave error if the Security Service were to maintain the quasi-independent relationship with government that it has enjoyed in the past. For reasons cited earlier in this chapter, we believe that a separate and civilian agency will develop a healthier relationship with government than would a Security Service within the R.C.M.P. The spectre of a civilian agency being more susceptible to becoming a 'political' police is an invalid one, provided that this agency is operating within a carefully designed system of checks and balances.

Acting within the law

28. Another argument, the validity of which we seriously question, is that members of a security intelligence organization who have had police training and experience are more likely to act legally than those members of a civilian agency who have never been policemen. A former Solicitor General, Mr. Fox, made this argument in the following way in testimony before us.

> . . . it would seem clear to me that. . . if you do have this pool of experienced police officers who have been brought up in the tradition of a law enforcement agency, who have spent a number of years, four or five years, let us say, on the enforcement side, in specialized areas of the fight against crime in general, and organized crime in particular; and then, if you take these people and say: well, from this point on, we are offering you a career in the Security Service, and they, at that point, go through, you know, another type of briefing or training or schooling period where the main objectives of the Security Service side of the Force are brought out. . . I still think that that is the type of model, to my mind, which offers the greatest possible guarantees [of a Security Service acting within the law.]
>
> (Vol. 160, p. 24462.)

29. The evidence before us prompts our questioning the soundness of this argument. In examining the motives that led R.C.M.P. members to perform questionable acts, we heard little or no evidence that their experience and training in law enforcement acted as a brake or a check on their actions. Consider this testimony of a Security Service officer involved in the R.C.M.P.'s disruptive measures programme:

> In the period 1971-72, when the operations known as CHECKMATE were being contemplated by myself, I certainly didn't view my role in any way as a layman. I saw myself as having certain responsibilities.
>
> I saw myself as a policeman but, more particularly, I saw myself as a member of the Security Service with certain responsibilities to deal with the activities which were at that time, in our view, escalating in the country.
>
> I felt that given that set of responsibilities as long as my actions in dealing with it were responsible, were reasoned, were measured, that I was quite within propriety, if you like, to advance them without any regard to whether they were legal, lawful or unlawful.

30. Testimony of many others within the Security Service who had police training and experience leads us to three conclusions. The first is that any government would be foolish to rely heavily on those with law enforcement backgrounds as the cornerstone for ensuring that Security Service activities were within the law. In making this assertion, we are not denying the importance of proper training in the law. Rather, we are asserting that there are many other factors to consider in designing an effective system of controls for a security intelligence agency and that some of these factors may negate the benefits of legal training: for example, training and experience in law enforcement work is of little significance if the agency tolerates, or even encourages, its members to break the law in pursuit of agency goals. A second conclusion is that a civilian security intelligence organization should be able to provide its members with training in the law which is at least as good as, if not better than, that which R.C.M.P. Security Service members have received in the past. As we noted in the last chapter, training in the law for R.C.M.P. recruits at Regina accounts for only 15 per cent of their time, and, until recently, additional training in the law for Security Service members was rudimentary. Finally, we wish to state a theme we shall develop several times in this Report: training in the law for Security Service members, while useful, is no substitute for the assignment of a lawyer from the Department of Justice to the Security Service to provide legal advice and to scrutinize proposed investigations with potential legal problems. This, to us, is a more critical factor in ensuring legally acceptable behaviour and is relevant no matter where the security intelligence function is located in government.

A stimulus for 'reforming' the R.C.M.P.

31. Some argue that retaining the Security Service within the R.C.M.P. will help to stimulate other segments of the Force to initiate managerial and personnel policy reforms similar to those necessary for the Security Service. Mr. Richard French and Mr. André Béliveau, in a recent study completed for the Institute For Research on Public Policy, make this case as follows:

> There is an additional perspective which has rarely featured in discussion of the issue of civilianization versus separation. It is that the kind of broadened recruiting and more flexible staffing and promotional policies essential to the development of the Security Service are equally essential to the managerial, policy formulation, and more sophisticated investigative functions of the criminal investigation side of the R.C.M.P.... The failures of management and policy which have emerged on the criminal investigation side prohibit complacency or inertia on that side. Separation would isolate it from the model and stimulus of a civilianized Security Service.[2]

32. We have already addressed this argument earlier in this chapter and, therefore, need only summarize the main points of our discussion. It is beyond our terms of reference to comment on the main premise on which this argument is built — that portions of the criminal investigation side of the Force require the same managerial and personnel reforms as are necessary

[2] Richard French and André Béliveau, *The R.C.M.P. And The Management of National Security*, Montreal, Institute for Research on Public Policy, 1979, p. 71.

within the Security Service. Nonetheless, let us assume for the moment that this premise is valid. In this case, we believe that it is illusory to expect that the Security Service would give any significant stimulus to the rest of the Force unless the Force's senior management were deeply committed to these fundamental reforms for the R.C.M.P. as a whole or a good portion of it. The evidence of the past 25 years suggests that the Force's senior management has been steadfastly opposed to such changes. We have seen no reason to suggest that this position has changed significantly, if at all.

The National Unity question

33. A common assertion is that the R.C.M.P. contributes to the national unity objectives of the government in at least two ways.[3] First there is the Force's role as a symbol of Canada. The scarlet coated "Mountie" is familiar to every Canadian and is an integral part of this country's international image. A further contribution the Force makes to national unity, according to some, is the example it sets of an institution in which people from all parts of Canada work together for the general good, often far from their home towns or provinces. Some who advocate retention of the Security Service within the R.C.M.P. argue that there is a strong likelihood over the next decade that the R.C.M.P. role in municipal and provincial contract policing will dramatically diminish. If this were to happen, coupled with the Force's losing its security intelligence function, they contend that an important contributor to national unity would have been severely crippled.

34. For many Canadians the R.C.M.P. no doubt contributes in an important way to their sense of national identity. However, we do not believe that the R.C.M.P.'s capacity to serve as a significant Canadian symbol is dependent on the Security Service being part of the R.C.M.P. Rather, the more significant contributor in this regard is the work of the R.C.M.P. in drug investigations, and the contract policing role which results in large numbers of highly visible Mounties dispersed across eight provinces. Moreover, disclosure of improper and illegal conduct by the R.C.M.P. Security Service has probably been a negative factor in terms of national unity.

35. A second point we should make concerning this argument is this: even if the R.C.M.P. eventually loses both its security intelligence role and part or all of its contract policing role, we believe that there is still a viable and important federal policing role. Every federal democracy of which we are aware has a national police force, regardless of the country's constitutional make-up. For Canada, a federal police force would have at least the following roles: enforcing a number of federal government statutes; policing the northern territories; investigating crimes with a national or transnational dimension (e.g. organized crime, commercial crime, and crimes involving drugs) and providing certain expensive and capital-intensive police services in the fields of education, communication, and the forensic sciences. In short, the *raison d'être* of a

[3] See, for example, the Task Force on Law Enforcement's Report, *The R.C.M.P. Provincial and Municipal Contracts*, prepared by the Department of the Solicitor General, 1978, pp. 23-24.

national police force is not contract policing, nor is it in security intelligence work. Thus, there is little likelihood, no matter how future constitutional talks proceed, of Canada losing the R.C.M.P. as a national symbol.

Foreign comparisons

36. Over the past several decades, those on both sides of the question of whether the Security Service should be part of the R.C.M.P. have used foreign comparisons to bolster their case. Here, for example, is part of the R.C.M.P.'s response to the recommendation of the Royal Commission on Security for a separate and civilian security agency:

> The Commission says "*we think it probable* that association of the security function with the police role tends to make the work of the security authorities more difficult" (para. 57 of the abridged version). Just the opposite is true. The police-security link is of daily value to both sides. This is substantiated by the fact that Canada, the United States, and all the larger countries of Western Europe except the United Kingdom, Greece, and West Germany have a security service tied to a national police organization.

37. Our own research has taken us to several countries to learn about the organization and governing patterns of the security intelligence function. We have visited the United States, the United Kingdom, Australia and New Zealand. In addition, our staff have gone to the Netherlands, West Germany and France. All of these countries, except the United States, have a security intelligence organization which is not part of a national police force. The usual pattern is for the police forces to have special units to liaise with, and sometimes support, the security intelligence organization in performing its role. We found no evidence of any inclination to change the structural arrangements in these countries. Nor did we find any evidence to suggest that these arrangements had been controversial in the past. The prime exception to the above pattern is to be found in the United States. But, because there are so many agencies performing some security intelligence functions — the C.I.A., the F.B.I., the National Security Agency, the Secret Service, and three military intelligence services — exact parallels with Canada are difficult to draw. No doubt the agency with duties most closely parallelling those of the R.C.M.P. is the F.B.I. Nonetheless, the F.B.I., a national police force with no similar 'contract' policing role, is very different from the R.C.M.P.

38. Our overall conclusion from studying these foreign examples is that they do not settle the question one way or the other. Our recommendation calling for a security intelligence organization separate from the R.C.M.P. is not based on evidence we have gathered from researching security arrangements in foreign countries. But we do take comfort from the fact that variations of the solution we are proposing for Canada have proved to be practicable in other countries.

Efficiencies from a widely dispersed R.C.M.P.

39. In the R.C.M.P.'s commentary on the recommendation of the Royal Commission on Security that there be a civilian security service, the Force

argued, among other things, that "... only the R.C.M.P. is spread sufficiently widely across Canada to constitute an adequate service...". Thus, if the R.C.M.P. Security Service wished to conduct an investigation in a remote area of the country, it could, according to this contention, call on members of the local R.C.M.P. detachment already established in this remote area to conduct the investigation. The savings realized would be in reduced transportation costs and the reduction of time taken on the part of the investigator to conduct the investigation. There would also be more likelihood of detection if someone from another area were to appear suddenly in a remote community.

40. These arguments have some validity, but the actual savings involved appear to be so small as to be an insignificant factor in the decision about where to locate the security intelligence function in government. Security intelligence work is heavily oriented to the cities, and a separate security intelligence agency would understandably have personnel in all the major urban centres of Canada. Moreover, if the investigation were a sensitive one, it is likely that the Security Service personnel would do the investigation themselves, no matter how remote the area. If our recommendation is accepted that the responsibility for doing much of the routine security screening work should be shifted elsewhere in government, then there should be even less need for investigatory work in remote areas on the part of the security intelligence agency. Finally, for certain investigations, the security intelligence agency could continue to seek the co-operation of the R.C.M.P. or of the local police.

Financial costs of separation

41. A variation on the efficiency argument dealt with above is to cite the financial costs involved in actually separating the Security Service from the R.C.M.P. and creating a new agency. In our view, this argument has some merit, at least in the period immediately following the decision to re-organize. However, in the longer term, we believe that a separate and civilian agency will be more efficient from a cost point of view than a Security Service within the R.C.M.P. Let us enlarge on this argument.

42. There is no doubt that the re-organization we are proposing would, in the short run, involve extra financial costs. For example, costs would accrue in establishing the agency in accommodation separate from that of the Force. Certain services now provided to the Security Service by the rest of the Force would need to be established in the security intelligence agency, and there would not likely be an immediate and corresponding decrease in the personnel providing such services for the Force as a whole. Significant portions of the time of senior managers from several organizations including the R.C.M.P., the security intelligence agency, the Solicitor General's Department and others such as the Privy Council Office, Treasury Board, and the Public Service Commission, would be consumed in planning the establishment of a separate agency. Finally, both the R.C.M.P. and the security intelligence agency would need to establish liaison units, at least for the first few years following the structural change, and these units would increase overall costs. (We shall argue later in this chapter that these liaison units should be small.) The total of these costs would not be large, given the relatively small size of the Security Service.

For example, the senior financial officer of the Security Service has made a rough estimate that in a separate agency it would be necessary to add 100 employees to the existing Security Service staff to perform administrative and other functions now provided for the Security Service by other parts of the R.C.M.P. He estimated that for the fiscal year 1977/78, these 100 extra employees would have increased the Security Service's budget by $2.8 million. Thus, it would not be a large reorganization by Federal government standards. Moreover, these re-organization costs, over time, would decrease rapidly, in that, for example, the R.C.M.P. would be able to reduce its administrative staff.

43. The more important question, however, is what would happen to overall costs in the longer term. We believe that the security intelligence agency we are recommending, whether it is within the R.C.M.P. or separate from the Force, has the potential of performing effectively with a significantly smaller number of employees than the current Security Service. An agency separate from the R.C.M.P. will likely reduce its size more quickly and to a greater extent than would a Security Service within the R.C.M.P. Thus, the long-term prospect is that a separate security intelligence agency will be more efficient.

44. The potential for a much smaller security intelligence agency comes from several sources. For example, we are recommending that certain Security Service functions, such as much of its current efforts in investigating what we call "revolutionary subversion", not be performed at all. (As we recommended in Part V, Chapter 3, the security intelligence agency could only monitor activities falling under this category of "revolutionary subversion" but could not launch full investigations unless there were evidence of espionage, foreign interference, or serious political violence.) Another example is the reduced role in security screening. Other reductions in size can be realized by reducing current overstaffing which the senior administrative officer in the Service estimated was at least 5 per cent in late 1979. In addition, by implementing the personnel policy changes recommended by us in the last chapter, a security intelligence agency should be able to reduce its size significantly. There are many people in the current Service doing work which they do not like and are not suited for. Without a detailed survey on a unit-by-unit basis, it is difficult to make a firm estimate of just how small a new security intelligence agency could become. Several former members of the Security Service, including very senior ones, have suggested to us that a reduction in size by as much as one-third to one-half is possible and desirable.

45. A separate security intelligence agency will be able to make these reductions in size more quickly. Moreover, the reductions themselves will likely be greater. We say this for several reasons. A separate agency should result (as we shall point out later in this chapter) in an infusion of new senior managers, who will not be wedded to current Security Service programmes and who will scrutinize the existing activities of the Service more thoroughly than would the existing group of senior managers. Second, and perhaps most important, the personnel policy changes we are recommending, if they were to take place within a Security Service which is part of the R.C.M.P., would occur more

slowly than in a separate organization. Thus, fewer economies over time would be realized.

46. We should emphasize that in advancing the above arguments we are not calling for a ruthless approach in dealing with current Security Service personnel. Nor, for that matter, are we suggesting that a smaller, more efficient security intelligence agency can be realized by having the R.C.M.P. accept unwanted personnel, thus itself becoming overstaffed and less efficient. Rather, what we are suggesting is that attrition within the R.C.M.P., including the Security Service, is large enough to accommodate over several years the magnitude of personnel changes we are proposing, without a resultant overstaffing of either organization. (In the past three years members leaving the Force were as follows: 1977 — 604, 1978 — 699 and 1979 — 774.)

47. We should discuss one additional point concerning the possible effects that the creation of a separate and civilian agency will have on current Security Service staff. Some might argue that most members of the Security Service do not favour the creation of a new agency, and therefore employee morale will suffer considerably. Those making this assertion might point to the 1976 survey of Security Service members, referred to in Part VI, Chapter 1, where the members were invited to select one of four options with respect to the future of the Security Service. Of those who responded, 74% opted for choices which would retain the Security Service in the R.C.M.P. The resultant poor morale, it could also be argued, may lead, in turn, to increased costs and lowered effectiveness in the new agency.

48. We do not accept this line of argument, for the following reasons. First, it is our impression based on many informal meetings with Security Service members that a significant portion of Security Service employees would happily become members of a separate and civilian agency. Indeed, we are concerned about morale levels, especially among current civilian members, if the Security Service were to remain in the R.C.M.P. Our impression is not based on any scientific survey conducted by either this Commission or the R.C.M.P. From our discussions with members of the Security Service we believe that there is currently a much stronger desire for major structural change than the 1976 survey might, at first blush, suggest. It is important to remember that this survey was conducted prior to the revelations and attendant negative publicity for the Force that gave rise to the creation of this Commission. In addition, we have more confidence in the face-to-face format of informal meetings, where an individual's beliefs and the intensity with which these beliefs are held can be examined in some depth, than in an impersonal survey which forces a person to choose one of four options without giving him the opportunity to explain his choice or to indicate how strongly he feels about the matter. Our second reason for rejecting the argument that morale will suffer under a separate and civilian agency arises out of our conviction — and we shall be making a recommendation to this effect later in this Chapter — that no one should be pressured in any way to become a member of the new agency. Current members of the Security Service who wish to remain in the R.C.M.P. should be seconded to the new agency for a period lasting no longer than two years. Under such an arrangement, we do not believe that morale

levels within the new agency would be unduly harmed even during the transitional period when the new agency is being established.

Co-operation from the public

49. One cost of separating the Security Service from the R.C.M.P., often cited by Security Service members themselves, is that a new civilian agency would not enjoy the same degree of public goodwill as does the R.C.M.P. Here is how the authors of one recent study of the separation question, completed within the Security Service itself, put this argument:

> It is our perception that many members receive quick and extensive co-operation from the public (e.g. access to people, places, records, etc.) once they identify themselves as police officers and as members of the Force. There is considerable emotional support for the R.C.M.P. as a Canadian symbol which inclines many people to co-operate. Much of the co-operation also flows from the public perception that they have an obligation to assist the police. Any new organization concerned solely with security intelligence would take some time to establish a parallel obligation.

50. We concur with this assessment but would add the qualifier that the R.C.M.P.'s public goodwill is less of an asset in certain areas of the country — most notably in the Province of Quebec — than it is in Western Canada, where the Force's historical roots lie. How significant would be this loss of public good will if the Security Service does separate from the R.C.M.P.? In our view, the costs in terms of reduced effectiveness would not be large and would likely diminish over time. A large majority of Canadians will be sympathetic to the goals of a new security intelligence agency, especially one which is under the control of government, has a clear legislative mandate, has a significantly reduced role in investigating domestic subversion, and is prohibited from doing "dirty tricks". Over time, we see no reason why a separate civilian agency with the type of personnel we are recommending in this Report could not develop an excellent relationship with the public. Throughout our research of security arrangements in other countries, we did not find officials anywhere bemoaning the lack of public support for their civilian agencies. The targets of a security intelligence agency — foreign spies, international terrorists, and violence-prone domestic groups — do not have a large constituency of supporters in a liberal democratic country.

Liaison with domestic and foreign police and security agencies

51. In its commentary on the Report of the Royal Commission on Security in 1969, the R.C.M.P. maintained that it had "... built up meaningful liaison with security services and police forces in foreign countries which could not be readily acquired by a new service". We believe that this assessment has some merit, especially in the period immediately following the establishment of the new agency. Indeed, this assessment could be extended to include the liaison arrangements the R.C.M.P. now has with domestic police forces. Nonetheless, we believe that a new agency could quickly develop as effective a set of relationships with both foreign and domestic agencies as the R.C.M.P. now appears to enjoy. As the authors of the recent R.C.M.P. study of the separation issue, to which we referred above, noted:

It has been maintained that foreign agencies (and security units of other police forces) would be less inclined to share information and co-operate with a non-police agency. It is our view that solid relationships will quickly develop based on need. It would be incumbent on a separate Security Service to quickly develop a reputation for professionalism and to develop a product which other organizations would deem valuable.

52. Even in the period immediately following the establishment of the new agency, it would appear to us that a number of steps could be taken to reduce the liaison problems which might develop. For example, as we suggested in Part V, Chapter 8, the establishment of a special liaison unit to work with domestic police forces might help the new agency better manage these important relationships. And, following the example of its Australian counterpart, the new security intelligence agency might attempt to develop written agreements with major domestic police forces. These agreements would state how the agency and the police force would liaise with each other, and secondly, what types of assistance each could expect from the other. Perhaps the most important factor, however, in determining the efficacy of these new liaison arrangements and the speed at which they develop will be the Director General of the security intelligence agency. It is essential that he be highly competent at working with domestic police forces and foreign security intelligence agencies.

Co-operation with the R.C.M.P.

53. Of all the domestic police forces, the R.C.M.P. will be the most important in contributing to the overall effectiveness of a civilian security intelligence agency. The size of the Force, its role in municipal and provincial policing, its expertise in the forensic sciences, and the overlapping responsibilities of the two organizations in such areas as security screening, V.I.P. protection, terrorism and other forms of politically motivated violence are all factors which contribute to the importance of the security intelligence agency's relationship with the R.C.M.P. A separation of the Security Service from the R.C.M.P. will be received with hostility by some members of the R.C.M.P. and this may result in considerable initial strains in the relationship between the two bodies. Indeed, we consider a potential lack of co-operation between the Force and a separate civilian security intelligence agency as the greatest risk involved in the structural change we are proposing. It is imperative, therefore, that a number of steps be taken to minimize the possible impact of a sour relationship.

54. The Solicitor General and the Deputy Solicitor General would have a tremendously important role to play in building an effective relationship between these organizations. One of the primary reasons for our recommending that both organizations remain within the same ministry is to ensure that a Minister and his deputy place high priority on developing an adequate level of co-operation between them. The Solicitor General and his Deputy can accomplish this in several ways. They should meet regularly and simultaneously with the Director General and the Commissioner of the R.C.M.P. to review mutual problems, especially those arising from the implementation of the new structural arrangements. They can help both organizations develop a written agreement, specifying how co-ordination will be achieved. (Incidentally such an agreement might serve as a model for formalizing the relationship between the

security intelligence agency and other Canadian police forces.) They can encourage the movement of personnel between the two organizations — both through secondments and on a more permanent basis.

55. Co-ordination between the two organizations might also be enhanced, especially in the period immediately following the formation of the civilian agency, by the establishment of a liaison unit at least at the Headquarters level within each organization. Their major responsibility would be to facilitate and control the exchange of information between the two organizations. In addition, the R.C.M.P. members carrying on liaison duties should assist the security intelligence agency in any of its operations requiring personnel with police powers, but they should not have any other investigatory responsibilities relating to security. The danger here is that security intelligence officers might be tempted to ask staff within the R.C.M.P. liaison unit, whom they would know well, to launch investigations which are outside the mandate of their agency. The independent review body should be aware of this danger and monitor closely the relationship between the two liaison units.

56. Given their limited responsibilities, these liaison units need not be large. Unfortunately, comparisons with other countries do not provide a basis for a precise estimate of the number of employees required. According to a statement in the British House of Commons in 1978[4] by the Secretary of State for the Home Department, Mr. Merlyn Rees, the number of Special Branch personnel in all police forces in England and Wales numbered approximately 1,250. However, special branch work in England and Wales entails several important responsibilities — V.I.P. protection, the collection of intelligence on the activities of the Irish Republican Army, and the monitoring of people and goods passing through British ports — which engage a large portion of special branch personnel and which have no parallel for the R.C.M.P. liaison unit we are suggesting. In addition, comparisons are difficult because of the basically unitary nature of the British governmental system. In Australia, a unified federal police force has been established only recently, and thus is not helpful for our purposes. Each of two large and long established Australian State police forces — one with 9,000 employees, the other with 7,000 employees — has a small special branch. Even here, these special branches have responsibilities for V.I.P. protection, which, in the case of the R.C.M.P., are already handled by 'P' Directorate.

57. Yet another way of ensuring that the R.C.M.P. and the security intelligence agency develop close ties with one another is to make them mutually dependent. Thus, both organizations should have something to gain from co-operation. One reason, for example, for recommending that intelligence officers not have police powers is to ensure that the agency will need to rely on the police, including the R.C.M.P., to perform effectively. The R.C.M.P., on the other hand, will depend on the security intelligence agency for information on espionage offences, international terrorism and V.I.P. protection. Perhaps having the two agencies share foreign liaison personnel, especially for countries

[4] United Kingdom, Parliament, *Debates*, May 24, 1978, p. 1,718.

requiring only one person for both police and security intelligence work, is another means of ensuring co-operation.

Conclusions

58. In this section, we have reviewed the major considerations which argue against separating the Security Service from the R.C.M.P. Most of these, in our opinion, have little validity. Others, while valid, entail costs that do not outweigh the benefits of establishing a separate and civilian security intelligence agency. Moreover, we believe that steps can be taken to minimize some of these risks and problems associated with the structural change we are recommending. In the last section of this chapter, we further consider ways to implement this structural change effectively.

59. We have no illusions that removing the Security Service from the R.C.M.P. will provide an iron-clad guarantee of future behaviour which is proper, legal, and effective. Any organizational change carries with it certain risks and potential problems. In addition, it is people who put shape and form to organizational structures and breathe life into them. The organization we are recommending to carry out the security intelligence function will change over time and there is no guarantee that all of these changes will be positive. Finally, organizations are not autonomous compartments, unaffected by their environment. As the evidence before this Commission has demonstrated, a security intelligence agency is highly dependent on the system of laws and directives within which it operates and on the structures and individuals shaping its relationships with government. The agency is not likely to operate effectively, legally, and properly if other parts of this system are badly askew.

60. Having admitted that no structure can provide absolute guarantees, we should be clear that we still regard the location of the security intelligence agency within government as an extremely important issue. It is not enough to staff the agency with 'good' people. Removing the security intelligence function from the R.C.M.P. will improve significantly the prospect for creating a security intelligence system for Canada which is effective, which is under the direction and control of government, and which has a high regard for the liberal democratic principles it is securing.

61. As one way of signalling the adoption of a fresh approach to the operation and control of Canada's security intelligence function, we recommend that the separate and civilian security intelligence agency be given a new name. We propose that the agency be called the Canadian Security Intelligence Service.

WE RECOMMEND THAT the Government of Canada establish a security intelligence agency, separate from the R.C.M.P., and under the direction of the Solicitor General and the Deputy Solicitor General.

(104)

WE RECOMMEND THAT this agency be called the Canadian Security Intelligence Service.

(105)

WE RECOMMEND THAT the Solicitor General and the Deputy Solicitor General place high priority in developing ways to strengthen the relationship between the security intelligence agency and

(i) **the R.C.M.P.**

(ii) **other Canadian police forces**

(iii) **foreign security agencies.**

(106)

D. IMPLEMENTATION OF STRUCTURAL CHANGE

62. Our review of the aftermath of the Royal Commission on Security in Chapter 1 of this part of the Report suggests to us the necessity of the government developing an implementation plan if it is to get full value from our Report. One of the first questions facing the government in developing such a plan arises from our recommendation for the establishment of a separate security intelligence agency. We think that this recommendation should be dealt with as quickly as possible. Avoiding prolonged uncertainty among existing Security Service staff is one reason for urging a speedy resolution to this question. Another is that foreign liaison arrangements might suffer, should there be an extended period of confusion about what is to happen to Canada's security arrangements. While we think a failure to move quickly on this matter may cause serious damage, still we think it desirable that this decision not be made in a way which precludes the requisite parliamentary and public discussion.

63. Once the decision to form the new agency has been announced publicly, the next steps in the implementation of the new agency can proceed. We propose that the Solicitor General be the Minister responsible for directing the establishment of the new agency. To aid him in this task, the Solicitor General should appoint an interdepartmental implementation team of officials, consisting of at least the following: the Deputy Solicitor General, the Commissioner of the R.C.M.P., the head of the security intelligence agency and senior officials from the Privy Council Office, Treasury Board, Department of Justice and the Public Service Commission. This implementation team would likely require support staff.

64. Following the establishment of the new agency, the next step would be the appointment of a Director General by the Prime Minister. If arrangements to establish a separate agency were to be made by executive decision before the passage of the new Act, the new Director General would be appointed subject to his confirmation under the terms of the statute. The Director General should work closely with the Solicitor General and the implementation team to choose the senior managers for the new agency. We believe strongly that some of these senior managers should come from outside the R.C.M.P. The evidence before us suggests that a Director General, unsupported by some senior management from outside the R.C.M.P., might have difficulty in effecting quickly the type of personnel and management changes necessary to put the new agency on a sound footing.

65. With the appointment of the Director General and the senior management of the agency, the Solicitor General and his implementation team can then turn their attention to the remaining staff of the present Security Service.

As a first step, we believe that all of the Security Service's personnel, including public servants, should be assigned to the new security intelligence agency but they should retain their current status as either members of the Public Service or members of the R.C.M.P. In effect, they would be seconded to the agency for as long as two years, until either they have become full-fledged members of the new agency or they have returned to take positions in the R.C.M.P. or the Public Service. We believe that neither public servants nor members of the R.C.M.P. should be forced to become permanent members of the new agency. We also believe that, should they become members of the new agency, they should not lose financial or other benefits they currently enjoy. Furthermore, no one from the Security Service should be dismissed as a direct result of the establishment of the new agency. We do not mean by this that everyone within the Security Service will be guaranteed a permanent job with the new security intelligence agency. Rather, we are suggesting that no one should lose his or her job with the Government of Canada.

66. In addition to determining the personnel needs of the new agency and attending to the existing employees of the Security Service, those involved in the implementation of the new agency will need to focus on other matters. Some of these we have already mentioned in this chapter — for example, ensuring the viability of liaison arrangements with foreign agencies and domestic police forces. Other concerns of the Solicitor General and his implementation team will be the new physical location of the headquarters of the new agency, the orderly transfer of files, the development of appropriate personnel and management policies, and the establishment of the necessary guidelines and internal control systems which we have outlined earlier in this report.

WE RECOMMEND THAT the Cabinet make its decision quickly to separate the Security Service from the R.C.M.P.

(107)

WE RECOMMEND THAT the Solicitor General be given responsibility for implementing the establishment of the security intelligence agency. He should appoint an implementation team to assist him, consisting of at least the following: the Deputy Solicitor General, the Commissioner of the R.C.M.P., the head of the security intelligence agency and senior officials from the Privy Council Office, Treasury Board, Department of Justice, and the Public Service Commission.

(108)

WE RECOMMEND THAT the Prime Minister appoint a Director General for the security intelligence agency.

(109)

WE RECOMMEND THAT some of the senior managers for the new agency should come from outside the R.C.M.P.

(110)

WE RECOMMEND THAT

(a) existing staff of the R.C.M.P. Security Service be assigned to the new agency but continue to belong to either the Public Service or the R.C.M.P. for an interim period to be established by the Solicitor

General. No current employees of the Security Service should be forced to become permanent employees of the security intelligence agency.

(b) no current member of the R.C.M.P. Security Service lose employment with the federal government as a result of the establishment of the new security intelligence agency.

(111)

PART VII

A PLAN FOR THE FUTURE: SECURITY SCREENING

INTRODUCTION

CHAPTER 1: Security Screening for Public Service Employment

CHAPTER 2: Immigration Security Screening

CHAPTER 3: Citizenship Security Screening

INTRODUCTION

1. To diminish the risk posed by threats to Canada's security, the federal government has established security clearance programmes for immigration, for citizenship, and for positions with access to classified information in the Public Service. To a large extent security clearance decisions are based upon the information provided by the Security Service of the R.C.M.P., the investigative agency responsible for the security screening programmes. In carrying out this responsibility, the Security Service comes into contact with hundreds of thousands of Canadians. In the course of a federal Public Service field investigation, neighbours, friends, and employers may be approached. Almost all potential immigrants are interviewed by R.C.M.P. liaison officers abroad, and many are subsequently re-screened when they apply for Canadian citizenship. Because of the pervasiveness and the importance of the security screening role, we are concerned that it be carried out both fairly and effectively. We believe security screening is essential to the maintenance of the security of Canada. Having said this, we concur with former Prime Minister Pearson when he noted the importance of ensuring that "the protection of our security does not by its nature or by its conduct undermine those human rights and freedoms to which our democratic institutions are dedicated."[1]

2. Our primary concern in this part of our Report is with the role of the security intelligence agency in the security screening process. Nonetheless, to analyze this role properly, we must concern ourselves with the overall security clearance programmes for the Public Service, immigration, and citizenship. Changes in the role of the agency will have important implications for other components in these programmes. In the following chapters we discuss each of these three security clearance programmes.

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[1] House of Commons, *Debates*, October 25, 1963, p. 4043.

CHAPTER 1

SECURITY SCREENING FOR PUBLIC SERVICE EMPLOYMENT

3. The objective of the Public Service security clearance programme is to ensure that personnel with access to secret government information can be trusted. In this chapter, we shall propose four major changes to this programme. First, we shall make recommendations aimed at reducing the number of security clearances required in the Public Service. Second, we shall propose that the security screening criteria for the Public Service be revised so as to reflect the threats to security as we have defined them in Part V, Chapter 3. Third, we believe that the role of the security intelligence agency in the security screening process should be modified to be more in keeping with the agency's mandate and the type of personnel which it should attract. Finally, we shall recommend several changes in the review and appeal process, the most important being the establishment of an advisory body to be called the Security Appeals Tribunal. This body would hear appeals and make recommendations to Cabinet on security cases involving not only the Public Service but also immigration and citizenship. Before elaborating on these proposed changes, we begin with a brief historical overview of security screening in the Federal Public Service.

A. HISTORICAL BACKGROUND

4. The need for a programme of clearance of Public Service employees was first brought to the attention of the government in 1946, when Igor Gouzenko revealed the presence of espionage activities in some of the highest and most sensitive government positions in Canada. The Taschereau-Kellock Commission, established to investigate this communication of classified information to agents of a foreign power, recommended "that consideration be given to any additional security measures which would be practical to prevent the infiltration into positions of trust under the Government of persons likely to commit acts such as those described in this Report."[2] Priority was given to this recommendation. In March 1948, a system of security screening was formalized in Cabinet Directive 4, and with it the basic pattern for security clearances was established. The R.C.M.P. was instructed to screen all employees and candidates for employment in security sensitive positions. The findings of these security investigations were reported to the individual's department where the decision to grant the security clearance would be made.

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[2] *Royal Commission on Espionage*, 1946, p. 689.

5. At first there were no screening criteria, but the situation was soon rectified. In April 1948, Cabinet Directive 4A was passed, prohibiting members or associates of the Communist Party or Fascist organizations from employment in government positions of trust or confidentiality. In 1952, Cabinet Directive 24 introduced a distinction between 'loyalty' and 'reliability', which still pervades our screening criteria. Disloyalty involved membership in the Communist Party, or belief in "Marxism-Leninism or any other ideology which advocates the overthrow of government by force". Unreliability, from a security standpoint, referred to 'defects' of character that might lead an employee to be indiscreet, dishonest or vulnerable to blackmail.

6. Soviet Premier Khruschev's pronouncements of "peaceful coexistence" and a general easing of cold war tensions in the mid-1950s did not lead to a reduction in security screening. On the contrary, Cabinet Directive 29, issued in December 1955, was a firm restatement of the necessity for screening. Access to classified information was now established as the rationale for security screening. In addition, this Directive took the position that there could be security risks involved even when there was no access to classified information, such as anti-democratic, foreign influence in organizations controlling the mass communications media.

7. With the change in the international climate there were indications that the Soviet bloc intelligence agencies were altering their method of recruiting spies abroad. A 1955 Royal Commission Report in Australia and two U.S. Congressional Committees indicated that the Communist intelligence services were relying upon the exploitation of the vulnerabilities of individuals rather than their ideological principles. Homosexuality was a form of behaviour thought to be particularly vulnerable to blackmail. Compromise techniques followed by blackmail and attempted recruitment had been used by the Soviets against several homosexuals in the Canadian government. As a consequence of this change of tactics by the hostile intelligence agencies, the R.C.M.P.'s Security and Intelligence Directorate began a Canada-wide programme of collecting information about homosexuals.

8. As the decade of the 1950s came to an end, the security screening role of the R.C.M.P. came under public scrutiny. A series of attacks in the press and Parliament began after the suicide of the Canadian Ambassador to Egypt, Mr. Herbert Norman. It was alleged that R.C.M.P. information had been included in the material upon which the U.S. Senate Internal Security Sub-Committee based its charge that Ambassador Norman had been a Communist.[3] It was in this atmosphere of criticism that Prime Minister Pearson introduced new security clearance procedures in the early 1960s. Cabinet Directive 35 (hereinafter referred to as CD-35), issued on December 17, 1963, was aimed at reconciling the needs of security and the rights of the individual. With a few modifications this document still forms the basis for the government's personnel security clearance procedures.

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[3] See Charles Taylor, *Six Canadian Journeys; A Canadian Pattern*, Toronto, House of Anansi Press, 1977.

9. CD-35, a confidential document until declassified in 1978 during the course of our public hearings (Ex. M-35), retained many of the features of the previous screening directives, but made several changes. One change it made was to require greater frankness in dealing with employees whose reliability or loyalty was in doubt. Further, it provided procedures for reviewing such cases both within the responsible department or agency and, if necessary, by a Board of Review composed of three of the Deputy Ministers who served on the Security Panel. In addition, more specific criteria for assessing loyalty were introduced. Confidence was not to be placed in individuals

> . . . whose loyalty to Canada and our system of government is diluted by loyalty to any Communist, Fascist or other legal or illegal political organization whose purposes are inimical to the processes of parliamentary democracy.[4]

These 'loyalty criteria' refer specifically to:

> 3. (a) a person who is a member of a communist or a fascist party or an organization affiliated with a communist or fascist party and having a similar nature and purpose;
>
> (b) a person who by his words or his actions shows himself to support a communist or fascist party or an organization affiliated with a communist or fascist party and having a similar nature and purpose;
>
> (c) a person who, having reasonable grounds to understand its true nature and purpose, is a member of or supports by his words or his actions an organization which has as its real objective the furtherance of communist or fascist aims and policies (commonly known as a front group);
>
> (d) a person who is a secret agent of or an informer for a foreign power, or who deliberately assists any such agent or informer;
>
> (e) a person who by his words or his actions shows himself to support any organization which publicly or privately advocates or practices the use of force to alter the form of government.

10. For the first time, specific 'character defects' considered likely to be marks of 'unreliability' were mentioned. Pursuant to paragraph 5 of CD-35, unreliable individuals were not to have

> . . . access to classified information, *unless* after careful consideration of the circumstances, including the value of their services, it is judged that the risk involved appears justified.

Included were:

> (a) a person who is unreliable, not because he is disloyal, but because of features of his character which may lead to indiscretion or dishonesty, or make him vulnerable to blackmail or coercion. Such features may be greed, debt, illicit sexual behaviour, drunkenness, drug addiction, mental imbalance, or such other aspect of character as might seriously affect his reliability;
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> (b) a person who, through family or other close continuing relationship with persons who are persons as described in paragraphs 3(a) to (e)

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[4] CD-35, December 18, 1963, paragraph 2.

above, is likely to be induced, either knowingly or unknowingly, to act in a manner prejudicial to the safety and interest of Canada. It is not the kind of relationship, whether by blood, marriage or friendship, which is of primary concern. It is the *degree* of and circumstances surrounding such relationship, and most particularly the degree of influence that might be exerted, which should dictate a judgement as to reliability, a judgement which must be taken with the utmost care; and

(c) a person who, though in no sense disloyal or unreliable, is bound by close ties of blood or affection to persons living within the borders of such foreign nations as may cause him to be subjected to intolerable pressures.[5]

11. Public dissatisfaction was expressed about the adequacy of the review procedures for security screening. A Royal Commission on Security was appointed in 1966, partly in response to these criticisms, and in particular to the controversy surrounding the dismissal of postal employee George Victor Spencer. The key security clearance changes recommended in the Commission's Report, published in 1969, were:

(1) *Establishment of a Security Review Board* to consider protests by public servants, or person under contract whose careers are adversely affected by denials of security clearance.[6]

(2) *Clarification of security policy with respect to separatism*: the Royal Commission stated that

"Separatism in Quebec, if it commits no illegalities and appears to seek its ends by legal and democratic means, must be regarded as a political movement, to be dealt with in a political rather than a security context. However, if there is any evidence of an intention to engage in subversive or seditious activities, or if there is any suggestion of foreign influence, it seems to us inescapable that the federal government has a clear duty to take such security measures as are necessary to protect the integrity of the federation".[7]

(3) *Changes in the role of the R.C.M.P. Security Service*: the investigative agency should provide better documented reports to the departments with comments on the validity, relevance and importance of information and a formal recommendation on whether or not to grant clearance. Field investigations should be conducted with much more tact and imagination.[8]

(4) *Extension of the scope of security screening:* security screening should be made universal for all employees in the civil service. It should no longer apply only to persons who have access to classified material.[9]

12. The Royal Commission's recommendations were only partially implemented. The Security Review Board was not established. Prior to the submis-

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[5] *Ibid.*, paragraph 6.

[6] *Report of the Royal Commission on Security*, 1969, Recommendation 299(a).

[7] *Ibid.*, paragraph 21.

[8] *Ibid.*, paragraph 56 and Recommendation 298(d).

[9] *Ibid.*, Recommendation 298(a).

sion of the Royal Commission's report, a limited 'appeal' procedure had been established in 1967, under section 7(7) of the Financial Administration Act. This 'appeal' procedure applied only to situations where a person was dismissed from the Public Service on security grounds. In 1975 the Public Service Security Inquiry Regulations were passed pursuant to that same section. These regulations provided for the appointment of a Commissioner to hear appeals of employees dismissed from the Public Service for reasons of security. The Commissioner is empowered to make a recommendation to the Governor in Council who has final authority in the matter. Contrary to the Royal Commission's recommendations, individuals who were transferred, or failed to obtain a promotion or position, or who had had a contract terminated on security grounds, were not provided with a right of appeal. Since the enactment of these Public Service Security Inquiry Regulations, no Commissioner has been appointed because no one has been dismissed from the Public Service for security reasons. Several individuals, however, have resigned, and other cases have been resolved by the Privy Council Office in favour of the employee.

13. Contrary to the recommendation of the Royal Commission, Ministers and their officials decided to include as a security rejection criterion involvement in separatist activities of all kinds, even those which were legal and democratic. We have already chronicled, in Part V, Chapter 3, the way in which the development of this policy since 1969 impinged on the intelligence collection programme of the Security Service. Suffice it to repeat here that this dilemma was not resolved by the Cabinet decision on May 27, 1976 — a decision in force today which reads:

> The Cabinet decision of March 27, 1975 [which established the Mandate of the Security Service] was not intended to alter the policy of the government with respect to the screening of persons for appointment to sensitive positions in the Public Service, namely that:
>
> (a) information that a candidate for appointment to a sensitive position in the Public Service, or a person already in such a position, is a separatist or a supporter of the Parti Québecois, is relevant to national security and is to be brought to the attention of the appropriate authorities if it is available; and
>
> (b) the weight to be given to such information will be for consideration by such authorities, taking into account all relevant circumstances, including the sources and apparent authenticity of the information and the sensitivity of the position.

14. This decision did not resolve the practical problem of how the Security Service was to produce such information for security clearance reports, given that the Security Service was not authorized to monitor or investigate the Parti Québecois or other democratic separatist groups. The key expression "if it is available" has never been clarified by Cabinet.

15. The role of the Security Service in carrying out security screening investigations in the field has not been substantially modified since the 1969 report of the Royal Commission on Security. The civilian security service, which the Royal Commission thought would be better equipped to carry out personnel security investigations, was not created. Regular members of the

Force, supplemented by approximately eight full-time special constables, now do security investigations in the field.

16. The format of reports has changed in accordance with the Royal Commission's recommendations. The Security Service began to write more extensive reports with comments on the validity, relevance and importance of the 'adverse information' provided. Until recently the reports included recommendations as to whether or not the candidate on whom the Security Service had some 'adverse information' should be granted a security clearance. The R.C.M.P. adopted this latter practice with some reluctance. The Force at first wanted no role in the decision-making process and later wanted authorization for what it felt was a significant change in its mandate. CD-35 authorized the R.C.M.P. only to conduct investigations and report the facts:

> The functions of an investigative agency are to conduct promptly and efficiently such investigations as are requested by departments or agencies to assist them in determining the loyalty and reliability of the subject of investigation; and to inform departments and agencies of the results of their investigations in the form of factual reports in which the sources have been carefully evaluated as to the reliability of the information they have provided.[10]

As most departments found the R.C.M.P.'s advice helpful, the practice of making recommendations continued until very recently when the R.C.M.P. finally discontinued the practice, giving the lack of authorization as the reason.

17. The role of the R.C.M.P. in security screening has been misconstrued over the years. In Parliament the Security Service has been accused both of making the actual security clearance decision and of doing nothing more than supplying factual security screening reports.[11] Neither of these contentions has been a correct representation of the role of the R.C.M.P. Security Service, which has been investigating, reporting, and, until recently, recommending. The recommendations had no binding effect. The final decision as to the granting or withholding of a security clearance rested with the employing department. Nonetheless, the recommendations of the Security Service were usually given great weight by the departments and agencies.

18. Universal screening for the Public Service, recommended by the Royal Commission on Security, has not been implemented. However, a very large number of Public Service positions still require security clearance. In the ten years prior to the Royal Commission on Security, the average annual number of security screening requests was 43,700. In the years 1972-77 the average annual number was 67,602. Much of this increase can be attributed to the 35-40 per cent increase in the size of the federal Public Service and to the annual turnover of 12 per cent.

19. We now turn to a detailed examination of this security clearance programme as it has developed over the last 35 years. We examine the types of

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[10] CD-35, paragraph 11.

[11] House of Commons, *Debates*, January 24, 1979, p. 2517.

positions requiring clearance, the criteria applied, the roles and responsibilities of the organizations involved and the review and appeal procedures in place. In each of these areas we shall make recommendations that we feel could improve both the fairness and effectiveness of the programme.

B. EXTENT OF THE SECURITY CLEARANCE PROGRAMME

20. In this section, we look at whether federal government employees, Order-in-Council appointments and Members of Parliament should require a security clearance. We also examine the issue of updating and transferring security clearances.

21. To protect government information from unauthorized disclosure, some form of screening mechanism is needed to ensure as far as possible that persons who have access to that information can be trusted. It is also necessary to ascertain the likelihood of employees attempting to subvert the institutions of government from within or influence its policies to the advantage of foreign or violence-prone organizations. However, excessive screening involves unnecessary investigations into the personal lives and political activities of individuals. In our democratic system such investigations by the state should be confined to what is clearly necessary.

Federal government employees

22. According to the authorizing document for security screening, CD-35, employees with access to three levels of classified information — Top Secret, Secret and Confidential — require screening. A 1956 handbook of the Privy Council Office entitled *Security of Information in the Public Service of Canada* describes each of these three categories. Documents are to be classified

> *TOP SECRET* when their security aspect is paramount, and when their unauthorized disclosure would cause exceptionally grave damage to the nation.
>
> *SECRET* when their unauthorized disclosure would endanger national security, cause serious injury to the interests or prestige of the nation, or would be of substantial advantage to a foreign power. (Such as: minutes of Cabinet meetings; defence matters not of vital strategic importance; current and important negotiations with foreign powers; the national budget; and scientific, technical and military developments of substantial interest to a foreign power.)
>
> *CONFIDENTIAL* when their unauthorized disclosure would be prejudicial to the interests or prestige of the nation, would cause damage to an individual, and would be of advantage to a foreign power. (Such as: personal or disciplinary administrative matters, minutes of interdepartmental meetings, political and economic reports advantageous to a foreign power, and the private views of officials.)

We have noted a tendency in the security community to overclassify documents. This tendency, which usually arises out of an abundance of caution, appears to be merely part of a general trend throughout all areas of govern-

ment. Each government department and agency is responsible for classifying its own material, and the process of classification has not been subject to careful control. Nor have uniform standards reflecting the meaning of the original classifications been applied. This tendency to overclassify has contributed to overloading the security screening programme since the number of cases requiring screening is related to the quantity of material classified. CD-35 stipulates that there should be different screening procedures for positions with access to the three classifications of information. A Top Secret level clearance requires the most extensive screening:

(1) a subversive indices check;

(2) a fingerprint criminal records check;

(3) a field investigation.

23. For 'secret' and 'confidential' level clearances a subversive indices check and a fingerprint criminal records check suffice. Although these levels do not require a field investigation, one may be requested for cause. While overclassification of all three levels of clearance is of concern to us, it is the Top Secret level clearance that is of greatest concern, since it calls for an automatic investigation into the private life of an individual. In our opinion such investigations should be prescribed only when absolutely necessary.

24. There is strong evidence to suggest that far too many investigations have been required by departments and agencies. In 1978, 67,668 requests for screening were sent to the Security Service, of which 2,405 were for Top Secret clearances requiring a field investigation. Several other factors, besides overclassification, appear to account for the large number of Top Secret clearances requested. First, the principle of CD-35, which bases screening requirements on access to classified information, has not been strictly followed. Whole areas of employment have been deemed to require Top Secret level clearance regardless of whether each and every individual has direct access to information classified Top Secret. For example, all employees of External Affairs who are eligible for postings abroad must have Top Secret clearances. Career mobility, physical proximity and ease of intra-office communications are the reasons often cited to justify these high-level clearances.

25. Second, ever since the first security clearance directive in 1948, there has been a tendency for government departments and agencies to transfer what should normally be considered personnel staffing responsibilities to the security investigative agency. Field investigations incorporate the checking of an applicant's credentials. In many instances it has become the practice to designate positions as requiring a high-level clearance where there was not even an indirect link to classified information. Two such examples are employees working with valuable government assets, such as at the Mint, or on politically sensitive programmes such as Canadian aid programmes abroad.

26. More precise and appropriate standards for identifying positions requiring security screening are needed. Assuming these standards are to remain tied to levels of document classification, then the levels of classification must be much more precisely defined and their application carefully monitored. Once

precise classification standards are established, each government department and agency must carefully identify those positions that require security screening. Similar standards should extend to government contracts.

27. The screening programme for national security purposes should be differentiated from screening for the purpose of protecting valuable government assets or politically sensitive information. In January 1979, Cabinet approved in principle a classification scheme that made such a differentiation. Interim measures have been introduced to confine security screening to positions of national security relevance. The impetus for these interim measures was Part IV of the Canadian Human Rights Act, which gives to individuals a right of access to governmental information about themselves. Under section 54(1) of the Act, security screening reports could not be exempted from access unless they are related to "national security".[12] Hence, in March 1978, the Security Service, conscious of a need to protect its information, announced that it would no longer forward screening reports unless the department or agency affirmed that the position was one requiring access to classified information. No procedure has as yet been established for assessing the reliability of persons selected for politically sensitive positions or positions with access to monetarily valuable assets. Clearly, such a system is required; however, as these positions do not require an investigation of political activities threatening Canada's security, they should not involve a security field investigation or a subversive records check. Our view in this regard is different from that taken by the Royal Commission on Security, which recommended a fingerprint and subversive records check for all employees of the Public Service, whether or not they would be likely to have access to classified material. If the occupant of the position does not require access to classified information, the position does not clearly entail a risk to security. In such cases, we feel the security intelligence agency should not be involved in the selection process.

28. Another personnel procedure that significantly adds to the number of security screenings is the practice of requesting security reports on all or a significant number of candidates for a position before the final selection. In our opinion the selection of the successful candidate should precede any request for screening. Such a procedure would reduce the number of security clearances required and would therefore be less costly and less intrusive. More important, however, if the security clearance investigation produces security relevant information about the successful candidate, he has a greater chance of having the report assessed with due consideration, rather than merely being struck from the eligible list without explanation. We will discuss this review process later in the chapter.

Order-in-Council appointments

29. Security screening for senior positions in government presents a problem. Although screening requirements are adhered to for lower-level positions in the government, they have often been ignored for Order-in-Council appointments, which include such high-level positions as heads and members of Agencies,

[12] S.C. 1976-77, ch.33.

Boards and Commissions, Deputy Ministers, Cabinet Ministers, Senators, Judges, and Parliamentary Secretaries. Pursuant to the CD-35 these appointments are subject to the same security screening requirements as other positions with access to classified information, with the one exception of Confidential level clearances where, as Prime Minister Trudeau pointed out in a memorandum for Cabinet Ministers in 1971, "it is neither feasible nor desirable that prospective appointees be required to complete the Personal History Form which is the basis of normal security clearance regulations". In such cases a check through the Security Service's records, based on the name of the appointee alone, is substituted. In practice, however, these 'Cursory Records Checks' have been used for all Order-in-Council appointments, even those who have no access to classified information. With the exception of Members of Parliament, there appears to be no justification for exempting high-level government appointees who have access to classified information from as thorough security screening as public servants. On the other hand, we do not feel that there is any justification for conducting records checks on appointments that do not entail any access to classified information or material.

30. As Mr. John Starnes stated in his evidence before us, the 'Cursory Records Check' is both ineffectual and open to abuse (Vol. 104, pp. 16418-22). Before an appointment is made, a list of names is submitted to the Security Service for a cursory check of its records; a response within a few hours will often be requested. An effective records check cannot be done under pressure of time and with no biographical data save the individual's name. Mistakes in identity can be made and unsubstantiated rumour can be reported in place of facts. The reporting of such information can have serious adverse effects on an individual's career for years. If the Security Service reports the results of a 'Cursory Records Check' verbally, there is no means of verifying later whether adverse information was ever passed on. Because of these problems, inherent in the procedure, we consider that 'Cursory Records Checks' should be discontinued for all Order-in-Council appointments, with the exception of Members of Parliament, whose situation we shall discuss below. Order-in-Council appointments are some of the most important in government; enough time should be taken to conduct a proper security check if the position entails access to classified information.

Members of Parliament and Senators

31. We have recommended that screening standards be applied consistently across government regardless of the status of the candidate. These recommendations cause us to consider whether or not the same principle should apply to Members of Parliament and Senators with access to security relevant matters. Normally Members of Parliament and Senators do not have access to classified information. The exceptions are Cabinet Ministers and Parliamentary Secretaries who have access to such information through their departmental responsibilities and their role in Cabinet decision-making. If our recommendation calling for a Joint Parliamentary Committee on Security and Intelligence is accepted, the members of that committee will also have access to security information.

32. It has been the practice to conduct 'Cursory Records Checks' on M.P.s who are being considered for appointment as Parliamentary Secretaries. Sometimes, candidates for Cabinet positions have been screened through this same procedure, but often the required Privy Councillor Oath has been considered sufficient. The appointment of a Parliamentary Secretary who is to have access to the operations of a ministry connected with national security matters and of a Senator as a Cabinet Minister requires, in practice, a full records check but no field investigation.

33. Our opinion is that there should be a modified security screening for any appointment of an M.P. or Senator to a position in which he will have access to classified information. Because of the time pressures often involved, a modified version of the present 'Cursory Records Check' will have to suffice. There is less of a danger of mistaken identity with M.P.s than other Order-in-Council appointments. The 'Cursory Records Check' is thus more acceptable in this case. Nevertheless, the present procedure needs to be modified in order both to increase its effectiveness and to avoid possible abuses. As much biographical information as possible should be given to the security intelligence agency as far in advance as is feasible. To broaden the coverage, criminal as well as security intelligence records should be checked. The Director General should personally communicate all adverse information, recorded in writing, to the Prime Minister or to the appropriate party leader in the case of a Member of Parliament who is a member of the opposition.

34. Members of Parliament should also receive a security briefing on appointment to positions involving access to security classified information. This procedure would be similar to that in effect in Britain since 1969. On the occasion of a first appointment, every British Minister is briefed by a member of the British Security Service on the threat posed by foreign intelligence agencies in their attempts to compromise or suborn those with access to classified information. The basic system of security to protect classified information is also explained to the Ministers. A report of the British Security Commission in 1973 recommended that no security screening procedure for Ministers be introduced, but that the security briefings be expanded and that the Prime Minister "should bear in mind the desirability of satisfying himself that there is no character defect or other circumstances which would mean that the appointment of that person would endanger security".[13] This information would be obtained through the Prime Minister's personal contacts, not the British Security Service.

35. Appointees to Parliamentary Committees with access to classified information should also be subjected to a cursory security screening. In these cases, however, only the members selected should be screened, not a list of potential candidates. If significant security relevant information should come to the attention of the security intelligence agency about a Member of Parliament on or about to be appointed to one of these committees, that information should be reported to the leader of the party to which the individual belongs. The

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[13] Cmnd. 5367, 1973, p. 11.

Members appointed to these Committees should also receive a briefing by the security intelligence agency on security threats and the system established to protect public officials against such threats.

36. Any Member of Parliament who feels that his career has been adversely affected by a security report should have access to an independent review. The Security Appeals Tribunal, which we shall describe in a later section, would provide a recourse, not now available, against potential injustices.

Updating and transferability of security clearances

37. The scope of security screening involves not only the question of who should be screened but how often they should be screened. At the present time, there is a tacit understanding that security clearances will be updated through subsequent vetting every five years. While it makes sense to review an employee's security status at least every five years, it should not be necessary in most cases to recheck the files of the security intelligence agency. If sufficiently adverse information has come to the attention of the security intelligence agency since the last records check, it should already have been reported to the personnel security officer in the department. The updating of clearances should be the responsibility of this officer. An interview every five years with the employee and a check with the immediate superior would only be considered good management and an effective option to a full security vetting.

38. When a person who has been security cleared is transferred to a different department or agency, another evaluation of that person's security clearance is required. Each department and agency is responsible for its own security clearance decisions. Positions, even with the same security level of classification, might involve different levels or dimensions of security risk. The personnel security officer in the department to which the public servant has been transferred should assess the previous security screening report and interview the candidate. A transfer should not necessarily imply the need for another check of security intelligence records.

WE RECOMMEND THAT federal government positions requiring security screening be precisely identified according to clearly defined and carefully monitored standards. Top Secret clearances should be reduced to the minimum required to protect information critical to the security and defence of the nation.

(112)

WE RECOMMEND THAT the security intelligence agency not be involved in screening or selection procedures established to ensure the suitability of persons for those government positions that do not require access to information relevant to the security of Canada.

(113)

WE RECOMMEND THAT the security intelligence agency not be requested to undertake a security screening before the final selection of a candidate for a position requiring a clearance.

(114)

WE RECOMMEND THAT the Cursory Records Check for Order-in-Council appointments be discontinued. Regular security screening proce-

dures should be carried out for those appointed to positions requiring access to security related information.

(115)

WE RECOMMEND THAT

(a) there be security and criminal records checks for M.P.s and Senators who will have access to classified information;

(b) any adverse information be reported by the Director General to the leader of the party to which the M.P. or Senator belongs; and

(c) the persons appointed receive a security briefing by the security intelligence agency.

(116)

WE RECOMMEND THAT security clearances be updated every five years. This update should be the responsibility of a personnel security officer in the department. It should not normally include a security records check.

(117)

WE RECOMMEND THAT security clearances for candidates transferring between classified positions be re-evaluated by a personnel security officer in the new department. A transfer should not necessarily include a check of the security intelligence agency's records.

(118)

C. SECURITY CLEARANCE CRITERIA

39. The current security clearance criteria for Canada, found in the 1963 CD-35, reflect the concerns during the post 'cold war' era. The only additional criterion added in the past 17 years has been that of separatist affiliation or association. These security clearance criteria are in need of revision. They do not reflect current threats, nor are they consistent with the mandate proposed by us for the security intelligence agency. Rather than specify Communist, Fascist or separatist organizations, the rejection criteria should be confined to the threats defined by Parliament in the statutory mandate of the security intelligence agency. The mandate proposed by us is meant to encompass all the threats to the security of the country. Any extension in the screening criteria would place the security intelligence agency in the untenable position of being required to give information in security screening reports that it has no mandate to collect. This situation would create a very real danger that in order to fulfill its screening mandate the security intelligence agency might extend its investigatory mandate into areas otherwise prohibited. A specific consequence of this proposal to confine rejection criteria is that the May 1976 Cabinet Decision which we quoted earlier would have to be rescinded. Parti Québecois or separatist affiliation or association *per se* should not be considered a security concern. It may well be a personnel concern for such agencies as the Federal-Provincial Relations Office, but information on such political affiliation should not be requested of the security intelligence agency. Separatism may be a threat to the federal structure of Canada but, as long as legitimate political and non-violent means are employed, it is not a threat to the security of the country, using security in the sense we have used it throughout this Report.

40. Past activities or associations should not necessarily be a bar to security clearance. The granting or denial of clearance should depend upon the individual's currrent beliefs and the nature of the position for which the individual is a candidate. For example, a person who flirted with Communism as a youth should not necessarily be denied access to classified information, though it may be imprudent to hire such an individual for the first time for an extremely sensitive job that is directly related to the internal security operations of this country. We have consciously omitted past activities from the security rejection criteria we recommend below. This is not meant to imply that the security intelligence agency should stop reporting past activity and associations. Such information might well be necessary for the department to make a clearance decision. There is a difference between the criteria and the evidence needed to satisfy the criteria.

41. Besides loyalty, there is another security clearance category listed in CD-35. The so-called 'reliability criteria' are concerned with the employee's integrity, discretion and invulnerability to blackmail or coercion. There are three sources of unreliability listed in CD-35 — features of character, associations with political security risks, and family in Communist countries — yet only in the case of the second, associations with individuals listed under the loyalty criteria, does CD-35 explicitly state that it is not the fact of the association, itself, that is pertinent, but rather the circumstances surrounding that association. According to paragraph 6(b):

> It is not the kind of relationship, whether by blood, marriage or friendship, which is of primary concern. It is the *degree* of and circumstances surrounding such relationship, and most particularly the degree of influence that might be exerted, which should dictate a judgment as to reliability, a judgment which must be taken with the utmost care. . .

42. This type of qualifier should be attached to the other two criteria of 'unreliability'. Relatives and associations abroad should not necessarily be an impediment to obtaining a security clearance. Greater consideration needs to be applied in each case to ascertain the degree of influence that could be exerted upon a candidate from relations abroad, before any decision to deny clearance is made. Similarly, in order to calculate the possibility of a candidate being indiscreet, dishonest or vulnerable to blackmail or coercion, it is not sufficient merely to provide information about certain character traits such as indebtedness, drinking habits, or sexual proclivities. Rather, there must be evidence of a connection or a potential connection between these character traits and a threat to Canada's security. For instance, for a homosexual relationship or an extra marital affair to be of relevance to a security clearance decision, there must either be evidence that the candidate is having this relationship or affair with a person who is known or suspected to be a threat to Canada's security or who is somehow connected with such a threat, or alternatively, that the conduct of the candidate is such that it will make him vulnerable to blackmail.

43. Our view that character traits must be related, or potentially related, to a security threat has important implications for the type of information that a

security intelligence agency should collect about individuals. We are very concerned about the systematic collection of information on individuals solely because such individuals exhibit a certain character trait. As we noted earlier, there has been a concerted effort on the part of the Security Service for over two decades to collect information on homosexuals. This programme began as a result of reports in the mid 1950s that the Communist bloc Intelligence Services were involved in operations to recruit homosexuals with access to classified information. By the late 1950s a seven-man team was established to investigate homosexuals in sensitive government positions. In 1960 a special squad of investigators was established to interview homosexuals in Ottawa not in the government. The Security Service in several other cities was also involved in investigating homosexuals. On the basis of interviews and Morality Squad records, the Security Service had, by the 1960s, a fairly thorough knowledge of the members of the homosexual community. Because of the effectiveness of these investigations the teams of investigators were gradually reduced. Although in 1969 an amendment to the Criminal Code made a homosexual act in private between two consenting adults no longer an offence, the Security Service continued to collect intelligence on the homosexual community. The security screening branch of the Security Service became responsible for homosexual investigations. There is now one member of that branch responsible for writing security reports on homosexuals and for directing the occasional field investigation.

44. The collection programme we have described is inconsistent with the proper role of a security intelligence agency. That such a programme has not been halted years ago is a striking illustration of an insensitivity about what the Security Service ought to be securing. Moreover, it is illustrative of a poor analytical capability within the Security Service. We believe that the security intelligence agency should no longer systematically collect information on homosexuals or for that matter on any group of people solely because they exhibit a certain character trait. Such collection programmes do not conform to the principles we established in Part V, Chapter 4 for opening and maintaining files on individuals. The existing files on homosexuals that are not relevant to security ought to be destroyed.

The Profumo affair: a case study

45. The principles we have developed in this section are consistent with those enunciated by Lord Denning in 1964 in his Report on what was known as the Profumo Affair. Lord Denning considered that when the police (i.e. the police carrying out their duty to enforce the criminal law) come across discreditable incidents in the life of a Minister, they are not to report it — save only if it appears that the security of the country may be endangered. In this case, they should report the information to the British Security Service. Experience in recent years in Canada has been that the R.C.M.P. Security Service has encouraged the police, particularly in the Ottawa area, to report "discreditable incidents" to it on a much wider basis than Lord Denning's views, or our own, would regard as proper.

46. As for the British Security Service, Lord Denning said that it was a

> ... cardinal principle that their operations are to be used for one purpose, and one purpose only, the *Defence of the Realm*. They are not to be used so as to pry into any man's private conduct, or business affairs: or even into his political opinions, except in so far as they are subversive, that is, they would contemplate the overthrow of the Government by unlawful means...
>
> Most people in this country would, I am sure, whole-heartedly support this principle, for it would be intolerable to us to have anything in the nature of a Gestapo or Secret Police to snoop into all that we do, let alone into our morals.[14]

In the circumstances before him, Lord Denning found that the British Security Service had two proper roles. One was "to defend the country against any activities by or on behalf of Russian agents", and in particular those of a Russian Intelligence officer named Ivanov. The second was to consider the possibility that Ivanov might defect and help the British. Lord Denning found that the British Security Service had

> ... confined themselves to the role I have described. They had, at one critical point, carefully to consider whether they should inquire into the moral behaviour of Mr. Profumo — they suspected that he had had an illicit association with Christine Keeler — but they decided that it was not their concern. It was a new problem for them to have to consider the conduct of a Minister of the Crown, and they decided it by reference to the principles laid down for them, to wit, they must limit their inquiries to what is necessary to the Defence of the Realm: and steer clear of all political questions. And this is what they did.

Lord Denning continued:

> The only criticism that I can see of the decision is that the conduct of Mr. Profumo disclosed a character defect, which pointed to his being a security risk (e.g., the girl might try to blackmail him or bring pressure on him to disclose secret information). But at the time when the information came to their knowledge, his association with the girl had ceased. Captain Ivanov had gone. And what remained was not sufficient to warrant an infringement of the principle that the Security Service must not pry into private lives. At any rate, it was not such a risk as they should investigate without express instructions.[15]

Thus Lord Denning appeared to accept that, if Mr. Profumo's association with Christine Keeler had not ceased, the Security Service would have been justified in continuing to investigate or "pry into" Mr. Profumo's life because his "character defect" made him a security risk.

47. The recording of such information is acceptable when so obtained because it may in due course be relevant to the investigation. But when the investigation is complete, if the information about the person's private life is no longer relevant to any suspected security risk, it ought to be discarded. It is not clear from the passage quoted what Lord Denning's view would have been if a

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[14] Cmnd. 2152, 1963, paragraph 230.

[15] *Ibid.*, paragraphs 233 and 234.

Russian Military attaché had not been connected with Mr. Profumo's affair with Christine Keeler. Where the illicit behaviour is connected with a foreign intelligence agent its security relevance is clear as is the security intelligence agency's mandate to investigate and, if the incident points to a security risk, to report it. But what if there is no discernible relationship between the personal behaviour and a subversive political activity, and the concern is simply that the Minister is involved in circumstances which make him highly vulnerable to blackmail? Should the security intelligence agency ascertain the reliability of a report of such behaviour, and if they find it reliable, report it to the Prime Minister? We believe that the agency should ascertain the reliability of such information, and if it is reliable, report it to the Prime Minister in the case of a Minister, or to the appropriate Deputy Minister in the case of a public servant in a security classified position.

WE RECOMMEND THAT a person should be denied a security clearance only if there are

(1) Reasonable grounds to believe that he is engaged in or is likely to engage in any of the following:

(a) activities directed to or in support of the commission of acts of espionage or sabotage;

(b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;

(d) revolutionary subversion, meaning activities directed towards or intended ultimately to lead to the destruction or overthrow of the liberal democratic system of government;

or

(2) Reasonable grounds to believe that he is or is likely to become

(a) vulnerable to blackmail or coercion, or

(b) indiscreet or dishonest,

in such a way as to endanger the security of Canada.

(119)

WE RECOMMEND THAT the existing Security Service files on homosexuals be reviewed and those which do not fall within the guidelines for opening and maintaining files on individuals be destroyed.

(120)

D. SECURITY SCREENING ROLES AND RESPONSIBILITIES

48. The R.C.M.P. Security Service now plays a central role in the security screening process. For Top Secret clearances, the Security Service initiates

three investigatory procedures: (1) it checks its own files for relevant information on the candidate, his relations and close associates; (2) it requests the criminal investigation side of the Force to do a fingerprint check of criminal records; (3) it does a field investigation. A Secret or Confidential level clearance requires only the first two of these procedures, although a field investigation can be initiated for cause. Based on the information it collects from these investigations, the Security Service assesses the candidate from a security standpoint and, until recently, advised the Department on whether or not to issue a security clearance.

49. In this section, we shall propose that the security intelligence agency play a much less central role in the security screening process. We shall recommend the establishment of a pool of personnel security staffing officers under the direction of the Public Service Commission, the federal government's central staffing agency. This pool of security staffing officers would be responsible for initiating the necessary investigatory procedures, for actually doing the field investigations and for liaising with and advising the departmental security officers on security clearance matters. The role of the security intelligence agency would be to provide the Public Service Commission's security staffing officers with security relevant information from its files on a candidate and, in some cases, to conduct an investigation in order to update or clarify certain information on a particular candidate or a group to which the candidate belongs. In addition, the agency should become an important source of advice on both individual security clearance questions and more general matters concerning the security clearance system as a whole. We elaborate on these proposals by examining two aspects of the Security Services current role — conducting field investigations and advising on security clearance matters.

Field investigations

50. We have four reasons for recommending the establishment of a pool of security staffing officers, under the Public Service Commission, with primary responsibility for initiating security screening investigations and actually doing field investigations. First, security screening field investigations uncover information about the personal habits and activities of an individual, and rarely disclose anything of an adverse nature relevant to the security of Canada. Thus, field investigations are primarily a personnel function in a security context, not a security intelligence function. By establishing a separate group of people to perform these investigations, the government and the people of Canada can have greater confidence that the security intelligence agency with all of its intrusive investigatory powers is confining itself to gathering and storing information which is relevant to its mandate. Under this arrangement, there can be no possible excuse for a security intelligence agency to collect information on a broadly defined group of people like the homosexual community.

51. A second reason for our central recommendation in this section concerns the control mechanisms we have established for the recruitment of human sources by the security intelligence agency. We believe that the use of human sources recruited and paid by the state must be carefully controlled lest this

intrusive investigative technique seriously damage institutions vital to our democratic beliefs. As we noted in Part III, Chapter 11, the Security Service has on occasion used the security clearance programme as a pretext for the recruitment of sources on university campuses in order to circumvent existing government control procedures. By assigning the field investigation function to another agency, we believe that this type of abuse will be less likely to recur.

52. Third, it is clear to us that a small security intelligence agency will experience difficulties in properly staffing this security screening function. As we noted earlier, much of the content of the job of a field investigator has little to do with security intelligence; consequently, it will be difficult for the agency to attract into this area security intelligence officers who have the background and skills to do the work properly. For a competent and experienced security intelligence officer, security screening does not have the attractions of many other aspects of the agency's work. By placing this function in the government's central staffing agency, we believe that it will be easier to find appropriate staff. The Public Service Commission will have the whole of the federal government from which to draw candidates. Moreover, given the similarity of the screening jobs to personnel staffing work, there might be employees within the P.S.C. itself who would be interested in spending part of their careers in this function. Those who become security staffing officers should be mature individuals well versed in the variety of political ideologies relevant to Canadian society, sympathetic to the democratic principles which the security screening process is designed to protect, knowledgeable about and interested in human behaviour and the various methods used by foreign intelligence agencies to compromise people, and above all competent at interviewing a wide variety of people.

53. Finally, having another agency in addition to the security intelligence agency with experience and expertise in the security screening function will benefit government departments and agencies by providing two sources of advice to draw from in making difficult security clearance decisions. Thus, on difficult cases, it would be wise for departmental security officers to meet simultaneously with members of both the security intelligence agency and the Public Service Commission security staffing pool to ensure that the assumptions of both agencies are carefully tested. This idea of introducing countervailing pressures into the security screening procedures parallels recommendations we have made in other aspects of security intelligence decision-making in government. We shall develop this general theme more fully in Part VIII.

54. As an alternative to creating a pool of security staffing officers in the Public Service Commission, we have considered the assigning of security screening responsibilities to the departments themselves. In departments where the volume of security work is relatively small, the Departmental Security Officer is probably not the most appropriate person to conduct these security screening interviews. While competent in the carrying out of departmental security procedures, few Departmental Security Officers are highly skilled personnel interviewers. Because we think it is essential to attain a consistently high standard of security personnel interviews and verification of references across departments, a pool of personnel security staffing officers should be

established within the Public Service Commission. These personnel security staffing officers should be assigned responsibility for specific government departments and agencies. If certain departments have the expertise and resources to meet the standards of the personnel security staffing officers in the pool, then these departments, through an arrangement similar to that now maintained by the Department of National Defence, could carry out their own security screening interview programme. We believe that the Interdepartmental Committee on Security and Intelligence should be the body to decide which departments should have responsibility for their own field investigations. In making these decisions, this Committee should ensure that there is some means of co-ordinating federal government screening activities so that these activities are done consistently and competently across the government.

55. While primary responsibility for field investigations should rest with the security staffing officers in the Public Service Commission, there are occasions when the security intelligence agency should also conduct field investigations for security screening purposes. Such occasions would occur when there is a trace or a hint of a kind of political activity on the part of a candidate that would fall within the agency's mandate. It is essential that field investigations of the security staffing officers not spill over into the investigation of political activities which is under the mandate of the security intelligence agency. Thus, the security staffing officers might become suspicious either because of a remark by the candidate himself or because of a comment by one of his referees. Alternatively, the security intelligence agency might have information on its files about a candidate — information which is dated or ambiguous and which consequently requires further clarification.

56. In addition to recommending a change in the agency having primary responsibility for the field investigations, we also propose changes in how field investigations are conducted. The current field investigation is neither effective nor appropriate as a method of meeting the security requirements of the personnel clearance programme. While the philosophy of the current investigative approach may well have been reasonably sound in 1948, from a practical standpoint the procedure is no longer viable. The increased impersonalization of society in the last 30 years has made it more difficult to obtain useful information from neighbours and employers. The strength of the civil rights sentiment has led to a growing reluctance on the part of employers and educators to co-operate with the Security Service in the screening interviews. With the advent of consumer protection legislation in the early 1970s, credit bureau checks are no longer an effective way to obtain personal financial information. Concern about maintaining the confidentiality of health records has called into question the propriety of the R.C.M.P. obtaining such records to investigate the "mental stability" of candidates for a security clearance. The R.C.M.P.'s dissatisfaction with present field investigation procedures is evident in this extract from a memorandum on security screening sent by Director General Dare to the Security Advisory Committee, on October 18, 1979.

> We are satisfied that our enquiries are not producing information which is specifically relevant to the security clearance process in over 98 per cent of the routine field investigations conducted, although it may be of some

benefit in the staffing context. And we are equally satisfied that information produced in the other 2 per cent, which usually reflects adversely on the character of the candidate, can be obtained by other means.

57. We believe that one prerequisite for obtaining an adequate insight into a person's reliability is an interview with a candidate, conducted by the Public Service Commission's security screening personnel. Second, we propose that the candidate name three referees whom the security screening officer might interview in order to gain an insight into the character of the candidate. We believe that this would be an improvement over the current practice of interviewing neighbours or employers, who in many cases may scarcely know the candidate. If the Public Service Commission security screening pool does not find the list of referees provided by the candidate to be satisfactory, then it should request additional referees as is the practice for other personnel enquiries. It should also be free to interview other persons as it sees fit.

58. Both Top Secret and Secret level clearances should require an interview of the candidate by the personnel security staffing officer. During the interview, the personnel security staffing officer should explain the security aspects of the classified position to the candidate and try to elicit any hesitations he or she may have about taking on such a position. The security staffing officer should also attempt to assess aspects of the candidate's character that would make the person particularly susceptible to blackmail or indiscretion. The interview should occur after several referees have been interviewed for a security reference. This timing would give the security staffing officer an opportunity to discuss any doubts expressed by the referees.

59. Mandatory interviews with candidates for Secret level clearances would bring the requirements of a Secret level clearance close to those for a Top Secret clearance. Until now the procedure for a Secret level clearance has been the same as that for a Confidential level clearance. In the case of both these lower level clearances, because there has been no field investigation there has essentially been no check on the "reliability" of candidates, with the one exception of the homosexual records checks. Reliability is an important criterion of screening, and should be included in Secret level clearances. An interview with the candidate should help the various government departments to assess this reliability. Interviews with the referees should not be necessary for the Secret or Confidential levels of clearance.

60. This proposed change in the security screening procedure should meet any international screening commitments Canada may have.

61. We make one final comment on the field investigation procedures. Many aspects of the current field investigation are actually personnel staffing functions. It is good employment practice to check a candidate's credentials. Academic records and employment histories, now checked as part of a field investigation, should become the responsibility of the personnel staff of the various employing departments and agencies. Credit bureau checks can equally well be carried out, if departments so desire, by personnel staffing officers.

Advisory role

62. We have already noted that the security intelligence agency should provide advice to both departments and Public Service security staffing personnel on security clearance cases, particularly those which call for careful judgments. In performing this role, the agency may find it necessary, on occasion, to clarify ambiguous or contradictory information or to update its assessment of the activities of a particular individual or group. Such is the current arrangement between the Security Service and the Department of National Defence, and it is similar to what we understand is the role of the Security Service in Britain.[16] Security intelligence officers should also provide assistance to the Public Service Commission on request by assessing information the security staffing officers have collected through interviews with candidates and their referees. If there is a difference of opinion between the security intelligence agency and the security staffing officer as to whether or not a security clearance should be granted to a particular candidate, the Departmental Security Officer should ensure that the Deputy Minister is informed of this difference.

63. In addition to advising on particular cases, the security intelligence agency should develop a competent research capacity for the purpose of providing advice to government on a variety of general matters affecting the security clearance programme including the following:

- information on the latest techniques used by foreign intelligence officers to compromise people;
- the risks posed by individuals with certain character traits;
- developments relating to security screening in other countries;
- advice on policy changes to improve the government's screening procedures.

The Security Service provides some advice in these matters but not to the extent which we believe necessary. Given its relationships with foreign agencies, and given its experience in investigating foreign intelligence officers in this country, the security intelligence agency is the organization in government best suited to provide such advice.

Criminal records checks

64. To complete this portion of our review of the security screening process, we turn to one final topic — the role of the R.C.M.P. in conducting a criminal records check. A check of records of indictable offences (using fingerprints) is part of the screening procedure for all full-time positions requiring a security clearance. This requirement, explicit in CD-35, does not apply to contract employees. Nevertheless, following the recommendation of the Royal Commission on Security that this fingerprint procedure be instituted for all those with access to classified information, a practice has developed of requesting fingerprints from some contract personnel. Fingerprinting is usually requested for

[16] See Cmnd. 1681, 1962, paragraph 70.

support staff and maintenance personnel on defence contracts, though not for professional contract personnel such as lawyers and professors.

65. The fingerprint check is inadequate as a procedure to help establish the trustworthiness of an individual about to be granted access to classified information. Only indictable offences and the 'wanted list' are checked. Summary offences, commercial fraud involvement or underworld or drug culture connections will not necessarily be uncovered by the fingerprint check. Intelligence on these other forms of criminal activity is collected in various other files in the criminal investigative side of the R.C.M.P. To obtain a more thorough verification of the absence of criminal activity these files should also be checked. If a copy of the Personal History Form is necessary to check these files, then such a form should be forwarded to the criminal investigation side of the R.C.M.P.

66. Pardoned or vacated records should be respected in security screening and should not be mentioned in security screening reports. The position we take in this regard is contrary to that of the Royal Commission on Security, which recommended that full criminal records should be available for security clearances, regardless of decisions on vacating records in other contexts. A pardon under the Criminal Records Act is granted when individuals, after a conviction, have subsequently shown that they are responsible citizens and have reintegrated into society. According to the National Parole Board the purpose of such a pardon is "to remove the stigma that so often restricts or adversely affects an individual's peace of mind, social endeavours, or career".[17] To use such a record for security clearance purposes would seem to contradict the intent of the pardon procedure.

A summary

67. At this point, it would be useful to illustrate how our proposed screening system would function. Assume that a competition has been held for a position in the Public Service with access to Top Secret information. The winner of this competition (but not the other candidates), assuming that he was not already in a security classified position, would then undergo security screening. He would fill out a personal history form and submit it along with the names of three referees to the Departmental Security Officer, who, in turn, would forward this information to the appropriate security staffing officer in the Public Service Commission. This security staffing officer would request both the R.C.M.P. and the security intelligence agency to do a records check on the candidate. If the security intelligence agency had some indication in its records of involvement by the candidate, his relations or close associates in activity which fell within its mandate, or there were some ambiguity about its information, the agency might conduct an investigation to clarify or update its records. Having received replies from the R.C.M.P. and the security intelligence agency on their records checks, the security staffing officer would interview each of the three referees. (If the staffing officer believed that any of these referees was unsatisfactory, he would request additional names from the

[17] National Parole Board, *Pardon under the Criminal Records Act*, Ottawa, 1980, p.1.

candidate. He could also interview other persons as he saw fit except to seek medical information.) Once these interviews were completed, he would then interview the candidate himself, and, if appropriate, he would review with the candidate any information that he had so far received. Given that the Deputy Minister of a department is responsible for deciding whether or not to grant a security clearance, the screening officer would summarize all security relevant information which had come to light during the screening process and, in addition, the officer would make a recommendation on whether or not to grant a clearance. In difficult cases, the security staffing officer would consult with the security intelligence agency (and possibly the R.C.M.P.) before making his recommendation to the department. In his report, he would indicate the recommendation of the security intelligence agency on the matter. This information would be sent to the Departmental Security Officer who would brief his Deputy Minister on difficult cases. The Deputy Minister, before making his decision on such cases, would likely meet with the Public Service Commission screening officer and the appropriate person from the security intelligence agency. Should the Deputy Minister decide not to grant a clearance at this point, then the review and appeal process would begin. This process is the subject of the next section of this chapter.

WE RECOMMEND THAT the federal government establish a pool of security staffing officers under the direction of the Public Service Commission with responsibility for:

(a) carrying out security screening procedures on behalf of federal government departments and agencies;

(b) conducting field investigations for security screening purposes;

(c) assessing the information resulting from the various investigatory procedures related to security screening;

(d) providing departments and agencies with advice on whether or not to grant security clearances.

(121)

WE RECOMMEND THAT Public Service Commission security staffing officers be mature individuals

(a) well versed in the variety of political ideologies relevant to Canadian society;

(b) sympathetic to the democratic principles which the security screening process is designed to protect;

(c) knowledgeable about and interested in human behaviour and the various methods used by foreign intelligence agencies to compromise people;

(d) competent at interviewing a wide variety of people.

(122)

WE RECOMMEND THAT the Interdepartmental Committee on Security and Intelligence decide what departments or agencies should have responsibility for conducting their own security screening interviews and field investigations.

(123)

WE RECOMMEND THAT the following changes be made to the field investigation procedures:

(a) for Top Secret level clearances, the Public Service Commission security staffing officers should interview three referees named by the candidate. If the list of referees provided by the candidate is not satisfactory, then the Public Service Commission should request additional referees. The security staffing officers should also interview other persons as they see fit, except to seek medical information;

(b) for Top Secret and Secret level clearances, the Public Service Commission security staffing officers should interview the candidate;

(c) good employment practices, such as checking a candidate's credentials, academic records, and employment histories should not be the responsibility of security staffing officers;

(d) in those departments and agencies which are responsible for conducting their own security screening interviews and field investigations, the functions mentioned in (a) and (b) above would be performed by their own security staffing officers.

(124)

WE RECOMMEND THAT the security intelligence agency have responsibility for:

(a) providing the Public Service Commission and departmental security staffing officers with security relevant information from its files about a candidate, his relations and close associates;

(b) conducting an investigation when necessary to clarify information or to update its assessment of a particular candidate or group relevant to the candidate's activities;

(c) advising the Public Service Commission and the employing department or agency through the security staffing officer on whether or not a candidate should be granted a security clearance;

(d) advising the federal government on general matters affecting the security clearance programme.

(125)

WE RECOMMEND THAT the R.C.M.P., as part of the security screening procedures in future, conduct

(a) a fingerprint records check and,

(b) a check of its various criminal intelligence records

for all persons with access to classified information.

(126)

WE RECOMMEND THAT pardoned or vacated criminal records not be included in screening reports.

(127)

E. REVIEW AND APPEAL PROCEDURES

68. The purpose of security screening is to ensure as far as possible the protection of information the disclosure of which might endanger the security

of the country. Nevertheless, the screening procedure must be sensitive to the requirements of individual justice and fair treatment, requirements which are essential to the very nature of the democratic system we are trying to protect. CD-35 attempted to reconcile screening procedures for the preservation of security with a review procedure that would protect the individual's rights and interests. It has not been wholly successful. We begin this section by examining some of the principal weaknesses of the review and appeal procedures contained in CD-35. We then describe the nature of the changes necessary to correct these weaknesses. Our major recommendation calls for the establishment of a Security Appeals Tribunal, an advisory body to hear appeals in the areas of public service employment, citizenship and immigration.

Weaknesses of CD-35

69. CD-35 was a classified document until it was made public by us in 1978. Previously, persons whose careers and livelihoods were adversely affected usually had no idea of the opportunities available under CD-35 to resolve doubts as to their suitability for a position requiring a security clearance. Often they would not even be told of their ineligibility for a position because they had been denied a security clearance. As a first principle, therefore, the government should publicize widely any future review and appeal procedures established for security screening purposes. In addition, the Interdepartmental Committee on Security and Intelligence should establish monitoring and control mechanisms to ensure that departments follow the review and appeal procedures.

70. Another problem with the review procedures of CD-35 is that they are not comprehensive enough. The contract employee has no right of review. Nor does the applicant from outside the Public Service. The Departmental Security Officer may request a further specific investigation to resolve the doubts raised over granting the clearance but there is no requirement to do so. Nor is there even a requirement to inform an applicant of the reason he was refused the job. The review procedures offer more protection for the individual who is already an employee of the Public Service, but even here the protection is far from complete, as the Ronda Lee case, which we summarize later in this section, illustrates.

71. Perhaps the most important weakness of CD-35, however, is the lack of an effective and independent appeal mechanism, although it does provide for some review procedures within the executive branch. According to CD-35, if doubt has been raised about the advisability of allowing an employee access to classified information and if the doubt cannot be resolved, or if further investigation is inexpedient, the assistance of the employee should be sought in an attempt to resolve the doubt. A senior officer of the department, after consultation with the Security Service, shall

> interview the subject and inform him, to the fullest extent that is possible without jeopardizing important and sensitive sources of security information, the reasons for doubt, and shall give the employee an opportunity to resolve it to the satisfaction of the responsible department or agency.[18]

[18] CD-35, paragraph 15.

Should the doubt remain, the department or agency is to withhold clearance and consult with the Privy Council Office for assistance in determining whether the employee can be informed of the situation and transferred to a less sensitive position, or whether the employee should be asked to resign, and, if he refuses, be dismissed. Before dismissal is recommended to the Governor in Council, two conditions must be met:

(a) the Deputy Minister or head of agency personally has to make a complete review of the case, including interviewing the employee;

(b) the employee must be as fully informed as possible about the charges, and allowed an opportunity to submit any information or considerations he thinks ought to be taken into account.[19]

72. There are some admirable features about these review procedures but the lack of an independent appeal mechanism is a glaring weakness. To some extent, the government has moved to correct this weakness. In 1975 the Public Service Security Inquiry Regulations were adopted. According to these regulations, if the Deputy Minister has proposed that a person be dismissed from the Public Service for reasons of security, a Commissioner may be appointed. This Commissioner has access to all files that he considers pertinent to the inquiry. The Commissioner notifies the employee that he is about to be dismissed and discloses the circumstances and information necessary to acquaint the appellant with the nature of the charges, keeping in mind the constraints of security. At the inquiry, the appellant, who may be represented by counsel, has a chance to present further evidence, including calling witnesses. Upon conclusion of the inquiry the Commissioner submits a report to the Governor in Council. It is only by a decision of the Governor in Council that an employee can be dismissed from the Public Service on security grounds.

73. As we noted in section A of this chapter, no Commissioner has ever been appointed. Since the enactment of the Public Service Security Inquiry Regulations, no one has been dismissed from the Public Service for security reasons, although some have resigned and others have been transferred or have had their careers adversely affected. Many have been denied employment or contract work. The last years for which figures are available, 1972 and 1973, indicate that for these two years 103 were denied employment for various reasons related but not necessarily confirmed as security factors, 6 resigned, and 160 were denied access, of whom 66 were transferred.

74. A recent case before the Federal Court of Appeal, that of Ronda Lee, a public servant seeking a transfer into a position requiring a security clearance, illustrates many of the shortcomings of the current review and appeal procedures for those persons whose careers have been, or are suspected of having been, adversely affected by security procedures. Ms. Lee, the successful applicant in an internal government competition for a position with the R.C.M.P., was passed over in favour of another candidate because she received an adverse security report. No attempt was made to resolve the doubts raised about her. Ms. Lee appealed the decision to the Public Service Commission Appeal Board, which determines if the merit principle has been applied in the

[19] Paraphrased from CD-35, paragraph 17.

selection of successful applicants. The Board ruled that it had jurisdiction to hear the case on the grounds that security clearance, a required qualification for the position, was a merit consideration. The Board allowed the appeal because the R.C.M.P., as the hiring department, refused to disclose the security information or the reasons for the decision to deny clearance. The Attorney General of Canada appealed successfully to the Federal Court of Appeal which held that the Public Service Commission Appeal Board had no jurisdiction to inquire into the security clearance question.[20] In an *obiter dictum*, Mr. Justice Heald noted, however, that the fact that Ronda Lee had not been afforded the opportunity, provided for in CD-35, to resolve the doubt was a "disturbing" aspect of the case, possibly forming the basis for "relief to be sought elsewhere".

Required changes

75. The case of Ronda Lee illustrates the need for improvements in the procedures for reviewing security clearance decisions. The first step is to improve the review procedures for handling adverse security reports within the executive branch of government. We believe that senior officials should make a significant effort to remove doubt about adverse security information and to ascertain if some amicable settlement is not possible. The Interdepartmental Committee on Security and Intelligence should prepare for the approval of the Cabinet Committee on Security and Intelligence a set of internal review procedures which would satisfy the following four points:

(a) The procedures must be comprehensive. They must provide for all individuals, whether public servants or not, who have been, or who suspect that they have been, adversely affected by the security clearance process.

(b) Decisions which adversely affect individuals for security reasons — these could be decisions to fire a public servant, to deny promotion or transfer to a classified position or to refuse to hire an individual — should be made by the Deputy Minister of the department concerned about the security problem.

(c) Before making such a decision, the Deputy Minister must provide the individual in question an opportunity to resolve the reasons for doubt.

(d) Before making his decision, the Deputy Minister should consult officials in at least the Privy Council Office's Security Secretariat to seek their advice on how the case should be handled.

76. When all administrative efforts to resolve the situation amicably have failed, the next step towards a more just security clearance procedure is the need to establish an appeal mechanism. The Royal Commission on Security recommended such a body, but despite public avowals of support for the idea from both government and opposition critics, the recommendation has been

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[20] The reasons for judgment are now reported: *Re Lee* (1980) 31 N.R. 136 (Fed. C.A.). The case is now under appeal to the Supreme Court of Canada.

only partially implemented. Dismissals from the Public Service for security reasons and deportation orders against permanent residents on security or criminal grounds are the only situations where an appeal mechanism has been established. The establishment of a comprehensive security appeal procedures is a pressing issue which has not been resolved. Prime Minister Trudeau noted in the House of Commons on June 26, 1969, that the government duty to ensure the security of the State, "perhaps more than any other, requires public assurance that the measures taken in its discharge are not of a character which could infringe the basic rights of individuals or be damaging to their careers and reputations".[21] He continued:

> For this reason, Mr. Speaker, the government, after careful consideration, has decided to accept the commissioners' recommendation for the establishment of a Security Review Board. Full details of the scope, character and operation of the board are still under consideration and these may differ in some respects from the commission's recommendations...
>
> It is their opinion that such a system of review might be required in the three areas of employment, immigration and citizenship. The three basic principles which they would apply are: first, that the individuals concerned be given as many details as possible of the factors which have entered into the decisions; second, that the decisions of the Review Board could only be advisory; and third, that the importance of expertise and understanding in security matters is such that the same board should review contentious decisions in all of the three areas.
>
> With these basic principles the government agrees.[22]

77. We agree with these three principles for a security review board. We would add a fourth principle. The review body should be composed of individuals who are independent of the federal government in the sense that they are not employed by a federal department or agency. We propose that a Security Appeals Tribunal be established by statute to hear security appeals in the three areas of Public Service employment, immigration, and citizenship. In the following chapters we shall discuss in detail the appeal procedure for immigration and citizenship. In the case of Public Service positions, an independent review should be afforded all persons who have been, or who suspect that they have been, adversely affected by federal government security screening procedures, including Order-in-Council appointees, and Members of Parliament. The Security Appeals Tribunal should replace and extend the function of the Commissioner provided for in the Public Service Security Inquiry Regulations. A Commissioner of the Public Service Commission has stated publicly that the number of adverse security reports is small, "but the problem is that the number of public servants who feel their careers have been adversely affected is large".[23] We are also aware of a number of M.P.s who believe their careers have been adversely affected by unjustified or erroneous security reports.

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[21] *House of Commons, Debates*, June 26, 1969, p. 10637.

[22] Idid.

[23] *Ottawa Citizen*, June 12, 1980.

78. The Security Appeals Tribunal must disclose to the appellant as much information as is possible without jeopardizing the security of Canada. One of the principles of natural justice dictates that the accused know all the facts of the allegations. However, insistence upon full application of this principle could seriously harm the security of Canada through the disclosure of such vital information as the identity of sources. The best compromise we can suggest is that, in order to afford the appellant reasonable reassurance that the information which he is prevented from seeing has been classified on sound grounds, the information should be reviewable by an independent Tribunal. As is provided in the Public Service Inquiry Regulations and the Immigration Act, the Tribunal must have the discretionary power to decide what information it can disclose, although it should first consult the security intelligence agency or the personnel security staffing officer as to why the information has so far been denied to the appellant.

79. The composition and procedures of this Security Appeals Tribunal should reflect the independent nature of the review. The Tribunal should consist of five members, of whom any three could compose a panel to hear appeals. The chairman should be a Judge of the Federal Court of Canada. The other members of the Tribunal should be appointed by the Governor in Council but should not be currently employed by a government department or agency. The members of the recently established Australian Security Appeals Tribunal are of similar independent calibre. The first president of the Tribunal, which reviews public service, immigration and citizenship adverse security reports, is a judge of the New South Wales Court of Appeal; the second member is a former chairman of the Australian Institute of Political Science, and the remaining members, who may be involved depending upon the case being heard, are a former Deputy Attorney General (as we would call him), a retired Air Vice Marshal and a senior academic who is chairman of a "Migrant Resources Centre."[24]

80. As in the case of appeals against dismissal from the Public Service or for deportation on security grounds, the Security Appeals Tribunal must have access to all information pertinent to the case. It should be able to require any person, other than the appellant, to supply relevant information and testimony. The appellant should have the opportunity to give evidence, call witnesses and be represented by counsel. The Australian Security Appeals Tribunal permits the Australian Security Intelligence Organization a similar opportunity to give evidence, although neither party may be present when the other is making his or her case. This procedure could be added to the Canadian security appeals process.

81. The Security Appeals Tribunal, as we envisage it, would be only an advisory body. The final decision on cases appealed to the Security Appeals Tribunal should rest with the Governor in Council. At the conclusion of its hearing the Tribunal should submit a written report and recommendation to the Governor in Council.

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[24] *Canberra Times*, June 7, 1980.

82. It is very important that members of the Tribunal build up an expertise in security screening matters. This is a major reason for recommending that the Tribunal also hear appeals in those other security clearance areas — immigration and citizenship. To increase its expertise, the Security Appeals Tribunal should also review all screening reports that do not go to appeal, but which contain adverse information. These reports would be those which were sent to departments by the security intelligence agency or by the personnel security staffing officer, but which did not go to appeal because the Deputy Minister or agency head decided to grant the clearance, or the clearance was denied and the individual concurred with the reasons for denial. A review of these reports (about 500 a year) would provide the Security Appeals Tribunal with an overall view of the security screening information reported. The Tribunal would therefore not be hearing appeals in a vacuum but in the context of other adverse reports. The Tribunal should compile the results of these adverse reports and report on them annually to the Interdepartmental Committee on Security and Intelligence. In these annual reports, the Security Appeals Tribunal should bring to the attention of the government any changes it considers necessary in the security clearance process. The Tribunal, though not responsible for policy changes in this area, will have one of the best vantage points from which to assess the effectiveness and fairness of security screening procedures.

83. In our review of the security screening system, we were alarmed to find that there was no one organization charged with the responsibility of monitoring the system and initiating policy changes. One manifestation of this deficiency is the lack of a comprehensive, up-to-date set of statistics which would allow year by year comparisons of such important indicators as the number of people screened for each security classification, the number of adverse reports, and the number of individuals adversely affected by the screening procedures. We deal with the question of who should have responsibility for policy changes concerning security screening in Part VIII, Chapter 1. In essence, we shall recommend that the Cabinet Committee on Security and Intelligence should have ultimate responsibility here and that this Committee should designate a lead Minister to monitor and initiate policy changes in areas such as personnel security, physical security and emergency planning.

WE RECOMMEND THAT the federal government widely publicize any review and appeal procedures established for security screening purposes and that the Interdepartmental Committee for Security and Intelligence establish monitoring and control mechanisms to ensure that departments and agencies follow these procedures.

(128)

WE RECOMMEND THAT the Interdepartmental Committee for Security and Intelligence prepare for the approval of the Cabinet Committee on Security and Intelligence a set of internal review procedures for adverse security reports, to include at least the following points:

(a) the procedures must be comprehensive enough to include all individuals who might be adversely affected by security clearance procedures;

(b) decisions which adversely affect individuals for security reasons should be made by the Deputy Minister of the department concerned about the security problem;

(c) before making such a decision, the Deputy Minister should provide the individual in question with an opportunity to resolve the reasons for doubt;

(d) before making his decision, the Deputy Minister should consult appropriate officials in at least the Privy Council Office's Security Secretariat.

(129)

WE RECOMMEND THAT the federal government establish, by statute, a Security Appeals Tribunal to hear security appeals in the areas of Public Service employment, immigration, and citizenship. In the case of Public Service employment all individuals who have been or who suspect that they have been adversely affected by security screening procedures should have access to the Tribunal. The specific responsibilities of the Tribunal concerning Public Service employment should be as follows:

(a) to advise the Governor in Council on all appeals heard by the Tribunal;

(b) to review all adverse screening reports of the security intelligence agency and the Public Service Commission's security screening unit;

(c) to report annually to the Interdepartmental Committee on Security and Intelligence about its activities and about any changes in security clearance procedures which would increase either their effectiveness or their fairness.

(130)

WE RECOMMEND THAT

(a) the Security Appeals Tribunal consist of five members appointed by the Governor in Council, any three of whom could compose a panel to hear security appeals;

(b) the chairman of the Tribunal be a Federal Court Judge;

(c) the other members not be currently employed by a federal government department or agency.

(131)

WE RECOMMEND THAT the Security Appeals Tribunal disclose as much information as possible to the appellant and that the Tribunal have the discretion to decide what security information can be disclosed to the appellant.

(132)

WE RECOMMEND THAT the procedures of the Security Appeals Tribunal be similar to those now established for appeals against the dismissal from the Public Service or against deportation, with the added feature that members of the security intelligence agency or personnel security staffing officers be allowed to appear before the Tribunal to explain the reasons for denying a security clearance.

(133)

CHAPTER 2

IMMIGRATION SECURITY SCREENING

A. HISTORICAL BACKGROUND

1. Canada is a country mainly composed of immigrants or their descendants, but the desire to encourage immigration has become increasingly tempered by selectivity in deciding who will be permitted to immigrate. Statutory rejection criteria and screening procedures have been developed over the years to prevent the immigration of individuals deemed undesirable for occupational, medical, criminal, or security reasons. The numbers rejected for security reasons have always been negligible — less than one per cent of the total number of potential immigrants refused entry. Nevertheless, security rejections are sometimes highly controversial.

2. Without attempting a complete review of changes in security-related provisions of legislation relating to immigration, a brief survey of some of the more important changes is helpful. As early as 1872 there was a prohibition against immigrants who might be a security risk. That year an amendment to the Immigration Act provided that "The Governor-in-Council may, by proclamation, whenever he deems it necessary, prohibit the landing in Canada of any criminal, or other vicious class of immigrants, to be designated by such proclamation".[1] The Immigration Act of 1910 added to the prohibited classes: "... any person other than a Canadian citizen [who] advocates in Canada the overthrow by force or violence of the Government of Great Britain or Canada, or other British Dominion, Colony, possession or dependency, or the overthrow by force or violence of constitutional law or authority."[2] By 1923 immigrants were required to have visas, and procedures for the examination of visa applicants began to develop.

3. Following World War II, the Canadian government was anxious to meet domestic demands for labour, to facilitate family reunions and to contribute to the relief of displaced persons in Europe. Recognition of the security problem that this entailed led the Security Panel to recommend that the R.C.M.P. provide assistance to the Immigration Branch (at that time under the Department of Mines and Resources) in the screening overseas of prospective immigrants. This was not the first time the R.C.M.P. had been involved in immigration: during the Yukon gold rush, they filtered out ill-prepared prospectors and suspected criminals at the Chilkoot and White Passes. It was,

[1] S.C. 1872, 35 Vict. ch.28, s.10.
[2] S.C. 1910, Edw. VII, ch.27, s.41.

however, the first time that the R.C.M.P. had been asked to conduct such a service abroad.

4. In 1946, the first R.C.M.P. member was dispatched to London to join the immigration vetting team, but it was not until 1959 that the R.C.M.P. Act was amended to provide explicitly for such R.C.M.P. activity, by the addition of the phrase "outside of Canada" to section 4 of the Act.[3] As with the R.C.M.P.'s other screening functions — in citizenship, and Public Service employment — there was no specific statutory authorization for the role of the Force in immigration screening.

5. An Order-in-Council, made in June 1950, resulted in an increase in the flow of applications from the big European industrial areas. A huge backlog of cases awaiting security clearance developed because of the increase in the number of applications, and because many of the applicants were applying from countries in which they had not been resident for a sufficient period of time to permit the local authorities to provide the R.C.M.P. with adequate information. To reduce the workload, from time to time security screening was waived for various categories.

6. The Immigration Act of 1952[4] governed Canadian immigration procedures for the following 25 years. Section 5 of the Act listed the classes of persons who were prohibited from admission to Canada. The following were considered security risks:

> (l) persons who are or have been... members of or associated with any organization, group or body of any kind concerning which there are reasonable grounds for believing that it promotes or advocates... subversion by force or other means... except persons who satisfy the Minister that they have ceased to be members of or associated with such organizations, groups or bodies and whose admission would not be detrimental to the security of Canada;
>
> (m) persons who... are likely to engage in or advocate subversion by force or other means...
>
> (n) persons concerning whom there are reasonable grounds for believing they are likely to engage in espionage, sabotage or any other subversive activity...
>
> (q) persons who have been found guilty of espionage...
>
> (r) persons who have been found guilty of high treason or treason against or of conspiring against Her Majesty or of assisting Her Majesty's enemies in time of war,...

Section 19 of the Act (renumbered section 18 in the 1970 Revised Statutes of Canada), which was concerned with persons already in Canada, made subject to deportation, on security grounds, persons who fell within the following categories:

> (a) any person, other than a Canadian citizen, who engages in, advocates or is a member of or associated with any organization, group or body of

[3] S.C. 1959, ch.54.

[4] R.S.C. 1952, ch.325.

any kind that engages in or advocates subversion by force or other means of democratic government, institutions or processes, as they are understood in Canada;

(c) any person, other than a Canadian citizen, who, if outside Canada, engages in espionage, sabotage or any activity detrimental to the security of Canada;

7. In 1962, an Order-in-Council was passed introducing the principle of universal immigration to Canada for unsponsored applicants, although sponsored immigration remained geographically restricted.[5] In practice, immigration from countries where reliable information could not be obtained was restricted simply by providing no facilities for the processing of applications in such countries. By the mid-1960s, to meet urgent manpower needs, the Cabinet opened up immigration opportunities still further by accepting changes in security screening procedures. Automatic rejection criteria, such as Communist Party membership, were eliminated for the sponsored immigrant and the immigrant coming from a country controlled or influenced by the Communist Party. At the same time, easier international travel and a growing tourist industry led to a gradual removal of the visa requirement for most visitors. In 1967 an amendment to the Immigration Regulations allowed visitors to Canada to remain permanently, subject to only slightly more difficult selection criteria than those which applied to applicants abroad. It was considered at the time that not many persons would take advantage of that provision, but in fact thousands did so, and by 1970 one fourth of the landed immigrants were persons who first came to Canada as visitors.

8. The Immigration Appeal Board Act of 1967[6] created an appeal body independent of the Minister and extended the right of appeal for persons ordered deported, even at a port of entry. The Board was given power to set aside deportation orders on compassionate grounds. The very fact that a person was physically on Canadian soil determined his right of appeal, even if he had entered Canada illegally. An unintended consequence of this change was that it encouraged persons who might otherwise have had difficulty qualifying for immigrant status to come to Canada, ostensibly as visitors, but with the full intention of remaining. As such persons could now appeal deportation, the Immigration Appeal Board was soon swamped with up to 400 appeals a month. By the fall of 1970, a backlog of 4,000 cases had developed. Many of those who, had they applied abroad, might have been prohibited on security grounds from entering Canada as landed immigrants were thus able to remain, in effect, immune to deportation for a long period of time. Immigration Appeal Board procedures and departmental practice required that the appellants and their lawyers were to have access to all information submitted at special inquiries and appeal proceedings. Sometimes this could jeopardize security intelligence sources. If the R.C.M.P. refused to admit publicly that they had such information, the appellant won his appeal to remain in Canada. In cases where the appeal was based on compassionate or humanitarian grounds the

[5] *White Paper on Immigration*, 1964, section 95 "Security Screening", p. 36.
[6] S.C. 1966-67, ch.90.

alternative was that the Minister of Immigration and the Solicitor General would sign a certificate pursuant to section 21 of the Act, stating that in their opinion, based on confidential security reports, the Immigration Appeal Board must allow the deportation order or refusal of visa to proceed.

Recommendations of the Royal Commission on Security

9. In trying to resolve the dilemma between the need for security and the rights of the individual, the Report of the Royal Commission on Security, published in 1969, recommended both a tightening of security measures in relation to immigration and the establishment of clearer, more consistent security screening procedures for all categories of prospective immigrants. The recommendations of the Commission that have been at least partially implemented can be summarized as follows:

(a) *Changes in the role of the officers abroad*: The maturity, quality and training of both the R.C.M.P. and Immigration officers abroad should be upgraded so that normally individual cases could be decided jointly by these officers in the field. All cases of refusals for sponsored immigrants, and all cases where the officers in the field could not agree, should be reviewed in Ottawa by the Department of Manpower and Immigration and the Security Service, and, at the option of either, by the Security Secretariat in the Privy Council Office.

(b) *Universal screening procedures and guidelines* should be introduced for all prospective immigrants without regard for relationship, sponsorship or country of origin. Sponsors should also be screened. The same rejection criteria should apply to both sponsor and immigrant. New, universally applicable guidelines for rejection should be introduced.

(c) *Review procedures require modification*: Immigrants applying from within Canada should not be entitled to an appeal against rejection on security grounds. Sponsors whose relatives have been refused admission on security grounds should have access to a review of that decision by a security review board. Persons formally admitted as landed immigrants should not be subject to deportation without full judicial appeal before a body such as the Immigration Appeal Board.[7]

10. The first of these recommendations has been only partially implemented. In May 1975, after extensive interdepartmental consultation, the Solicitor General and the Secretary of State for External Afffairs, in an exchange of letters, agreed upon revised and expanded terms of reference for R.C.M.P. liaison officers abroad and contemplated a raising of their quality and status. When considering the rejection of an independent potential immigrant on security grounds, the liaison officer abroad confers with R.C.M.P. Headquarters before advising rejection to the Immigration officer in the field. The advice is normally accepted but in case of disagreement the Immigration officer at the foreign post can have the situation reviewed by Immigration Headquarters in Ottawa. When the R.C.M.P. liaison officer advises rejection of an immigrant

[7] *Report of the Royal Commission on Security*, 1969, paragraph 300.

sponsored by a permanent resident or citizen of Canada, the case is automatically reviewed by Immigration Headquarters in Ottawa.

11. The second recommendation has also only partially been implemented. New security screening guidelines have been introduced, universal in application but different in substance from those proposed by the Royal Commission on Security. Security screening is now required for nearly all immigrants between the ages of 18 and 70 except in certain tightly circumscribed cases of urgency, or for humanitarian considerations. These new security screening guidelines were approved by Cabinet in March 1975 at the same time as approval was given to what has come to be known as the Security Service's 'mandate'. These guidelines were essentially similar to that mandate, with two additions:

> Persons who hold, or have held, positions of executive responsibility in any organization, group or body which promotes or advocates the subversion, by force or violence or any criminal means, of democratic government, institutions or processes, as they are understood in Canada.
>
> Persons who engage in deliberate and significant misrepresentation or untruthfulness during any personal interview or in the completion of documents for immigration purposes, if such misrepresentation or untruthfulness has a bearing on background enquiries relating to admissibility to Canada.

12. The new guidelines served as the criteria for security screening and rejection until the Immigration Act, 1976, established the classes of people inadmissible to Canada for security reasons. Pursuant to section 19(1) of the Act these are:

> (e) persons who have engaged in or who there are reasonable grounds to believe will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, except persons who, having engaged in such acts, have satisfied the Minister that their admission would not be detrimental to the national interest;
>
> (f) persons who there are reasonable grounds to believe will, while in Canada, engage in or instigate the subversion by force of any government;
>
> (g) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;[8]

The Act also dealt with the deportation, on security-related grounds, of non-Canadian citizens already in Canada. Section 27(1) covered any permanent resident who

> (a) if he were an immigrant, would not be granted landing by reason of his being a member of an inadmissible class described in paragraph

[8] S.C. 1976-77, ch.52.

19(1)(c), (d), (e) or (g) or in paragraph 19(2)(a) due to his having been convicted of an offence before he was granted landing,

or

(c) is engaged in or instigating subversion by force of any government,

Section 27(2) dealt with any person, other than a Canadian citizen or a permanent resident who

(a) if he were applying for entry, would not or might not be granted entry by reason of his being a member of an inadmissible class other than an inadmissible class described in paragraph 19(1)(h) or 19(2)(c),

or

(c) is engaged in or instigating subversion by force of any government,

13. The differences between these statutory security criteria and those of the 1952 Immigration Act reflect the change in the international environment. Concerns with treason and wartime activities against Her Majesty's allies have shifted to acts of violence and terrorism. Any likelihood of an act of violence, whether or not politically motivated, which might endanger the safety of Canadians, is now a ground for rejection.

14. In 1972, changes in the Immigration regulations were passed which were designed to eliminate the practice of applying for landed status from within Canada. However, visitors and persons on student and temporary work visas who had relatives in Canada continued to apply, many of them successfully. In 1973 the Immigration Appeal Board Act was amended to remove the right of appeal from all but permanent residents, refugees, persons in possession of visas, and Canadian citizen sponsors.

15. That part of the third recommendation of the Royal Commission on Security, which proposed that permanent resident deportation cases involving security should be heard by the Immigration Appeal Board, was not accepted. Instead, under section 42 of the Immigration Act, 1976, a new advisory review body, the Special Advisory Board (S.A.B.), was created:

(a) to consider any reports made by the Minister and the Solicitor General pursuant to subsection 40(1); and

(b) to advise the Minister on such matters relating to the safety and security of Canada... as the Minister may refer to it for its consideration.[9]

16. This Board is in some ways similar to the Security Review Board proposed by the Royal Commission on Security. However it does not hear

[9] *Ibid.* Subsection 40(1), considered later in the text, reads as follows:

40. (1) Where the Minister and the Solicitor General are of the opinion, based on security or criminal intelligence reports received and considered by them, that a permanent resident is a person described in subparagraph 19(1)(d)(ii), or paragraph 19(1)(e) or (g) or 27(1)(c), they may make a report to the Chairman of the Special Advisory Board established pursuant to section 41.

sponsored immigration rejection cases, but rather acts as adviser in these cases to the Minister responsible for Immigration. Under section 42(a) it does hear evidence in cases concerning permanent residents whom the Minister of Employment and Immigration and the Solicitor General are seeking to have deported on security grounds where the public disclosure of such evidence would endanger national security. The S.A.B. has received only one report made by the Minister and the Solicitor General under section 40(1). It has acted in its security advisory function under section 42(b), advising the Minister on contentious security screening cases.

Special immigration security procedure

17. In the decade that followed the report of the Royal Commission on Security, the staging of the Summer Olympic Games in Montreal in 1976 had a permanent effect on immigration security policy and procedures. Provisions similar to those contained in the Temporary Immigration Security Act, which allowed visitors to be turned back at a port of entry or deported without a formal inquiry, have been incorporated into the Immigration Act, 1976, but modified to provide for a hearing by a departmental adjudicator.

The Immigration Act, 1976

18. The new Immigration Act, passed in 1977, came into force in April 1978. It reflected a 1975 Green Paper suggestion that immigration legislation should embody a more positive approach. The negative 'gate keepers' stance of previous legislation was replaced by a more positive emphasis on the reasons and means for admittance; only two of the 10 immigration objectives stated in section 3 of the Act are concerned with safeguarding public order and security. As one commentator noted, the legislation

> ... attempts to strike a balance between administrative efficiency and respect for civil liberties. It accords the government increased power to deal with terrorists, subversives, criminals and those seeking to circumvent immigration laws; at the same time, it offers increased protection to the individual in a number of areas — refugees, the adjudication system, alternatives to deportation, and arrest and detention.[10]

19. We now turn from this chronology, which has attempted to place present immigration security policy in a historical perspective, to a critical analysis of the present system of immigration security screening, including its scope, the criteria for security rejection, the role of the R.C.M.P. in the screening process, and the appeal mechanisms available.

B. THE EXTENT OF IMMIGRATION SECURITY SCREENING

20. The screening of aliens crossing a national frontier can still be considered the first line of defence in a country's security programme, but in today's fast-shrinking world it is a decreasingly effective barrier. Given this changing

[10] Warren Black, "Novel Features of the Immigration Act, 1976" (1978) 56 *Can. Bar Rev.*, 56.

situation, should there continue to be security screening of people who wish to visit or immigrate to Canada? We feel that the answer to this question must be in the affirmative. A total elimination of security screening of applicants would not be desirable for this country, since Canada is likely to maintain relatively high levels of immigration in the future. Moreover, unlike many European countries, Canada does not have an extensive system of internal controls, with flexible deportation procedures and extremely stiff citizenship requirements, making it relatively easy to remove undesirable foreigners.

21. As we indicated earlier, nearly all persons between the ages of 18 and 70 wishing to immigrate to this country are subject to security screening. While there appears to be no reason to modify the universal nature of the screening for potential permanent residents, there are some problems with the selectivity of the screening for visitors and refugees.

Permanent residents

22. There is one change in the screening for permanent residents that should be considered. The practice should provide that the security liaison officer abroad is involved in the process of deciding whether screening should be waived on humanitarian grounds.

Visitors and temporary residents

23. There are at present two situations in which persons coming to Canada as visitors or temporary residents must undergo a security screening process. They are if a person is from a country whose citizens require a visa to visit Canada, or if a person arrives in Canada and then applies for permanent resident status. Visas are not required to enter Canada except in the case of citizens of certain designated countries. All individuals applying for visas to come to Canada from these countries require screening by the R.C.M.P. Security Service. For citizens of other countries there is normally no security screening of applicants for temporary permits unless an applicant has a record of refusals from the post abroad or the applicant's name appears in the Immigration Index of individuals whose entry into Canada is undesirable for security reasons.

24. In the past the Security Service has insisted on applying the same screening criteria to applicants for visitor's visas as are applied to applicants for permanent residence, even though the holder of a visa may be visiting Canada for a very short period of time. One reason for this practice is that a great many visitors and holders of permits (commonly referred to as Minister's permits) apply for permanent status after they arrive in Canada. For instance, 14,288 of the 111,899 persons granted permanent residence status in 1979 arrived in Canada as visitors or on Minister's permits. The screening prerequisites when an individual applies from within Canada are the same as for a person applying from abroad, but if an applicant already in Canada does not pass the security requirements, the Minister is then faced with the option of deportation, with a possible public outcry, or waiving the security objection. Another reason that the Security Service has applied screening criteria to visa applicants which are identical to those which are applied to applicants for

permanent residence is that some temporary residents prolong their stay in Canada by repeatedly having their visitor's status in Canada extended.

25. We think it is inappropriate to apply security criteria in exactly the same way to temporary visitors as to applicants for permanent residency. The reasons for the existing practice, in our view, can be satisfied by two changes in procedure. First, when the security intelligence agency has information about an individual which would justify his rejection if he were an applicant for permanent residency but not justify denying him the right to visit Canada for a limited period, then a non-renewable visa should be issued. Second, those who have obtained temporary permits and have not been screened should be subjected to normal security screening if they apply for a renewal of their visa. Applications for renewal could be sent to the security intelligence agency for a records check (and to the R.C.M.P. for a criminal records check). Alternatively, a less thorough but possibly less costly system would be one of 'stop-notices'. A visa would not be extended automatically if the security intelligence agency has notified Immigration officials that a temporary resident is a security risk. There is already provision for a system similar to this 'stop-notice' procedure in the Immigration Act. Under section 27(2) of the Act reports can be written to the Deputy Minister of Employment and Immigration when a temporary resident has been engaging in criminal or subversive activities.[11]

Refugees

26. The desire to deal expeditiously and humanely with large numbers of homeless and persecuted refugees has inevitably meant a relaxation of security screening requirements.

27. Canada has gained a humanitarian image internationally because of the large number of refugees it accepts. For example, Canada accepted twice as many Chilean refugees as any other two countries combined. Canada's receptiveness to the victims of political repression is reflected in the Immigration Act, 1976, in which the refugee is designated a separate class for whom special admission standards may be established. Following the United Nations Convention and Protocol Relating to the Status of Refugees, the Immigration Act, 1976, defines a Convention Refugee as any person who cannot return to his own country

> by reason of well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.[12]

28. The Immigration Act, 1976, provides for flexible procedures in which each refugee situation can be treated on its merits. Under sections 6(2) and 115(1)(e) of the Act special regulations can be written to facilitate the entry into Canada of a particular group of refugees or quasi-refugees. While these procedures cannot override the definition of inadmissible classes in section 19, they can provide for a modification of the way in which the security criteria are applied. While such flexibility is desirable, there is a danger that in the turbulent atmosphere of an international crisis, decisions might be made to

[11] S.C. 1976-77, ch.52.
[12] *Ibid.*

reduce screening without an adequate consideration of the implications for the security of Canada.

29. We think it is possible to retain the humanitarian and flexible procedures now established while at the same time reducing the potential risk inherent in accepting large numbers of refugees as immigrants. The Contingency Refugee Committee should be reinstated as a special task force under the Interdepartmental Committee on Security and Intelligence to ensure that there is a continuing and current assessment of potential refugee situations, ready for use by the government. The security intelligence agency should contribute to this committee. In co-operation with other government departments and agencies, it should help to prepare security profiles of countries which appear likely to generate refugee situations. Then, if a crisis occurs, the government could take time to balance humanity and security in making its decisions.

30. Convention Refugees should not routinely be subjected to a security screening interview on arrival in Canada even if they have not been subjected to the full security screening process abroad.

31. Another reason for prohibiting routine screening interviews of Convention Refugees after their arrival in Canada is that the information might be used for other purposes.

WE RECOMMEND THAT the security intelligence liaison officer at the post abroad be involved in any decision, on application for permanent residency, to waive immigration security screening for humanitarian reasons or in cases of urgency.

(134)

WE RECOMMEND THAT the security screening rejection criteria applied to visa applicants reflect the temporary nature of their stay. Where appropriate, non-renewable visas should be issued for applicants who could not pass the security criteria for permanent immigration.

(135)

WE RECOMMEND THAT applicants for the renewal of temporary permits or visas be required to undergo the security screening process.

(136)

WE RECOMMEND THAT the humanitarian and flexible procedures for dealing with Convention Refugees remain, but that the security intelligence agency, in co-operation with other government departments and agencies, help prepare regular threat assessment profiles of potential refugee situations for the Contingency Refugee Committee, which should be revived.

(137)

WE RECOMMEND THAT the security intelligence agency, hold security screening interviews with Convention Refugees after their arrival in Canada, not as a matter of course, but only for cause.

(138)

C. IMMIGRATION SECURITY CRITERIA

32. As we have seen, the Immigration Act, 1976, introduced new definitions of the classes of persons to be denied admission to Canada on security grounds.

These new statutory security criteria (set out in full in section A of this chapter) are too broad, and are inconsistent with the definition of threats to the security of Canada which we proposed earlier in this Report should be the basis of the statutory mandate of the security intelligence agency.

33. It could be argued that because screening for immigration purposes is our first line of defence, the security rejection criteria should be more extensive than those for other screening functions. We do not agree. If the criteria governing immigration screening are wider than those which define the basic mandate of the security intelligence agency, the agency will, in effect, be authorized to seek intelligence from foreign agencies that it is not empowered to collect in Canada. This would violate one of the principles which we have recommended should govern the security intelligence agency's relations with foreign agencies. Therefore, to avoid ambiguity and inconsistency, we recommend that the Immigration Act be amended so that the criteria for denying admission to Canada on security grounds are consistent with the definition of threats to the security of Canada found in the statutory mandate of the security intelligence agency.

34. There is a need for administrative guidelines to interpret the statutory criteria and designate specific areas of security concern. There have been three separate sets of such guidelines approved by Cabinet in the past. The existing guidelines, established prior to the Immigration Act, 1976, are in some respects inconsistent with the new statutory criteria. They should be made consistent with the proposed amended statutory criteria.

35. Administrative guidelines of this kind should be subject to a process of periodic review and adjustment in order to reflect changes in the perception of security threats. This did not always happen in the past. It took nearly 20 years before the guidelines differentiated between the security risk entailed by Communist Party membership in the Communist bloc countries and those of western European countries. Participation in political violence abroad, especially, requires careful analysis: the context in which the violence took place is important in any consideration of whether an individual would constitute a risk to the security of Canada. Carefully drafted guidelines should assist the security intelligence agency to determine what is pertinent for immigration security clearance purposes.

WE RECOMMEND THAT section 19(1)(e), (f) and (g) of the Immigration Act be repealed and the following substituted:

19. (1) No person shall be granted admission if he is a member of any of the following classes:

(e) persons who it is reasonable to believe will engage in any of the following activities:

(i) activities directed to or in support of the commission of acts of espionage or sabotage;

(ii) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(iii) **political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country.**

(iv) **revolutionary subversion, meaning activities directed towards or intending ultimately to lead to the destruction or overthrow of the liberal democratic system of government.**

(139)

WE RECOMMEND THAT administrative guidelines to interpret the statutory classes of persons denied admission to Canada on security grounds be drafted for Cabinet approval.

(140)

D. ROLE OF THE SECURITY INTELLIGENCE AGENCY IN IMMIGRATION SCREENING

36. R.C.M.P. liaison officers are stationed at 28 Canadian posts abroad. These officers are responsible, amongst their other duties, for the security vetting of all applicants for permanent immigration to Canada. Liaison officers check the records at the post and request criminal and security information from the local police and security intelligence agencies, and at times from other foreign agencies, and assess the security relevant information.

37. There is a danger in the immigration screening process of placing too great and uncritical reliance on foreign agency information. The information received must always be carefully analysed in the context of the political circumstances of the country providing it. No foreign agency should be considered a 'reliable source' in the sense that its reports can be accepted uncritically. The interests and perceptions of foreign nations will often differ from those of Canada, and their interpretation of data may well reflect those differences. The security intelligence agency liaison officers and the analysts at Headquarters must be sensitive to the shades of difference between foreign and Canadian concerns. One of the reasons an effective and knowledgeable review body is needed to review the evidence supporting denials of security clearance in immigration cases is the fact that frequently the evidence will be based on reports from foreign agencies.

38. The security and criminal intelligence required to determine whether the criteria of the Immigration Act are met is not always available. There are several countries, for instance, that do not permit the reporting of criminal information about their citizens to any foreign agency. To authorize the Canadian security intelligence agency to establish a paid source or otherwise to break the laws of a foreign country to obtain the required screening intelligence in those countries would be unacceptable. In these situations Canada should endeavour to establish arrangements for obtaining the intelligence through government to government negotiations. If inter-governmental agreement cannot be reached, the onus should be placed upon the immigrant, personally, to provide the Canadian immigration officials with documentation guaranteeing that he or she has no criminal record, or as in the case with immigration

from Communist countries where security intelligence is not available, the requirement of intelligence for the particular criteria in question could be waived.

WE RECOMMEND THAT officers from the security intelligence agency carry out immigration security screening functions abroad. If they are tasked to obtain criminal and other intelligence pertinent to the suitability of an immigrant, they should pass it on to the Immigration Officer for assessment.

(141)

WE RECOMMEND THAT the security intelligence agency cross-check immigration screening information received. The security intelligence agency should assess the information on potential immigrants received from a foreign intelligence agency in the light of the political concerns and interests of the country of the providing agency.

(142)

WE RECOMMEND THAT the security intelligence agency not be authorized to transgress the laws of foreign countries in order to obtain intelligence for immigration screening purposes.

(143)

E. IMMIGRATION APPEAL PROCEDURES

39. Immigration appeal procedures deal with appeals against certain removal orders and decisions refusing applications for or by sponsored (family class) immigrants. The Immigration Appeal Board (I.A.B.) hears such appeals against removal orders and decisions made by the Canada Employment and Immigration Commission. The I.A.B. can determine appeals based on questions of fact or of law and also has power to overturn a removal order or decision if it considers that there are humanitarian grounds for doing so. However, according to section 83(1) of the Immigration Act, 1976, the I.A.B. cannot overturn a removal order on humanitarian grounds or a sponsored immigrant application refusal on any grounds if the Minister of Employment and Immigration and the Solicitor General co-sign and file a certificate with the Board "stating that, in their opinion, based on security or criminal intelligence reports... it would be contrary to the national interest for the Board..." not to dismiss the appeal.[13]

40. In our opinion the criterion of "contrary to the national interest" used in section 83(1) is not appropriate to decide matters involving security. The words are too vague and imprecise. We think that with respect to security matters the phrase used ought to be "contrary to national security", and this phrase should be defined as having the same meaning as we have recommended for the definition of threats to security in the statute governing the security intelligence agency. This would be consistent with the wording in section 40(9) of the Act which covers similar appeals with respect to permanent residents.

41. Pursuant to section 39 of the Immigration Act, 1976, in security cases involving any person other than a permanent resident or Canadian citizen, a

[13] *Ibid*, s.83(1).

person may be ordered deported by certain immigration officials if the person is named in a certificate signed by the Minister of Employment and Immigration and the Solicitor General and the certificate is filed with the official stating that "in the opinion of the Minister and the Solicitor General, based on security or criminal intelligence reports. . . which cannot be revealed in order to protect information sources..."[14] the person falls within the categories described in paragraph 19(1)(d), (e), (f) or (g) or paragraph 27(2)(c) of the Act. Four such certificates, which are conclusive, were signed and filed in each of 1978 and 1979.

42. The provisions of section 39 of the Act do not apply to Canadian citizens or permanent residents. When the deportation of a permanent resident is proposed on security grounds, and the evidence cannot be presented at an open inquiry, a different procedure is followed: a report under section 40(1) of the Act is made by the Solicitor General and the Minister of Employment and Immigration to the Chairman of the Special Advisory Board. Section 40(1) reads:

> 40. (1) Where the Minister and the Solicitor General are of the opinion, based on security or criminal intelligence reports received and considered by them, that a permanent resident is a person described in subparagraph 19(1)(d)(ii), or paragraph 19(1)(e) or (g) or 27(1)(c), they may make a report to the Chairman of the Special Advisory Board established pursuant to section 41.

43. The Special Advisory Board, as we noted in section A of this chapter, has two functions, one of which is considering reports by the Ministers alleging a permanent resident's deportability on security grounds based on confidential evidence. Upon receiving such a report the Board follows an appeal procedure similar to that used by a Commissioner appointed under the Public Service Security Inquiry Regulations to deal with security dismissals from the Public Service. The Special Advisory Board in dealing with a report, can request all relevant information and can

> determine what circumstances and information should not be disclosed on the ground that disclosure would be injurious to national security or to the safety of persons in Canada.[15]

The Board may decide at any time that there is nothing in the information before it the disclosure of which would endanger "national security or the public safety of persons in Canada",[16] and in such a case it must terminate its proceedings so that the case can be heard through the regular channels of inquiry and appeal to the I.A.B. or the Federal Court.

44. Under section 40(4) of the Immigration Act, when the Board has determined what information can be disclosed to the individual concerned, it notifies him of the proposal to deport him and informs him as fully as possible about the circumstances and the nature of the allegations. The individual has the right to a hearing, to be held *in camera*. He has the right to be represented

[14] *Ibid.*, s.39.
[15] *Ibid.*, s.40(2)(b).
[16] *Ibid.*, s.40(8).

by counsel, to call witnesses and to present evidence. At the conclusion of the hearing the Special Advisory Board makes a report to the Governor in Council, for consideration as to whether to make a deportation order. In our view this role of the Special Advisory Board should be transferred to the Security Appeals Tribunal which we recommended should be created.

45. There is a further appeal route for all persons faced with deportation. Section 28 of the Federal Court Act[17] allows an appeal directly to the Federal Court, bypassing the I.A.B. In such an appeal against deportation, where the deportation order had been made on sensitive security grounds, an appellant would likely encounter substantial difficulty, either because the Solicitor General would object to the production of evidence by signing an affidavit under section 41(2) of the Federal Court Act, or because the provisions of section 119 of the Immigration Act would be invoked. Section 119 reads:

> 119. No security or criminal intelligence report referred to in subsection 39(1), 40(1) or 83(1) may be required to be produced in evidence in any court or other proceeding.[18]

46. We do not feel that an appeal to the Federal Court of Canada is the most appropriate way of reviewing the security aspects of deportation cases involving persons who are neither citizens nor permanent residents. In such cases a section 39 certificate is more than a ministerial affidavit certifying that a document contains evidence that would be injurious to national security; it is "proof of the matter therein", i.e. that, based on security or criminal intelligence reports, the person meets the criteria in the Act for rejection or deportation. We think that the most appropriate agency for reviewing the reports relied upon in the exercise of ministerial power under section 39, is the Security Appeals Tribunal with its expertise in security matters and full access to security reports. As we recommend above, this Tribunal should absorb the functions of the Special Advisory Board in relation to appeals of permanent residents. In this way the proposed Tribunal will combine the functions of appeal for both permanent and non-permanent residents. We are not recommending that individuals be given a right to appeal personally to this body — only that there should be some independent review of the evidence. The same review body that examines deportation orders against permanent residents should be responsible for this review. In that way there will be consistency in decisions and an experiential base to draw upon.

47. The Security Appeals Tribunal should also review all cases in which, although the security intelligence agency has recommended deportation or denial of admittance or status, the responsible Minister has chosen not to follow the advice. As with recommended denials of security clearance for the public service, this review function will help to inform the Security Appeals Tribunal of the rejection procedure as a whole.

WE RECOMMEND THAT the criteria in s.83(1) of the Immigration Act, as far as they relate to security matters, be amended to read "contrary to national security".

(144)

[17] R.S.C. 1970, ch.10 (2nd Supp.).
[18] S.C. 1976-77, ch.52.

WE RECOMMEND THAT the responsibilities of the Special Advisory Board under subsection 42(a) of the Immigration Act be transferred to the proposed Security Appeals Tribunal.

(145)

WE RECOMMEND THAT the ministerial certificates for the deportation of temporary residents and visitors continue to be considered as proof, and hence not subject to appeal, but that the security or criminal intelligence reports upon which the deportation decision is based should be subject to independent review by the same body that reviews the evidence in the case of permanent residents, namely the Security Appeals Tribunal.

(146)

WE RECOMMEND THAT the Security Appeals Tribunal review all the security reports written by the security intelligence agency where the recommendation for deportation or denial of permanent residency status or admittance was not followed by the Minister.

(147)

CHAPTER 3

CITIZENSHIP SECURITY SCREENING

A. HISTORICAL BACKGROUND

1. The granting of Canadian citizenship can no longer be considered a privilege bestowed by prerogative of the Crown. Successive legislation has made the granting of citizenship the responsibility of the Citizenship Courts. Citizenship is a right that can be claimed after three years by any immigrant, 18 years or older, who has been legally admitted into Canada on a permanent basis, who has an adequate knowledge of Canada and one of its official languages, and who is not subject to a list of specific prohibitions (for example, an immigrant who is an inmate in a penitentiary cannot become a Canadian citizen). For reasons of security and public order, however, the government still retains discretionary power to reject an applicant for Canadian citizenship.

2. For almost 50 years, the R.C.M.P. has been supplying the government with security and criminal information on citizenship applicants. Under the Naturalization Act of 1914 an arrangement was established between the R.C.M.P. and the Department of the Secretary of State. By World War II, the R.C.M.P. was systematically investigating the character and background of all applicants for what was then called naturalization. Criminal and subversive indices were checked, an interview was held with each applicant, and reports were sent to the Department of the Secretary of State. The Canadian Citizenship Act of 1947 made no explicit provision for the security screening; the practice that had developed through the years continued under section 10(1)(d), which required that an applicant for citizenship be "of good character".[1] Under this Act, the Minister was given final authority to approve or deny an application for citizenship.

3. In January 1951, an interdepartmental Citizenship Advisory Committee, consisting of representatives from External Affairs, Citizenship, and the Privy Council Office, with the R.C.M.P. as observers, was established. The Committee began to examine all adverse reports submitted by the R.C.M.P. and to advise the Minister whether a citizenship certificate should be granted. The following month, Cabinet agreed upon criteria for the rejection of citizenship on security grounds. An applicant described as a member of a Fascist, Communist or other revolutionary organization would be rejected, as would applicants who were members of a Communist front organization.

[1] S.C. 1946, ch.15.

4. Heavy immigration in the late 1940s and early 1950s affected the citizenship screening procedure. The R.C.M.P. could not process what amounted to a threefold increase in citizenship applications. As a result, in 1954, the criminal records check was eliminated. Less than one per cent of enquiries turned up evidence of a criminal record, and it was felt that the examination by the Citizenship Judge, local knowledge of the individual in smaller communities, information received from Clerks of the Court and other interested parties, together with the reports received from the Immigration Branch, would identify most individuals who might have criminal records.

5. A more lenient attitude to the granting of citizenship developed in the early 1960s and steps were taken to reduce the detail involved in the application of security criteria.

6. The Royal Commission on Security concurred with the trend to reduce the stringency of the citizenship security criteria. The Commission's Report concluded that possession of citizenship only marginally increased the capabilities of a Canadian resident in the field of espionage and subversion.[2] Hence, the Commissioners argued, there is "an element of unfairness in denying citizenship to an individual who has been a resident of Canada for five years when his actions have not been illegal and represent no immediate and direct threat to the security of Canada."[3]

They suggested that:

> ... as a general rule citizenship should be withheld only for actual illegalities or criminal acts; in the area of security, these would include espionage, treason and similar offences. Membership in communist organizations or even of the Party itself, however, should not constitute causes for rejection.[4]

7. Nevertheless, the Commission thought that despite this general rule there would be some cases in which the applicant would constitute a significant risk to security, even though not involved in an illegal activity. In such cases the Minister should exercise discretion in refusing citizenship on security grounds. The Report recommended that:

> ... the grant of citizenship should normally be refused on security grounds only if actual illegalities or criminal acts have been committed and proved in court, and not merely for membership in subversive associations or even the Communist Party. However, WE RECOMMEND that ministerial discretion should be retained to deal with certain cases in which it may remain appropriate to withhold citizenship for particularly significant security reasons. All persons whose applications are rejected on security grounds should have access to the Security Review Board.[5]

8. "Significant security risk" was left undefined by the Royal Commission except in the negative sense that the category did not include those who merely hold "membership in subversive associations or even the Communist Party."[6] The Commission's recommendation was therefore difficult to implement. The

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[2] *Report of the Royal Commission on Security*, 1969, paragraph 154.
[3] *Ibid.*, paragraph 155.
[4] *Ibid.*
[5] *Ibid.*, paragraph 301.
[6] *Ibid.*

Cabinet finally decided in 1973 that security clearance should remain a requirement for obtaining citizenship. The Interdepartmental Committee on Citizenship (formerly the Advisory Committee on Citizenship) drew up a new list of criteria, which, although never formally approved by Cabinet, remained until recently the basic working criteria for citizenship security screening. According to those criteria the R.C.M.P. were to report:

(1) Persons known or strongly suspected to be involved in espionage activities.

(2) Persons known or strongly suspected to be terrorists.

(3) Persons actively engaged or prominently involved with violence-prone organizations.

9. The new Citizenship Act was assented to by Parliament on July 16, 1976, and proclaimed on February 15, 1977.[7] Although there was no specific mention of screening, the new Act had a direct effect on the R.C.M.P. Security Service. Sections 19 and 20 dealt with probation and criminal records, while section 18 was concerned with security. Subsection 18(1) reads as follows:

> 18. (1) Notwithstanding anything in this Act, a person shall not be granted citizenship under section 5 or subsection 10(1) or be issued a certificate of renunciation under section 8 if the Governor in Council declares that to do so would be prejudicial to the security of Canada or contrary to public order in Canada.

10. Since the Act came into effect, the Security Service has again undertaken criminal records checks for all applicants for citizenship and the Interdepartmental Committee, now called the Interdepartmental Advisory Committee on Citizenship, has begun to meet again. This Committee has drawn up new screening criteria, which were ratified by Cabinet in December 1979. Before examining these criteria we turn to an evaluation of the present citizenship screening procedures.

B. THE ROLE OF A SECURITY INTELLIGENCE AGENCY IN CITIZENSHIP SCREENING

11. In 1979, the Security Service carried out subversive and criminal records checks on each of the 130,000 applicants for Canadian citizenship. Although the results suggested a seemingly low return for the effort expended, the efficacy of the citizenship screening programme must be evaluated in the context of the protection it affords the security of Canada. Likely, knowledge that there is a screening process is in itself a deterrent to applications by those who suspect that they will be rejected on security grounds.

12. We agree with the Royal Commission on Security that the security risk in granting citizenship is marginal, yet it must be noted that a Canadian citizen cannot be deported, except under the War Measures Act. Thus, if citizenship is granted to an individual engaged in activities considered threatening to the

[7] S.C. 1977-78, ch.22.

security of Canada that person can virtually never be deported. Moreover, a Canadian passport provides the possibility of travelling to most parts of the world; hence, advantage could be taken of a Canadian passport to facilitate either international terrorism or espionage activities. Furthermore, security implications accompany some of the rights and opportunities afforded a Canadian citizen in the approximately 90 federal statutes and more than 500 provincial statutes that contain references to the requirements or privileges dependent on citizenship. These restrictions to some extent protect various internal processes critical to our democratic state. For instance, only Canadian citizens can legally vote or run for office in federal, and some provincial and municipal elections, and a number of professions, including the law societies of the provinces, require citizenship.

13. These security ramifications of the granting of citizenship may be minor but they establish a need to retain the discretionary power, found in the Citizenship Act, to reject application for citizenship on security grounds. We agree with the Royal Commission on Security that normally a person should not be rejected for security reasons unless an actual illegality or criminal act has been committed. Further, we feel that, if an individual is seen to be a serious security risk, deportation, rather than the rejection of citizenship, should ensue. As we discussed in Chapter 2 of this part of the Report, in the past, deportation of persons reported to be security risks was difficult as it required a public hearing. Because members of the Security Service, anxious to protect the source of their information, were often reluctant to present their evidence at these public deportation hearings, deportation could not proceed. Under the Immigration Act of 1976 these deportation difficulties have been rectified. There is provision for reporting security risks (section 27(1) and (2)), for the deportation of non-permanent residents without appeal (section 39) and for *in camera* hearings by a Special Advisory Board for the deportation of permanent residents (section 40).[8] Given these changes, we feel that the security intelligence agency should report relevant security information concerning permanent residents applying for citizenship, not only to the Citizenship Branch but to the proper Immigration authorities, for the purpose of deportation. Deportation is a much more effective means of counteracting a significant security problem than is rejection of citizenship. If the threat posed by the applicant is not sufficient to warrant deportation, yet still of significant concern, the security intelligence agency should send a report to the Registrar of Citizenship for rejection purposes.

14. The R.C.M.P. Security Service has no formal authorization to screen applicants for Canadian citizenship. The origins of the procedure, now obscure, were developed some time prior to the passage of the 1947 citizenship legislation. The 1975 Cabinet Directive on the Role, Tasks and Methods of the R.C.M.P. Security Service did not mention citizenship screening or any of the other screening functions of the R.C.M.P. Other Cabinet Directives authorize security screening for classified positions in government and for immigration, but in the case of citizenship no such formal directive exists. Formal authoriza-

[8] S.C. 1976-77, ch.52.

tion is needed for the security intelligence agency's role in providing information about applicants for citizenship who might threaten the security of Canada. This authorization should be included in the statutory mandate given the security intelligence agency.

15. The citizenship security screening procedure now in place is cumbersome. Many hours of routine paperwork are required within the Citizenship Registration Branch of the Secretary of State's Department and within the Security Service to check all citizenship applications against Security Service records. When adverse information is found, the Security Service screening officer discusses the case with intelligence officers concerned with that area of subversive activity. If the case is considered of significant security concern, an adverse report is written to the Citizenship Registration Branch.

16. Despite its cumbersome quality, we recommend that the procedure be retained. We have considered recommending other procedures, such as having the security intelligence agency assess citizenship rejection in the same manner as it now assesses the possibility of deportation. When an individual, otherwise eligible for citizenship, comes to the attention of the agency, an assessment could be made as to whether the rejection of citizenship is warranted. If so, the individual's name could be sent to the Citizenship Registration Branch. When such a person applies for citizenship, the name would be found on the list and the Citizenship Registration Branch would notify the security intelligence agency. The agency would then evaluate the case and decide whether or not to recommend denial of citizenship on security grounds. This procedure would involve an active analysis of information and as such, we feel, would be more appropriate for a security intelligence agency than the passive and routine processing of thousands of files such as is involved in the current citizenship security screening programme. Nevertheless, on balance, we have decided that the present system is preferable. The alternative which we considered would require the security intelligence agency to supply the Citizenship Registration Branch with a list of names, and there is always the danger that such a list would not be secure. Leakage of the names on the list could result in unnecessary damage to the reputations of the individuals implicated or to current operations of the security intelligence agency.

17. While the procedure is cumbersome, the cost of the present programme is not a serious factor. The annual cost is approximately $163,000, or $1.30 per case.[9] The present system, moreover, allows a screening of all citizenship applicants, which ensures that the security intelligence agency is aware of applications for citizenship by anyone about whom they have an active concern. Finally, the deterrent effect alone of such a universal screen may be sufficient grounds for keeping the procedure in place. Residents, otherwise eligible, may refrain from applying for citizenship if they believe that in so doing their activities will be reviewed by the security intelligence agency.

18. A Security Service citizenship screening procedure that should be discontinued is the check of criminal records. Not only is the present procedure

[9] This is the combined figure from both the R.C.M.P. and Citizenship Registration Branch, $98,000 from the former and $65,000 from the latter. It includes both man-hours and postage.

inefficient but it is outside the function of a security intelligence agency. In 1954, the R.C.M.P. stopped routine criminal records checks because criminal information on citizenship applicants could be obtained from immigration statistics and other sources. This system of criminal records checks should be reinstated. Information on the criminal activity of permanent residents is centralized for deportation purposes within the Canada Employment and Immigration Commission (for the purpose of 'section 27(1) reports'). Notification, applicable for three years, on such individuals could be supplied to the Citizenship Branch by the Enforcement Branch of Immigration. The procedure would be similar to the deportation notices already sent by the Immigration Regional Offices to fulfill the requirements of section 5(e) of the Citizenship Act.

19. Screening of citizenship applicants is a service provided by the Security Service to government. As we noted in Part V, Chapter 6, we have heard evidence as to one case in which the Security Service provided this service in a questionable manner. In this case the security objection was waived unilaterally by the Security Service without informing the other departments of government, so that citizenship would be granted, the aim being to discredit the applicant's standing with a foreign intelligence service (Vol. 171, pp. 123484-89; Vol. 172, pp. 123507-13). It is possible that at times one security concern may override another; however, we feel that in such circumstances the security intelligence agency should inform its Minister, who should in turn inform the Minister responsible for citizenship. The security intelligence agency should not unilaterally deviate from the citizenship rejection criteria.

WE RECOMMEND THAT the discretionary power of the Governor in Council to reject citizenship on security grounds be retained. Upon receiving a request for citizenship screening, the security intelligence agency should report any significant security information, not only to the Citizenship Registration Branch for the rejection of citizenship, but also to the appropriate immigration authorities for deportation purposes.

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WE RECOMMEND THAT the security intelligence agency continue to screen all citizenship applicants.

(149)

WE RECOMMEND THAT the security intelligence agency no longer process criminal record checks on citizenship applicants.

(150)

WE RECOMMEND THAT when the security intelligence agency feels that a competing security concern should take precedence over its security screening role in citizenship the Minister responsible for the security intelligence agency and the Minister responsible for the citizenship security clearance should be informed.

(151)

C. CITIZENSHIP SECURITY CRITERIA

20. There are several different levels of citizenship security rejection criteria. At the most general level, section 18(1) of the Citizenship Act states that citizenship is not to be granted if "the Governor in Council declares that to do

so would be prejudicial to the security of Canada or contrary to the public order in Canada".[10]

21. In 1960, membership per se in Communist front organizations was no longer considered cause for rejection. The Royal Commission on Security in 1969 also recommended that membership in the Communist Party itself should not be grounds for rejection. In 1973, the Interdepartmental Committee on Citizenship drew up new rejection guidelines, in which three criteria — espionage, terrorism and membership in violence-prone organizations — were mentioned; subversion was notably absent. We believe that what we earlier referred to as "revolutionary subversion" should be included in the citizenship rejection criteria.* We would like to make it clear that, with regard to this criterion, the applicant should be judged on his merits rather than being judged by label alone.

22. On the whole, it is the applicant's activity in the years since immigration that is pertinent to the rejection of citizenship on security grounds. There should be, however, as in the present criteria, enough flexibility to permit rejection if the security intelligence agency is concerned that an individual may be lying low, awaiting citizenship before commencing activities that would be detrimental to the security of Canada.

23. Beyond the citizenship security rejection criteria is the R.C.M.P.'s interpretation of the Interdepartmental Committee's guidelines. In our opinion, there are discrepancies between the interpretation and the guidelines — discrepancies which have not been corrected.

24. A series of Security Service misinterpretations of government guidelines is of concern to us. Also of concern to us is the R.C.M.P. description of terrorists as "members or active supporters of. . . guerrilla or liberation organizations". There are many liberation and even guerrilla movements around the world fighting for the same principles of democratic government that we desire to protect in Canada. It has been said that "one man's terrorist is another man's freedom fighter". The objective of the terrorist act must be taken into account by the security intelligence agency; there should be no automatic assumption that an applicant who committed such an act in another country is likely to behave similarly in Canada or even to plan from Canada another act of violent political coercion in his homeland. Reports recommending the rejection of citizenship should reflect such considerations. In future, any interpretation by the security intelligence agency of government guidelines on security screening criteria should be reviewed and approved by the Minister responsible for the agency before distribution to other Ministers or interdepartmental committees.

25. Section 18(1) of the Citizenship Act gives to the Governor in Council discretionary power to refuse citizenship on two grounds — security and public order. There are explicit Cabinet-approved guidelines for security, but none for

[10] S.C. 1977-78, ch.22.

*The Chairman has filed a minority report on this point.

public order. Consideration should be given to what encompasses public order, and rejection guidelines should be drawn up accordingly. Offences against public order in the Criminal Code include such crimes as treason, sedition, sabotage, duelling and piracy. These offences do not include venality of character. In previous legislation "moral turpitude" and a statutory list of other reprehensible behaviour had excluded less desirable immigrants, while "good character" was a statutory requirement for citizenship. These prohibitions were removed when both the Citizenship and Immigration Acts were liberalized in the mid-1970s. The Security Service has continued to provide the Citizenship Registration Branch with reports on reprehensible behaviour. As this sort of behaviour does not meet the security guidelines these individuals are granted citizenship. In future, the security intelligence agency should not be involved in reporting on public order offences or reprehensible behaviour that fall outside its mandate. Information on public order offences not included in the mandate of the security intelligence agency must be obtained from criminal records.

WE RECOMMEND THAT a person be denied citizenship on security grounds only if there are reasonable grounds to believe that he is engaged in, or, after becoming a Canadian citizen, is likely to engage in, any of the following activities:

(a) activities directed to or in support of the commission of acts of espionage or sabotage;

(b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;

(d) revolutionary subversion, meaning activities directed towards or intended ultimately to lead to the destruction or overthrow of the liberal democratic system of government;

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WE RECOMMEND THAT any security intelligence agency interpretation of government security screening guidelines be reviewed for approval by the Minister responsible for the agency. Approval to apply the guidelines or to distribute them to other Ministers or interdepartmental committees should not be given until the Minister has satisfied himself that there are no discrepancies between the guidelines and the agency's interpretation.

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WE RECOMMEND THAT guidelines be drawn up and approved by Cabinet interpreting the phrase "contrary to public order" as a ground for the rejection of citizenship; but that the security intelligence agency not be responsible for reporting information concerning threats to public order or reprehensible behaviour unless those threats fall within its statutory mandate.

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D. APPEAL PROCEDURES

26. There is no appeal against a decision to reject an application for citizenship on security grounds. Section 18 of the Citizenship Act states:

> 18. (1) Notwithstanding anything in this Act, a person shall not be granted citizenship under section 5 or subsection 10(1) or be issued a certificate of renunciation under section 8 if the Governor in Council declares that to do so would be prejudicial to the security of Canada or contrary to public order in Canada.
>
> (2) Where a person is the subject of a declaration made under subsection (1), any application that has been made by that person under section 5 or 8 or subsection 10(1) is deemed to be not approved and any appeal made by him under subsection 13(5) is deemed to be dismissed.
>
> (3) A declaration made under subsection (1) ceases to have effect two years after the day on which it was made.
>
> (4) Notwithstanding anything in this or any other Act of Parliament, a declaration by the Governor in Council under subsection (1) is conclusive of the matters stated therein in relation to an application for citizenship or for the issue of a certificate of renunciation.[11]

27. An appeal is allowed to the Federal Court of Appeal against rejections by Citizenship Judges on other grounds. An argument has been made that an appeal against rejection on security grounds is not necessary since rejection is not final but is merely a two-year deferral, and the cost to the individual is only one of delay and inconvenience. Yet, the individual's reputation can be seriously damaged and the delay may be interminable. Moreover, given that the grounds for dismissal may be mere suspicion, it seems only just that a person who has been a resident of Canada for three years should be able to have his case reviewed and tell his side of the story. A Federal Court of Canada decision in 1973 supports this position. The Court ruled that Mr. Tanasic Lazarov's application should be referred back to the Secretary of State for reconsideration and that the applicant was to be given an opportunity to be heard. The fact that a citizenship applicant has no opportunity to dispute the security appraisal was, in the words of Mr. Justice Thurlow, "shocking to one's sense of justice".[12] In the end, Mr. Lazarov reapplied for citizenship, which was granted without a hearing.

28. We agree with the recommendation of the Royal Commission on Security that persons denied citizenship on security grounds should have the right of an independent review. These cases should be heard by the Security Appeals Tribunal we have recommended earlier in this part of the Report. After the Minister has taken the advice of the Interdepartmental Advisory Committee on Citizenship and has recommended rejection of citizenship to the Governor in Council, the applicant for citizenship should be able to request that his case be heard by the Security Appeals Tribunal. The procedure of the Tribunal should be the same as that followed in cases of a denial of security clearance in the Public Service, or for the impending deportation of a permanent resident. The

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[11] *Ibid.*

[12] *Lazarov* v. *Secretary of State* [1973] F.C.R. 940.

Tribunal should report its findings to the Governor in Council for a final decision. In addition to reviewing cases in which a denial of citizenship for security reasons is proposed, the Tribunal should also review the reports of the security intelligence agency that do not lead to a recommendation of denial. This review procedure, consistent with the Tribunal's review function in other areas of screening, would increase the base of experience of its members, thus enabling the Tribunal to hear citizenship appeals with the benefit of the perceptions gained not only in previous appeals but also from knowledge of cases that did not go to appeal. This review procedure would also provide an independent overview of citizenship security screening procedures.

WE RECOMMEND THAT any applicant recommended for denial of citizenship on security grounds be able to appeal that decision to the Security Appeals Tribunal. The Tribunal should follow the same procedures of appeal and review as for recommended denials of public service and immigration security clearances.

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PART VIII

A PLAN FOR THE FUTURE: DIRECTION AND REVIEW OF THE SECURITY INTELLIGENCE SYSTEM

INTRODUCTION

INTRODUCTION

1. Maintaining an acceptable system of government control and review of security and intelligence activities poses a serious challenge to a democracy. Among these activities, those related to security must, in particular, often be conducted with great secrecy. Therefore, it may be difficult to provide direction and control in a manner which is consistent with the principles of democratic government. We perceive the difficulties, but we do not concede that the principles must be compromised. Where a choice must be made between efficiency in collecting intelligence and the fundamental principles of our system of government, the latter must prevail. It would be a serious mistake — indeed a tragic misjudgment — to compromise our system of democratic and constitutional government in order to gather information about threats to that system: this would be to opt for a cure worse than the disease.

2. Earlier in the Report we proposed one important step towards a more democratic system of direction of the security intelligence organization: an Act of Parliament establishing the organization and defining in general terms its functions and powers. We have also emphasized how important it is to ensure that responsible Ministers give direction on the policy issues which will inevitably arise in carrying out a general statutory mandate. In Chapter 1 of this part of our Report we shall consider in more detail the mechanisms and relationships needed within government to provide this policy direction. In an adequate system of government direction and control not only must there be ministerial knowledge and direction of the security agency's operation involving significant policy decisions, but there must also be collegiality and countervailing powers. Security matters, as we emphasize throughout this Report, raise issues requiring thoughtful and balanced political judgment. No single Minister should be left with sole responsibility for security matters.

3. However, a thorough-going and well balanced system of government control and direction of a security agency is not enough, in our view, to satisfy the requirements of democracy. We believe there is also a need to bring to bear on the government some checks and balances from external sources. The modern history of western democracies has revealed that there is a danger of secret intelligence agencies being used by the government of the day for narrowly partisan purposes or to serve the personal interests of political leaders rather than the security of the nation. To avoid this danger and to strengthen public confidence in the integrity of security intelligence operations and their direction by government, provision must be made for independent review of security activities. One element of independent review is the Security Appeals Tribunal we proposed in Part VII to hear appeals in security clearance cases. Also, in Part V, we proposed that judicial approval be required for the use of certain intrusive techniques of investigation. In Chapter 2 of this part of the Report we shall propose some additional elements of external review.

4. Before presenting our detailed proposals as to various institutions and offices involved in the direction and review of security intelligence activities, we think it worthwhile to provide a short outline of all the elements in the system we propose. The outline will show clearly how the various components of the system interact.

5. The main elements in the system we propose for government direction and independent review of the security intelligence agency are as follows:

(a) Parliament should express its will in statutory form as to the functions and powers of a security intelligence agency and the means of directing and reviewing its activities.

(b) Within the statutory framework established by Parliament, general policy as to the agency's methods and intelligence collection priorities should be established and reviewed by the Cabinet.

(c) The Cabinet, the Privy Council Office and interdepartmental committees should be responsible for the co-ordination of security and intelligence activities, including the development and implementation of personnel and physical security policies and the provision of assessments of intelligence reports to government consumers.

(d) The Prime Minister's responsibility for national security has some special dimensions. He should continue to chair the Cabinet Committee on Security and Intelligence and be consulted on security issues of major importance.

(e) The Secretary to the Cabinet and the staff in the Privy Council Office should assist the Prime Minister in discharging his responsibilities with regard to security and intelligence. They should also assist the Cabinet in co-ordinating the activities of the intelligence agencies and in developing and implementing policy on an interdepartmental basis with respect to personnel and physical security.

(f) The Solicitor General of Canada should continue to be the Minister responsible for the security intelligence agency. He should be responsible for ensuring that government policy with respect to the security intelligence agency is carried out and should take the lead in initiating changes in government policy and legislation governing the security intelligence agency.

(g) The Deputy Solicitor General should be the Minister's deputy with respect to all aspects of direction and control of the agency. With the assistance of the Departmental staff and the Director General of the agency, he should be in a position to give the Minister informed advice on all aspects of the security intelligence agency's activities.

(h) The accountability of the agency, both to the Cabinet and to Parliament, must be ensured by an effective system of communication. It should operate within the agency and also between the Director General of the agency and the Deputy Solicitor General and the Solicitor General to ensure that the Minister is informed of all those activities which raise questions of legality or propriety.

(i) An effective system of control on security intelligence expenditure and efficiency must be maintained by the Treasury Board through its Secretariat and the Comptroller General and the Auditor General.

(j) Parliament's function of scrutinizing the activities of the security intelligence agency must be facilitated by a joint parliamentary committee on security and intelligence which can examine the activities of the agency *in camera*.

(k) An Advisory Council on Security and Intelligence should be established to assist the Minister, the Cabinet, and Parliament in assessing the legality, propriety, and effectiveness of the security intelligence agency. It should be made up of capable people who will command the respect of Parliament and the public. It should have no executive powers, but should have an investigating capacity. It should report any findings of illegality or impropriety to the responsible Minister. It should also report at least annually to the joint parliamentary committee on security and intelligence.

(l) A Security Appeals Tribunal should be established to review situations in which individuals wish to challenge security clearance decisions in the areas of public service employment, immigration and citizenship. The conclusions of this review process should be reported as recommendations to the Cabinet.

(m) Where Parliament has empowered the security intelligence agency to collect information by methods not available under law to the ordinary citizen, a judge of the Federal Court of Canada should determine, on an application approved by the Solicitor General of Canada, whether the conditions established by Parliament for the use of such techniques are satisfied in each case.

(n) Members of the security intelligence agency must not be above the law. Evidence of illegal activity by members or their agents must be submitted to the appropriate Attorney General who is responsible for deciding what further steps should be taken with regard to prosecution.

(o) The internal security of Canada must not be treated as a water-tight compartment under exclusive federal jurisdiction. Arrangements should be established for ensuring that the federal Minister and officials responsible for security intelligence activities meet with other levels of government on a regular basis to ensure mutual understanding and co-operation.

(p) Ministers and Parliamentarians with responsibilities relating to security and intelligence should endeavour to provide the public with all information possible about the security of Canada, the threats to it and steps taken to counter those threats so that a more informed public opinion can address with some understanding the major issues relating to the work of a security intelligence agency.

CHAPTER 1

INTERNAL GOVERNMENTAL CONTROLS

A. ROLE OF THE CABINET AND INTERDEPARTMENTAL COMMITTEES

6. The Parliament of Canada must establish the basic 'charter' of the security intelligence agency, but this charter will inevitably require important policy decisions in its implementation. Such decisions require answers to the following:

> What should be the priorities of the agency in collecting intelligence?
>
> How can its capacity to serve the needs of the government be improved?
>
> How can its performance better meet the intention of Parliament and the concerns of the public?

In our system of government the Cabinet must be responsible for determining these policy questions, subject always to its accountability to Parliament.

7. We recognize that the amount of time the Cabinet can devote to any subject, even national security, is quite limited. But we would emphasize that because security issues so often involve the balancing of conflicting policy interests and social values, it is highly desirable that important policy matters in this field be subject to a collegial decision-making process. In the past, the participation of the Cabinet and Cabinet Committees has occurred mostly during periods of crisis. We think it important that the Cabinet should be involved in the policy-making process in normal times.

8. The assignment of much of the detailed policy work of Cabinet to specialized Cabinet committees has become a permanent feature of Cabinet government in Canada. Such committees have the advantage of making it possible for the Ministers whose departments are most involved in a particular policy to devote more attention to its development than could the full Cabinet. Also, meetings of Cabinet committees permit interaction between senior government officials and Cabinet Ministers which is not possible at meetings of the full Cabinet. The advantages of using specialized Cabinet committees can be realized in the field of security and intelligence through the Cabinet Committee on Security and Intelligence which has existed since 1963.

9. This Committee has not met on a regular basis to consider policy matters in relation to security and intelligence. Instead it has dealt with particular issues which are referred to it, usually by the Interdepartmental Committee on Security and Intelligence. As we shall see shortly, that Interdepartmental

Committee has not been able in recent years to develop policy proposals in most of the areas under review to the point of submitting them for consideration by the Cabinet Committee. This is one reason why meetings of the Cabinet Committee on Security and Intelligence have been relatively infrequent. Between 1972 and mid-1980 it has met 20 times.

10. We think that one matter which the Cabinet Committee should deal with on a regular basis is the establishment of the government's intelligence priorities. When the Committee meets for this purpose, its membership should be expanded to include Ministers whose departments are the principal consumers of foreign and domestic intelligence as well as those whose departments are involved in intelligence collection. The Committee should review the performance of the security intelligence agency along with other components of the intelligence community to ensure that government departments and agencies are receiving useful intelligence products. The Committee's assessment of intelligence priorities should be reflected in the budget allocations for the various intelligence and security functions of government. For some years now the Treasury Board has been trying to establish a satisfactory method of identifying expenditures on security and intelligence. As soon as such a scheme is arrived at, the Cabinet Committee should be asked to make budget recommendations to those government departments with responsibilities in security and intelligence. An improvement in the Cabinet Committee's capacity for deciding intelligence priorities depends very much on the assistance which it can receive from the Interdepartmental Committee on Security and Intelligence in identifying the government's intelligence needs. We shall make a number of specific suggestions in this chapter designed to improve this aspect of the interdepartmental committee system.

11. The 1975 Cabinet Directive on "The Role, Tasks and Methods of the R.C.M.P. Security Service" stated that

> (b) the R.C.M.P. Security Service be required to report on its activities on an annual basis to the Cabinet Committee on Security and Intelligence;

There have been two reports so far: the first covered the 1976 calendar year and the second covered the period from January 1977 to April 1979. We were told the second report was delayed because the R.C.M.P. Security Service decided to change the time basis for its annual report from calendar year to fiscal year, and because a special task force was examining the interpretation of terms in the 1975 Cabinet Directive. We think this delay is regrettable. A report once a year is the minimum required to keep the Cabinet Committee on Security and Intelligence adequately informed about the security intelligence agency's activities. Preferably, there should be reports twice a year. The quality of the second report is a distinct improvement over the first. It contains a good deal of information about the nature of security threats and targetting decisions, but has much less to say about methods of investigation and countering. A dramatic reduction in security screening activity is reported but not explained. The report could be improved by focussing more directly on policy issues which should be of concern to the Cabinet. Shifts in the allocation of resources to target areas should be indicated as these should reflect changes in

intelligence priorities. Legal implications of operational practices which indicate a need for legislative change should be identified. The report should also refer to serious difficulties encountered in relationships with foreign agencies, provincial or municipal authorities, or with other federal departments or agencies.

12. Since its inception, the Cabinet Committee on Security and Intelligence has been chaired by the Prime Minister. The Prime Minister's responsibility for national security has some special dimensions which set it aside from his other basic responsibilities and create the need for him to chair the Cabinet Committee during discussions of major issues in this area. Weaknesses in the internal security system can have drastic consequences for the well-being of the nation. The secret, intrusive nature of security work makes it dangerous to permit any Minister to become overly dominant in this field. The consideration of intelligence needs should be a balanced process free from domination by any single government department. It is doubtful that any other area of government activity has as much potential for damaging civil liberties. For all of these reasons we think it essential that the Prime Minister continue to be chairman of the Cabinet Committee on Security and Intelligence, and should chair the Committee when it deals with matters of great urgency or major policy questions, or when the Committee determines the government's intelligence requirements. But there should be a vice-chairman who could chair the Committee when such matters as administrative changes in security screening or protective security are being considered. The Solicitor General might be the appropriate Minister to serve as vice-chairman.

WE RECOMMEND THAT the Cabinet annually determine the government's intelligence requirements.

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WE RECOMMEND THAT the security intelligence agency prepare at least annually a report on its activities for submission to the Cabinet Committee on Security and Intelligence and that this report include an analysis of changes in security threats, changes in targetting policies, serious problems associated with liaison arrangements and legal difficulties arising from operational practices.

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WE RECOMMEND THAT the Prime Minister be the chairman of the Cabinet Committee on Security and Intelligence and have the assistance of a vice-chairman.

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B. ROLE OF THE PRIVY COUNCIL OFFICE AND INTERDEPARTMENTAL COMMITTEES

13. Because of the central role which the Prime Minister must play in policy relating to Canada's internal security and the need for balanced direction and central co-ordination, the Privy Council Office must continue to play an important role in security and intelligence matters. The Privy Council Office is, in effect, the Prime Minister's department. One of its principal functions is to act as a central coordinator for government activities. It serves as the

secretariat for the Cabinet and Cabinet committees and provides advice to the Prime Minister on the various matters with which he must deal. The Secretary to the Cabinet (who is also the Clerk of the Privy Council) is the deputy minister of the Prime Minister and as such is considered to be the senior public servant in the Government of Canada. The Secretary to the Cabinet chairs the Interdepartmental Committee on Security and Intelligence. This is the Committee of senior officials at the Deputy Minister level which is responsible for developing most of the policy proposals considered by the Cabinet Committee on Security and Intelligence. An Assistant Secretary to the Cabinet for Security and Intelligence reports to the Secretary to the Cabinet and heads the Privy Council Security and Intelligence Secretariat.

14. The recommendation of the Royal Commission on Security that a considerably enlarged Privy Council Office Secretariat develop and implement security policy has not been implemented. The group of officials in the Privy Council Office devoted to security and intelligence matters continues to be quite small. In addition to the Assistant Secretary to the Cabinet for Security and Intelligence, there are, on the security side, a security policy adviser and two officers who are responsible for personnel and physical security within the Privy Council Office. On the intelligence side of the Secretariat, there are currently four officers seconded from the Departments of External Affairs, National Defence and the R.C.M.P. These officers, under the direction of the Intelligence Advisory Committee, perform the staff work involved in collating intelligence reports and preparing material which is distributed to several departments and agencies of government. In addition, the seconded staff participates in working groups that prepare long-term intelligence assessments.

15. We see no reason to change the basic responsibilities or the size of the Privy Council Office's Security and Intelligence Secretariat. The Privy Council Office should play a co-ordinating, not an operational role, in this as in other fields. The Bureau of Intelligence Assessments which we recommend below should not be part of the Cabinet secretariat, although reporting — through the Secretary to the Cabinet — to the Prime Minister. That Bureau would relieve the seconded intelligence officers in the Privy Council Office of any responsibilities they now have for the preparation of long-term intelligence estimates, but not of their work as it relates to current intelligence. The central co-ordinating role of the Privy Council Office requires that the Secretary to the Cabinet devote a significant portion of his time to security and intelligence matters. His responsibilities in this field are already considerable. Our recommendations for strengthening the interdepartmental committee system and establishing a Bureau of Intelligence Assessments will increase the responsibilities of the Secretary to the Cabinet in this area. So will his work in co-ordinating the implementation of this Report. On the basis of our discussions here and in other countries which have a parliamentary and cabinet system of government, we estimate that as much as 10 per cent of the Secretary's time might be spent, particularly in the next few years, in dealing with security and intelligence policy.

WE RECOMMEND THAT the Privy Council Office Secretariat for Security and Intelligence continue its existing functions with the exception

of any responsibilities its seconded staff now has for the preparation of long-term intelligence estimates and that the Secretary to the Cabinet devote a considerable amount of time to security and intelligence matters.

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The Interdepartmental Committee System

16. In Part II of our Report we traced the development of the system of interdepartmental committees which deal with security and intelligence matters. It will be recalled that this committee system was reorganized in 1972. The principal components of this system are:

— *The Interdepartmental Committee on Security and Intelligence* (I.C.S.I.) chaired by the Secretary to the Cabinet and composed of the Deputy Ministers of the principal departments involved in security and intelligence activities and the Commissioner of the R.C.M.P. Its secretary is the Assistant Secretary to the Cabinet for Security and Intelligence.

— A subcommittee of I.C.S.I., known as the *Security Advisory Committee* (S.A.C.), chaired by the Assistant Deputy Solicitor General who is the head of the Police and Security Branch in the Solicitor General's Secretariat. The Committee is composed of senior departmental officials responsible for security matters including the Director General of the R.C.M.P. Security Service.

— Another subcommittee of I.C.S.I., known as the *Intelligence Advisory Committee* (I.A.C.), is chaired by the Deputy Under Secretary of State for External Affairs (Security and Intelligence) and composed of senior officials including the Director General of the R.C.M.P. Security Service.

17. The principal activity of the Security Advisory Committee has been to develop policy with respect to the security of information, government property and personnel. In recent years it has also taken on a responsibility in relation to security intelligence: the preparation and distribution of the weekly report on threats to internal security. The reports are based primarily on information received from the R.C.M.P. Security Service, with occasional contributions from the Department of National Defence. The group which drafts reports is chaired by a member of the Police and Security Branch in the Solicitor General's Department, and the final product is approved by key members of the Security Advisory Committee. The Intelligence Advisory Committee supervises the collation of reports received from various departments and agencies and the production of papers. Most of the staff work in this collation and analysis process is done by the officials seconded to the Privy Council Office.

18. Virtually everyone who discussed the interdepartmental committee system with us, including those who participate in it, said that though the basic structure of the system is sound it is not working as well as it should. Our own study of this system has identified two major shortcomings. First, in the area of security policy, while a great deal of time and effort has been devoted by the Security Advisory Committee and its network of subcommittees to such matters as security clearance policy, the system of classifying government documents and emergency planning arrangements, few of these matters have

been finally resolved. Second, the process of providing government departments with useful assessments of intelligence received from collecting agencies needs to be strengthened. We shall deal with each of these issues in turn.

Security policy and co-ordination

19. Turning first to security policy, our review of the performance of the Security Advisory Committee (S.A.C.) over the last eight years revealed a high degree of frustration. In 1972, the Chairman of the S.A.C. presented to the Interdepartmental Committee on Security and Intelligence (I.C.S.I.) a list of priority items in the area of security policy which required resolution. The I.C.S.I. approved the list and the S.A.C. went to work. Eight years later some of the most important items on the list remain unresolved. For instance the redrafting of Cabinet Directive 35 governing security screening in the Public Service has been under way since 1973, but despite numerous drafts and re-drafts, a new directive has still not been adopted. In Part VII we noted how the failure of the Committee system to develop a new method for classifying government information has impeded the reform of the security screening mechanisms. In Part IX we shall describe the failure of the Committee system to develop policy on emergency security matters. Both these failures have had a direct impact on the R.C.M.P. Security Service as they have left that organization without comprehensive, up-to-date policy directions in several areas.

20. We think that one of the factors which accounts for the ineffectiveness of the Committee system with regard to Security policy is the poor linkage between Deputy Ministers on the senior committee (I.C.S.I.) and the members of the junior committee (S.A.C.) from some departments or agencies. Some of the security officials who represent their departments on the Security Advisory Committee do not have a direct reporting relationship with their Deputy Ministers. The discussion and proposals at the S.A.C. level too often focus on the intricacies of administration rather than on fundamental policy. As a result the proposals of this Committee do not have a receptive audience in the senior Committee.

21. We recommend that in the future the *initiative* in policy issues such as personnel security, physical security and emergency planning not be delegated to a junior committee. Leadership in determining which security policy issues need resolution, in assigning policy problems to the S.A.C. and in monitoring the impact of security procedures, must be exercised by Ministers and Deputy Ministers. The Cabinet and Interdepartmental Committees on Security and Intelligence should establish clear mandates with firm completion dates for working groups at the S.A.C. level. Leadership at the Cabinet level requires the designation of a lead Minister for policy in this area. The Solicitor General would seem to us to be the logical Minister to be designated for most security policy matters. In section C of this chapter we shall discuss his role as the Minister responsible for the security intelligence agency. There we shall argue that the Solicitor General must continue to have within his Department, and outside the security intelligence agency itself, a nucleus of personnel to advise him on security matters. The Assistant Deputy Solicitor General who heads the Police and Security Branch in the Solicitor General's Department should be

one of the most knowledgeable senior officials in the federal government on security matters. It makes good sense for the person who holds this position to continue to chair the Security Advisory Committee. There may be some areas of security policy in which a department other than the Solicitor General's Department has a more direct operational responsibility (for instance, security screening for the Public Service) in which case the Minister responsible for that department should be designated as the Minister responsible for bringing forward policy proposals to Cabinet. The important point to bear in mind is that adequate Cabinet attention to the various elements of security policy will be ensured by assigning responsibility for each element to one or more Ministers.

22. The Secretary to the Cabinet and the Assistant Secretary for Security and Intelligence must continue to play the primary role in overseeing and co-ordinating the committees or working groups of security experts. It is through the work of these interdepartmental groups co-ordinated by the Privy Council Office that the perspectives — philosophical and technical — of the different departments and agencies must be brought to bear on the resolution of security problems. More effort should be made through this central co-ordinating mechanism to learn how security policies are working. In particular it is important for the Privy Council Office to be able to keep the Minister responsible for the security intelligence agency well informed about the impact that the agency's work is having on the security clearance process. How often are persons being denied a security clearance? For what reasons? Are the departments following the recommendations of the security intelligence agency? If not, why not? What major breaches of security have occurred in government? What is their cause? It is on questions of this kind that the central machinery of security policy co-ordination should focus. No time should be spent on routine meetings which are not channelled towards solving policy problems recognized as reasonably urgent and in need of resolution by Deputy Ministers and Ministers.

WE RECOMMEND THAT the Cabinet and Interdepartmental Committees on Security and Intelligence assume active responsibility for determining those security policy issues which require resolution and, where necessary, instruct the Security Advisory Committee or working groups of officials to prepare draft proposals for submission by stipulated deadlines.

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WE RECOMMEND THAT one or more Ministers be clearly designated as responsible for bringing forward policy proposals to Cabinet on all aspects of security policy, and that the Solicitor General be the Minister responsible for the development of policies governing the work of the security intelligence agency.

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WE RECOMMEND THAT the Secretary to the Cabinet and the Assistant Secretary to the Cabinet for Security and Intelligence continue to be responsible for overseeing the interdepartmental co-ordination of security policies and that more emphasis be given to analyzing the impact of security practices and policies on the departments and agencies of government.

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Intelligence policy and co-ordination

23. Turning now to the committee system's role in formulating policy with regard to intelligence priorities and in co-ordinating intelligence activities, we think improvement is needed in two areas. First, there is a need for a more effective process of identifying intelligence requirements for the Cabinet and ensuring that these requirements have a direct and significant impact on the work of the collecting agencies. The identification of the requirements entails closer collaboration with the consumers, or users, of intelligence. A second area of improvement concerns the analysis of the intelligence received and its use by the intelligence consuming departments and agencies of government. The structural changes which we shall recommend are directed towards realizing improvements in these closely connected areas.

24. We think that the logic which led to the amalgamation of security and intelligence at the Deputy Minister level in 1972 (i.e. in I.C.S.I.) should now also be applied to the central collation and assessment of intelligence. Under the present system, domestic security intelligence and foreign intelligence are dealt with separately: the Security Advisory Committee collates and prepares assessments of current security intelligence, the Intelligence Advisory Committee does the same for foreign intelligence. As we have pointed out many times in this Report, many of the threats to Canada's internal security have international dimensions. The collation and distribution of reports about such threats should not be split up into foreign and domestic compartments. Thus, we think that the intelligence assessment and dissemination functions of the Security Advisory Committee should be transferred to the Intelligence Advisory Committee.

25. Some changes should be made in the structure of the Intelligence Advisory Committee to enable it to function more effectively as a central co-ordinating body for intelligence activities. This central co-ordinating work must not be dominated or be perceived to be dominated by one or two departments of government. It is essential that the perspectives of the various collecting departments be reflected in the intelligence products the government receives. We think what might be referred to as the "confederal" character of this process will be enhanced if the Intelligence Advisory Committee is chaired by the Assistant Secretary to the Cabinet (Security and Intelligence) rather than by the Deputy Under Secretary of State for External Affairs (Security and Intelligence). In the past, the Department of External Affairs and the R.C.M.P. have had their differences in assessing the significance of security threats. These differences are inevitable and, indeed, their expression in the intelligence process provides a desirable element of countervailance. These differences, however, should not be resolved by one department having more influence than the other on the intelligence assessment process. That is why we think the official who presides over this process should be someone who reports to the Secretary to the Cabinet and the Prime Minister.

26. The membership of the I.A.C. should represent the community of intelligence producers and its major customers. If our recommendation to establish a security intelligence agency separate from the R.C.M.P. is adopted, the

Director General of the new organization should certainly be a member of the Committee just as the Director General of the present Security Service is a member of the I.A.C. The R.C.M.P. should continue to be represented on the Committee as a major consumer of security intelligence and because of its liaison with the security intelligence agency. We think, too, that there should be better representation of the economic departments of government on this Committee. Certainly the Department of Finance should be represented, as well, perhaps, as the Departments of Industry, Trade and Commerce, and Energy, Mines and Resources. The central assessment of intelligence needs and intelligence products has tended to focus on political and military intelligence. We think this emphasis is too narrow and that as a result the Government of Canada does not make the best use of the information at its disposal. The integration of economic intelligence into the overall intelligence requirements and priorities may contribute to a less narrow intelligence community, and one perhaps more aware of the benefits to be gained from the intelligence machinery. In addition, the Treasury Board should be represented on the Committee in order to assist it in monitoring the costs of the different components of the intelligence system.

27. With these additions to the membership and with the integration of security intelligence analysis, we think that the Intelligence Advisory Committee should continue with its present functions. One of these functions is the production of current intelligence — analyzed information on events to assist short-term decision-making. At present, the support staff of the Committee who do most of the work in drafting papers is constituted by a small group of officers seconded to the Privy Council Office, usually from the Departments of External Affairs and National Defence, and from the R.C.M.P. Under our suggested reforms this group would remain in the Security and Intelligence Secretariat of the Privy Council Office under the supervision of the Chairman of the Intelligence Advisory Committee. Its work in current intelligence would follow the requirements and priorities as defined by the Committee and as approved by the Interdepartmental Committee on Security Intelligence. With the suggestions we have made for greater integration between producers and consumers of intelligence, and for a broader definition of intelligence requirements, the current intelligence function would expand to include security intelligence and economic intelligence in addition to political and military intelligence.

28. While these changes in the functions and structure of the Intelligence Advisory Committee will improve the collation and distribution of *current* intelligence, this in itself is not enough. The aim of intelligence is to provide information needed for informed decision-making by government. In addition to current intelligence, there is a need for longer term, strategic estimates assessing the likelihood that certain situations will exist or that certain events will occur. The aim of such assessments or estimates is to attempt to reduce the inevitable degree of uncertainty in making calculations about future situations. A former Deputy Director of the C.I.A. has written that of "all the different duties devolving on the C.I.A." as a result of the National Security Act "... the preparation and dissemination of national estimates is the most

difficult, the most sophisticated, the most important."[1] Maintaining a current intelligence function and providing intelligence estimates provide the policy-maker with information of use both in the short-term and in the longer term. The existing interdepartmental committee system produces the occasional long-term assessment, but we think the government's intelligence capacity in this area needs strengthening. As for the domestic scene, our examination of the intelligence situation with respect to separatist terrorism in Quebec during 1970 and afterwards leads us to draw the following inference. There are indications that there was a deficiency in the machinery available to do strategic long-term assessments within government of intelligence received from various sources, including the Security Service.

29. The lack of an interdepartmental security and intelligence assessments programme singles Canada out from its close allies. A recent Australian Royal Commission on Security and Intelligence recommended the establishment of an assessments agency.[2] Mr. Justice Hope, who headed the Australian Royal Commission, found that in that country the assessment process suffered from too great control by the Defence Department and the Department of Foreign Affairs.[3] He also concluded that other departments of government did not take any real part in setting intelligence targets and priorities.[4] He found, too, that there was a lack of definition of roles and co-ordination which affected the collectors of intelligence.[5] As was the case in Canada for much of the post-war period, Mr. Justice Hope thought that too little emphasis had been placed on non-military intelligence,[6] and the Royal Commission proposed a centralised assessment function.[7] Our review of the co-ordination of intelligence policy in Canada has drawn us to some similar conclusions, including the need for a centralized assessments body. The Australian body, which emerged as a result of the Royal Commission's recommendations is called the Office of National Assessment (O.N.A.). Its functions and personnel arrangements are laid out in the Office of National Assessments Act, 1977, that governs its operations.

30. With these examples, and bearing in mind our criticisms of the intelligence analysis function as presently constituted, we propose the creation of a Bureau of Intelligence Assessments. The Bureau should be centrally located in the Privy Council Office, but separate from the Security and Intelligence Secretariat. The functions of the Bureau would be to produce intelligence assessments under the direction of the Interdepartmental Committee on Security and Intelligence and in line with the requirements and priorities set by the Intelligence Advisory Committee and approved by the Interdepartmental and the Cabinet Committees on Security and Intelligence. Following the Australian

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[1] Ray S. Cline, *Secrets, Spies and Scholars: Blueprint of the Essential C.I.A.*, Washington, Acropolis Books, 1976, p. 135.

[2] Australia, *Third Report of the Royal Commission on Intelligence and Security* (The Hope Report), *Abridged Findings and Recommendations*, Canberra 1978, para. 67.

[3] *Ibid.*, para. 67.

[4] *Ibid.*, para. 48.

[5] *Ibid.*, para. 51.

[6] *Ibid.*, para. 53.

[7] *Ibid.*, para. 59.

model, we think the Bureau should have a nucleus of its own intelligence analysts augmented by officers seconded from the departments and agencies of government with responsibilities for security and intelligence matters. It should be headed by a Director General, an individual with experience in the assessment of intelligence. We think he should report to the Prime Minister through the Secretary to the Cabinet and should be a member of the I.A.C.

31. It is our belief that the confederal character of the intelligence community should be retained in the work of the Bureau. Much of its work should be carried out by working groups devoting their time and energies to specific topics. In the preparation of papers on a subject which is likely to be perceived differently by different departments of government, it would be wise to ensure that representatives of these departments are included, or are consulted by the working group. Departments with intelligence collecting functions must have the opportunity to present their views to government if they dissent from the assessment presented in a paper prepared by the Bureau. To provide for this opportunity, consideration should be given to providing a clause in the legislation establishing the Bureau, similar to section 8(3) of Australia's Office of National Assessments Act 1977. That section requires that, where consultation with departments has not produced a consensus, the Director General

> shall forward to each person to whom the assessment is furnished a statement setting out the matter or matters in respect of which the difference of opinion has arisen.

32. It must be emphasized that the Bureau of Assessments would not be an intelligence collecting agency. Its function would be confined to using the intelligence collected by other departments and agencies of the Canadian government and that obtained from other sources, and combining this with the best available public sources of information to produce long-term assessments of threats to Canada's security and vital interests. Nor would the Bureau be a substitute for developing a strong analytic capacity within the security intelligence agency. As we have explained earlier, analysis is an essential ingredient of the operational work of an effective security intelligence agency. The agency's products must include short-term and long-term assessments of security threats. These reports would often be used by the Bureau in its work. In addition intelligence officers from the agency would frequently be members of groups working under the Bureau's auspices on long-term estimates.

33. The Bureau should also make an important contribution to the process of developing intelligence priorities. From its preparation of assessments it will be in a position to identify shortcomings in the information or intelligence held by government and, therefore, to help define the requirements and priorities of the intelligence community.

34. But the primary responsibility for developing annual intelligence priorities should continue to rest with the Requirements and Priorities Group which functions under the supervision of the Intelligence Advisory Committee. The Assistant Secretary to the Cabinet (Security and Intelligence) should forward that group's recommendations to the Chairman of the I.C.S.I. The intelligence requirements for security and foreign intelligence, including economic intelli-

gence identified by the Bureau, should be integrated with the I.A.C.'s list of intelligence requirements and be subject to discussion in an interdepartmental environment, as well as to review by the I.C.S.I. and the Cabinet Committee on Security and Intelligence. The links that exist between assessments and the definition of priorities and requirements, together with the close links that exist between current intelligence and intelligence assessments will, we think, require a close working relationship between the Assistant Secretary to the Cabinet and the Director General of the Bureau of Assessments. Also the participation of the Solicitor General, the Deputy Solicitor General, and the Director General of the security intelligence agency at each stage of the process should ensure that the intelligence requirements established by the government are reflected in the operational priorities of the security intelligence agency.

WE RECOMMEND THAT the collation and distribution of security intelligence now carried out by the Security Advisory Committee be transferred to the Intelligence Advisory Committee and that the work of the Intelligence Advisory Committee in collating current intelligence and advising on intelligence priorities be broadened to include security intelligence and economic intelligence.

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WE RECOMMEND THAT the Intelligence Advisory Committee be chaired by the Assistant Secretary to the Cabinet (Security and Intelligence).

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WE RECOMMEND THAT the membership of the Intelligence Advisory Committee include, among others, the Director General of the security intelligence agency, the Commissioner of the R.C.M.P. and representatives of the Department of Finance and the Treasury Board.

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WE RECOMMEND THAT a Bureau of Intelligence Assessments be established to prepare estimates of threats to Canada's security and vital interests based on intelligence received from the intelligence collecting departments and agencies of the government and from allied countries and that it be under the direction of a Director General who reports to the Prime Minister through the Secretary of the Cabinet.

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C. MINISTERIAL DIRECTION

35. A discussion of the ways in which the security intelligence agency should be directed by its Minister and the Prime Minister entails a study of how the agency should itself relate to the responsible Minister and to the Prime Minister. It also requires a determination of who ought to be the responsible Minister and how those reporting to him on security matters ought to be structured. Confusion and controversy in the past as to precisely what role ought to be played by the Prime Minister, the Solicitor General, the Deputy Solicitor General, the Commissioner of the R.C.M.P. and the Director General of the Security Service not only have been responsible for wasted time and

energy but also have contributed to the creation of an environment in which many of the activities which have been investigated by us have been allowed to take place. Direct and clear lines of responsibility and reporting relationships can go a long way to preventing future abuses.

36. Before embarking on an examination of what the extent of ministerial direction ought to be and how it ought to be effected, a brief look at developments in the past and the current status will make clear what changes ought to be made and what pitfalls ought to be avoided in the future.

Legal background

37. As a starting point it is useful to recall the legal basis for the existence of the Security Service. Section 18 of the R.C.M.P. Act[8] sets out the duties of members of the Force who are peace officers:

> 18. It is the duty of members of the Force who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

Thus it will be seen that the Governor in Council is authorized to specify "other duties and functions" but only with respect to those members "who are peace officers".

38. Section 21 of the Act gives the Governor in Council further authority to make regulations and also gives the Commissioner authority to make rules in precisely the same areas, exclusive of the power to make regulations generally. It reads:

> 21. (1) The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Force and generally for carrying the purposes and provisions of this Act into effect.
>
> (2) Subject to this Act and the regulations made under subsection (1), the Commissioner may make rules, to be known as standing orders, for the organization, training, discipline, efficiency, administration and good government of the Force.

[8] R.S.C. 1970, ch.R-9.

39. Pursuant to its regulation making powers, the Governor in Council passed the R.C.M.P. Regulations,[9] regulation 24 of which provides the only specific authority for the maintenance and operation of a Security Service, in the following terms:

> 24. In addition to the duties prescribed by the Act, it is the duty of the Force:
>
> (e) to maintain and operate such security and intelligence services as may be required by the Minister.

One other mention of the Force's security role used to be found in regulation 110 of the same Regulations where provision was made for the position of the Director General. It stated:

> 110. No person shall be appointed a civilian member unless he is of good character and physically fit to perform the duties of the position to which he is appointed and to perform one of the following duties:
>
> ...
>
> r. Director General - Security and Intelligence.[10]

That provision was dropped in the consolidation of the Regulations in 1978.

40. On this legal base is built the edifice of the R.C.M.P. Security Service. In our opinion this legal foundation is not firm. It is at least doubtful whether, the Act having delegated authority to the Governor in Council to make regulations (sections 18 and 21), the Governor in Council can then sub-delegate that authority by Order-in-Council to the Minister [regulation 24(e)].[11] Had the duties been assigned directly by the Commissioner of the R.C.M.P. under the powers of prescription granted to him under section 18(d) of the Act this difficulty might have been avoided. However, even in that case the Commissioner's powers are limited to prescribing the duties and functions of members "who are peace officers", and therefore would not extend to the civilian members of the Security Service, one of whom is the Director General. In addition, the Commissioner's assignment of responsibilities to the Security Service might have excluded the direct involvement of the Minister.

41. Even assuming that the R.C.M.P. can in fact legally be assigned duties and functions in the security field, there are further legal problems with respect to the way in which those duties and functions have been assigned. In Part II, Chapter 2, we defined the present role assigned to the Security Service. Much of that role has been assigned by Cabinet Directive or by Record of Decision of Cabinet. Neither of these methods is provided for in the R.C.M.P. Act or Regulations, and therefore neither would appear to possess any *statutory* legal authority. It might be argued that the Cabinet was acting under prerogative authority of the Crown but it is at least debatable whether any such prerogative remains, Parliament in the R.C.M.P. Act having provided the means by which the Crown may direct the R.C.M.P. — by regulations or by the Solicitor

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[9] C.R.C., ch.1391.

[10] P.C. 1969-14/2318.

[11] *A/G Can.* v. *Brent* (1956) 2 D.L.R. (2d) 503 (Supreme Court of Canada).

General's direction.[12] Since the Solicitor General is a member of the Cabinet, it also could be argued that the Cabinet directions (for example, the Cabinet Directive of March 27, 1975) are in fact his directions under regulation 24(e) as he is a member of the Cabinet, but this seems to be a rather imprecise way of dealing with the matter.

42. Setting aside the problems mentioned above relating to the legal assignment of security duties and functions to the R.C.M.P., we turn to an examination of the legislation as it affects the responsibilities of the key participants. Our purpose here is simply to point out the problems in the current legislation as they affect ministerial direction in the security field. It must be borne in mind that when we speak here of the Commissioner of the R.C.M.P. we are considering him in his capacity as the person responsible for the Security Service, the Director General of the Security Service being simply the Commissioner's deputy for that purpose. We shall be analyzing these latter problems, as they relate to the policing role of the R.C.M.P. in Part X, Chapter 4.

43. Our present examination requires an analysis of the legal relationships between the Commissioner, the Solicitor General and the Deputy Solicitor General. This has been a vexing problem, at least since the creation of the Department of the Solicitor General, and has been a major contributing factor to the present difficulties of the Security Service. Prior to January 1, 1966, the R.C.M.P. reported to the Minister of Justice. In 1965 the government of the day decided that a new department should be created under an already existing Minister of the Crown, the Solicitor General. There were at least two reasons for this decision. First, it was felt that the Minister of Justice was overburdened with responsibilities, departmental and otherwise, and consequently was unable to give proper consideration to all of them: in addition to his normal departmental duties, the Minister of Justice was also the Minister responsible for the Canadian Penitentiary Service, the National Parole Board and the R.C.M.P. It is clear that by 1965 the R.C.M.P. was receiving little direction or guidance at the ministerial level. Nor did it appear to be seeking any. Although the R.C.M.P. was not dissatisfied with a relationship which enabled them to operate in a semi-autonomous fashion, the lack of supervision and civilian control was considered by the government to be undesirable. It was believed that one consequence of transferring responsibility for the R.C.M.P. to a Minister with fewer responsibilities would be more direction given by the Minister in security matters. The second reason for the creation of the Department of the Solicitor General was a growing awareness on the part of the government that there was a theory of "social defence" in the system of criminal justice which had a logic to it and required more attention. This theory looked at the path of a criminal from detection and apprehension, through conviction and detention, to parole. There is, according to the adher-

[12] In *Attorney General* v. *De Keyser's Royal Hotel* [1920] A.C. 508 the principle was established that the conferment of statutory powers upon the Crown may prevent the Crown from using prerogative powers which otherwise would have been available to it: Wade and Phillips, *Constitutional and Administrative Law*, London, Longman, 9 ed., 1977, p. 239.

ents to the theory, a need to tie the components together to ensure that full consideration is given to the impact in one area of any change made in another area. It was determined, however, that in order to protect the rights of the individual prior to conviction there was one aspect that ought not to be too closely tied in with the others. That was the prosecutorial role. Thus it was decided that the police, penitentiaries and parole should be placed under one Minister who would have enough time to integrate them and develop them as a system. At the same time, by removing them from the Minister of Justice, the direct connection with the prosecutorial function would be severed.

44. As is usually the case with government reorganizations, the necessary steps to accomplish the reorganization were taken in advance, with the forthcoming legislation in mind. On December 22, 1965 an Order-in-Council was passed,[13] to be effective January 1, 1966, which transferred to the Solicitor General responsibility for supervision of the R.C.M.P. and for control or supervision of the Canadian Penitentiary Service as well as the powers, duties and functions of the Minister under the relevant Acts, including the National Parole Act. The Order further provided that, pursuant to section 2(1) of the Civil Service Act, the Commissioner of the R.C.M.P., the Commissioner of Penitentiaries and the Chairman of the National Parole Board were each designated as deputy heads for the purposes of that Act. This latter designation was necessary because, although there was a new Minister responsible for the agencies, he had no department or deputy minister, both of which required legislation to bring them into existence. This was the embryo Department of the Solicitor General, which came into being when the Government Organization Bill was passed in 1966. That Bill included the Department of the Solicitor General Act,[14] which became law on October 1, 1966. (In Part II, Chapter 2, section E, we described the creation of the Department, which was based on "The Swedish Ministry" concept.)

45. There appears to have been no effort to make the provisions of the new Department of the Solicitor General Act compatible with those of the existing R.C.M.P. Act. Nor was any effort made in the legislation to define clearly the responsibilities of the different positions involved. Section 4 of the Department of the Solicitor General Act sets out the "normal" ministerial powers of the Solicitor General vis-à-vis the R.C.M.P.:

> The duties, powers and functions of the Solicitor General of Canada extend to and include all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to . . .
>
> (c) the Royal Canadian Mounted Police.

This section does not say what the Solicitor General's duties, powers and functions are in relation to the R.C.M.P. It simply states that he has those duties, powers and functions falling within federal jurisdiction "not assigned by law" to any other federal "department, branch or agency". One consequence of this section is that if any other statute assigns duties, powers or functions to the

[13] P.C. 1965-2286.

[14] R.S.C. 1970, ch.S-12.

Minister responsible for the R.C.M.P. then the "Minister" referred to is the Solicitor General. An example of this would be section 54 of the Canadian Human Rights Act[15] which empowers a Minister to exempt databanks. In relation to the R.C.M.P. databanks the "Minister" is therefore the Solicitor General.

46. Difficulties arise when section 4 of the Department of the Solicitor General Act is examined in conjunction with the R.C.M.P. Act. To the extent that any power, duty or function can be said to be assigned by the R.C.M.P. Act to another department, branch or agency, that power, duty or function will be excluded from those of the Solicitor General. There are certain sections of the R.C.M.P. Act which appear to fall clearly within that category — for example, the authority given to the Treasury Board in sections 6(2) and 7(2) of the Act to prescribe the maximum number of officers and members in the Force. But what of the powers assigned to the Commissioner of the R.C.M.P.? Section 5 of the Act[16] provides:

> The Governor in Council may appoint an officer to be known as the Commissioner of the Royal Canadian Mounted Police who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.

Do the words "control and management" cover all the activities of the R.C.M.P. or are they limited to administrative matters? If the words are so limited, what respective roles do the Minister and the Commissioner play in activities not covered by the limitation? And do the words "all matters connected therewith" refer to "the Force" or do they refer to "the control and management of the Force"? And what is the meaning of the French version of section 5 which does not appear to say the same thing as the English version? We shall discuss this question of the meaning of section 5 in greater detail in Part X, Chapter 4, when considering the powers of the Minister and the Commissioner on the policing side. Certain other areas of authority are dealt with specifically in the R.C.M.P. Act. For example, the Governor in Council and the Commissioner are given specific authority in section 21, previously cited. Further, by virtue of section 7 of the Act the Commissioner is given authority to appoint members other than officers. Presumably under either of those sections, and others similar to them in the Act, the Commissioner does not fit the category of a "department, branch or agency of the Government of Canada" as contained in section 4 of the the Department of the Solicitor General Act. If that assumption is correct, is the Commissioner subject to the authority given to the Minister in section 4? If the Commissioner does not fall within the exclusions found in section 4 then what legal reason was there for not amending section 5 of the R.C.M.P. Act which gives the Minister a specific power of "direction" in relation to "control and management"? The only other section of the R.C.M.P. Act which purports to give the Minister authority to perform an act is section 20(1). That section empowers the Minister, with the approval of the Governor in Council, to contract with a province to provide

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[15] S.C. 1976-77, ch.33.

[16] R.S.C. 1970, ch.R-9.

policing by the R.C.M.P. or, with the approval of the Lieutenant Governor in Council of a province, to contract with a municipality for the same purpose. It will be noted that this section simply adds to the powers of the Minister and does not purport to affect his relationship with the Commissioner.

47. Short of statutory amendment, we do not think there can be any reasonable answer given to the various questions we have posed. We think that all the necessary amendments should be made to make it clear, beyond any doubt, that the Minister has full power over all activities of the security intelligence agency. We shall set out in Part X, Chapter 4, our views as to what the Minister's powers ought to be with respect to the R.C.M.P.'s policing role. We do not consider that any restrictions which should be placed on ministerial direction of peace officers should in any way be intended to derogate from the powers of the Minister in connection with the duties of the security intelligence agency. We shall expand on this shortly, but first we shall look briefly at the legal status of the Deputy Solicitor General in relation to the R.C.M.P., a relationship which, as we have already mentioned, applies to the Security Service.

48. Section 23(2) of the Interpretation Act[17] reads as follows:

> (2) Words directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a Minister acting for him, or, if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council, and also his successors in the office, and his or their deputy, but nothing in this subsection shall be construed to authorize a deputy to exercise any authority conferred upon a Minister to make a regulation as defined in the Regulations Act.

In the absence of anything to the contrary that section would appear to make it clear that whatever statutory authority the Solicitor General has with respect to his office is also granted to the Deputy Solicitor General, exclusive of the power to make regulations. The authority thus acquired by the Deputy Solicitor General would normally extend to the R.C.M.P. However, since at least 1965 the Commissioners of the R.C.M.P. have consistently taken an opposite view. In their opinion the Deputy Solicitor General does not stand between them and the Solicitor General for any purpose whatsoever. It has been, and continues to be, contended by them that the Commissioner is the deputy head (in the sense of being the Deputy Minister) of the R.C.M.P. for all purposes. They have argued that, with respect to section 23(2) of the Interpretation Act, it is the Commissioner who is the "deputy" in relation to the R.C.M.P. Some legal support for this position can be found in both the legislation and two Orders-in-Council.

49. The statutory support arises out of the changes in relevant legislation. The North-West Mounted Police Act, 1873, provided that:

> The Department of Justice shall have the control and management of the police and all matters connected therewith: but the Governor-in-Council

[17] R.S.C. 1970, ch.I-23.

> may, at any time, order that the same shall be transferred to any other Department of the Civil Service of Canada...[18]

That Act also made the Commissioner of the Force "subject to the control, orders and authority of such person or persons as may, from time to time, be named by the Governor-in-Council for that purpose".[19] These sections clearly envisaged that the Force was not merely under the Minister but that the "control and management" belonged to the "Department". Just over twenty years later this formula had changed. It then provided that "such member of the King's Privy Council for Canada as the Governor-in-Council from time to time directs, shall have the control and management of the Force and of all matters connected therewith".[20] By 1959, the relevant sections of the R.C.M.P. Act had adopted the present wording of section 5 which speaks of the Commissioner having "control and management" under the direction of the "Minister". The Minister at that time was the Minister of Justice. There is no mention of any departmental involvement. It is argued that this removal of explicit statutory departmental jurisdiction, when coupled with the other statutory powers bestowed on the Commissioner in the R.C.M.P. Act, gives the Commissioner deputy head status.

50. Further support for the proposition is found in two Orders-in-Council. The first of these was the one mentioned earlier which was passed on December 22, 1965.[21] It designates the Commissioner as the "deputy head" of the R.C.M.P. for the purposes of the Civil Service Act. The second was passed on October 5, 1967[22] and designates the Commissioner as "deputy head" for the purposes of the Public Service Employment Act. That latter Act had replaced the Civil Service Act which had been repealed.

51. But neither the R.C.M.P. Act nor the two Orders-in-Council, nor any other statute or statutory instrument, makes the Commissioner the deputy of the Minister for the purposes of section 23(2) of the Interpretation Act, thereby giving the Commissioner the full powers of a deputy with respect to the R.C.M.P. None of the other principal Acts which organize the legal status and powers of the constituent parts of the Public Service and their chief executive officers designates the R.C.M.P. as a "department". The Public Service Staff Relations Act,[23] by virtue of the definition of "Public Service" in section 2 and the listing of the R.C.M.P. in Schedule I to the Act, does make the R.C.M.P. a separate "portion" of the Public Service. That same definition has been incorporated, by reference, into the Public Service Employment Act.[24] But there is no designation of the R.C.M.P. as a "department" as distinct from a "portion" of the Public Service.

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[18] 36 Vict., ch.35, s.33.
[19] 36 Vict., ch.35, s.11.
[20] 57-58 Vict., ch.27, s.3.
[21] P.C. 1965-2286.
[22] P.C. 1967-1898.
[23] R.S.C. 1970 ch.P-35.
[24] R.S.C. 1970, ch.P-32, section 2(1).

Attempts at resolution of the problem

52. It is not our intention to try to come to a conclusion as to the current legal status, within government, of the R.C.M.P. and its Commissioner. Our purpose in cataloguing the legal problems set out above is simply to show that a very real problem does exist. The lines of disagreement were drawn very shortly after the creation of the Department of the Solicitor General. Ministers who held the Solicitor General portfolio in the early days of the Department took different views as to what role should be played by the Deputy Solicitor General and the Commissioner. Mr. Ernest Côté, who was the second Deputy Solicitor General, serving from December 15, 1968 to July 31, 1972, spent a great deal of time and effort trying to resolve the problem. It was his position that the Deputy Solicitor General was the "alter ego" of the Solicitor General for all purposes (Vol. 307, pp. 300, 752). According to Mr. Côté, his position was strenuously resisted by the Commissioner of the day (Vol. 307, pp. 300, 745).

53. On January 27, 1971, shortly after Mr. Goyer was appointed Solicitor General, the Prime Minister wrote to him with his views as to what the relationship ought to be between the Deputy Solicitor General and the heads of the R.C.M.P., the Canadian Penitentiary Service and the National Parole Board. The Prime Minister suggested that the problems be reviewed with the purpose of finding some solutions. He said:

> To begin with, you must endeavour to foster within these three components of your Department a spirit of understanding and solidarity which has hardly been encouraged by their long-established hierarchical structure and independence. The senior officials, in particular, seem suspicious of and distant with both one another and the Deputy Minister. This behaviour has prevented them from developing bonds of trust and a spirit of understanding and solidarity — elements which are essential to the smooth operation of the Department.
>
> This problem could no doubt have been resolved at the outset by unifying the three agencies under a single firm authority, instead of allowing them to develop their own structure and autonomy. The decision made at the time was a sound one which complied with the desire to work out an arrangement that, while guaranteeing the exercise of central authority, permitted the existence of a decentralized administration. This decentralized structure was to remain under the overall authority of the central body which was responsible for allocating resources. It had been anticipated that, under the supervision of the Deputy Minister, the authority exercised by the departmental team would be firm enough to foster confidence and co-operation within these three agencies without diminishing unduly the autonomy they needed.
>
> Therefore, in my opinion, the solution lies not in carrying out a total merger of the Department's components but rather in ensuring mutual co-operation and co-ordination. Contrary to current practice, in order to manage the affairs or allocate the resources of your Department, your Deputy Minister must have at his disposal all the information needed to advise you or, as required by his duties, to act for you in any matter. He must also be able to rely on the full co-operation of the officials responsible for each of the agencies.

Therefore, I ask you to take into account the measures advocated many times by your predecessors — specifically, the idea that the three departmental agency heads should refer all departmental matters to you through your Deputy Minister. In this regard, it would no doubt be advisable to review Orders-in-Council 1965-2286 and 1967-1898, the terms of which inevitably complicate relations between your Deputy Minister and the departmental agency heads. I feel that it is important to seek the most acceptable solutions with respect to relations between your officials as well as to management, personnel and the budget. Your Deputy Minister could submit these problems to the Committee of Senior Officials which could study them and suggest a way of resolving them.

In my opinion, measures of this kind would help to improve the operation of your Department. I do not think there is any need to pursue matters further and apply the Government Organization Act, 1966, in accordance with the original intent. Your task is rather to establish clearly that you are counting on and require everyone's co-operation, that your Deputy Minister will frequently act on your behalf, that it is through him that you are seeking to obtain the necessary co-operation, and that you are expecting him, in his turn, to act in a manner which will not undermine the leadership, authority and responsibility of the departmental agency heads. Ideally, the Deputy Minister and the agency heads should work together as a team in a spirit of openness, understanding and good will. The climate which must be established within your Department would be undermined by the imposition of strict hierarchical relations on either side. In my view, a good way of fostering a climate of this kind — one which I hope you will often resort to — is to invite study groups and task forces set up within your Department to participate in the formulation of new policies. Their combined efforts could not help but increase the effectiveness of their activities.

54. In the Spring of 1971 the problem was referred to a Committee of senior officials, chaired by the Secretary to the Cabinet, but no resolution was forthcoming from that Committee by the time Mr. Côté left office. The Treasury Board and the Public Service Commission were both treating the Commissioner as a deputy head and the R.C.M.P. was acting as a department of government completely independent of the Department of the Solicitor General, although reporting to the same Minister.

55. The result of this autonomy of the R.C.M.P. was that the Solicitor General was not able to obtain any independent advice or guidance from his Deputy Minister on police or security matters. When Mr. Goyer became Solicitor General he initiated the practice of having the Deputy Solicitor General present at all his meetings with the Commissioner and the Director General except when warrants for electronic surveillance were being considered. But simply having the Deputy Solicitor General present at meetings did not solve the problem of how the Solicitor General was to examine and analyze all the information which was being passed to him by the R.C.M.P., particularly on the security side. It was in part to alleviate this problem that a group was set up in the Secretariat of the Department of the Solicitor General to analyze and assess information received from the Security Service and to advise the Solicitor General with respect to it, and when appropriate, to report the information within government. That group was created on May 14, 1971

and was called the Security Planning and Research Group (SPARG). It was not its role to monitor the activities of the Security Service, nor did it have any authority to get information from the Security Service if the latter refused to provide it. Indeed, from the outset SPARG was denied access to operational files by the Security Service and only has such access now in connection with its review of applications by the Security Service for warrants for electronic surveillance. SPARG was set up with the approval of the Director General of the Security Service, although he would have preferred to see it located in the Privy Council Office. With respect to the work of the Security Service, SPARG performed a service essentially confined to handling the liaison between the Security Service and the Minister. That SPARG worked successfully in this limited role was manifested by the extension of its mandate, at the request of the R.C.M.P., to include police matters. When that occurred its name was changed to the Police and Security Planning Branch (PSPB), which was subsequently modified to the Police and Security Branch (PSB).

56. We have described the development and current role of SPARG in Part II, Chapter 2, section E, in discussing the place of the Department of the Solicitor General in the security system of the government. We therefore simply wish to repeat here that PSB, the successor to SPARG, is the centre within the Department of the Solicitor General in which the security policy advice to the Minister originates and it has all the limitations which we previously discussed.

57. Over the past few years a *modus vivendi* has been worked out between the Solicitors General, Deputy Solicitors General and Commissioners of the R.C.M.P. based on the "ministry" concept which we have described in Part II, Chapter 2. It is now understood that the Deputy Solicitor General is the principal adviser of the Solicitor General. He is responsible for coordinating the development of policies and legislation. He is also responsible in large part for federal-provincial relations and for the organization of meetings with the provinces at the level of Ministers and senior officials. He is also, of course, the deputy head of the Secretariat of the Department. The Commissioner is the deputy head for purposes of the R.C.M.P. and is responsible for its operations. He therefore reports directly to the Solicitor General on operational matters. We are advised that, because the Deputy Solicitor General is the principal adviser, he is present, except on rare occasions, at all meetings between the Solicitor General and the Commissioner and he sees all correspondence and documents between them. A very recent change is that the Deputy Solicitor General is now present when the Director General is seeking warrants for electronic surveillance. Working together, the Commissioner concentrates on operations and the Deputy Solicitor General's emphasis is on overall policies and directives, legislation and research. That this current system was for some time an uneasy truce can be seen by the attempts of the R.C.M.P. to revert to previous practices when the Solicitor General's portfolio changed hands from Mr. Goyer to Mr. Allmand on November 27, 1972. Mr. Goyer had insisted that the Deputy Solicitor General be involved in all dealings with the R.C.M.P. (Vol. 120, pp. 18831-32). After Mr. Allmand assumed office, the Force was reluctant to include the Deputy in some matters and Mr. Allmand had to insist that they do so (Vol. C71, p. 9924 et seq.).

Proposed role of the Minister

58. Having examined the present situation we turn now to our proposals as to how ministerial direction ought to be exercised with respect to the new security intelligence agency which we advocate be created. The main question is whether the Minister should be limited in any way as to the matters over which he should have the power of direction. The argument in favour of limitation is based on the very real concern that the Minister might give a direction based on improper considerations. For example, the Minister might direct that surveillance take place in order to harass a political opponent or direct that surveillance not take place in order to protect a personal friend. Direction based on partisan or political considerations is clearly wrong, but in our view the protection against such improper direction can be achieved otherwise than by making the Director General independent of ministerial direction. In Chapter 2 of this part of the Report we shall be recommending the creation of an independent review body, one of whose prime responsibilities will be to provide protection against improper direction by investigating and reporting to a Parliamentary Committee any instances that it finds of such improper direction. Were there no such protective mechanism we could see some merit for restricting the Minister as has been done in Australia.[25] However, even then we would be very concerned about placing independent authority in the hands of the Director General, a non-elected official responsible to no one for the exercise of that authority. We have discussed this question in greater detail in Part VI, Chapter 2.

59. It has been suggested, both in evidence before us and in statements elsewhere, that there should be limitations on the power of direction of the Minister based on a perceived dichotomy between policy and operations. For example, consider the following evidence given to the Commission by the present Commissioner of the R.C.M.P.

> A. . . . The Minister's role, I suppose, the most basic — really as I understand it, is really a policy role. Not an operational director in any sense; although when you are in the security areas, he gets very close to operations, because he does control your warrants, and you produce the intelligence product, if you want, which is the papers that are produced

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[25] Australian Security Intelligence Organization Act, 1979, section 8(2) reads as follows:

> In the performance of his functions under this Act, the Director General is subject to the general directions of the Minister, but the Minister is not empowered to override the opinion of the Director General
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> (a) on the question whether the collection of intelligence by the Organization concerning a particular individual would, or would not, be justified by reason of its relevance to security;
>
> (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security; or
>
> (c) concerning the nature of the advice that should be given by the Organization to a Minister, Department or authority of the Commonwealth.

as a result of your work, which is for the purpose of government, and so on. Thus, they are in a position where they can see what you are doing, and ask questions and one thing or another, which is, I think, their proper role.

Q. But if you are a deputy head for certain matters, if the policy of the Force is issued under your signature, be it the criminal investigation side or the Security Service side, now, you say the Minister has control over policy. What is there left for him?

A. Well, you know, perhaps a definition of *policy* is needed. I think, you know, to me, policy — I suppose the law itself is the ultimate expression of policy. And under the law, there are various directives and orders and Cabinet directives, and something or another, all of which are reflections of government policy. And then, you get down to what we in the Force sometimes call *policy*, which is really not government policy in the broad sense. It is operational directives and policies to guide our operations and so on. And even that comes in a variety of levels, if you like.

Now, the Minister has great responsibility for the first area that I spoke of: proper laws, proper guidance in the broad sense, and one thing and another. But much less when it comes to the directing of the Force. There are also many other policies in the Force, particularly in the administrative side, that flow out of directives that are not in the control of the Minister at all: Treasury Board Directives with respect to many operations all across government, and so on, from which we develop directives in the Force, and so on. So, the problem in using simple words like *policy*, is to know exactly what we are talking about.

(Vol. 164, pp. 25214-6.)

Prime Minister Trudeau has made the same distinction in explaining his government's approach to security matters. He said,

> We in this government and I believe it was the case with previous governments, have removed ourselves from the day to day operations of the Security Services. . . . We just make sure that the general directives are those which issue from the government and the example of that kind of directive was given in the guidelines of March 1975.[26]

60. In our view such a distinction between policy and operations leads to insurmountable difficulties in application, and even worse, it results in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of 'operations' and are thus outside the Minister's purview. This neglect has been apparent in what might be called the policy of operations - those policies which ought to be applied by the Security Service in its methods of investigation, its analysis of the results of investigations and its reporting on those results to government. All policies of operations must receive direction from the ministerial level. For instance, whether or not a particular new foreign target ought to be the subject of surveillance and, if so, what methods of surveillance ought to be employed are questions which Ministers should decide as a matter of policy even though such a decision could clearly be described as involvement in operations. Policy and operations in the

[26] House of Commons, *Debates*, November 2, 1977, p. 568.

security field are not severable and any attempt to make them so is doomed to failure. Two further examples should suffice. In the work of a security intelligence agency important policy questions concerning the distinction between legitimate dissent and subversive threats to the security of Canada will arise in the context of deciding whether or not to initiate surveillance of a particular individual or group. Similarly, questions will arise about the legality and propriety of a particular method of collecting intelligence in the context of a particular case. Obviously, the Minister cannot direct the day-to-day operations of the agency any more than can the Minister of any other department do so with respect to his or her department. However, there must be no fetters on the Minister's legal right to give such direction provided that such direction is consistent with the authority granted to the security intelligence agency under the Statute. In the instances we have mentioned above, and others where day-to-day operations raise significant policy questions, the Deputy Minister and the Director General must keep the Minister informed and seek his advice and direction.

61. In directing the security intelligence agency the Minister must not be simply reactive to proposals brought to him by the agency. He must also take the initiative in developing policies and guidelines, and in reviewing activities of the agency. Without attempting to be exhaustive we think the Minister should be responsible for the following:

(i) developing policy proposals for administrative or legislative changes with regard to the activities of the security intelligence agency and presenting such proposals to the Cabinet or Parliament;

(ii) developing guidelines with respect to investigative techniques (e.g. on use of informants) and reporting arrangements;

(iii) continuous review of the agency's progress in establishing personnel and management policies required by government;

(iv) reviewing difficult operational decisions involving any questions concerning legality of methods or whether a target is within the statutory mandate;

(v) reviewing targetting priorities set by the government and ensuring that the agency's priorities and deployment of resources coincide with the government's priorities;

(vi) approving proposals by the Director General to conduct full investigations and to apply for judicial authorization of investigative techniques (e.g. electronic surveillance and mail checks);

(vii) approving liaison arrangements with foreign countries after consultation with the Secretary of State for External Affairs;

(viii) approving liaison arrangements with provincial and municipal police forces and government; and

(ix) authorizing reporting of security intelligence to the media.

62. The Minister cannot, of course, carry out his powers of direction without adequate advice and assistance. Normally in government a Minister looks to the agency or department for which he is responsible for such advice and assistance. This system is usually satisfactory because of the myriad of other

ways in which inadequacies or improprieties of the agency or department can be brought to his attention. For example, most departments of government have a constituency within the country which will be quick to express its concerns to the Minister, such as farmers, labour, business, consumer groups, universities, and other levels of government. In addition, within government, certain central agencies are charged with the specific responsibility of ensuring that the operating departments and agencies "toe the line". Also, to the extent that one department's activities border on those of another department there is a certain amount of monitoring of the other department's activities. Parliament itself has a large role to play in this scrutiny through its examination of estimates, question period, debates on legislation, and so on. Moreover, the media are always searching for stories. Through all of these processes and others, a Minister is normally made aware of problems and difficulties of both a policy and operational nature. He is then able to seek answers from his department and give direction on the basis of the information and advice received. Such is not the case with an agency whose activities are essentially secret. Very few people either inside or outside government have much of an idea what the agency is doing. Moreover, if the agency is to function as it must, not much can be done to change that situation. Certainly not a great deal can be made public so as to put into play the forces of the media and interest groups. Implementation of our recommendations with respect to a statutory base for security activities would offset the problem to some extent, as would our suggestions for more adequate reporting to Parliament on the extent of electronic surveillance and other intrusive techniques requiring warrants.

63. Within government, our proposals as to the role to be played by the Committee system and the Cabinet secretariat, and as to the increased activities to be undertaken by the Department of Justice should each help to make available to the Minister a larger pool of knowledge and advice. As a further source we place great store in the reports to the Minister by the Advisory Council on Security and Intelligence, the creation of which we shall recommend in the next chapter.

64. At the parliamentary level, the special Committee which we envision should also be of some assistance to the Minister, not as a source of information, but rather as a guide on general policies. In discussing matters with that Committee the Minister will no doubt wish to use its members as a sounding board for some of the more difficult policy areas.

Role of the Deputy Minister

65. However, none of these sources of information and advice can serve as a substitute for the information that the Minister must get from the agency and the advice that he must get from his senior officials. In Part VI, Chapter 2, we recommended that the Director General report to the Deputy Minister rather than directly to the Minister. The purpose of this recommendation is to avoid the concentration of too much power in the hands of the Director General, who will have a statutory term of office and whose appointment will have been made after consultation with the leaders of the opposition parties in the House of Commons. The Deputy Minister should be considered for all purposes as the

'alter ego' of the Minister. Section 23(2) of the Interpretation Act should apply to the Deputy Minister in his relations with the security intelligence agency. Also, the Deputy Minister should be the 'deputy head' for the agency for the purposes of all applicable legislation.

66. The paramountcy of the Deputy Minister having been thus established, we hasten to repeat our recommendation in Part VI, Chapter 2, that the legislation provide for the security intelligence agency to be under the control of the Director General, subject to that paramountcy. The Deputy Minister must be ever mindful that although he has full legal authority over the agency he ought not to exercise that authority in such a way as to weaken the role of the Director General. We do not envision that the Deputy Minister become, in effect, the Director General of the agency and that the Director General become simply a Deputy Director General. We have recommended that the Deputy Minister have plenary power to ensure that he is able to carry out his functions. He should exercise that power to its full extent only in exceptional circumstances.

67. The Deputy Minister is the principal adviser of the Minister for all purposes, including the areas of responsibility covered by the agency. But the Director General must also be seen as an adviser to the Minister in those same areas and, as a matter of good management, should meet regularly, together with the Deputy Minister, with the Minister. The Director General will, in the normal course of things, run the operations of the agency. He will also be responsible to the Deputy Minister for developing policy proposals with respect to the agency's field of activities.

68. However, it is the Director General who should be reporting to the Minister on operational problems, and he should also be presenting to the Minister the policy proposals developed by the agency. In both cases this reporting should be done with the knowledge and consent of the Deputy Minister, other than in exceptional circumstances which we will mention shortly. The Deputy Minister should engage such staff outside of the agency as he considers necessary to assess the policy proposals brought forward by the Director General and to fill any gaps in security policy that are identified. The Deputy Minister must also have sufficient staff to appraise for the Minister the quality of the reports produced by the agency so that the Minister can assess the agency's work. For that purpose the Deputy Minister and no more than one or two of his staff having the appropriate security classification, should have such access to the operational files of the agency as the Deputy Minister considers necessary. We make the recommendation while fully realizing the difficulties faced by a security intelligence agency in protecting the identity of its human sources and its communications with foreign intelligence agencies. The Deputy Minister's departmental staff will also be serving the Minister in carrying out all his other responsibilities in the security field, some of which we mentioned earlier. In many of the areas the staff work will be a cooperative venture between the agency and the secretariat of the department.

Direct access by the Director General to the Minister and the Prime Minister

69. Because we have tried to recommend a system of countervailance between the Deputy Minister and the Director General, subject to the overriding authority of the Deputy Minister if it is necessary for him to assert it, we think there are certain circumstances in which the Director General must have direct access to the Minister without the consent, or even necessarily the knowledge of the Deputy Minister. Those circumstances would arise only when the Director General is of the opinion that the conduct of the Deputy Minister is such as seriously to threaten the security of the country. For example, the Director General might obtain information that leads him to believe that the Deputy Minister is a security risk, or the Director General might consider that the Deputy Minister is wrongly refusing to submit to the Minister proposed policy changes of great importance. We do not think that such a right of access needs to be provided for formally, either legislatively or administratively, since it will be exercised only in extreme cases, when the dictates of common sense would govern.

70. There are also circumstances when the Director General must be able to "go over the heads" of both the Deputy Minister and the Minister to the Prime Minister. It is part of our constitutional convention that a Deputy Minister may, *in extremis*, go directly to the Prime Minister, either with or without the knowledge of his Minister. It is not possible or desirable to describe definitively the circumstances in which this might be necessary in the security field. We would expect that in most cases where the Minister is to be by-passed it would be done by the Deputy Minister, in consultation with the Director General. This would be the case, for example, if it were necessary to bring to the attention of the Prime Minister security concerns relating to any of his Ministers. In our opinion such concerns should not be brought to the attention of the Minister responsible for the agency unless the Prime Minister so directs. The Director General should only go directly to the Prime Minister in those situations where he considers there is a serious security threat and he is being blocked at either or both of the deputy or ministerial level. Once again, we do not think there is any necessity to spell this out in a formal sense. Indeed, even if this custom did not already exist or nothing had been said about it we would find it alarming if the Director General did not take this step in appropriate circumstances when the security of the state is threatened.

Role of the Prime Minister

71. We think it is appropriate to deal briefly with the directing role of the Prime Minister in the security field. As the leader of the government he has the ultimate responsibility for the security of the nation. This means that he must be kept informed of issues arising from the work of the security intelligence agency that have serious implications for Canada's internal security, for the civil liberties of Canadians, or for Canada's international relations. It is the responsibility of the Deputy Minister, with the assistance of the Director General, to bring such matters to the attention of the Minister, who must then decide whether and how to brief the Prime Minister. In the circumstances previously described the Prime Minister may also be informed by either the

Deputy Minister or the Director General. The Prime Minister, after ensuring that he is being adequately briefed, must be prepared to give advice and direction to the responsible Minister on the major security policy positions of the government.

72. In addition, as we have indicated earlier in this chapter, given the ultimate responsibility of the Prime Minister for the security of Canada and the need to prevent policy on security or intelligence from being unduly influenced by any one department or agency, the Prime Minister should chair the Cabinet Committee on Security and Intelligence. Also he should be expected to answer questions in the House of Commons relating to the security of Canada or the activities of the security intelligence agency whenever he believes an issue is important enough.

Choice of responsible Minister

73. Throughout this chapter we have referred to "the responsible Minister". We turn now to a consideration of which Minister that ought to be. We have examined three options:

(i) the Solicitor General (who is now the minister responsible for the R.C.M.P. Security Service);

(ii) the Minister of Justice (who until 1966 was responsible for the R.C.M.P., including its security intelligence directorate);

(iii) a Minister of State or Minister Without Portfolio especially appointed for the purpose of directing the security intelligence agency and implementing the Commission's Report.

There are advantages and disadvantages to each of these options. On balance we favour the first of the three. We also feel that there might be some advantage in combining the first and the third options and we shall discuss that as well.

74. In rejecting the option of the Minister of Justice we considered two matters. First, the principal reason for the removal of the R.C.M.P. from the responsibility of the Minister of Justice in 1965 — the too-heavy workload — still holds, and is no doubt even more applicable today. From many of our recommendations it will be clear that we consider that only if the security intelligence agency receives considerable attention from the Minister and the Deputy Minister will the countervailing forces be effective and accountability be achieved. Our second reason is that we think there would be some danger of a conflict of interest developing if the Minister who is responsible for reviewing the legality of the agency's operations is also responsible for directing the agency. That same reasoning of course might apply to the assignment of responsibility for any other agency to the Minister of Justice, who is the government's legal adviser, but in any event it is certainly applicable to a security intelligence agency. We have not discounted the one great advantage in having the agency report to the Minister of Justice: the benefit which would accrue to the agency by virtue of the prestige of the Minister and the Department of Justice both within and outside government.

75. This element of prestige is the main reason why we rejected the option of having the agency report directly to a Minister of State or a Minister without Portfolio. For a variety of reasons, whether valid in all cases or not, these Cabinet positions are seen by many to be less important or significant than the 'regular' Portfolios. If it were decided that there should be a separate Minister responsible only for the security intelligence agency, which we do not recommend, that Minister could function effectively only if he were attached directly to the Prime Minister, thus acquiring the prestige and authority of that office. Along with that acquisition would be the concomitant danger of the activities of the agency being in too close association with the Prime Minister. Such close association might result in knowledge of particular matters being imputed by Members of Parliament to the Prime Minister when in fact he has no knowledge of them.

76. There is no Minister of the Crown, except the Solicitor General, whose responsibilities have any logical association with the agency. (Perhaps a marginal case could be made with respect to the Minister of National Defence or the Secretary of State for External Affairs but the case is so tenuous as not to require further elaboration.) The office of the Solicitor General has, of course, 15 years of experience with the Security Service. Along with the machinery and structure which have been built up in his department, the various relationships and understanding which have developed are also indefinable but significant benefits which should not be cast aside without valid justification.

77. If the security intelligence agency is separated from the R.C.M.P., it might be argued that it would be unwise to leave it under a Minister who continues to be responsible for the R.C.M.P. No matter how well separation is implemented it is bound to arouse some hostile feelings and a Minister responsible for both the R.C.M.P. and the new agency might find himself with divided loyalties. On the other hand, a strong Minister should be in a position to arbitrate the differences and ensure that hostilities are not allowed to degenerate into costly organizational rivalries. He should also play a key role in ensuring that effective liaison — which will be essential — is established between the R.C.M.P. and the new agency.

78. We do not accept the view that the responsibilities of the Minister responsible for a police force and those of a Minister responsible for a security intelligence agency are so incompatible that they should be assigned to different Ministers. A security intelligence agency does need more direction from a federal Minister than does a law enforcement agency whose targets are primarily defined by the law creating federal and provincial offences and which performs functions for eight provincial governments and many municipalities. But, we submit, this is more a difference of degree than of kind. While in police matters there may be certain "quasi-judicial" functions, such as the laying of a charge, in relation to which ministerial direction is improper, there are a great many policy questions concerning the deployment of resources and the legality and propriety of investigative techniques which are similar to the policy issues on which a Minister should give direction to a security intelligence agency.

79. It is beyond our terms of reference to comment on the structure of the reporting relationships of the other operational components of the Solicitor General's "Ministry", and the suitability of those relationships for ministerial direction.[27] We have rejected this "Ministry" concept as it applies to the security intelligence agency for the reasons stated in our discussion of the relationship between the Deputy Minister and the Director General. One thing is clear: no matter how the "Ministry" is structured, its components are such that any one of them can, over a considerable period of time, occupy almost the whole of the time of the Minister to the unfortunate exclusion of the others. There are two reasons for this: the disconnected nature of the components, although there is a thread of commonality, and the 'high profile' areas of their responsibilities (police, parole, penitentiaries and security) when problems of public concern arise. For example, when Mr. Fox assumed the portfolio in September 1976, there were major disturbances in certain penitentiaries on which he had to concentrate most of his efforts (Vol. 159, p. 24338). And no doubt there have been periods just prior to and during the life of this Commission when the Solicitor General has had to pay less attention to parole and Correction Service matters than is desirable.

80. One further point about the responsible Minister requires consideration. Since the bringing together of the various components under the Solicitor General on January 1, 1966, and the subsequent creation of the Department of the Solicitor General on October 1, 1966, there have been nine Solicitors General. Three of the changes came about by resignations and two by a change of the Party in power. It would be impossible for any government department to escape unscathed by such a turnover, but it is especially damaging to a security agency. It must be remembered that until the last year or two public knowledge about the Security Service was practically non-existent. A new Minister assumed his responsibilities absolutely "cold". With all his other duties as a Minister and a Member of Parliament it would take him months, if not years, to begin to understand the workings of this arcane Service. We hope that the recommendations we have made as to the structure of the agency will help to alleviate this problem through the Deputy Minister's being able to brief the Minister more quickly and adequately. Nevertheless, we think that such a rapid turnover in Ministers as has occurred in the past must, if at all possible, be avoided in the future.

Ministerial assistance for the Solicitor General

81. The other major changes which we have proposed, including the creation of a new security intelligence agency, will place severe time demands on the Solicitor General. There will be the creation of the new agency, the preparation and processing of legislation, the preparation and implementation of adminis-

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[27] For a discussion of the "Ministry" concept see: H.L. Laframboise, "Portfolio Structure and a Ministry System: A Model for the Canadian Federal Service", *Optimum*, vol. 1 (Winter, 1970); D.R. Yeomans, "Decentralization of Authority", *Canadian Public Administration*, (Spring, 1969); John W. Langford, *Transport in Transition: The Reorganization of the Federal Transport Portfolio*, Montreal, McGill-Queen's University Press, 1976.

trative orders and guidelines and extensive negotiations with the provinces. We are concerned that the Solicitor General will not have the time to direct the details of all those matters. This would be true if an emergency arose on the police or security side, but particularly if one arose on the corrections side. For that reason we think serious consideration should be given to the appointment of a Minister of State, pursuant to section 23(a) of the Government Organization Act, 1970,[28] to assist the Solicitor General in implementing the changes. We do not envisage this Minister of State assuming the responsibilities of the Solicitor General nor do we suggest that he operate independently of the Solicitor General in any way. He would be there simply to assist the Solicitor General in providing direction on all the details which will require ministerial attention. We visualize such assistance being necessary only during the implementation stages and see no role for such a Minister beyond that. We are reluctant to make this suggestion as one of our recommendations because we are not familiar with the various considerations which a Prime Minister must bear in mind when recommending that a Minister be appointed. As outsiders to that process we would have thought that a Senator might be ideal for this role. He would have the necessary experience and maturity, and would be knowledgeable about governmental processes, would not seek to use the position for personal advancement or to compete with the Solicitor General, and would not be reluctant to give up the duties when the implementation had been completed. We raise this matter of a Minister of State for consideration only, and not as a recommendation.

82. Having thus examined the way in which we feel ministerial direction of the agency ought to take place, whether at the level of Cabinet, Prime Minister or responsible Minister, we turn now to look briefly at other levels of government direction.

WE RECOMMEND THAT the Minister responsible for the security intelligence agency be the Solicitor General.

(167)

WE RECOMMEND THAT the Minister responsible for the security intelligence agency should have full power of direction over the agency.

(168)

WE RECOMMEND THAT the Minister's direction of the security intelligence agency include, inter alia, the following areas:

(i) developing policy proposals for administrative or legislative changes with regard to the activities of the security intelligence agency and presenting such proposals to the Cabinet or Parliament;

(ii) developing any guidelines which are required by statute with respect to investigative techniques and reporting arrangements;

(iii) continuous review of the agency's progress in establishing personnel and management policies required by government;

[28] S.C. 1970-71, ch.42.

(iv) reviewing difficult operational decisions involving any questions concerning legality of methods or whether a target is within the statutory mandate;

(v) reviewing targetting priorities set by the government and ensuring that the agency's priorities and deployment of resources coincide with the government's priorities;

(vi) approving proposals by the Director General to conduct full investigations and to apply for judicial authorization of investigative techniques (e.g. electronic surveillance and mail opening);

(vii) approving liaison arrangements with foreign countries after consultation with the Secretary of State for External Affairs;

(viii) approving liaison arrangements with provincial and municipal police forces and governments; and

(ix) authorizing dissemination of security intelligence to the media.

(169)

WE RECOMMEND THAT the Director General be responsible, in the normal course, for running the operations of the agency.

(170)

WE RECOMMEND THAT the Director General be responsible to the Deputy Minister for developing policy proposals with respect to the agency's field of activities.

(171)

WE RECOMMEND THAT the Minister meet regularly with the Director General and the Deputy Minister together, to discuss matters relating to the agency and to receive reports from the Director General on operational problems in the agency and policy proposals developed by the agency.

(172)

WE RECOMMEND THAT the Deputy Minister have such staff as he considers necessary to:

(i) assess the policy proposals brought forward by the Director General and to fill any gaps in security policy that are identified;

(ii) to appraise for the Minister the quality of the reports produced by the agency; and

(iii) assist the Minister in carrying out all his other responsibilities in the security field.

(173)

WE RECOMMEND THAT the Director General have direct access to the Minister, without the knowledge or consent of the Deputy Minister, when the Director General is of the opinion that the conduct of the Deputy Minister is such as to threaten the security of the country.

(174)

WE RECOMMEND THAT the Deputy Minister and the Director General each have direct access to the Prime Minister, and not consult with their Minister, in the following circumstances:

(i) if there are security concerns relating to any Minister;

(ii) if, in the opinion of the Deputy Minister or the Director General, the conduct of the Minister is such as to threaten the security of the country.

(175)

WE RECOMMEND THAT recognition be given to the special need for continuity in the office of the Minister responsible for the security intelligence agency.

(176)

D. OTHER FORMS OF GOVERNMENT DIRECTION AND REVIEW

83. There are three other government entities which have a role to play in this area. They are:

— Minister and Department of Justice

— Treasury Board, which has two components, the Treasury Board Secretariat and the Comptroller General

— Auditor General

Minister of Justice

84. We do not propose to examine here the responsibilities and duties of the Minister and Department of Justice. They have been dealt with in Part V, Chapter 8, and Part VI, Chapter 2 and will also be covered in detail in Part X, Chapter 3. We simply wish to emphasize at this point that their role is crucial in ensuring that the security intelligence agency conducts its activities within the law.

Treasury Board

85. The Treasury Board, which is made up of certain designated Ministers, has two distinct parts of the Public Service, each reporting directly to it. They are the Treasury Board Secretariat and the Comptroller General's office.

86. The Treasury Board Secretariat performs a number of functions but we are concerned only with the direction and control it exercises over the Security Service through the Program and Budget Analysis Process. Each department and agency of government must submit to the Treasury Board each year a Program Forecast which relates to the following fiscal year and the four subsequent fiscal years. This forecast is an estimate of the fixed costs of providing services in the designated year plus any new or expanded initiatives. A department's programme allocation for the next ensuing fiscal year becomes the budgetary target level for the Main Estimates for that same year. Each year a department must submit its Main Estimates for the following year and twice during a year there is the opportunity to submit Supplementary Estimates. The Program Forecasts and the Estimates are reviewed by program analysts in the Treasury Board Secretariat and then submitted by the Secretariat to the Treasury Board with recommendations.

87. The Program Forecast of the R.C.M.P. falls under the Solicitor General's Program Review. Normally, a budget such as that of the Security Service,

being in the category of a sub-activity, would not receive special treatment by the Treasury Board. But it does receive special treatment. For purposes of analysis only it is broken out as a sub-activity and the Program Forecasts and the Estimates are examined as though the Security Service were a separate agency or department. The recommendations of the Secretariat are then submitted for approval to the President of the Treasury Board only, and not to the full Board, as would be normal. Thus it will be seen that the Security Service budget is subject to an extraordinarily detailed examination. This process appears to be satisfactory and we see no need for change in it. It could be readily adapted to the new security intelligence agency which we have recommended.

88. The other component of the Treasury Board which is of interest to our concerns is the Office of the Comptroller General. This office was created approximately two years ago to improve financial management in the Public Service. The Comptroller General decided that he should first conduct a study of 20 of the largest departments. Included was the R.C.M.P. (The study of the R.C.M.P. did not include the Security Service nor the Security Service internal audit mechanism.) This study is called "Improvement of Management Practices and Controls" (IMPAC). After doing a "systems walk through" (which means there is no verification of documents or of representations made by the department or agency) the Comptroller General discusses his conclusions with each department or agency and obtains its agreement to the conclusions. Each department and agency must submit an action plan of how it intends to remedy the faults which have been found. A copy of that action plan is given to the Auditor General and both the Comptroller General and the Auditor General monitor the implementation of the plan. The role that the Comptroller General will play after the action plans are implemented has not yet been determined. We see nothing in this process which requires any particular comment by us. Should any problems develop between the Comptroller General and the security agency with respect to access to files they should be capable of resolution at the ministerial level.

Auditor General

89. Currently there is only one examination of any aspect of the affairs of the Security Service which is performed by an agency independent of the government. That is the Auditor General's review process. The Auditor General has been given three responsibilities by Parliament and he must report on them to Parliament. They are:

- a financial audit of government accounts;
- a legislative audit to determine the degree of compliance by government departments and agencies with the legislation governing the management and operation of the public service, e.g. the Financial Administration Act
- a value-for-money audit — this audit examines programmes as to three facets:
  - (i) the way in which goods and services are acquired
  - (ii) the efficiency of use of the goods and services

(iii) the manner in which the departments and agencies measure their effectiveness. But the Auditor General is not authorized to comment on the effectiveness itself.

90. Each year the Auditor General does an attest audit of each department and agency, which involves a minimum amount of audit of the accounts. There is a comprehensive audit of each department and agency once every five years. This is an audit of the application by the department or agency of government regulations, procedures, directives, guidelines and practices. This audit is done not only on a departmental and agency basis but also on a horizontal basis across departments and agencies with respect to particular factors, as for example, buildings.

91. It is our understanding that in the past the Auditor General has done very little in relation to the Security Service as such. Because the Security Service financial figures are included in the R.C.M.P. figures they have been subject to the annual attest audit and that is the extent of the examination to date. A comprehensive audit of the R.C.M.P. is scheduled to be completed in 1981. This audit will include a thorough look at the affairs of the Security Service under the three rubrics mentioned above ie. financial, legislative and value-for-money.

92. As a result of the undertaking of this comprehensive audit we can envision problems arising in two areas: access to confidential Security Service files and disclosure of confidential information in the report to Parliament. There are certain files, such as those dealing with human sources, which the Security Service justifiably considers should be seen by only those persons having an absolute 'need to know'. Access to those files is not normally given to anyone outside the Security Service. We do not know to what extent the Auditor General will wish to see such files but if any difficulties arise that cannot be resolved between the Auditor General and the Solicitor General we suggest that they be referred for resolution to the Joint Parliamentary Committee which we shall recommend, and pending the creation of such a Committee that the resolution of any impasses be held in abeyance. Because criticisms in the Auditor General's Report are usually system based it is unlikely that there will be any need for the disclosure of any confidential information. If such a problem does arise, however, and cannot be resolved between the Auditor General and the Solicitor General that, too, should be referred to the Joint Parliamentary Committee for resolution.

WE RECOMMEND THAT any disagreements between the Solicitor General and the Auditor General with respect to:

(i) access by the Auditor General to information in the possession of the security intelligence agency; and

(ii) disclosure in the Auditor General's Report of classified information obtained by him from the agency

be referred to the Joint Parliamentary Committee on Security and Intelligence for resolution, and pending the creation of that Committee the resolution all such disagreements be held in abeyance.

(177)

CHAPTER 2

EXTERNAL CONTROLS

INTRODUCTION

1. In this chapter we consider one of the most neglected aspects of Canada's security and intelligence system: control of security intelligence activities by bodies external to the executive branch of the federal government. In our system of cabinet and parliamentary government under the rule of law, 'control' of government activity by individuals or institutions not accountable to Ministers primarily takes two forms: (1) the supremacy of laws enacted by a representative legislature and (2) review of governmental activity to ensure that it is effective and that it meets the requirements of the law and acceptable standards of propriety. The function of bodies which are independent of the executive, such as Parliament, the judiciary and oversight bodies, is not to carry out, nor to direct the carrying out, of national security functions, but rather to provide some assurance that national security responsibilities are performed properly and effectively within an established legislative framework.

2. Our inquiry has shown how limited has been the control and direction of the Security Service by responsible Ministers and their deputies. Our recommendations in the previous chapter were aimed at remedying that situation. But if adequate ministerial control and direction of security intelligence activities were lacking in the past, independent review of these activities was almost non-existent. The judiciary has played a limited role on the relatively rare occasions when security investigations have resulted in the laying of charges. Parliament has been very active in raising questions and provoking debates on security matters, but members of Parliament (aside from Ministers) have had little or no opportunity to scrutinize security intelligence practices systematically. The proposal of the Royal Commission on Security for the establishment of a Security Review Board was implemented only to a very limited extent in the field of security screening. On the whole, security intelligence operations have remained in a secret realm. Little has been known about them, even by the Ministers who were theoretically responsible for them, and even less by anyone outside government. The work of our own Commission of Inquiry and the report of the earlier Royal Commission on Security have, perhaps, been the principal departures from this pattern of excluding external review of security activities.

3. The recommendations put forward in this chapter would permit a number of 'outsiders' to have considerable knowledge of security practices. Although the number would not be large, still there is a risk, though a slight one, of

compromising operations whose effectiveness often depends on their absolute secrecy. We acknowledge that risk, but we think it is justified by the greater risk to our democracy that lies in the absence of any effective independent check on the government's conduct of security operations.

A. THE FEDERAL COURT OF CANADA AND THE SECURITY APPEALS TRIBUNAL

4. In our First Report, *Security and Information*, we recommended that the Federal Court of Canada have two responsibilities with regard to security matters. First, we recommended an appeal to the Federal Court from an administrative tribunal reviewing government decisions refusing disclosure of government documents on security and intelligence grounds. The appeal would be available to the government or, in cases where the existence of a document is admitted, to the person applying for access. We further recommended that section 41(2) of the Federal Court Act no longer apply to security and intelligence documents. When, in the course of judicial proceedings, a litigant seeks to introduce evidence consisting of government documents, we recommended that instead of the court being bound by a Minister's affidavit that production of the document would be injurious to national security, the matter be referred to a judge of the Federal Court of Canada who would determine whether the need to disclose the evidence for the purpose of doing justice outweighed the public interest in non-disclosure.

5. Earlier in this Report, our recommendations for controlling methods of intelligence collection by the security intelligence agency called upon the Federal Court of Canada to play a role in authorizing the use of electronic and photographic surveillance, mail interception, surreptitious entry and access to confidential governmental information of a personal nature. It will be recalled that, under the scheme we proposed, the Solicitor General would be responsible for deciding whether, as a matter of policy, the use of any of these techniques to gather intelligence about a particular 'target' is advisable. If he decides that it is and also is satisfied that the evidentiary standards established by the statute for use of the technique have been satisfied, he could authorize an application by the security intelligence agency to a judge of the Trial Division of the Federal Court of Canada for a warrant to use the technique. A refusal might be appealed to the Federal Court of Appeal. The judicial function in this scheme would be to ensure that the evidentiary standards established by the Statute, governing the use of the techniques, are satisfied. Because of the secret nature of these techniques and the absence of any provision requiring notification of persons subject to them, we felt that judicial authorization is the best way to ensure that the requirements of the law are met in each case.

6. These two sets of recommendations clearly envisage a significant role for the Federal Court of Canada in decisions relating to national security. As we recommended earlier in Part V, this role would best be carried out by a nucleus of judges from the Appeal and Trial Divisions who would be specially designated for the purpose by the Chief Justice of the Court.

7. The judiciary may be involved in the review of security intelligence operations in one other way. Our proposed statutory charter for the security intelligence agency may create opportunities to launch a legal challenge against the security agency if it is suspected of gathering information, by any technique, about a subject which lies outside its statutory mandate. Such a charter, it might be argued, will lead to harassment of the agency by persons or groups who will launch suits mainly to expose or inconvenience the agency. We do not believe that such harassment is a significant danger. Australia (since 1956) and New Zealand (since 1969) have had statutes governing their security intelligence agencies and have not experienced this difficulty. We are confident that the Federal Court, which hears cases involving challenges alleging that Federal departments or agencies have exceeded their jurisdiction, can deal expeditiously and properly with litigants.

8. Besides the judiciary, our earlier recommendations include one other element of independent review: the Security Appeals Tribunal for security screening cases. The purpose and nature of this body are fully set out in Part VII of the Report. Here we wish only to include the Tribunal in our consideration of external controls and distinguish it clearly from the independent review body — the Advisory Council on Security and Intelligence (A.C.S.I.) which we will recommend below. The Security Appeals Tribunal is a quasi-judicial body whose function would be to hear cases in which persons wish to challenge security clearance decisions. Given the adversarial nature of proceedings before the tribunal and the need for the tribunal to function as much as possible like a Court, we think it should be quite separate from the Advisory Council on Security and Intelligence which will have a broad mandate to review and advise the government on all aspects of security and intelligence policy and operations.

B. THE ADVISORY COUNCIL ON SECURITY AND INTELLIGENCE (A.C.S.I.)

9. In 1977, the R.C.M.P. took some steps to establish better internal controls of Security Service activities. Earlier, we commented on these developments and in Parts V and VI recommended a number of ways in which the internal control of security intelligence activities could be improved. In Chapter 1 of this part of the Report, we have made recommendations designed to strengthen the capacity of the Solicitor General and the Cabinet to supervise security intelligence activities. We shall also be recommending a special parliamentary committee to increase parliamentary review of security intelligence activities. While all of these changes will provide much greater assurance that the security intelligence agency's conduct is lawful and proper, still we believe that they are not sufficient. In addition a review mechanism is needed, both to ensure that ministerial neglect or ignorance of security intelligence activities does not recur and at the same time to guard against the possibility of the security intelligence agency's being subject to direction by Ministers based on partisan or personal considerations.

10. Two features of security intelligence operations point to the need for an independent review body: the extreme secrecy of many operations and their

potential impact on the civil liberties of Canadians. With normal operations of government the citizen knows what the government has done to him, and can decide whether he wishes to question the propriety or legality of government action. However, with regard to security intelligence investigations which a citizen may fear are encroaching on his privacy or his political liberty, he has no way of knowing whether he has been investigated as a threat to security and, if he has, whether the investigation has been carried out in a legal and proper manner. For reasons that are fully set out in our First Report, we think providing a right of access to information about the operations of a security intelligence agency would defeat its very purpose. However, in that Report we argued that rigorous mechanisms of scrutiny subject to democratic control would be even more effective than freedom of information legislation as a means of ensuring that security intelligence operations are acceptable. "The function of scrutinizing the operations of a security or intelligence agency", we wrote,

> "should be systematic and continual. It is a sensitive and important task which must be performed assiduously by highly competent people who are also responsible to democratically elected representatives."[1]

This is so even if Parliament adopts Freedom of Information legislation which affords a mechanism for some degree of non-systematic, intermittent scrutiny of the activities of the security intelligence agency. It is with the object of providing a *systematic* and democratically accountable review mechanism that we now recommend the establishment of the Advisory Council on Security and Intelligence.

11. This Advisory Council, as its title suggests, should have no executive powers. Its basic functions should be to carry out a continuous review of security intelligence activities to ensure that they are lawful, morally acceptable and within the statutory mandate established by Parliament. Although it should not be responsible for assessing the effectiveness of the security organization, it should be fully cognizant and supportive of the functions of the security intelligence organization as set out in its statutory mandate. The Council should report on a continuing basis to the Solicitor General so that he has an opportunity to take remedial action in response to any finding by the Council that an operation or practice is questionable. Also, it should report from time to time and at least annually to the parliamentary Committee on Security and Intelligence so that Members of Parliament representative of all political parties will know of any situations in which the Solicitor General has rejected the views of the Advisory Council.

12. The independence of the Council will be best ensured if its review of the agency's operation is strictly *ex post facto*. If the Council becomes involved in advising on or, worse, approving operations before they occur, it will be implicated in the agency's operations and in effect will be reporting on itself. Therefore it should avoid giving advisory opinions before the fact. Its *ex post*

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[1] *Security and Information*, Ottawa, Department of Supply and Services, 1979, paragraph 97.

facto review of operations should, nevertheless, produce a body of "case law" which should be of considerable assistance to the agency and those in government who are responsible for supervising the agency in making the difficult policy decisions which, as we have emphasized throughout the Report, are inherent in security intelligence operations.

13. The scope of the Advisory Council's review of intelligence activities should extend to all organizations employed by the federal government to collect intelligence through clandestine means, other than the R.C.M.P. and other federal police forces. Unless the independent review body's jurisdiction extends this far, it will be all too easy for a government to evade its scrutiny by *de facto* transfers of responsibilities from the security intelligence agency to some other organization which is not subject to its review. In Part X, Chapter 2, we recommend the establishment of the Office of Inspector of Police Practices as a review and audit body to perform functions in respect to the R.C.M.P. which are similar in this regard to those which we recommend the Advisory Council on Security and Intelligence should perform with respect to the security intelligence agency.

14. To be effective the Advisory Council must be both independent and knowledgeable. These two characteristics are not easily combined. The Advisory Council's advice will be of little value to the government or to Parliament if it does not acquire a solid understanding of security intelligence work. Its members must appreciate the purposes of this work, its problems and its temptations. It must learn what questions to ask and where to look for the answers. But the more knowledge the Advisory Council acquires about the agency the more its members are apt to become so enmeshed in the world of security and intelligence that they lose perspective and objectivity. There is no fool-proof defence against this tendency. Our recommendations as to the Council's composition, powers and organization will be designed to minimize the danger while ensuring that the Council is knowledgeable enough to perform a useful function.

15. The Council must be small. The risk of disseminating highly sensitive information about intelligence activities to 'outsiders' should be kept to a minimum. We think that an appropriate size would be three members. In the United States, the President's Intelligence Oversight Board is that size and it appears to function effectively.[2] One member of the Council should be designated by the government as the chairman. We think that members of the Council should be at arm's length from the Government of Canada — for example, they should not be employees of the government. It would be a distinct advantage if one of the members had some previous experience in the field of security and intelligence. At least one member should be a lawyer of not less than 10 years standing. On the basis of our own experience, we know how much is involved in obtaining a reasonable understanding of security intelligence activity. It is a field in which reliable knowledge is simply unavailable to outsiders. Therefore we would urge that members new to the

[2] See *Executive Order 12036*, January 24, 1978, section 3-101. Note that all three members of this Board "shall be from outside the government".

field should, on being appointed, undergo a month-long programme of intensive study on security and intelligence activities. After this, the members should be expected to devote several days a month to the work of the Council. We do not think that any of the members of the Council should be full-time, although they should have the assistance of a small full-time secretariat. There is a danger of their becoming too closely identified with the agency whose activities they are to review. This danger is reduced if members of the Council do not spend all of their time on security and intelligence business. For the same reason, they should serve for no more than six years. Continuity in the membership of the Council, so that its accumulated experience is passed on to new members, would be ensured if all appointments did not terminate at the same time.

16. The method of appointing and removing members of the Council must be designed to ensure, so far as possible, that both the government and the Opposition in Parliament respect the judgment and integrity of the Council. We think this condition is most likely to be realized if members are appointed by the Governor in Council after approval of the appointment by resolution of the Senate and House of Commons. An appointment system of this kind would be similar to that used for appointing the Commissioner of Official Languages and that proposed for the Ombudsman in the bill introduced by the government in April 1978. The method of removal should be the same as that which applies to three offices or bodies which now report to Parliament (the Auditor General, Members of the Human Rights Commission and the Commissioner of Official Languages) as well as the proposed Ombudsman namely that members should hold office during good behaviour for six years but may be removed by the Governor in Council on address of the Senate and House of Commons. We emphasize that our reason for making this recommendation is our belief that this degree of parliamentary involvement in the appointment and removal of Council members will increase the likelihood of Parliament's having confidence in the Council. Public confidence in the security agency — confidence that its activities are not serving narrow partisan interest and are not biased against one side of the democratic political spectrum — will be best assured if the body responsible for the independent, continuous audit of security intelligence activities, demonstrably has the confidence of Parliament.

17. The Council's full-time secretariat need not be large. It will certainly need a full-time executive secretary and a small administrative staff. It should also have authority to retain its own legal counsel and one full-time investigator. In addition, the Council should be able to recruit personnel on a temporary basis for major investigations or studies. To reduce the danger of the Council's staff being co-opted or of their coming to dominate the work of the Council, full-time members of the Council's secretariat should hold their positions for limited periods of time. The secretariat and Council should be housed separately from the security intelligence agency and the staff should be instructed to avoid frequent social contact with members of the security intelligence agency.

18. Members of the Council must have complete access to all documents and files of the security intelligence agency and of other agencies which it scrutinizes. There may be information, for instance, pertaining to the identity of

sources or to foreign agencies, which is considered so sensitive that the Council staff should not have access to it. But for purposes of examining files and documents in the possession of the agency, the three members of the Council must be treated as if they were members of the security intelligence agency who are entitled to see all material. The arrangement would be similar to that which has applied to the work of this Commission. Nothing less would be acceptable for an effective and credible independent review body. The Council should have the power to require members of intelligence agencies to testify before it under oath and to produce documents — that is, the powers of a Commission of Inquiry appointed under Part I of the Inquiries Act. Although it is to be expected that the ordinary relationship of the Council to the agencies would not require such formality, we are convinced that there may be circumstances in which the use of the power will be necessary.

19. The basic function of the Advisory Council on Security and Intelligence should be to conduct a continuing review of legality and propriety of the activities of the security intelligence agency and of any other federal government agencies (other than police forces) which collect intelligence by clandestine means. Amongst the matters which the Council should keep under review are the following:

(a) The interpretation of the statutory mandate. The Council should review how the general terms of the statutory mandate are interpreted. It will be particularly important in the first few years under a statutory mandate for the Solicitor General, the Cabinet and Parliament to obtain an informed, independent appraisal of the judgment exercised in translating the general terms of the statute into an active programme of intelligence collection.

(b) The implementation of administrative directives and guidelines. The Council should periodically conduct audits to ensure that the security intelligence agency is observing the directives or guidelines issued by the Cabinet, the Solicitor General or the senior management of the agency with regard to such matters as the use of human sources, reporting information about individuals to government departments and the role of the agency in the security screening process.

(c) The operation of the system of controlling intrusive intelligence collection techniques. The system we have proposed, especially for controlling electronic surveillance, mail opening, surreptitious entries and access to confidential information is complex and novel. The Council should review the functioning of the system as a whole: Is the system too cumbersome? Are the powers, especially the new powers of mail checks, surreptitious entry and access to confidential information, being used to good effect or are they being used excessively? The Council's answers to these questions should be expected to provide a far deeper insight into the use of these extraordinary powers than has been the case with the bare statistical reports which have been published in the past under section 16 of the Official Secrets Act.

(d) Relationships with other agencies. The Council should monitor the security intelligence agency's liaison arrangements with foreign agencies and with other police or security agencies in Canada. It is

especially important that it review intelligence sharing activities with foreign agencies to ensure that they satisfy the standards set out in guidelines established by the government.

(e) Director General's report of improper ministerial direction. At several points earlier in this Report we stated that the Director General of the security intelligence agency should have a "safety valve" in the event that he received what he considered to be an improper direction from the Solicitor General and was unable to resolve the matter to his satisfaction through the Deputy Solicitor General or the Prime Minister. Although it is unlikely that such a situation would ever arise, still we think there should be some provision for it other than the resignation of the Director General. The Director General should at least be able to discuss with an independent body his opinion that his "political masters" are asking him to use the security intelligence agency for a purpose he believes is outside its mandate.

20. Although the Advisory Council's main task should be to carry out on its own initiative a continuing audit of security intelligence activities, it should also play two other roles. The first is described in Part V, Chapter 8, and concerns the review of decisions by the Attorney General of Canada not to refer allegations of illegal conduct by members or agents of the security intelligence agency to provincial attorneys general. The second role is responding to public complaints of improper or illegal conduct by members of the agency. The primary responsibility for investigating such complaints should rest with the agency itself, as it now rests with the R.C.M.P. In Part VI, Chapter 2, we recommended the establishment of a small investigative unit within the security intelligence agency for this purpose. But we think it essential that the Advisory Council review the adequacy of the agency's response to complaints. A number of incidents afford ample evidence of the need for outside scrutiny of the response to public complaints of wrongdoing by members of the security agency.

21. The Advisory Council should be able to receive complaints and should be kept informed of all complaints received by the agency, including those that the Solicitor General refers to the agency, and the actions taken by the agency in response to such complaints. The Council's main function with regard to complaints should be to review the effectiveness and fairness of the security intelligence agency's response to complaints; it should advise the Solicitor General when it finds that a complaint has not been dealt with satisfactorily; it should report, at least on an annual basis, to the joint parliamentary committee on the frequency of complaints and the adequacy of the agency's response to them. Although the Advisory Council should not normally investigate complaints itself, it should have a reserve power to carry out its own investigation in exceptional circumstances. The Advisory Council on Security and Intelligence must be empowered to conduct its own investigation when the Council considers that it is in the public interest to do so. The general audit function of this independent review body will not be adequately fulfilled if it is denied the power to carry out independent investigations. The discretionary power to investigate complaints should be used sparingly and for stated reasons. These reasons, particularly if the Council's power to investigate complaints is used

complaints is used frequently, should alert the Minister and the parliamentary committee either to inadequacies in the internal investigative capacity of the security intelligence agency or to excessive use of the Council's investigative powers.

22. As we indicated in Part VI, the Council should also serve as a safety valve in those exceptional situations when a member of the security intelligence agency believes that an operation or practice of the agency is illegal or improper and there appears to be no satisfactory way of having his concern investigated by his superiors or by the Deputy Solicitor General or the Solicitor General. While we think that it is essential to have such a safety valve, we would stress that the Council should investigate such a complaint by a member of the agency only when it has assured itself either that the member has tried unsuccessfully to have his concern looked into by his superiors, the Director General, the Deputy Solicitor General and the Solicitor General, or that the member had good reason to believe that bringing the matter to the attention of these people would not elicit a satisfactory response.

WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of an Advisory Council on Security and Intelligence to review the legality and propriety of the policies and practices (which includes operations) of the security and intelligence agency and of covert intelligence gathering by any other non-police agency of the federal government.

(178)

WE RECOMMEND THAT the Advisory Council on Security and Intelligence be constituted as follows:

(a) The Council should be comprised of three members, who should be at arm's length with the Government of Canada, and at least one of whom should be a lawyer of at least ten years' standing.

(b) Members of the Council should be appointed by the Governor in Council after approval of their appointments by resolution of the House of Commons and Senate. One member should be designated by the Governor in Council as the Chairman of the Council.

(c) Members of the Council should serve for not more than six years, and the termination dates of their appointments should vary so as to maintain continuity.

(d) Subject to (c) above, members of the Council should hold office during good behaviour subject to being removed by the Governor in Council on address of the Senate and House of Commons.

(e) Members of the Council need not serve on a full-time basis but must be able to devote up to five days a month to the work of the Council.

(179)

WE RECOMMEND THAT the Advisory Council on Security and Intelligence have the following powers and responsibilities:

(a) For purposes of having access to information, members of the Council should be treated as if they were members of the security intelligence agency and have access to all information and files of the security intelligence agency.

(b) The Council should be authorized to staff and maintain a small secretariat including a full-time executive secretary and a full-time investigator, to employ its own legal counsel and to engage other personnel on a temporary basis for the purpose of carrying out major investigations or studies.

(c) The Council should be informed of all public complaints received by the security intelligence agency or by the Minister, or by any other department or agency of the federal government, alleging improper or illegal activity by members of the security intelligence agency or any other covert intelligence gathering agency (except police) of the federal government, and when it has reason to believe that a complaint cannot be or has not been satisfactorily investigated it must be able to conduct its own investigation of the complaint.

(d) The Council should have the power to require persons, including members of the security intelligence agency or of any other federal non-police agency collecting intelligence by covert means, to testify before it under oath and to produce documents.

(e) The Council should report to the Solicitor General any activity or practice of the security intelligence agency or any other federal non-police agency collecting intelligence by covert means, which it considers to be improper or illegal and from time to time it should offer the Solicitor General its views on at least the following:

(i) whether an activity or practice of the security intelligence agency falls outside the statutory mandate of the security intelligence agency;

(ii) the implementation of administrative directives and guidelines relating to such matters as the use of human sources, the reporting of information about individuals to government departments and the role of the security intelligence agency in the security screening process;

(iii) the working of the system of controls on the use of intrusive intelligence collection techniques;

(iv) the security intelligence agency's liaison relationship with foreign agencies and with other police or security agencies in Canada;

(v) the adequacy of the security intelligence agency's response to public complaints;

(vi) any other matter which in the Council's opinion concerns the propriety and legality of the security intelligence agency's activities.

(f) The Council should report, to the Minister responsible for any federal non-police organization collecting intelligence by covert means, any activity or practice of a member of such organization which in the Council's view is improper or illegal.

(g) The Council should report to the Joint Parliamentary Committee on Security and Intelligence at least annually on the following:

(i) the extent and prevalence of improper and illegal activities by members of the security and intelligence agency or any other

federal organization collecting intelligence by covert means, and the adequacy of the government's response to its advice on such matters;

(ii) any direction given by the Government of Canada, to the security intelligence agency or any other federal organization collecting intelligence by covert means, which the Council regards as improper;

(iii) any serious problems in interpreting or administering the statute governing the security intelligence agency.

(180)

C. THE ROLE OF PARLIAMENT

23. In the past Parliament's effectiveness in security matters has been limited. This is not surprising. Indeed there appears to be a basic inconsistency between the requirements of the field of security and the role of Parliament. Security operations directed against significant threats to the country's security must be associated with a high degree of secrecy, but Parliament is an open arena of partisan debate. Consideration of security matters in the parliamentary forum, it may be argued, can result only in jeopardizing the efficacy of our security arrangements. Adherence to this philosophy since the days of Sir John A. Macdonald has had much to do with the fact that the function and structure of Canada's security intelligence organization have not been debated and approved by Parliament.

24. Yet security has not been completely absent from the parliamentary agenda. On the contrary, particularly in recent years, national security issues have been frequently debated in the House of Commons. As has been shown in the study of *Parliament and Security Matters* prepared for us, between 1966 and 1978 the House of Commons spent a great deal of time questioning and debating the government's handling of security issues — 230 hours of debate, the equivalent of more than half the government's time for an annual session.[3] During these years Parliament has often been effective in performing its 'watch dog' role and many questions have been asked about alleged breaches of security or improprieties. Often these questions have been inspired by information 'leaked' to the media.

25. There has not been a full debate on the basic purpose, the permissible methods and the structure of the Security Service, nor an opportunity for even a small group of parliamentarians (other than Cabinet Ministers) to scrutinize its activities. When the Report of the Royal Commission on Security was tabled in the House of Commons in June 1969, there was a one-hour exchange of statements by the Party Leaders. In concluding his remarks, Prime Minister Trudeau stated that the government intended

> . . . to consult with the leaders of the opposition parties to determine how the report might best be made the subject of parliamentary debate during the next session.[4]

[3] C.E.S. Franks, *Parliament and Security Matters*, Ottawa, Department of Supply and Services, 1979, p. 22.

[4] House of Commons, *Debates*, June 26, 1969, p. 10638.

This debate did not take place. In 1971, the government indicated that the debate on a resolution to appoint a Special Joint Committee of the House of Commons and the Senate to study the nature and kind of legislation required to deal with emergencies might be an opportunity to consider the Royal Commission's report. But the debate which occurred focussed on whether the opposition would have an opportunity to examine the circumstances leading to the invocation of the War Measures Act in 1970 and resulted in the government's dropping the motion to establish the Special Committee. In 1977 the Solicitor General, the Honourable Francis Fox, in disclosing Operation Ham in the House of Commons, paraphrased the 1975 Cabinet Directive on the Role, Tasks and Methods of the R.C.M.P. Security Service and thus disclosed its existence and essence for the first time, but no opportunity was afforded for a parliamentary debate on these guidelines. At the Committee level, the House of Commons Standing Committee on Justice and Legal Affairs has annually been briefed *in camera* on security matters. We were permitted by the Chairman of this Committee to examine the proceedings of two *in camera* sessions held in November 1977. Our impression of these sessions is that, while they offer a general survey of the security system, they are not occasions for probing in any depth the operational policies or practices of the security organization. From time to time opposition leaders have been privately informed of, or consulted on, security matters, but these briefings have been *ad hoc* and rare in recent years.[5]

26. We think Parliament should play a larger role with respect to the federal government's security intelligence organization than it has in the past. Parliament should debate and determine the mandate of the security intelligence agency. The Minister should have full knowledge of the agency's operational policies and practices so that he can answer parliamentary questions. Members of the opposition must have a means of acquiring more accurate knowledge of the security agency's policies and practices. In making recommendations to achieve these ends, our aim is to tilt the balance between secrecy and openness slightly away from a near monopoly of knowledge on the executive side of government, so that the work of the security intelligence agency is based on a parliamentary endorsement of its mandate and subject to a reasonably well-informed and knowledgeable process of parliamentary review. In our view the requirements of security and democracy require no less than this.

A parliamentary mandate

27. We think that a point in Canadian history has been reached when both the requirements of security and the requirements of democracy would be best served by embodying the mandate of Canada's security intelligence agency in an Act of Parliament. The security intelligence agency has an important service to perform for the people of Canada. The organization which performs this service will cost many millions of dollars annually and will often intrude on the privacy of individuals and groups. If it is ineffective in its work, foreign powers will, with relative ease, operate secretly within Canada and elected

[5] See C.E.S. Franks, *Parliament and Security Matters*, pp. 70-6.

governments in Canada will not be forewarned of programmes of political violence directed against them. Also, friendly foreign governments will not trust Canada and hence will refuse to share information. A service of this importance must not be left to be regulated, as it is now, almost solely by administrative guidelines. Parliamentary democracy requires that a government service of this importance be explicitly approved by the Parliament of Canada.

28. The process of enacting a statutory mandate for the security intelligence agency may be a harrowing experience for those responsible for the effective operation of such an agency. Parliamentary debate, and the public debate it will stimulate, will expose the agency to unaccustomed and uncongenial publicity. Given the necessarily limited knowledge which those outside the security and intelligence community possess of security operations, there is a risk that Parliament will impose a statutory mandate on the security intelligence agency which will dangerously emasculate it. We acknowledge these risks, but we think that they are outweighed by the risk to parliamentary democracy of continuing to operate such an important government service without explicit statutory authorization, and the risk to the effectiveness of the security intelligence agency which results from the lack of clear public endorsement of its purpose. The short-run unsettling effects which may be associated with a full-scale parliamentary debate will, we think, be justified by the long-run benefits for both democracy and security.

29. On the basis of discussions we had with members of the three parliamentary parties we have formed the impression that there is the basis for a parliamentary consensus on the need for an effective security intelligence agency, providing it is under an adequate system of controls. We hope that information provided in this Report will be useful background knowledge to Parliament in considering the various aspects of a statutory mandate. We know from our own experience that there are a number of Canadian and international experts in the field who might be of assistance when draft legislation is considered at the Committee stage. In the previously mentioned study, *Parliament and Security Matters*, it was suggested that for the consideration of some matters, it might be advisable for the House of Commons Standing Committee on Justice and Legal Affairs to meet *in camera*. As an alternative, Parliament might set up a smaller joint committee of both Houses of Parliament along the lines of the permanent joint committee we shall suggest below. However, we would hope that resort to *in camera* proceedings is minimized so that there is as wide as possible a public understanding of the security intelligence agency's rationale and of the precepts embedded in its statutory mandate.

30. At a number of points in this Report, we have indicated matters which should be included in the Act of Parliament governing the security intelligence agency. Here we bring together these various suggestions and, for ease of reference, list below the subjects which should be dealt

(a) *Definition of national security threats.* The Act should identify the categories of activity which are deemed to constitute threats to Canada's security such that advance intelligence about them should be provided by the security intelligence agency. In Part V, Chapter 3, we

advanced our recommendations as to how these threats should be defined. In addition to this definition of security threats, the statute might also set out in an introductory section, as for example is done in the Broadcasting Act, a statement of the fundamental purpose of the security intelligence agency and the framework of values within which it is expected to operate.

(b) *Structure of the security intelligence agency.* The department or agency of government to which the security intelligence agency belongs should be indicated, along with the responsibilities, manner of appointment and term of office of its Director General and the status, within the Public Service, of its personnel. Provision should also be made for ministerial responsibility for the agency and for the Deputy Minister's power with respect to the agency.

(c) *Functions of the security intelligence agency.* The Act should positively identify the agency's basic function of collecting, analyzing and reporting intelligence about threats to national security and negatively establish the limits of the agency's operations by stipulating that it must not perform intelligence functions unrelated to threats to national security (as defined in the Act) nor perform executive functions to enforce security measures. Besides providing for its general function, there are a number of specific functions the permissible extent of which should be provided for in the statute. These are activities outside Canada, liaison with foreign agencies and with provincial and municipal authorities, and the provision of security intelligence reports in programmes of security screening for public service employment, immigration, and citizenship.

(d) *Extraordinary powers.* Any investigatory power to be exercised by the security intelligence agency which is not available under law to persons generally, in Canada, must be provided for in the Act. This would mean that the statutory authorization to intercept or seize communications for security purposes which is now in section 16 of the Official Secrets Act should be transferred to the Act governing the security intelligence agency. Additional powers which we have recommended above and which should be similarly provided for are the power to intercept and open mail, the power of surreptitious entry and the power to gain access to certain kinds of confidential information. Certain additional techniques which are not otherwise unlawful, such as the use of dial digit recorders and hidden cameras or optical devices, should also be covered by the Act. The Act should stipulate all of the conditions and controls which apply to the exercise of all such powers. The Act should also specify the evidentiary standard which the security intelligence agency must meet before it can initiate a full investigation.

(e) *External controls of security and intelligence operations.* Mechanisms for providing an independent check and review of security intelligence operations and of any intelligence activities, other than police activities, conducted by the Government of Canada involving covert techniques of intelligence collection should be provided for in the statute. In this Report we suggest four such mechanisms:

— the designation of judges of the Federal Court of Canada to decide whether certain statutory tests relating to national security have been met;

— a Security Appeals Tribunal to review security screening cases;

— an Advisory Council on Security and Intelligence to review the legality and propriety of security intelligence activities and the covert intelligence activities of any other federal agency other than a police force;

— a joint standing committee of the Senate and House of Commons on security and intelligence activities.

31. Legislation covering the points outlined in the preceding paragraphs should be enacted whether or not our structural recommendation on the separation of the security intelligence agency from the R.C.M.P. is adopted. Security intelligence work is so important for Canada's security, has such a potential impact on civil liberties and is sufficiently distinct from normal police work, that it requires a clear and explicit authorization by Parliament, whether or not it continues to be carried out by a division of our national police force.

WE RECOMMEND THAT Parliament enact legislation vesting authority in an organization to carry out security intelligence activities and that such legislation include provision for

(a) the definition of threats to the security of Canada about which security intelligence is required;

(b) certain organizational aspects of the security intelligence agency including: its location in government; the responsibilities, manner of appointment and term of office of its Director General; the powers of direction of the responsible Minister and Deputy Minister; and, the employment status of its personnel;

(c) the general functions of the organization to collect, analyze and report security intelligence and to be confined to these activities, plus specific authorization of certain activities outside Canada, liaison with foreign agencies and provincial and municipal authorities and of the organization's role in security screening programmes;

(d) authorization of certain investigative powers and the conditions and controls applying to the use of such powers;

(e) mechanisms of external control to ensure an independent review of the legality and propriety of security intelligence activities and any other covert intelligence activities by agencies of the Government of Canada except those performed by a police force.

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The ability of Ministers to answer questions in Parliament

32. A second way in which the role of Parliament in security matters needs strengthening is that Ministers must be better able to answer parliamentary questions about security intelligence activities. In the past ministerial ability in this area was deficient in two respects: first, Ministers did not have sufficient knowledge of the operational policies and practices of the R.C.M.P. Security Service, and second, Ministers lacked means of ensuring that answers to parliamentary questions about the Security Service supplied by the R.C.M.P. were accurate, complete, and understandable by the audience to which they were addressed.

33. The proposals we have made earlier for strengthening internal governmental control of the security intelligence agency are designed to ensure adequate ministerial direction and control of security intelligence activities. In particular we refer to our recommendations concerning the role of the Solicitor General, as the Minister responsible for the security agency, and his Deputy, aimed at ensuring full ministerial knowledge of the agency's operational policies. We also emphasized the extent to which ministerial direction and control should be carried out in a collegial manner when important policy issues are at stake and for that purpose we called for a strengthening of the role played by Cabinet and the interdepartmental committee system in directing and reviewing security intelligence activities. Further, an independent review body, along the lines proposed in our recommendation for an Advisory Council on Security and Intelligence, with its own powers of investigation, should give Ministers more assurance than they have had in the past that significant information about security investigations is not being withheld from them.

34. We believe that, if these changes in the system of government control are made, Ministers will at least possess the knowledge to answer questions about security intelligence activities asked in the House of Commons. Of course, because of the need for secrecy with respect to many aspects of security operations, they may choose not to divulge in public some of the information which they have: but such non-disclosure will be of their own choosing and not because the information is kept from them by the security organization. To insist that this condition be realized is to demand nothing more than that a fundamental principle of responsible government be applied to security intelligence activities undertaken on behalf of the Government of Canada. Furthermore, the proposal we make below for a special parliamentary committee will make it more feasible than it has been in the past for the Minister responsible for the security intelligence agency to give those parliamentarians who are members of the committee important information about policy matters relating to security activities which it would be unwise to disclose publicly.

A Parliamentary Committee on Security and Intelligence

35. Effective scrutiny of security intelligence activities by representatives of all parties in Parliament is more likely to be maintained if a new committee is formed which can examine policies and practices in more depth than is now done by the Standing Committee on Justice and Legal Affairs of the House of Commons. That Committee is too large, its membership too fluctuating and its procedures too restrictive of the time which each of its members has to raise questions and pursue a line of inquiry. Our examination of the record of that Committee's *in camera* meetings in 1977, when public disclosures had focussed attention on the R.C.M.P., indicated the inherent difficulties faced by such a committee when it comes to inquiring about policy issues arising from security intelligence activities. Most of the time at these meetings was spent receiving the views of security officials and members of the R.C.M.P. While what they said was educational, most of it could have been, and indeed has been, stated in public.

36. We think effective parliamentary scrutiny of security intelligence activities is more likely to be achieved by establishing a small joint committee of both Houses of Parliament. This committee should be constituted of parliamentarians whose commitment to Canada's democratic system of government is unquestionable and who have the confidence of all parliamentary parties. The members of this Committee, either through their previous experience in government or by continuing to serve on this Committee from session to session, must possess or acquire a reasonable base of knowledge about Canada's security and intelligence system. The need for experience and knowledge is one reason why we think the participation of Senators in such a committee would be valuable.

37. Our proposals concerning ministerial direction of the security organization acknowledged that a risk inherent in closer ministerial direction and control was the possibility of the organization being used for narrow partisan or personal purposes. A key protection against this possibility is the Advisory Council on Security and Intelligence with its independent powers of investigation and its availability to the Director General in the event that he receives what he regards as improper direction from government. But this independent review body will be more credible as a check on partisan or personal misuse of the security intelligence agency (or any other federal intelligence agency) if it in turn has access to a parliamentary committee containing members of opposition parties.

38. To ensure that the Committee has the confidence of the recognized parties in Parliament, the leaders of opposition parties should personally select members of their party and, if possible, serve themselves on the Committee. The Committee should not have more than ten members. All recognized parliamentary parties should be represented on the Committee with the exception of a party dedicated to the ultimate overthrow of the democratic system of government in Canada, if in the future any such party should have members of Parliament. If the parties are represented on the Committee roughly in proportion to their strength in the House of Commons, as is traditional with parliamentary committees, the Committee should be chaired by a member of an opposition party. We understand that the combination of a government majority and an opposition chairman has worked well with the Public Accounts Committees. We think a similar balance would contribute to the effectiveness and credibility of a Joint Parliamentary Committee on Security and Intelligence.

39. This Committee should have much more continuity in its membership than is the case with Standing Committees of the House of Commons. During the first three sessions of the 30th Parliament (1974-79) substitutions in the membership of committees totalled 4,310, 1,749, and 1,409 respectively.[6] Rapid turnover of membership during a session, or from session to session, would prevent the Committee from developing the background understanding which is a prerequisite for knowledgeable questioning and judgment of security

[6] Robert J. Jackson and Michael M. Atkinson, *The Canadian Legislative System*, 2nd Edition, Toronto, Macmillan of Canada, 1980, p. 142.

and intelligence matters. The necessary continuity would be best provided by establishing the Committee for the life of a Parliament. We considered the possibility of a Committee of parliamentarians (rather than a Committee of Parliament) which, rather like the British Committees of Privy Councillors, would not die with each dissolution of Parliament. But such an arrangement would, in our view, go too far towards detaching this Committee from Parliament. Also there is the danger of building too much continuity into the structure of this Committee with the result that its members would become, or would be perceived to have become, too closely associated with the security and intelligence system.

40. The prime function of the Joint Parliamentary Committee we are recommending should be to scrutinize the activities of the security intelligence organization with a view to ensuring that it fulfills the intentions of Parliament as set out in the organization's legislative charter. The Committee's regular opportunity for examining the conduct of the security organization's affairs should be its examination in an *in camera* session of the organization's annual financial estimates. This should be an occasion on which members of the Committee can question the Solicitor General, and officials who accompany him, on security intelligence activities. As a background paper for this activity of the Committee, the Solicitor General should provide an annual report of the security intelligence agency's activities similar to, but not necessarily containing the same information as, that which we have recommended be prepared for the Cabinet. It is interesting to note that in making this recommendation for an examination of security intelligence expenditures on a confidential basis by a joint committee of Parliament, we are in part, reviving a recommendation made more than a century ago by the House of Commons' Select Standing Committee on Public Accounts. That Committee, which was appointed to look into Sir John A. Macdonald's handling of secret service funds, resolved

> that inasmuch as such large sums as $75,000 have been voted for 'Secret Service Money' of which there is no audit, as in the case of other expenditure, this Committee is of opinion, that an account of all sums hereafter spent for 'Secret Service' should be kept, as in England, in a book specially prepared for the purpose, and that this book should annually be inspected by a confidential Committee, of whom two shall be Members of the Opposition of the day.[7]

The detailed examination of estimates must be *in camera*, although it should be remembered that the Parliamentary committee would be composed of members from both sides of the House. We would point out further that in Australia, the total figure for expenditure by their security intelligence agency is a matter of public record and we would urge that after some experience with the new Parliamentary Committee careful consideration be given to the adoption of that practice in Canada. We are not recommending such publication at this time.

41. Our earlier recommendations referred to two specific matters which should be considered by the Committee. First, the Committee should receive

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[7] *Journals of the House of Commons*, May 29, 1872, p.173.

detailed annual reports on the use of the extraordinary powers of intelligence collection authorized in the Act governing the security intelligence agency. The bare statistical report on the use of the power to intercept and seize communications for security purposes, which Parliament now receives pursuant to section 16 of the Official Secrets Act is, as was explained earlier, an inadequate means of accounting to Parliament. We realize that a much more detailed and in-depth public account of the use which is made of such powers would require the disclosure of information which could seriously damage security. Therefore, we have recommended that the more detailed examination of the use of these powers be carried out *in camera* by the Joint Parliamentary Committee on Security and Intelligence. Second, we have recommended that the Advisory Council on Security and Intelligence report at least annually to the Joint Parliamentary Committee on the extent and prevalance of improper or illegal activities, on improper direction by government and on any serious problems which have arisen in applying the security intelligence agency's statutory mandate. In addition to these matters, Parliament would be able by resolution to ask the Committee to inquire into and report on any matter relating to security and intelligence. The availability of such a Committee might make it unnecessary to establish Commissions of Inquiry in the future.

42. We have referred to this special parliamentary Committee as the Joint Parliamentary Committee on Security and Intelligence. As this title implies, the jurisdiction of such a Committee should extend to the covert intelligence collection activities of all agencies of the federal government. The rationale for this recommendation is the same as the rationale for a similar recommendation with respect to the Advisory Council on Security and Intelligence. The maintenance of effective parliamentary scrutiny of secret intelligence activities conducted on behalf of the Canadian government could be jeopardized if other agencies could be assigned covert intelligence-gathering tasks and not be subject to the same powers of parliamentary scrutiny as the security intelligence agency. We would exempt the collection of criminal intelligence (i.e. advance information about criminal activity unrelated to security threats) from the purview of this Committee but not the activities of federal police agencies if any of them are authorized to carry out non-criminal, covert intelligence-gathering tasks unrelated to the investigation of offences.

43. Unlike the Advisory Council on Security and Intelligence, the Parliamentary Committee should be as much concerned with the effectiveness of the security intelligence organization as with the legality or propriety of its operations. Gaps in the security or intelligence system should be of as much concern to this Committee as alleged excesses of security surveillance. In this respect it might be asked to look into breaches of security which in Britain are referred to the Security Commission[8] (an appointed body of individuals, with experience in security matters).

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[8] The British Prime Minister, Sir Alec Douglas-Home, announced the establishment of the Security Commission in January 1964: United Kingdom, Parliament, *Debates*, January 23, 1964, pp. 1271-5.

44. The Committee we have recommended should also play a role in the legislative process. It should be in a strong position to see how the terms of the security intelligence agency's new statutory charter are working out in practice and to identify areas where legislative change may be required. In particular, under the clause we have proposed for providing some flexibility in the scope of security surveillance, this Committee would be notified of any order-in-council temporarily extending security intelligence collection to a category of activity not provided for in the Act. The Committee's knowledge of these situations would enable it to assess the need for permanent changes in the agency's mandate. The House of Commons might prefer to continue to have the committee stage of bills relating to national security handled by the larger and more representative Standing Committee of the House of Commons on Justice and Legal Affairs. If this were so, then it would be important to include Members of Parliament from the Joint Committee on Security and Intelligence on the Justice and Legal Affairs Committee. If, on the other hand, the Joint Committee were to have bills sent to it for clause-by-clause consideration, it would be essential to arrange for the appearance of expert witnesses and the representation of views by public interest groups as is done when legislative proposals are before the Justice and Legal Affairs Committee.

45. The Joint Committee on Security and Intelligence should have some staff assistance. In addition to the access it would have to the Research Branch of the Library of Parliament and to the services of a committee clerk, it should be able to call upon the assistance of one or more specialists in security and intelligence matters to assist it in obtaining background information on security and intelligence matters and in preparing itself for other questioning of security officials who may appear before it.

46. The Committee we are proposing, to be effective, must carry out many of its inquiries *in camera*. There is simply no other way in which it can examine the structure and management of the security organization, the deployment of its resources and the policy issues which arise in, or can only be satisfactorily illustrated by, references to concrete cases. Participation in *in camera* sessions by members of opposition parties raises the prospect of reducing their freedom to criticize the government's handling of security and intelligence matters. Reluctance to compromise their right to criticize the government was a factor, on occasions in the past, which inhibited Leaders of the Opposition from accepting invitations from Prime Ministers to be briefed on some security matter. We can see no tidy solution to this problem. Knowledge brings with it the burden of responsibility to respect the conditions under which the knowledge has been provided. The alternative is to provide no authorized means of informing opposition members about significant security and intelligence matters, and to continue to leave them dependent on unauthorized leaks of information. We think that almost total dependence on unauthorized leaks is undesirable: leaks of information are likely to be organized by disgruntled members of the security intelligence organization or by hostile intelligence agencies. The quality of parliamentary and public discussion of security and intelligence will, we think, be enhanced if a few opposition members have the opportunity to acquire a firmer, more balanced understanding of practices and

policies in the field than is available through public information and the unauthorized disclosure of confidential information.

47. The dilemma we have referred to can be lessened, although not entirely removed. Not all of the Committee's proceedings need be *in camera*. It is particularly important, as we have stressed, that when the Committee considers legislative matters it have public sessions and discussions with expert witnesses from outside the government and representatives of public interest groups. Further, the Committee could adopt the practice of British Parliamentary Committees and publish edited records of its *in camera* proceedings. Our own experience suggests that such a procedure can produce a record that retains an account of the important policy issues while editing out references to specific sources, targets or organizational features, which might damage security. More fundamentally, if members of the Committee discover what they regard as bad practices or policies pointing to serious inadequacies or improprieties in Canada's security and intelligence arrangements and are not satisfied that the government is taking appropriate remedial action, then they might well have to speak out publicly. They should do so in a manner which does not disclose the particular information given to them in confidence, but informs Parliament and the public of their perception of the government's failure to deal adequately with a serious security or intelligence problem. Informed public criticism of government is essential to democracy. In the final analysis, as we have contended throughout this Report, security must not be regarded as more important than democracy, for the fundamental purpose of security is the preservation of our democratic system.

48. The view expressed at the end of the last paragraph may give rise to the fear that access to confidential security information, rather than muzzling opposition members, will have the opposite result of leaking important confidential information. It has been suggested that, as a protection against this possibility, members of the kind of parliamentary committee we are proposing should all need formal security clearance. That indeed was the view of the Royal Commission on Security. However, that Commission took the position that it was "inappropriate to subject private Members of Parliament to these (security clearance) procedures". Because of this view and the general contention that security was a matter for the executive, not the legislature,[9] the Commission discarded the idea of recommending a parliamentary committee as a means of providing independent, responsible scrutiny of the Security Service. In Part VII of this Report we put forward our own position on the security screening of Senators or Members who are being considered for positions with access to confidential information relating to national security, including those who are considered for appointment to the proposed Joint Committee on Security and Intelligence. Our position is that, while parliamentarians should not be subjected to the formal security screening process, the security intelligence agency should be asked to report in advance to a party leader as to whether it has information about a Member the leader is proposing to name to the Committee which indicates a significant association of that

[9] Canada, *Royal Commission on Security*, 1969, paragraph 65.

member with an activity threatening the security of Canada. This would mean that while parliamentarians would not be subjected to all the procedures of a regular security clearance process (e.g., they would not fill out personal history forms nor be screened for "character weaknesses" by government officials), party leaders would have an opportunity to be apprised in advance if an appointment is likely to raise serious security problems. In addition to this security check, Members might be asked to take an oath similar to that taken by Privy Councillors, and they should receive a security briefing from the Director General of the security intelligence agency.

49. Security checks and oaths will not likely satisfy those whose fear focusses, not so much on the possibility of a person who is associated with a genuinely subversive activity serving on the Committee, but on the possibility of members of the Committee leaking information for partisan purposes to embarrass the government or to obtain publicity for themselves or their party. A minimum amount of realism about the role of partisanship in democratic politics makes it necessary to acknowledge this risk. We are not in a position, and we doubt that anyone else is, to be categorical about the extent of this risk in the context of Canadian politics. However, we are not aware of evidence which would indicate that members of the Canadian Parliament are so much more partisan and so much less trustworthy than are members of the United States Congress or the Bundestag of the Federal Republic of Germany who serve on security intelligence oversight committees, that it is too dangerous to attempt such an experiment in Canada. Only time will tell the likelihood of this danger. If it appears to the government that opposition members, for partisan political purposes, disclose information damaging to Canadian security, the government will cease to permit the disclosure of important information to the Committee, and the Committee will become ineffectual.

50. In embarking on the experiment in parliamentary oversight which we have proposed, Canada would not be breaking entirely new ground. Nearly all of the western democracies in one way or another have been moving away from the position taken by the Canadian Royal Commission on Security (the Mackenzie Commission) 13 years ago that the legislature should not be directly involved in security matters. The trend has been towards a greater role for Members including those who do not belong to the governing party or coalition, to review secret security and intelligence activities. The two countries which have made the most use of committees of the legislature are the United States and the German Federal Republic. In the United States, Congressional Committees, especially since the Watergate episode, have played a prominent role in reviewing the operations of all of that country's intelligence agencies. Recently there has been a movement to cut back on the number of committees involved in such oversight and a rejection of the proposal that covert foreign operations should require advance notification. These changes, however, will not alter the comprehensive scrutiny of intelligence activities carried out by the House and Senate Select Committees on Intelligence. The Senate Committee, for instance, consisting of 19 Senators (10 Democrats and 9 Republicans while the Democrats controlled the Senate), assisted by a staff of approximately 50, two-thirds of whom are experts in various disciplines, continuously monitors all

aspects of covert and overt intelligence collection, including the F.B.I.'s counter-intelligence activities. About 95 per cent of its sessions are *in camera*, but all Senators may examine records of its proceedings and documents in its possession. In Germany, a Parliamentary Panel of Party Representatives to examine the activities of that country's intelligence services has been in existence since 1956. Recent legislation in Germany has given the Parliamentary Committee a more formal status.[10] It consists of eight members drawn from the three major party groups in the Bundestag. The chairman of each party group is a member of the Committee, and the chairmanship of the Committee rotates every three months amongst the party groups. The scale of this committee's activities (it has one staff member, who is an expert on security and intelligence matters) is closer to what we envisage for a similar parliamentary committee in Canada, although we would hope that a Canadian Committee might have more access to information about operational policy matters than has the German Committee. There is also a Parliamentary Committee on Security and Intelligence in the Netherlands, although it would appear to have been less active than the German Committee.

51. In Australia a parliamentary committee has not been adopted as a means of providing scrutiny of intelligence activities. One reason for this is the practice of electing members of parliamentary committees. However, the Australians have emphasized consultation with the Leader of the Opposition as a means of providing "a bi-partisan approach to security matters."[11] Section 94(2) of the Australian Security Intelligence Organization Act 1979, requires that a copy of the annual report, which the Director General of the Australian Security Intelligence Organization is required to furnish his Minister, be given to the Leader of the Opposition, but with the proviso that "it is the duty of the Leader of the Opposition to treat it as secret". Also section 7(2) requires consultation with the Leader of the Opposition before appointing the Director General of A.S.I.O. We do not see a Parliamentary Committee, along the lines we have proposed, as replacing consultation with the Leader of the Opposition or leaders of other parliamentary parties on security matters. Situations may well arise, as was the case in 1970 and frequently in World War II, when the government deems it advisable to offer to brief the Leader of the Opposition and other party leaders on security situations. But this kind of consultation is too fragmentary and too dependent on the personal relationships between party leaders to provide the systematic parliamentary scrutiny which is required. Nor do we think it is wise to concentrate the burden of knowledge and judgment concerning security matters on a single opposition member. Finally, in the context of the Canadian Parliament, which for more than half a century has been a multi-party, not a two-party, forum, it is essential to involve opposition parties other than the official Opposition. Being more likely to be associated with what, in the context of the times, are considered to be more radical views,

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[10] An exchange of articles examining the strength and weaknesses of this Committee can be found in the October 22, 1977 issue of *Aus Politik und Zeit Geschichte*.

[11] Australia, *Fourth Report of the Royal Commission on Security and Intelligence* (The Hope Report), Canberra 1978, paragraph 461.

leaders of these parties are likely to be especially sensitive to the need for careful judgment in distinguishing threats to security from legitimate dissent.

52. The British Parliament has not developed a special parliamentary committee on security and intelligence matters. Instead, it has relied extensively on Committees of Privy Councillors, who have served in Conservative and Labour governments, to inquire into security issues. This is scarcely a feasible option in Canada until such time as the balance of power in federal politics shifts much more frequently from one party to another. Indeed, one important function which the existence of a parliamentary committee on security and intelligence would perform is to provide much more opportunity for at least a few leading opposition Members of Parliament to become reasonably well-informed about security and intelligence matters than has been possible in recent years.

53. We realize that institutions and procedures developed by other democracies, even those with parliamentary systems, may not be workable within the context of Canadian parliamentary institutions. We have cited these foreign experiences not because any of them will provide an ideal model for Canada, but because all of them indicate a democratic desire to subject secret state intelligence activities to review by persons associated with the democratic critics of the party in power. We think most Canadians share that desire. The way it is fulfilled will depend on the conventions and attitudes which govern the workings of parliamentary government in Canada. These conventions and attitudes are not static. We sense an interest by all political parties in strengthening parliamentary committees to examine the operations of government effectively. Our proposed Joint Parliamentary Committee would be consonant with parliamentary reform in this direction.

WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of a Joint Committee of the Senate and House of Commons to review the activities of the security intelligence agency and of any other agency collecting intelligence (other than criminal intelligence) by covert means.

(182)

WE RECOMMEND THAT the Joint Committee on Security and Intelligence have not more than ten members, that all recognized parliamentary parties be represented on it, that the leaders of parliamentary parties personally select members of their parties for the Committee and, if possible, serve themselves, that the Committee be chaired by a member of an opposition party, that members serve for the duration of a Parliament and that it retain the help of such specialists as it considers necessary.

(183)

WE RECOMMEND THAT the Committee be concerned with both the effectiveness and the propriety of Canada's security and intelligence arrangements and that its functions include the following:

(a) consideration of the annual estimates for the security intelligence agency and for any other agency collecting intelligence (other than criminal intelligence) by covert means;

(b) examination of annual reports of the use made of "extraordinary" powers of intelligence collection (other than criminal intelligence) authorized by Parliament;

(c) consideration of reports directed to it by the Advisory Council on Security and Intelligence;

(d) the investigation of any matter relating to security and intelligence referred to it by the Senate or House of Commons.

(184)

WE RECOMMEND THAT the Joint Committee on Security and Intelligence whenever necessary conduct its proceedings *in camera*, but that it publish an expurgated report of all *in camera* proceedings.

(185)

D. PUBLIC KNOWLEDGE AND DISCUSSION OF SECURITY MATTERS

54. Our experience in carrying out the mandate of our Commission has made us acutely aware of the low level of public knowledge about security issues. This is, of course, what one should expect, given the veil of secrecy which, traditionally, has been drawn over this sphere of government. The main sources of 'information' for most Canadians are newspaper disclosures of 'spy scandals' and popular works of fiction. Public discussion of Canada's internal security arrangements tends to be dominated by two groups who advance positions at two extreme poles: those who contend that the threats to security are so serious that the wisest course is to disclose as little information as possible about the measures taken to counter these threats and those who contend just the opposite — that Canada is so fortunately immune from threats to its security that there are no secrets worth keeping. We think that both of these groups are wrong. There are serious threats to the security of Canada but they are not so serious as to prevent a reasonable amount of informed discussion about the nature of these threats and the measures necessary to protect Canada against them. As we have said in more expanded form elsewhere in this Report, security measures can be so corrosive, that to preserve democracy we should minimize the secrecy aspect wherever this can reasonably be done.

55. The recommendations we have made to strengthen the role of Parliament would, we think, contribute to raising the level of public discussion about security matters. Also, the Solicitor General, as the Minister responsible for the security intelligence agency, should take a leading role in informing the public about security issues and encouraging the study of these issues by private research institutes and the universities. The Solicitor General might turn to the Advisory Council on Security and Intelligence for assistance in these areas. As laymen temporarily involved in the world of security and intelligence, members of this Council should be in a good position to identify subjects which would benefit from public discussion and independent research.

56. The Bureau of Intelligence Assessments which we have recommended would provide another opportunity for wider public participation in security

and intelligence matters. The Office of National Assessments in Australia from time to time arranges seminars attended by experts from outside government to discuss subjects on which it is preparing an intelligence assessment. If such a Bureau were established in Canada, we think it too should draw upon the perceptions and knowledge of Canadians outside of the security and intelligence community in collating intelligence on various topics. Indeed, we think that one of the distinct advantages of such a Bureau is to ensure that the intelligence estimates prepared for government combine information and viewpoints obtained from covert sources with insights from a broad range of public sources.

57. Another means of creating wider public knowledge of the security intelligence agency's functions is to make more of the historical record of the agency available to the general public. The Security Service has not transferred to the public archives any file material covering any period after 1925. We find this practice both overly conservative and shortsighted. It is overly conservative in that there is much Security Service file material of interest to the public which is less than 50 years old and which, if made public, would not damage Canada's security nor be harmful to the privacy of individuals. The public record of this Commission in examining events which occurred as recently as three years ago amply demonstrates this point. The practice is shortsighted because it is in the security intelligence agency's best interests to have its history published and widely examined. Such a process will serve as a check on the abuse of the agency's power, will help the agency learn from its past mistakes, and will help mobilize support for its activities. We believe, therefore, that the security intelligence agency should adopt a more liberal approach than in the past in making historical material relating to its policies and practices available to the general public.

58. It is also our hope that the public record of this Commission's proceedings, this Report and its accompanying bibliography, as well as the books and articles stimulated by the work of the Commission, will provide Canadians who are interested in this subject with a much better basis for study and research than has ever been available before. The requirements of both security and democracy are better served when the ideas which influence and shape Canada's security and intelligence arrangements come not only from those who work within government agencies but also from a broad cross-section of informed Canadians.

WE RECOMMEND THAT the security intelligence agency be directed to draft a policy for approval by the Minister to ensure the release of historical material, unless such release can be shown to endanger the security of Canada.

(186)

PART IX

ADDITIONAL LEGAL AND POLICY PROBLEMS RELATING TO THE SECURITY OF CANADA

INTRODUCTION

INTRODUCTION

1. Paragraph (c) of our terms of reference requires us to advise and report on "... the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada... as well as the adequacy of the laws of Canada as they apply to such policies and procedures...". In Parts V, VI, VII and VIII, which together form what could be called a manual for Canada's security intelligence agency, we discussed what we considered to be the major policy problems facing this security intelligence agency. Many of our recommendations called for important changes in both federal and provincial laws — changes which included the establishment of a statute to govern the agency's scope of intelligence collection and its use of intrusive investigative methods.

2. In this Part, we present further proposals with respect to changing inadequate laws relating to the security intelligence agency's mandate. Four chapters make up this Part. In Chapter 1, we examine the special powers available to the federal government in time of war or national emergency. We also discuss the role that the security intelligence agency should play in such emergencies. In Chapter 2, we focus on the Official Secrets Act. We recapitulate earlier recommendations we made in our First Report, *Security and Information*, of relevance to this Act, and then discuss other sections of the Act about which we have not yet made recommendations. In Chapter 3, we consider legislative proposals to prohibit or restrict active measures of foreign interference. Finally, in Chapter 4, we examine the law of sedition in Canada and make a recommendation concerning that law.

CHAPTER 1

NATIONAL EMERGENCIES*

INTRODUCTION

3. In this chapter we examine the special powers available to the federal government in time of war or other national emergency. We also discuss the role of the R.C.M.P. in relation to emergency planning since World War II, with particular reference to the October Crisis of 1970, and the role of the security intelligence agency in the future. We have considered only emergencies arising from threats to the internal security system of Canada, not natural disasters or other catastrophes unlikely to involve the security intelligence agency.

4. Our terms of reference require us to advise on "the adequacy of the laws of Canada" as they apply to the "policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada". A security intelligence agency should play a significant role in national emergencies, being prepared to advise government on the possibility of political violence and on various operations to ensure the security of the state. After an emergency has been declared, the agency should keep government and police forces informed on security matters. Before we discuss the specific role of the security intelligence agency, however, we examine the laws which give the federal government the authority to exercise emergency powers.

A. THE LEGAL FRAMEWORK

5. When the state is threatened by attack from a hostile power or by civil insurrection, special powers are available to the federal and provincial governments. At common law and by virtue of the prerogatives of the Crown, the state had the power to take all measures which were absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency.[1] Many of these inherent emergency powers are now set down in the War Measures Act,[2] the National Defence Act[3] and the Criminal Code. In the event of a complete breakdown of civil authority, there remains the ultimate power to

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[1] *Halsbury's Laws of England*, 4th edition (1974), Vol. 8, pp. 624-28.

[2] R.S.C. 1970, ch.W-2.

[3] R.S.C. 1970, ch.N-4.

*Commissioner Gilbert has filed a minority report with respect to some aspects of this question.

impose military government or martial law (last declared in Canada following the rebellion of 1837). In this section we set out the emergency powers which are now available.

Criminal Code

6. The Criminal Code contains a number of provisions which may have particular application in emergency situations, including treason (section 46), sabotage (section 52), inciting to mutiny (section 53), sedition (section 62), riot (section 65), and hijacking (section 76.1). No special powers beyond the ordinary police powers of search and seizure and arrest are provided for.

Use of the armed forces

7. In cases involving riot or civil disturbances, where local police forces are insufficient, a provincial government can call upon military aid. The consent of the federal government is not required. Section 233 of the National Defence Act provides that the Canadian forces

> ... are liable to be called out for service in aid of the civil power, in any case in which a riot or disturbance of the peace requiring such service occurs, or is, in the opinion of an attorney general, considered as likely to occur, and that is beyond the powers of the civil authorities to suppress, prevent or deal with.

A provincial attorney general may act on his own or after receiving notification from a judge of a superior, county or district court that the services of the armed forces are needed. It should be noted that the Chief of the Defence Staff, although required to respond to a provincial requisition, may determine what resources to call upon to deal with particular situations. The province is legally liable to pay for the costs of such military assistance.

8. Troops have been used on a number of occasions, including the labour disturbances in Quebec City in 1878 and in Cape Breton in 1923, and the Winnipeg General Strike in 1919. More recently, during the 1970 October Crisis, the military was called in by the government of Quebec, prior to the invocation of the War Measures Act by the federal government.

9. It is not entirely clear how far the federal government can use its own initiative to employ troops in connection with domestic disturbances. In the anti-conscription riots of 1918 in Quebec City, the local commanding officer moved in troops to restore order without waiting for any requisition for aid from the provincial or local authorities. A week later, such interventions were authorized by a federal Order-in-Council under the War Measures Act. Of course, in the event of a national emergency the Government of Canada has undoubtedly the constitutional power, pursuant to its authority to legislate in relation to "peace, order and good government", to enact legislation to authorize the deployment of troops within Canada.

10. A member of the armed forces does not ordinarily have the powers of a peace officer (except when enforcing military law), but may exercise them when called in to help civil authorities. Section 239 of the National Defence Act provides:

> 239. Officers and men when called out for service in aid of the civil power shall, without further authority or appointment and without taking oath of office, be held to have and may exercise, in addition to their powers and duties as officers and men, all of the powers and duties of constables, so long as they remain so called out, but they shall act only as a military body, and are individually liable to obey the orders of their superior officers.

11. The ability to invoke military aid to civil authorities would appear to be less necessary today than in the early days of Confederation. Most local disturbances can be adequately controlled by local police. Since the end of World War II the provinces have used the requisition power on only two occasions, once for the Police and Firemen's Strike in Montreal in 1969, and again for the October Crisis in 1970.

The War Measures Act

12. The War Measures Act was enacted by Parliament on August 21, 1914, at the outbreak of World War I. The Act was passed without dissent after just over half an hour of debate, and became law, following Royal Assent, on August 22. The Canadian government had already detained enemy vessels and taken other actions that were validated retroactively by the legislation.

13. The Canadian War Measures Act followed much the same pattern as the Defence of the Realm Act[4] passed in the United Kingdom on August 8, 1914. The emergency powers granted to the government were not spelled out in the legislation. Rather, the Governor in Council was given broad powers to declare a state of emergency and then to pass regulations under the Act. The Canadian Act, which was more all-embracing than the United Kingdom legislation, allows the government to make orders and regulations deemed "necessary or advisable for the security, defence, peace, order and welfare of Canada". Under the Act a state of emergency may be declared by proclamation and, until revocation, the proclamation is conclusive evidence that a state of war, insurrection or invasion, real or apprehended, exists. Section 2 of the War Measures Act states:

> 2. The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.

14. The Canadian Act provides that the regulations may impose penalties of up to five years for breaches of the regulations, compared with three months under the United Kingdom legislation.

15. The U.K. legislation expired shortly after the end of World War I, whereas the Canadian Act has never been repealed. New emergency powers legislation was enacted in the U.K. just before World War II which remained

[4] (Imp.) 4 and 5 Geo. 5, ch.29.

in force for the duration of hostilities.[5] It is not clear whether the original intent was to make the Canadian Act a permanent one. The statute makes specific reference to the existing hostilities, yet refers to "war, invasion, or insurrection, real or apprehended". Since if it were meant only to be applied during the war there would have been no need to refer to "insurrection", it seems likely that the government intended the statute to be permanent. Moreover, it may be that the scope of the Act was altered during its passage. The resolution introducing it referred to the issue of a proclamation only as "conclusive evidence that war exists", whereas the legislation passed a few days later made the proclamation "conclusive evidence that war, invasion, or insurrection, real or apprehended, exists...".

16. It is not certain how the crucial words "insurrection, real or apprehended", which were not in the U.K. legislation, came into the Canadian statute. However, it is very likely that the language was borrowed from the Militia Act of 1904[6] which had defined the word "emergency" to mean "war, invasion, riot or insurrection, real or apprehended." Another Canadian Act, the Finance Act, passed on the same day as the War Measures Act, used the precise words of the Militia Act to allow the government to issue certain proclamations (authorizing, for example, a debt moratorium and other measures to prevent a run on financial institutions) in case of "war, invasion, riot or insurrection, real or apprehended...". In the War Measures Act, the word "riot" was dropped.

17. During World War I the government enacted extensive regulations under the authority of the War Measures Act. Towards the end of the war a number of organizations, such as the Industrial Workers of the World and the Russian Workers Union, were declared to be unlawful for the duration of the war by Order-in-Council under the Act. Membership in such associations or even attendance at their meetings was an offence. Investigating the activities of such unlawful organizations was the responsibility of the Royal North-West Mounted Police.

18. The War Measures Act was invoked for World War II on September 1, 1939, nine days before the formal declaration of war. The regulations had been prepared by a Standing Interdepartmental Committee on Emergency Legislation set up in 1938. During the war a number of front organizations were declared unlawful by Orders-in-Council. Also, a Treachery Act was passed to allow for prosecutions for major espionage and other serious cases.[7] After 1945 special transitional Acts were passed from year to year until 1951. Following the outbreak of the Korean War, a special Emergency Powers Act was passed which expired in 1954.[8]

19. In 1960, at the time of the enactment of the Canadian Bill of Rights, the War Measures Act was amended so that section 6 provided that a proclamation invoking the Act "shall be laid before Parliament forthwith after its issue,

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[5] Emergency Powers (Defence) Act, 1939, 2 and 3 Geo. 6, ch.62.
[6] S.C. 1904, ch.23.
[7] S.C. 1940, ch.43.
[8] S.C. 1951, ch.5.

or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting". Section 6 also provides for Parliamentary debate of a motion signed by ten members, "praying that the proclamation be revoked". Finally, section 6(5) provides that anything done under the authority of the Act "shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights".

20. Mr. Pearson, then Leader of the Opposition, maintained that an effective Bill of Rights should restrict the executive even in an emergency. He submitted that the Governor in Council should be expressly forbidden to deprive any Canadian citizen of citizenship or to banish or exile any citizen in any circumstances. He further proposed a "limitation by law on the absolute and arbitrary power of the government to detain persons, even in wartime", but stopped short of recommending that detention without an early trial on properly laid charges should be expressly forbidden. These proposals were not accepted. Prime Minister Diefenbaker pointed out that the government's amendments "assured parliamentary control which has not previously existed under the War Measures Act". Moreover, he suggested that a parliamentary committee should later be established to examine the operation of the War Measures Act.[9] Such a committee was never set up.

21. The War Measures Act was invoked for the third time, on the occasion of the October Crisis of 1970. This crisis was precipitated by the kidnapping of the British Trade Commissioner, James Cross, and the subsequent kidnapping and murder of Pierre Laporte, a cabinet minister in the Quebec government. It provides an opportunity to evaluate the strengths and weaknesses of the statute. Much was learned from the crisis about the adequacies of the legal framework and the state of emergency preparedness of the country.

22. On October 16, 1970, at four a.m., the War Measures Act was invoked by proclamation and the Order-in-Council incorporating the regulations was signed by the Governor General. Later that morning, the Prime Minister tabled in Parliament the Orders-in-Council under the War Measures Act "authorizing the issuing of a proclamation" that a state of "apprehended insurrection exists" in Quebec and "authorizing certain regulations to provide emergency powers". The regulations were published in the Canada Gazette at 11:00 a.m., and debated in the House of Commons for two days. On October 19, the House voted 190 to 16 to approve the action of the government in invoking the War Measures Act. The resolution read:

> That the House approves the action of the government in invoking the powers of the War Measures Act to meet the state of apprehended insurrection in the Province of Quebec as communicated to the Prime Minister by the Government of Quebec and the civic authorities of Montreal and further approves the orders and regulations tabled today by the Prime Minister on the clear understanding that the proclamation invoking the powers as contained in the regulations will be revoked on or before

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[9] House of Commons, *Debates*, July 7, 1960, p. 5948.

April 30, 1971, unless a resolution authorizing their extension beyond the date specified has been approved by the House.[10]

23. The regulations declared as unlawful the Front de Libération du Québec (F.L.Q.) and any other association that advocated the use of force or criminal means to effect governmental change within Canada.[11] Membership in the F.L.Q. was declared an indictable offence, as were advocating or promoting its aims and policies, communicating its statements, contributing to it financially, soliciting subscriptions for it, or rendering assistance to its members. According to the regulations, peace officers (including members of the armed forces) were given extended powers of search, seizure, and arrest. A peace officer could arrest without warrant a person suspected of committing, or of being likely to commit, any of the activities declared illegal. Those arrested could be detained for seven days without charges being laid.

24. The proclamation under the War Measures Act was revoked on December 3, 1970 when Parliament enacted the Public Order (Temporary Provisions) Act.[12] This Act incorporated the same regulations in slightly different form restricting the definition of illegal organizations to the F.L.Q. and groups that advocated the same or similar methods to accomplish governmental change "with respect to the Province of Quebec or its relationship to Canada as that advocated by..." the F.L.Q. The time of detention was made shorter and certain protections drawn from the Canadian Bill of Rights were included in the Act. By its own terms, the statute expired on April 30, 1971.

25. It is clearly not within our terms of reference to judge whether or not there were sufficient grounds for invoking the War Measures Act. The matters relevant to our mandate are the adequacy of that Act, the extent to which the federal government looked to the Security Service for intelligence before deciding to invoke the Act and the extent to which the R.C.M.P. was later involved in dealing with this national crisis.

26. There is some uncertainty as to the role played by the R.C.M.P. in the decision to invoke the War Measures Act. Was the decision based upon intelligence supplied by the R.C.M.P. or were the relevant facts in the public domain? On October 16, 1970, the Minister of Justice, the Honourable John Turner, told the House that some of the information in the government's hands could not be made public.[13] The Prime Minister, however, on October 23, 1970, stated that the decision was based on information that was then known to the public:

> The first fact was that there had been kidnappings of two very important people in Canada and that they were being held for ransom under the threat of death. The second was that the Government of the Province of Quebec and the authorities of the City of Montreal asked the Federal Government to permit the use of exceptional measures because, in their

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[10] *Ibid.*, October 19, 1970, p. 335.
[11] S.O.R./70-444; P.C. 1970-1808, October 16, 1970.
[12] S.C. 1970-71-72, ch.2.
[13] House of Commons, *Debates*, October 16, 1970, p. 212.

> own words, a state of apprehended insurrection existed. The third reason was our own assessment of all the surrounding facts, which are known to the country by now — the state of confusion that existed in the Province of Quebec in regard to these matters.[14]

27. During the months preceding October 1970, the Security Service provided the Solicitor General, the Department of External Affairs and the Privy Council Office with assessments on subversive organizations within Quebec, including the F.L.Q. In addition, the Security Service had itself collected information on the activities of the F.L.Q. and its supporters. On the operational level, the Security Service had established a close relationship with the Quebec Police Force and the Montreal City Police.

28. After the October crisis, criticism was expressed by Ministers that the intelligence provided by the R.C.M.P. on the F.L.Q. had been less than adequate. Yet it was well known to the Security Service that the F.L.Q. was a tightly knit terrorist organization capable of political violence. An abortive attempt to kidnap the Israeli Consul and Trade Commissioner in Montreal had been discovered as the result of an arrest by the Montreal City Police in February 1970. A similar plot to kidnap the U.S. Consul in Montreal was discovered in June after a raid by the Combined Anti-Terrorist Squad. Information on this aborted kidnapping was transmitted by the Security Service to the Department of External Affairs and the Privy Council Office. Mr. E.A. Côté, who as Deputy Solicitor General was directed by the Prime Minister during the crisis to prepare an independent report on the F.L.Q., expressed the view to us that the R.C.M.P.'s basic intelligence on the F.L.Q. had been very good, better indeed than the intelligence of the Quebec Police Force and the Montreal City Police. A general report on subversion in Quebec had been prepared by the Security Service for the Interdepartmental Committee on Law and Order in July and was considered by Mr. Côté to be a good summary of the situation (Vol. C76, pp. 10486-95; Vol. C77, p. 10532; Vol. C79, p. 10846). After the crisis broke on October 5 with the kidnapping of James Cross, the R.C.M.P. was in daily contact with the Solicitor General and other Ministers to report on events as they unfolded (Vol. C39, pp. 5221-32). Not surprisingly, there were no written assessments of the situation in those hectic days.

29. Commissioner Higgitt testified that the R.C.M.P. was not asked at the time for an opinion as to whether the Act should be proclaimed or, in other words, whether there existed a state of "apprehended insurrection" in the Province of Quebec. According to his evidence, the R.C.M.P. did not take the initiative to recommend to government that the Act should be proclaimed, nor was the opinion of the R.C.M.P. sought. Furthermore, the R.C.M.P. did not volunteer any comment on the government's proposal to invoke the War Measures Act (Vol. C39, pp. 5297-5305; Vol. C40, pp. 5354-55, 5375-79; Vol. C39, pp. 5336-64, 5367-68, 5376). In early November, Commissioner Higgitt was asked for his views as to whether the War Measures Act needed to be

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[14] *Ibid.*, October 23, 1970, p. 510.

continued. Mr. Higgitt told us that he then advised Ministers that as far as the R.C.M.P. was concerned the special emergency powers did not need to be continued (Vol. C39, p. 5288).

30. According to the Security Service records, during the several days preceding October 15, the Security Service in Montreal had been working with the Quebec Police Force putting together lists of suspects. According to the testimony of Superintendent (then Sub-Inspector) Ferraris, some of the information on which the lists were based had been sent from R.C.M.P. Headquarters in Ottawa. Late in the afternoon of October 15 the lists arrived in Ottawa. According to the testimony of Superintendent Ferraris, during the course of the evening a shorter list that had been prepared independently by the Montreal City Police, arrived in Ottawa. (An R.C.M.P. memorandum prepared late in 1970 stated that the number of names on the Montreal City Police List was 56.) The lists prepared by the R.C.M.P. in co-operation with the Quebec Police Force were of persons who, according to records, had participated in violent demonstrations, or advocated the use of violence, or were suspected of terrorist activities (Vol. C51, p. 6979-80; Vol. C39, pp. 5309-14). Late in the evening of October 15 Sub-Inspector Ferraris, accompanied by a more senior officer, took the lists that the R.C.M.P. had prepared, which totalled 158 names, to Parliament Hill in order to show them to the Honourable Jean Marchand and the Honourable Gérard Pelletier, both members of the federal Cabinet from Quebec. Those lists were shown to Messrs. Marchand and Pelletier. (It is unclear whether the Montreal City Police list was shown to them.) (Vol. C39, p. 5325; Vol. C51, pp. 6982-3.) According to the testimony of Superintendent Ferraris, Messrs. Marchand and Pelletier did not ask that the lists be altered in any respect (Vol. C51, pp. 6985-87). According to Commissioner Higgitt, there were two reasons for showing the list to the Cabinet Ministers: first, this had been decided upon at a meeting of Ministers and second, in a highly charged situation with political overtones, the greatest care had to be taken in the preparation of the lists (Vol. C39, pp. 5319-27).

31. There has been little public discussion about the part played by the R.C.M.P. after the proclamation of the War Measures Act. The major responsibility for police operations remained with the police authorities in the Province of Quebec (Vol. C39, p. 5256; Vol. C51, p. 6939). The R.C.M.P. co-operated with the Quebec, Montreal, and various other municipal police forces in supplying intelligence to help identify and locate the kidnappers. Members of the Security Service also acted in a liaison capacity with the crisis centres and special task forces within the Privy Council Office, the Department of External Affairs, and the Department of the Solicitor General.

32. The arrests when they took place were not confined to those on the original lists. The majority of the arrests were made by the Quebec Police Force or the Montreal City Police. According to the R.C.M.P., members of the R.C.M.P. assisted in many of the arrests but never acted alone. There were cases of local municipal police forces acting unilaterally to arrest people without consulting the Quebec Police Force or the R.C.M.P. In the first few hours after the regulations under the War Measures Act came into force, the

Quebec Police Force, acting on its own, (according to R.C.M.P. records) arrested 140 persons, 115 of whom were the subject of files maintained by the Security Service. Of the 68 noted to represent the greatest threat to security, 54 had been arrested by mid-December. Warrants had been issued for 5 of the remaining 14, namely, the two Rose brothers, Francis Simard, Marc Carbonneau, and Jacques Lanctot.

33. Mr. James Cross was found by the police and released by his captors on December 4, 1970. On December 27 the Rose brothers and Francis Simard were arrested for the murder of Pierre Laporte. The tension then subsided. In the perception of the Security Service, however, the crisis did not end. Even after the Public Order (Temporary Provisions) Act expired in April 1971, methods of investigation appropriate to a crisis situation were continued. Here is the testimony of two members of the Security Service, both of whom were involved in R.C.M.P. activities in Quebec during this period:

> And so, in our minds, while the Act had been revoked, the situation had not changed, and that to some extent many of the same measures that had been used at that time seemed to us to be still necessary. And so there was a kind of attitude, if you will, that prevailed among those of us that were doing the work.
>
> (Vol. 71, p. 11393.)

> . . . we were told that Mr. Turner would be bringing in the permanent Public Order Measures Act, which would allow us to operate at a more reasonable level, with more authority and more legality behind our operations. . . So when the Public Order Measures Act [sic] was repealed in April. . . we continued our operations as if the new one was going to come in any time.
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> (Vol. 92, p. 14982.)

In the opinion of Commissioner Higgitt, the situation during the October Crisis and for one or two years thereafter was far from normal. It was in effect "a war between the Security Service and those forces who were disrupting and causing mayhem and unease in the country" (Vol. 87, p. 14346; Vol. 85, p. 13933-34). In his testimony he implied that those times demanded "fairly desperate counter-measures" (Vol. 85, p. 13934).

34. The Security Service, which had been severely criticized for failing to provide government with adequate intelligence on the F.L.Q., expanded its operations after the October Crisis. The situation was described by the Solicitor General, the Honourable Francis Fox, in 1977 in the House of Commons:

> Nonetheless, when the October crisis of 1970 struck, there was an immediate realization that information on groups responsible for the crisis had been wholly inadequate. It was not clear which specific groups involved in the separatist movement were advocating or resorting to the use of violence or the commission of criminal acts, including murder, to accomplish the changes they sought. It was difficult to determine at that time precisely which groups were conducting themselves in accordance with the law and the principles of democratic action. In response to the gaps that were recognized as existing in October 1970, the security service realigned its

operational activity to obtain intelligence on groups and organizations that had been identified as supporting the separatist cause.[15]

Some of the operations that resulted from the realignment of operational activity after October 1970 were among the events ultimately leading to the establishment of this Commission.

B. LEGISLATIVE REFORM

35. The October Crisis made one thing quite clear: the government had no means of bringing emergency powers into play in a national domestic crisis other than by invoking the War Measures Act or by enacting special legislation in Parliament. Whether or not the use of emergency powers was justified in 1970 is not for us to decide. However, the question that arises is whether a statute that would authorize less severe measures, with more protection for fundamental rights and freedoms, should be available for use in similar circumstances. In the spring of 1971, legislation was drafted dealing with civil emergencies and the government proposed the appointment of a special joint committee of the Senate and the House of Commons to consider the enactment of this legislation. However, the committee was not appointed and the legislation was never introduced.

36. At first blush the concept of a statute to fill this gap and to give the executive certain powers in the case of emergencies which fall short of war or insurrection has attractions. However, many citizens are opposed in principle to such laws which would give government more power to introduce emergency measures without the prior approval of Parliament.[16]

37. Some countries, such as the United Kingdom, have no permanent legislation on the statute books applicable to civil political emergencies. In the United Kingdom the only comparable statute is the Emergency Powers Act of 1920 which authorizes the executive to exercise emergency powers if essential services, such as the supply of food, water, fuel or light, are threatened.[17] The legislation has been used only in connection with emergencies arising out of industrial disputes. Regulations under the Act must be laid before Parliament forthwith and they expire after seven days unless continued by a resolution of both Houses. There are three limitations: there can be no conscription; to strike cannot be made an offence; and existing criminal procedures cannot be altered.

38. In 1974, with the outbreak of I.R.A. violence in Britain the British Parliament enacted The Prevention of Terrorism (Temporary Provisions) Act. In many respects this legislation was similar to the Canadian statute enacted in December 1970, the Public Order (Temporary Provisions) Act. The British legislation was of limited duration. It required renewal by Parliament every six

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[15] *Ibid.*, October 28, 1977, p. 394.

[16] See the Brief submitted by the Canadian Civil Liberties Association, *Emergency Powers and the War Measures Act*, October 3, 1979.

[17] (Imp.) 10 and 11 Geo. 5, ch.31.

months. In 1976, the statute was amended to provide for renewal on an annual basis.[18]

39. The War Measures Act applies to a variety of emergency conditions: "war, invasion, or insurrection, real or apprehended". The decision of the government to invoke the act by proclamation is conclusive evidence that an emergency condition under the Act is in existence. These are wide powers, but grave national emergencies, such as war or insurrection, may well require immediate action by the executive and we do not believe that there are convincing arguments for the repeal of the War Measures Act. We do, however, think that the Act can be improved, and we comment on this below. On the other hand, we are not convinced that a case has been made, from the point of view of national security, for the enactment of additional emergency powers legislation that would give the government special powers in situations falling short of "war, invasion or insurrection, real or apprehended". When less grave emergencies occur or are apprehended, and the government wishes special powers, it should seek the approval of Parliament to special legislation.

Amending the War Measures Act

40. We now make a number of specific suggestions for the improvement of the War Measures Act.

(a) *The role of Parliament*

41. Section 6(2) of the War Measures Act provides that a proclamation of an emergency shall be laid before Parliament forthwith if Parliament is sitting and, if Parliament is not sitting, within the first 15 days of the new session. Parliament, after debate, may then decide whether or not to revoke the proclamation. In our opinion, section 6 should be amended to reduce the time during which a state of emergency can continue without the approval of Parliament. As now drafted, the Act does not provide for any time limit within which Parliament must be assembled if not then in session. If a proclamation invoking the Act is ordered by government, Parliament should be summoned immediately. We therefore recommend that, if Parliament is not in session it should be summoned to meet within seven days of the proclamation, so that the merits of the proclamation and regulations may be debated and approval or disapproval be given. We also consider that any proclamation should be limited to a specific time not to exceed twelve months. Parliament would be required to approve continuation for each subsequent twelve-month period.

42. In order to hold a genuinely useful debate on the proclamation and the regulations, Members of Parliament should be given the information on which the government based its decision. In some cases this can be accomplished openly in Parliament, but there may be situations in which it would be unwise to disclose some of the information publicly. Other arrangements must be made to inform the House of the real situation. One solution is to have Parliament sit *in camera* for part of its deliberations, as happened during the

[18] 1974, ch.56.

Second World War in both Canada and the United Kingdom in regard to certain other matters. Another is to inform the Leader of the Opposition, or the leaders of all recognized parliamentary parties. A further possibility is to inform a committee of the House, which could report its conclusions to the House. In this context, the Parliamentary Committee on Security and Intelligence, which has been referred to earlier in our Report, could play a useful role.

(b) *Emergency regulations*

43. Under the War Measures Act, the government has plenary authority, once a proclamation is issued, to make such orders and regulations as are deemed necessary "for the security, defence, peace, order and welfare of Canada". Section 3 of the Act goes on to state "without restricting the generality of the foregoing", that such orders and regulations of the Executive may extend to

> (a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
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> (b) arrest, detention, exclusion and deportation;
>
> (c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
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> (d) transportation by land, air, or water and the control of the transport of persons and things;
>
> (e) trading, exportation, importation, production and manufacture;
>
> (f) appropriation, control, forfeiture and disposition of property and of the use thereof.

44. In the past, regulations under the War Measures Act were not made public until an emergency was declared. Draft regulations, called the Internal Security Regulations, based on the old Defence of Canada Regulations, were prepared in 1962 at the interdepartmental level although we understand that they were not submitted to Cabinet for approval. The draft Internal Security Regulations cover such matters as the authority of the Minister of Justice to make detention orders, the establishment of a review committee to hear objections to detention orders, security of vital points, censorship, offences related to sabotage, interference with communications, possession of firearms and special powers of search and seizure. The draft regulations also provide for the registration of aliens, authorize the Governor in Council to declare an association or group to be an illegal organization and authorize the Minister of Justice to establish and regulate places for the detention of persons.

45. It is highly desirable that the emergency powers set out in the draft regulations be debated in public *before* a crisis develops, to ensure that proper attention will be paid to civil liberties. In our view, it would be an appropriate and useful step to have such draft regulations tabled and discussed in Parliament. This would ensure the greatest degree of public confidence if and when the regulations, in whole or in part, are brought into force at the time of an emergency. If the government decides at the time the War Measures Act is

invoked that further regulations which have not received Parliamentary approval, are required, such regulations should be submitted to Parliament for approval at the earliest possible date and in any event within 30 days, otherwise they would lapse.

(c) *Fundamental rights*

46. In 1960, the Opposition, led by the Honourable L.B. Pearson, demanded that certain fundamental rights, such as the right of citizenship, be spelled out in the statute. This view was not accepted by the government. Instead, there is a blanket proviso in section 6(5) that the War Measures Act applies, notwithstanding the Canadian Bill of Rights. Prime Minister Diefenbaker did suggest that the question be debated by a special all-party committee. As we have noted, no such committee was set up. Twenty years have gone by, and we think it is time for Parliament to reconsider the question.

47. We are not convinced that the fundamental freedoms expressed in the Canadian Bill of Rights should be completely excluded after a proclamation under the War Measures Act. The Public Order (Temporary Provisions) Act 1970, which revoked the October 1970 proclamation, retained the application of certain provisions of the Canadian Bill of Rights — the right to a fair hearing, the right to instruct counsel without delay, the presumption of innocence, and the right to the assistance of an interpreter. These are fundamental to our system of justice and public administration in peace and in war, and we believe that the total exemption of the War Measures Act from the Canadian Bill of Rights is not required. The powers that are to be permitted, notwithstanding the Canadian Bill of Rights, should be specifically identified in the legislation. For example, if the executive is to have the power to hold without bail, the statute should specifically identify this power as one permitted, notwithstanding the Canadian Bill of Rights.

48. Also, in considering the rights and freedoms which should be preserved even in emergency situations, Parliament should have regard to the fact that Canada is a signatory to the International Covenant on Civil and Political Rights. Hence Canada can be the subject of an international complaint for violation of its provisions. Article 4 of the Covenant provides that although some rights can be overriden in time of "public emergency threatening the life of the nation", certain rights cannot be overridden under any circumstances. These are: the right to life; the protection against cruel, inhuman, or degrading treatment or punishment; the protections against slavery, against imprisonment for debt, and against punishment for acts made crimes retroactively; the right of every individual to be recognized as a person before the law; and the right to freedom of thought, conscience and religion. We believe that these rights should not be capable of being overridden by regulations adopted under the War Measures Act.

49. Certain additional rights, not specifically covered in the Canadian Bill of Rights, should also apply even in a state of emergency. The Canadian Civil Liberties Association, echoing Mr. Pearson's sentiments, has expressed the view that the Act should not authorize government to denaturalize, deport or

exile a Canadian citizen.[19] We agree. It should be recalled that on December 15, 1945, a series of Orders-in-Council were passed under the authority of the War Measures Act which allowed under certain conditions for the deportation from Canada of nationals of Japan resident in Canada and British subjects, natural born and naturalized, "of the Japanese race". Those Japanese who were British subjects by naturalization or birth were to lose their citizenship on deportation. Revocation of citizenship is not one of the powers explicitly mentioned in section 3 of the War Measures Act, and, in our opinion, there should be no such power. The power to exile or deport a Canadian citizen should not be part of the War Measures Act. Although the deportation and denaturalization of the Japanese Canadians was not carried out, as Prime Minister Trudeau has said, "the fact that it could have been contemplated is a frightening thing".[20] If fundamental rights and freedoms are to be introduced in the Constitution, extremely careful consideration should be given as to which rights and freedoms ought not to be abrogated even in time of national emergency.

50. As in the Second World War, there should be a Board of Detention Review to consider the circumstances of persons whose liberty has been restrained by actions taken or purported to have been taken under the War Measures Act. Further, an independent tribunal should have the power to award compensation to persons whose rights have been infringed, without due cause, through the application of emergency legislation. Compensation should be awarded not only for loss of property but also for loss of liberty. These procedural safeguards should be provided in the War Measures Act itself rather than in the regulations.

(d) *The power to search, seize and arrest*

51. Under the Criminal Code a search warrant may be issued when a Justice of the Peace has "reasonable grounds to believe" that evidence with respect to the commission of an offence will be found in a specific place (section 443). A peace officer may arrest without warrant a person who he believes "on reasonable and probable grounds" has committed or is about to commit an offence (section 450). Under the regulations enacted at the time of the October Crisis, a police officer was given the power to "enter and search without warrant any premises... in which he has reason to suspect" that a member of the F.L.Q. or anything that might be evidence of an offence under the regulations was present. The draft Internal Security Regulations, on the other hand, use the more familiar "reasonable grounds to believe" criterion. We are not convinced that there is likely to be much substantive difference between "reasonable suspicion" and "reasonable belief" in the context of a political emergency. In any event, it is worth pointing out that neither of these phrases would appear to authorize anything in the nature of wholesale house-to-house searches.

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[19] *Emergency Powers and the War Measures Act*, p. 10.

[20] Prime Minister Trudeau, *Globe and Mail*, October 28, 1968, p. 12.

52. It is a fundamental precept of our law that an arrested person be charged as soon as possible. Thus, the Criminal Code provides that a person who is arrested and detained in custody shall, with very limited exceptions, be brought before a justice of the peace within 24 hours. The British anti-I.R.A. legislation requires a charge within 48 hours, although this can be extended by the Minister for a further period of five days. The regulations enacted at the time of the October Crisis provided that a person arrested had to be charged within seven days although the period could be extended up to another 14 days by a provincial attorney general. The Public Order (Temporary Provisions) Act 1970 provided that a charge had to be laid within three days of arrest, a period which could be extended up to another four days by a provincial attorney general. While we recognize that the time limits provided in the Criminal Code may be too short in the case of an emergency, we believe that lengthy detention before charge should not be permitted. We are of the view that the War Measures Act should be amended to provide that the period of detention before charge should be as short as possible and in any event should not exceed seven days after arrest.

53. Section 3(2) of the War Measures Act provides that breaches of orders and regulations made under the Act may be enforced by "... such courts, officers and authorities as the Governor in Council may prescribe,...". This may be interpreted as providing authority to create new courts. Such courts might appear to be simply extensions of the executive arm of government. In our opinion there should be no such authority and the Act should be amended to make this clear. If, by reason of the volume of charges arising out of a given situation, the ordinary courts of criminal jurisdiction cannot handle the case-load, they should be enlarged, or the jurisdiction of other existing courts should be extended to deal with the overload.

(e) *Unlawful organizations and associations*

54. During the October Crisis the regulations declared the F.L.Q. to be an illegal organization and membership was made an offence. There was precedent for this in Canada. During the two World Wars a number of organizations had been banned and membership in them prohibited. Such organizations have not always been of a violent nature. During World War II, under the provisions of the Defence of Canada Regulations,[21] the Jehovah's Witnesses, not a violent group, were declared an illegal organization.

55. The draft Internal Security Regulations confer authority on the Governor in Council to declare an organization illegal. There is a similar provision which authorizes the Minister of Justice to issue a detention order. It is important, however, to distinguish persons who are simply members of a banned organization from those who are also dangerous and should be detained in the national interest for the duration of the emergency. Membership in a banned organization may be made an offence, but as a rule membership should not be the sole basis for arrest in an emergency.

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[21] Defence of Canada Regulations (1942), Reg. 39c.

56. During the second World War the Government gave notice of the organizations that were to be proscribed, thus affording persons an opportunity to relinquish membership or cease active participation in such organizations. The legislation in the United Kingdom proscribing the I.R.A. provides, to the same effect, that

> A person belonging to a proscribed organization shall not be guilty of an offence under this section by reason of belonging to the organization if he shows that he became a member when it was not a proscribed organization and that he has not since then taken part in any of its activities at any time while it was a proscribed organization.[22]

57. The regulations adopted on October 16, 1970, came into force at four o'clock in the morning. People were arrested and charged with being members of the F.L.Q. before they had an opportunity to renounce their membership. The Associate Deputy Minister of Justice for Quebec, Gerald Boisvert, issued instructions to some prosecutors that the regulations did not have retroactive effect and therefore that for guilt to be established there should be evidence of membership in, or support for, the F.L.Q. on or after October 16. This reflected the common law rule of statutory construction that penal statutes not be construed retrospectively unless the statute so provides. The instruction no doubt contributed to the fact that of 467 persons arrested under the War Measures Act only five were eventually prosecuted. If simple membership in an illegal organization is declared to be an offence (as compared with active support of an illegal organization) the regulations should allow for a certain period of grace during which membership may be renounced with respect to any membership held prior to the making of the regulations. Indeed, the same period of grace should apply to any other section of the regulations proscribing conduct which was not previously an offence if such conduct began prior to the making of the regulations. An example would be the possession of literature. The principle of non-retroactivity of penal legislation is enshrined in our law and should be applicable even in the case of national emergencies.

> **WE RECOMMEND THAT a proclamation invoking the War Measures Act be debated in Parliament forthwith if Parliament is in session or, if Parliament is not in session, within seven days of the proclamation. Parliament should be informed of the reasons for the invocation of the Act, either publicly in the House, in an *in camera* session or by means of consultation with the leaders of the opposition parties, or through a report to the Joint Parliamentary Committee on Security and Intelligence.**
>
> (187)
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> **WE RECOMMEND THAT the War Measures Act limit the duration of a proclamation issued by the Governor in Council to a specific period not to exceed twelve months. Extensions for periods not to exceed twelve months should require further approval by Parliament.**
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> (188)
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> **WE RECOMMEND THAT orders and regulations to be brought into force when the War Measures Act is invoked be drafted in advance.**
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> (189)

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[22] 1974, ch.56, s.1(b).

WE RECOMMEND THAT the War Measures Act be amended to provide that such draft orders and regulations be tabled and approved by Parliament prior to their being brought into force. Any orders and regulations under the War Measures Act which have not been so approved in advance of the emergency should have to be tabled forthwith and should expire 30 days after coming into force unless approved by Parliament in the meantime.

(190)

WE RECOMMEND THAT section 6(5) of the War Measures Act be amended to provide that powers that are to be permitted, notwithstanding the Canadian Bill of Rights, should be specifically identified in the legislation and approved by Parliament.

(191)

WE RECOMMEND THAT section 3(1)(b) of the War Measures Act be amended. There should be no executive power in emergencies to exile or deport a Canadian citizen, nor should the Governor in Council have the power to revoke Canadian citizenship.

(192)

WE RECOMMEND THAT there be provision in the War Measures Act for:

(a) a Board of Detention Review to consider the circumstances of persons whose liberty has been restrained by actions taken or purported to have been taken under the War Measures Act; and

(b) a Compensation Tribunal to award compensation to persons whose rights have been infringed, without just cause, through the application of emergency legislation.

(193)

WE RECOMMEND THAT the War Measures Act be amended

(a) to prohibit prolonged detention after arrest without the laying of a charge; a charge should be laid as soon as possible and in any event not more than seven days after arrest;

(b) to prohibit the creation by the Governor in Council of new courts to handle charges laid under the Act and Regulations; and

(c) to provide that if, because of the volume of cases arising out of charges laid under the Act and regulations, the ordinary courts of criminal jurisdiction cannot handle the caseload, such courts should be enlarged or the jurisdiction of other existing courts should be extended to deal with the overload.

(194)

WE RECOMMEND THAT the War Measures Act be amended Act should not be based solely upon the fact of simple membership in an illegal organization.

(195)

WE RECOMMEND THAT:

(a) no regulations passed pursuant to the War Measures Act have a retroactive effect; and

(b) if the regulations proscribe a course of conduct which was not previously an offence, and the conduct began prior to the making of the

regulations, a reasonable period of grace be granted during which any person may comply with the regulations.

(196)

WE RECOMMEND THAT certain fundamental rights and freedoms, such as those specified in the Public Order (Temporary Provisions) Act, those specified in Article 4 of the International Covenant on Civil and Political Rights, and the right of citizens not to be deprived of citizenship or exiled, not be abrogated or abridged by the War Measures Act or any other emergency legislation under any circumstances.

(197)

C. INTERNMENT

58. To complete our discussion of the War Measures Act, we turn to the question of internment. A major security responsibility of the R.C.M.P. in the past has been the preparation of contingency plans for interning persons who are considered to be security risks, in time of emergency of the kinds contemplated by the War Measures Act, because of their allegiance to hostile powers, or their known tendency towards political violence. During World War I, World War II, and the October Crisis, the R.C.M.P. advised government with respect to internment. The War Measures Act confers upon the Governor in Council the authority to enact regulations that provide for the "arrest, detention, exclusion and deportation" of persons. In World War II internment of aliens was dealt with under the Defence of Canada Regulations enacted pursuant to the War Measures Act. As we have noted, these regulations have been replaced by the draft Internal Security Regulations, which, if adopted when an emergency is proclaimed, would authorize the Governor in Council to declare an association, society, group or organization illegal. The regulations also would give the Minister of Justice authority to order the indefinite detention of an individual or a group of individuals.

59. In 1948, a programme was established by the Commissioner of the R.C.M.P. to identify persons who, it was expected, might have to be rounded up promptly in the event of hostilities with the Soviet Union. An Advisory Committee was established in 1950 to review the list of people to be interned. The R.C.M.P. was directed to identify and to group such persons in order "of importance and danger to the country in the event of a further deterioration in international affairs". Emphasis was placed not only on those who might hold allegiance to a foreign power but also on those who might play key roles in espionage or sabotage in the event of war.

60. From 1950 until 1965, the programme was accorded a very high priority within the Security Service. Some organizations were subjected to close scrutiny and surveillance and a large number of potential internees were screened through the programme. With the relaxation of international tensions the programme was given less and less attention until, by the 1970s, it had been placed virtually in abeyance.

61. For the past decade Canada has lacked an effective contingency plan for dealing with dangerous or hostile persons in the event of emergency of the

kinds provided for in the War Measures Act. The Security Service maintained that a similar system, but including terrorists and other dangerous 'subversives', was needed. In fact, within the R.C.M.P. (and without approval of the Advisory Committee) the criteria were revised in 1970 to include terrorists and other violence-prone individuals generally. The Security Service developed proposals for a general reform of the system and referred these in 1973 to the Security Advisory Committee for approval. There was a good deal of consensus since it was apparent that the programme was outdated and that the Advisory Committee on Internments had not functioned well. Interdepartmental consultation on this aspect of emergency planning, however, was extraordinarily slow. Eventually, on November 3, 1976, a memorandum on the proposal was submitted to members of the Interdepartmental Committee on Security and Intelligence (I.C.S.I.) with the following recommendations:

(a) the Advisory Committee and the existing internment programme be abandoned;

(b) the Security Service be authorized and instructed to set up and maintain a system of identification of individuals, and data retrieval, such system to be incorporated in the R.C.M.P. War Book; and

(c) the selection of such individuals be on the basis of "subversive activity" as defined in s.16(3) of the Official Secrets Act.

62. Members of I.C.S.I. replied in writing and expressed general agreement with the recommendations, although the Deputy Minister of Communications and the Deputy Minister of Justice felt that the selection of individuals should be approved by an independent body such as the Advisory Committee. The views of the Security Service were again solicited and on March 25, 1977, the Director General's comments on the proposed system, were circulated to members of I.C.S.I. The Director General indicated at this time that the selection of individuals and organizations would be subject to the supervision of an internal review committee that would include representatives of the Departments of Justice and Solicitor General. Although there is apparent consensus, the new programme has not been approved.

63. At the time of writing, the Security Service is engaged in the preparation of basic lists employing new criteria. These criteria are extremely broad. The preparation of lists based on the new criteria has not, as far as we know, been authorized by the Government of Canada. Although the action now being taken by the Security Service has been reported to the Department of the Solicitor General, the government has not given approval to the new criteria or to the programme as a whole. In our opinion, the government should give this matter urgent attention, both in terms of being prepared to act effectively in the event of emergency and in terms of ensuring that the Security Service does not develop "lists" except on the basis of approved criteria and proper monitoring of the application of the criteria.

64. The history of the internment programme affords a striking example of the inadequate functioning of the interdepartmental system of decision-making on emergency security matters. We are disturbed by the incapacity, not only of the Security Service, but also of the whole machinery of government, to come

to grips with this aspect of emergency planning during the past 15 years. While the Security Service has maintained its interest and developed proposals for a new programme, it does not seem to have been able to obtain any decisions from the Security Advisory Committee or the Interdepartmental Committee on Security and Intelligence. Even conceding that emergency planning is a low priority in times of peace, the failure of the interdepartmental system to act effectively over the past eight years is regrettable. In the meantime, Canada has no responsible emergency plan for the detention of hostile or dangerous persons in the event of emergency of the kinds contemplated in the War Measures Act. No doubt the R.C.M.P. on short notice can provide government with the names of likely candidates for internment — as was done in October 1970 — but this is surely not good enough. Even the most senior official dealing with security matters during the period 1964 to 1977 was given little, if any, information about the programme. He testified that, until questioned about the matter at a hearing before us in late 1980, he had not been made aware of the "essentials" of the programme or that the Security Service regarded it as one of the major sources of authority for some of the Service's most sensitive investigations (Vol. C116, pp. 15138-40).

65. The extent to which a security intelligence agency, or indeed any agency of government, should make preparations for dealing with dangerous or hostile persons is doubtless a contentious subject. The broad brush approach of the post World War II years, is not justifiable today. We are not prepared to accept the proposition that the Canadian government and its security intelligence agency should collect intelligence on the assumption that in the event of hostilities with the Soviet Union key members of all designated organizations will be interned. Even if all such persons could be considered to be hostile to Canada in the event of war, only a few might be considered to be of such a character as to require their immediate arrest. The wholesale round-up of people does not sit well with many Canadians who have lived through the arrests of Japanese Canadians in World War II and the crisis of October 1970. Having said this, however, the fact remains that in an emergency of the kinds contemplated by the War Measures Act some potentially dangerous persons will have to be put under restraint. However, this should occur only when the criteria for arrest, charge and imprisonment (detention) under law are defined as clearly and narrowly as possible and the civil rights of the persons affected are protected as much as possible. Because this is our view, we think that it is undesirable that the regulations, in addition to providing offences for which there may be arrest and trial in accordance with traditional judicial procedures, should provide a system of detention upon order by a Minister or the Governor in Council. Our view is that any order of extended detention should be made only by judicial procedures in the ordinary courts of law. We realize that this proposal has procedural ramifications which should be closely examined; we are thinking of the kinds of procedural questions which we examined in our First Report in connection with trials under the Official Secrets Act. The preparation of arrest lists in times of calm, subject to a system of careful external review, is one means of minimizing the abrogation of civil liberties at the time of crisis. Such lists must of course be kept to a minimum and be

consistent with the threat of hostilities or emergencies as perceived by government.

The Advisory Committee on Internments

66. When the programme was established, it was recognized that the evidence required to place a person on the list should be sufficient to satisfy any independent committee that might subsequently be established to review the internment programme. With this in mind, the Minister of Justice in 1950 appointed a committee external to the R.C.M.P., the Advisory Committee on Internments. While the origin of the Committee is not fully documented, it appears that the idea was first suggested by the Commissioner of the R.C.M.P. He insisted that members of the Force should not serve on the Committee.

67. The main function of the Committee was to decide, on the basis of evidence supplied by the R.C.M.P., whether an individual should be placed on the list. The Advisory Committee was also asked to approve a list of 'subversive' organizations, membership in which was one of the criteria for internment. In the event of emergency of the kinds contemplated by the War Measures Act, such organizations might be banned as unlawful if the government of the day agreed.

68. The Advisory Committee on Internments was composed of the Deputy Minister of Justice, three other senior officials from the Department of Justice, and a legal adviser, who was a lawyer from outside the federal government service. During the 1950s the Committee did not function to any extent; its work, including the approval of organizations, was carried on by the external legal adviser. By 1960 the Committee had been reconstituted, and became more active. Thus, in 1961 and 1962, the Committee met on several occasions, considered R.C.M.P. briefs on organizations, reviewed the criteria for internment and considered the nature of the evidence required. After this spurt of activity, the Advisory Committee ceased to function. The Committee was reconstituted in 1967, and thereafter held one meeting, but never met again.

69. The Advisory Committee on Internments cannot be called an effective piece of interdepartmental machinery. In spite of the fact that the Committee was appointed by and, it would appear, responsible to the Minister of Justice, it was of no real interest to the Department. Mr. D.S. Maxwell, Q.C., who in 1968 became Deputy Minister of Justice and *ex officio* chairman of the Committee, told us that the Committee was not accorded much priority at that time (Vol. C66, pp. 9127, 9132). Before that, the Committee had become active only by virtue of prodding by the Commissioner of the R.C.M.P. and, in 1961-62, by an interested Deputy Minister and legal adviser. After 1969-70, as the programme itself wound down, it appears that both the R.C.M.P. and the Department of Justice gave up and allowed the Committee to die. During its entire career, the Advisory Committee on Internments was in practice accountable to no one and never made a report of any kind.

70. In 1948, the Commissioner of the R.C.M.P., in the aftermath of the Second World War, felt that an independent view of evidence was essential if the internment process were to function properly in a future emergency. We

feel, in the light of the subsequent 30 years, that his perception was sound. Indeed, an independent review body is necessary to supervise all aspects of contingency planning for arresting people in times of emergency, not merely to provide an external legal opinion as to the sufficiency of evidence in individual cases. Important policy matters that should be reviewed by such a body include the criteria for arrest, the selection of potential unlawful organizations, the resources employed in the agency to keep the programme up-to-date, and last, but by no means least, the techniques used to gather evidence on individuals.

71. Experience has shown that a committee of lawyers from the Department of Justice, responsible to no one, is not the answer. It would seem appropriate to locate the proposed Committee, which we propose be called the Committee on Arrests in Emergencies, squarely within the interdepartmental committee structure under the Interdepartmental Committee on Security and Intelligence or, if preferred, the Interdepartmental Committee on Emergency Preparedness. The proposed Committee need not be large, but should have representation from the Department of the Solicitor General and the Department of Justice. We have also considered the participation of the security intelligence agency and have concluded that for continuity and communication, a senior member of the agency should serve as an adviser to the Committee, but should not participate in the actual review of case files.

72. The implementation of arrest procedures and contingency planning are potentially so oppressive that the programme should be carefully reviewed by the interdepartmental committee responsible for the special identification programme. That interdepartmental committee should submit an annual report as to the state of planning of these matters to the Cabinet Committee on Security and Intelligence.

73. The Committee will have to review individual cases proposed for arrest. It is probably inevitable, if only because of the routine nature of the work, that the actual examination of individual files will be delegated by the Committee to one or two of its legal members who would report to the full Committee from time to time. In the past, although the Advisory Committee was inactive for most of the time, a large number of individual cases were reviewed by the Committee's external legal adviser. In effect, it was the legal adviser who gave approval to names being placed on the list. His job was to ascertain if there was adequate documentation to support a conclusion that an individual occupied a key position in a designated organization.

74. When the system began it was probably felt that the Advisory Committee would approve all possible cases. However, it soon became evident that many important "probable" cases existed that could be proved conclusively only when an emergency was declared and the police were granted special powers of search and seizure. The "not-approved" and "special case" categories were created to hold these "probables". The power to search the premises of a "probable" subversive is almost as much an invasion of liberty as the power to detain or intern, as the experience of the October crisis showed. Therefore, we believe that the Committee should review not only the list of potential persons to be arrested but also those as to whom further evidence is required and who,

in the heat of an emergency, will be subject to emergency police powers of search and seizure pursuant to regulations made under the War Measures Act. We also believe that a record of the decisions of the Committee and of the reasons for making them should be maintained. The lack of such documentation in the past is regrettable and appears to be contrary to the original purpose of establishing the Committee.

Criteria for arrest

75. The criteria applied to cases in the past were clear-cut. An individual was included on the list if he was a permanent member of certain organizations dedicated to the overthrow of our system of government. The evidence to support each case was required to be either (1) an authentic document, such as a membership list or a newspaper report of the election to office of an individual, or (2) evidence from two independent and reliable human sources whose reports were to be corroborative of each other, or (3) evidence from three human sources which did not need to be corroborative, but which was, of course, required to be relevant to the criteria.

76. The review of case files by the legal adviser was largely mechanical. Thus, if an individual was an important member then *ipso facto* he was included on the list. The criteria did not admit of fine distinctions as to whether or not an individual was a significant threat to security (except perhaps in the category of persons "suspected of espionage"). The evidence in most cases would simply be proof that an individual held an office or a position, a fact easily enough established from the reports of human sources, membership lists and newspaper reports. Reports derived from technical sources were not used by the Security Service to support applications to the Advisory Committee because such sources were considered extremely sensitive. On occasion, evidence obtained by means of "Contact 300" (a code name for surreptitious entries) was put forward. For the most part, however, the evidence was obtained from the reports of human sources and from publications.

77. In future, the criteria for the arrests programme must be more closely related to security threats, and the selection process should be far less mechanical. During more normal times, arrest lists should be prepared only of persons who are predicted to be serious threats to the community in the event of war or national emergency, as, for example, those who on reasonable grounds are believed to be, or would in the event of an emergency of the kinds contemplated by the War Measures Act likely become, espionage agents, terrorists or saboteurs. If this approach is adopted the criteria for arrests should be based on the statutory definitions of threats to security which we have recommended in Part V. This approach will also require the submission of more elaborate evidence, including a threat assessment, to the Committee. To help members of the Committee evaluate this evidence, the security intelligence agency should brief them fully as to the methods used to collect security intelligence. A report on such methods should be included in the Committee's annual report. In the event of an imminent emergency, it might become necessary to seek authority from government to expand the criteria so as to

include, for example, key figures in organizations who are considered sympathetic to likely hostile powers.

WE RECOMMEND THAT the government give immediate attention to the establishment of a Special Identification Programme.

(198)

WE RECOMMEND THAT the legislation dealing with national emergencies should prohibit the making of regulations which would provide for a system of detention upon order by a Minister or the Governor in Council. Any detention should be consequent upon arrest, trial and imprisonment in accordance with traditional judicial procedures.

(199)

WE RECOMMEND THAT the identification of dangerous individuals who should be arrested in situations of emergency of the kinds contemplated by the War Measures Act be carefully reviewed prior to the outbreak of any crisis by a Committee on Arrests in Emergencies external to the security intelligence agency. This Committee should be responsible to the Interdepartmental Committee on Security and Intelligence or the Interdepartmental Committee on Emergency Preparedness and should include representatives from the Department of the Solicitor General and the Department of Justice, with a member from the security intelligence agency serving in an advisory capacity. The responsible interdepartmental committee should annually submit a report on the arrests programme to the Cabinet Committee on Security and Intelligence.

(200)

WE RECOMMEND THAT members of the Committee review and record decisions on individual cases proposed for arrest or for extraordinary powers of search and seizure in case of an emergency.

(201)

WE RECOMMEND THAT the members of the Committee who review individual cases be fully briefed as to the methods used by the security intelligence agency to obtain the supporting evidence. This evidence should be discussed in the annual report to the Cabinet Committee on Security and Intelligence.

(202)

WE RECOMMEND THAT arrest lists be prepared only in respect of persons who are believed on reasonable grounds to be serious security threats in the event of emergency of the kinds contemplated by the War Measures Act such as those who, on reasonable grounds, are believed to be espionage agents, terrorists or saboteurs, or likely to become such.

(203)

D. THE ROLE OF A SECURITY INTELLIGENCE AGENCY IN NATIONAL EMERGENCIES

78. A security intelligence agency should play a role only in those emergencies — for example, war, insurrection, serious political violence, political terrorism, or sabotage — that affect the security of the nation. Public order

emergencies, such as rioting, looting, street fighting and other such forms of violent civil disorder, require action by law enforcement agencies. Emergencies that arise from natural disasters or major accidents do not call for action by the security intelligence agency.

79. After the October Crisis in 1970 there was a substantial feeling in the federal government that there was considerable room for improvement in its capability for handling peacetime emergencies relating to security. Consequently a group was assembled in the Privy Council Office under Lieutenant-General Michael Dare of the Department of National Defence to consider ways of improving the federal government's ability to respond quickly, intelligently and efficiently to a broad range of emergency situations. Its report was completed in 1972 and tabled in the House of Commons in March 1974. One of the report's key recommendations called for "a comprehensive system within the federal structure which would confirm and formalize the primary responsibilities of departments in crisis handling matters and which would provide the Cabinet with an enhanced capacity for crisis management."[23]

80. In October 1973 the Cabinet decided to establish a co-ordinated system for federal emergency preparedness and management. Each department was directed to be responsible for the preparations necessary to deal with emergencies within its area of responsibility. Particular Cabinet Ministers were appointed as "lead Ministers" to assume automatic responsibility for co-ordination of the federal government's response should an emergency arise. The Solicitor General was designated the lead Minister for emergencies affecting the internal security of Canada. A security intelligence agency can be vitally important to the Solicitor General in helping him with his responsibilities during a national emergency. In the remainder of this section, we examine the various roles an agency should play before and during an emergency.

Providing intelligence and advice

81. Intelligence is the first line of defence, both in preventing emergencies and managing them once they occur. During an emergency it is of vital importance that the government receive accurate, timely and relevant information about the identity, capacity, intentions and techniques of those who are the source of the serious political violence. The government's capability to deal with an emergency depends to a very great extent on the availability of such intelligence. The primary role of a security intelligence agency is to supply this intelligence to the various sections of government responsible for managing the situation and to the authorities with the primary law enforcement jurisdiction. The agency should possess the most extensive data bank in the country on subversive and terrorist organizations and have developed a high level of expertise on terrorist tactics and the effectiveness of various means of countering terrorist tactics in Canada and in other jurisdictions. Besides intelligence obtained from its own sources, there will likely be intelligence reports from

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[23] Report of the Crisis Management Study Group, *The Enhancement of Crisis Handling Capability within the Canadian Federal Structure*, October 15, 1972, p. 45.

police forces and other government agencies. The security intelligence agency should be in a position to monitor all the intelligence that is received and to provide assessments of such intelligence to the Emergency Operations Centre established to co-ordinate the government's response to the crisis.

82. The security intelligence agency should also be responsible for alerting government to potential emergencies affecting the security of Canada. When a security intelligence agency fails in this task, a serious lack of confidence in the agency can result. There is some evidence before us to suggest that such a lack of confidence occurred with respect to the R.C.M.P. during the October Crisis. In the midst of the crisis, rather than continuing to rely solely on the Security Service, Cabinet established several special task forces to assess the political intelligence available on the F.L.Q. (Vol. C76, p. 10441).

83. An agency report which assesses the likelihood of an emergency occurring should be reviewed both by the Solicitor General and by the Intelligence Advisory Committee we described in Part VIII. Such reports could be used by the Bureau of Intelligence Assessments (proposed in Part VIII) to prepare long-term, strategic assessments of security threats. Further refinement and analysis of reports might be required before they are considered by the Cabinet Committee on Security and Intelligence. The timing of the Cabinet review of the reports should depend upon the imminence of the threat.

84. When a national emergency threatens the internal security of the country, the government should be able to rely for policy advice on the head of the organization with the most expertise and resources in security intelligence matters, namely the Director General of the security intelligence agency. As has been noted, the Commissioner of the R.C.M.P. attended meetings of government at the beginning of the October Crisis, yet neither gave, nor was asked for, advice as to whether or not the R.C.M.P. saw the situation as one of an apprehended insurrection. We find Commissioner Higgitt's silence in such situations somewhat puzzling, if for no other reason than the fact that silence may well have been interpreted as approval. Although the Department of the Solicitor General may play the lead role in orchestrating the procedures necessary to handle any future crisis, there must be no reticence or hesitation on the part of the Director General in offering the agency's assessment of the situation or on the part of the government in asking for it.

Advice on vital points

85. Vital points are facilities, such as power stations, communications centres, government buildings and transportation networks, that are of sufficient importance to warrant extra security precautions to protect them from interference or destruction in time of emergency. A systematic attempt to protect such vital points began in Canada in 1948 when an Interdepartmental Committee was established to maintain an up-to-date list of vital civilian installations. The Department of National Defence was responsible for assessing the vulnerability of these vital points to military attack; the R.C.M.P. assessed their vulnerability to sabotage. All vital points were assessed in terms of their vulnerability as targets in case of war. In the crisis of October 1970, it became evident that the

criteria for identifying vital points in wartime were not entirely appropriate for a peacetime terrorist crisis. A second list of vital points was drawn up by the federal Emergency Measures Organization with the aid of the provincial governments to identify those facilities that might be the peacetime target of insurrectionists. Several thousand peacetime vital points were listed. This figure compared with 800 wartime vital points. The two lists have not been amalgamated and are currently under review by the Interdepartmental Advisory Committee on Vital Points. The Security Service has no direct responsibility for the vital points programme; the responsibility resides with the Protective Security Directorate of the R.C.M.P. Directorate whose representatives sit on the Interdepartmental Advisory Committee. Nor is the Force responsible for the actual protection of the vital points, except to ensure that the most important federally owned wartime vital points can be, and are, guarded.

86. The role of a security intelligence agency, as described in Part V, does not include protective security functions such as surveying the security requirements of vital points. This function properly belongs in a protective security unit of the federal police force. The security intelligence agency has, however, an advisory role to play in that it should be responsible for reporting to the protective security unit any intelligence on methods of sabotage or terrorist tactics that might influence the security requirements for vital points. The security intelligence agency should also be responsible for reporting intelligence on new targets of terrorists or saboteurs to the Advisory Committee on Vital Points.

Advice concerning the media

87. The October crisis revealed the necessity for cooperation between the security and police forces and the media. Communiqués by the F.L.Q. were announced by the media before the police had a chance to see them, and the media were antagonistic because of the lack of daily operational information from the police.

88. Because of the very nature of terrorism itself some form of media control may be necessary when a terrorist incident occurs. One of the main aims of the terrorist is to gain maximum publicity for his cause. A total news blackout of a terrorist incident, however, would be unacceptable and untenable in a democratic society. Furthermore, the media need information; to deny it could lead to serious inaccuracies and flagrant rumours. We concur with the approach suggested by Mr. Justice Hope in Australia. In the *Protective Security Review*, he proposes the development of effective liaison between those directing the police response to the crisis and the press.[24] Briefings with the media should be instituted to establish guidelines and appropriate channels of communication that would operate during a crisis. During these briefings the security implications of irresponsible reporting should be explained to members of the media. It would not be the function of the security intelligence agency to conduct or

[24] Australia, *Protective Security Review*, Canberra, Australian Government Publishing Service, 1979.

attend such meetings, but it should be able to advise the government and the police on the ways in which media reports might adversely affect the investigation of and response to the terrorist incident.

WE RECOMMEND THAT the security intelligence agency have the responsibility to alert government to situations that might develop into emergencies that would threaten the internal security of the nation. Reports on such threats should be reviewed by the Solicitor General and the Intelligence Advisory Committee and used by the Bureau of Intelligence Assessments in preparing long-term, strategic assessments of security threats. Reports assessing the imminence and significance of threats should be submitted to the Cabinet at an appropriate time.

(204)

WE RECOMMEND THAT in times of national emergency, the security intelligence agency monitor all intelligence received from its own sources and from sources of other agencies, and provide assessments of such intelligence to the crisis centre established to co-ordinate the government's response to the crisis.

(205)

WE RECOMMEND THAT in national emergencies the government seek the advice of the Director General of the security intelligence agency as to matters to which security intelligence collected by the agency would be relevant.

(206)

WE RECOMMEND THAT the responsibility for assessing the security requirements for vital points remain a protective security function of the federal police agency. The proper role of a security intelligence agency is to report intelligence that may be valuable towards ensuring that vital points are adequately protected.

(207)

WE RECOMMEND THAT during a national emergency involving terrorism or political violence the security intelligence agency be responsible for advising these officials on the security implications of media coverage of the crisis.

(208)

CHAPTER 2

THE OFFICIAL SECRETS ACT

1. One of the most important pieces of legislation relating to the work of the Security Service is the Official Secrets Act.[1] In our First Report, *Security and Information*,[2] we discussed most of the offences in the Official Secrets Act and in Part V, Chapter 4 of this Report we made recommendations with regard to the special powers of investigation provided for in the Act. In this chapter we recapitulate these earlier recommendations and discuss other sections of the Official Secrets Act on which we have not yet made recommendations. Our recommendations as a whole, as we indicated in the First Report, call for the repeal of the Official Secrets Act and the replacement of some of its provisions by new legislation. Thus, the aim of this chapter is to provide a comprehensive statement of the way in which our Security Plan for The Future will affect the various provisions of the Official Secrets Act.

A. SUMMARY OF FIRST REPORT

Espionage, leakage and related offences

2. By any standard, the Official Secrets Act is an anachronism and should be substantially revised. This is particularly so in the light of recent legislative initiatives in the field of Freedom of Information. The Official Secrets Act is so broad that it covers in section 4 any official document, whether classified or not, entrusted to a civil servant or government contractor. Release of any government information to the public or the media without authority constitutes an offence. In this respect, the Act runs contrary to the Freedom of Information proposals which assume that information may be released to the public unless there is good reason shown for not doing so.

3. In our First Report we argued that, having regard to the steps being taken to achieve greater openness in government, it is inappropriate to include in a single statute, both a serious national security offence such as espionage, (section 3) and a general catch-all offence covering the unauthorized disclosure of government information, (section 4). Accordingly, we felt that the Official Secrets Act should be repealed and replaced with new legislation. We suggested that the espionage offences be placed in the Criminal Code or in a separate statute. Finally, we noted the overlap between the treason provisions in section

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[1] R.S.C. 1970, ch.O-3, amended S.C. 1973-74, ch.50.

[2] Department of Supply and Services, 1979.

42(2)(b) of the Criminal Code and the espionage provisions in section 3 of the Official Secrets Act. We made the following recommendations in the First Report:

> that the Official Secrets Act be repealed and replaced with new legislation with respect to espionage, which should be incorporated in a new statute or placed in one part of the Criminal Code with all other national security offences.
>
> (First Report, Recommendation 27)

> that new espionage legislation incorporate in a single enactment the offences relating to espionage now set out in section 3(1) of the Official Secrets Act and section 42(2)(b) of the Criminal Code.
>
> (First Report, Recommendation 1)

4. We gave close attention to espionage which is one of the most serious offences in any country. It was our view that the offence should apply to a person who communicates to a foreign power information prejudicial to national security, whether he acts knowingly or with reckless disregard of the consequences. Furthermore, a person would be convicted even if the information he communicated was not classified, provided that the release of the information might be prejudicial to national security. We gave as an example of this the provision to a foreign state of photographs and data on key facilities, such as dams, harbours and pipelines. We made the following recommendations with respect to espionage:

> that espionage offences apply only to conduct which relates to the communication of information to a foreign power.
>
> (First Report, Recommendation 2)

> that new espionage legislation define the term 'foreign power' to include a foreign group that has not achieved recognition as an independent state.
>
> (First Report, Recommendation 3)

> that new espionage legislation cover the disclosure of, or an overt act with the intention to disclose, information whether accessible to the public or not, either from government sources or private sources, if disclosure is, or is capable of being, prejudicial to the security of Canada.
>
> (First Report, Recommendation 4)

> that the maximum penalty for espionage be life imprisonment, except in the case of the communication to a foreign power of information accessible to the public in which case the maximum penalty should be six years.
>
> (First Report, Recommendation 22)

We recommended that the offence of espionage be worded as follows:

> No person shall:
>
> (a) obtain, collect, record or publish any information with the intent of communicating such information to a foreign power, or
>
> (b) communicate information to a foreign power
>
> if such person knows that the foreign power will or might use such information for a purpose prejudicial to the security of Canada or acts with reckless disregard of the consequences of his actions to the security of Canada.
>
> (First Report, Recommendation 5)

5. We also made recommendations with regard to offences in the Official Secrets Act which are closely related to espionage. We recommended that the provisions with respect to harbouring spies be retained, although in a somewhat narrower form; that a new offence be introduced to cover the possession of instruments of espionage; and that the "prohibited place" subsection of section 3 be repealed because, in our view, it was archaic and constituted an unnecessary duplication of the sabotage section of the Criminal Code. We recommended

> that the provisions of section 3(1)(a) of the Official Secrets Act relating to a prohibited place be repealed and not be included in new legislation.
>
> (First Report, Recommendation 6)

> that the provisions of section 8 of the Official Secrets Act, the harbouring section, be retained but that the new legislation should make it clear that the provisions would only apply in cases in which the accused has knowledge that the person on his premises has committed or is about to commit an espionage offence.
>
> (First Report, Recommendation 7)

> that the new legislation include the offence of possession of instruments of espionage. Under this provision it would be an offence to be found in possession without lawful excuse of instruments of espionage, which would include false documents of identity.
>
> (First Report, Recommendation 8)

6. Section 4 of the Official Secrets Act makes the unauthorized use of virtually all official documents or information an offence: its catch-all quality has been subject to almost universal criticism. In our First Report we urged that criminal liability for unauthorized disclosure of government information apply only to well defined categories of information. We confined our recommendations to the two categories which fell within our terms of reference: security and intelligence, and the administration of criminal justice. However, we treated those two categories differently in view of the greater risks to the state that accompany any disclosure of information relating to security and intelligence.

7. Thus, we felt that it should be an offence if a person entrusted with security and intelligence information disclosed that information regardless of what his motives might be. We also felt that a court should not be bound to accept the security classification that has been placed by the government on a document but should be able to determine the appropriateness of that classification. We therefore recommended

> that new legislation with respect to the disclosure of government information should make it an offence to disclose without authorization government information relating to security and intelligence.
>
> (First Report, Recommendation 9)

> that new legislation should empower the court trying an offence of unauthorized disclosure of government information relating to security and intelligence to review the appropriateness of the security classification assigned to such government information.
>
> (First Report, Recommendation 10)

8. However, with regard to the disclosure of information which would adversely affect the administration of criminal justice, we felt that a person should not be convicted if he believed that the disclosure of such information was for the public benefit. We recommended

> that new legislation with respect to the unauthorized disclosure of government information should make it an offence to disclose government information relating to the administration of criminal justice the disclosure of which would adversely affect:
>
> (a) the investigation of criminal offences;
> (b) the gathering of criminal intelligence on criminal organizations or individuals;
> (c) the security of prisons or reform institutions;
>
> or might otherwise be helpful in the commission of criminal offences.
>
> (First Report, Recommendation 11)

> that it should be a defence to such a charge if the accused establishes that he believed, and had reasonable grounds for believing the disclosure of such information was for the public benefit.
>
> (First Report, Recommendation 12)

9. Finally, we recommended that in both categories — disclosure of information relating to security and intelligence and information relating to the administration of criminal justice — a person should not be convicted if he was authorized, or had reasonable grounds for believing he was authorized to disclose the information. We recommended

> that the offence of unauthorized disclosure of government information relating to security and intelligence and the administration of criminal justice provide that a person shall not be convicted
>
> (a) if he had reasonable grounds to believe and did believe that he was authorized to disclose such information, or,
> (b) if he had such authorization, which authorization may be expressed or implied.
>
> (First Report, Recommendation 13)

10. We also considered the position of the person such as a newspaper editor who receives government information, albeit unsolicited, and who then wishes to publish the information or who simply retains it without doing anything. Information relating to security and intelligence or to the administration of criminal justice as defined should not find its way, even innocently, into the public domain. Positive harm to our country would result in most cases if such information were published. We reached the conclusion that all citizens, including members of the press, are under a public duty to return documents relating to security and intelligence and to the administration of criminal justice as defined should such documents come into their hands. We recommended

> that the communication of government information relating to security and intelligence or the administration of criminal justice by a person who receives such information, even though such information is unsolicited, be an offence.
>
> (First Report, Recommendation 14)

that it be an offence to retain government documents relating to security and intelligence or to the administration of criminal justice notwithstanding that such documents have come into the possession of a person unsolicited and that there has been no request for the return of such documents.

(First Report, Recommendation 15)

11. However, we did not feel that criminal liability should attach to the negligence of a public servant who fails to take reasonable care of secret government information unless his conduct shows wanton or reckless disregard for the lives or safety of other persons or their property. We recommended

that the failure to take reasonable care of government information relating to security and intelligence or to the administration of criminal justice not be an offence unless such conduct shows wanton or reckless disregard for the lives or property of other persons.

(First Report, Recommendation 16)

12. The 'leakage' offences are quite different from the espionage offences. To be convicted of 'leakage', the intent to assist a foreign power is not required; furthermore, the 'leakage' is a less serious offence than espionage. Therefore, we recommended

that the maximum penalty in a case of unauthorized disclosure of government information relating to security and intelligence or the administration of criminal justice, be six years imprisonment.

(First Report, Recommendation 23)

that the legislative provisions with respect to the unauthorized disclosure of information relating to security and intelligence and the administration of criminal justice be clearly separated from the legislative provisions with respect to espionage.

(First Report, Recommendation 28)

Procedural matters

13. Much of the recent criticism of the Official Secrets Act as a result of the *Toronto Sun* and *Treu* prosecutions was directed at the special advantages alleged to be enjoyed by the Crown, particularly the right to an *in camera* or "secret" trial. In our opinion, much more could be done in the way of conducting the trial of espionage offences and offences of unlawful disclosure of government information in public, even in cases where the accused consents to or, as in the Treu case, at least does not oppose having the entire proceedings *in camera*. We felt that the onus should be clearly placed on the trial judge to hold *in camera* only those parts of the trial that must be kept confidential for reasons of national security. We suggested that a pre-trial proceeding *in camera* might be a useful procedure in order to reduce the need for an *in camera* trial. Thus, we recommended

that with respect to section 14(2) of the Official Secrets Act which permits *in camera* proceedings that:

(a) the provisions of section 14(2) be retained and made applicable to all offences, either offences in new legislation or in the Criminal Code, in which the Crown may be required to adduce evidence the disclosure of which would be prejudicial to the security of Canada or to the proper administration of criminal justice.

(b) the phrase 'prejudicial to the interest of the state' read 'prejudicial to the security of Canada or to the proper administration of criminal justice'.

(c) the last clause of the section read 'but except for the foregoing, the trial proceedings, including the passing of sentence, shall take place in public'.

(d) the legislation make provision for the holding of an *in camera* pre-trial conference for the purpose of dealing with procedural questions relating to the handling of evidence which might have to be received *in camera*

(First Report, Recommendation 18)

that new legislation provide that jurors who participate in proceedings *in camera* be subject to the offences relating to the unauthorized disclosure of government information.

(First Report, Recommendation 21)

14. In some cases, we were convinced that certain special provisions were necessary for the prosecution of national security offences. Thus, we agreed that the provisions in the Official Secrets Act which require that the Attorney General of Canada give his consent to prosecution (section 12) and which make the Act applicable to offences committed by Canadians overseas (section 13) were necessary. We further agreed that section 9, which makes it an offence to attempt to commit an offence or to incite an offence or to aid and abet an offence, should remain in the legislation. However, we felt that that part of section 9 which makes it an offence to do "any act preparatory to the commission of an offence" should be dropped for it goes well beyond the normal scope of the criminal law. Thus, we recommended

that the consent of the Attorney General of Canada be required for the prosecution of espionage offences, conspiracy to commit espionage offences, or offences relating to the unauthorized disclosure of that federal government information discussed in this report. Similarly, the conduct of such prosecutions should be the responsibility of the Attorney General of Canada.

(First Report, Recommendation 17)

that the offence of doing an act preparatory to the commission of an offence under the Official Secrets Act be removed but that the other offences found in section 9 be retained in the new legislation and made applicable to the offences of espionage and the unauthorized disclosure of government information relating to security and intelligence and the administration of criminal justice.

(First Report, Recommendation 25)

that the provisions of sections 13(a) and 13(b) of the Official Secrets Act which make the Act applicable to offences committed abroad be retained in the new legislation.

(First Report, Recommendation 26)

15. Our general approach to procedural matters, however, was that the Crown should not be given any advantage, over and above any advantages it may have in a normal criminal case, unless clearly necessary. We did not

believe that the Crown required a special right to 'vet' the members of a jury in a security case, nor did we believe that the various presumptions in the Official Secrets Act in favour of the Crown should be retained. In previous espionage trials, it does not appear that the Crown required the assistance of the presumptions in the Act. We also recommended that the accused be tried on indictment and not by summary conviction, thus preserving the right of the accused to have a jury trial. Thus, we recommended

> that offences dealing with espionage and the unauthorized disclosure of information relating to security and intelligence and the administration of criminal justice should be required to be tried by indictment and not by summary conviction.
>
> (First Report, Recommendation 19)

> that the Crown have no special right to 'vet' a jury in security cases over and above the rights now provided in the Criminal Code and under provincial law.
>
> (First Report, Recommendation 20)

> that the presumptions in favour of the Crown in section 3 of the Official Secrets Act not be incorporated in the new legislation.
>
> (First Report, Recommendation 24)

B. SPECIAL POWERS OF INVESTIGATION

16. The Official Secrets Act contains the following special powers for security investigations.

Section 7 — warrants to seize telegrams

Section 10 — power to arrest without warrant on reasonable suspicion

Section 11 — warrant to search and seize

Section 16 — warrant to intercept communications

In Part V, Chapter 4, of this Report we gave extensive consideration to the use of warrants for the interception of electronic communications and the seizure of telegrams and other communications. We also considered the power to enter secretly and search for documents in the course of a security investigation (surreptitious entries). If our recommendations are accepted all these special powers will be brought together in a provision in the National Security Act and may be authorized only by warrant of a judge after approval by the Minister. As recommended in Part V, Chapter 4, this will result in the repeal of the present sections 7, 11 and 16 of the Official Secrets Act.

17. Section 10 provides for a special power of arrest by a police officer of a person who is "reasonably suspected" of having committed, or being about to commit, an offence. It reads

> Every person who is found committing an offence under this Act, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be arrested without a warrant and detained by any constable or police officer.

So far as we have been able to determine, it has never been necessary for the police to resort to this special power of arrest in connection with offences under the Official Secrets Act. The Criminal Code (section 450) gives a police officer the right to arrest in these circumstances if he has "reasonable and probable grounds" to believe that an offence has been, or is about to be, committed. In our view the power of arrest in the Criminal Code should be sufficient to deal with security offences and section 10 should also be repealed.

WE RECOMMEND THAT section 10 of the Official Secrets Act be repealed.

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C. OTHER MATTERS

18. In our First Report, we did not refer to sections 5 and 6 of the Official Secrets Act. Section 5 makes the following conduct an offence if done "for the purpose of gaining admission, or assisting any other persons to gain admission, to a prohibited place, or for any other purpose prejudicial to the safety or interests of the State":

1. Use of a military or police uniform.
2. Making a false written or oral statement.
3. Forging a passport, permit or licence.
4. Impersonating a person entitled to use or have possession of a password or official document.
5. Use without authority of an official die, seal or stamp or the counterfeiting or sale of such die, seal or stamp.

Section 6 makes it an offence to obstruct or interfere with a police officer or military officer on guard near a prohibited place. In our First Report we recommended repeal of the provision in section 3(1)(a) of the Act relating to "prohibited place". Similarly, the provisions of sections 5 and 6 need not be retained. They would be covered by the general espionage section or by the provisions of the Criminal Code against impersonation, forgery or the obstruction of justice. Indeed, the espionage offence which we have recommended in our First Report is broad enough to comprehend the types of conduct that are referred to in such unnecessary detail in sections 3, 4, 5 and 6 of the Official Secrets Act. Apart from the specific offences mentioned in the First Report, none of these sections need be retained in the new legislation.

WE RECOMMEND THAT sections 5 and 6 of the Official Secrets Act not be retained in the new espionage legislation; if a general espionage offence is enacted, as recommended in the First Report (Recommendation 5), it will not be necessary to preserve the other particular espionage related offences in sections 3, 4, 5 and 6 of the Official Secrets Act.

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CHAPTER 3

FOREIGN INTERFERENCE

1. In our First Report, entitled Security and Information, we pointed out that there were activities of secret foreign agents which, although detrimental to the security of Canada, could not be prosecuted under the espionage laws. These activities can be described generally as active measures of foreign interference. In Part V, Chapter 3, of this Report, we discussed these activities and recommended that, because they involve attempts by foreign powers to interfere with or manipulate our democratic process of government by secret means, they should be included as one of the kinds of activity about which the security intelligence agency has a statutory mandate to collect and report intelligence. In this chapter, we consider legislative proposals designed to restrict or prohibit such active measures of foreign interference.

2. The proposal which has received most consideration in Canada is legislation requiring the formal registration of persons acting in Canada as agents of foreign powers. The existence of such legislation in the United States, in the form of the Foreign Agents Registration Act[1] and the Voorhis Act,[2] is widely known in Canada and it might be argued that similar registration requirements in Canada would facilitate the work of the security intelligence agency by compelling public identification of foreign agents.

3. Legislation prior to the current Foreign Agents Registration Act was passed in the United States as early as 1917, as a response to the view that a host government had a right to know the identity of persons acting within its boundaries as agents of foreign powers. The current Act came into effect in 1938 in response to the rapid growth in Nazi and Communist propaganda in the United States. Despite numerous alterations in the Act since 1938, its basic purpose has continued to be as stated in its 1942 revision:

> To protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

Some knowledgeable American observers have attributed a wider purpose to this legislation. For instance, Senator Fulbright, long time Chairman of the

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[1] October 17, 1940, ch.645, All 62 Stat. 808.

[2] October 17, 1940, ch.897, 54 Stat. 1201 (see Title 18, *2386).

Senate Foreign Relations Committee, has stated that the registration and disclosure were initially intended to serve the broader purpose of making public the identities of all foreign sponsors of public relations campaigns and of political lobbyists, regardless of whether their activities were subversive or not.[3] In any event, American effort in this field has been marked by a shift in emphasis from control of classic subversion and propaganda activities to disclosure of attempts by foreign interests to manipulate American policies and public opinion. It has proven extremely difficult, however, to administer the legislation on a day-to-day basis, and the result has been a series of attempts to refine the legislation so as to reflect changing concerns.

4. In broad outline, the Foreign Agents Registration Act defines those required to register with the Department of Justice as foreign agents and specifies how they must register and report on their activities, provides exemptions from registration for certain types of agents, establishes specific filing and labelling requirements for political propaganda disseminated by registered agents, requires all registered agents to preserve books of account and other records of all their activities, requires all of these books to be made available for inspection by officials responsible for enforcement of the Act, provides for public inspection of all registration statements and imposes penalties for wilful violations of the Act. Over time, it has been necessary to introduce a series of exemptions to the Act so as to overcome such special problems as those associated with lawyers and others acting in a normal professional capacity. The resulting "patchwork nature" of the Act has given rise to great uncertainty as to which persons are required to register under it.

5. The Voorhis Act, passed in 1940, requires the registration and detailed disclosure of the activities of organizations subject to foreign control engaging in political activity in the U.S. or whose civilian members engage in military-type activity in the U.S., and all organizations whose purposes include the establishment, control, conduct, seizure, or overthrow of a government or subdivision thereof by the use of force, violence, military measures, or threats of any of the foregoing. Thus an attempt is made to expose the activities of organizations, subject to foreign control or not, which seek to overthrow a government by force or otherwise.

6. Our examination of American experience with these registration schemes leads us to the conclusion that it would be unwise for the Canadian government to introduce similar legislation in Canada. Even if legislation were adapted to our own distinctive needs, we doubt that its benefits would justify the cost involved in developing and administering such a scheme in Canada. It is possible that a few agents of influence would register and disclose their affiliation publicly. Also, such a scheme, by delineating acceptable forms of foreign involvement in Canadian affairs, would provide a clearer basis for identifying unacceptable activities which are a threat to security. But we doubt that such a scheme would be of much assistance at all in detecting the professional, clandestine activities of agents of foreign interference. American

[3] (1964-65) 78 *Harvard Law Review*, 619 at 621.

experience indicates that, while a wide range of persons and organizations involved in legitimate and mainly commercial activities would register, the truly secret agent or organization would continue unaffected by the requirements of the legislation and might even be driven further underground and forced to use more subtle techniques which are harder to detect. In the meantime, the government would be obliged to establish, at considerable cost, administrative machinery which, if it is to be effective, would likely involve setting up an inspectorate to examine the books and records of representatives of foreign organizations in Canada. We think the results of such a scheme are too dubious to justify taking on these enforcement difficulties.

7. In our First Report, we suggested as an alternative to a registration scheme that consideration be given to the enactment of a provision which would make it an offence to be a secret agent of a foreign power. We have considered this possibility, but conclude that such a provision in the Criminal Code would be extremely difficult to enforce without basing it on a registration scheme providing a means for publicly disclosing a person's or organization's affiliation with a foreign power. Since we have rejected such a scheme as being impracticable we do not recommend this alternative.

WE RECOMMEND THAT there be no legislation requiring the registration of foreign agents or making it an offence to be a secret agent of a foreign power.

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CHAPTER 4

THE LAW OF SEDITION

1. Paragraph (c) of our terms of reference requires us to report on the adequacy of the laws of Canada as they apply to the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada. The several Criminal Code offences commonly called "sedition" are among those laws. In this section we shall examine the law of sedition in Canada and make recommendations concerning that law.

2. Before the Cabinet attempted to define the "Role, Tasks and Methods" of the R.C.M.P. Security Service by its Cabinet Directive of March 27, 1975, one of the cornerstones upon which the Security Service rested its authority was the law of sedition. For example, participants in the "Security and Intelligence Induction Course" held in November 1970, were told in written material given to them that their duties were based "directly" on the R.C.M.P. Act, sections 17(3) and 18(a) and (d), particularly section 18(a), which provides as follows:

> 18. It is the duty of members of the force who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform the duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada...

The words "the laws of Canada" were of course taken as including the Criminal Code and the Official Secrets Act. The provisions of the Criminal Code relating to sedition were analyzed (Ex. MC-17, Tab 30).

3. The training material defined 'sedition' as follows:

> Practices by word, deed or writing, which are carried out to disturb the tranquility of the State, and lead persons to endeavour to subvert the government and laws of the country. There must be an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority.

The last sentence is taken verbatim from the judgment of Mr. Justice Kellock in the leading Canadian judgment on the subject, *Boucher* v. *The King*.[1] The first sentence is taken verbatim from an English case from which the following passage was also quoted in the materials handed out:

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[1] [1951] S.C.R. 265 at 301. Mr. Justice Estey said, to the same effect: "Seditious intention must be founded upon evidence of incitement to violence, public disorder or unlawful conduct directed against His Majesty or the institution of the government."

> The objects of sedition generally are to induce discontent and insurrection, and to stir up opposition to the government, and bring the administration of justice into contempt and the very tendency of sedition is to invite the people to insurrection and rebellion. . . . [t]he law considers as sedition all those practices which have for their object, to excite discontent or dissatisfaction, to create public disturbance or to lead to civil war.[2]

The materials describe the evolution of the law quite accurately. We quote at length because we wish to give credit to the R.C.M.P. for sensitively conveying the law to its members on such an important issue:[3]

> Some earlier decisions suggest that an intention to promote feelings of ill-will and hostility between different classes of subject in itself would establish a seditious intention. This proposition seems to have been clearly rejected by the Supreme Court in the *Boucher* case. In this respect Rand, J. stated:
>
> There is no modern authority which holds that the mere fact of tending to create discontent or defamatory feelings among His Majesty's subjects or ill-will or hostility between groups of them not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons.
>
> This decision clearly establishes that to be guilty of sedition a person must have an intention to incite others to violence or disorder against the government. The creation of violence or disturbance of some nature, must be evident to show a seditious intention. Whether in fact a disturbance takes place is immaterial. The crux of the matter is whether or not the words themselves suggest the intention to incite violence. A person could therefore be convicted of sedition on the evidence of the words alone and no other overt act may be required.
>
> A difficulty may arise in the case of particularly critical remarks directed against the government. The right of an individual to criticize government is a recognized democratic right in this country. This right is emphasized and protected by section 61 of the Criminal Code. This section provides in effect that a person should not be deemed to have a seditious intention by reason only that he intends in good faith to point out certain fallacies in government policy or government action.
>
> The problem is to determine the line of demarcation between *bona fide* criticism of the government and an actual seditious intent. The judge or jury must determine what in fact was the real purpose of the statement. Do the words seditious intention, themselves suggest incitement to violence? If they do, the necessary element in sedition, is evident. If the real purpose was honest criticism directed towards government policy or action with no seditious intention then no offence has been committed. This distinction was expounded in the judgment of Lord Chief Justice Coleridge in *Rex* v. *Aldred*[4] where he stated:

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[2] *Regina* v. *Sullivan* (1868) 11 Cox C.C. 44, per Mr. Justice Fitzgerald.

[3] The history of sedition is traced in a research study prepared for this Commission, *National Security: The Legal Dimensions*, by M.L. Friedland, Ottawa, Department of Supply and Services, 1979, at pp. 17-25.

[4] (1904) 22 Cox C.C. 1.

> A man may lawfully express his opinions on any public matter however distasteful, however repugnant to others, if, of course, he avoids anything that can be characterized either as blasphemous or as an obscene libel. Matters of State, matters of policy, matters even of morals — all these are open to him. He may state his opinion freely, he may buttress it by argument, he may try to persuade others to share his views. Courts and juries are not the judges in such matters. For instance, if he thinks that either a despotism, or an oligarchy or a republic or even no government at all is the best way of conducting human affairs, he is at perfect liberty to say so. He may assail politicians, he may attack governments, he may warn the executive of the day against taking a particular course, or he may remonstrate with the executive of the day for not taking a particular course; he may seek to show that rebellions, insurrections, outrages, assassinations, and such-like, are the natural, the deplorable, the inevitable outcome of the policy which he is combatting. All that is allowed, because all that is innocuous; but on the other hand, if he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then, whatever his motives, whatever his intention, there would be evidence on which a jury might, on which I should think a jury ought, and on which a jury would decide that he was guilty of a seditious publication.

4. We have no quarrel with the foregoing instructional material. We have quoted it partly to lay the foundation for the following points:

(a) If Canada retains the offences of the speaking of seditious words, publishing a seditious libel and being a party to a seditious conspiracy,[5] then the definition of "seditious intention", which is an essential ingredient of each of those offences[6] should be defined in the Criminal Code and not left to judicial decisions. When the Criminal Code was first introduced in Canada in 1892, the Minister of Justice abandoned an attempt to include a definition of seditious intention, "leaving the definition of sedition to common law".[7] We think that the positions taken by the judges of the Supreme Court of Canada in the *Boucher* case represent what the law should be, and that the important limitation there stated, which requires "an intention to violence", should become part of the statutory definition of the seditious offences. Unless there is a narrow statutory definition of the offence, there is a risk that, despite the excellent instruction which appears to have been given to members of the R.C.M.P. Security Service, the police and others will give the offence a wider meaning than is now the law, when deciding upon the scope of investigation and search. The language that we propose be employed, if

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[5] The three indictable offences provided for in section 62 of the Criminal Code.

[6] Criminal Code, section 60.

[7] Sir John Thompson, House of Commons, *Debates*, 1892, Vol. 2, col. 2837, quoted in Friedland, *National Security: The Legal Dimensions*, p. 17.

the seditious offences are retained, is "an intention to incite others to violence or disorder against government".[8]

(b) However, we propose an even more radical step — the deletion of the seditious offences from the Criminal Code. For it seems to us that the scope of possible application of the present seditious offences, including a judicially imported requirement of proof of an intention to incite violence, is already covered by other offences under the Code. We refer to counselling or incitement or conspiracy to commit either offences against the person, or offences against property, or to riot or to assemble unlawfully. Advocacy of revolution is covered by incitement to commit treason, for the commission of treason includes the use of "force or violence for the purpose of overthrowing the government of Canada or a province".[9] Therefore there is no need for the seditious offences that are now found in the Criminal Code.[10]

WE RECOMMEND THAT the seditious offences now found in the Criminal Code be abrogated.

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[8] We delete the additional words found in *Boucher*: "or resistance or defiance for the purpose of disturbing constituted authority". Retention of those words in the statutory definition might mean that incitement to call a major illegal strike would be regarded as seditious.

[9] Criminal Code, section 46(2)(a).

[10] Professor Friedland argues that a new, comprehensive offence of "armed insurrection" ought to be considered; see his study at pp. 15-16. However, it is difficult to see the advantages of creating a new offence if existing offences are sufficient to enable effective protection of the State.

PART X

THE R.C.M.P. POLICING FUNCTION: PROPOSALS FOR IMPROVING ITS LEGALITY, PROPRIETY AND CONTROL

INTRODUCTION

INTRODUCTION

1. Our intent in this Part is to examine and make recommendations on certain policies and procedures affecting the R.C.M.P.'s policing function. The basis for our choice of which policies and procedures to examine is found in that part of our terms of reference which requires us first to report the facts established before us concerning incidents in which members of the R.C.M.P. were involved in actions or activities "not authorized or provided for by law", and second, "... to advise as to any further action that [we] may deem necessary and desirable in the public interest...". We have interpreted this second clause as requiring us to advise not only on what ought to be done with respect to the individuals involved in the specific incidents (this is the subject of a separate Report) but also on what general measures should be taken in order to avoid such incidents in the future. These general measures are the subject of this Part. Our focus here is solely on measures designed to ensure legality and propriety. Thus, our mandate with regard to the R.C.M.P. policing function does not extend to advising generally on policies and procedures and the means to implement them, as it does for the security side of the R.C.M.P.

2. This part of our Report contains five chapters. In the first, we examine the changes necessary within the R.C.M.P. to enhance legality and propriety. Our emphasis here is on the rule of law, and the role of the peace officer in relation to this principle. In Chapter 2, we develop recommendations concerning the R.C.M.P.'s procedures for handling complaints. Several of the activities we have inquired into have revealed major flaws in how the Force responds to allegations of misconduct on the part of its members. In Chapter 3, we focus on the system by which the R.C.M.P. receives legal advice. Again, it has been our experience that this legal advice system has had major deficiencies in the past. In Chapter 4, we turn to the relationship of the Force to the Solicitor General and the Deputy Solicitor General. We believe that many of the Force's problems which we have been examining stem, in part, from both a lack of clarity with regard to the roles of the Minister, his Deputy, and the Commissioner of the R.C.M.P., and inappropriate lines of control and direction. Our aim in this Chapter is to clarify these roles and to establish appropriate legal relationships in order that the Solicitor General can properly direct and control the R.C.M.P. Finally, in Chapter 5, we develop recommendations on the legal issues relevant to the R.C.M.P.'s policing function — issues which we have already highlighted in Part III and which include such topics as surreptitious entries, electronic surveillance, mail opening, access to confidential information and interrogation. This chapter corresponds to Part V, Chapter 4, in which we examined similar subjects with regard to the security intelligence agency.

CHAPTER 1

CHANGE WITHIN THE R.C.M.P.

A. BASIC PRINCIPLES

3. One of the commonly accepted implications of the rule of law, fundamental to the health of our democratic society, is that all persons are equal before the law.[1] That is, "officials like private citizens [are] under a duty to obey the same law".[2] All persons must obey the law: there is no special dispensation for policemen. Members of the R.C.M.P. who are peace officers and have the duty to preserve the Queen's peace[3] and to protect citizens from offenders are expected to conduct themselves so as not to break the law.

4. Although Parliament has seen fit to confer special powers on them, for instance powers of arrest, peace officers should not labour under the misconception that any act which would be an offence if committed by another citizen is not an offence if committed by a policeman during the investigation of a crime, or in the furtherance of national security. Yet we have found that in the R.C.M.P. just such a misconception exists, and tends to be justified by claims that there is no intent to commit a crime. The first part of this chapter will examine the principles of the law as they apply to the role of the police, and assess the validity of possible defences open to peace officers accused of committing a crime in the execution of their duty.

5. As already noted, it is true that the law does give certain powers to a peace officer which an ordinary person does not have. Thus, section 450(1)(c) of the Criminal Code provides that he may arrest without warrant "a person who has committed an indictable offence, or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence", or "whom he finds committing a criminal [even a non-indictable] offence", or where he "has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found". Generally

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[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10 ed.), London, Macmillan, 1959, p. 202.

[2] E.C.S. Wade and G. Godfrey Phillips, *Constitutional and Administrative Law* (9 ed.), London, Longman, 1977, p. 87.

[3] "The general duty of all Constables, both high and petty, as well as of the other officers, is to keep the King and peace in their several districts...": Blackstone's *Commentaries on the Laws of England* (1809), Bk I, 15th ed., Ch. 9, quoted by Judge Zalev in *R.* v. *Walker* (1979) 48 C.C.C. (2d) 126 at 138. See also *Reg.* v. *Dytham* [1979] 3 Weekly L.R. 467 (Eng. C.A.).

speaking, an ordinary person may not arrest a person in those circumstances. This provision is intended to protect a peace officer from civil liability for false arrest when he acts, as very often society expects him to, on the basis of information provided by others.

6. The defence of 'lack of intent' to commit a crime often put forward by the R.C.M.P., has been disclosed both in files we have examined and in testimony before us. While lack of intent may be a defence to a charge of "breaking and entering with intent to commit an indictable offence" upon the premises, it will most likely not be a defence to other criminal charges in which the question is not whether the accused had the "intent" to commit a crime but whether he had a "guilty mind" in a more general sense. (We have already discussed this question in detail in Part IV, Chapter 1.) The current impression which permeates the R.C.M.P. is mainly the result of inadequate basic training in the criminal law.

7. Another defence put forward is that of 'necessity', which is probably based on section 7(3) of the Criminal Code:

> 7. (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada. . .

While this provides a policeman and an ordinary citizen with a defence to criminal liability or liability for an offence under any other federal statute, it is probably limited to emergencies. In *Morgentaler* v. *The Queen*[4] Mr. Justice Dickson, speaking for the majority of the Supreme Court of Canada, said that, if the defence of necessity does exist,

> it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible.

He said that not only must the situation be one of great urgency but the harm averted must be "out of all proportion to that actually caused by the defendant's conduct". Let us take an example that has been raised with us in evidence by the R.C.M.P. A peace officer *prima facie* violates a federal law or regulation by not donning a life jacket when he goes in a motor boat to the aid of a drowning person. Probably the defence of necessity would prevent a conviction, unless of course the life jacket was on hand and the peace officer simply chose not to wear it. Therefore that example, which was put before us as an instance of the need for policemen to violate the law to protect the public interest, does not make the case at all.

8. There is also specific provision in section 25(1) of the Code that "everyone", including a peace officer,

> who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,

[4] (1975) 70 C.C.C. (2d) 449.

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Since the law — as rendered by statute in the oath he takes — requires him to enforce the law, he is protected from criminal and civil liability for any use of force in the course of enforcing the law, if the force he uses is no more than is reasonably necessary in the circumstances.

9. Section 27 of the Code, applicable to peace officers and non-peace officers alike, provides that a person is "justified in using as much force as is reasonably necessary" to prevent "the commission of an offence", or the doing of anything "that, on reasonable and probable grounds, he believes would, if it were to be done, be an offence", if the person committing it "might be arrested without warrant" and the offence "would be likely to cause immediate and serious injury to the person or property of anyone".

10. The provisions of sections 25 and 27 together permit a policeman, provided he acts reasonably, to perform those acts which society expects a policeman to do. They afford protection from criminal and civil liability if, for instance, he breaks into premises, breaking down the door in the process, in order to prevent the commission of an impending crime of serious violence.

11. This brief statement of the law relating to the powers of a peace officer should be sufficient to make it clear that, while the law expects a policeman to do more than it expects of an ordinary person, it correspondingly affords him certain specific protections which will be sufficient to enable him in many cases to do his duty without fear of prosecution or civil suit, provided he behaves reasonably.

12. There will, nevertheless, be situations in which he will not be able to enforce a law effectively without breaking some other law. In those situations he must not break the law. No assertion that his action is in the public interest or for the public good in the war against crime can be allowed to justify his committing an offence. His conduct must be above reproach, and set an example of obedience to the law. No equivocation is permissible either in the policy established for the police force or in its application in the field.

13. If a specific law, whether found in a federal, provincial or municipal statute or regulation or bylaw, stands as an obstacle to effective law enforcement then the police force should press for a change in the law. It must not subvert the law by permitting or even encouraging its members to break the law on grounds that the violation will only be "technical". Nor must it permit its members to encourage other persons to do some act of co-operation as a "good citizen" if that act is an offence.

14. We have heard a good deal about 'technical' violations of the law. There are no such things. A breach of a statutory prohibition is an offence, no matter

how noble the motive of the policeman committing it. While the selflessness of the motive may be taken into account by a judge in mitigation of what otherwise might be a severe penalty, the possibility of such leniency must not be the basis of a policy permitting conduct which constitutes an offence.

15. No doubt members of a police force such as the R.C.M.P. feel frustrated if they find it difficult to persuade governments and legislators to change the law, as they feel it needs to be changed to enable them to enforce it effectively. We have found that the R.C.M.P. is unskilled at presenting a case for legislative change. This may be a reflection of an inadequate capacity for analytical thought and presentation, or it may flow from a failure to understand the process of government or the necessity to present the need and the proposed solution with clarity and absolute candour. Government cannot be expected to press the R.C.M.P. for clear evidence of need, or for more effective presentation of argument. On the other hand, we recognize that a number of legal problems which are analyzed in this Report, if they are to be resolved, will require the active and concerted effort of the federal and provincial governments, each of which bears constitutional responsibilities that affect law enforcement in general and the work of the R.C.M.P. in particular. The federal system does not render the solution to these problems easier.

16. Our preceding observations have referred to offences. But a police officer must equally not be guilty of conduct which, although not an offence, will constitute a civil wrong. For example, even if entry upon premises and surreptitious search without warrant may not be a crime and in most provinces does not contravene a provincial statute, in the common law provinces it will be trespass and in Quebec may be a delict. It was the law of trespass which in England 200 years ago established the unacceptability of searches by general warrant issued by an officer of state. The observations found in the great judgments of those times (see Part III, Chapter 2) apply equally to render "illegal" or "unlawful", in the civil sense, any such conduct by a peace officer. That is enough to require a police force to prohibit such an investigative practice.

17. The currency of the doctrine that tortious conduct by policemen is unacceptable, even if it is not a criminal offence or an offence under any statute, was vividly illustrated by a recent judgment in the highest court of England, the House of Lords. In *Morris* v. *Beardmore*[5], a charge by police was dismissed because the evidence was obtained while the police were trespassing. Lord Diplock stated:

> In my opinion, in order to constitute a valid requirement the constable who makes it must be acting lawfully towards the person whom he requires to undergo a breath test at the moment that he makes the requirement. He is not acting lawfully if he is then committing the tort of trespass on that person's property, for [the statute] gives him no authority to do so.[6]

[5] [1980] 3 Weekly L.R. 283.
[6] *Ibid.*, at p. 289.

Lord Edmund-Davies said:

> ... although policemen have been vested by statute with powers beyond those of other people, they are exercisable only by virtue of the authority thereby conferred upon them and in the execution of their duty. A policeman as such — in or out of uniform — has no powers or authority beyond those of the ordinary citizen on occasions or in matters which are unconnected with his duties.
>
> My Lords, I have respectfully to say that I regard it as unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this regardless of whether his contravention is of the criminal law or simply of the civil law. And so, when Parliament decreed that in the circumstances indicated in section 8 "a constable in uniform" was empowered to take certain steps in relation to motorists, the whole framework of the legislative provision was that the powers were being conferred on a constable who at the material time would not merely be in uniform but would also be acting in the execution of his duty.[7]

And later he warned that

> ... if the police (above all people) are seen to flout the law and are yet to be regarded as lawfully exercising powers granted to them by Act of Parliament, diminished respect for the law and for the officers of law enforcement must inevitably follow.[8]

18. The policy of the R.C.M.P., and its application in the field, must unequivocally expect compliance with the law. Any deficiency in the law which is perceived as a serious obstacle to the effective performance of the tasks entrusted to the R.C.M.P. by the government and Parliament should be drawn candidly to the attention of government. It should not be regarded as a difficulty to be overcome either by turning a blind eye to violation of the law, or by being equivocal in its approach to government on the subject.

19. Our investigations reveal that some of the legal problems that have arisen in the R.C.M.P. should have been identified sooner, and, when identified, should have been brought to the attention of the government for legal advice and if necessary for remedial legislation. Too often we have found that a legal problem, even if identified as such by senior management of the Force, has been hidden from government because of fear that the legal advice that the government would obtain would result in a prohibition of the use of an investigative technique.

20. In addition to recognizing unreservedly the significance of the rule of law in its application to the R.C.M.P., it is imperative that in word and deed all police forces accept the primacy of the civil government. Yet we have detected, in subtle references, that there is an impression in some quarters in the R.C.M.P. that the Commissioner of the R.C.M.P. is answerable to the law and not to the government. Such is the impression one has when members of the

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[7] *Ibid.*, at p. 291.

[8] *Ibid.*, at p. 294.

Force refer to *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn*[9] (cited and discussed in Chapter 4 of this Part) as an apparent authority for that proposition. The limits of what was said in that judgment were analyzed by the Honourable Madam Justice Roma Mitchell, of the Supreme Court of the State of South Australia, in the Report of the Royal Commission on the Dismissal of Harold Hubert Salisbury from the office of Commissioner of Police, 1978.[10] She found that former Commissioner Salisbury had misled the Government of the State by his communications to it as to the nature and extent of the activities of the Police Special Branch, and that the decision to dismiss him was justifiable in the circumstances. Shortly before his dismissal, as Madam Justice Mitchell said in her Report:

> In his interview with the Premier on the 13th January 1978 Mr. Salisbury said that special branches of Police Forces had duties which he considered to be to the Crown, to the law and not to any political party or elected Government. In giving evidence he again affirmed that that was his belief and he said "As I see it the duty of the police is solely to the law. It is to the Crown and not to any politically elected Government or to any politician or to anyone else for that matter." That statement, in so far as it seems to divorce a duty to the Crown from a duty to the politically elected Government, suggests an absence of understanding of the constitutional system of South Australia or, for that matter, of the United Kingdom. As I understand his evidence he believed that he had no general duty to give to the Government information which it asked but he regarded it as politic to give such information as, in his view, was appropriate to be general knowledge.[11]

Madam Justice Mitchell then continued:

> Of course the paramount duty of the Commissioner of Police is, as is that of every citizen, to the law. The fact that a Commissioner of Police "is answerable to the law and to the law alone" was adverted to by Lord Denning M.R. in *R.* v. *The Commissioner of Police of the Metropolis: ex parte Blackburn.* This was in the context of the discretion to prosecute. No Government can properly direct any policeman to prosecute or not to prosecute any particular person or class of persons although it is not unknown for discussions between the executive and the police to lead to an increase in or abatement of prosecutions for certain types of offences. That is not to say that the Commissioner of Police is in any way bound to follow government direction in relation to prosecutions. Nor should it be so. There are many other police functions in respect of which it would be unthinkable for the Government to interfere. It is easier to cite examples than to formulate a definition of the circumstances in which the Commissioner of Police alone should have responsibility for the operations of the Police Force.
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> It is one matter to entrust to the Commissioner of Police the right to make decisions as to the conduct of the Police Force. It is quite another to

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[9] [1968] 2 Q.B. 118; [1968] 1 All E.R. 763.

[10] *Royal Commission Report on the Dismissal of Harold Hubert Salisbury*, South Australia, 1978.

[11] *Ibid.*, at p. 19.

deny the elected Government the right to know what is happening within the Police Force.[12]

We shall express our views on this subject in Chapter 4 of this Part. Suffice it to say here that requests by government for information as to what is happening within the R.C.M.P. must be answered in a forthright manner using unequivocal language that sets out clearly any qualifications to the information being provided. But candour and completeness are not the only essentials. The police, because they are aware of the difficulty government may have in identifying issues requiring its attention, must bring forward all such issues, even matters which the police themselves might consider to be "internal management".

B. MANAGEMENT AND PERSONNEL PRACTICES

21. A study of the management and personnel practices of the R.C.M.P. policing function, parallel to the one we conducted and reported on in Part VI in relation to the Security Service, is outside our terms of reference. We have not been asked to examine the role that the Force ought to play as Canada's national police force, and without such an examination we believe that a study of management and personnel issues would be on an unsound footing. Even if we were to assume a continuation of the R.C.M.P.'s existing role, we could review the Force's procedures in the area of policing in a comprehensive manner only by focussing on effectiveness as well as on legality and propriety. We consider that lasting improvements will not be effected simply by suggestions for improved legal training or by calling upon R.C.M.P. members to refuse to obey illegal orders. Questions of legality and propriety relate directly to long established, deeply rooted characteristics of the Force: its managerial style, with its emphasis on obedience; its disciplinary procedures; the extensive and well-defined set of rules that governs behaviour on and off the job; the stress on loyalty; the initial training which attempts to mould the individual to fit the image of the Force; the insularity of the R.C.M.P. These topics, in our view, should be looked at only in the context of effectiveness.

22. However, although a study of management and personnel issues for the R.C.M.P. policing function lies outside our terms of reference, we would be remiss in dropping the subject entirely. We believe that there is a strong connection between legality and propriety on the one hand and management and personnel procedures on the other. Moreover, we strongly suspect that some of the weaknesses we have identified in the Security Service — a poor capacity for legal and policy analysis, a serious deficiency in management skills, lack of continuity and expertise in key areas because of the generalist career path — are also weaknesses in the criminal investigations side of the Force. Indeed, some have argued that the type of managerial and personnel policies which we are recommending for the security intelligence agency would be appropriate for at least certain parts of the Force, such as those branches

[12] *Ibid.*, at p. 20.

dealing with commercial crime, criminal intelligence, and drug offences. For these reasons, we suggest that the government consider initiating a study of the R.C.M.P. policing function, centering on at least the following topics:

- the role for Canada's national police force,
- the desired qualities for the R.C.M.P. Commissioner and his senior managers,
- the major personnel policies including recruitment, training and development, career paths and classification,
- the organizational structure of the Force,
- the approach to management and decision-making.

The objectives of such a study should be to enhance the effectiveness of the Force and to ensure legal and proper conduct on the part of its members.

CHAPTER 2

COMPLAINTS OF POLICE MISCONDUCT

1. "Who should police the police?" is one of the most difficult questions facing those concerned with law enforcement in a liberal democracy. Allegations of police misconduct must be resolved promptly and fairly to protect the rights of citizens and police alike, and to maintain the confidence and respect of citizens in the police. Moreover, an effective means of handling complaints can be an important management tool for a police force in identifying problem areas such as poor recruiting and training practices or improper investigatory procedures. As we have noted in Part VI, Chapter 2, the problem of police misconduct — certainly as it relates to the R.C.M.P. — is not simply a question of 'evil' people doing 'evil' deeds. We were not investigating acts of police corruption, that is policemen acting illegally or improperly for their own aggrandizement. Rather the evidence before us suggests that the causes of police misconduct are complex and have at least as much to do with failures in our systems of law, management, and governmental relationships as they do with human failings. The proper handling of complaints is an excellent way of identifying and correcting these systems failures.

2. As in the case of 'policing' a security intelligence agency, an effective system for 'policing' the police requires a judicious blending of several approaches. In some instances, especially those in which the complaint is a relatively mild one — for example, a complaint that a police officer was rude — the best approach may be for the complainant and the officer to meet face to face in order to ascertain whether an amicable resolution is possible. In other cases, the R.C.M.P. itself should conduct an investigation. In situations where there is an alleged illegality on the part of the police, the matter must be handled by the appropriate Attorney General. Finally, we believe that an external review body is necessary to monitor how the R.C.M.P. handle complaints, and in certain circumstances, to undertake an investigation of its own. Indeed, the major recommendation in this chapter will call for the establishment of the Office of Inspector of Police Practices whose functions and roles, with some important exceptions, will be similar to those of the Advisory Committee on Security and Intelligence, which we discussed in Part VIII, Chapter 2.

3. In addition to the establishment of an external review body, we shall make recommendations in three other areas to improve the R.C.M.P.'s handling of complaints. First, we shall recommend ways of improving the flow of complaints about police misconduct from the general public, the judiciary and from members of the R.C.M.P. Then we shall make proposals for improving the way in which complaints are dealt with, once they have been received by the

R.C.M.P. or some other government body. Finally, we shall examine the role which the provinces should play in the complaints system relating to the R.C.M.P.

4. Before turning to each of these areas, we should note that a Royal Commission has recently studied R.C.M.P. complaint procedures. The Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedures Within the Royal Canadian Mounted Police[1] (chaired by His Honour Judge René Marin and referred to hereafter as the "Marin Commission") was published early in 1976 and called for a series of changes in the manner in which public complaints against the R.C.M.P. are handled. The R.C.M.P. has since implemented many of these proposals. Having that Report makes our task much easier in that we agree with a number of the Marin Commission's recommendations. Nonetheless, there are certain areas where we differ with the recommendations made by that Commission and for this reason we have developed our own proposals on certain key points.

A. EXISTING PROCEDURES FOR HANDLING PUBLIC COMPLAINTS AGAINST THE R.C.M.P.

5. The existing procedures provide for the reception, investigation and resolution of a complaint by the Force itself. With the exception of certain provincial police boards, whose constitutional authority in so far as their jurisdiction over the R.C.M.P. is concerned is now in doubt (which we shall discuss later in this chapter), no authority external to the Force oversees, on a regular and systematic basis, the handling of public complaints against it. The administration of public complaints and internal discipline procedures is the responsibility of the divisional commanding officers. Appeals concerning internal discipline can be made to the Commissioner, whose rulings are final.

6. When a complaint is received by the R.C.M.P., a preliminary investigation is carried out at the local level. The majority of complaints appear to be satisfactorily resolved on an informal basis by way of an explanation or an apology. R.C.M.P. Headquarters does not keep records of complaints which are resolved informally. However, Force policy requires divisions to compile reports on the nature and frequency of all complaints as a measure of divisional effectiveness. At the discretion of Headquarters and the Commanding Officer of each division, the R.C.M.P. also examines and investigates adverse comments reported in the press or contained in judicial decisions in court cases. The R.C.M.P. told us that an investigation is undertaken in a case where there is an expectation that questions will be addressed to the responsible federal or provincial Minister.

7. Where any matter is considered by the R.C.M.P. to be serious, or if the complainant is not satisfied at the informal level, a formal investigation is undertaken by a senior NCO or an officer at the local level, or by a special

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[1] Information Canada, Ottawa, 1976.

R.C.M.P. internal investigation unit called the Complaints and Internal Investigation Section (C.I.I.S.). There are internal investigation sections in most divisions across Canada and they can be sent to smaller detachments as required. C.I.I.S. Sections investigate most serious cases including those cases where R.C.M.P. members normally responsible for service investigations (or criminal investigations in areas where the R.C.M.P. has general law enforcement responsibilities) have personal involvement or interest in the matter to be investigated; where there is any question of corruption; or, where public interest appears to be high.

8. If a complainant alleges illegal conduct on the part of an R.C.M.P. member in an area where the R.C.M.P. has general law enforcement responsibilities, the Force undertakes a criminal investigation. The R.C.M.P. then refers the matter to the provincial prosecutorial authorities who determine whether criminal charges should be laid. In other areas, the R.C.M.P. refers the matter to the police force which has general law enforcement responsibilities for investigation and referral to the prosecutorial authorities. One of the Marin Commission's recommendations concerning public complaints proposed that such criminal investigations be carried out by experienced R.C.M.P. investigators seconded to a provincial attorney general and working under his direction. This recommendation has not been implemented. The R.C.M.P. and the interdepartmental review committee that studied the report believed that these investigations should be carried out by experienced R.C.M.P. members under the direction of the Commissioner. The provincial attorneys general have never requested seconded officers, and there does not appear to be administrative machinery available to implement the recommendation. We return to this matter later in this chapter.

9. In cases of alleged illegal conduct the R.C.M.P. may also undertake an internal investigation. If it does, it may rely heavily on the criminal investigation material to determine the appropriate disciplinary action. This procedure is contrary to two recommendations of the Marin Commission. These recommendations would not permit the use of the criminal investigation reports or the employment of the criminal investigators in subsequent disciplinary proceedings.

10. The focus of R.C.M.P. internal investigations regarding complaints is not solely on determining the validity of the complaint and proposing remedial steps. In addition Force management sometimes review training programmes, standing orders of the Commissioner, and Force directives. When an incident suggests that training or operational procedures were part of the cause of a problem, modifications to those procedures are considered.

11. According to the R.C.M.P., whenever it receives a complaint through a provincial attorney general, and in cases where the matter is sufficiently serious that inquiries by the press or public are likely to be made to the attorney general, the R.C.M.P. keeps the attorney general's office informed of the progress and the final result of the investigation. (We have examined cases in which this procedure has not been followed and these are documented in a subsequent Report.) The complainant, for his part, is told whether his com-

plaint has been found to be substantiated and, in some cases where property damage is involved, he receives compensation from an *ex gratia* fund. The fact that an R.C.M.P. member was or was not disciplined is always disclosed. However, the nature of the discipline is not disclosed.

12. In December 1978, the R.C.M.P. established a unit called the Complaints Section within its Internal Affairs Branch at Headquarters to receive complaints and forward them to the appropriate region. The Complaints Section does not receive particulars of all complaints, but has recently begun to receive statistical data of complaints, and their resolution, from each division. In the six months ending September 30, 1979, the Complaints Section recorded that 1,042 complaints were lodged against the R.C.M.P., of which 576 were disposed of informally. A total of 281 complaints were found to be substantiated. If R.C.M.P. personnel at the divisional level rule that a complaint is unsubstantiated, Headquarters has at present no means to review the case. To date, the only authorities external to the R.C.M.P. which have reviewed internal investigation of complaints are the provincial attorneys general in the contracting provinces or their police boards and commissions. They are provided with access to investigation files to ensure that complaints have been fairly dealt with. In isolated instances, specially appointed provincial commissions of inquiry have investigated specific allegations of misconduct. Until recently, complainants in some provinces were advised that if they were dissatisfied with the disposition of their complaint, they could appeal the matter to the provincial police board or commission. However, as we shall explain later in this chapter, serious doubt has now been cast on the constitutional power of provincial police boards and commissions to review complaints against R.C.M.P. members.

13. We have concluded that the present R.C.M.P. public complaints procedures go some distance in providing for the just disposition of a complaint, and for the use of complaints as a remedial management tool to improve policies and procedures governing R.C.M.P. operations. However, based on our experience at the formal hearings and on our research of how other jurisdictions handle this matter, we believe that improvements can be made. We shall describe the major shortcomings of the present system and develop proposals which we think will solve them.

B. LODGING OF COMPLAINTS

14. It is clear to us that only a small minority of cases involving police misconduct are reported by the 'victim' of alleged wrongdoing. This is a matter of serious concern to us. In this section we shall recommend the adoption of measures to facilitate the lodging of complaints by aggrieved citizens. We shall also examine two other sources of information about police misconduct — the judiciary and members of the R.C.M.P. — and make recommendations to facilitate the lodging of complaints from these sources as well.

Complaints from the public

15. We have found that R.C.M.P. misconduct does not necessarily lead to a public complaint. Of nine sample cases of alleged R.C.M.P. misconduct reviewed by our counsel, in only one did the alleged victim complain to the Force directly. In each of two cases, the lawyer for the potential complainant wrote to the R.C.M.P. years after the event, following the disposition of criminal appeals. In the remaining cases the R.C.M.P. initiated an inquiry following adverse publicity.

16. There are a variety of reasons why a 'victim' of alleged police misconduct may fail to complain to the police. First, the 'victim' himself is often engaged in questionable activity, and may be subject to continuing police investigation. Evidence relating to the complaint may also be relevant to the charges against him. Second, some individuals may fear, especially if there was a physical altercation, that complaints against police officers will result in later police harrassment. Third, minority groups may lack confidence in police impartiality. Fourth, even where the incident comes to the knowledge of lawyers, it may serve as a tool in plea bargaining and never be publicly disclosed. Further, lawyers often hesitate to raise the issue of police impropriety outside the criminal proceedings brought against their clients until the cases have been finally resolved by the courts. Fifth, the fear, whether justified or not, of incurring heavy legal costs may deter many people from lodging complaints. Finally, the 'victim' may not be aware of the police misconduct. For example, a policeman might break into his home without his knowledge. Alternatively, the victim might be aware of a questionable act, but have no idea that the police were responsible.

17. In those cases where the 'victim' is aware of possible police misconduct, it is important, we believe, that there be public bodies other than the R.C.M.P. to which a complaint may be submitted. Consequently, we propose that provincial police boards and commissions continue to receive complaints against the R.C.M.P. These boards and commissions should transmit the allegations to the R.C.M.P. If so requested, they should not reveal the name of the complainant to the R.C.M.P. The second alternative to lodging complaints directly with the R.C.M.P. should be the registering of allegations with a new federal review agency, the Office of Inspector of Police Practices. We do not see a need for this agency to establish offices in every region for the purpose of receiving complaints. Rather, the local offices of the federal Department of Justice should receive complaints on behalf of this body. Copies of complaints received by or on behalf of the federal review body should be forwarded to the R.C.M.P. Again, if so requested, the Inspector should not reveal the name of the complainant to the R.C.M.P.

18. These alternatives to filing a complaint directly with the R.C.M.P. should be widely publicized by the Solicitor General, the Force, the Inspector of Police Practices and the provincial police boards and commissions. In particular those agencies and organizations dealing with minority groups should be aware of the right to complain about R.C.M.P. conduct to the Inspector of Police Practices and the provincial police boards and commissions, as well as the right

to anonymity. As the Marin Commission recommended, the public should be advised of the need to file complaints as soon as possible after the event because

> . . . with the passage of time evidence is lost, memories dim, members of the Force are transferred and the reconstruction of events becomes difficult.[2]

Complaints from the judiciary

19. Members of the judiciary are in a position to provide a continuous, albeit unsystematic, review of police conduct in the course of the criminal trial process. We are referring here to situations where judges, in the course of criminal trials, learn of possible police misconduct. What action should they take? In Part X, Chapter 5, we deal with the efficacy of judicial discretion to reject illegally obtained evidence in controlling improper police investigative measures. We conclude there that the possibility of penalizing the prosecution is not an adequate response when police misconduct is discovered by a judge. There is a need to ensure that the matter comes to the attention of the proper authorities in order that corrective action can be taken.

20. For want of established procedure, the response from the judiciary on police misconduct has been variable and sometimes inequitable. At present, when the issue of police misconduct is raised in the criminal courts, members of the bench occasionally castigate the police officers involved for the apparent impropriety. While the desire of judges to voice their concern over an apparent case of police misconduct is understandable, sometimes all the facts are not before the court and the police officer involved is not given an opportunity to state his case.

21. We believe that the courts should establish procedures whereby judges may send a formal report to the Commissioner of the R.C.M.P. of cases of suspected police misconduct. The culpability of police officers should be determined in the proper forum where, after a full investigation, a fair hearing is accorded the police officer. Informing judges of the avenues available for lodging complaints or allegations, and encouraging them to make use of these channels, would seem to us to be the best approach. In Chapter 5 of this Part of our Report, in a section concerning the interrogation of suspects, we shall make a related recommendation calling for the establishment of procedures to ensure that the R.C.M.P. is notified of the reasons given by judges for excluding confessions because of questionable police practices being brought to the attention of the management of the R.C.M.P.

Misconduct reported by members of the R.C.M.P.

22. Even if the present obstacles to filing a complaint against the R.C.M.P. are partially or wholly removed, public complaints and criticism will continue to be irregular sources of information on police misconduct. There might still be serious cases of illegal or improper conduct on the part of R.C.M.P. members which either do not come to the attention of anyone outside the

[2] *Ibid.*, p. 75.

Force, or, if they do, for one reason or another are not brought to the attention of the proper authorities. In such cases, the only way in which the incidents may come to light is through other members of the R.C.M.P. who know of the illegalities or improprieties and report them. "Whistle-blowing" is a term often used to describe such reports. We make two proposals aimed at encouraging R.C.M.P. members to report misconduct. The first is to have a clearly designated organization outside the R.C.M.P. to which members can report questionable acts in a way that ensures anonymity and protects the whistle-blowers from future reprisals. The second proposal calls for the explicit recognition, in the statute governing the R.C.M.P., of an R.C.M.P. member's duty to report misconduct within the Force. We enlarge below on each of these proposals.

23. R.C.M.P. members should normally bring questionable acts to the attention of their immediate superiors or the designated units within the Force responsible for investigating misconduct. There may be situations, however, where an R.C.M.P. member, having knowledge of a case of illegal or improper conduct, is not confident that the matter will be properly handled by the Force. A case of improper conduct, for example, may have its roots in policies and procedures which have received the approval of senior officers of the R.C.M.P. (We have found evidence of several such situations in the past.) Or the member may suspect that his superiors have either participated or acquiesced in the misconduct. Or the member may have received an order that he believes is either illegal or improper. Finally, the member may have made an allegation internally and not been satisfied with the Force's response. In all of those cases, the member may be concerned that pursuing his allegation within the Force will bring him into disfavour. Such cases should arise only infrequently, but if they do there must be a means for R.C.M.P. members to report their allegations to an authority external to the Force. We recommend that the Inspector of Police Practices be the external authority to receive such allegations. In addition to investigating these allegations, he should ensure that the members making the allegations should remain anonymous, if they so wish, and that they not be punished or their careers harmed for making these allegations. This recommendation is similar to one we have made for the security intelligence agency in Part VI, Chapter 2, and provides a channel for members' allegations which is an alternative to the public forums of the press and Parliament.

24. Our second recommendation calls for a more explicit requirement by Parliament that members of the R.C.M.P. disclose incidents of wrongdoing by other members of the Force. We believe that members of the R.C.M.P. should be under a statutory duty to report evidence or knowledge of illegal or improper conduct on the part of other R.C.M.P. members. R.C.M.P. Regulation 25 provides that:

> It is the duty and responsibility of every officer and of every person in charge of a post to ensure that there is at all times strict observance of the law, compliance with the rules of discipline and the proper discharge of duties by all members of the Force.[3]

[3] P.C. 1960-379.

This regulation does not place a duty on R.C.M.P. members to report incidents of wrongdoing. Rather, it places a duty on superiors to ensure that their subordinates obey the law. One other enactment which should be mentioned is paragraph 25(o) of the present R.C.M.P. Act,[4] which provides that every member of the Force who "conducts himself in a scandalous, infamous, disgraceful, profane or immoral manner" is guilty of a major service offence. While this provision might be broadly construed so as to apply to the withholding by an R.C.M.P. member of knowledge of illegal or improper acts committed by other members, so far as we know it has not been so applied in the past. Bill C-50, An Act to Amend the Royal Canadian Mounted Police Act, which was introduced in April 1978, and which subsequently died on the order paper, had the following section which is appropriate to what we are recommending:

> 37. It is incumbent on every member
>
> (e) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue.

By adopting such a provision, Parliament will make it clear to the members of the Force that the rule of law must be paramount in all that the R.C.M.P. does. Loyalty to the Force or even to members within the Force must be secondary.

25. In making these two recommendations designed to encourage and, indeed, compel members of the Force to report misconduct on the part of other members, we recognize that their adoption by government may not, by itself, be adequate. Our own experience supports this conclusion. In December 1977, Commissioner Simmonds told members of the Force that they had a "right" to appear before this Commission in order to give evidence which would help the Commission in its deliberations. He further promised that the fact that a member did so would not "give rise to disciplinary action". A year later, in the "Pony Express", the R.C.M.P. newsletter, we invited members of the Force to volunteer knowledge relevant to the Commission's mandate without their being officially called upon to do so. Despite these messages, not one serving member of the Force has come *directly* to us to volunteer information about incidents or practices that may have been unlawful. We realize that it is expecting a good deal of a member to come to us voluntarily when his own conduct is in issue. However, knowledge of some questionable practices was widespread, and it is noteworthy that no one has come forward in regard to such practices even when his own conduct would not be in issue.

26. In one of our formal hearings, a senior R.C.M.P. officer, who has served in both the Security Service and the criminal investigation side of the Force, gave us some inkling of the norms operating within a police force which would discourage members from reporting questionable activities which occur within their organization. In attempting to explain the reason for his not knowing

[4] R.S.C. 1970, ch.R-9.

about a certain questionable activity conducted by several of his own subordinates, he said:

> ...I had every reason to believe at that time, that I had installed in the organization and procedures and communications facilities of that Section — and I'm speaking now of the formal ways people communicate — so many safeguards there was no way that this kind of thing could happen. In looking for an explanation afterwards, I have gone back into the literature and I have brought for whatever interest it might have for the Commission... an extract from the work of — I believe he is a sociologist — on police cultures, that explains that where you have rogue individuals in groups of this kind, it is part of the police tradition, of *esprit de corps* and professional secrecy, that as long as people do not break these codes, as long as they do not rat on each other, that police groups are tolerant of the existence among them, of individuals of this kind... A number of people in the Section knew it, but they knew intuitively that the last thing they could do was let that knowledge get to the level of a person who would have to act on it...
>
> (Vol. C106, pp. 13703-04.)

The senior officer then went on to quote passages from the extract[5] he had brought with him. Relevant to what we are dealing with in this chapter is the following excerpt:

> Teams of partners do not talk about each other in the presence of non-team members, line personnel do not talk about their peers in the presence of ranking officers... and, of course, no members of the department talk about anything remotely connected with police work with any outsiders. Obviously the rule of silence is not uniform throughout these levels. Thus, matters that could never be mentioned to outsiders can be topics of shoptalk among peers. But this reflects only gradations of secretiveness. In a larger sense police departments accommodate a colossally complicated network of secret sharing, combined with systematic information denial.
>
> (Vol. C106, pp. 13705-06.)

In reply to a question asking him whether the passages he had quoted reflected his experience in the R.C.M.P., the witness said

> Yes, sir. As a matter of fact, when I came across that book, I was astounded at the perceptions that this person could communicate, not having been a police officer. Then I discovered that he had, in fact, like many of his practitioners, ... gone to work directly in police forces to acquire his knowledge.
>
> (Vol. C106, p. 13708.)

27. It is not important for us at this point to comment on the merits of the thesis put forward by this senior officer. But what his evidence does suggest to us is that the reporting by R.C.M.P. members of questionable acts within the Force is a complex matter which is very much tied to the management style and personnel policies now employed by the R.C.M.P. Reflecting on this relationship has reinforced for us the suggestion we made in an earlier chapter

[5] Egon Bittner, *The Functions of the Police in Modern Society*, Chevy Chase, Maryland, National Institute of Mental Health, 1970.

— a suggestion that the Solicitor General undertake a review of the R.C.M.P.'s organizational structure and its management and personnel policies with the twin objectives of increasing the Force's effectiveness and reducing the risks of members committing illegalities and improprieties in the performance of their duties.

WE RECOMMEND THAT the federal government establish the Office of Inspector of Police Practices, a review body to monitor how the R.C.M.P. handles complaints and, in certain circumstances, to undertake investigations of complaints on its own.

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WE RECOMMEND THAT as alternatives to filing complaints directly with the R.C.M.P.,

(a) provincial police boards and commissions continue to receive complaints against the R.C.M.P., and to forward copies of them to the R.C.M.P. without revealing the name of the complainant if so requested by the complainant;

(b) the Inspector of Police Practices and local offices of the federal Department of Justice, receive complaints against the R.C.M.P. and forward copies of them to the R.C.M.P. without revealing the name of the complainant if so requested by the complainant.

These alternatives to sending a complaint directly to the R.C.M.P. should be widely publicized by the Solicitor General, by the Force, by the Office of Inspector of Police Practices and by provincial police boards and commissions.

(214)

WE RECOMMEND THAT the Federal Government request the courts to establish procedures whereby judges may send a formal report to the Commissioner of the R.C.M.P. of cases of suspected police misconduct.

(215)

WE RECOMMEND THAT the Inspector of Police Practices be authorized to receive allegations from members of the R.C.M.P. concerning improper or illegal activity on the part of other members of the Force.

(216)

WE RECOMMEND THAT the Inspector of Police Practices endeavour to keep secret the identities of R.C.M.P. members who report incidents of illegal or improper R.C.M.P. activity.

(217)

WE RECOMMEND THAT R.C.M.P. officers be proscribed from taking recriminatory personnel action against any member under their command by reason only that the member filed, or is suspected of having filed, an allegation of illegal or improper R.C.M.P. conduct with the Office of the Inspector of Police Practices.

(218)

WE RECOMMEND THAT members of the R.C.M.P. be under a specific statutory duty to report evidence of illegal or improper conduct on the part of members of the Force to their superiors. Where there is reason to believe that it would be inadvisable to report such evidence to their superiors they should be under a statutory duty to report it to the Inspector of Police Practices.

(219)

C. INVESTIGATING ALLEGATIONS OF MISCONDUCT

28. Who should investigate allegations of R.C.M.P. misconduct? This is a sensitive issue requiring consideration of the nature of the allegation (is the alleged misconduct illegal or merely improper?), the effectiveness of the investigation, the morale of the Force, public confidence in the R.C.M.P. and in the administration of justice, and the constitutional division of powers between the federal and provincial governments. We believe that different circumstances call for different approaches to the form of investigation. We see an initial distinction between complaints which allege or disclose the commission of a federal or provincial offence on the one hand, and those which complain of impropriety but make no allegation of illegality on the other. We shall deal with the latter class of allegations first.

Complaints of R.C.M.P. impropriety

29. As we discussed earlier, the R.C.M.P. now employs special units for the investigation of complaints against members of the Force. Is this sufficient, or should provision be made for investigation by non-R.C.M.P. investigators? We are persuaded that in most cases R.C.M.P. investigations into allegations against their own members are fair and thorough. Moreover, there are other compelling reasons for having the R.C.M.P. investigate its own members in the majority of cases. First, as we explained earlier in this chapter, many complaints can be handled informally by the complainant and the R.C.M.P. member involved, thus avoiding the need for a costly investigation. Second, having 'outsiders' completely in charge of investigating misconduct would undermine the sense of responsibility within the R.C.M.P. for uncovering and preventing questionable behaviour in its own ranks. Third, we believe that the level of co-operation given to R.C.M.P. investigators will generally be higher than that given by members of the Force to 'outsiders'. For all of these reasons, the following remarks of one American writer commenting on the F.B.I., apply to the R.C.M.P.:

> For more than thirty years the F.B.I. has gathered evidence for federal prosecutions of local law enforcement officers for corruption, police brutality, and other crimes. Now it is learning that it must sometimes investigate its own personnel. Every law enforcement agency has to face this problem; and there is no simple answer. But to act as if the F.B.I. is incapable of investigating itself would be as unrealistic as to rely on the traditional assumption that the F.B.I. does not need investigating.[6]

30. We have two concerns, however, which lead us to suggest that, in special circumstances, it may be advisable to have the Office of the Inspector of Police Practices investigate allegations of misconduct. Our first concern is the need for public confidence in the resolution of allegations of police misconduct. Sometimes, in controversial or very serious cases, the notion of the police investigating themselves may not provide the public with the assurance it needs that a completely thorough and impartial investigation has been conducted.

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[6] John T. Elliff, *The Reform of F.B.I. Intelligence Operations*, Princeton, New Jersey, Princeton University Press, 1979, p. 174.

Our second concern is that, in some situations where there is tension or distrust between the R.C.M.P. and the community they serve, complainants or witnesses may not lend their complete co-operation to the investigators. Without such co-operation, the quality of the investigation will be poor and consequently the complaint will not be satisfactorily resolved.

31. For these reasons we adopt the general approach suggested by the Australian Law Reform Commission in its 1978 Supplementary Report entitled "Complaints Against the Police".[7] The Australian Law Reform Commission thinks that the Australian Ombudsman should have a reserve power to undertake, at his discretion, an independent investigation into public complaints against the police. This power would be exercised in any of four circumstances:

(1) The complaint involves a member of the police force senior to all members of the internal investigation unit;

(2) the complaint involves a member of the internal investigation unit;

(3) the complaint is related to a matter which the Ombudsman has already investigated; or

(4) the Ombudsman is of the opinion that it is in the public interest that the complaint should be investigated by him.

32. We believe it is especially important that the Inspector of Police Practices have the residual discretion which is incorporated in the fourth condition. He must be able to exercise his judgment as to whether and when to conduct an independent investigation. Thus when a citizen is dissatisfied with the disposition by the R.C.M.P. of his complaint and brings his allegation to the attention of the Inspector, the latter would decide whether further inquiry is necessary. Review would not be automatic. In addition, we think that the Solicitor General should have the power to require the Inspector to investigate a specific allegation.

33. In addition to its investigatory role, the Office of the Inspector of Police Practices should have a second function — that of monitoring the R.C.M.P.'s investigations of complaints and evaluating the R.C.M.P.'s complaints handling procedures. To perform this role effectively, the Inspector should receive copies of all written complaints of R.C.M.P. misconduct and reports from the R.C.M.P. of the results of its investigations of these complaints. As one American writer has noted:

> Acquisition of the input and output information [relating to a complaint] is one of the most powerful monitoring devices available over an organization. Whoever has that information has the potentiality to assess where the problems of the organization lie. The power of aggregate information is considerable. The patterns exhibited in matters surrounding the complaint and its processing provide useful information for changing the organization.[8]

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[7] The Australian Government Publishing Service, Canberra, 1978.

[8] Albert Reiss, *The Police and the Public*, 1971, pp. 193-7 as quoted by John Elliff in *The Reform of F.B.I. Intelligence Operations*, p. 177.

As part of this reviewing and evaluating role, the Inspector of Police Practices should be empowered to inquire into and review at his own discretion or at the request of the Solicitor General any aspect of R.C.M.P. operations and administration which may relate to questionable behaviour on the part of R.C.M.P. members. This proposal is in line with our belief that complaints can be an important managerial tool for identifying 'systems' problems which can lead to improper or even illegal behaviour.

Allegations of illegal conduct on the part of R.C.M.P. members

34. Allegations of illegal conduct on the part of R.C.M.P. members will normally result in at least two investigations. The first and primary investigation will be a police inquiry into the alleged violation of a federal or provincial law. This police investigation is conducted under the ultimate direction of either the federal or provincial attorney general (usually the latter) in order that the appropriate authorities can determine whether there is sufficient evidence to warrant a prosecution. The second investigation is the internal one conducted by the R.C.M.P. It is conducted under the authority of the Commissioner of the Force, and its purpose is to determine whether the member violated the R.C.M.P.'s own standards of conduct. It may result in disciplinary or other remedial action by the Force.

35. Important questions arise as to the timing of these investigations, and who should conduct them. These issues are further complicated by the division of constitutional responsibility in the field of law enforcement. We shall turn first to the matter of police investigations into alleged violations of federal and provincial statutes by R.C.M.P. members. Then we shall discuss the R.C.M.P. internal inquiry, and its relation to the police investigation for purposes of prosecution.

36. We consider it most important, as did the Marin Commission, that the investigation of suspected unlawful conduct by R.C.M.P. members parallel as closely as possible regular police investigations into allegations concerning private citizens. That is, there should be no special treatment accorded a member of the R.C.M.P. The general rule should be that the details of all allegations of R.C.M.P. illegal conduct received by the Force, by the provincial police boards, or by the Inspector of Police Practices, should be forwarded to the appropriate law enforcement body for investigation, and concurrently to the appropriate prosecutorial authorities. We endorse the Marin Commission's admonition against refraining from prosecuting in the expectation that R.C.M.P. internal disciplinary proceedings will suffice. Internal discipline proceedings should not be viewed as a substitute for prosecution under a federal or provincial statute.

37. Many, although not all, allegations of R.C.M.P. violations of federal and provincial statutes occur in jurisdictions where the R.C.M.P. is the police force which would normally investigate the matter. In most cases the R.C.M.P. investigators will be capable of undertaking a thorough and impartial investigation, and will have the complete confidence of the public. Still, the problems which may, on occasion, arise when a police force investigates allegations of

improper conduct on the part of its own members may be equally present when criminal conduct is alleged, especially if the incident has been a violent one. That is, R.C.M.P. investigators may encounter problems obtaining evidence from complainants and witnesses who are reluctant to co-operate with investigators belonging to the same police force uniform as the potential 'accused'. Also the appearance of justice may be compromised at times if the R.C.M.P. is seen to be carrying out the investigation into the alleged offence.

38. Just as we recommended above that occasionally complaints of improper conduct lodged against the R.C.M.P. should be investigated by members of an outside body, we feel also, for the same reasons, that certain police investigations of alleged criminal or other statutory offences might be better conducted by members of a police force other than the R.C.M.P. The appropriate attorneys general might therefore, in certain cases, direct members of another municipal or provincial police force to investigate an allegation of criminal misconduct lodged against an R.C.M.P. member. It may be necessary to establish special administrative machinery if outside investigators are to be employed frequently. One other alternative is to appoint a provincial commission of inquiry for special investigative problems. The importance of a thorough and impartial investigation into allegations of criminal misconduct on the part of R.C.M.P. members cannot be overstated. The prosecutorial authorities need a complete and accurate investigative record for the purpose of deciding whether or not to prosecute, and generally how best to proceed. Consequently, we believe that allowing for the use of 'outside' investigators in certain circumstances is superior to the recommendation made by the Marin Commission whereby R.C.M.P. investigators would be seconded to an attorney general. We note that the procedure we are proposing is similar to one now commonly used in England.

39. Almost all police investigations into suspected offences should be supplemented by internal R.C.M.P. investigations for purposes of disciplinary or other remedial action. We propose that whenever the R.C.M.P. is the police force undertaking the criminal investigation, a separate, special R.C.M.P. unit be directed to investigate the matter for internal (non-prosecutorial) purposes. These parallel inquiries would be for different ends, and the two investigative teams, even though both composed of R.C.M.P. members, would be responsible to different authorities for the purpose of the investigation. While R.C.M.P. members investigating the alleged statutory offence would be subject to the final authority and direction of the appropriate attorney general, the members of the special internal unit would be under the direction of the Commissioner of the Force.

40. With respect to the timing of the internal investigation, it is clear that the criminal investigation, by whichever police force it is undertaken, must take precedence. This means that the internal investigation would normally not be undertaken until the criminal investigation is substantially completed, unless exceptional circumstances warranted an immediate internal inquiry. As well, the Inspector of Police Practices, as we noted earlier, should be empowered, in certain circumstances,to conduct an independent investigation into alleged misconduct, including criminal allegations. If the Inspector decides to conduct

an investigation, any criminal investigation should take precedence, but the R.C.M.P. should halt its internal investigation for disciplinary purposes. Any new relevant information which the Inspector obtains should also be transmitted to the R.C.M.P. and the appropriate prosecutorial authorities.

41. One final matter we would like to raise in this regard is the Marin Commission recommendation that criminal investigative files not be used by the R.C.M.P. for disciplinary purposes. Their view was that the rights of members might be compromised if investigative reports which are prepared under the direction of the prosecutorial authority, and which do not contain sufficient evidence to warrant the laying of criminal charges, are used as the basis for internal disciplinary charges. We take the view that the use of these records by the R.C.M.P. does not threaten the rights of members. Indeed, investigatory reports which show a prosecution is not warranted may contain exculpatory evidence which might be missed by an internal investigation. We believe that it is imperative that the R.C.M.P. obtain as much information as possible in the course of their internal investigations, not only to ensure the just disposition of the allegation against the members involved, but also to assess better the effectiveness of R.C.M.P. policies and procedures.

WE RECOMMEND THAT the R.C.M.P. retain the primary responsibility for investigating allegations of improper, as opposed to illegal, conduct lodged against its members.

(220)

WE RECOMMEND THAT the Inspector of Police Practices be empowered to undertake an investigation of an allegation of R.C.M.P. misconduct when

(a) the complaint involves a member of the R.C.M.P. senior to all members of the internal investigation unit;

(b) the complaint involves a member of the internal investigation unit;

(c) the complaint is related to a matter which the Inspector is already investigating;

(d) the Inspector is of the opinion that it is in the public interest that the complaint be investigated by him; or

(e) the Solicitor General requests the Inspector to undertake such an investigation.

(221)

WE RECOMMEND THAT the Inspector of Police Practices be empowered to monitor the R.C.M.P.'s investigations of complaints and to evaluate the R.C.M.P.'s complaint handling procedures. The Inspector should receive copies of all formal complaints of R.C.M.P. misconduct and reports from the R.C.M.P. of the results of its investigations.

(222)

WE RECOMMEND THAT, as part of his monitoring and evaluating role, the Inspector of Police Practices inquire into and review at his own discretion or at the request of the Solicitor General any aspect of R.C.M.P. operations and administration insofar as such matters may have contributed to questionable behaviour on the part of R.C.M.P. members.

(223)

WE RECOMMEND THAT copies of all allegations of illegal conduct on the part of R.C.M.P. members, which are received by any of the bodies authorized to receive the allegations, be forwarded to the appropriate law enforcement body for investigation and concurrently to the appropriate prosecutorial authorities.

(224)

WE RECOMMEND THAT the Solicitor General adopt the necessary administrative machinery to allow provincial attorneys general to direct at their discretion members of municipal or provincial police forces to investigate an allegation of criminal misconduct lodged against an R.C.M.P. member.

(225)

WE RECOMMEND THAT whenever the R.C.M.P. is the police force undertaking the investigation into an alleged offence committed by one of its members, a separate, special R.C.M.P. investigative unit be directed to investigate the matter for internal (non-prosecutorial) matters.

(226)

WE RECOMMEND THAT an R.C.M.P. internal investigation into alleged illegal conduct not be undertaken until the regular police investigation has been substantially completed, unless there are exceptional circumstances which warrant an immediate internal inquiry.

(227)

WE RECOMMEND THAT

(a) **the Office of Inspector of Police Practices be empowered to conduct an investigation into allegations of illegal conduct;**

(b) **any criminal investigation take precedence over the Inspector's investigation;**

(c) **the R.C.M.P. halt any internal investigation that it is conducting for disciplinary purposes; and**

(d) **any relevant information discovered by the Inspector during the investigation be transmitted to the appropriate prosecutorial authorities.**

(228)

WE RECOMMEND THAT criminal investigatory files continue to be used by the R.C.M.P. for internal investigations.

(229)

D. RESOLVING ALLEGATIONS OF MISCONDUCT

42. In this section we shall be concerned with the resolution of alleged improprieties not involving illegalities. Determining whether or not an R.C.M.P. member committed a statutory offence is of course the responsibility of the prosecutorial authorities and the courts. The responsibility of the R.C.M.P. with regard to such offences, if it is the police force investigating the allegation, is to conduct a thorough and impartial investigation. Otherwise, its responsibility is to co-operate completely with the police force which is conducting the investigation.

43. We have two main concerns regarding the resolution of allegations of improper conduct lodged against the R.C.M.P. The first is that there be a just and effective resolution of the specific allegation. The second is that the report on the incident serve as a remedial management tool, i.e. that it be examined with a view to improving the quality of the management and operation of the R.C.M.P. We examine each of these matters in turn.

Resolving specific complaints

44. It has been controversial in many jurisdictions whether a body independent of the police should resolve allegations of police misconduct, or whether the determination of the validity of a complaint and any subsequent disciplinary action ought to be left in the hands of the police themselves. Some argue, for example, that the only way in which a fair result can be achieved, and seen by the public to be achieved, is for an individual or body independent of the police force to make the finding as to police misconduct. Others believe that the police themselves should be entirely responsible for deciding on the validity of the complaint and the subsequent action to be taken with regard to the complainant.

45. Our position on this difficult issue of who should determine the validity of the complaint parallels our view as to who should investigate the complaints. We believe that in the large majority of cases the responsibility for adjudicating complaints should rest with the R.C.M.P. Once it has completed the investigation of the complaint, the R.C.M.P. should advise the complainant as to whether the Force has determined the allegation to be founded, unfounded or unsubstantiated. The R.C.M.P. should also advise the complainant that if he is not satisfied with how the Force has handled his complaint, he can appeal to the Solicitor General who will be the final adjudicator. In this regard, we part company with the strongly held view within the R.C.M.P. and other police forces that the final judge in complaint matters should be the head of the Force. In Bill C-50, to which we have previously referred, which was introduced in 1978 but not passed, the traditional approach was maintained. But we feel there cannot be public confidence in the complaint procedure if the final arbiter belongs to the force whose conduct is under review. We emphasize that we have not taken the extreme position favoured by some who advocate the investigation and adjudication of complaints by a body external to the Force. In the case of an appeal from a complainant, the Solicitor General, in coming to his decision, may wish to seek the advice of the Inspector of Police Practices as to the quality and thoroughness of the R.C.M.P. investigation. The Solicitor General should also be able to ask the Inspector to re-investigate the matter if he believes this is necessary. In those cases in which the Office of the Inspector of Police Practices has done the original investigation, the R.C.M.P. should not decide on the validity of the complaint. Rather, the Inspector of Police Practices should report the results of his investigation directly to the Solicitor General who should make a decision on the matter and communicate it directly to the complainant.

46. In addition to the complainant appealing a decision by the R.C.M.P. to the Solicitor General, the Inspector of Police Practices, in his role as monitor of

the complaint handling procedures of the R.C.M.P., should also bring to the attention of the Solicitor General any specific case which, in his opinion, has not been handled or adjudicated properly by the R.C.M.P. We believe that this is an essential role for the Inspector to have. There may be cases, for example, where the complainant is anonymous or where the complainant is only an observer to the alleged misconduct and is not directly affected by it. In both of these situations, there is a need for a review body to ensure that the complaint is dealt with fairly and effectively.

Remedial action within the R.C.M.P.

47. Another important aspect of resolving a complaint of misconduct has to do with the R.C.M.P. itself and those members who were involved in the activity leading to the complaint. In Part VI, Chapter 2, we have already noted our agreement with the Marin Commission's assessment of R.C.M.P. disciplinary procedures. That Commission found the procedures too formal, the control too centralized, the members' rights ill-defined and the exercise of disciplinary authority too arbitrary. Following the Marin Commission, we also believe that the primary emphasis on correcting improper behaviour should be through remedial action, rather than by punishing individuals. Moreover, the remedial action should not be directed solely or primarily at individuals. Rather, improper behaviour may indicate faults in certain organizational practices such as inadequate supervisory patterns or poor training programmes. When remedial action is directed toward an individual, the key, in our view, is to avoid a highly formalized adversarial process. The stress should be on creatively working out joint solutions to problems rather than on punishing people.

48. Because we agree with the general principles of the Marin Commission's approach to disciplinary matters, we decided not to commit time and resources to further exploration of this subject. Consequently, we make no recommendations on R.C.M.P. disciplinary procedures with one exception concerning an issue on which the Marin Commission did not comment. We believe that the punishment given an R.C.M.P. member arising from a complaint should not necessarily be communicated to the complainant. Rather, the Force should tell the complainant that it recognizes the error, that it apologizes for the misconduct of its member, that it has taken steps to ensure that such activity will not be repeated, and that, in those cases where the complainant has suffered damage or loss, it will make an *ex gratia* payment. In addition, as part of its monitoring responsibilities of complaints handling procedures, the Office of Inspector of Police Practices should periodically review and report on the appropriateness of the disciplinary measures taken by the Force in regard to questionable conduct affecting persons outside of the R.C.M.P. We do not think that this general power of review will undermine the authority of the Commissioner of the R.C.M.P. We are not proposing that the Inspector of Police Practices have any authority to overturn the Commissioner's decisions in these matters.

WE RECOMMEND THAT the R.C.M.P. advise complainants whether it has found the allegation to be founded, unfounded, or unsubstantiated.

(230)

WE RECOMMEND THAT complainants have the right to appeal to the Solicitor General if they are not satisfied with how the R.C.M.P. has handled their complaint.

(231)

WE RECOMMEND THAT, upon request, the Inspector of Police Practices advise the Solicitor General as to the quality and thoroughness of any investigation of a complaint undertaken by the R.C.M.P. The Inspector of Police Practices should also re-investigate a complaint at the request of the Solicitor General.

(232)

WE RECOMMEND THAT the Inspector of Police Practices report directly to the Solicitor General the results of his office's investigations of complaints alleging misconduct.

(233)

WE RECOMMEND THAT the Inspector of Police Practices, as part of his role of monitoring the complaint handling procedures of the R.C.M.P., bring to the attention of the Solicitor General any specific complaints which, in the opinion of the Inspector, have not been properly handled by the R.C.M.P.

(234)

WE RECOMMEND THAT any punishment given an R.C.M.P. member arising from a complaint not necessarily be communicated to the complainant. Rather, the Force should tell the complainant that it recognizes the error, that it apologizes for the misconduct of its member, that it has taken steps to ensure that the activity will not be repeated, and that in those cases where the complainant has suffered damage or loss it will make an *ex gratia* payment.

(235)

WE RECOMMEND THAT the Inspector of Police Practices periodically review and report on the appropriateness of the disciplinary measures taken by the R.C.M.P. in regard to questionable conduct on the part of a member which affects the public.

(236)

E. THE OFFICE OF INSPECTOR OF POLICE PRACTICES

49. Our major recommendation in this chapter calls for the establishment of an external review body which we have named the Office of Inspector of Police Practices. We have discussed the need for such a body and its role at several points already. In sum, it should have two basic functions: first, it should have the power in exceptional circumstances to investigate complaints of R.C.M.P. wrongdoing and make recommendations to the Solicitor General; second, it should monitor the investigations of alleged misconduct undertaken by the R.C.M.P. itself and evaluate the R.C.M.P.'s complaints handling procedures. The functions, responsibilities and staffing arrangements which we are recommending for the Office of Inspector of Police Practices closely parallel those of the Office of Professional Responsibility recently established in the Attorney

General's Department in the United States.[9] The system we are proposing places primary responsibility for investigating and disposing of complaints with the R.C.M.P. We believe this is necessary if the Force is to take seriously the need to make changes on a continuing basis to reduce the likelihood of future misconduct and if it is to continue to be responsible for ensuring a proper standard of conduct on the part of its members. The Inspector of Police Practices would act as a kind of safety valve in this system. We know from the evidence received in our hearings that the R.C.M.P. does not always investigate itself adequately, and consequently, in our opinion, there is room for skepticism about any claims that the R.C.M.P. does not need the intervention of 'outsiders' in handling certain complaints against it. We also believe that an outside body can be an important repository for complaints of R.C.M.P. misconduct, especially in those instances where someone from either inside or outside the organization might fear retaliation if he made the complaint directly to the Force.

50. Our recommendation of an external review body is similar to one made by the Marin Commission, which, as one of its pivotal recommendations, called for the establishment of a "Federal Police Ombudsman". The Marin Commission preferred an ombudsman specializing in police matters because such a person would soon acquire a detailed and intimate knowledge of the Force and its members, and thereby dispel fears expressed by R.C.M.P. members that an 'outsider' would lack an understanding of the particular problems the R.C.M.P. have to face. This central proposal was not fully accepted by the government of the day. Instead, in 1978, Bill C-43 proposed the establishment of an Ombudsman who would oversee all federal government departments and agencies, and not simply the R.C.M.P. The Bill died on the order paper that year.

51. We believe the Marin Commission's proposal of a specialized police Ombudsman remains fundamentally valid. The police function is intrinsically different from other administrative functions in the federal Public Service, and the problems which arise between members of the public and the R.C.M.P. are of a special character. Unlike most federal civil servants, R.C.M.P. members exercise powers of arrest and search and seizure. They are occasionally obliged to use physical force on potential complainants in the course of their duties. R.C.M.P. members, by the nature of their tasks, are more apt than any other federal government employees (with the possible exception of members of the security intelligence agency) to infringe upon fundamental rights and freedoms, especially those relating to due process of law. Consequently, the problems R.C.M.P. members face in the course of their duties are quite distinct from those faced by most other federal civil servants. We therefore see

[9] The Office of Professional Responsibility was established on December 9, 1975, by Attorney General Edward H. Levi. The Office was designed to oversee and, if necessary, investigate "conduct by a Department employee that may be in violation of law, of Department regulations or orders, or of applicable standards of conduct." 28 C.F.R. Section O.39 *et seq.* (1976).

the need for a continuing review of police activity by an external body which can acquire an intimate understanding of the problems involved in police work.

52. While we support the Marin Commission's proposal for a specialized external review body for the R.C.M.P., and perhaps for other federal police forces, we believe the institution of the Ombudsman would not go far enough in meeting the needs we have identified. Our view is that the work of an external review body should go beyond the traditional role of the Ombudsman of responding to individual complaints and should involve a *continuing* review of the adequacy of the R.C.M.P.'s practices. Such matters, we feel, should be within the mandate of an external body charged not only with reviewing the R.C.M.P.'s disposition of complaints, but also with identifying problems within the R.C.M.P. which may have contributed to the incidents in question.

53. There is a second reason for our preferring the Office of Inspector for Police Practices to the Marin Commission's police Ombudsman. An Ombudsman is usually an officer of Parliament and is therefore independent of any government department. In contrast, we believe that there are real advantages to having the Office of Inspector of Police Practices as part of the Solicitor General's Department. First, the evidence we have heard concerning several allegations of R.C.M.P. misconduct — for example, the North Star Inn incident and the surreptitious entry into the A.P.L.Q. premises — suggests that it would have been highly advantageous for a Solicitor General to have a convenient means of launching an investigation of the R.C.M.P. using investigators attached to his office but not part of the Force. Second, having the Inspector of Police Practices within the Solicitor General's Department will give the Minister and his Deputy another source of information and advice about the R.C.M.P.'s handling of complaints. It is clear from the evidence we have heard that past Solicitors General knew far too little about the R.C.M.P., and did not have sufficient means for finding out enough to even ask the right questions. The Inspector of Police Practices should be one way of remedying this weakness.

54. In making this recommendation, we realize that we are departing from the organizational arrangements we recommended in Part VIII, Chapter 2 for the Advisory Council on Security Intelligence, an agency with similar functions to those of the Inspector of Police Practices. We do so because we see a fundamental difference in the manner in which a police force and a security intelligence agency should relate to government. There is far less danger than in the case of the security intelligence agency that the Solicitor General will himself be a party to R.C.M.P. misconduct because of the quasi-independence the police should enjoy in terms of conducting investigations and making arrests. (We shall return to this theme in Chapter 4 of this part of our Report.) In contrast, the Solicitor General, under the system we are proposing for directing the security intelligence agency, would be actively involved in the "targetting" decisions to be made by the agency and therefore, would be more likely to risk becoming a participant in wrongdoing.

55. Still, we can envision situations where the Solicitor General might use the Office of Inspector of Police Practices improperly. We believe that there are

several ways in which the position of Inspector of Police Practices should be structured to avoid such possible abuses. Specifically, we propose that the Inspector be an Order-in-Council appointment for a fixed five-year term, that no Inspector should serve for more than 10 years, and that the Inspector can be dismissed only for 'cause'. (We have defined 'cause' in Part VI, Chapter 2 to include mental or physical incapacity, misbehaviour, bankruptcy or insolvency, or failure to comply with the provisions of the Act establishing the position of the Director General.) Further, the statute establishing his agency should give the Inspector the authority to launch any investigation he deems necessary to fulfill his mandate. Thus, the Solicitor General should not be able to prevent the Inspector from investigating a matter in which the Solicitor General might be implicated. Finally, it should be understood that the Inspector would have access to the Prime Minister on matters where the integrity of the Solicitor General is at question. By structuring the Office of Inspector of Police Practices in this way, we believe that the Office can be placed within the Solicitor General's Department but still enjoy a quasi-independent relationship with the Minister and his officials.

56. The Office of Inspector of Police Practices should have a small staff with experience in the field of police administration or criminal justice. The Inspector should be a lawyer who has at least 10 years standing at the Bar. The permanent staff members should focus primarily on the monitoring and review role we have defined above. Their role in investigation should be limited to preliminary inquiries to determine the need for an investigation. When the Inspector decides to undertake a special investigation, he should obtain on secondment, experienced police investigators from different police forces and other experts as required. This arrangement will ensure that the Inspector does not undertake investigations merely in order to keep permanent staff occupied. More importantly, the Inspector and his assistants will not have a strong vested interest in the outcome of investigations conducted by the seconded staff of investigators, and, consequently, will be a more reliable source of advice to the Solicitor General.

57. A final aspect of the Office of Inspector of Police Practices concerns the submission of reports. The Inspector should report regularly to the Solicitor General on the results of investigations of serious concern, and he should report annually to the Solicitor General on significant activities of his office during the year, including recommendations calling for changes in R.C.M.P. policies and procedures and the Force's response to these. This annual report should also be tabled in Parliament.

WE RECOMMEND THAT the Office of Inspector of Police Practices be established within the Department of Solicitor General and that the Inspector report directly to the Solicitor General.

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WE RECOMMEND THAT the Inspector of Police Practices be an Order-in-Council appointment and that the following conditions of employment be included in the statute establishing the office:

(a) the Inspector should be subject to dismissal only for 'cause';

(b) 'cause' includes mental or physical incapacity; misbehaviour; bankruptcy or insolvency; or failure to comply with the provisions of the Act establishing the Office of Inspector of Police Practices;

(c) the Inspector should be appointed for a five-year term;

(d) no Inspector should serve for more than 10 years.

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WE RECOMMEND THAT the Inspector of Police Practices have access to the Prime Minister on matters concerning improper behaviour on the part of the Solicitor General in the performance of his duties vis-à-vis the R.C.M.P.

(239)

WE RECOMMEND THAT the Inspector of Police Practices be a lawyer who has at least 10 years standing at the Bar, and that he have a small staff with experience in the field of police administration or criminal justice.

(240)

WE RECOMMEND THAT the Inspector of Police Practices be empowered to obtain on secondment experienced police investigators and other experts to conduct investigations, when appropriate, of misconduct on the part of R.C.M.P. members.

(241)

WE RECOMMEND THAT the Inspector of Police Practices report regularly to the Solicitor General on the results of investigations and annually to the Solicitor General on significant activities of his Office during the year. The Solicitor General should table this report in Parliament.

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F. THE PROVINCIAL ROLE

58. Before outlining a role for the provinces in resolving allegations against the R.C.M.P., we shall examine briefly the current developments in the courts and define what we believe to be the present limits on provincial power over the R.C.M.P. and its contract policing role. The relevant provincial power is section 92(14) of the B.N.A. Act, which grants to the provinces power over "... the Administration of Justice in the Province...". This has traditionally been thought to include not only the establishment and administration of provincial courts, but also the enforcement of law within the province. The scope of the power of the provincial attorney general in regard to law enforcement does not seem to be in doubt so far as the direction and control of provincially constituted police forces are concerned. But where a federal agency, the R.C.M.P., carries out the provincial policing functions under contract, there are significant constitutional limitations on the control the provinces may exercise over it. There are also constitutional limits on provincial power in relation to the R.C.M.P.'s federal policing role.

59. Two recent court decisions have dealt specifically with the limits to provincial authority over the R.C.M.P. The first case is the 1978 decision of

the Supreme Court of Canada in *Attorney General of the Province of Quebec and Keable* v. *Attorney General of Canada et al.*[10] Specifically, the constitutional question addressed was:

> If members of a federal institution, namely the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the Administration of Justice in the province have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to enquire into:
>
> (a) the federal institution, namely, the Royal Canadian Mounted Police;
>
> (b) the rules, policies and procedures governing the members of the institution who are involved;
>
> (c) the operations, policies and management of the institution;
>
> (d) the management, operations, policies and procedures of the security service of the Royal Canadian Mounted Police;
>
> and to make recommendations for the prevention of the commission of said acts in the future?

60. Mr. Justice Pigeon, speaking for the majority of the Court, answered this question in the negative. He stated:

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the Force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.

61. Thus, while the provincial authorities may investigate and prosecute offences committed by members of the R.C.M.P., they cannot expand their focus to include matters relating to the administration and management of the Force. This decision by itself would appear to suggest that provincial boards and commissions are not constitutionally competent to investigate the non-criminal aspects of public complaints against the R.C.M.P., even when the R.C.M.P. is performing a provincial-policing service in the contract provinces. Attempts by a provincial police commission to inquire into policies and procedures which may have given rise to a series of complaints, for example, may well be unconstitutional in light of the *Keable* decision. The same may be true of attempts by a provincial commission to order the R.C.M.P. to conduct an internal investigation into allegations which come to the attention of the provincial commission.

62. A recent Alberta case confirmed these limitations on provincial powers to inquire into public complaints against the R.C.M.P. The Alberta Court of Appeal, in *The Attorney General of Alberta and the Law Enforcement Appeal Board* v. *Constable K.W. Putnam and Constable M.G.C. Cramer and the*

[10] [1979] 1 S.C.R. 218.

Attorney General of Canada,[11] held that section 33 of the Alberta Police Act, which established a procedure for the investigation and review of complaints against all police forces in the province, was *ultra vires* the province in so far as it applied to members of the R.C.M.P. This section purported, among other things, to empower the Alberta Law Enforcement Appeal Board to hear an appeal by the complainant from the decision made by the R.C.M.P. as to the merits of the complaint. It also purported to permit the Board to conduct its own investigation into any complaint, and to conduct an investigation into any matter relating to the discipline or conduct of any member of a police force. These provisions were held to be invalid insofar as they would interfere with the internal management of the R.C.M.P., and insofar as they would conflict with valid and subsisting federal legislation and regulations. This decision is now being appealed to the Supreme Court of Canada.

63. The result of these decisions has been to cast serious doubt on the validity of provincial machinery for handling public complaints against the R.C.M.P., even when the Force is carrying out a provincial policing function under the direction of a provincial attorney general. One must now assume that some of the central features of these provincial schemes no longer apply to the R.C.M.P.

64. We believe that the provinces have a legitimate role to play in the handling of public complaints against the R.C.M.P. They would like to provide a uniform system of redress for aggrieved citizens regardless of whether the complaint concerns the R.C.M.P. or another provincially constituted police force. The police boards have proved to be valuable instruments of provincial oversight and control. The provincial attorneys general have a constitutional duty to oversee the effectiveness of provincial police operations, including those undertaken by the R.C.M.P. How are these concerns to be reconciled with the responsibility of the Solicitor General of Canada to direct the control and management of the federal agency under his supervision, the R.C.M.P.?

65. As we said earlier, the investigation and adjudication of allegations of criminal misconduct on the part of R.C.M.P. members should continue to be the responsibility of the provincial attorneys general, as a matter of the administration of justice in the provinces. This accords with the existing judicial interpretation of Canada's Constitution. With respect to the non-criminal aspects of complaints against the R.C.M.P. in their provincial policing role, we feel that effective communication and co-operation between the provincial attorneys general and police boards on the one hand, and the R.C.M.P., the Inspector of Police Practices, and the federal Solicitor General on the other, are essential. In the remainder of this section, we indicate where co-operation is required and how it might be obtained. Given the recent court decisions cited

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[11] [1980] 22 A.R. 510, [1980] 5 W.W.R. 83. [Commissioners' Note: Since delivery of this Report the Supreme Court of Canada, on May 28, 1981, delivered reasons for judgment in dismissing the appeal to it, and upholding the judgment of the Alberta Court of Appeal. The reasons are not yet reported in the law reports.]

above, it is incumbent on the federal government to take many of the required initiatives to ensure that provincial bodies play a significant role in the complaints system.

66. One area of potential co-operation is in the sharing of information about complaints of R.C.M.P. misconduct. The provincial attorneys general and the provincial police boards should be advised by the R.C.M.P. and the Inspector of Police Practices of all serious complaints in their respective provinces, which were not filed with the provincial police boards. They should be informed of the disposition of all allegations of R.C.M.P. misconduct within their provinces, and should receive the statistical analyses of complaints compiled by the R.C.M.P. subject to the restrictions which we are proposing in Part V, Chapter 8, when the R.C.M.P. are carrying out duties relating to the mandate of the security intelligence agency. Requests for any information by provincial attorneys general and police boards respecting allegations against R.C.M.P. members should be met fully by the Force, by the Inspector of Police Practices and by the Solicitor General.

67. Another area where co-operation is required concerns the actual investigations and inquiries of alleged misconduct. As we understand the present law, provincial police boards and special Commissions of Inquiry are not constitutionally barred from inquiring into instances of criminal misconduct, violations of the rights of citizens, or damage to property. The only limitation is that the scope of the inquiry may not include the internal administration and management of the R.C.M.P. Provincial inquiries, if conducted, should, to the extent of their constitutionally proper scope, receive the full co-operation of the R.C.M.P., the Inspector and the Solicitor General.

68. Alternatively, a provincial police board or commission should be able to request an investigation by the R.C.M.P. or refer a matter to the Inspector of Police Practices if the commission or board deems it to be unusually important or sensitive. The R.C.M.P. and the Inspector, while they should not be obliged to comply with such requests, ought to accommodate them wherever possible. It would also be highly desirable for the Inspector to obtain on secondment, staff from provincial or municipal bodies when his office conducts investigations of alleged misconduct. As well, the Inspector should normally consult provincial officials on recommendations he proposes to make arising out of a serious allegation made in that province. It is especially important that the provinces have an opportunity to comment on and influence recommendations which concern the management of the Force and which are relevant to complaints occurring in the provinces.

69. One way in which the Solicitor General might facilitate the necessary co-operation and communication amongst federal and provincial ministers and officials in this area is to establish a regular forum for discussing mutual problems and for sharing information on handling complaints. Such a forum, which might be held annually or perhaps semi-annually, might lead to more formalized structures and procedures for ensuring federal-provincial co-operation. Without such co-operation, the system for handling complaints of R.C.M.P. members, proposed in this chapter, will not be as effective as it could be.

WE RECOMMEND THAT, subject to the restrictions which we have proposed when the R.C.M.P. are carrying out duties relating to the mandate of the security intelligence agency, the R.C.M.P. and the Inspector of Police Practices provide each provincial attorney general and each provincial police board with the following:

(a) information about all serious complaints in their province;

(b) reports on the disposition of such complaints;

(c) statistical analyses of complaints regarding R.C.M.P. misconduct.

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WE RECOMMEND THAT the Inspector of Police Practices should

(a) obtain on secondment staff from provincial police forces, police boards, or appropriate provincial government departments when forming task forces to investigate allegations of R.C.M.P. misconduct;

(b) normally consult the appropriate provincial officials on recommendations he proposes to make arising out of a serious allegation in that province.

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WE RECOMMEND THAT the Solicitor General

(a) initiate the establishment of a regular forum for Provincial and Federal ministers and officials to discuss problems and share information concerning complaint handling procedures; and

(b) ensure that provincial inquiries into allegations of R.C.M.P. misconduct, to the extent of their constitutionally proper scope, receive the full co-operation of the R.C.M.P. and the Inspector of Police Practices.

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CHAPTER 3

OBTAINING LEGAL ADVICE AND DIRECTION

A. ROLE OF THE LEGAL BRANCH

1. Our mandate instructs us "to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law...", and further "to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest". We consider that advice with respect to legal services falls squarely within those instructions.

2. Prior to 1960 the R.C.M.P. apparently did not feel the need for 'in-house' legal advice. They found it satisfactory to obtain their legal advice from the Department of Justice or from the appropriate provincial attorney general, depending on the circumstances. Although some members of the Force, most notably former Commissioner Lindsay, had graduated from law school, they did not act officially in the role of legal advisers.

3. In the 1950s, as part of its university education programme, the Force paid for 10 of its members to acquire law degrees. Some of the graduates under this programme comprised the Legal Section of the R.C.M.P. which was set up in 1960. They did not article, were not admitted to the Bar of a Province, and hence were not, in the normal sense of the term, 'lawyers'.

4. The Royal Commission on Government Organization (1962) (Glassco Commission), chaired by Mr. Grant Glassco, reported that in 1961 there were three legally trained officers in the R.C.M.P. engaged in legal work and that they served much as did departmental solicitors in other government departments. The Commission pointed out that those officers were not recruited as solicitors, but sent by the Force to law school. Members of the Force graduating from law school were assigned to legal work at Headquarters, and after three to five years were promoted to non-legal positions. It was also pointed out that those officers did not article and were not admitted to the Bar of any province.

5. The Glassco Commission recommended that there be an integrated legal service for the government, with several exceptions, those being:

- Judge Advocate General;
- Legal Division of the Department of External Affairs;
- Legal Branch of Taxation, Department of National Revenue;
- Pensions Advocates in the Department of Veteran's Affairs;
- Legal Officers in the R.C.M.P.

6. In the Rivard affair, which gave rise to the Commission[1] of 1965, chaired by Chief Justice Frédéric Dorion, the fledgling Legal Section gave a legal opinion to the Commissioner of the R.C.M.P. as to the sufficiency of evidence to warrant a successful prosecution of Raymond Denis, one of the participants in the events that gave rise to the Inquiry. That advice was adopted by the Commissioner of the R.C.M.P. in his verbal report to the Minister of Justice. The Minister of Justice acted upon the recommendations in that verbal report without consulting his departmental lawyers. Chief Justice Dorion commented unfavourably on the advice given by the Commissioner to the Minister, and went on to say:

> I do not believe it to be the responsibility of the R.C.M.P. officers, no matter how great their experience, to advise the Minister of Justice in regard to the decision he should take in respect to a denunciation, nor in regard to the probable results of a charge laid before a Court. Their duty is rather to seek out all the facts and leave the decision to the Minister.[2]

7. The rebuke had no apparent effect on the development of the R.C.M.P.'s 'in-house' legal services. The then Commissioner, Mr. McClellan, considered that he had not been giving legal advice to the Minister, but only a police officer's advice on the stage reached in the police investigation.

8. In 1966, with the creation of the new Department of the Solicitor General, responsibility for the R.C.M.P. was transferred from the Minister of Justice to the Solicitor General. The government had accepted the basic recommendation of the Glassco Commission that most of the government's legal services be integrated in the Department of Justice, and, in keeping with that decision, lawyers were assigned by the Department of Justice to provide legal services to the Solicitor General's Department. This appears to have had no measurable impact on the course of development of the in-house legal services of the R.C.M.P. Indeed, in 1966 the Legal Section was upgraded to branch status. The Force continued its policy of sending selected members to university to obtain law degrees. It also continued its policy of not allowing those law graduates to article with a practising lawyer, thus denying them the opportunity to become members of a provincial Bar.

9. The Glassco Commission recommended that a Department of Justice lawyer be assigned to the R.C.M.P. to "head up the legal work" of the Legal Section, but this recommendation was virtually ignored by the R.C.M.P. The failure to implement it appears not to have been of concern to the Department of Justice, which assumed that the Legal Branch was providing advice to the Force only on internal matters, such as the contents of R.C.M.P. manuals, and that whenever the Force required an opinion, it obtained it from the Department of Justice or from the appropriate provincial attorney general. After the Rivard affair, nothing of significance relating to the Legal Branch would appear to have come to the attention of the Department of Justice.

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[1] The Dorion Commission was to investigate fully into allegations about any improper inducements having been offered to, or improper pressures having been brought to bear on, counsel acting upon application for the extradition of one Lucien Rivard and all relevant circumstances connected therewith.

[2] Report of the Commission, p. 118.

10. From 1960 to 1974 inclusive, the Legal Branch grew very little: the number of law graduates in the Force increased from 12 to 17; 22 members graduated in law and 17 law graduates left the Force. The net gain of five law graduates was not enough to staff the Legal Branch, which was being saddled with an increasing number of responsibilities. By 1975 the problem had become acute and the R.C.M.P. sought assistance from the Department of Justice. They requested that Department to second a civilian lawyer to assist the Legal Branch. No mention was made, however, of that lawyer 'heading up' the Legal Branch, and there is no record of a reply from the Department of Justice. Nor was a lawyer seconded.

11. In response to the disclosure of the events which gave rise to the creation of this Commission, it was determined by the Commissioner of the R.C.M.P. and the then Solicitor General, Mr. Fox, that certain steps would have to be taken to ensure that the Security Service of the R.C.M.P. would operate within the law. One of the steps envisaged was to request the assignment of a Department of Justice lawyer to the R.C.M.P. to assist the Security Service with some of its legal problems.

12. After some discussion between the Department of Justice and the Security Service, a formal request was made on November 20, 1977, from the Director General of the Security Service to the Deputy Minister of Justice and the Deputy Solicitor General for the assignment of a Department of Justice lawyer to the Security Service. On November 29, 1977 the Solicitor General advised the Justice and Legal Affairs Committee of the House of Commons as follows:

> There was, in March of 1977, set up by the Director General of Security Services the Operational and Priorities Review Committee which has as its mandate to ensure that the new operations are not only within the mandate given to the Security Service by the government but also within the law. It also has the mandate of reviewing operations that have gone on in the previous year to ensure once again that they come within the mandate and are within the framework of the law.[3]

The Minister said that three additional steps had been taken and explained the one relevant to our considerations as follows:

> . . . the Security Service Operational and Priorities Review Committee has been reinforced, so to speak, by the addition of two members, one of whom is a senior officer with current criminal operations responsibility for the Force, the other is a lawyer seconded from the Department of Justice. This is with a view to ensuring that all operations are within the mandate and are also within the scope of the law.[4]

A Department of Justice lawyer, R. Watson, Q.C., who was at that time the Director of Legal Services in the Solicitor General's department, was assigned to the R.C.M.P. on December 1, 1977. He was not given any guidelines or terms of reference except for what was contained in the Minister's statement.

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[3] Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, November 29, 1977, p. 87.

[4] *Ibid.*

Discussion took place between the R.C.M.P. and the Department of Justice over the next year and finally, on December 19, 1978, the terms of reference were settled. By these terms his duties were not confined to the Security Service, but were extended to the whole of the R.C.M.P.

13. From the date of the Glassco Commission until 1980, the Legal Branch had grown to nine members, all with law degrees. They continued to be assigned to the Legal Branch for three to five years, usually immediately after receiving their degrees, and then to non-legal duties. On occasion they were re-assigned to the Legal Branch in a more senior capacity later in their careers. Only three members had been admitted to the Bar of a province and thus were the only ones legally qualified to practise law. (Of these three, one member retired from the Force, became a member of a provincial Bar and subsequently re-enlisted.)

14. The most recent objective and goals of the Legal Branch were set out in the R.C.M.P. Policies, Objectives and Goals for 1979 as follows:

Objective:

> To provide legal advice and services to Commissioner, Deputy Commissioners, Directorates, Branches and Sections in Headquarters.

Goals:

- Conduct research and submit reasoned opinions on legal problems; interpret statutes, contracts, leases, and give legal opinions or direction on matters referred in writing or verbally by Senior Management, Directorates, Branches and Sections.
- Assist in redrafting the R.C.M.P. Act, Regulations and Orders, and in restructuring administrative procedures in accordance with the Marin Commission recommendations.
- Write selected articles for publication; serve on committees inside and outside Headquarters; attend conferences, meetings, seminars, etc.
- Respond to requests for lecturing to internal training courses as well as to outside organizations as required, covering the aspects of criminal and civil law, their application and interpretation and law enforcement in general.

No facet of legal services appears to be missing from this mandate.

15. The relevant paragraphs of the terms of reference for the Department of Justice lawyer assigned to the R.C.M.P. can be summarized as follows:

(a) The R.C.M.P. may look to the Department of Justice for legal advice, and when acting as a provincial police force to the appropriate provincial attorney general.

(b) A legal opinion obtained from other than the above provides no protection "within the framework of responsible government".

(c) In all matters, other than certain specified areas where it should seek legal advice from a provincial attorney general, the Force "should seek its legal advice from the Minister of Justice".

(d) The Legal Branch should channel all requests for a legal opinion through the Department of Justice counsel assigned to the R.C.M.P.

(e) The Legal Branch advises the Commissioner and the Force "in relation to internal operational matters which include a variety of considerations as well as matters of law".

(f) The Legal Branch may assist "in the identification of issues and problems which require (or do not require) a legal opinion from the Minister of Justice or a provincial attorney general".

16. It is clear from the terms of reference that the Department of Justice lawyer was not to fulfill the role recommended by the Glassco Commission, to "head up the legal work" of the Legal Branch. It is also clear that the Department of Justice lawyer was not given any supervisory role over the Legal Branch. Any such role does not appear to have been contemplated by either the Department of Justice or the R.C.M.P.

17. The terms of reference imply that a legal opinion obtained from an attorney general provides "protection" to a member of the Force "within the framework of responsible government". This implication arises from the provision which states that any other opinion does not afford such protection. We understand that the protection allegedly afforded arises out of constitutional convention and the consequence of such protection is that the Government of Canada will do whatever it can to ensure that a member of the Force does not suffer personally if he acts in conformity with the opinion. For example, the government will pay the legal fees of a member who has to defend himself as a result of an activity based on a legal opinion of an attorney general, even if that legal opinion is found to be wrong.

18. The paragraphs of the terms of reference which deal with the relationship between the Justice counsel and the Legal Branch are instructive in their lack of clarity. The extent to which the Legal Branch is to provide legal advice to the Commissioner and the Force is not spelled out, nor is there any indication as to when the Legal Branch should seek an opinion from the Justice counsel. The role of the Legal Branch set out in the 1979 Policies, Objectives and Goals, and the role of the Department of Justice spelled out in the terms of reference of the Department of Justice lawyer, are clearly not compatible. The former provides that the Legal Branch is to "give legal opinions or direction" to "Management, Directorates, Branches and Sections". The latter provides that the R.C.M.P. "should seek its legal advice from the Minister of Justice" or "the appropriate provincial attorney general" and "the Legal Branch should . . . channel all requests for a legal opinion through the Justice counsel...".

19. This, then, was the status of the Legal Branch in 1980. However, in late 1979 the Commissioner of the R.C.M.P. decided that it was not desirable to maintain a Legal Branch within the R.C.M.P. There was a concern on his part that the Legal Branch had been providing legal advice that should have been obtained from the Department of Justice. Since the members of the Legal Branch did not have the status of government legal advisers it was not proper, in his opinion, for the R.C.M.P. to rely on this advice. He initiated discussions with the Department of Justice with the aim of eliminating the Legal Branch

and having all legal services provided by Department of Justice lawyers assigned to the R.C.M.P. We understand that the plans include provision for the secondment of legally trained R.C.M.P. members to assist those Department of Justice lawyers. It is our view that this is precisely the direction which should be followed.

B. GLASSCO COMMISSION'S POSITION

20. We should now discuss briefly the current plans for the Legal Branch in the light of the recommendations of the Glassco Commission. In Part VI, Chapter 2, section F, dealing with legal advice for the security intelligence agency, we set out the Glassco Commission's general position with respect to the provision of legal advice. That Commission recommended that the R.C.M.P. Legal Branch be one of the exceptions to the general rule of integration of the government's legal services. They stated as their reason:

> ...The nature of the work may be such as to require a close identification of the legal staff with officials who are administering the law: to sever this organic connection would, as has been said, cause the whole function to "bleed". This is the relevant consideration in recommending the partial dissociation from the proposed integrated system of... the lawyers in the R.C.M.P.[5]

That Commission went further, however, to propose "that a representative of the integrated legal services be seconded to the Force to head up the legal work". The Commission added that "The existing pattern of legal training and rotation would not be disturbed, but more effective liaison with the Department of Justice would be maintained".[6]

21. An organization the size of the R.C.M.P., whose principal function is law enforcement, requires a full range of legal services. Not only must it have legal advice and assistance on all those matters common to any government department or agency, such as contracts for goods and services and real estate transactions; it also needs specialized legal advice with respect to its functional role as a law enforcement agency. As to legal advice essentially unrelated to the functional role of the Force, e.g. property law, commercial law, etc., we can see no reason why such advice should not be provided by the Department of Justice in precisely the same fashion as it is provided generally to other departments and agencies.

22. In our view, when the Glassco Commission spoke about the necessity for "a close identification of the legal staff with the officials who are administering the law" it had in mind the legal advice required in relation to the functional role of the Force. We agree with the Glassco Commission that the whole function must not be allowed to "bleed", if what this means is that the legal advice will be inadequate unless those providing it are totally familiar with the context within which the advice has to be applied. We would add that the same is true of all legal advice. What we think is unique about the R.C.M.P. is the

[5] Commission Report, Vol. 2, p. 413.

[6] Commission Report, Vol. 2, p. 419.

depth and range of the knowledge which the lawyer must have. In other words, a lawyer providing legal advice to the R.C.M.P. in matters relating to law enforcement must be knowledgeable about law enforcement generally as well as all aspects of the Force's activities in that field. This does not imply, however, that such lawyers need to be members of the R.C.M.P.

23. We pointed out earlier, in discussing legal advice for a security intelligence agency, the problems associated with the provision of legal advice by lawyers who are on the staff of the department or agency that they are advising. The essential problem is that independence, which is a prerequisite to the giving of sound legal advice, may be lost. Against this must be balanced the requirement, also mentioned above, that the lawyer must have extensive general knowledge about the field in which he or she is providing the legal advice. We believe that the plan presently being developed between the R.C.M.P. and the Department of Justice will provide the benefits of both independence and extensive knowledge and experience in the field. We also believe that it is consistent with the principles underlying the recommendations of the Glassco Commission.

24. Earlier in this Report, in discussing the legal services for the security intelligence agency we pointed out that it is the duty of a Department of Justice counsel to report immediately to the Deputy Attorney General of Canada any knowledge he obtains with respect to past or potential illegalities by members of the agency. In our opinion the same reasoning and result apply to the Department of Justice counsel who are legal advisers to the Force. Such a duty might be considered by some to be incompatible with the counsel's responsibility towards his client. We feel that, on the contrary, the two are entirely consistent in that it is the counsel's duty to promote, at all times, the interests of the Force as a whole, and adherence to the law is clearly in its best interests.

25. As indicated earlier, a senior Department of Justice lawyer with a great deal of experience and expertise in the area of criminal law enforcement was assigned to the R.C.M.P. in November 1977. It is obvious that a number of lawyers will have to be assigned by the Department of Justice to the R.C.M.P. and we believe it is imperative that among them there be several with those same qualities of experience and expertise.

26. Our approval of the current plan includes an endorsement of the proposal to second legally trained R.C.M.P. members with several years of regular police duties to assist the Department of Justice lawyers. We consider, as did the Glassco Commission, that such an element is essential to the provision of sound legal advice to the R.C.M.P. Those members will assist immeasurably in interpreting and explaining the problems of the Force to the Justice lawyers when legal advice is being sought. We prefer the concept of their being seconded rather than that the Legal Branch be retained. If the Legal Branch were to be retained, there would be a danger of its drifting towards its former role.

27. There is a further point with respect to the use of law graduates by the R.C.M.P. We understand that it is the intention of the R.C.M.P. to increase

the number of law graduates among its regular members and that this will be accomplished primarily through recruitment of law graduates after graduation. We applaud this recruiting of more highly educated persons, but we wish to inject a note of caution with respect to the use of such law graduates in any positions where they are expected to provide some sort of legal advice.

28. No law graduate can hope to become or remain competent as a lawyer unless he is active full-time in the practice of law, has the use of a good law library and has the opportunity to mix daily with other lawyers to discuss legal problems with them. The legally trained member of the Force who is assigned to a post without the benefit of all of those conditions and who has, in addition, other duties to perform, would be woefully inept in providing proper legal advice. That is not to say that the forensic skills acquired by that member will be lost to the Force. Clearly, he will be more capable of analyzing difficult problems than he would otherwise have been: this is the outstanding benefit derived from legal training. Even more important, he will be more aware of legal problems and will see those circumstances in which they are likely to arise. That, however, is not the same thing as providing the legal solution to the problems, which must be left to the full-time legal practitioners.

29. We also wish to enter a *caveat* with respect to the intention of the Force to assign members with law degrees to represent other members who have been charged with breaches of discipline. We see this as an entirely appropriate measure provided that the member law graduate is acting under the general supervision of a Department of Justice counsel. In our opinion, if the matter is sufficiently serious to require an advocate and there is legal advice to be given, it must be given under the supervision of a qualified and experienced lawyer.

C. RELATIONSHIP OF R.C.M.P. TO PROVINCIAL ATTORNEYS GENERAL

30. In carrying out certain of its responsibilities the R.C.M.P. ought to obtain its legal advice from a provincial attorney general. In our view, as a general rule the legal advice with respect to problems of a typically departmental nature should be sought from the federal and not the provincial level. This should be so regardless of whether it relates to services provided under provincial or municipal contracts or whether it relates to the federal policing role. However, in the law enforcement area the situation is different. Here, if the advice concerns a matter being performed under a municipal or provincial contract it must be sought from the attorney general of the province in which the matter occurs. If it does not so fall within a provincial or municipal contract then the legal advice must be sought at the federal level. If the R.C.M.P. is in doubt as to which governmental level is the appropriate one from which to seek its advice, it should, as a federal government agency, seek the opinion of the federal Attorney General and abide by that opinion.

WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice relating to matters arising out of its administrative activities as an agency of the Government of Canada from the federal Department of Justice.

(246)

WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice with respect to its federal law enforcement role from the federal Department of Justice, and with respect to its law enforcement role pursuant to a provincial or municipal contract from the appropriate provincial attorney general.

(247)

WE RECOMMEND THAT if the R.C.M.P. is in doubt as to which governmental level is the appropriate one from which to seek its legal advice in a particular matter it should get an opinion from the federal Department of Justice as to which is the appropriate level and abide by that opinion.

(248)

WE RECOMMEND THAT the Department of Justice assign sufficient counsel to satisfy the requirements of the R.C.M.P.

(249)

WE RECOMMEND THAT there be no Legal Branch of the R.C.M.P.

(250)

WE RECOMMEND THAT THE R.C.M.P. continue to have within the Force regular members with law degrees and to assign a sufficient number of such members to work with the Department of Justice counsel to ensure that the R.C.M.P.'s needs are explained and interpreted to those counsel.

(251)

WE RECOMMEND THAT no member of the Force with a law degree be assigned to any duty requiring him to give a legal opinion to another member of the Force, with the exception of the normal assistance given by any superior to a subordinate in the course of the investigation of an alleged offence.

(252)

WE RECOMMEND THAT members with law degrees who are assigned to represent other members in disciplinary proceedings be supervised by Department of Justice counsel.

(253)

WE RECOMMEND THAT the Department of Justice counsel assigned to the Force have a specific duty to report to the Deputy Attorney General of Canada any past or future acts which he believes may be unlawful, of any past or present member of the Force.

(254)

CHAPTER 4

MINISTERIAL RESPONSIBILITY FOR THE R.C.M.P.

INTRODUCTION

1. Throughout the long and distinguished existence of the R.C.M.P., spanning over 100 years of Canadian history, there has never been a study in depth, by an independent body, of the interrelationships between the Force and the Government of Canada. The work of this Commission of Inquiry represents the first. In this chapter we are principally concerned with the proper dimensions of ministerial supervision and accountability for the criminal law aspects of policing by the R.C.M.P. We have earlier described the degree of supervision and direction that is appropriate in security matters.

2. The post of Commissioner of the R.C.M.P. has been elevated to a position of prominence in the senior ranks of the government. He has right of access to the Prime Minister of the day, claimed and exercised by successive Commissioners; he is a member of Committees of Deputy Ministers; and, when invited, he sits in on meetings of Cabinet Committees. This status, combined with the dependence of the government upon the R.C.M.P. to enforce federal laws effectively, has generated an unwarranted disinclination on the part of government to interfere in R.C.M.P. affairs, even when serious questions of ultimate government control of the Force arise. This reluctance has been increased by three other factors — an ill-defined principle of non-intervention by the government in the decision-making processes of peace officers, the long-standing legal ambiguity surrounding the legal status of the Deputy Solicitor General and the R.C.M.P. Commissioner vis-à-vis each other, and the monolithic character of the Force arising from its organizational structure and the common ethos imbued in each of its members by its internal systems. The first two factors will be examined in the context of the discussion which follows. The third factor has been dealt with in detail in Part VI, Chapters 1 and 2.

A. PRINCIPLES GOVERNING MINISTERIAL RESPONSIBILITY AND ACCOUNTABILITY FOR POLICE ACTIVITIES

3. We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative

bodies composed of elected representatives. This important doctrine in our system of democratic government has often been overshadowed by the parallel concept that the best interests of the state are served by keeping at bay any attempts to interfere with the making of police decisions relating to investigation and prosecution in individual cases.

4. The concept of independence for peace officers in executing their duties has been elevated to a position of paramountcy in defining the role and functions of the R.C.M.P., thus setting the norm for all relationships between the government and the Force. We believe, on the contrary, that the peace officer duties of the R.C.M.P. should qualify, but not dictate, the essential nature of those relationships. The government must fulfill its democratic mandate by ensuring that in the final analysis it is the government that is in control of the police, and accountable for it. There is no inconsistency in asserting simultaneously that every member of the government, and above all the Minister responsible for the R.C.M.P., has an essential obligation not normally to become involved in the decisions to be made by members of the Force, including the Commissioner himself, with respect to investigation, arrest and prosecution in individual cases.

5. We have studied carefully statements made by Prime Minister Trudeau, on his government's policy with respect to ministerial responsibility for the day-to-day operations of the police. Speaking in 1977 he said:

> I have attempted to make it quite clear that the policy of this Government, and I believe the previous governments in this country, has been that they... should be kept in ignorance of the day-to-day operations of the police force and even of the security force. I repeat that is not a view that is held by all democracies but it is our view and it is one we stand by. Therefore, in this particular case it is not a matter of pleading ignorance as an excuse. It is a matter of stating as a principle that the particular Minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it.
>
> I would be much concerned if knowledge of that particular investigative operation by the security police were extended to all their operations and, indeed, if the Ministers were to know and therefore be held responsible for a lot of things taking place under the name of security or criminal investigation. That is our position. It is not one of pleading ignorance to defend the government. It is one of keeping the government's nose out of the operations of the police force at whatever level of government.
>
> On the criminal law side, the protections we have against abuse are not with the government. They are with the courts. The police can go out and investigate crimes, they can investigate various actions which may be contrary to the criminal laws of the country without authorization from the Minister and indeed without his knowledge.
>
> What protection do we have then that there won't be abuse by the police in that respect? We have the protection of the courts.[1]

[1] Prime Minister's Press Conference, December 9, 1977.

6. We note that the Prime Minister, in his statement quoted above, assigned the source of protection against police misdeeds on the law enforcement side of the R.C.M.P. to the courts and not to the government. Such a policy implies two things. The first is that the courts will become aware of police misdeeds during the course of criminal trials on other matters and will make their views known from the Bench, and the second is that those views will have a salutary effect on the police. This procedure is considered by the R.C.M.P. to be a significant control over their activities, but we have come across situations in which the failure of a judge to express disapproval of an objectionable investigative procedure disclosed in evidence has been interpreted by the R.C.M.P. as judicial approval. We discuss this in the following chapter of this Part. In our view reliance on comments from the Bench is an entirely haphazard and unsatisfactory method of control, depending as it does on the almost accidental disclosure of a misdeed in the course of other proceedings, and the inclination of the judge to comment on it or not, usually without the benefit of any background evidence or argument. Moreover, judges are unlikely to comment on the lawfulness of an investigative procedure if, as at present, the law holds that evidence is admissible if relevant, even if illegally obtained. (We shall discuss this law and make recommendations about it, Chapter 5 of this Part.) The second implication of the policy is that it transfers to the private citizen the initial responsibility for correcting alleged abuses, either by laying an information or bringing a civil action against the Force. There does not appear to be a strong tradition in Canada of the civil courts being used by private citizens as a means to curb police transgressions. The cost alone of such civil action is likely to deter all but the exceptional person. Neither is it sufficient to invoke the right of private prosecutions without also pointing out the statutory powers of the Crown to take over such private prosecutions and to determine whether to press forward with the case or to enter a stay of proceedings. In short, the realities of the situation significantly diminish the controls exercised theoretically by the courts.

7. These realities help to explain why we have seen emerge in recent years a plethora of Ombudsmen, assistant Ombudsmen and quasi-Ombudsmen, in the form of civilian review boards, whose functions include the task of investigating citizen complaints against other police forces and, if possible, effecting remedial actions. There has, however, never been any suggestion that these Ombudsmen should be given the powers of control over the day-to-day operations of the police, with respect to which the government disclaims any responsibilities. In Chapter 2 of this part of the Report we developed our views on the desirability of extending the principle of an Ombudsman to handle public complaints against the R.C.M.P. Our recommendations there were in no way intended to diminish the accountability of the Minister responsible for the R.C.M.P.

8. In the areas of both security and law enforcement we strongly support the principle that considerations of a purely partisan or personal nature should play no part in the making of decisions at any level. In examining earlier in this Report the role of the responsible Minister in relation to the security intelligence agency, we set out our views on the extent to which the Minister ought to be involved in its operations. In our view, the methods, practices and proce-

dures used by the R.C.M.P. in executing its criminal law mandate — "the way in which they are doing it" to borrow the Prime Minister's words — *should* be of continuing concern to the appropriate Minister. We believe that the Solicitor General of Canada has not only the right to be kept sufficiently informed but a duty to see that he is kept sufficiently informed.

B. MINISTER'S AND DEPUTY MINISTER'S ROLES IN DIRECTING R.C.M.P.

9. As far as the Minister is concerned, the language of the pertinent Acts of Parliament does not brook much doubt as to where the ultimate authority of direction lies. We detailed in Part VIII, Chapter 1, the cumulative effect of the relevant sections in the Department of the Solicitor General Act and the R.C.M.P. Act which make it clear that the Solicitor General has the power of direction over the R.C.M.P., subject to any powers, duties or functions assigned by law to any other department, branch or agency of the government. Those sections do not, however, make clear which activities of the R.C.M.P. are subject to such direction.

10. As already recounted, the roots of the present constitutional arrangements are to be found in the North-West Mounted Police Act of 1873, section 11 of which made the Commissioner "subject to the control, orders and authority of such person or persons as may, from time to time, be named by the Governor in Council for that purpose". The same enactment designated the Department of Justice as being responsible for "the control and management" of the new police force. By the R.C.M.P. Act of 1959 the Commissioner of the R.C.M.P. was given "control and management" of the Force, subject to the direction of the Minister. Prior to 1966 the responsible Minister was, with one change of short duration, the Minister of Justice. The Government Organization Act of 1966, which included the Department of the Solicitor General Act, transferred responsibility for the R.C.M.P. to the Solicitor General. What, it may be asked, did Parliament intend in conferring upon the R.C.M.P. Commissioner "control and management" of the Force, subject to the direction of the Minister, when previously the Department of Justice was made responsible in the legislation for "the control and management" of the Force? And what did Parliament intend should be the relationship between the Commissioner and the Deputy Minister?

11. We have encountered within the R.C.M.P. a misunderstanding of certain judicial decisions concerning the extent to which the powers of police officers affect the Minister's power of direction of the Force. In our opinion, these misunderstandings have contributed greatly to the barrier that arises repeatedly when attempts are made to define the proper relationship between police and government. We refer specifically to the oft-repeated claim that, by the very nature of their office, police officers acquire the privilege of independence from the executive branch of government, at all levels. The present day police officer, it is asserted, is a direct descendant of the early constable or peace officer in England whose duties were to preserve the King's peace and to bring malefactors to justice without fear or favour. It is said that his duty is to "the

Crown" as a public officer of the state. However, the responsibilities of a member of the R.C.M.P. are defined by the common law or subsequent legislation. In the case of members of the R.C.M.P. reference is specifically directed to section 17(3) of the R.C.M.P. Act which states:

> Every officer, and every person appointed by the Commissioner under this Act to be a peace officer, is a peace officer in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law.

and to section 18 of the same enactment which declares:

> It is the duty of members of the Force who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;...
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

12. Little or no attention has been given to the potential conundrum posed by the fact that the exercise of the powers, which historically were exercisable by each peace officer in his own right, is by section 18 made "subject to the orders of the Commissioner". Any police force is a disciplined body of men acting in accordance with a hierarchical structure that, leaving aside questions of possible unlawfulness, requires the orders of a superior to be carried out. The pertinent clause above, by making the members' performance of their duties "subject to the orders of the Commissioner", presumably does no more than state explicitly what is implied in other Police Acts governing provincial and municipal police forces. This conclusion is advanced with some tentativeness, since the question has not been litigated. In any event, the alleged independent authority of each peace officer is, at least with respect to the R.C.M.P., limited by the exercise of such authority having been made "subject to the orders of the Commissioner".

13. In support of the claim by members of the R.C.M.P. to occupy a special status of independence in the discharge of their peace officer's duties, reference is frequently made to decisions of the English courts and to the Report of the British Royal Commission on the Police in 1962 which examined the relationship of police personnel in that country both with the central authority, in the person of the Home Secretary, and with the local police authorities. In its Report, that Royal Commission reaffirmed the special constitutional status of the police in Britain, on the grounds that in such "quasi-judicial" matters as inquiries with regard to suspected offences, the arrest of persons, and the decision to prosecute,

> ... it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardized

and public confidence in it shaken, if in this field he were to be made the servant of too local a body.[2]

The Royal Commission, however, experienced more difficulty in defining the status of the chief constable and his relations with the local or regional police authority. When dealing specifically with the "quasi-judicial" matters referred to above, the Royal Commission accepted the proposition that it is in the public interest that a chief constable "should be free from the conventional processes of democratic control and influence". The problem areas, the Commission deduced, were those which fell outside the enforcement of the law in particular cases and included such matters as the police chief's

> general policies in regard to law enforcement over the area covered by his force, the disposition of the force, the concentration of police resources on any particular type of crime or area, the manner in which he handles political demonstrations or processions and allocates and instructs his men when preventing breaches of the peace arising from industrial disputes, the methods he employs in dealing with an outbreak of violence or of passive resistance to authority, his policy in enforcing traffic laws and in dealing with parked vehicles and so on.[3]

It is important to note with respect to these questions, that the British Commissioners rejected the prevailing doctrine by which, as a consequence of his legal status, the chief constable is invested with an unfettered discretion, and accountable to no one and subject to no one's orders as to the manner in which he exercises that discretion.

14. This fundamental distinction between the "quasi-judicial" and other functions of a police force is, we believe, pertinent to the Canadian situation. But it is a serious mistake to assume that the conclusions of English judges and Royal Commissioners correctly describe the constitutional status of police officers in Canada, and particularly so with reference to the Royal Canadian Mounted Police whose powers, responsibilities and relationship to the appropriate Minister of the Crown are the subject of express statutory definition. The English decision most frequently cited is the judgment of the Court of Appeal in *R.* v. *Metropolitan Police Commissioner, ex parte Blackburn* in 1968.[4] In that case, Lord Denning M.R., referring to the constitutional position of the Metropolitan Police Commissioner stated:

> I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the

[2] Cmnd. 1728, 1962, paragraph 68.

[3] *Ibid.*, paragraph 89.

[4] [1968] 2 Q.B. 118; 1968 1 All E.R. 763.

servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher* v. *Oldham Corpn.* (1930), and the Privy Council case of *A.G. for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (1955).

15. The judgment in *A.G. of N.S.W.* v. *Perpetual Trustee Co. Ltd.*, cited by Lord Denning, has also often been cited with approval by Canadian provincial Courts of Appeal in their attempt to define, by analogy to the English constable, the true status of a police officer. According to the Privy Council:

> ... there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office; he is a ministerial officer exercising statutory rights independently of contract.[5]

It is important to recognize that the issues which have arisen in the Canadian courts, and which have prompted Canadian judges to invoke the analogy of the common law constable contained in the passage just quoted, have been issues of civil liability (e.g. the extent to which chiefs of police, police governing bodies or various levels of government are liable for the wrongful exercise of police powers by a subordinate police officer) and the power of the courts to review collective bargaining agreements. To date Canadian courts have not addressed the problem that arose indirectly before the English Court of Appeal in *Ex parte Blackburn*, namely, the powers of the executive (or the courts) to give directions to a chief constable in matters of law enforcement.

16. Unfortunately, the particular passage from the judgment of Lord Denning, M.R., in *Ex parte Blackburn*, quoted above, is constantly transposed to the Canadian scene with no regard to those essential features that distinguish Canadian police forces from their British counterparts. There is no English legislation defining the precise nature of the relationship between the Home Secretary and the Commissioner of the Metropolitan Police, nor does the English Police Act of 1964 (enacted in the wake of the recommendations of the 1962 report of the Royal Commission on the Police) contain either a general authority for the governing of police forces or specific powers to issue directions or orders to police forces or their individual members. In Canada, however, section 5 of the R.C.M.P. Act clearly empowers the Minister to give direction to the Commissioner in regard to "the control and management of the force and all matters connected therewith". To the extent that a matter is one of "control and management" or is "connected" with control and management, the Minister has a statutory power of direction. The statute has to that extent made the English doctrine expounded in *Ex parte Blackburn* inapplicable to the R.C.M.P. However, there is a further question in the interpretation of section 5, which has not been tested in the courts. Can decisions to investigate

[5] [1955] A.C. 457 at 489-90 (P.C.).

in a particular case, to lay an information in a particular case, or to arrest in a particular case, properly be described as powers "connected" with control and management of the R.C.M.P.?

17. On this point, section 5 of the R.C.M.P. Act is open to two interpretations. The English language version of the section empowers the Minister to give direction to the Commissioner in regard to "the control and management of the force and all matters connected therewith." Under one construction of the English version the Minister's power of direction would extend to "control and management" and "all matters connected" with "control and management". In other words, the reference to "matters connected therewith" might be to "control and management". On the other hand, a broader construction of the words would be that "matters connected therewith" refers to "the Force" and thus the Minister would have the power of direction over "all matters connected" with "the Force" including decisions to investigate, lay an information or arrest in individual cases. The French language version of the section is not an exact translation. It reads as follows:

> Le gouverneur en conseil peut nommer un officier, appelé commissaire de la Gendarmerie royale du Canada, qui, sous la direction du Ministre, est investi de l'autorité sur la Gendarmerie et de la gestion de toutes les matières s'y rattachant.

Our translation from the French is as follows:

> The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has authority over the Force and has the management of all matters connected therewith.

The versions are "equally authentic", according to the Official Languages Act.[6] The French version does not appear to be subject to the same ambiguity as the English version. It seems to state clearly that the Commissioner has full authority over the Force, that the exercise of that authority is subject to the direction of the Minister, and that the Commissioner's authority extends to the management of all matters connected with the Force. In other words, in the French version there is not the same problem with what is being referred to by the words "connected therewith". Thus, in interpreting section 5 we receive little assistance from the rules quoted from the Official Languages Act. Nor does another provision of the Official Languages Act assist in resolving the problem of interpretation, for there is no obvious way to determine which of the different interpretations to which the two linguistic versions of section 5 are open would best ensure the attainment of the objects of the R.C.M.P. Act.[7]

18. There has been no judicial interpretation of this section of the R.C.M.P. Act. For our purposes, we do not think it is necessary for us to attempt an

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[6] R.S.C. 1970, ch.0-2, section 8(1).

[7] *Ibid.*, section 8(2):

> "In applying subsection (1) to the construction of an enactment,
>
> (d) if the two versions of the enactment differ. . . preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects."

interpretation. We think that the statute should be amended to effectuate the recommendations which we will be proposing, and such amendments would, we believe, eliminate any existing ambiguity. We do not think that this problem can be solved otherwise.

19. We believe that those functions of the R.C.M.P. which we have described as 'quasi judicial' should not be subject to the direction of the Minister. To be more explicit, in any particular case, the Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P. Even though the Minister should have no power of direction in particular cases in relation to the exercise by the R.C.M.P. of these 'quasi judicial' functions, the Minister should have the right to be, and should insist on being, informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases he may give guidance to the Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give *direction* to the Commissioner.

20. As we reported in Part VIII, Chapter 1, throughout the short history of the Department of the Solicitor General, the Commissioner of the R.C.M.P. has not accepted that the Deputy Solicitor General has the full powers of a deputy minister with respect to the R.C.M.P. This state of affairs, moreover, did not begin in 1966, when the Solicitor General's Department was first established, but was carried over from the previous era when the Commissioner of the R.C.M.P. reported to the Minister of Justice.

21. Because of the difficulties we encountered in comprehending the exact nature of these working relationships, both past and present, we attempted to analyze in depth the legal status of the Commissioner of the R.C.M.P. In the opinion of the R.C.M.P. its Commissioner is the 'Deputy Head' in charge of the Force for all purposes and is not required to report to the Minister through the Deputy Solicitor General. We concluded that the legal position is not clear. In our earlier analysis we did not come to any conclusion as to the current legal status nor do we propose to do so here. We believe such legal speculation to be futile, in the circumstances. Until now the people who could have resolved this dispute have fought shy of grasping this nettle and, in consequence, the problems arising from ineffective accountability have been seriously compounded. In our opinion what is required is clear and decisive action on the part of the government to resolve the problem through the introduction of legislation which states categorically that the Deputy Solicitor General is the deputy of the Solicitor General for all purposes related to the R.C.M.P. The Commissioner of the R.C.M.P. should be legally accountable to the Deputy Solicitor General. Such a legal relationship is imperative to ensure that ministerial responsibility is effective. The Deputy Minister is the principal adviser of the Minister. The Deputy Minister must have unimpeded access to all matters being handled by the R.C.M.P., to be able to advise the Minister properly. Any doubts about the Deputy Minister's right to be kept informed and to look into all matters must be removed. The Deputy Minister is not a

member of the Force itself and thus should be able to give the Minister informed, independent advice on policy matters relating to the Force, something which has not been possible in the past.

22. One final point needs to be made in this regard. On no account should the Minister or his deputy give direction based on partisan or personal considerations. If the Deputy Solicitor General does so, the Commissioner should take the matter up with the Minister and if necessary the Prime Minister. If the Minister gives such an improper direction the Commissioner should speak to the Prime Minister directly.

WE RECOMMEND THAT the Deputy Solicitor General be considered as the deputy of the Solicitor General for all purposes related to the R.C.M.P. and that the Commissioner of the R.C.M.P. report directly to the Deputy Solicitor General rather than to the Solicitor General as at present.

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WE RECOMMEND THAT the Solicitor General have full power of direction over the activities of the R.C.M.P., except over the 'quasi-judicial' police powers of investigation, arrest and prosecution in individual cases.

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WE RECOMMEND THAT the Commissioner of the R.C.M.P. keep the Deputy Solicitor General, and through him the Solicitor General, fully informed of all policies, directions, guidelines and practices of the Force, including all operational matters in individual cases which raise important questions of public policy.

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WE RECOMMEND THAT if the Commissioner considers that the Deputy Solicitor General is giving him direction based on partisan or political considerations, the Commissioner take the matter up directly with the Minister. We further recommend that if the Commissioner, after consultation with the Deputy Solicitor General, considers that the Solicitor General is giving him, the Commissioner, direction based on partisan or political considerations, he should take the matter up directly with the Prime Minister.

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C. RELATIONSHIP WITH PROVINCIAL ATTORNEYS GENERAL

23. Pursuant to contracts entered into between the Government of Canada and eight of the provinces (Ontario and Quebec having their own provincial police forces) the R.C.M.P. provides policing services to those eight provinces. In carrying out its duties under each of those contracts it is accountable to the provincial attorney general. In Alberta, where the responsibility for the administration of justice has been divided between two ministers, the Force is also accountable to both the provincial solicitor general and the provincial attorney general. The extent to which the Commanding Officer of the R.C.M.P. (in the contracts called the "Commanding Officer of the Provincial Police Services") in each province is responsible to the provincial minister or

ministers is governed by the terms of the contract. The relevant provisions are the same in all contracts (except the Alberta contract which we will cite later). They read:

> 3. The internal management of the Provincial Police Services, including the administration and application of professional police procedures, shall remain under the control of Canada.
>
> 4. (1) The Commanding Officer of the Provincial Police Services shall for the purposes of this agreement act under the direction of the Attorney General in the administration of justice in the province.
>
> (3) The Commanding Officer shall provide the Attorney General with information in possession of the Royal Canadian Mounted Police which affects the administration of justice in the Province. This will include information obtained by members employed in Federal duties and shall be provided in a manner and form to be mutually agreed upon between the Commanding Officer and the Attorney General.

Nowhere does the contract state what is meant by the words in clause 4(1) "under the direction of the Attorney General in the administration of justice in the Province". Nor is there any clarification of which activities are subject to such "direction" and which are governed by the words in clause 3 which provide that internal management "shall remain under the control of Canada".

24. The relevant provisions in the Alberta contract simply add to the confusion. They read:

> 3. The internal management of the Provincial Police Services, including the administration and application of professional police procedures, shall remain under the control of Canada.
>
> 4. (1) The Commanding Officer of the Provincial Police Services shall for the purposes of this agreement act under the direction of the Solicitor General of Alberta in matters dealing with the operations, broad policy and functions of the Provincial Police Services. The said Commanding Officer shall for the purposes of this Agreement act under the direction of the Attorney General of Alberta in matters dealing with administration of justice and the enforcement of those laws which the Government of Alberta is required to enforce.
>
> (2) Nothing in this agreement shall be interpreted as limiting in any way the powers of the Attorney General, relating to the administration of justice within the Province.
>
> (3) The Commanding Officer of the Provincial Police Services shall provide the Attorney General of Alberta with information in the possession of the Royal Canadian Mounted Police that relates to the administration of justice in the Province. The Commanding Officer shall provide the Solicitor General of Alberta with information in the possession of the Royal Canadian Mounted Police that relates to the operations, broad policy and functions of the Provincial Police Services. The phrase 'information' as it appears in this paragraph shall include information obtained by members employed in Federal duties and shall be provided in a manner and form to be mutually agreed upon by the Commanding Officer and the Attorney General of Alberta, and the Solicitor General of Alberta, as the case may be.

It will be noted that in the Alberta contract "direction" of the Commanding Officer is extended to more than "matters dealing with administration of justice". It also covers "those laws which the Government of Alberta is required to enforce" and "matters dealing with the operations, broad policy and functions...".

25. There is no common understanding on the part of the responsible provincial ministers and the eight Commanding Officers in the provinces as to what is included in the power of direction of the provincial ministers and what information must be provided by the Commanding Officers to those ministers. This cannot help but lead to misunderstandings and subsequent litigation such as the *Putnam* case,[8] which we discuss in Chapter 2 of this Part. We consider it doubtful that our terms of reference require us to recommend how the responsibilities for direction of the R.C.M.P. ought to be divided between the federal and provincial ministers. In view of that doubt, we did not carry out the extensive research and analysis which would have been required to formulate recommendations on this subject. We are concerned, however, that the matter be clarified. In our view, agreement should be reached between the two levels of government as to what is meant by "internal management" for purposes of exclusion from direction by the provincial ministers. With respect to all other matters, members of the R.C.M.P. who are acting within a province pursuant to a contract should be governed by the same principles which we outlined earlier in this chapter with respect to the responsible Minister and Deputy Minister at the federal level.

26. There have also been controversies between the federal government and provincial governments about the extent to which the R.C.M.P. is obliged to keep the provincial attorneys general informed of the activities of members of the R.C.M.P. involved in the enforcement of federal laws. This problem applies to all provinces: contract and non-contract. In Chapter 2 of this Part we discussed this problem as it relates to acts in which members of the R.C.M.P. may have been engaged and which may be violations of the Criminal Code or other federal or provincial statutes. We made recommendations for the procedure to be followed in these cases. In cases not involving such acts the solution appears to be close and continuous consultation among the federal and provincial ministers responsible for policing.

WE RECOMMEND THAT in the contracts with the provinces covering the provision of R.C.M.P. policing services, the respective roles of the responsible federal and provincial ministers be clarified, so that the R.C.M.P. members involved have an accurate understanding of the division of their obligations and duties vis-à-vis those ministers.

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WE RECOMMEND THAT the contracts with the contracting provinces incorporate as far as possible the principles of ministerial direction recommended above for the federal level.

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[8] *The Attorney General of Alberta and the Law Enforcement Appeal Board v. Constable K.W. Putnam and Constable M.G.C. Cramer and the Attorney General of Canada*, [1980] 22 A.R. 510, [1950] 5 W.W.R. 83. Affirmed by the Supreme Court of Canada in a judgment pronounced May 28, 1981.

CHAPTER 5

SOME METHODS OF CRIMINAL INVESTIGATIONS AND THEIR CONTROL

INTRODUCTION

1. In this chapter we consider the legal and policy problems identified in Part III which pertain to methods of investigation used by the criminal investigation side of the R.C.M.P. In contrast to our comprehensive treatment of investigative techniques required for the protection of national security, our consideration of legal and policy changes in relation to the investigation of crime is limited to those changes which we deem necessary in response to activities of the R.C.M.P. found to be not authorized or provided for by law. While our recommendations call for legislation to render lawful certain techniques of criminal investigation which have been used in the past (for example, searching mail for illicit drugs and obtaining information about suspects from confidential government files) we also call for a rigorous system of controlling intrusive techniques in criminal investigations and, in the final section of the chapter, where we consider the admissibility of illegally obtained evidence and entrapment by agents provocateurs, we recommend changes in the law designed to prevent police use of illegal or improper investigative techniques.

2. As with our recommendations on the security side, our recommendations in this chapter constitute an interconnected package: in our view, it would be unwise to adopt recommendations for greater police powers without at the same time adopting our recommendations with respect to controls and sanctions against unlawful or improper investigative activities.

A. A SYSTEM FOR CONTROLLING CRIMINAL INVESTIGATORY METHODS

3. In Part V, Chapter 4, we began by stating five principles which should form the basis of a system of controls governing the use of investigatory methods by the security intelligence agency. Using those principles, we developed a system of controls which divided investigatory techniques for the Security Service into three categories which we called levels one, two and three. In addition to these elements, our control system consisted of ministerial guidelines governing the use of certain techniques, and two "external" bodies — an independent review body (the Advisory Committee on Security Intelligence) and a joint Parliamentary Committee — with responsibilities for monitoring and evaluating the operation of the total system of controls.

4. We do not propose a parallel system of controls for the criminal investigation side of the R.C.M.P. Our terms of reference do not permit us to examine the command structure and decision-making processes of the R.C.M.P. as a whole, and without such an examination, we are unable to evaluate in a comprehensive manner the current system within the Force for controlling the use of investigatory methods. A clear, comprehensive system for controlling such investigation techniques is essential, in our view, if elected officials are to exercise properly their responsibilities with regard to the R.C.M.P. Consequently, we believe that the Solicitor General, in concert with his counterparts in the provinces, should give priority to reviewing the current system of controls in the R.C.M.P. We do not underestimate the difficulty of this task. Designing a control system on the criminal investigation side of the Force will be a complex undertaking because of the decentralized command structure of the C.I.B. and because of the contract policing role which the R.C.M.P. has in eight of the provinces. It is by no means certain that the control system has to be the same in each of these eight provinces. Furthermore, there is a very difficult question of what ought to be the respective responsibilities of the federal and provincial governments in the contract provinces with regard to the control of investigatory methods used by the R.C.M.P. Finally, adding to the complexity is another factor: the significant overlap in responsibilities of the R.C.M.P. and other police forces in this country. Consequently a proposal for a control system for the R.C.M.P. should be based on knowledge of how other police forces control their use of intrusive investigative methods.

5. We put forward the following questions as a suggested initial agenda for the review we are proposing:

(a) what should be the principles on which a control system should be based?
(b) to what extent can the main outlines of the system of controls be made public without harming the effectiveness of the individual investigatory methods?
(c) what is an appropriate method for periodically evaluating the effectiveness of this control system?
(d) to what extent should officials 'outside' the Force, in addition to those who now participate by law, be included in the control system in order to provide countervailing pressures to use of intrusive investigatory techniques?
(e) what should be the role of the Department of Justice lawyers assigned to the R.C.M.P. in this control system so as to ensure the lawful use of these methods?
(f) what role should the Solicitor General and the provincial attorneys general play in this system?

WE RECOMMEND THAT the Solicitor General, in concert with his counterparts in the provinces, initiate a review of the current system of controls governing the use of the R.C.M.P.'s investigatory methods.

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B. SURREPTITIOUS ENTRIES

6. In a brief to us concerning surreptitious entries the R.C.M.P. has made a strong case that this is a desirable, and often an essential, investigative technique when the manufacture of illicit drugs and alcohol comes under the scrutiny of resourceful investigators. Eventually a time comes when members employed on lengthy, difficult investigations, many involving great personal danger, are faced with the problem of having to know with certainty whether an illicit drug laboratory or still is secreted in a place, if the laboratory or still is producing or is in the development stage, if a cache of drugs or alcohol is in a place, or if quantities of illicit drugs or spirits are being removed from a cache bit by bit for trafficking purposes. The Force considers that it is extremely difficult, without the power to search in circumstances when a search warrant cannot now be obtained, to detect the existence of clandestine drug laboratories. The R.C.M.P. also asserts that surreptitious entry is a valuable tool generally in the fight against "white-collar" crime. This latter assertion, however, has not been substantiated before us.

7. We consider that any broad power to search private premises upon mere *suspicion* that there might be evidence of the commission of an offence or the intended commission of an offence, even if such a power were authorized by a judicial warrant, should be granted by statute only after a thorough review of all police powers of search and seizure — a review which should study this proposal in the context of the entire ambit of such powers. If what was being sought were the power to search upon warrant granted upon suspicion, and the search was to be made known to the occupant at the time of the search or soon thereafter, at least the power to enter and inspect would have many counterparts in federal and provincial regulatory laws. However, what is sought by the R.C.M.P. in these situations is a power to search covertly. Such a power, we think, should be granted by statute, only if a thorough review of all police powers of search and seizure demonstrates the need for such a power. We therefore decline to make any recommendation in regard to this proposal, except that the matter be referred to the Law Reform Commission of Canada, which is at present studying the laws relating to search and seizure.

> **WE RECOMMEND THAT the Solicitor General refer to the Law Reform Commission of Canada the matter of whether or not the Criminal Code should be amended to allow peace officers in Canada, under defined circumstances and controls, to make surreptitious entries.**
>
> (262)

C. ELECTRONIC SURVEILLANCE

8. In Part III, Chapter 3, we set forth statistics as to the use of electronic surveillance by the R.C.M.P. in criminal investigations. Based on these statistics and on knowledge which is common to those familiar with the operations of the criminal courts since 1974, we are confident that electronic surveillance is a valuable and necessary tool in the investigation of crime and the prosecution of offenders. Having said this, we believe that there are legal problems to resolve so that this investigative tool can be used legally and effectively. These problems fall into three categories: first, there are problems relating to the use

of information obtained as a result of a lawful interception; second, there is an inadequate review procedure to evaluate the use of electronic eavesdropping devices; and third, there is a set of problems paralleling those connected with the use of electronic surveillance under section 16 of the Official Secrets Act and involving a lack of legal authorization to examine premises prior to installation and to install, operate, repair, and remove electronic devices.

Use of information

9. A problem that the R.C.M.P. has drawn to our attention is whether or not members of the Force may give to a foreign law enforcement agency any information which the R.C.M.P. obtains from electronic surveillance. Section 178.2(1) of the Criminal Code prohibits disclosure of information obtained from the use of electrical eavesdropping devices, subject to several exceptions. In our view, it is doubtful whether any of these exemptions are applicable to foreign law enforcement agencies. Another aspect of the limited exceptions is that members of the R.C.M.P. are severely restricted as to what information they may give to anyone involved in preparing the Solicitor General's Annual Report to Parliament or a provincial attorney general's Annual Report to his provincial legislature on the use of electronic surveillance. A similar problem may arise for any other body reviewing the use of this power. We believe that section 178.2(1) should be amended to make it clear that information obtained from a lawful interception can be given to foreign law enforcement agencies, to those involved in producing annual reports and to federally authorized persons reviewing the use of this power.

Review mechanism

10. We think that there should be a mechanism to facilitate an effective review of the use of electronic surveillance. The yearly statistical reports of the provincial attorneys general and the Solicitor General of Canada to provincial legislatures and Parliament, while more useful than the yearly report on the Security Service's use of electronic surveillance, does not provide for an extensive enough review of this investigative method. In Part III, Chapter 3, we explained the constraints that make it difficult for a Commission of Inquiry to review thoroughly the manner in which the process of applying for authorization under section 178 is working. Any other government body would face at least equal difficulty in doing so. If our proposal for a more thorough review of the use of electronic surveillance in criminal investigations by all police forces in Canada is adopted, section 178 would have to be amended to allow access to sealed packets and to the product of interception. Presumably this access could be limited to certain federal Commissioners appointed under Part I of the Inquiries Act.

11. One means of improving the safeguards, both with regard to electronic surveillance and with regard to the search of mail for illicit drugs or narcotics, would be the creation of a committee appointed jointly by federal and provincial governments to review the exercise of these powers by peace officers across Canada. This committee, consisting of two judges, two lawyers, and two citizens (one of whom might, for example, be a person active in a civil liberties

organization) could review the documents filed in support of applications for judicial authorization, the orders themselves, the alternatives available to the police, the results of the investigative work to the extent that it was aided by the means authorized by the judicial authorizations, and so on. In addition, this committee could sponsor sessions in which judges from across the country could compare experiences and seek to arrive at high standards by which applications for authorization orders should be judged. Moreover, the committee could report annually to Parliament, taking care to keep its comments on specific cases at a general level so as not to prejudice the rights of individuals or the techniques and circumstances of past and continuing police investigative operations.

12. Results of our research, based on a broad survey of experience gained in administering the application procedure, raise issues which a more extensive review process might study thoroughly. These issues are of a kind that a yearly statistical summary cannot answer. Some of our research results are as follows:

(a) Applications to a judge are usually completed in less than half an hour — in many cases in less than 15 minutes.

(b) Frequently, but far from always, when the application is made privately to the judge, the agent of the Solicitor General of Canada or of the provincial attorney general is accompanied by the police officer who swore the affidavit.

(c) In order to supplement the information contained in the affidavit, many judges question the policemen. Some judges receive this additional information under oath, but most do not. Some judges require the additional information in writing, some do not.

(d) There is evidence that the applications are well prepared, but the fact that they lack detail about a variety of matters is a ground for some degree of dissatisfaction.

(e) There is substantial evidence that the fact that almost all applications are successful is due to the efforts of police forces and Crown agents to submit only those applications that have been well prepared and are likely not to encounter difficulty.

(f) Although, as has been disclosed by the Annual Reports of both the Solicitor General of Canada and the provincial attorneys general, very few applications have been refused by judges, there is some evidence that this information is somewhat misleading. It appears that applications are frequently withdrawn when the judge points to inadequacies in the affidavit. Thus the official statistics are misleading because they do not record the number of applications which are made but withdrawn.

(g) Some judges attach a condition to the authorization that there be periodic progress reports to the judge.

(h) In the several provinces in which research was conducted, there was evidence that the system adopted by each Court for determining which judge received applications has reduced but not eliminated 'judge-shopping' by the Crown — i.e. the selection of judges more likely to be amenable to such applications. Despite the minimization of this undesirable risk, it may be that, wherever possible, instead of all the

judges in the court being entitled to receive applications, there should be a limited number of designated judges who would be so entitled. This would reduce the possibility of 'judge-shopping' and at the same time develop a number of judges who have a certain expertise in analysing the quality of the applications.

13. Our research covered many other points concerning the application process, but the foregoing are the most significant. We make one further observation: it would be desirable that there be organized discussion among the judges of Canada of the many problems associated with the process. Many judges lack experience as criminal law practitioners before going to the bench, and consequently are not fully familiar with the alternative means of investigation that in many situations are available to policemen. If the judges are to be effective instruments of ensuring that electronic surveillance is used as an investigative tool of last resort, discussion would enhance the sharing of the knowledge which is possessed by those judges who are wise in the ways of criminal investigation.

Executing authorizations for electronic surveillance

14. An important question which we addressed at length in Part III, Chapter 3, in our discussion of the legal issues relating to electronic surveillance was the following: does a judge have the statutory power under section 178.13 of the Criminal Code to authorize *entries* to examine premises prior to installation and to install, repair and remove a listening device, and, if he does not expressly authorize entry for those purposes is the power to enter implied under section 25(1) of the Criminal Code or section 26(2) of the Interpretation Act? We believe that a judge does not have the authority to authorize entries, nor is the power to enter implied in any statute. Consequently, section 178.13 of the Criminal Code should be amended in a manner similar to that which we have recommended for the statute governing the security intelligence agency's use of electronic surveillance in Part V, Chapter 4. Specifically, the judge should be granted the authority to authorize peace officers to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device. The judge issuing the authorization should set the methods which may be used in executing it. These powers should be available only on the condition that their execution shall not cause significant damage to premises that remains unrepaired, nor involve the use of physical force or the threat of such force against any person. In addition, section 178.13 of the Criminal Code should be amended to provide for the use, without compensation, of the electrical power supply available in the premises.

15. A further problem relating to the installation and operation of electronic eavesdropping devices involves the possible violation of provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards. We believe that the Solicitor General should seek the co-operation of the provinces in order to effect the required administrative and legislative changes so that this investigatory method can be used in a lawful manner.

WE RECOMMEND THAT a committee be established with statutory powers to review the use of electronic surveillance by all police forces in Canada, including, but not limited to, the procedure by which authorizations are applied for.

(263)

WE RECOMMEND THAT section 178.2(1) of the Criminal Code be amended so that information obtained as a result of lawful electronic surveillance can be given to

(a) a foreign law enforcement agency;

(b) any person who is involved in the preparation of the Solicitor General's Annual Report to Parliament on the use of electronic surveillance;

(c) any person who is involved in the preparation of a provincial attorney general's Annual Report to a provincial legislature on the use of electronic surveillance; and

(d) any person authorized by federal legislation to review the use of this investigative technique.

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WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device, providing the judge issuing the authorization sets out in the authorization

(a) the methods which may be used in executing it;

(b) that there be nothing done that shall cause significant damage to the premises that remains unrepaired;

(c) that there be no use of physical force or the threat of such force against any person.

(265)

WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to use the electrical power source available in the premises without compensation.

(266)

WE RECOMMEND THAT the Solicitor General seek the co-operation of the provinces to effect the necessary administrative and legislative changes to provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards in order to allow peace officers to install, operate, repair and remove electronic eavesdropping devices in a lawful manner.

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D. MAIL COVERS AND MAIL OPENING

16. On the criminal investigation side of the Force's operations, investigations of drug trafficking have relied not only on mail cover checks and mail openings, but also on controlled deliveries of drugs to bring the cases to a

successful conclusion. (See Part III, Chapter 4 for a description of controlled deliveries.) Various examples of drug-related investigations were cited in evidence to demonstrate the efficacy of these investigative techniques. However, in a number of cases, charges were not laid even though the evidence against the accused had been obtained, because the Force did not want to compromise postal or customs authorities (Vol. 18, pp. 2827-59; Vol. 23, pp. 3619-50). According to the R.C.M.P., letter bombs are another indication of the need for mail opening. One witness argued that not only is it necessary to have early evidence, if possible, in an attempt to predict the sending of the bomb, but if the item of mail is not delayed it may reach the recipient and be opened (Vol. 8, pp. 1032-35). We also heard evidence *in camera* of a fraud investigation, in which the accused had left Canada. Mail arrived in Canada from the country he was living in, and it was opened in the hope that it would disclose whether he might go to a country from which it would be possible to extradite him.

17. One senior R.C.M.P. officer told us that the Force should be empowered by legislation to open the mail, not only during the course of drug investigations, but also for investigations of all those offences concerning which a judge may now authorize electronic interception under section 178.13 of the Criminal Code (Vol. 8, p. 1146). The R.C.M.P. is not satisfied with limiting mail opening to drug investigations as was proposed in Bill C-26, introduced in the House of Commons in 1979.

18. In our view the need for mail cover checks and mail opening has not been established in the case of investigations other than for drugs. We think that the need to examine substances (not messages) in the mail has been established clearly if there is a reason to suspect that mail of any category contains narcotics or illicit drugs. A senior R.C.M.P. officer gave evidence before us about the extent to which the mail has been a channel of importation for narcotics and drugs — a channel "which has been taken advantage of in increasing fashion over the past several years... and has resulted in a tremendous influx of narcotic drugs into this country" (Vol. 8, p. 1013. See Vol. 8, pp. 1042-1150 for testimony on drugs and mail opening). While this evidence has convinced us of the need to open mail to search for illicit drugs and narcotics, because of the importance we attach to individual privacy we do not recommend that mail be opened for the purpose of reading messages about drug offences or any other criminal offences. Whatever may be our personal views as to the threat to our society that is posed by trafficking in narcotics and illicit drugs, we are not a Commission of Inquiry into the harmful effects of those substances. All we can properly say is that, if Parliament considers trafficking in narcotics and illicit drugs to be a grave problem, then we would point out that the police have great difficulty in lawfully investigating and even detecting such traffic unless certain legislative provisions are enacted. These provisions are as follows. First, the power to open mail and even to examine or photograph an envelope should be exercisable only on judicial authorization, subject to the same safeguards as are now found in section 178 of the Criminal Code in regard to electronic surveillance. In addition, just as section 178 makes it an offence for anyone to use electronic or other artificial means to eavesdrop, except upon consent or lawful authorization, so should the legislation make it

an offence to open mail except upon consent or lawful authority. The powers should be limited initially to examination and testing of any substance found in the mail. Only when a narcotic or illicit narcotic drug is found in the letter should a peace officer be empowered to read an accompanying written, printed or typewritten message. To ensure that in executing the judicial authorization no one has read any message contained in the mail unless a narcotic or illicit drug is found in the letter, there should be a procedure such as a statutory declaration by the official supervising the opening of the letter that the law has been followed. The declaration should be filed with the Solicitor General. Finally the Post Office Act should be amended so that it is clear that controlled deliveries in drug investigations may be made lawfully. The problem is that a controlled delivery may require a delay in the delivery of the letter to ensure that the police are present to witness the delivery and that the recipient of the letter is actually at the address to receive it. Such a delay is illegal under the present Post Office Act.

19. We wish to make one further proposal for legislative change. In Part III, Chapter 4, with regard to letter bombs, we noted that if it is *known* that an article of mail contains an explosive, then the article of mail is considered "non-mailable matter" under sections 1 and 2 of Schedule I of the Prohibited Mail Regulations, and consequently whether it is domestic or international mail, it can be disposed of by the Postmaster General's Department. A problem arises, however, if there is only reasonable belief or suspicion that an article of mail contains a bomb. In such cases, it appears that a postal employee or a member of the R.C.M.P. who opens an article of mail or delays it commits an offence except when the mail is international and the article opened by a Customs Officer (which includes R.C.M.P. members) is not a "letter". To rectify this problem, we believe that Schedule I of the Prohibited Mail Regulations should be amended so that an article of mail is considered "non-mailable matter" if there are grounds to suspect that it contains an explosive.

WE RECOMMEND THAT, not withstanding the present provisions of the Post Office Act, R.C.M.P. peace officers be authorized by legislation to examine or photograph an envelope and to open mail in order to examine and test any substance found in the mail, subject to the following conditions:

(a) this power is exercisable only on judicial authorization, subject to the same safeguards as are now found in section 178 of the Criminal Code;

(b) the offences concerning which this power can be exercisable are limited to narcotic and drug offences;

(c) the reading of an accompanying written, printed or typewritten message other than a message accompanying an illicit drug or narcotic is an offence;

(d) there is a procedure established (such as a statutory declaration by the official supervising the opening of mail) to ensure that in executing the judicial authorization no one has unlawfully read any message contained in the mail. The declaration should be filed with the Solicitor General.

(268)

WE RECOMMEND THAT the Post Office Act should be amended so that it is clear that controlled deliveries of mail by R.C.M.P. peace officers or their agents may be made lawfully.

(269)

WE RECOMMEND THAT Schedule I of the Prohibited Mail Regulations be amended so that an article of mail is considered "non-mailable matter" if there are grounds for suspicion or reasonable belief that the article of mail contains an explosive.

(270)

E. ACCESS TO CONFIDENTIAL INFORMATION

20. It is clear that an investigation of crime will be more effective if a police force could gain access to names, addresses, family relationships, financial information, medical histories, physical characteristics and other data. Particularly fruitful sources of such information are the data banks of government departments and agencies. As we have seen, the R.C.M.P. in its criminal investigations has particularly sought such information from the Income Tax Branch of the Department of National Revenue, the Unemployment Insurance Commission (now the Canada Employment and Immigration Commission) and the Family Allowance Division and the Old Age Pension Division of the Department of National Health and Welfare.

21. In the case of information provided by taxpayers to the Income Tax Branch of the Department of National Revenue, we accept that both biographical information and financial information can be of substantial importance in the investigation of fraud, gambling and bankruptcy offences — whether by organized criminals or by single adventurers.

22. In the case of information from the Unemployment Insurance Commission, the R.C.M.P. consider that the kind of biographical data and employment records obtained was of importance — a "necessary tool" according to one senior R.C.M.P. officer who testified before us — in the location of persons wanted for the commission of crime, as well as the identification of dead bodies and missing persons, and the accurate identification of persons generally. We consider that the need for such information is evident, but as we stated in Part III, Chapter 5, there is some doubt as to whether it is within the power of the Minister of Employment and Immigration and of the Canada Employment and Immigration Commission under existing law to make it lawful for employees of the Commission to provide information to the R.C.M.P. or to other police forces.

23. We have no doubt that access by the R.C.M.P. to biographical information possessed by social welfare programmes, including the Social Insurance Number, is a valuable tool in the location of missing persons, the identification of stolen property and other matters of importance. Similarly, we are sure that access by the R.C.M.P. to some kinds of confidential information possessed by provincial government departments or agencies such as vital statistics and medical information, will be of vital importance in some criminal investigations or attempts to preserve the peace and protect lives and property.

24. As in the case of security intelligence investigations, it is necessary in the case of each category of confidential information to balance the need of the police force for the information to fulfill its public duties against the need to maintain confidentiality of information. Usually administrators of statutory programmes involving the collection of confidential information express concern that the integrity and effectiveness of these programmes will suffer if police forces are granted access to the information. Public knowledge of the fact of such access, these administrators argue, will discourage members of the public from candour and forthrightness in disclosing information. In addition to these concerns it is also necessary to take into account the concern of society to prevent unjustified and excessive intrusion by the state into the private lives of its people. Again, there is the argument that changing the present law to provide access by the police to information at present prohibited breaks a tacit understanding that the confidentiality dictated by the governing statute would be honoured.

25. We think that there will be a need in some criminal investigations, and in some other cases where the police are acting to maintain the peace and protect lives and property, for the state to enable them to have lawful access to the information which the state has received in confidence. What must be provided, however, is a system designed to prevent unrestrained and uncontrolled access. Putting it another way, there must be a means to limit access to those cases where the need is very clear and demonstrably outweighs the opposing considerations we have mentioned.

26. We prefer not to make any recommendations in regard to provincial statutes, except that the Solicitor General negotiate a similar solution with the provinces. The views of provincial and municipal police forces should be taken into account, as well as those of other interested persons and groups, since it is after all the provincial legislatures that will have to act. Perhaps those negotiating a solution will bear in mind, as possible answers on the provincial level, the recommendations we shall make in regard to confidential information held by federal government departments and agencies.

27. We turn, then, to the federal government. In Part V, Chapter 4, we noted that the "non-derivative use" section of Part IV of the Canadian Human Rights Act (section 52(2)) has been interpreted strictly by all departments and agencies, with the result that the R.C.M.P. Security Service and the criminal investigation side of the Force have now been denied access to virtually all personal information possessed by other federal government institutions. The proposed Privacy Act currently before Parliament, a section of which would replace Part IV of the Canadian Human Rights Act, provides that personal information under the control of a government institution shall, subject to certain exceptions, be used only for the purpose for which it was obtained. The exception which is most relevant for our purposes would permit a government institution to disclose personal information

> (e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed.

28. As we noted in Part V, Chapter 4, in certain respects this legislative change goes too far in opening up access of confidential information to investigative bodies including the R.C.M.P. For example, it does not provide a clear enough test of necessity for access to personal information. Moreover, it makes no distinction between information about a person which is publicly available (e.g. biographical information) and information which is not publicly available. In other respects, the legislative proposals do not go far enough. Thus, it does not provide access to income tax, family allowance, old age security and Canada Pension Plan information, all of which are protected by Acts of Parliament which bar disclosure of information, even with the permission of the Minister, for any purpose unrelated to the programme or purpose for which the information was obtained.

29. The changes in this legislative proposal which we recommended for the security intelligence agency should apply with appropriate modifications to the criminal investigation side of the R.C.M.P. We distinguish at the outset between 'biographical' and 'personal' information. The former would consist of an individual's name (including change of name), address (including change of address), telephone number, date and place of birth, physical description and occupation. We believe that this class of information, since for the most part it is publicly available, merits less protection than more 'personal' information. Consequently the R.C.M.P. should be able to request this type of information from government departments under a system of administrative controls provided for under section 8(2)(e) of the proposed Privacy Act. Such applications before being submitted should be approved by a designated senior officer at Headquarters in Ottawa.

30. With regard to 'personal' information, we believe that access should be conditional on the investigative body's receiving authorization from a judge upon meeting the same tests that are now found in section 178 of the Criminal Code for authorizing electronic surveillance. Because decision-making in criminal investigations is more decentralized than in a security intelligency agency, and because decisions in criminal investigation cases need to be made quickly, we propose that applications for judicial authorization be made to either a judge of the Federal Court of Canada or a judge of the superior court in the province in which the investigation, or a part of it, is taking place.

31. In the case of the security intelligence agency, we recommended that the Solicitor General should approve all requests for 'personal' information prior to the agency's seeking a judicial warrant. In addition, we recommended that the Minister or head of the government institution which holds the information should comply with the warrant unless the Prime Minister directs the Solicitor General not to execute it. This system of ministerial involvement in dealing with specific requests for 'personal' information is inappropriate in the case of criminal investigations conducted by the R.C.M.P. As proposed in Chapter 4 of this Part, the Solicitor General should become involved in the R.C.M.P.'s investigation of individual cases only in very exceptional circumstances involving significant policy matters. Thus, we propose that the R.C.M.P., in the same way that it now does with requests for electronic surveillance, submit applications for access to 'personal' information to the Minister of Justice, who, as the

Attorney General of Canada, can request an agent to apply for a judicial warrant authorizing the delivery of the information to the R.C.M.P. The Minister who receives the warrant should be required to comply with it, but as with access for security purposes, if he thinks the integrity of his department's programme is being seriously undermined by use of this power by the police and cannot resolve the matter through discussions with the Attorney General he should make representations to the Prime Minister. Whether the R.C.M.P. should be allowed to distribute information received under judicial authorization to other police forces is a matter for the Solicitor General of Canada to discuss with the provincial attorneys general.

32. Finally, the R.C.M.P.'s scope of access to government information should be the same as that which we have recommended for the security intelligence agency. Thus the Force should, subject to the controls referred to in the preceding paragraph, have access to all government data banks including those now protected by Acts of Parliament which bar disclosure of information for any purpose unrelated to the programme or purpose for which the information was obtained. One category of federal government information which it would be reasonable to exempt from the scope of legislation giving access to otherwise protected bodies of information is the census information compiled by Statistics Canada for reasons we gave in Part V, Chapter 4.

WE RECOMMEND THAT

(a) **legislation authorize the heads of federal government institutions to release information concerning an individual's name, address, phone number, date and place of birth, occupation and physical description on receiving a written request from the R.C.M.P. stating that such information is necessary for the purpose of conducting a criminal investigation.**

(b) **all other personal information held by the federal government with the exception of census information held by Statistics Canada, be accessible to the R.C.M.P. through a system of judicially granted authorizations subject to the same terms and conditions as are now found in section 178 of the Criminal Code with regard to electronic surveillance.**

(271)

WE RECOMMEND THAT the R.C.M.P. obtain personal information held by government institutions under the jurisdiction of provincial governments only from persons legally authorized to release such information and that, with regard to any province in which there is no authorized means of access to information to which the Solicitor General of Canada considers that the R.C.M.P. should have access in order to discharge its policing responsibilities effectively, the Solicitor General should seek the co-operation of the province in amending its laws to make such access possible.

(272)

F. PHYSICAL SURVEILLANCE

33. In Part III, Chapter 8 we described the importance in criminal investigations of the police being able to follow and watch suspects and apprehend criminals, often by the use of vehicles. In Part V, Chapter 4 we made

recommendations as to what should be done to enable physical surveillance operations to be conducted effectively yet lawfully by the security intelligence agency. What follows in regard to criminal investigation will be brief; the details of our approach may be found by referring to our identical recommendations in regard to the security intelligence agency.

34. In regard to criminal investigations, as in the case of security intelligence work, we think that the only proper way to resolve the legal difficulties that now place members of the R.C.M.P. in a dilemma is to make appropriate changes in the relevant provincial legislation and municipal bylaws, as to the rules of the road, pedestrian movement on the roads, the use of documents of identification and registration issued by the provincial government, the use of a fictitious name in registering at a hotel, and trespass to land or chattels. The details of the amendments are as set out in the recommendations in Part V, Chapter 4.

> **WE RECOMMEND THAT the amendments which we proposed in Part V, Chapter 4 to facilitate physical surveillance operations by the security intelligence agency be made applicable to physical surveillance in criminal investigations by the R.C.M.P.**
>
> (273)

G. UNDERCOVER OPERATIVES

35. In Part III, Chapter 9 we discussed the important contributions to the detection and investigation of crime which are made by regular members of the R.C.M.P. who serve under cover (particularly in combatting trafficking in narcotics and restricted drugs) and by other persons who serve as paid or volunteer sources of information about criminal activity. We have no doubt that these means of collecting criminal intelligence and evidence for use in prosecutions are vital to the effective functioning of the R.C.M.P., particularly in regard to some kinds of crime, especially drug and gambling offences and organized crime.

36. In Part III, Chapter 9, we analyzed the legal difficulties involved in the use of undercover operatives. This analysis causes us to doubt seriously whether operatives may be used by either the criminal investigation side of the Force or the security intelligence agency without violating existing federal and provincial laws. Some of these legal problems are common to both criminal investigations and security intelligence functions. Consequently, our recommendations, given in Part V, Chapter 4 are applicable to criminal investigations by the R.C.M.P. While there is no need to repeat them in detail, we outline them as follows:

(a) Legislation relating to income tax should be amended to permit the non-declaration as income of payments made by the police to sources. We considered and rejected the alternative of having the tax deducted at source and sent to the Department of National Revenue without the identity of the source being disclosed. Other fiscal legislation requiring deduction and remittance by or on behalf of employees ought to be amended to exclude such sources.

(b) Federal and provincial legislation should be amended where necessary, to allow R.C.M.P. undercover operatives, both members and sources, in defined circumstances, to obtain, possess and use false documentation, subject to administrative controls such as return of the documentation when the operation is completed.

(c) Section 383 of the Criminal Code should be amended to provide expressly that an agent or employee who gives information to the police about his principal's or employer's activities does not commit the offence provided for in that section, so long as the act is done or the favour that is exercised in relation to the business of the principal or employer is in fulfilment of a public interest or duty which transcends the private relationship. At the same time, the R.C.M.P. should have internal operational guidelines that reflect an awareness of the social value of the relationships which are affected by the operation of sources — an awareness which is to be balanced against the need for effective investigation. These guidelines should be approved by the Minister and publicly disclosed.

(d) In criminal investigations there should be no special power of access to confidential records in the private sector, with the exception of medical records, discussed below. We do not think that the police should encourage persons controlling such records to violate legal or professional requirements of confidentiality. We suggest that the R.C.M.P. should obtain legal advice in regard to particular problems of this sort; sometimes such advice will enable the supposed barrier to access to be 'lowered' because it will be found that there is none in law in the particular circumstances. Conversely, failure to obtain legal advice may result in the police encouraging individuals to breach their legal duties of confidentiality. There is one kind of confidential records in the private sector which requires specific consideration, namely, medical records. We have now read the report of the Krever Commission and concur with its recommendations as to access by police forces to such records if the police forces are under proper control as to how they use the information. Our comments on this matter are found in Annex 1.

37. One legal problem which pertains only to the criminal investigation work arises from the use of undercover operatives to investigate drug offences. The Narcotic Control Act and the Food and Drugs Act should be amended to broaden the circumstances in which it is lawful for agents or members of the R.C.M.P. to handle drugs for the purpose of gathering information or evidence concerning drug-related offences. The amendments should provide that a person who is employed as a member of the R.C.M.P. or a person acting under the instructions of the R.C.M.P. shall not be guilty of the following offences related to a narcotic or a controlled or restricted drug so long as his acts are for the purpose of and in connection with a criminal investigation: possession, trafficking, possession for the purpose of trafficking and sale. To prevent abuse of this exemption, and to ensure that it is relied upon to protect undercover members in the specific situations described in Part III, Chapter 9 (kickbacks,

administering, passing on, offering, distribution and possession), the R.C.M.P. should deal with this exemption in a detailed way in its guidelines governing the use of undercover operatives. For one thing, these guidelines should provide direction as to the extent to which undercover members or sources may release drugs into the market, a subject which we will discuss in a future Report.

38. There is one final matter concerning administrative policy to which we wish to draw attention. In Part III, Chapter 9 we referred to the isolation, stress and danger often associated with long-term undercover work by a regular member of the R.C.M.P. Long-term dissociation from his regular police milieu, prolonged simulation of the habits and manners of the milieu which he has penetrated, the risks of exposure and physical harm, his isolation from family and friends, and his inability to discuss what he is doing except with those in the R.C.M.P. associated with his operation, can produce significant disorientation. This may result in a decreased effectiveness while under cover, and difficulty upon "re-entry" into regular police work. If the latter occurs, he may become a less effective regular policeman during the remainder of his career, or he may even leave the Force. In either case, there is a heavy cost both in human terms and in terms of the loss of the state's financial investment in his training as a policeman. We are satisfied that the R.C.M.P. does not adequately recognize the problem as one that deserves systematic attention. It appears to be regarded as one that can be handled by the common sense and firmness of the undercover member's superior during his period of serving under cover and afterwards. We think that that is not enough. We think that there is a need for a sensitive and planned programme designed to assist the member (and indeed long-term sources) to overcome the personality disorders that can result from a long-term undercover assignment. In one other national police force the problem is considered to be serious and is met by the use of a psychiatrist who meets the member regularly while he is under cover and afterward. We recommend that the R.C.M.P. adopt such a programme.

WE RECOMMEND THAT the R.C.M.P. establish administrative guidelines concerning the use of undercover operatives in criminal investigations. These guidelines should be approved by the Solicitor General and should be publicly disclosed.

(274)

WE RECOMMEND THAT to facilitate the obtaining of false identification documents in a lawful manner for R.C.M.P. undercover operatives in criminal investigations, federal legislation be amended, and the co-operation of the provinces be sought in amending relevant provincial laws, in a similar manner to that recommended for the false identification needed in physical surveillance operations of both the security intelligence agency and the criminal investigation side of the R.C.M.P.

(275)

WE RECOMMEND THAT income tax legislation be amended to permit R.C.M.P. sources in criminal investigations not to declare as income payments received by them from the force and that other fiscal legislation requiring deduction and remittance by or on behalf of employees be amended to exclude R.C.M.P. sources.

(276)

WE RECOMMEND THAT section 383 of the Criminal Code of Canada concerning secret commissions be amended to provide that a person providing information to the R.C.M.P. in a duly authorized criminal investigation does not commit the offence defined in that section.

(277)

WE RECOMMEND THAT the R.C.M.P. develop a programme designed to assist its members who serve as undercover operatives in criminal investigations to overcome the personality disorders associated with long-term assignments in this role.

(278)

H. INTERROGATION TECHNIQUES

39. In Part III, Chapter 10 we outlined the policy of the R.C.M.P. towards the interrogation of suspects. We examined there four areas which give rise to concern. As we pointed out, there have been very few cases brought to our attention of R.C.M.P. members being involved in questionable interrogation techniques: nevertheless, in the light of those cases that we have looked at, we have concluded that some changes are necessary.

Reporting reasons for judicial decisions that statements are inadmissible

40. We consider that there should be more systematic mechanisms for review, within the R.C.M.P., of the standards members attain in their interrogation of suspects. A starting point would be collection of the reasons for which statements by an accused are held to be inadmissible at preliminary inquiries and trials, or indeed the reasons for which Crown attorneys decide not even to tender the statement. In our research programme a number of federal Crown attorneys were interviewed about their experiences with R.C.M.P. interrogations. Although in the experience of these counsel the vast majority of *voir dire* resulted in the admission of statements, in the few problem cases which did arise they gave the following as reasons for their not offering statements or for judges holding them to be inadmissible: (1) an atmosphere of general oppression due to the youth of the accused; (2) the number and size of the officers involved in the interrogation; (3) persistent questioning over a long period when the accused had made it clear that he did not want to speak. (There were other reasons beyond the control of the police.) Even so, none of these counsel had encountered cases of overt violence, tricks or obvious denial of counsel. We cite those in which difficulties have arisen, not so much to indicate a prevalence of these problems as to illustrate the kinds of reasons that should be collected in each division, and nationally. Problems that arise in court are already required to be reported on a form that is to be submitted to the divisional C.I.B. Director when a case is dismissed. But this procedure is an inadequate safeguard, for it allows two situations in which reports are not made: (a) when a conviction is obtained even though the accused's confession is held inadmissible; (b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained. Consequently, it would be desirable that there be a reporting and review procedure whenever an

accused's statement is held inadmissible, and whenever the Crown attorney decides not to tender it in court.

Right to counsel

41. We do not consider it necessary to make any recommendations with respect to oppressive conduct, brutality and trickery beyond what we have said above. However, some specific steps need to be taken with respect to the right to counsel. In our view, R.C.M.P. policy should be that members of the Force have a duty to inform a person in custody, within a reasonable time after being taken into custody, of his right to retain counsel. Furthermore, in order to comply with the spirit of the Canadian Bill of Rights the policy should require the provision of reasonable means to a person in custody to communicate with counsel.

42. Members of the R.C.M.P., both in their initial training and in later training courses, should receive instructions as to the duty to advise persons in custody of the right to retain and instruct counsel without delay, and of their right to have reasonable access to that counsel. Our research (including attendance by a researcher in the classroom) indicates that recruits in training at Regina, at least in sessions on interrogation, are not told of the right to retain and instruct counsel, and it follows that they are not told at that time that they should advise persons in custody of their right to do so. The topic is not mentioned in the lesson plan or the written materials on interrogation, and no mention is made by the lecturer of these matters. The right to counsel does not appear to be referred to during the day and a half spent on interrogation techniques, statements, admissions and confessions during the divisional training on the Criminal Investigators course. Even when it is referred to it may receive insufficient stress. For example, the right to counsel is referred to in the Polygraph Examiner Training Course only after there has been a lengthy period of training in interrogation. This is unlikely to be effective in stressing to the participants the importance of the right. Moreover, apart from the question of *when* the right to counsel is referred to, in our view, all materials relating to these subjects in any courses should be revised to include proper instructions on right to counsel, even if it is covered as a separate topic elsewhere.

43. Joint federal-provincial funding in recent years has provided meaning in substance to the "right to counsel", by supporting programmes of legal aid in criminal cases for those who could not otherwise afford counsel. The administrative means of providing legal aid vary from province to province. We believe that members of the R.C.M.P. should have a responsibility for seeing that persons in custody are advised reasonably soon after their arrest not only that they have a right to counsel but that arrangements exist to enable them to apply for counsel to advise and represent them without cost to themselves if they cannot afford to pay counsel. We do not think it is sufficient to have notices posted in cell blocks about the legal aid system. We emphasize that we are not proposing that it be a duty of R.C.M.P. members upon making an arrest to give that advice; what we do say is that the advice should be given reasonably soon thereafter. What is "reasonably soon" will depend on the circumstances. We propose this not as a legal duty, breach of which would

invalidate the arrest or imperil the prosecution, but as a duty imposed by Force policy.

44. Some forms of trickery may be clearly prohibited in regard to interrogations. No trick which includes criminal conduct by the police can be permitted. Another sound rule of conduct is provided in the Judges' Rules, one of which prescribes the method by which one accused or suspect is to be told of his co-accused's or co-suspect's written statement: a copy of the written statement is to be shown. This rule was designed to discourage oral misrepresentations by a police officer to an accused or suspect as to what a co-accused or co-suspect has said. Beyond that, it is desirable that policy disapprove of deceit in interrogation, not just because (as the Training and Development Branch booklet indicates) deceit may backfire, but because it is an unacceptable police practice. We make no recommendations about this subject, but we would expect that the Inspector of Police Practices (a new office we propose in Part X, Chapter 2) would show a continuing interest in the ethics of R.C.M.P. interrogation procedures.

WE RECOMMEND THAT the R.C.M.P. develop reporting and review procedures both at the divisional and the national levels to enable an internal review of the following cases:

(a) when a conviction is obtained even though the accused's confession is held inadmissible;

(b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained.

(279)

WE RECOMMEND THAT the R.C.M.P. adopt the following policies concerning interrogation:

(a) members of the Force have a duty to inform a person in custody, within a reasonable time after being taken into custody, of his right to retain counsel; and

(b) members of the Force should provide reasonable means to a person in custody to communicate with his counsel without delay upon the person making a request to do so.

(280)

WE RECOMMEND THAT the R.C.M.P. revise training materials and programmes relating to interrogation to include proper instructions on the right of an accused to retain and communicate with counsel.

(281)

WE RECOMMEND THAT members of the R.C.M.P. be required to advise persons in custody reasonably soon after their arrest that arrangements exist to enable them to apply for counsel, such counsel to be paid for by the state if they cannot afford to pay counsel.

(282)

I. ADMISSIBILITY OF EVIDENCE OBTAINED BY ILLEGAL MEANS, AND ENTRAPMENT

45. In this section we address two important legal issues relating to the criminal justice system in Canada. The first concerns the conditions, if any, under which evidence that has been illegally or improperly obtained by the police should be admitted at trial. The second issue concerns the question of how the criminal justice process should treat the police use of *agents provocateurs*. We have examined these issues because they have a significant bearing on the penalties which may apply to illegal or improper acts by Canadian police forces, including the R.C.M.P.

46. As the Law Reform Commission of Canada has stated:

> Canadian law has followed English law: the illegality of the means used to obtain evidence generally has no bearing upon its admissibility. If, for example, a person's home is illegally searched — without a search warrant or reasonable and probable cause for a search — the person may sue the police for the damages incurred, complain or demand disciplinary action or the laying of criminal charges. But, the evidence uncovered during this search together with all evidence derived from it is admissible.[1]

In short, assuming that the evidence is relevant to an issue in the case, it is admissible even if it was obtained illegally, and the trial judge has no discretion to exclude it except in the most limited of circumstances.

47. The rule of Canadian law was expressed by the Supreme Court of Canada in *The Queen* v. *Wray* in 1970.[2] Mr. Justice Martland based his analysis on an English decision, *Kuruma* v. *The Queen*, where the following had been said:

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained.[3]

An exception to this general rule was stated as follows:

> In a criminal case, the Judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against an accused.

As an example of this, police trickery was cited.

48. Referring to the *Kuruma* case, Mr. Justice Martland said:

> It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the Trial Judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for

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[1] Law Reform Commission of Canada, Study Paper "The Exclusion of Illegally Obtained Evidence", 1974, p. 7.

[2] [1971] S.C.R. 272.

[3] [1955] A.C. 197.

> the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.[4]

49. The general rule of admissibility of illegally obtained evidence had been stated in previous Canadian cases. In one of them, which we select because we have found that it has been quoted in R.C.M.P. memoranda and training courses, the following was said in regard to a claim by the accused that the search warrant was illegal and that the police officers had obtained possession of the articles seized by means of their own trespass:

> . . . the question is not, by what means was the evidence procured; but is, whether the things proved were evidence; and it is not contended that they were not; all that is urged is, that the evidence ought to have been rejected, because it was obtained by means of a trespass — as it is asserted — upon the property of the accused by the police officers engaged in this prosecution. The criminal who wields the 'jimmy' or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers: it is still quite permissible to 'set a thief to catch a thief'....[5]

50. The Scottish law[6] is that "an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible" and that "irregularities required to be excused, and infringements of the formalities of the law in relation to these matters, are not lightly to be condoned". In Scotland, if evidence is "tainted by the method by which it was deliberately secured, . . . a fair trial. . . is rendered impossible".

51. There have been some important judicial decisions on the subject in other Commonwealth countries in very recent years.

52. The High Court of Australia, in *Bunning* v. *Cross,*[7] held that the law for Australia had been laid down in the following passage in an earlier case:

> Whenever such unlawfulness or unfairness appears, the Judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.[8]

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[4] [1971] S.C.R. 272, at 293.

[5] Mr. Justice Meredith of the Ontario Court of Appeal in *R.* v. *Honan*, (1912) 20 C.C.C. 10 at 16, 6 D.L.R. 276 at 280. The passage was quoted in a Quebec appeal case, *Paris* v. *The Queen* (1957) 118 C.C.C. 405 at 407, and it is that case which has been cited by the R.C.M.P. in recent years.

[6] As stated by Lord Fraser of Tullybelton, in *Regina* v. *Sang* [1979] 3 W.L.R. 263, at 282. He quoted from the leading Scottish cases.

[7] (1978) 52 A.L.J.R. 561.

[8] *R.* v. *Ireland*, (1970) 126 C.L.R. 321 at 335, per Chief Justice Barwick.

Thus the Australian law is more like that of Scotland than that of England or Canada.

53. The highest court in England has recently reasserted firmly the position to which Canadian law subscribes. In some lower court decisions in England it had been said (purporting to apply the exception recognized in *Kuruma*) that the trial judge has a discretion to refuse the admission of particular evidence if the police officers obtaining the evidence "have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible". However, in *Regina* v. *Sang*,[9] the House of Lords rejected that position. One of the judges, Lord Diplock, said that "there is no discretion to exclude evidence discovered as the result of an illegal search" and that

> the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge of the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.

He said that, while

> there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information,

nevertheless a fair trial according to law is provided, even if evidence obtained illegally is admitted:

> However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason.[10]

Similarly, Lord Scarman said that the trial judge "has no power to exclude admissible evidence of the commission of a crime" except for incriminating evidence which an accused has been compelled to produce or admissions or confessions not proved to have been made voluntarily.[11]

54. In the United States, the law excludes illegally obtained evidence completely.[12] This is known as the 'exclusionary rule'. Thus evidence obtained

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[9] [1979] 3 W.L.R. 263.

[10] *Ibid.*, at 271-2. Viscount Dilhorne agreed with Lord Diplock.

[11] *Ibid.*, at 288. The first exception was asserted again by Lord Diplock in *Morris* v. *Beardmore* [1980] 3 W.L.R. 283. He explained that the exception related to an offence that has already been committed.

[12] *Weeks* v. *U.S.* (1914) 232 U.S. 383; *Mapp* v. *Ohio* (1961) 367 U.S. 643.

by an illegal search and seizure is to be excluded, and in addition all evidence that indirectly results from the information obtained by the illegal search and seizure is also excluded. The latter is known as the "fruit of the poisoned tree" principle.

R.C.M.P. policy

55. We feel that the most important contribution which we can make to the public debate on this matter is to relate the issues to the policies of the R.C.M.P. and to the attitudes of members of the R.C.M.P. toward their investigative duties and powers in the light of their understanding of the law. Our powers under the Inquiries Act have given us an opportunity not possessed or exercised by other Commissions that have examined the subject. This may, we think, enable us to shed some new light on it.

56. The policy of the R.C.M.P., stated in the operational manual of the R.C.M.P. for criminal investigation purposes, clearly states that only lawful methods of investigation are to be employed. Moreover, whatever may be the case with other police forces in Canada, the research undertaken by the Commission, including inquiries made nationally among the judiciary, leads us to the conclusion that, so far as R.C.M.P. members' investigative conduct which reaches the attention of the Courts is concerned, the instances of conduct constituting a crime or civil wrong in the course of investigation are infrequent. We recognise nevertheless that there may be instances in which unlawful conduct has been employed which have not come to the attention of the courts. Moreover, the effect of the present law on police attitudes towards investigative conduct is of importance in regard to other police forces as well; but we are not in a position to comment on the conduct or attitudes of other police forces.

57. It is not only criminal conduct which is here of concern. We believe that the law should be concerned in some manner with ensuring that the standards of investigative conduct of our police forces are high in terms of their being acceptable and that they not violate the criminal law or the civil law (of tort or delict). As an English judge has said recently:

> ...I regard it as unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this is regardless of whether his contravention is of the criminal law or simply of the civil law.[13]

Thus, a police force should be encouraged by the law to ensure that its members use lawful investigative methods, and the requisites of propriety should go beyond mere questions of the absence of criminal conduct.

58. The files of the R.C.M.P. disclose that there is a significantly general attitude that, since the courts of Canada have held that illegally obtained evidence is admissible, this means that the judges do not condemn unlawful investigative conduct, and this in turn is taken as implied authorization of

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[13] Lord Edmund-Davies in *Morris* v. *Beardmore* [1980] 3 W.L.R. 283, at 291.

unlawful investigative conduct if the result is the obtaining of evidence relevant to an issue before the Court. Thus, for example, as far back as 1936 Assistant Commissioner G.L. Jennings reviewed the case law and concluded:

> It is considered that it may be necessary in connection with some of our work, more and more in the future, to resort to wiretapping.
>
> In this connection an opinion of the Justice Department was obtained, copy of which is enclosed for your very secret information. You will note the attached memo mostly refers to the admissibility of evidence obtained in an irregular manner. The consensus of the legal opinion is that if evidence so obtained is admissible it is not material to the case in what manner such evidence was obtained.
>
> (Ex. E-1, Tab 1A.)

(This was at a time when it was thought that telephone tapping might be in violation of the Bell Telephone Act.)

59. This attitude was stated very clearly in testimony before us and in briefs prepared by the R.C.M.P. for us. In a brief prepared by the R.C.M.P. it was stated, in regard to two cases in which it had been admitted by R.C.M.P. officers that surreptitious entries had been effected, that

> In neither case was any criticism levelled at the police officers or their forces by the judges or defence counsel over the fact that surreptitious entry had been employed.
> (Ex. E-1, Tab 2.)

And in another brief prepared by the R.C.M.P. the following statement was made:

> Numerous trials have taken place since June 30, 1974 in which intercepted material was accepted as evidence. Many courts were told that surreptitious entries had to be made into premises to carry out the interception as authorized.
>
> In no case has a court criticized the police action and in no case has a police officer been charged with a criminal offence respecting surreptitious entry. It appears that our procedures in this area have been accepted as sound.
>
> (Ex. E-1, Tab 1.)

In a similar vein, Commissioner Simmonds, in a letter to the Solicitor General, the Honourable Francis Fox on October 6, 1977, observed that

> Courts across the nation accepted evidence before and after passage of PART IV.I of the Criminal Code which clearly showed that premises had been surreptitiously entered by the police to successfully carry out their duties. To our knowledge, there has been no judicial criticism of this investigative technique.
>
> (Vol. 33, p. 5379.)

60. The logic of this reasoning is defective and its apparent acceptance at senior levels of the R.C.M.P. encourages the inference that it is accepted at low levels, where there is the most frequent day-to-day contact between policeman and citizen in the investigation of crime. Our discovery of this attitude is, in our opinion, the most significant contribution which we can make to the debate concerning this area of the law. Until now, the debate has been of a rather

theoretical nature, and writers and commentators have perforce guessed at the effect of the law on police investigative attitudes and conduct. It can now be said, at least in this country and in regard to the R.C.M.P., that the attitude of members of that Force, as expounded by its most senior officers, is to regard the absence of critical comment by the judiciary as tacit approval of forms of conduct that might be unlawful. In fact the absence of judicial comment will frequently be because no issue has been made by defence counsel about the illegality of the means used to obtain the evidence; and defence counsel has not made any issue of it because, even if he did, the law gives him no advantage as the law does not permit the exclusion of the evidence on that ground. It is in this sense that one may say that the present law has encouraged the police, quite erroneously, to infer that judicial silence implies approval of the investigative method that has been described in court.

61. In our view, the significance of our discovery is that, even though the number of known instances of unlawful or unacceptable investigative conduct in criminal investigations may, in the case of the R.C.M.P. at least, be relatively small, no rule of law which encourages such conduct can be tolerated unless there are other effective means in place which will discourage such conduct.

Arguments for and against the present law

62. We shall first set forth the arguments in favour of the present rule that illegally obtained evidence is admissible without any significant judicial discretion to exclude it, and comment on each of them.

(a) A rule excluding illegally obtained evidence would divert a criminal trial away from its essential function of discovering the truth and making a correct finding as to the guilt or innocence of the accused. However, if this argument is valid, it would logically justify the abolition of other rules of evidence that result in the exclusion of relevant evidence. For there are other rules that cause evidence to be excluded on the ground that some social value requires protection by an exclusionary rule of evidence, even if the result is that relevant evidence, which might result in the conviction of an accused person, is excluded. An example is communications between a client and his solicitor, which are generally protected from disclosure. In the case of each kind of evidence, the real question is whether the social value in issue is sufficiently important to justify the suppression of relevant evidence and whether the suppression of relevant evidence is an efficacious manner of achieving the social value.

(b) A rule excluding illegally obtained evidence would reduce the effectiveness of law enforcement. Correctly stated, the argument would be that the rules applying to search and seizure, for instance, reduce the effectiveness of law enforcement because they prevent searches and seizures except in certain controlled circumstances. We believe that if the laws of search and seizure can be demonstrated to impair the effectiveness of law enforcement, then it is the laws of search and seizure which require review, but the law of evidence should not

encourage their being undermined, particularly if the undermining is intentional and serious.

(c) Since criminals are unrestrained in the way they carry out their activities, the police should be given some leeway in pursuing them: they should be allowed to "fight fire with fire". This argument, like the first, if valid, proves too much. If it were valid and applied to its logical extreme, murder would be met with murder, robbery with robbery, kidnapping with kidnapping. We believe that the standard of conduct of our police forces should not be established on this basis.

(d) If the police know a person to be guilty but a rule of law excluding illegally obtained evidence would result in the person's acquittal, the police, as witnesses, will be tempted to lie about such matters as whether the search was lawful. An American scholar has supported this argument by saying that the American rule which excludes illegally obtained evidence "corrupts law enforcement personnel and degrades the whole system of criminal justice".[14] However, in our view it is unacceptable to fashion a rule of law on the premise that the police will perjure themselves to subvert rules of which they do not personally approve; to accept that premise as a working foundation in our view would libel and downgrade and treat as corrupt the system of criminal justice as a whole and law enforcement personnel generally. We have found no basis, as far as the R.C.M.P. is concerned, for regarding members of that Force as deserving such implicit condemnation.

(e) A rule excluding illegally obtained evidence would result in the acquittal and release of persons guilty of crime, which would shock the conscience of the community. We agree that if a murderer is freed because of a trivial and inadvertent error made by the police in the course of a search and seizure, the public is likely to be outraged at such a judicial decision. The confidence of the public in the entire judicial system may be undermined. There is, we think, some validity to this argument. On the other hand, this argument assumes that exclusion of the evidence will necessarily result in criminals going free. Yet in some cases in which evidence is obtained by police forces by illegal means, there would be other evidence to convict the accused. In any case, *any* effective rule of law or discipline which deters police illegalities in investigative conduct would equally have the result of permitting some guilty persons to escape punishment; yet no one argues that policemen who transgress the law should not be disciplined or prosecuted. Why, then, is there concern that a rule excluding illegally obtained evidence would result in more criminals being at large? Perhaps the real reason is that the effect of such a rule is more often the subject of public discussion than is the fact that the criminal law and the law of tort or delict and disciplinary rules also discourage illegal police investigative conduct and also result in guilty persons escaping punishment.

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[14] Oaks, "Studying the Exclusionary Rule in Search and Seizure", (1970) 37 *U. of Chi. L. Rev.* 665 at 740.

63. The following are the principal arguments which have been advanced against the admissibility of illegally obtained evidence (the American position of complete exclusion of such evidence):

(a) There is a need to protect the integrity of the judicial process. The government ought not to profit from its own lawless behaviour. Refusing to permit the court to become a party to police illegality contributes to the moral acceptability of judicial decisions. If the police engage in flagrant illegality in obtaining evidence against a burglar or a person in possession of drugs, the public may be outraged and lose some confidence in the judicial system if it permits the use of evidence collected in such a fashion. This position is represented by judgments of Mr. Justice Holmes and Mr. Justice Brandeis, both dissenting, in *Olmstead* v. *U.S.*[15] Mr. Justice Holmes observed:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained...I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.[16]

Mr. Justice Brandeis reasoned that the use of illegally obtained evidence

> is denied in order to maintain respect for law; in order to promote confidence in the administration of justice: in order to preserve the judicial process from contamination.[17]

The same point of view was expressed by Mr. Justice Spence, dissenting, in *The Queen* v. *Wray*. In defending an exclusionary rule he said

> I am most strongly of the opinion that it is the duty of every judge to guard against bringing the administration of justice into disrepute. That is a duty which lies upon him constantly and that is a duty which he must always keep firmly in mind. The proper discharge of this duty is one which, in the present day of almost riotous disregard for the administration of justice, is of paramount importance to the continued life of the state.[18]

These passages associate the courts with the governmental process as a whole, and it is a premise of their position that the public is unable to dissociate the courts from the rest of the government machinery for the detection, investigation and prosecution of crime.

(b) The exclusionary rule serves to educate people, including the police, as to the serious commitment which our society has to the proper and restrained

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[15] (1928) 277 U.S. 438.
[16] *Ibid.*, at p. 470.
[17] *Ibid.*, at p. 484.
[18] [1971] S.C.R. 272 at 304.

restrained exercise of power. Other rules of criminal procedure and evidence which shape the conduct of the criminal trial have a social effect in teaching people, including the police, about the proper exercise of power. Any rule which requires the admission of illegally obtained evidence runs the risk of teaching people, including the police, that society, including the courts, does not have such a serious commitment. The evidence which we have seen in R.C.M.P. documents and testimony supports this argument.

(c) A rule excluding illegally obtained evidence will deter the police from breaking the laws relating to search and seizure, unlawful arrest and imprisonment, and other unlawful investigative conduct. Is this true? Studies in the United States have come to differing conclusions as to the validity of this argument in practice. Here, no more need be said than that the case for the proposition that the exclusionary rule has a deterrent effect has been overstated. Reason tells us that there are grounds on which it may be unlikely that the exclusionary rule is an effective deterrent. The rule imposes no personal or financial penalty on the offending police officer; great delay may occur before the evidence is excluded at trial; the exclusionary rule cannot have a deterrent effect if the consequence of the illegal investigative conduct is not the production of evidence at trial. On the other hand, the existence of an exclusionary rule, or at least of a discretion to exclude illegally obtained evidence, will probably deter *some* police illegality: such a rule would be studied in police training and might result in the placing of increased emphasis on the importance of the laws of search and seizure, arrest and imprisonment; the existence of the rule or the discretion might assist a well-intentioned officer in resisting pressure from his colleagues and superiors to violate the law, and in persuading his colleagues and superiors that other investigative means should be attempted.

Our position

64. In our view, the law of Canada should, like that of Scotland and Australia, give the trial judge a discretion to exclude illegally and unfairly obtained evidence. It will be noted that we do *not* propose the adoption of the American rule requiring the absolute exclusion of all illegally obtained evidence. The Canadian rule should be discretionary rather than absolute, because:

(a) The state's commitment to due process would be seriously diluted if the court in the most serious of crimes were to exclude evidence that was obtained as a result of the most trivial breaches of the laws of search. Rather than demonstrating the commitment of the law to principle, such a result would confirm in the minds of many members of the public the commitment of the law to technicality and in their minds would bring the law into disrepute. Therefore, the protection of judicial integrity and encouraging confidence in the judicial system require a discretionary rather than an absolute rule.

(b) The rationale of deterrence ought logically to apply only to intentional breaches of the law. Generally, an absolute rule of exclusion fails to

distinguish between wilful and flagrant conduct on the part of the police on the one hand, and conscientious and careful police conduct undertaken in a difficult situation, on the other. An absolute rule fails to distinguish between errors of judgment that cause no harm and those that seriously violate fundamental values. An absolute rule fails to distinguish between a minor case such as shoplifting, and a grave case such as murder. Any rule that fails to discriminate between those different factual circumstances is too blunt an instrument to achieve any of its objectives, such as the preservation of judicial integrity and the deterrence of improper or illegal police conduct.

65. We do not believe that reliance upon a discretion will result in unequal application of the law, any more than the exercise of judicial discretion does in many other circumstances in which judges are given a discretion. Nor do we consider that delays caused by voir dires (a voir dire is a trial within a trial), in which the question of admissibility is decided, will result in significant lengthening of the judicial criminal calendar. For we have no reason to believe that the police forces in Canada, whether the R.C.M.P. or any other forces, engage frequently in illegal or unfair conduct that results in evidence being proferred by the prosecution in Court.

66. In its report in 1975, recommending the adoption of a code of evidence, the Law Reform Commission of Canada recommended that the code should include the following provision:

> 15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.
>
> (2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.[19]

The very brief commentary which accompanied the proposed code observed that the intent of the section "is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained...".[20]

67. We support the Law Reform Commission in recommending the adoption of this statutory provision, whether it is in a new code of evidence or by amendment to the Canada Evidence Act.

68. We would like to refer specifically to two of the factors which the Law Reform Commission's proposed section would require the Court to take into

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[19] Law Reform Commission of Canada, *Report on Evidence*, 1975, p. 22.
[20] *Ibid.*, at p. 62.

account. The first is the extent to which the violation was wilful and the police officer's ignorance inexcusable. We have already observed that, if one purpose of the rule is to deter illegal conduct by the police, it makes little sense to exclude the evidence if the officer's conduct was inadvertent. Moreover, if the officer's conduct was not culpable, the integrity of the court is not so much in jeopardy if the evidence is admitted. However, if only the wilfulness of the violation were to be considered, this would place a premium on the ignorance of the officer. Therefore, to ensure that police forces are motivated to train and educate officers adequately, the court should be required to consider whether the officer's ignorance was inexcusable. This would, we hope, have the effect, in the case of an inadvertent error, of requiring the judge to determine whether adequate police training procedures were undertaken.

69. The second is that the seriousness of the offence for which the accused is charged is a factor to be considered. An exclusionary rule that does not permit consideration of the seriousness of the crime produces a risk that dangerous offenders will more frequently be returned to the community and that the rule will be self-defeating. Instead of appreciating the moral purity of the court system and internalizing values of due process, citizens will see the system as the champion of errant technicality at the expense of other more humane values. Moreover, in terms of deterrents to police officers, it is in serious cases that it is most likely that alternatives to the exclusionary rule will be most effective.

70. We recognize, consequently, that the exclusionary discretion is likely to be exercised in favour of excluding the illegally obtained evidence in minor criminal cases. In serious criminal cases, such as murder, the trial judge is likely to admit the evidence.

71. This being so, if the system as a whole is to deter illegal and improper police conduct, the exclusionary discretion must be supplemented by other effective measures. The exclusionary discretion will not alone be a sufficient deterrent. Effective systems of training, discipline, complaint procedures and policy review must also be looked to. Conversely, we do not believe that proper training, disciplinary proceedings, complaint procedures and policy review will be enough, unless the police see that the rules applied by the courts as to the admissibility of evidence permit judicial scrutiny and sometimes condemnation of methods used.

WE RECOMMEND THAT the Criminal Code be amended to include the following provision:

(1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including:

(a) the extent to which human dignity and social values were breached in obtaining the evidence;

(b) whether any harm was inflicted on the accused or others;

(c) whether any improper or illegal act under (a) or (b) was done wilfully or in a manner that demonstrated an inexcusable ignorance of the law;

(d) the seriousness of any breach of the law in obtaining the evidence as compared with the seriousness of the offence with which the accused is charged;

(e) whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

(283)

Agents provocateurs and entrapment

72. It is undesirable to discuss and make recommendations about illegally obtained evidence without at the same time considering the use by police forces of *agents provocateurs* and the subject of entrapment. These subjects all raise the issue of the extent to which the courts should have a role in attempting to discourage illegal or improper police tactics.

73. We have already explained that there is a tendency in the R.C.M.P. to regard the present Canadian law that relevant evidence is admissible even if illegally obtained as an indication that Canadian judges do not disapprove of using unlawful means to obtain evidence. As for the use of *agents provocateurs*, since Canadian law does not recognize a defence of entrapment or exclude evidence obtained as a result of the instigation by the police of criminal conduct by another person, there has undoubtedly been, at least in the R.C.M.P., a failure on the part of the police to analyze whether some customary police practices are unlawful. Since the rules applied by the courts attach no significance to "entrapment", there has been, naturally, little incentive within the R.C.M.P. to consider the lawfulness of these practices.

74. There is confusion in the terminology of entrapment and *agents provocateurs*. The most common definition of an *agent provocateur* is that by his words and conduct he instigates an act by another that the other would not otherwise have committed in the sense that he had no pre-existing intention generally to commit that sort of act. It may be said that the conduct of the *agent provocateur* is "entrapment".

75. Sometimes the two phrases are used to describe a situation in which the other person had the general intention to commit such acts and the *agent provocateur* by his words or conduct has done no more than help to cause him to commit a crime by providing him with an opportunity, by passively acceding to the accused's suggestions or by exposing him to temptation. This situation at first sight seems remote from the first but in practice it is difficult to distinguish the two.

76. In Canada and England, in neither case does such conduct by the agent — an undercover policeman or an informer — affect the admissibility in law of the evidence of the act committed by the other person. Thus, for example, in neither case will the court exclude the agent's evidence that the accused has

sold him a narcotic. Such evidence is very common in prosecutions for trafficking in narcotics or in substances under the Food and Drug Act.

77. In the United States, however, the accused has a complete defence to the charge in the first situation. Critics of the English/Canadian rule propose that the American rule be adopted.

78. There is no question that in England and in Canada the first situation is deplored, even if the disapproval has not resulted in a rule excluding the evidence resulting from it. In 1977, Chief Justice Laskin, of the Supreme Court of Canada, said in *Kirzner* v. *The Queen.*

> The problem which has caused judicial concern is the one which arises from the police-instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught.[21]

79. The Supreme Court of Canada has not yet, as a court, held as a reason for decision in any case, that entrapment is, or is not a defence to a charge. However, members of that court have considered the question. In *Lemieux* v. *The Queen* Mr. Justice Judson, delivering the judgment of the court, said:

> Had Lemieux in fact committed the offence with which he was charged, the circumstances that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence.[22]

However, this statement was not essential to the decision, so that the question could be said to remain open. The members of the Supreme Court of Canada in *Kirzner* v. *The Queen* considered that it was not necessary to decide whether there is a defence of entrapment because the evidence did not show a "police-concocted plan to ensnare him going beyond mere solicitation".[23] But the Ontario Court of Appeal, in that case, had held that the defence of entrapment is not available.

80. In England, the Court of Appeal has held in a number of cases that the defence of entrapment does not exist in English law.[24] In *Regina* v. *Mealey and Sheridan*,[25] in 1974, Lord Chief Justice Widgery stated:

> If one looks at the authorities, it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be

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[21] (1977) 38 C.C.C. (2d) 131, at p. 136.

[22] [1968] 1 C.C.C. 187 at p. 190.

[23] (1977) 38 C.C.C. (2d) 131, at p. 142, per Mr. Justice Pigeon. Chief Justice Laskin preferred "to leave open the question whether entrapment, if establishment, should operate as a defence".

[24] e.g. in *R.* v. *Sang* [1979] 2 W.L.R. 439 at p. 444; *R.* v. *Mealey and Sheridan* (1974) 60 Crim.App.R. 59; *R.* v. *McEvilly* (1973) 60 Cp.App.R. 150.

[25] (1974) 60 Crim.App.R. 59 at 62.

> described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty.

He also stated that policemen

> must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all.

81. Now the highest court in England, the House of Lords, in *Regina* v. *Sang*,[26] in 1979, has assumed that the defence does not exist. Although the point was not, in fact, argued before the House of Lords, the judgments used sufficiently conclusive language that it would now require legislation to bring the defence into English law. Lord Diplock, for example, stated that "the decisions... that there is no defence of 'entrapment' known to English law are clearly right".[27] A Court of Appeal decision even more recent than the judgment of the House of Lords in *Sang* stated: "It has now been established beyond possibility of further argument that the doctrine of entrapment, as it is sometimes called, is not known to the English law".[28]

82. In both England[29] and Canada,[30] even if entrapment is not a defence, it may result in a reduced sentence. As we have seen, in *R.* v. *Mealey and Sheridan*, Lord Chief Justice Widgery said that it "may be an important matter in regard to sentence".[31] In England, entrapment may result in the granting of an absolute discharge in appropriate cases.[32] However, Canadian courts cannot grant an absolute or conditional discharge in cases where there is a minimum punishment prescribed by law or the possible penalty is 14 years or more.[33] Thus, entrapment could not result in a discharge in narcotics trafficking cases, where the sentence may be life, or wherever there is a minimum sentence such as seven years for importing a narcotic.[34]

83. It is not necessary that we analyze the arguments that might be advanced, based on section 7(3) of the Criminal Code or the concept of due process, in the hope of persuading a Canadian court to accept the defence. Suffice it to say that it is unlikely that the defence will be developed judicially

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[26] [1979] 3 W.L.R. 263.

[27] *Ibid.*, at p. 267. Similar statements were made by the other Law Lords: Viscount Dilhorne at p. 276; Lord Salmon, at p. 277; Lord Fraser of Tullybelton, at p. 280; and Lord Scarman, at p. 285.

[28] *R.* v. *Underhill*, July 27, 1979.

[29] *Browning* v. *Watson* [1953] 1 W.L.R. 1172 (Div. Ct.); *R.* v. *Birtles* (1969) 53 Cr.App.R. 469 (C.A.); *R.* v. *McGavin* (1972) 56 Cr.App.R. 359 (C.A.); *R.* v. *Sang* [1979] 3 W.L.R. 263 (H.L.); *R.* v. *Underhill*, July 27, 1979.

[30] *R.* v. *Steinberg* [1967] 3 C.C.C. 48 (Ont. C.A.); *R.* v. *Price* (1970) 12 C.R.N.S. 131 (Ont. C.A.); *R.* v. *Chernecki* [1971] 4 C.C.C. (2d) 556 (B.C.C.A.); *R.* v. *Kirzner* (1976) 32 C.C.C. (2d) 76 (Ont. C.A.).

[31] (1974) 60 Crim.App.R. 59 at 62.

[32] e.g. *Browning* v. *Watson* [1953] 1 W.L.R. 1172.

[33] Criminal Code, section 662.1(1).

[34] Narcotic Control Act, R.S.C. 1970, ch.N-1, s.4(3).

in Canada. It is also unlikely that the courts in Canada, in the light of decisions of the Supreme Court of Canada on the subject, will use the concept of abuse of process to bar a prosecution because of improper entrapment.[35] It is also unlikely that Canadian judges would follow New Zealand cases[36] or pre-*Sang* English cases[37] in which, although entrapment was not recognized as a defence, the evidence obtained as a result of the entrapment was excluded. In *R.* v. *Sang*, the Law Lords considered that to reject evidence on this ground would be, in effect, to bring the defence in through the back door. This, their Lordships said, "does not bear examination" and would be "inconceivable", "remarkable" and "odd".[38]

84. If there were, as we recommend, a limited discretion to exclude evidence illegally or improperly obtained, would it be applicable to the entrapment situation and thus be a sound technique for preventing those forms of entrapment that are objectionable? Probably not. It is true that, in the typical case, the act of the accused was instigated by the undercover policeman and consequently the policeman is a party to the offence or abetted it. So the policeman's evidence was obtained as a result of conduct on his part which was probably unlawful in that, quite apart from any liability for a substantive offence such as "trafficking" by purchase of drugs, he might be guilty of an offence because of his "counselling or procuring" as defined in section 22 of the Criminal Code. Even if his evidence were excluded on that ground, the rule might not permit exclusion of the evidence of another policeman to whom the accused has admitted the facts, or of another person who happened to be present at the time of the crime but was not a party to the instigation. These distinctions are unwarranted.

85. It must be borne in mind that there are some situations in which the conduct of a policeman will result in acquittal of the accused even if there is no defence of entrapment:

(a) In some cases, the conduct of the policeman may result in an element of the offence being absent so that the accused will be acquitted without resort to the notion of entrapment. For example, the physical act of possessing stolen goods will be missing if the police have passed the stolen goods to the accused, because the police involvement may mean that they are no longer considered "stolen".[39] There will not be the physical act of breaking and entering if the owner has really, unbeknown to the accused, consented to the entry as part of his co-operation with the police.[40] In the case of treason, the enemy may not actually have been assisted.[41]

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[35] *R.* v. *Osborn* [1971] S.C.R. 184; *R.* v. *Rouke* [1978] 1 S.C.R. 1021.

[36] *R.* v. *Pethig* [1977] 1 N.Z.L.R. 448 (S.C.); *R.* v. *Capner* [1975] 1 N.Z.L.R. 411 (C.A.).

[37] Several cases in the earlier 1970s are cited in *R.* v. *Sang* [1979] 3 W.L.R. 263.

[38] [1979] 3 W.L.R. 263, at 267, 277, 280 and 276.

[39] See, e.g., *Haughton* v. *Smith* [1975] A.C. 476, and *Booth*, v. *State of Oklahoma* (1964) 398 P. 2d 863 (C.C.A., Okla.).

[40] *Lemieux* v. *The Queen* [1968] 1 C.C.C. 187 (S. Ct. Can.).

[41] *R.* v. *Snyder* (1915) 24 C.C.C. 101 (Ont. C.A.).

(b) There are other, but not many, isolated instances where traditional concepts might make a defence available to an accused without resorting to the notion of entrapment. For example, an assurance by a peace officer that the proposed conduct is not illegal might enable the accused to raise a mistake of law defence,[42] particularly if the peace officer acts openly as a peace officer. The American Model Penal Code specifically deals with this in the entrapment section, providing a defence if the police make "knowingly false representations designed to induce the belief that such conduct is not prohibited".[43] And there may be cases where the police tactics are so excessive that they can amount to duress.

86. We think that it is unacceptable that a police force should be tacitly encouraged by the law to tolerate instigation by its members of crime by others when that instigation goes well beyond mere solicitation. If members of the R.C.M.P. engage in such conduct, we think that it is not surprising if they should regard such conduct as being tolerated by the courts and thus implicitly approved of: as the record shows, the same reasoning applies, in the minds of at least some members of the R.C.M.P. to illegal methods of obtaining evidence. Moreover, it would seem that entrapment cannot be the basis of a civil action for damages against the police, so such alternative means of discouraging such conduct are not available and the ability to establish criminal liability would, in most cases, be doubtful. Therefore, in our opinion, some mechanism should be available to the courts to register clear disapproval of such conduct in appropriate cases.

87. As we have pointed out, the discretion to exclude illegally or improperly obtained evidence is unlikely to provide a strong enough sanction against the use of evidence obtained by *agents provocateurs*. What is required is the establishment of either a criminal offence of entrapment or a defence of entrapment which, if established, would result in the acquittal of the accused. Our concern with using a new statutory offence of entrapment is that it would probably rarely be used and it would not give the required guidance to the police. Therefore, we opt for the latter alternative: a defence of entrapment.

88. The burden of proof of the defence should rest upon the accused. The accused should be required to give notice to the Crown before trial that he intends to raise the defence, so that the prosecution will not be taken by surprise.

89. The test of the availability of the defence should be subjective, according to some advocates of the defence, including the Canadian Committee on Corrections. Its Report recommended that legislation be enacted to provide:

(a) That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer or agent of a law enforcement officer, for the

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[42] See Friedland, *National Security: the Legal Dimensions*, Department of Supply and Services, 1980, at p. 101 et seq. This was a background study published by the Commission.

[43] Section 213(1)(a).

purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.

(b) Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.

(c) The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life.[44]

However, other proponents of the entrapment defence have preferred an objective test that requires proof not that the accused lacked pre-existing intention to commit the offence, but that there was police conduct of an importuning nature, or, as has been stated by many observers in the United States, the test should be "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power".[45] Only the latter test, it is argued, will discourage unacceptable police conduct. We see no reason why the objective and subjective tests should not be combined so that the police conduct and the accused's pre-existing intent would both be factors in determining whether a defence should apply. It is the combination of the two factors that make it unjust to convict in any particular case. Society should allow the police very little scope for entrapping the person who lacks a pre-existing intent, but substantially more scope in the case of the person who has a pre-existing intent. The test should reflect that the propriety of police conduct will vary from case to case depending on the crime charged and the accused's prior intent to engage in the activity.

90. It is the balancing of these interests, by the trier of fact, which is permitted by the availability of such a defence. Mere difficulty in application ought to be no reason for rejecting the proposal for such a defence. Society, represented by the jury, must frequently grapple with difficult legal concepts that are designed to reflect the need, in a particular case, to strike a fair balance between competing social interests.

91. We therefore propose that there be a statutory defence of entrapment, embodying the following principle:

> The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable, having regard to all the circum-

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[44] Report of the Canadian Committee on Corrections, 1969, pp. 79-80. The subjective test was adopted by the Supreme Court of the United States in *Sorrells* v. *U.S.* (1932) 287 U.S. 435 at 442, *Sherman* v. *U.S.* (1958) 356 U.S. 369, *United States* v. *Russell* (1973) 411 U.S. 423, and *Hampton* v. *U.S.* (1976) 425 U.S. 484.

[45] *Sherman* v. *United States* (1958) 356 U.S. 369 at p. 382, per Frankfurther, J. (dissenting), quoted in *United States* v. *Russell*, at p. 441, per Stewart, J.

stances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police.

92. In addition to the provision of a statutory defence, we think that the Commissioner of the R.C.M.P. should issue guidelines relating to informers and instigation, and these should be made public. Such guidelines have been issued and made public in England and the United States.[46] The guidelines should be approved by the Solicitor General. Breach of the guidelines should be regarded as a disciplinary offence. These guidelines should direct that "no member of a police force, and no police informant, counsel, incite or procure the commission of a crime".[47] This aspect of the guidelines has been discussed in Part V, Chapter 4 in relation to the use of informants by the security intelligence agency. On the issue now under discussion, they should require that the undercover policeman have reasonable grounds to believe that the person instigated had been engaged in similar conduct in the past. However, the guidelines cannot be too specific, for otherwise criminals will be able to test persons they are dealing with in the light of known detailed police procedures.

WE RECOMMEND THAT the Criminal Code be amended to include a defence of entrapment embodying the following principle:

The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable having regard to all the circumstances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police.

(284)

WE RECOMMEND THAT the administrative guidelines concerning the use of undercover operatives in criminal investigations which we recommended earlier be established by the R.C.M.P., include a direction that no member of the R.C.M.P. and no agent of the R.C.M.P. counsel, incite or procure an unlawful act.

(285)

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[46] In England, the Home Office circular is reproduced in Appendix 4 to the Law Commission's Report No. 83, Report on Defences of General Application, 1977. See also (1969) New L.J. 513, referred to with approval in *R.* v. *Mealley and Sheridan* (1974) 60 Crim.App.R. 59 at 64. In the United States, guidelines for the F.B.I. were issued in a memorandum by the Attorney General, Edward H. Levi, to the Director of the F.B.I., dated December 15, 1976.

[47] Quoting the British Home Office Circular to the Police on Crime and Criminal matters, *supra*, p. 46.

CONCLUSION TO THE REPORT

1. In this Second Report we have attempted to state our views as to the many policy issues that have come before us, and as to those legal issues which can be discussed without going into the facts of specific cases. Throughout, we have tried to develop recommendations for the future that are workable and practical and reflect the principles we stated at the beginning of the Report. We developed many of our recommendations in considerable detail. We did so, believing that we would be derelict in our duty if we left the development of detail in certain areas principally to the executive arm of government. Most of the persons who will be responsible for implementation will not have had the same opportunity as we to be immersed in the subject. Those who have been so immersed will likely be still active in the world of security intelligence or police work, and, while able to fill in detail, may not always have a detached perspective on these matters. In instances where those considerations did not apply, we have provided less detail and fewer concrete recommendations but even there we have tried to state in some depth the general principles which we think should be applied.

2. This Report has been written in a manner that will allow it to be published with few deletions. We recognize that there are some passages that will properly be deleted on the ground that their publication would, or might, prejudice the security of Canada, damage the privacy of individuals, or damage some other legitimate public interest. We believe that the excision of the limited number of passages that in our opinion is likely to be necessary will not impair the ability of Parliament and the public to understand our recommendations and the reasons for them.

3. We have entitled this Second Report "Freedom and Security under the Law". While we recognize that for a subject of this magnitude and complexity no title could fully express the whole message, we consider that three words are essential, and are at the heart of our considerations: Freedom, Security and Law.

4. Freedom and security are fundamentals to the preservation of the democratic process. They are interdependent, for without security freedom is imperilled, and without freedom the attainment of security will be to no avail. In striving for security we expect that our security intelligence agency and our police service will not only be effective in doing so but also will respect the rights of citizens.

5. Throughout this Report we have been uncompromising in our insistence on obedience to the law by members of our national police force and our security intelligence agency. Thus we have insisted that adherence to the Rule of Law is inseparable from attempts to attain the objectives of freedom and security. Without the Rule of Law, we do not believe that freedom and security can be obtained.

6. As we approach the end of this long and difficult inquiry we do not regret having sought to meet a profound challenge: how to assure the people of Canada that the functioning of their police force and their security intelligence agency will result in freedom and security, under policies and procedures provided for by law. We hope that our recommendations will enhance the *freedom and security of the people of Canada under the law.*

ANNEX I

ACCESS TO MEDICAL INFORMATION

1. At several places in this Report we stated that we would refrain from making recommendations with regard to the security intelligence agency's or the R.C.M.P.'s access to confidential medical information until we had the benefit of considering the findings and recommendations of the Ontario Commission of Inquiry into the Confidentiality of Health Information conducted by Mr. Justice Horace Krever. The Report of that Commission has recently been released and we can now put forward our views on the subject in the light of it.

The security intelligence agency

2. Mr. Justice Krever has found that the R.C.M.P. Security Service obtained medical information from Ontario Health Insurance Plan (O.H.I.P.) offices, hospitals and physicians in Ontario in a manner not authorized or provided for by law. He also reports instances in which the Security Service used medical information improperly (see especially, Vol. II, pp. 14-19 and 38-48). While he considers that there are law enforcement purposes which justify changing the laws of Ontario to provide the police greater access under law to medical information, he does not discuss the need for a security intelligence agency to have such access, nor does he make specific recommendations in this regard. However, because of his concern that medical evidence obtained for legitimate law enforcement purposes may be misused by the Security Service for disruptive or other improper purposes, and because of the inability of provincial authorities "... of following up and checking on..." how the R.C.M.P. uses medical information, he states that consideration should be given to allowing the R.C.M.P. access to provincially maintained health information for acceptable police purposes "only if the R.C.M.P. by federal-provincial agreement or otherwise, were first made accountable to a provincial authority for the information it was entitled to have". He further states that:

> One would want to reconsider this position if, in time, the security service responsibilities were removed from the R.C.M.P. and entrusted to a separate organization or agency, leaving the force with its conventional police role.
>
> (Vol. II, p. 48.)

3. In Part V, Chapter 4, we take the position that the security intelligence agency's access to confidential information held by provincial governments or private sources must be accomplished through lawful means. Further, in Part V, Chapter 6, we have recommended that the security intelligence agency should have no mandate to carry out disruptive activities of domestic political groups including activities involving the dissemination of medical information

such as occurred in the Riddell episode. We have also recommended in Part VII, which is concerned with security screening, that the function of obtaining information concerning an applicant's personal background, including any medical information, be transferred to security staffing officers in the Public Service Commission or government departments and that such information be sought only with the applicant's permission. Still, questions arise from the Krever Report, which we must address: is there a need to obtain amendments in provincial laws to permit the security intelligence agency to have access to confidential medical information, and, if there is, what arrangements should be made with the provinces to facilitate access?

4. On the question of need for access we should distinguish the three different kinds of information with respect to which the Krever Report makes recommendations:

(a) O.H.I.P. enrolment information — i.e. simple biographical information.

(b) O.H.I.P. medical records.

(c) Medical information held by physicians and hospitals.

As we noted in Part V, Chapter 4, the need to obtain the first kind of information, simple biographical information, from other sources may be greatly reduced if the legal barriers to obtaining such information from federal government data banks are altered in the ways we have recommended in that part of our Report. As we further noted, our recommendations on security screening procedures should remove any need to arrange security intelligence access to medical records for screening purposes. However, as we pointed out in Part V, Chapter 4, there may be a very real need for the security intelligence agency to have access to detailed medical information falling under either the second or third categories listed above, to enable it to carry out important counter-intelligence or counter-terrorist investigations. The Solicitor General should review this need with the security intelligence agency and, if he is convinced that the need exists, meet with appropriate officials of those provinces whose laws do not permit access for security purposes with a view to obtaining support for legislative changes which would allow access.

5. As to the arrangements which might be appropriate, we make several suggestions, based on the assumption that the concerns expressed and the solutions proposed in the Krever Report may apply to other provinces in addition to Ontario. First, we think that the changes in the mandate, management, structure and control of the national security intelligence agency which we have called for in this Report would provide much better assurance to provincial governments that medical information obtained by the federal security agency would be used for lawful and proper security purposes. Even with these changes, provincial authorities may wish to establish some way of participating in the review of security intelligence activities involving the use of provincially maintained and protected health information. If so, consideration should be given to employing the mechanism that, in Part V, Chapter 8, we recommended should be available to review decisions as to the disclosure to provincial attorneys general of criminal activities of members or agents of the

security intelligence agency. That mechanism would involve provincially nominated persons in the monitoring activites of the independent review body (the Advisory Council on Security and Intelligence). If this were done, we think it would be appropriate for provincial representatives on A.C.S.I. to be empowered to report any misuse of medical information to appropriate provincial authorities. In putting this proposal forward we are cognisant of the possibility that when arrangements of this kind are being considered, federal authorities may well wish to work out reciprocal arrangements which afford the federal government assurance that confidential information requested by provincial organizations from the security intelligence agency (or from the R.C.M.P.) is also used for legitimate and proper purposes.

6. One further issue that must be considered is the appropriateness for a security intelligence agency of Mr. Justice Krever's recommendations concerning police access to medical information. With regard to O.H.I.P. health information, he recommends

> 17. That no employee of O.H.I.P. be permitted to release health information to any police force without a search warrant. The district manager of O.H.I.P. or a person designated by him or her in writing at a district or satellite office should, however, be permitted to answer, yes or no, to the question of any police officer whether O.H.I.P. has specific health information about a named person.
>
> (Vol. II, p. 69.)

The approach contained in the recommendation would not serve the needs of the security intelligence agency, for two reasons. First, under sections 443 and 445 of the Criminal Code, a person or peace officer who is issued a search warrant must, after conducting the search and seizure, carry anything he has seized "... before [a] justice... to be dealt with by [the justice] according to law". Such a requirement, we believe, is inappropriate for a security intelligence agency, except in those rare cases where a prosecution is anticipated. Secondly, the requirements of section 443 of the Criminal Code with regard to reasonable belief about a specific crime are, for reasons we have fully set out in section F of Part V, Chapter 4, not likely to be met in many security intelligence investigations. Therefore, in place of Mr. Justice Krever's recommendation, we propose that access to provincial insurance health records by the security intelligence agency require that a judicial warrant be obtained on the conditions we have set out in Part V and which are contained in the proposed legislation at the end of that Part. Legislatively, this could be accomplished by the inclusion of an "opting in" provision for the provinces in the federal legislation.

7. The Krever Report also recommends that provincial laws forbidding doctors and hospital officials to disclose confidential information to the police without the patient's consent be modified so that such persons may do so without the patient's consent, if there is

> reasonable cause to believe that a patient is in such mental or emotional condition as to be dangerous to himself or the person of another or others and that disclosure of the information... is necessary to prevent the threatened danger.

He further recommends that senior hospital officials or doctors should be permitted to inform the police when they believe on reasonable grounds that a patient is a perpetrator or victim of a crime (Vol. II, pp. 93-4). These recommendations again, because they refer exclusively to the police and law enforcement concerns, may be too narrowly cast to allow the security intelligence agency to benefit from them. We think it quite likely that doctors and hospital employees may have information about terrorist or espionage threats vital to the security intelligence agency and, if this is so, the Solicitor General should endeavour to obtain the support of provincial authorities for a widening of legislative amendments to permit disclosure by doctors and senior hospital officials to the security intelligence agency (subject to conditions and controls such as those proposed in the Krever Report).

R.C.M.P. — Criminal Investigation Branch

8. The Krever Report also finds that the R.C.M.P. and provincial police forces have had access to medical information in a manner not authorized or provided for by law. The recommendations of that Report referred to above are designed to provide the police with greater access to medical information than Ontario law has permitted in the past. We have already noted Mr. Justice Krever's reservations about extending such access to the R.C.M.P.

9. We believe that our recommendations for separating the Security Service from the R.C.M.P. ought to allay the concern that if the R.C.M.P. are given access to medical information similar to that which is proposed for provincial police, the R.C.M.P. may give information to its Security Service which might use it for an improper purpose. Even if this particular concern is overcome, Ontario or other provinces might nevertheless wish to have some way of ensuring that confidential medical information is not misused by the R.C.M.P. in criminal investigations. If that is the case, we suggest that the Office of Inspector of Police Practices be used to monitor R.C.M.P. use of such information. When carrying out an audit for this purpose, the Inspector of Police Practices might use investigators seconded from provincial police forces or provincial government departments, and any misuse of information which is discovered could be reported to provincial authorities. We suggest that the Solicitor General discuss an arrangement of this kind with those provinces which have laws barring police access to the types of medical information which are of vital importance to the R.C.M.P.'s criminal investigation responsibilities.

MINORITY REPORT OF THE CHAIRMAN

Re: Part VII, Chapter 3

The last two sentences of paragraph 22 read as follows:

> However, we believe that what we earlier referred to as "revolutionary subversion" should be included in the citizenship rejection criteria. We would like to make it clear that, with regard to this criterion, the applicant should be judged on his merits rather than being judged by label alone.

That is the view of the majority. I am not convinced that it is necessary or desirable, in order to protect the security of Canada, to refuse to grant a person Canadian citizenship solely on the basis that he preaches violent overthrow of the government and may even proselytize others to his point of view. (I distinguish, of course, the person who in fact uses violence to achieve political ends.) I do not consider that my experience as a Commissioner enables me to arrive at a proper conclusion on this question. Both the Government and Parliament should address this issue when dealing with the recommendations in our Report.

MINORITY REPORT OF COMMISSIONER GILBERT

1. With due respect for the opinion expressed by my co-Commissioners, I wish to submit my own views and recommendations concerning an application of the War Measures Act, which is designed to be used in cases of national emergency. I shall not repeat here all the paragraphs of this report which will be affected by my remarks. Unless express mention is made in this minority report or unless there is an obvious incompatibility between my views and those expressed by my co-Commissioners, I subscribe fully to the tenor of the Chapter entitled "National Emergencies".

A. *The Scope of the War Measures Act*

2. The Chairman and Commissioner Rickerd have opted in favour of the continuation of this Act in its present form in so far as its scope is concerned. It should, they feel, grant to the executive the power to make regulations in the event of war, invasion or insurrection, real or apprehended. They consider that our country requires such an instrument to enable the restoration of order in cases of emergency. However, because they are concerned about abuses that might arise out of such legislation, they propose changes in its application. I shall consider the question of application later. First I want to set out my dissenting views with regard to the scope of the War Measures Act. In my opinion this legislation should only be applicable in cases of war and invasion, real or apprehended, as is provided in the corresponding British legislation, the Defence of the Realm Act. My reasons for taking this position follow.

3. It seems to me that a threat to established order made by an aggressor from outside the country is fundamentally different from a threat made by a group of citizens who rise up against the government, either to destroy it or to force a change of certain established policies. In the first case the aggressor has no right to interfere in the affairs of our government, while in the second, even if they are wrong in the methods they employ, it is citizens of the country who are expressing their disapproval.

4. Movements of insurrection act beyond the limits of legitimate dissent. But in practice, the clandestine nature of such movements can make it difficult to discover whether these activities are illegal and whether or not in a given situation in which violence is carried out, that violence was the expression of the insurrectional intent. We stated at the beginning of this Report that the right to legitimate dissent is one of the three values which must not be compromised by a true democracy (the other two values being responsible government and the rule of law). We would be well advised to bear in mind that the line is often narrow between what constitutes the expression of

legitimate dissent — a positive element essential to the health of a true democracy — and actual insurrection, which is an uprising by force and violence against the established authority.

5. Because insurrection and dissent are both expressed through confrontation with existing authority, such actions leave themselves open to abuse by that authority. In either case the existing authority tends to react against the aggressor by adopting a posture of self-justification. To sum up, it is not unfair to say that the existing authority is both party and judge in its confrontation with the dissenter, whether he be legitimate or insurrectional. It must be recognized that such a situation easily lends itself to vengeance and to the abuse of power.

6. To this point, I have examined the War Measures Act as a tool enabling the executive to act quickly to counter *surprise* aggression. By virtue of the Act, the Cabinet can legislate, without reference to Parliament, a proclamation being, by itself, conclusive proof of a state of war, invasion or insurrection, real or apprehended. While this element of surprise is appropriate for the idea of foreign aggression, as in an act of war or invasion, it is not compatible with the idea of insurrection, let alone apprehended insurrection. Since its passage on August 21, 1914, the War Measures Act has been used twice in cases of war and once to counter an apprehended insurrection. I do not wish to deal in any way here with the reasons for the government's recourse to the War Measures Act in 1970. But the history of the October Crisis provides an instance in which the aggressor was known for a number of years before the outbreak of the Crisis itself in the autumn of 1970. Insurrectional movements are not surprise movements by nature, as acts of war and invasion can be. On the contrary, insurrections take a long time to develop before they erupt with force and violence. Simply stated, a good government will be able to anticipate revolutionary movements, especially if it makes use of the intelligence provided to it by a well-informed national security service.

7. Thus, I conclude that the War Measures Act has a definite function in maintaining peace, security, order and good government. However, I feel that in a true democracy this function should be exercised only with respect to acts of war and invasion. In cases of insurrection, it seems to me that Parliament should be the instrument with the responsibility for adopting the legislation required in a given case. I therefore recommend that the War Measures Act be amended to apply only to cases of real or apprehended war or invasion.

8. It goes without saying that since my first recommendation is that the War Measures Act apply only to war or invasion, the severity of its implementing provisions is not as important a question as it would be if it applied also to internal insurrectional movements. Aggressive acts by foreign countries or foreign groups must be met on a war footing. Certainly, the government does not owe the same degree of respect for the rights of such aggressors as it does for its own citizens. It is appropriate, therefore, that the War Measures Act, when applied to a situation of war or invasion, should be severe; unfortunately, the rules of war require this. War has its own rules, and far be it from me to discuss here, even to a limited extent, how a country should make war.

B. *Application of the War Measures Act*

9. In the event that my recommendation on the scope of the War Measures Act is not accepted, I wish to consider certain provisions which I feel should be applied only in cases of real or apprehended insurrection. What follows applies only to such situations.

The framework of the regulations

10. Section 3 of the Act sets out the framework within which the executive may, after a proclamation, adopt regulations. Common sense dictates that such a framework should exist. It must be remembered, however, that when the executive is granted legislative power, the government acquires the power to make illegal all sorts of situations which otherwise would be legal. It is therefore especially important that such measures be specific and of short duration, but above all it is essential to orderly democratic process that they be submitted to Parliament within the shortest possible time. I am satisfied with our recommendation that a proclamation by the Governor in Council should be debated by Parliament immediately if Parliament is in session and within seven days if it is not. It should be necessary, however, that within that same period Parliament approve the regulations adopted by the executive, failing which the regulations should lapse.

Penalty for breach of regulations

11. Section 4 of the Act provides that violations of the regulations may be punished by fines of up to $5,000.00 or imprisonment not exceeding five years, or both. This provision is abusive. In England, the corresponding Act, the Defence of the Realm Act, provides for a maximum imprisonment of three months for breach of the regulations. Why five years in Canada? Some claim that the defence, peace, order, well-being and security of the country require nothing less. But in reply to that argument it must be borne in mind that the purpose of these regulations and the penalties for violation of them is not to supplant the penalties laid down in other laws, particularly the Criminal Code. Therefore, if in breaching a regulation adopted under the War Measures Act a person also commits another offence already provided for in the Criminal Code — for example, espionage — the penalties applying to that offence remain. I therefore recommend that the penalty attaching to the breach of a regulation under the War Measures Act be re-evaluated in the light of England's Defence of the Realm Act.

Duration of detention without charge

12. Presently, the law does not specify how long a person whom the police allege has breached regulations can be detained before a charge is laid. The regulations adopted during the October Crisis of 1970 provided for detention up to seven days without charge, with ministerial power to extend this period an additional 21 days. In the present structure of the Act there is a definite potential for abuse. In principle, no person should be arrested without being charged, so that he may know why he is being deprived of his liberty and take the necessary steps to regain it. I can see why, in a state of national emergency,

this principle should give way if the collective good requires concerted and rapid action on the part of the police, but it would be unjust, harmful and abusive to allow the police to make mass arrests and to take whatever time is required subsequently to sort out the real suspects. The period, in a national emergency, during which a person can be detained without charge should be stipulated by law, not by regulation. Since it can be presumed that in a given case an arrest would only take place after there has been a certain amount of proof that the regulations have been breached, the charge should be laid no longer than 48 hours after arrest. Here it must be remembered that when a crisis occurs, arrests are often more numerous and consequently the police would be better able to serve the ends of justice if allowed a short period of time between arrest and charge. I recommend that this period be 48 hours and that it be provided for in the Act itself.

SUMMARY OF RECOMMENDATIONS

1. WE RECOMMEND THAT legislation establishing Canada's security intelligence agency designate the general categories of activity constituting threats to the security of Canada in relation to which the security intelligence agency is authorized to collect, analyze and report intelligence.

2. WE RECOMMEND THAT the categories of activity to be so designated be as follows:

   (a) activities directed to or in support of the commission of acts of espionage or sabotage (espionage and sabotage to be given the meaning of the offences defined in sections 46(2)(b) and 52 of the Criminal Code and section 3 of the Official Secrets Act);

   (b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of any foreign (including Commonwealth) power in Canada to promote the interests of a foreign power;

   (c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;

   (d) revolutionary subversion, meaning activities directed towards or intended ultimately to lead to the destruction or overthrow of the democratic system of government in Canada.

3. WE RECOMMEND THAT, for category (d), revolutionary subversion, only non-intrusive techniques be used to collect information about individuals or groups whose known and suspected activities are confined to this category.

4. WE RECOMMEND THAT the legislation establishing Canada's security intelligence agency contain a clause indicating that the agency's work should be limited to what is strictly necessary for the purpose of protecting the security of Canada and that the security intelligence agency should not investigate any person or group solely on the basis of that person's or group's participation in lawful advocacy, protest or dissent.

5. WE RECOMMEND THAT all intelligence collection tasks assigned to the security intelligence agency by the government be consistent with the statutory definition of the security intelligence agency's mandate and that all legislation and regulations providing special powers or exemptions for security purposes be consistent with the definition of threats to

the security of Canada in the legislation establishing the security intelligence agency.

6. WE RECOMMEND THAT there be a provision to extend by Order-in-Council in emergency circumstances the mandate of the security intelligence agency to a category of activity not included in the agency's statutory mandate, providing that the Joint Parliamentary Committee on Security and Intelligence is notified on a confidential basis when the Order-in-Council is passed and that within 60 days of its passage the Order-in-Council is approved by an affirmative resolution of both Houses of Parliament.

7. WE RECOMMEND THAT a system for controlling the collection of information by the security intelligence agency be established which distinguishes three levels of investigation.

8. WE RECOMMEND THAT investigations at the first two levels be regulated by administrative guidelines developed by the security intelligence agency and approved by the Solicitor General.

9. WE RECOMMEND THAT the statute governing the security intelligence agency require ministerial approval for full investigations, indicate the techniques of collection that may be used in a full investigation and stipulate that a full investigation be undertaken only if

   (a) there is evidence that makes it reasonable to believe that an individual or group is participating in an activity which falls within categories of activities (a) to (c) identified, in the statute governing the security intelligence agency, as threats to the security of Canada; and

   (b) the activity represents a present or probable threat to the security of Canada of sufficiently serious proportions to justify encroachments on individual privacy or actions which may adversely affect the exercise of human rights and fundamental freedoms as recognized and declared in Part I of the Canadian Bill of Rights; and

   (c) less intrusive techniques of investigation are unlikely to succeed, or have been tried and have been found to be inadequate to produce the information needed to conclude the investigation, or the urgency of the matter makes it impractical to use other investigative techniques.

10. WE RECOMMEND THAT the security intelligence agency and the Solicitor General should move as quickly as possible to apply this system of controls to all security intelligence investigations which are underway at the time this new system of controls is introduced.

11. WE RECOMMEND THAT, with the exception of administrative and source files, the security intelligence agency open and maintain a file on a person only if at least one of the following three conditions is met:

(a) there is reason to suspect that the person has been, is, or will be, engaged in activities which Parliament has defined as threats to Canada's security;

(b) there is reason to suspect that the person, who is, or who soon will be, in a position with access to security classified information, may become subject to blackmail or may become indiscreet or dishonest in such a way as to endanger the security of Canada;

(c) the person is the subject of any investigation by the security intelligence agency for security screening purposes. (Once the investigation has been completed, the agency should not continue to add information to these files unless the information relates to category (a) or (b) above.)

12. WE RECOMMEND THAT the security intelligence agency and the independent review body (the Advisory Council on Security and Intelligence) develop programmes for reviewing agency files on a regular basis to ensure compliance with the general principles for opening and maintaining files on individuals.

13. WE RECOMMEND THAT the storage and retrieval system for information on individuals whose activities are relevant to the security intelligence agency's mandate be separate from those systems pertaining to administrative, source and research files.

14. WE RECOMMEND THAT the security intelligence agency's files, documents, tapes and other matter be erased or destroyed only according to conditions and criteria set down in guidelines approved by the Solicitor General.

15. WE RECOMMEND THAT the security intelligence agency consult the Department of External Affairs before initiating a full investigation involving the use in Canada of certain investigative techniques directed at a foreign government or a foreign national in Canada.

16. WE RECOMMEND THAT, in order to make it possible for physical surveillance operations to be carried out effectively by a security intelligence agency, changes be made in federal statutes and the co-operation of the provinces be sought to make changes in provincial statutes as follows:

(1) *Rules of the road*

(a) A defence be included in provincial statutes governing rules of the road for peace officers and persons designated by the Attorney General of the Province on the advice of the Solicitor General of Canada ("designated individuals") if such persons act

(i) reasonably in all the circumstances,

(ii) with due regard for the property and personal safety of others, and

(iii) in the otherwise lawful discharge of their duties;

(b) a defence similar to that referred to in (1)(a) above be included in relevant provincial legislation which authorizes municipal traffic by-laws;

(c) there be enacted by each of the provinces and territories, a provision for the protection of peace officers and designated individuals, saving them harmless from personal liability in civil suits, if such persons act

(i) reasonably in all of the circumstances;

(ii) with due regard for the property and personal safety of others; and,

(iii) in the otherwise lawful discharge of their duties;

(d) the Government of Canada compensate those persons who, but for recommendation (c) above would be entitled to recover damages in a civil suit brought against a federally engaged peace officer or designated individual in a cause of action arising by reason of acts done or omissions occurring in the course of the work of such peace officer or designated individual and on the principle that the quantum of compensation should be assessed on the same basis as is the practice in the civil courts.

(2) *False identification*

(a) Provincial highway traffic legislation regulating the licensing and identification of persons and property be amended to permit the Director General or designated member of the security intelligence agency (or a duly authorized member of a police force) to apply for false identification to the senior government official charged with the administration of the legislation. Provision be made to permit the documents related to the application to be sealed and not to be opened without court order. It is further recommended that such amendments be made as may be necessary to remove all statutory restrictions on the signing or holding of more than one piece of identification in each case;

(b) provincial hotel registration legislation be amended to make available a defence to peace officers and designated individuals who register in a hotel under a false name provided that

(i) they do so in good faith, and

(ii) the use of a false name is necessary for the performance of their otherwise lawful duties.

(3) *Trespass*

(a) Provincial petty trespass statutes be amended to make available a defence to peace officers and designated individuals who enter onto private property other than private dwelling-houses or

inhabited units in multi-unit residences but including vehicles, providing that

(i) entry onto private property is reasonably necessary in the circumstances;

(ii) they show due regard for the property rights of the owner; and,

(iii) they act in the otherwise lawful discharge of their duties.

(b) sections 387(1)(a) and 387(1)(c) and 388(1) of the Criminal Code be amended to make available a defence to peace officers and designated individuals in order to allow the attachment of tracking devices to vehicles, in order to assist in physical surveillance operations, provided that such persons

(i) act in the course of their otherwise lawful duties,

(ii) do no more damage or interference with the property than is reasonably necessary for the purposes of the operation; in any event, the damage or interference must not render the use of the property dangerous;

(c) civil remedies be preserved for both trespass and the affixing of devices in a manner similar to that recommended in respect of rules of the road.

17. WE RECOMMEND the establishment of administrative guidelines concerning the principles to be applied in the use of undercover operatives by the security intelligence agency. These guidelines should be approved by the Solicitor General, as the Minister responsible for the security intelligence agency and should be publicly disclosed. These guidelines should cover, *inter alia*, the following points:

(a) the forms of deceit which are unacceptable;

(b) sources and undercover members must be instructed not to participate in unlawful activity. If an undercover operative finds himself in a situation where the commission of a crime is imminent, he must disassociate himself, even at the risk of ending his involvement in the operation. In situations where there is time to seek advice as to the legality of a certain act required of the undercover operative, such advice should be sought. If the act is considered to be unlawful, alternative courses of action should be considered. In many situations, this will allow the operative to continue in his role while remaining within the law;

(c) undercover operatives should not be used in situations where it is likely that the operative will be required to participate in unlawful conduct in order to establish or maintain his credibility;

(d) the agency should report unlawful conduct by undercover operatives, in accordance with the procedures which we propose in Chapter 8 of this Part;

(e) undercover operatives must not be used for the purpose of disrupting domestic groups unless there is reason to believe such a group is involved in espionage, sabotage or foreign interference;

(f) undercover operatives should be instructed not to act as *agents provocateurs* and, in situations where they become aware of plans for violent activity, to do what they can to persuade the members of a group to adopt milder methods of protest;

(g) interviews of persons for security screening purposes should not be used as occasions for recruiting such persons as sources;

(h) great care should be taken in authorizing the use of undercover operatives to balance the potential harm to which the deployment of such individuals within a social institution may do to that institution against the value of the information which may be obtained;

(i) the security intelligence agency should respect confidential professional relationships and other legal barriers to the use of sources in the private sector and should be directed by expert legal advice as to the extent of such legal barriers;

(j) employees or persons under contract to the federal, provincial or municipal governments must not be used as undercover sources in regard to matters involving their government. Confidential information held by governments must be obtained through legally authorized channels; and

(k) the making of *ex gratia* payments for loss or damage suffered as a result of civil wrongs committed by undercover operatives.

18. WE RECOMMEND THAT to facilitate the obtaining of false identification documents in a lawful manner for undercover agents of the security intelligence agency, federal legislation be amended, and the co-operation of the provinces be sought in amending relevant provincial laws, in a manner similar to that recommended for the false identification needed in physical surveillance operations.

19. WE RECOMMEND THAT income tax legislation be amended to permit the security intelligence agency sources not to declare as income payments received by them from the agency, and that other fiscal legislation requiring deduction and remittance by or on behalf of employees be amended to exclude such sources.

20. WE RECOMMEND THAT section 383 of the Criminal Code of Canada concerning Secret Commissions be amended to provide that a person providing information to the security intelligence agency in a duly authorized investigation does not commit the offence defined in that section.

21. WE RECOMMEND THAT there continue to be a power to intercept communications for national security purposes but that the system of

administering the power and the statute authorizing the exercise of the power be changed as follows:

(1) All of the information on which an application for a warrant is based must be sworn by the Director General of the security intelligence agency or persons designated by him.

(2) Proposals for warrants should be thoroughly examined by a senior official of the Department of the Solicitor General and by the security intelligence agency's senior legal adviser, and the advice of the Deputy Minister should be available to the Solicitor General in considering the merits of proposals from both a policy and legal point of view.

(3) The legislation authorizing warrants should be amended so that, except in emergency situations, warrants are issued by designated judges of the Trial Division of the Federal Court of Canada on an application by the Director General of the security intelligence agency approved in writing by the Solicitor General of Canada.

(4) The legislation should authorize the judge to issue a warrant if he is satisfied by evidence on oath that the interception is necessary for obtaining information about any of the following activities:

(a) activities directed to or in support of the commission of acts of espionage or sabotage (espionage and sabotage to be given the meaning of the offences defined in sections 46(2)(b) and 52 of the Criminal Code and section 3 of the Official Secrets Act);

(b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;

and the warrant should indicate the type of activity of which the targetted individual or premises is suspected.

(5) The legislation should direct the judge to take the following factors into consideration in deciding whether the interception is necessary

(a) whether other investigative procedures not requiring a judicial warrant have been tried and have failed;

(b) whether other investigative procedures are unlikely to succeed;

(c) whether the urgency of the matter is such that it would be impractical to carry out the investigation of the matter using only other investigative procedures;

(d) whether, without the use of the procedure it is likely that intelligence of importance in regard to such activity will remain unavailable;

(e) whether the degree of intrusion into privacy of those affected by the procedure is justified by the value of the intelligence product sought.

(6) The legislation should provide that the Director General may appeal a refusal of a judge to issue a warrant to the Federal Court of Appeal.

(7) The legislation should provide that an applicant must disclose to the judge the details of any application made previously with respect to the same matter.

(8) The legislation should authorize the Chief Justice of the Federal Court of Canada to designate five members of the Trial Division of that court to be eligible to issue warrants under the legislation.

(9) The legislation should provide that in emergency circumstances where the time required to bring an application before a judge would likely result in the loss of information important for the protection of the security of Canada, the Solicitor General of Canada may issue a warrant which can be used for 48 hours subject to the same conditions which apply to judicial warrants. The issuance of emergency warrants must be reported to and reviewed by the Advisory Council on Security and Intelligence.

(10) The legislation should require that warrants specify the length of time for which they are issued and that no warrants should be issued for more than 180 days.

(11) Before deciding to make application to renew a warrant the Director General of the security intelligence agency and the Solicitor General should carefully assess the value of the intelligence product resulting from the earlier warrants. The legislation should stipulate that applications for renewals of warrants be treated on the same terms as applications for original warrants with the additional requirement that the judge to whom an application for renewal is made be provided with evidence under oath as to the intelligence product obtained pursuant to the earlier warrant(s).

(12) The legislation should authorize persons executing warrants to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device, pro-

viding that the judge issuing the warrant sets out in the warrant (a) the methods which may be used in executing it; (b) that there be no significant damage to the premises that remains unrepaired; and (c) that there be no physical force or the threat of such force against any person. The legislation should also provide for the use of the electrical power supply available in the premises.

(13) The Solicitor General should seek the co-operation of the provinces to make lawful what would otherwise be unlawful under provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards, in order to allow the security intelligence agency to install, operate, repair and remove electronic eavesdropping devices in a lawful manner.

(14) The legislation should provide for warrants to be issued to the Director General of the security intelligence agency or persons acting upon his direction or with his authority, but require that in every case the persons carrying out an entry of premises or removal of property in the course of executing a warrant be accompanied by a peace officer. If the Director General proposes to use a person who is not a member of the agency or a peace officer, he should obtain the prior approval of the Minister to the use of such person.

(15) The legislation should make it clear that warrants may be issued for the interception or seizure of written communications, other than a message in the course of post, as well as oral communications. Warrants for these interceptions must not be used for the examination or opening of mail or the search of premises. Section 7 of the Official Secrets Act should be repealed. (See Part IX, Chapter 2 for recommendation as to total repeal of the Official Secrets Act.)

(16) The legislation should exempt from section 178.2(1) of the Criminal Code the communication of any information obtained from an interception executed pursuant to the legislation by members of the security intelligence agency for purposes within the mandate of the security intelligence agency or for the purpose of enabling the Advisory Council on Security and Intelligence or the Parliament Committee on Security and Intelligence to review the operation of the legislation.

(17) The legislation should require that the Solicitor General annually prepare a report to be laid before Parliament indicating the number of warrants for interception which have been issued during the year, the number of these which constitute renewals, and the frequency of renewals and that the Solicitor General prepare a report for the parliamentary Committee on Security and Intelligence assessing the value of the intelligence products

obtained from the warrants and problems encountered in executing warrants under the legislation.

(18) The use by the security intelligence agency of (a) hidden optical devices or cameras to view or film activities in places which are not open to the public and (b) dial digit recorders ("pen registers") should be permitted only under a system of warrants subject to the conditions of control and review as are recommended above for electronic surveillance.

22. WE RECOMMEND THAT the security intelligence agency be authorized by legislation to enter premises, to open receptacles and to remove property for the purposes of examining or copying any document or material when it is necessary to do so in order to obtain information about activities directed towards, or in support of, espionage or sabotage, foreign interference or political violence and terrorism, providing that this investigatory power is subject to the same system of control and review as recommended above for electronic surveillance.

23. WE RECOMMEND THAT section 11 of the Official Secrets Act be repealed.

24. WE RECOMMEND THAT, notwithstanding the present provisions of the Post Office Act, the security intelligence agency be authorized by legislation to open and examine or copy the cover or contents of articles in the course of post when it is necessary to do so in order to obtain information about activities directed towards or in support of espionage or sabotage, foreign interference or serious political violence and terrorism, providing that this investigatory power is subject to the same system of control and review as recommended above for electronic surveillance, except that instead of requiring that a peace officer accompany persons executing warrants issued for this purpose, the legislation should require that the Post Office Department be notified when such warrants are issued and expire and that Post Office officials co-operate with members of the security intelligence organization in carrying out the procedure specified in the warrant.

25. WE RECOMMEND THAT legislation authorize the heads of federal government institutions to release information concerning an individual's name, address, phone number, date and place of birth, occupation and physical description on receiving a written request from the security intelligence agency stating that such information is necessary for the purpose of locating or identifying an individual suspected of participating in one of the activities identified as a threat to the security of Canada in the statute governing the security intelligence agency, and that all other personal information held by the federal government, with the exception of census information held by Statistics Canada, be accessible to the security intelligence agency through a system of judicially granted warrants issued subject to the same terms and conditions and system of review as recommended for electronic surveillance, searches of premises and property, and the examination of mail.

26. WE RECOMMEND THAT warrants issued for obtaining personal information for security intelligence purposes be submitted to the Minister or head of the government institution which holds the information and that the Minister be required to comply with the warrant unless the Prime Minister directs the Solicitor General not to execute the warrant.

27. WE RECOMMEND THAT the security intelligence agency obtain personal information held by government institutions under the jurisdiction of provincial governments only from persons legally authorized to release such information and that, with regard to any province in which there is no authorized means of access to information to which the Solicitor General of Canada considers that the security intelligence agency should have access in order to discharge its responsibilities effectively, the Solicitor General should seek the co-operation of the province in amending its laws to make such access possible.

28. WE RECOMMEND THAT the security intelligence agency's responsibilities for the development of a competent analytical capability be explicitly stated in the statute establishing the agency.

29. WE RECOMMEND THAT the Act establishing the security intelligence agency specify the reporting function of the agency and require the Minister responsible for the agency to issue guidelines on how the agency should conduct its reporting activities. These guidelines should cover at least the following:

    (a) conditions under which the agency can report information about individuals;

    (b) conditions under which the agency can advise individuals outside governments and police forces about security threats;

    (c) (i) the general principle that the security intelligence agency should report only information relevant to its mandate, except that information which it has collected by accident which the guidelines specifically require or authorize it to report to government or to the police;

        (ii) the agency should report information which it has collected by accident, which relates to an offence, to the appropriate police force if, in the agency's opinion, to do so would not be likely to affect adversely the security of Canada.

        (iii) the types of information collected by accident which the security intelligence agency may report to the appropriate federal or provincial government include information pertinent to the economic interests of Canada.

    (d) the manner in which the agency should handle *ad hoc* requests for information from government departments and police forces;

    (e) the manner in which the agency should reveal the basis for its judgments, while at the same time providing reasonable protection for the sources of its information.

30. WE RECOMMEND THAT when the Solicitor General receives information from the security intelligence agency relating to the commission of an offence, and the agency considers that it would adversely affect the security of Canada to pass that information to the police, the Solicitor General should consult with the Attorney General of Canada with respect to the release of that information. If, after such consultation, the Solicitor General decides that the security of Canada would not be adversely affected by the release of that information he should instruct the agency to release it to the appropriate police force. On the other hand, if the Solicitor General decides that the release of the information would adversely affect the security of Canada, he should so advise the Attorney General of Canada who should proceed in accordance with arrangements to be worked out with provincial attorneys general. (See discussion in Chapter 8 of this Part.)

31. WE RECOMMEND THAT

    (a) the security intelligence agency retain, in one location, records of all accidental by-products reported to government or to the police, and that such records state what information was reported, how the information was collected, to whom it was given, and the history of the investigation which produced the information; and,

    (b) the independent review body have access to such records and that it monitor closely the investigations which produced the information to ensure that the investigations are not being misdirected for a purpose irrelevant to the security of Canada.

32. WE RECOMMEND THAT the agency, in addition to providing information about specific individuals and groups relevant to its mandate, place greater emphasis than is now the case on providing government with:

    (a) analysis and advice on the latest developments, techniques, and countermeasures relating to physical and V.I.P. security, and security screening; and,

    (b) reports which analyze broad trends relating to threats to the security of Canada and which advise government on ways to counter these threats.

33. WE RECOMMEND THAT the legislation governing the security intelligence agency include a clause which expressly denies the agency any authority to carry out measures to enforce security.

34. WE RECOMMEND THAT members of the security intelligence agency should not have peace officer powers and that, to remove any doubt, the legislation establishing the organization should explicitly state that members of the security intelligence organization are not to be considered as peace officers.

35. WE RECOMMEND THAT the security intelligence agency not engage in making known to employers in the private sector its availability to

receive information about employees alleged to be subversives, and that any such advice as to such availability should, if the government considers such advice to be desirable, be transmitted through another department or agency.

36. WE RECOMMEND THAT it not be a function of the security intelligence agency to publicize, outside government, threats to the security of Canada; and accordingly, the security intelligence agency should not maintain liaison with the news media; and further, that all public disclosure about the activities of the security intelligence agency should be made by responsible Ministers.

37. WE RECOMMEND THAT the security intelligence agency not be permitted to disseminate information or misinformation in order to disrupt or otherwise inflict damage on Canadian citizens or domestic political organizations.

38. WE RECOMMEND THAT if the security intelligence agency wishes to use another government programme to help deceive one of the agency's subjects of surveillance, the Solicitor General should seek the concurrence of the Minister responsible for the programme in question.

39. WE RECOMMEND THAT the security intelligence agency not be permitted to use informants against domestic political organizations primarily for the purpose of disrupting such organizations.

40. WE RECOMMEND THAT an informant of the security intelligence agency who has penetrated a political organization for intelligence gathering purposes should be instructed that, when persons in the organization have formed an intent to commit a *specific* crime, the informant should try to discourage and inhibit the members of the organization from carrying out that crime, but that the informant must not transgress the law in order to discourage or inhibit the commission of the crime.

41. WE RECOMMEND THAT it not be a function of the security intelligence agency to carry out defusing programmes and that the agency not be permitted to use conspicuous surveillance groups for the purpose of intimidating political groups.

42. WE RECOMMEND THAT for intelligence purposes falling within the security intelligence agency's statutory mandate and subject to guidelines approved by the Cabinet Committee on Security and Intelligence, the security intelligence agency be permitted to carry out investigative activities abroad.

43. WE RECOMMEND THAT the Director General of the security intelligence agency inform the Minister responsible for the agency in advance of all foreign operations planned by the security intelligence agency.

44. WE RECOMMEND THAT in cases which on the basis of policy guidelines are deemed to involve a significant risk to Canada's foreign

relations, the Minister responsible for the security intelligence agency inform the Department of External Affairs sufficiently in advance of the operation to ensure that consultation may take place.

45. WE RECOMMEND THAT the Director General and appropriate officials of the security intelligence agency should meet with the Under Secretary of State for External Affairs and the responsible Deputy Under Secretary on an annual basis to review foreign operations currently being undertaken or proposed by the security intelligence agency.

46. WE RECOMMEND THAT the statutory mandate of the security intelligence agency provide for foreign liaison relationships subject to proper control.

47. WE RECOMMEND THAT the terms of reference for each relationship specify the types of information or service to be exchanged.

48. WE RECOMMEND THAT the terms of reference for each relationship be approved by the Solicitor General and the Secretary of State for External Affairs before coming into effect and that any disagreement be resolved by the Prime Minister or the Cabinet.

49. WE RECOMMEND THAT the Government establish a clear set of policy principles to guide the security intelligence agency's relationships with foreign security and intelligence agencies and that the Joint Parliamentary Committee on Security and Intelligence be informed of these principles.

50. WE RECOMMEND THAT the information given to foreign agencies by the security intelligence agency must be about activities which are within the latter's statutory mandate; that the information given must be centrally recorded; that the security intelligence agency know the reasons for the request; and that the information be retrievable.

51. WE RECOMMEND THAT the Director General approve of each joint operation with a foreign agency and ensure that Canada control all foreign agency operations in this country.

52. WE RECOMMEND THAT the Solicitor General be informed of each joint operation, or operation of a foreign agency, in Canada.

53. WE RECOMMEND THAT the security intelligence agency have liaison officers posted abroad at Canadian missions to perform security liaison functions now performed by R.C.M.P. liaison officers, except that in missions where the volume of police and security liaison work can be carried out by one person, either an R.C.M.P. or a security intelligence liaison officer carry out both kinds of liaison work.

54. WE RECOMMEND THAT the relationship between the liaison officer representing the security intelligence agency and the Head of Post be governed by the terms of reference as laid down for the Foreign Services of the R.C.M.P., but that the security intelligence agency's liaison officer have the right to communicate directly with his Headquarters

and independently of the Head of Post when the intelligence to be transmitted is of great sensitivity. Except in extraordinary circumstances, which should in each case be reported by the Director General to the Solicitor General, such communications should be made available to the Under-Secretary of State for External Affairs.

55. WE RECOMMEND THAT the government examine, on a regular basis, both the resources which are being devoted to the technical security of Canadian missions abroad, and the policies and procedures which are being applied to the security of those missions.

56. WE RECOMMEND THAT the security intelligence agency's relationships with foreign agencies be subject to the following forms of review:

    (a) An account of significant changes in these relationships be included in the security agency's annual report to the Cabinet;

    (b) relations with foreign agencies be subject to continuing review by the independent review body;

    (c) the Joint Parliamentary Committee on Security and Intelligence be informed of the principles governing the security agency's relations with foreign agencies and, to the extent possible, of the terms of reference of particular relationships.

57. WE RECOMMEND THAT the Solicitor General approve all agreements which the security intelligence agency makes with other federal government departments and agencies and which have significant implications for the conduct of security intelligence activities.

58. WE RECOMMEND THAT the security intelligence agency, once it has separated from the R.C.M.P., negotiate a Memorandum of Understanding with the Department of External Affairs.

59. WE RECOMMEND THAT the Deputy Solicitor General, the Deputy Minister of National Defence and the Chief of the Defence Staff negotiate a memorandum of understanding to be ratified by their respective Ministers.

60. WE RECOMMEND THAT the security intelligence agency and the R.C.M.P., with the approval of the Solicitor General, provide, upon request, security screening services

    (a) to provincial governments for public service positions which have a bearing on the security of Canada;

    (b) to provincial or municipal police forces.

61. WE RECOMMEND THAT the security screening services provided by the security intelligence agency for provinces and municipalities be subject to the same conditions which apply to the screening services for federal government departments and agencies.

62. WE RECOMMEND THAT, if the security intelligence agency obtains security relevant information about provincial politicians or public servants in the course of an investigation unrelated to a security screening

programme for the Province in question, then the agency seek the approval of the Solicitor General before reporting this information to the appropriate provincial politician or official.

63. WE RECOMMEND THAT the Solicitor General encourage a provincial government which uses these security sceening services either to establish its own review procedures for security screening purposes or to opt into the federal government's review system.

64. WE RECOMMEND THAT the Solicitor General initiate a study of V.I.P. protection in foreign countries with federal systems of government with the aim of improving federal-provincial co-operation in this country.

65. WE RECOMMEND THAT the security intelligence agency, to facilitate the exchange of security relevant information with domestic police forces and generally to encourge co-operation,

    (a) establish a special liaison unit for domestic police forces, staffed, in part, by personnel with police experience;

    (b) develop written agreements with the major domestic police forces to include, among other things, the types of information to be exchanged, the liaison channels for effecting this exchange, and the conditions under which joint operations should be conducted.

66. WE RECOMMEND THAT the Director General approve all joint operations undertaken by the security intelligence agency and that the Solicitor General develop guidelines for the use and approval of intrusive investigative techniques in joint operations.

67. WE RECOMMEND THAT the Solicitor General develop in conjunction with his provincial counterparts a mechanism for monitoring the use by private security forces of investigative or other techniques which encroach on individual privacy, freedom of association, and other liberal democratic values.

68. WE RECOMMEND THAT

    (a) the federal government immediately initiate discussion with the provinces on the procedures which should apply to the reporting and investigation of criminal activity committed by members or agents of the security intelligence agency; and

    (b) the arrangements outlined in this chapter be followed on an interim basis.

69. WE RECOMMEND THAT

    (a) the Director General should be a person of integrity and competence; he should have proven managerial skills but need not have prior working experience in security intelligence matters; he should be knowledgeable about political and social movements, international affairs and the functioning of govern-

ment; he should have a high regard for liberal democratic principles; and he should have sound political judgment, not affected by partisan concerns;

(b) the appointment of the Director General of the Security Intelligence Agency be made by the Governor in Council;

(c) the Prime Minister consult the leaders of the opposition parties prior to the appointment of the Director General.

70. WE RECOMMEND THAT the following conditions of employment for the Director General should be included in the statute establishing the security intelligence agency:

(a) the Director General can be dismissed only for 'cause';

(b) 'cause' includes mental or physical incapacity; misbehaviour; insolvency or bankruptcy; or failure to comply with the provisions of the Act establishing the agency;

(c) the Director General should be appointed for a five-year term;

(d) no Director General may serve for more than 10 years.

71. WE RECOMMEND THAT the Director General and his senior managers act as a team in dealing with important policy and operational matters affecting the security intelligence agency.

72. WE RECOMMEND THAT Canada's security intelligence agency encourage the infusion of new ideas and fresh approaches by ensuring that a reasonable number of its senior managers, prior to joining the agency in a middle or senior management capacity, have worked in other organizations.

73. WE RECOMMEND THAT the senior management team of Canada's security intelligence organization have a wide diversity of backgrounds, reflecting experience in both governmental and non-governmental institutions, in the law, in investigatory work, and in management. All of the agency's senior managers should place a high priority on effectiveness, on conducting the agency's operations legally and with propriety and on upholding liberal democratic principles.

74. WE RECOMMEND THAT the security intelligence agency adopt the following policies to help it determine who should work for the agency:

(a) the agency requires staff with a wide variety of backgrounds in governmental, non-governmental, and police organizations;

(b) police experience should be a prerequisite for only a small number of specialized positions;

(c) the agency should periodically hire persons from outside the agency for middle and senior management positions;

(d) having a university degree should not be a prerequisite for joining the agency. Nonetheless, the agency should actively recruit those with university training;

(e) the agency should hire individuals with training in a wide variety of academic disciplines;

(f) the agency should seek employees with the following characteristics: patience; discretion; emotional stability; maturity; tolerance; no exploitable character weaknesses; a keen sense of, and support for, liberal democratic principles; political acumen; and the capacity to work in an organization about which little is said publicly.

75. WE RECOMMEND THAT the security intelligence agency adopt the following recruiting procedures:

(a) it should widen its recruiting pool in order to attract the type of personnel we have recommended, rather than rely on the R.C.M.P. as its primary source of recruits;

(b) apart from support staff, it should have only one category of employee, to be known as intelligence officers. Intelligence officers should not be given military or police ranks;

(c) it should not rely primarily on referral by existing or former employees to attract new recruits but rather should employ more conventional methods, including recruiting on university campuses and advertising in newspapers;

(d) in addition to the personnel interview, it should develop other means, such as psychological testing and testing for writing and analytical ability, to ascertain the suitability of a candidate for security intelligence work;

(e) it should involve experienced and senior operational personnel more actively in the recruitment process.

76. WE RECOMMEND THAT

(a) the security intelligence agency initiate a more active secondment programme, involving federal government departments, the R.C.M.P., provincial police forces, labour unions, business, provincial governments, universities, and foreign agencies;

(b) secondment arrangements with foreign agencies should be approved by the Minister responsible for the security intelligence agency.

77. WE RECOMMEND THAT the security intelligence agency:

(a) develop an improved career planning capability in order to effect greater specialization in career paths;

(b) ensure that there is close collaboration between line and staff personnel in the design and implementation of specialized career paths.

78. WE RECOMMEND THAT the number of job levels for intelligence officers within the security intelligence agency be reduced.

79. WE RECOMMEND THAT the security intelligence agency establish a number of positions designed for senior intelligence officers who would have no administrative responsibilities.

80. WE RECOMMEND THAT security service training be redesigned so that it is more suitable for better educated, more experienced recruits. There should be less emphasis on 'parade square' discipline and 'molding' behaviour and more emphasis on developing an understanding of political, legal and moral contexts and mastering tradecraft techniques.

81. WE RECOMMEND THAT the security intelligence agency initiate a variety of training programmes with an aim to exposing its members to ideas from persons outside the agency.

82. WE RECOMMEND THAT

    (a) managers in operational jobs take an active role in the design and implementation of training and development programmes;

    (b) opportunities for increased specialization be available for training and development staff.

83. WE RECOMMEND THAT

    (a) security intelligence agency employees not be allowed to unionize, and this be drawn clearly to the attention of each person applying to join the agency;

    (b) the security intelligence agency

        (i) adopt a managerial approach which encourages employee participation in decision-making,

        (ii) encourage the formation of an employee association, and

        (iii) tie agency salaries and benefits by a fixed formula to the Public Service of Canada.

84. WE RECOMMEND THAT

    (a) employees of the security intelligence agency not belong to the Public Service of Canada;

    (b) the employee benefits of the security intelligence agency be the same as those enjoyed by federal public servants;

    (c) portability of employee benefits exist between the agency and the federal government;

    (d) pension portability arrangements between the federal government and other organizations including other levels of government encompass the security intelligence agency;

    (e) for the purposes of being eligible to enter public service competitions, employees of the security intelligence agency be deemed to be persons employed in the Public Service.

85. WE RECOMMEND THAT the security intelligence agency establish an employee counselling programme based on the two principles of

voluntary usage and confidentiality of information given to the counsellors.

86. WE RECOMMEND THAT the senior management of the security intelligence agency

(a) emphasize the practice of seeking local and informal avenues of resolution of grievances before resorting to formal procedures;

(b) monitor carefully the use of formal grievance procedures as a possible indicator of problem areas in current personnel policies;

(c) establish a two-stage formal grievance procedure, involving a three-person grievance board at the first stage, and an appeal to the Director General at the second stage;

(d) ensure that no member be penalized directly or indirectly as a result of lodging a grievance.

87. WE RECOMMEND THAT the security intelligence agency develop a program for dealing with improper behaviour which

(a) emphasizes remedial action rather than punishment;

(b) requires the Director General, in the case of an alleged illegality, to suspend an employee with pay and to refer the case to the Solicitor General;

(c) places responsibility for dismissal with the Deputy Solicitor General, subject to the advice of the Director General and his senior management team;

(d) emphasizes the necessity of the security intelligence agency expending every effort, in appropriate instances, to help dismissed employees find new work;

(e) provides for a procedure for relocating employees who are suspected of being security risks to non-sensitive areas in other federal government departments.

88. WE RECOMMEND THAT the security intelligence agency develop

(a) a leadership style which relies less on giving orders and obedience and more on participation in decision-making, and

(b) training courses, especially in small group decision-making techniques, which will support such a leadership style.

89. WE RECOMMEND THAT, to minimize the likelihood of internal communication barriers developing, the senior management of the security intelligence agency should

(a) eliminate separate eating and social facilities based on job levels within the agency;

(b) develop a regular forum for communicating with staff they would not normally meet in the course of their work;

(c) encourage ad hoc problem-solving groups, when appropriate, to include staff from a variety of levels within the agency;

(d) encourage the attendance of junior ranking members when their work is discussed.

90. WE RECOMMEND THAT the security intelligence agency include in its key decision-making forums individuals who, because of their function, have different perspectives on the problems to be considered.

91. WE RECOMMEND THAT the legal services of the security intelligence agency be provided by the Department of Justice, and that the Department of Justice assign to the security intelligence agency well-qualified lawyers of mature judgment in sufficient number to provide all of the legal services required by the agency.

92. WE RECOMMEND THAT the lawyers assigned to the agency serve from five to ten years in that assignment and that there be a gradual staggering of the appointments so as to ensure that there is always at least one lawyer at the agency with several years' experience in its work.

93. WE RECOMMEND THAT the agency's legal advisers provide the agency with advice on the following matters:

(a) whether actions are in conformity with the law and agency guidelines;

(b) the legality of each application for a warrant to perform an intrusive technique and whether such application is in conformity with those agency guidelines with respect to its use;

(c) whether a proposal to use certain other investigative techniques is in conformity with the agency's guidelines.

94. WE RECOMMEND THAT the advice of the legal adviser be binding on the agency unless a contrary opinion is given by the Deputy Attorney General of Canada.

95. WE RECOMMEND THAT the legal adviser report to the Deputy Attorney General of Canada any knowledge he acquires of any illegal act by any member of the agency.

96. WE RECOMMEND THAT the legal adviser counsel senior management of the agency in its dealings with senior officials, Ministers or Parliamentary Committees with respect to the proposed legislative changes affecting the work of the agency.

97. WE RECOMMEND THAT

(a) major responsibility for auditing the operations of the security intelligence agency for legality and propriety should rest with a new independent review body. (The functions of this body will be described in a later chapter of this report.)

(b) the security intelligence agency should have a small investigative unit for handling complaints and for initiating in-depth studies of agency operations on a selective basis; and

(c) the security intelligence agency should not allocate resources for managerial auditing, but instead should experiment with other approaches to organizational change.

98. WE RECOMMEND THAT the security intelligence agency

(a) review regularly how the 'need to know' principle is being applied within the agency and whether the balance between security on the one hand and effectiveness on the other is appropriate;

(b) ensure that the principle is being applied to primarily operational matters;

(c) ensure that the principle is not used as an excuse to prevent either an auditing group or a superior from knowing about questionable acts;

(d) improve its training programmes with regard to the rationale behind and the application of the 'need to know' principle.

99. WE RECOMMEND THAT screening procedures for security intelligence agency employees

(a) be more stringent than those employed for the Public Service;

(b) ensure that the Deputy Solicitor General, on the advice of the Director General, is responsible for denying a security clearance to an individual;

(c) specify that the agency has a responsibility to advise an individual who is not granted a security clearance why doubt exists concerning his reliability or loyalty so long as sensitive sources of security information are not jeopardized.

100. WE RECOMMEND THAT the security intelligence agency have a less stringent set of conditions than the Public Service for releasing an employee for security reasons.

101. WE RECOMMEND THAT the security screening appeal process for agency employees be identical to that of the Public Service, except for the application of more demanding screening standards.

102. WE RECOMMEND THAT the security intelligence agency's internal security branch

(a) be staffed with more senior people who have the necessary interviewing and analytical skills;

(b) develop a research and policy unit which would keep track of and analyze all security incidents of relevance to the agency;

(c) participate in or be kept fully informed of all investigations relating to security.

103. WE RECOMMEND THAT agency employees be encouraged to provide information about questionable activities to the independent review

body (the Advisory Council on Security and Intelligence), and that any employees who do so should not be punished by the agency.

104. WE RECOMMEND THAT the Government of Canada establish a security intelligence agency, separate from the R.C.M.P., and under the direction of the Solicitor General and the Deputy Solicitor General.

105. WE RECOMMEND THAT this agency be called the Canadian Security Intelligence Service.

106. WE RECOMMEND THAT the Solicitor General and the Deputy Solicitor General place high priority in developing ways to strengthen the relationship between the security intelligence agency and

(i) the R.C.M.P.

(ii) other Canadian police forces

(iii) foreign security agencies.

107. WE RECOMMEND THAT the Cabinet make its decision quickly to separate the Security Service from the R.C.M.P.

108. WE RECOMMEND THAT the Solicitor General be given responsibility for implementing the establishment of the security intelligence agency. He should appoint an implementation team to assist him, consisting of at least the following: the Deputy Solicitor General, the Commissioner of the R.C.M.P., the head of the security intelligence agency and senior officials from the Privy Council Office, Treasury Board, Department of Justice, and the Public Service Commission.

109. WE RECOMMEND THAT the Prime Minister appoint a Director General for the security intelligence agency.

110. WE RECOMMEND THAT some of the senior managers for the new agency should come from outside the R.C.M.P.

111. WE RECOMMEND THAT

(a) existing staff of the R.C.M.P. Security Service be assigned to the new agency but continue to belong to either the Public Service or the R.C.M.P. for an interim period to be established by the Solicitor General. No current employees of the Security Service should be forced to become permanent employees of the security intelligence agency.

(b) no current member of the R.C.M.P. Security Service lose employment with the federal government as a result of the establishment of the new security intelligence agency.

112. WE RECOMMEND THAT federal government positions requiring security screening be precisely identified according to clearly defined and carefully monitored standards. Top Secret clearances should be reduced to the minimum required to protect information critical to the security and defence of the nation.

113. WE RECOMMEND THAT the security intelligence agency not be involved in screening or selection procedures established to ensure the suitability of persons for those government positions that do not require access to information relevant to the security of Canada.

114. WE RECOMMEND THAT the security intelligence agency not be requested to undertake a security screening before the final selection of a candidate for a position requiring a clearance.

115. WE RECOMMEND THAT the Cursory Records Check for Order-in-Council appointments be discontinued. Regular security screening procedures should be carried out for those appointed to positions requiring access to security related information.

116. WE RECOMMEND THAT

(a) there be security and criminal records checks for M.P.s and Senators who will have access to classified information;

(b) any adverse information be reported by the Director General to the leader of the party to which the M.P. or Senator belongs; and

(c) the persons appointed receive a security briefing by the security intelligence agency.

117. WE RECOMMEND THAT security clearances be updated every five years. This update should be the responsibility of a personnel security officer in the department. It should not normally include a security records check.

118. WE RECOMMEND THAT security clearances for candidates transferring between classified positions be re-evaluated by a personnel security officer in the new department. A transfer should not necessarily include a check of the security intelligence agency's records.

119. WE RECOMMEND THAT a person should be denied a security clearance only if there are

(1) Reasonable grounds to believe that he is engaged in or is likely to engage in any of the following:

(a) activities directed to or in support of the commission of acts of espionage or sabotage;

(b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;

(d) revolutionary subversion, meaning activities directed towards or intended ultimately to lead to the destruction or overthrow of the liberal democratic system of government;

or

(2) Reasonable grounds to believe that he is or is likely to become

(a) vulnerable to blackmail or coercion, or

(b) indiscreet or dishonest,

in such a way as to endanger the security of Canada.

120. WE RECOMMEND THAT the existing Security Service files on homosexuals be reviewed and those which do not fall within the guidelines for opening and maintaining files on individuals be destroyed.

121. WE RECOMMEND THAT the federal government establish a pool of security staffing officers under the direction of the Public Service Commission with responsibility for:

(a) carrying out security screening procedures on behalf of federal government departments and agencies;

(b) conducting field investigations for security screening purposes;

(c) assessing the information resulting from the various investigatory procedures related to security screening;

(d) providing departments and agencies with advice on whether or not to grant security clearances.

122. WE RECOMMEND THAT Public Service Commission security staffing officers be mature individuals

(a) well versed in the variety of political ideologies relevant to Canadian society;

(b) sympathetic to the democratic principles which the security screening process is designed to protect;

(c) knowledgeable about and interested in human behaviour and the various methods used by foreign intelligence agencies to compromise people;

(d) competent at interviewing a wide variety of people.

123. WE RECOMMEND THAT the Interdepartmental Committee on Security and Intelligence decide what departments or agencies should have responsibility for conducting their own security screening interviews and field investigations.

124. WE RECOMMEND THAT the following changes be made to the field investigation procedures:

(a) for Top Secret level clearances, the Public Service Commission security staffing officers should interview three referees named by the candidate. If the list of referees provided by the candidate is not satisfactory, then the Public Service Commission should request additional referees. The security staffing officers should also interview other persons as they see fit, except to seek medical information;

(b) for Top Secret and Secret level clearances, the Public Service Commission security staffing officers should interview the candidate;

(c) good employment practices, such as checking a candidate's credentials, academic records, and employment histories should not be the responsibility of security staffing officers;

(d) in those departments and agencies which are responsible for conducting their own security screening interviews and field investigations, the functions mentioned in (a) and (b) above would be performed by their own security staffing officers.

125. WE RECOMMEND THAT the security intelligence agency have responsibility for:

(a) providing the Public Service Commission and departmental security staffing officers with security relevant information from its files about a candidate, his relatives and close associates;

(b) conducting an investigation when necessary to clarify information or to update its assessment of a particular candidate or group relevant to the candidate's activities;

(c) advising the Public Service Commission and the employing department or agency through the security staffing officer on whether or not a candidate should be granted a security clearance;

(d) advising the federal government on general matters affecting the security clearance programme.

126. WE RECOMMEND THAT the R.C.M.P., as part of the security screening procedures in future, conduct

(a) a fingerprint records check and,

(b) a check of its various criminal intelligence records

for all persons with access to classified information.

127. WE RECOMMEND THAT pardoned or vacated criminal records not be included in screening reports.

128. WE RECOMMEND THAT the federal government widely publicize any review and appeal procedures established for security screening purposes and that the Interdepartmental Committee for Security and Intelligence establish monitoring and control mechanisms to ensure that departments and agencies follow these procedures.

129. WE RECOMMEND THAT the Interdepartmental Committee for Security and Intelligence prepare for the approval of the Cabinet Committee on Security and Intelligence a set of internal review procedures for adverse security reports, to include at least the following points:

(a) the procedures must be comprehensive enough to include all individuals who might be adversely affected by security clearance procedures;

(b) decisions which adversely affect individuals for security reasons should be made by the Deputy Minister of the department concerned about the security problem;

(c) before making such a decision, the Deputy Minister should provide the individual in question with an opportunity to resolve the reasons for doubt;

(d) before making his decision, the Deputy Minister should consult appropriate officials in at least the Privy Council Office's Security Secretariat.

130. WE RECOMMEND THAT the federal government establish, by statute, a Security Appeals Tribunal to hear security appeals in the areas of Public Service employment, immigration, and citizenship. In the case of Public Service employment all individuals who have been or who suspect that they have been adversely affected by security screening procedures should have access to the Tribunal. The specific responsibilities of the Tribunal concerning Public Service employment should be as follows:

(a) to advise the Governor in Council on all appeals heard by the Tribunal;

(b) to review all adverse screening reports of the security intelligence agency and the Public Service Commission's security screening unit;

(c) to report annually to the Interdepartmental Committee on Security and Intelligence about its activities and about any changes in security clearance procedures which would increase either their effectiveness or their fairness.

131. WE RECOMMEND THAT

(a) the Security Appeals Tribunal consist of five members appointed by the Governor in Council, any three of whom could compose a panel to hear security appeals;

(b) the chairman of the Tribunal be a Federal Court Judge;

(c) the other members not be currently employed by a federal government department or agency.

132. WE RECOMMEND THAT the Security Appeals Tribunal disclose as much information as possible to the appellant and that the Tribunal have the discretion to decide what security information can be disclosed to the appellant.

133. WE RECOMMEND THAT the procedures of the Security Appeals Tribunal be similar to those now established for appeals against the dismissal from the Public Service or against deportation, with the added feature that members of the security intelligence agency or personnel

security staffing officers be allowed to appear before the Tribunal to explain the reasons for denying a security clearance.

134. WE RECOMMEND THAT the security intelligence liaison officer at the post abroad be involved in any decision, on application for permanent residency, to waive immigration security screening for humanitarian reasons or in cases of urgency.

135. WE RECOMMEND THAT the security screening rejection criteria applied to visa applicants reflect the temporary nature of their stay. Where appropriate, non-renewable visas should be issued for applicants who could not pass the security criteria for permanent immigration.

136. WE RECOMMEND THAT applicants for the renewal of temporary permits or visas be required to undergo the security screening process.

137. WE RECOMMEND THAT the humanitarian and flexible procedures for dealing with Convention Refugees remain, but that the security intelligence agency, in co-operation with other government departments and agencies, help prepare regular threat assessment profiles of potential refugee situations for the Contingency Refugee Committee, which should be revived

138. WE RECOMMEND THAT the security intelligence agency, hold security screening interviews with Convention Refugees after their arrival in Canada, not as a matter of course, but only for cause.

139. WE RECOMMEND THAT section 19(1)(e), (f) and (g) of the Immigration Act be repealed and the following substituted:

19. (1) No person shall be granted admission if he is a member of any of the following classes:

(e) persons who it is reasonable to believe will engage in any of the following activities:

(i) activities directed to or in support of the commission of acts of espionage or sabotage;

(ii) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(iii) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country.

(iv) revolutionary subversion, meaning activities directed towards or intending ultimately to lead to the destruction or overthrow of the liberal democratic system of government.

140. WE RECOMMEND THAT administrative guidelines to interpret the statutory classes of persons denied admission to Canada on security grounds be drafted for Cabinet approval.

141. WE RECOMMEND THAT officers from the security intelligence agency carry out immigration security screening functions abroad. If they are tasked to obtain criminal and other intelligence pertinent to the suitability of an immigrant, they should pass it on to the Immigration Officer for assessment.

142. WE RECOMMEND THAT the security intelligence agency cross-check immigration screening information received. The security intelligence agency should assess the information on potential immigrants received from a foreign intelligence agency in the light of the political concerns and interests of the country of the providing agency.

143. WE RECOMMEND THAT the security intelligence agency not be authorized to transgress the laws of foreign countries in order to obtain intelligence for immigration screening purposes.

144. WE RECOMMEND THAT the criteria in s.83(1) of the Immigration Act, as far as they relate to security matters, be amended to read "contrary to national security".

145. WE RECOMMEND THAT the responsibilities of the Special Advisory Board under subsection 42(a) of the Immigration Act be transferred to the proposed Security Appeals Tribunal.

146. WE RECOMMEND THAT the ministerial certificates for the deportation of temporary residents and visitors continue to be considered as proof, and hence not subject to appeal, but that the security or criminal intelligence reports upon which the deportation decision is based should be subject to independent review by the same body that reviews the evidence in the case of permanent residents, namely the Security Appeals Tribunal.

147. WE RECOMMEND THAT the Security Appeals Tribunal review all the security reports written by the security intelligence agency where the recommendation for deportation or denial of permanent residency status or admittance was not followed by the Minister.

148. WE RECOMMEND THAT the discretionary power of the Governor in Council to reject citizenship on security grounds be retained. Upon receiving a request for citizenship screening, the security intelligence agency should report any significant security information, not only to the Citizenship Registration Branch for the rejection of citizenship, but also to the appropriate immigration authorities for deportation purposes.

149. WE RECOMMEND THAT the security intelligence agency continue to screen all citizenship applicants.

150. WE RECOMMEND THAT the security intelligence agency no longer process criminal record checks on citizenship applicants.

151. WE RECOMMEND THAT when the security intelligence agency feels that a competing security concern should take precedence over its security screening role in citizenship the Minister responsible for the security intelligence agency and the Minister responsible for the citizenship security clearance should be informed.

152. WE RECOMMEND THAT a person be denied citizenship on security grounds only if there are reasonable grounds to believe that he is engaged in, or, after becoming a Canadian citizen, is likely to engage in, any of the following activities:

(a) activities directed to or in support of the commission of acts of espionage or sabotage;

(b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of a foreign power in Canada to promote the interests of a foreign power;

(c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;

(d) revolutionary subversion, meaning activities directed towards or intended ultimately to lead to the destruction or overthrow of the liberal democratic system of government;

153. WE RECOMMEND THAT any security intelligence agency interpretation of government security screening guidelines be reviewed for approval by the Minister responsible for the agency. Approval to apply the guidelines or to distribute them to other Ministers or interdepartmental committees should not be given until the Minister has satisfied himself that there are no discrepancies between the guidelines and the agency's interpretation.

154. WE RECOMMEND THAT guidelines be drawn up and approved by Cabinet interpreting the phrase "contrary to public order" as a ground for the rejection of citizenship; but that the security intelligence agency not be responsible for reporting information concerning threats to public order or reprehensible behaviour unless those threats fall within its statutory mandate.

155. WE RECOMMEND THAT any applicant recommended for denial of citizenship on security grounds be able to appeal that decision to the Security Appeals Tribunal. The Tribunal should follow the same procedures of appeal and review as for recommended denials of public service and immigration security clearances.

156. WE RECOMMEND THAT the Cabinet annually determine the government's intelligence requirements.

157. WE RECOMMEND THAT the security intelligence agency prepare at least annually a report on its activities for submission to the Cabinet

Committee on Security and Intelligence and that this report include an analysis of changes in security threats, changes in targetting policies, serious problems associated with liaison arrangements and legal difficulties arising from operational practices.

158. WE RECOMMEND THAT the Prime Minister be the chairman of the Cabinet Committee on Security and Intelligence and have the assistance of a vice-chairman.

159. WE RECOMMEND THAT the Privy Council Office Secretariat for Security and Intelligence continue its existing functions with the exception of any responsibilities its seconded staff now has for the preparation of long-term intelligence estimates and that the Secretary to the Cabinet devote a considerable amount of time to security and intelligence matters.

160. WE RECOMMEND THAT the Cabinet and Interdepartmental Committees on Security and Intelligence assume active responsibility for determining those security policy issues which require resolution and, where necessary, instruct the Security Advisory Committee or working groups of officials to prepare draft proposals for submission by stipulated deadlines.

161. WE RECOMMEND THAT one or more Ministers be clearly designated as responsible for bringing forward policy proposals to Cabinet on all aspects of security policy, and that the Solicitor General be the Minister responsible for the development of policies governing the work of the security intelligence agency.

162. WE RECOMMEND THAT the Secretary to the Cabinet and the Assistant Secretary to the Cabinet for Security and Intelligence continue to be responsible for overseeing the interdepartmental co-ordination of security policies and that more emphasis be given to analyzing the impact of security practices and policies on the departments and agencies of government.

163. WE RECOMMEND THAT the collation and distribution of security intelligence now carried out by the Security Advisory Committee be transferred to the Intelligence Advisory Committee and that the work of the Intelligence Advisory Committee in collating current intelligence and advising on intelligence priorities be broadened to include security intelligence and economic intelligence.

164. WE RECOMMEND THAT the Intelligence Advisory Committee be chaired by the Assistant Secretary to the Cabinet (Security and Intelligence).

165. WE RECOMMEND THAT the membership of the Intelligence Advisory Committee include, among others, the Director General of the security intelligence agency, the Commissioner of the R.C.M.P. and representatives of the Department of Finance and the Treasury Board.

166. WE RECOMMEND THAT a Bureau of Intelligence Assessments be established to prepare estimates of threats to Canada's security and vital interests based on intelligence received from the intelligence collecting departments and agencies of the government and from allied countries and that it be under the direction of a Director General who reports to the Prime Minister through the Secretary of the Cabinet.

167. WE RECOMMEND THAT the Minister responsible for the security intelligence agency be the Solicitor General.

168. WE RECOMMEND THAT the Minister responsible for the security intelligence agency should have full power of direction over the agency.

169. WE RECOMMEND THAT the Minister's direction of the security intelligence agency include, inter alia, the following areas:

(i) developing policy proposals for administrative or legislative changes with regard to the activities of the security intelligence agency and presenting such proposals to the Cabinet or Parliament;

(ii) developing any guidelines which are required by statute with respect to investigative techniques and reporting arrangements;

(iii) continuous review of the agency's progress in establishing personnel and management policies required by government;

(iv) reviewing difficult operational decisions involving any questions concerning legality of methods or whether a target is within the statutory mandate;

(v) reviewing targetting priorities set by the government and ensuring that the agency's priorities and deployment of resources coincide with the government's priorities;

(vi) approving proposals by the Director General to conduct full investigations and to apply for judicial authorization of investigative techniques (e.g. electronic surveillance and mail opening);

(vii) approving liaison arrangements with foreign countries after consultation with the Secretary of State for External Affairs;

(viii) approving liaison arrangements with provincial and municipal police forces and governments; and

(ix) authorizing dissemination of security intelligence to the media.

170. WE RECOMMEND THAT the Director General be responsible, in the normal course, for running the operations of the agency.

171. WE RECOMMEND THAT the Director General be responsible to the Deputy Minister for developing policy proposals with respect to the agency's field of activities.

172. WE RECOMMEND THAT the Minister meet regularly with the Director General and the Deputy Minister together, to discuss matters relating to the agency and to receive reports from the Director General on operational problems in the agency and policy proposals developed by the agency.

173. WE RECOMMEND THAT the Deputy Minister have such staff as he considers necessary to:

(i) assess the policy proposals brought forward by the Director General and to fill any gaps in security policy that are identified;

(ii) to appraise for the Minister the quality of the reports produced by the agency; and

(iii) assist the Minister in carrying out all his other responsibilities in the security field.

174. WE RECOMMEND THAT the Director General have direct access to the Minister, without the knowledge or consent of the Deputy Minister, when the Director General is of the opinion that the conduct of the Deputy Minister is such as to threaten the security of the country.

175. WE RECOMMEND THAT the Deputy Minister and the Director General each have direct access to the Prime Minister, and not consult with their Minister, in the following circumstances:

(i) if there are security concerns relating to any Minister;

(ii) if, in the opinion of the Deputy Minister or the Director General, the conduct of the Minister is such as to threaten the security of the country.

176. WE RECOMMEND THAT recognition be given to the special need for continuity in the office of the Minister responsible for the security intelligence agency.

177. WE RECOMMEND THAT any disagreements between the Solicitor General and the Auditor General with respect to:

(i) access by the Auditor General to information in the possession of the security intelligence agency; and

(ii) disclosure in the Auditor General's Report of classified information obtained by him from the agency

be referred to the Joint Parliamentary Committee on Security and Intelligence for resolution, and pending the creation of that Committee the resolution all such disagreements be held in abeyance.

178. WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of an Advisory Council on

Security and Intelligence to review the legality and propriety of the policies and practices (which includes operations) of the security and intelligence agency and of covert intelligence gathering by any other non-police agency of the federal government.

179. WE RECOMMEND THAT the Advisory Council on Security and Intelligence be constituted as follows:

(a) The Council should be comprised of three members, who should be at arm's length with the Government of Canada, and at least one of whom should be a lawyer of at least ten years' standing.

(b) Members of the Council should be appointed by the Governor in Council after approval of their appointments by resolution of the House of Commons and Senate. One member should be designated by the Governor in Council as the Chairman of the Council.

(c) Members of the Council should serve for not more than six years, and the termination dates of their appointments should vary so as to maintain continuity.

(d) Subject to (c) above, members of the Council should hold office during good behaviour subject to being removed by the Governor in Council on address of the Senate and House of Commons.

(e) Members of the Council need not serve on a full-time basis but must be able to devote up to five days a month to the work of the Council.

180. WE RECOMMEND THAT the Advisory Council on Security and Intelligence have the following powers and responsibilities:

(a) For purposes of having access to information, members of the Council should be treated as if they were members of the security intelligence agency and have access to all information and files of the security intelligence agency.

(b) The Council should be authorized to staff and maintain a small secretariat including a full-time executive secretary and a full-time investigator, to employ its own legal counsel and to engage other personnel on a temporary basis for the purpose of carrying out major investigations or studies.

(c) The Council should be informed of all public complaints received by the security intelligence agency or by the Minister, or by any other department or agency of the federal government, alleging improper or illegal activity by members of the security intelligence agency or any other covert intelligence gathering agency (except police) of the federal government, and when it has reason to believe that a complaint cannot be or has not been satisfactorily investigated it must be able to conduct its own investigation of the complaint.

(d) The Council should have the power to require persons, including members of the security intelligence agency or of any other federal non-police agency collecting intelligence by covert means, to testify before it under oath and to produce documents.

(e) The Council should report to the Solicitor General any activity or practice of the security intelligence agency or any other federal non-police agency collecting intelligence by covert means, which it considers to be improper or illegal and from time to time it should offer the Solicitor General its views on at least the following:

(i) whether an activity or practice of the security intelligence agency falls outside the statutory mandate of the security intelligence agency;

(ii) the implementation of administrative directives and guidelines relating to such matters as the use of human sources, the reporting of information about individuals to government departments and the role of the security intelligence agency in the security screening process;

(iii) the working of the system of controls on the use of intrusive intelligence collection techniques;

(iv) the security intelligence agency's liaison relationship with foreign agencies and with other police or security agencies in Canada;

(v) the adequacy of the security intelligence agency's response to public complaints;

(vi) any other matter which in the Council's opinion concerns the propriety and legality of the security intelligence agency's activities.

(f) The Council should report, to the Minister responsible for any federal non-police organization collecting intelligence by covert means, any activity or practice of a member of such organization which in the Council's view is improper or illegal.

(g) The Council should report to the Joint Parliamentary Committee on Security and Intelligence at least annually on the following:

(i) the extent and prevalence of improper and illegal activities by members of the security and intelligence agency or any other federal organization collecting intelligence by covert means, and the adequacy of the government's response to its advice on such matters;

(ii) any direction given by the Government of Canada, to the security intelligence agency or any other federal organization collecting intelligence by covert means, which the Council regards as improper;

(iii) any serious problems in interpreting or administering the statute governing the security intelligence agency.

181. WE RECOMMEND THAT Parliament enact legislation vesting authority in an organization to carry out security intelligence activities and that such legislation include provision for

(a) the definition of threats to the security of Canada about which security intelligence is required;

(b) certain organizational aspects of the security intelligence agency including: its location in government; the responsibilities, manner of appointment and term of office of its Director General; the powers of direction of the responsible Minister and Deputy Minister; and, the employment status of its personnel;

(c) the general functions of the organization to collect, analyze and report security intelligence and to be confined to these activities, plus specific authorization of certain activities outside Canada, liaison with foreign agencies and provincial and municipal authorities and of the organization's role in security screening programmes;

(d) authorization of certain investigative powers and the conditions and controls applying to the use of such powers;

(e) mechanisms of external control to ensure an independent review of the legality and propriety of security intelligence activities and any other covert intelligence activities by agencies of the Government of Canada except those performed by a police force.

182. WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of a Joint Committee of the Senate and House of Commons to review the activities of the security intelligence agency and of any other agency collecting intelligence (other than criminal intelligence) by covert means.

183. WE RECOMMEND THAT the Joint Committee on Security and Intelligence have not more than ten members, that all recognized parliamentary parties be represented on it, that the leaders of parliamentary parties personally select members of their parties for the Committee and, if possible, serve themselves, that the Committee be chaired by a member of an opposition party, that members serve for the duration of a Parliament and that it retain the help of such specialists as it considers necessary.

184. WE RECOMMEND THAT the Committee be concerned with both the effectiveness and the propriety of Canada's security and intelligence arrangements and that its functions include the following:

(a) consideration of the annual estimates for the security intelligence agency and for any other agency collecting intelligence (other than criminal intelligence) by covert means;

(b) examination of annual reports of the use made of "extraordinary" powers of intelligence collection (other than criminal intelligence) authorized by Parliament;

(c) consideration of reports directed to it by the Advisory Council on Security and Intelligence;

(d) the investigation of any matter relating to security and intelligence referred to it by the Senate or House of Commons.

185. WE RECOMMEND THAT the Joint Committee on Security and Intelligence whenever necessary conduct its proceedings *in camera*, but that it publish an expurgated report of all *in camera* proceedings.

186. WE RECOMMEND THAT the security intelligence agency be directed to draft a policy for approval by the Minister to ensure the release of historical material, unless such release can be shown to endanger the security of Canada.

187. WE RECOMMEND THAT a proclamation invoking the War Measures Act be debated in Parliament forthwith if Parliament is in session or, if Parliament is not in session, within seven days of the proclamation. Parliament should be informed of the reasons for the invocation of the Act, either publicly in the House, in an *in camera* session or by means of consultation with the leaders of the opposition parties, or through a report to the Joint Parliamentary Committee on Security and Intelligence.

188. WE RECOMMEND THAT the War Measures Act limit the duration of a proclamation issued by the Governor in Council to a specific period not to exceed twelve months. Extensions for periods not to exceed twelve months should require further approval by Parliament.

189. WE RECOMMEND THAT orders and regulations to be brought into force when the War Measures Act is invoked be drafted in advance.

190. WE RECOMMEND THAT the War Measures Act be amended to provide that such draft orders and regulations be tabled and approved by Parliament prior to their being brought into force. Any orders and regulations under the War Measures Act which have not been so approved in advance of the emergency should have to be tabled forthwith and should expire 30 days after coming into force unless approved by Parliament in the meantime.

191. WE RECOMMEND THAT section 6(5) of the War Measures Act be amended to provide that powers that are to be permitted, notwithstanding the Canadian Bill of Rights, should be specifically identified in the legislation and approved by Parliament.

192. WE RECOMMEND THAT section 3(1)(b) of the War Measures Act be amended. There should be no executive power in emergencies to exile

or deport a Canadian citizen, nor should the Governor in Council have the power to revoke Canadian citizenship.

193. WE RECOMMEND THAT there be provision in the War Measures Act for:

(a) a Board of Detention Review to consider the circumstances of persons whose liberty has been restrained by actions taken or purported to have been taken under the War Measures Act; and

(b) a Compensation Tribunal to award compensation to persons whose rights have been infringed, without due cause, through the application of emergency legislation.

194. WE RECOMMEND THAT the War Measures Act be amended

(a) to prohibit prolonged detention after arrest without the laying of a charge; a charge should be laid as soon as possible and in any event not more than seven days after arrest;

(b) to prohibit the creation by the Governor in Council of new courts to handle charges laid under the Act and Regulations; and

(c) to provide that if, because of the volume of cases arising out of charges laid under the Act and regulations, the ordinary courts of criminal jurisdiction cannot handle the caseload, such courts should be enlarged or the jurisdiction of other existing courts should be extended to deal with the overload.

195. WE RECOMMEND THAT the War Measures Act be amended to provide that an arrest under the War Measures Act should not be based solely upon the fact of simple membership in an illegal organization.

196. WE RECOMMEND THAT:

(a) no regulations passed pursuant to the War Measures Act have a retroactive effect; and

(b) if the regulations proscribe a course of conduct which was not previously an offence, and the conduct began prior to the making of the regulations, a reasonable period of grace be granted during which any person may comply with the regulations.

197. WE RECOMMEND THAT certain fundamental rights and freedoms, such as those specified in the Public Order (Temporary Provisions) Act, those specified in Article 4 of the International Covenant on Civil and Political Rights, and the right of citizens not to be deprived of citizenship or exiled, not be abrogated or abridged by the War Measures Act or any other emergency legislation under any circumstances.

198. WE RECOMMEND THAT the government give immediate attention to the establishment of a Special Identification Programme.

199. WE RECOMMEND THAT the legislation dealing with national emergencies should prohibit the making of regulations which would provide for a system of detention upon order by a Minister or the Governor in Council. Any detention should be consequent upon arrest, trial and imprisonment in accordance with traditional judicial procedures.

200. WE RECOMMEND THAT the identification of dangerous individuals who should be arrested in situations of emergency of the kinds contemplated by the War Measures Act be carefully reviewed prior to the outbreak of any crisis by a Committee on Arrests in Emergencies external to the security intelligence agency. This Committee should be responsible to the Interdepartmental Committee on Security and Intelligence or the Interdepartmental Committee on Emergency Preparedness and should include representatives from the Department of the Solicitor General and the Department of Justice, with a member from the security intelligence agency serving in an advisory capacity. The responsible interdepartmental committee should annually submit a report on the arrests programme to the Cabinet Committee on Security and Intelligence.

201. WE RECOMMEND THAT members of the Committee review and record decisions on individual cases proposed for arrest or for extraordinary powers of search and seizure in case of an emergency.

202. WE RECOMMEND THAT the members of the Committee who review individual cases be fully briefed as to the methods used by the security intelligence agency to obtain the supporting evidence. This evidence should be discussed in the annual report to the Cabinet Committee on Security and Intelligence.

203. WE RECOMMEND THAT arrest lists be prepared only in respect of persons who are believed on reasonable grounds to be serious security threats in the event of emergency of the kinds contemplated by the War Measures Act such as those who, on reasonable grounds, are believed to be espionage agents, terrorists or saboteurs, or likely to become such.

204. WE RECOMMEND THAT the security intelligence agency have the responsibility to alert government to situations that might develop into emergencies that would threaten the internal security of the nation. Reports on such threats should be reviewed by the Solicitor General and the Intelligence Advisory Committee and used by the Bureau of Intelligence Assessments in preparing long-term, strategic assessments of security threats. Reports assessing the imminence and significance of threats should be submitted to the Cabinet at an appropriate time.

205. WE RECOMMEND THAT in times of national emergency, the security intelligence agency monitor all intelligence received from its own sources and from sources of other agencies, and provide assessments of such intelligence to the crisis centre established to co-ordinate the government's response to the crisis.

206. WE RECOMMEND THAT in national emergencies the government seek the advice of the Director General of the security intelligence agency as to matters to which security intelligence collected by the agency would be relevant.

207. WE RECOMMEND THAT the responsibility for assessing the security requirements for vital points remain a protective security function of the federal police agency. The proper role of a security intelligence agency is to report intelligence that may be valuable towards ensuring that vital points are adequately protected.

208. WE RECOMMEND THAT during a national emergency involving terrorism or political violence the security intelligence agency be responsible for advising these officials on the security implications of media coverage of the crisis.

209. WE RECOMMEND THAT section 10 of the Official Secrets Act be repealed.

210. WE RECOMMEND THAT sections 5 and 6 of the Official Secrets Act not be retained in the new espionage legislation; if a general espionage offence is enacted, as recommended in the First Report (Recommendation 5), it will not be necessary to preserve the other particular espionage related offences in sections 3, 4, 5 and 6 of the Official Secrets Act.

211. WE RECOMMEND THAT there be no legislation requiring the registration of foreign agents or making it an offence to be a secret agent of a foreign power.

212. WE RECOMMEND THAT the seditious offences now found in the Criminal Code be abrogated.

213. WE RECOMMEND THAT the federal government establish the Office of Inspector of Police Practices, a review body to monitor how the R.C.M.P. handles complaints and, in certain circumstances, to undertake investigations of complaints on its own.

214. WE RECOMMEND THAT as alternatives to filing complaints directly with the R.C.M.P.,

(a) provincial police boards and commissions continue to receive complaints against the R.C.M.P., and to forward copies of them to the R.C.M.P. without revealing the name of the complainant if so requested by the complainant;

(b) the Inspector of Police Practices and local offices of the federal Department of Justice, receive complaints against the R.C.M.P. and forward copies of them to the R.C.M.P. without revealing the name of the complainant if so requested by the complainant.

These alternatives to sending a complaint directly to the R.C.M.P. should be widely publicized by the Solicitor General, by the Force, by

the Office of Inspector of Police Practices and by provincial police boards and commissions.

215. WE RECOMMEND THAT the Federal Government request the courts to establish procedures whereby judges may send a formal report to the Commissioner of the R.C.M.P. of cases of suspected police misconduct.

216. WE RECOMMEND THAT the Inspector of Police Practices be authorized to receive allegations from members of the R.C.M.P. concerning improper or illegal activity on the part of other members of the Force.

217. WE RECOMMEND THAT the Inspector of Police Practices endeavour to keep secret the identities of R.C.M.P. members who report incidents of illegal or improper R.C.M.P. activity.

218. WE RECOMMEND THAT R.C.M.P. officers be proscribed from taking recriminatory personnel action against any member under their command by reason only that the member filed, or is suspected of having filed, an allegation of illegal or improper R.C.M.P. conduct with the Office of the Inspector of Police Practices.

219. WE RECOMMEND THAT members of the R.C.M.P. be under a specific statutory duty to report evidence of illegal or improper conduct on the part of members of the Force to their superiors. Where there is reason to believe that it would be inadvisable to report such evidence to their superiors they should be under a statutory duty to report it to the Inspector of Police Practices.

220. WE RECOMMEND THAT the R.C.M.P. retain the primary responsibility for investigating allegations of improper, as opposed to illegal, conduct lodged against its members.

221. WE RECOMMEND THAT the Inspector of Police Practices be empowered to undertake an investigation of an allegation of R.C.M.P. misconduct when

    (a) the complaint involves a member of the R.C.M.P. senior to all members of the internal investigation unit;

    (b) the complaint involves a member of the internal investigation unit;

    (c) the complaint is related to a matter which the Inspector is already investigating;

    (d) the Inspector is of the opinion that it is in the public interest that the complaint be investigated by him; or

    (e) the Solicitor General requests the Inspector to undertake such an investigation.

222. WE RECOMMEND THAT the Inspector of Police Practices be empowered to monitor the R.C.M.P.'s investigations of complaints and to evaluate the R.C.M.P.'s complaint handling procedures. The Inspec-

tor should receive copies of all formal complaints of R.C.M.P. misconduct and reports from the R.C.M.P. of the results of its investigations.

223. WE RECOMMEND THAT, as part of his monitoring and evaluating role, the Inspector of Police Practices inquire into and review at his own discretion or at the request of the Solicitor General any aspect of R.C.M.P. operations and administration insofar as such matters may have contributed to questionable behaviour on the part of R.C.M.P. members.

224. WE RECOMMEND THAT copies of all allegations of illegal conduct on the part of R.C.M.P. members, which are received by any of the bodies authorized to receive the allegations, be forwarded to the appropriate law enforcement body for investigation and concurrently to the appropriate prosecutorial authorities.

225. WE RECOMMEND THAT the Solicitor General adopt the necessary administrative machinery to allow provincial attorneys general to direct at their discretion members of municipal or provincial police forces to investigate an allegation of criminal misconduct lodged against an R.C.M.P. member.

226. WE RECOMMEND THAT whenever the R.C.M.P. is the police force undertaking the investigation into an alleged offence committed by one of its members, a separate, special R.C.M.P. investigative unit be directed to investigate the matter for internal (non-prosecutorial) matters.

227. WE RECOMMEND THAT an R.C.M.P. internal investigation into alleged illegal conduct not be undertaken until the regular police investigation has been substantially completed, unless there are exceptional circumstances which warrant an immediate internal inquiry.

228. WE RECOMMEND THAT

(a) the Office of Inspector of Police Practices be empowered to conduct an investigation into allegations of illegal conduct;

(b) any criminal investigation take precedence over the Inspector's investigation;

(c) the R.C.M.P. halt any internal investigation that it is conducting for disciplinary purposes; and

(d) any relevant information discovered by the Inspector during the investigation be transmitted to the appropriate prosecutorial authorities.

229. WE RECOMMEND THAT criminal investigatory files continue to be used by the R.C.M.P. for internal investigations.

230. WE RECOMMEND THAT the R.C.M.P. advise complainants whether it has found the allegation to be founded, unfounded, or unsubstantiated.

231. WE RECOMMEND THAT complainants have the right to appeal to the Solicitor General if they are not satisfied with how the R.C.M.P. has handled their complaint.

232. WE RECOMMEND THAT, upon request, the Inspector of Police Practices advise the Solicitor General as to the quality and thoroughness of any investigation of a complaint undertaken by the R.C.M.P. The Inspector of Police Practices should also re-investigate a complaint at the request of the Solicitor General.

233. WE RECOMMEND THAT the Inspector of Police Practices report directly to the Solicitor General the results of his office's investigations of complaints alleging misconduct.

234. WE RECOMMEND THAT the Inspector of Police Practices, as part of his role of monitoring the complaint handling procedures of the R.C.M.P., bring to the attention of the Solicitor General any specific complaints which, in the opinion of the Inspector, have not been properly handled by the R.C.M.P.

235. WE RECOMMEND THAT any punishment given an R.C.M.P. member arising from a complaint not necessarily be communicated to the complainant. Rather, the Force should tell the complainant that it recognizes the error, that it apologizes for the misconduct of its member, that it has taken steps to ensure that the activity will not be repeated, and that in those cases where the complainant has suffered damage or loss it will make an *ex gratia* payment.

236. WE RECOMMEND THAT the Inspector of Police Practices periodically review and report on the appropriateness of the disciplinary measures taken by the R.C.M.P. in regard to questionable conduct on the part of a member which affects the public.

237. WE RECOMMEND THAT the Office of Inspector of Police Practices be established within the Department of Solicitor General and that the Inspector report directly to the Solicitor General.

238. WE RECOMMEND THAT the Inspector of Police Practices be an Order-in-Council appointment and that the following conditions of employment be included in the statute establishing the office:

    (a) the Inspector should be subject to dismissal only for 'cause';

    (b) 'cause' includes mental or physical incapacity; misbehaviour; bankruptcy or insolvency; or failure to comply with the provisions of the Act establishing the Office of Inspector of Police Practices;

    (c) the Inspector should be appointed for a five-year term;

    (d) no Inspector should serve for more than 10 years.

239. WE RECOMMEND THAT the Inspector of Police Practices have access to the Prime Minister on matters concerning improper behaviour

on the part of the Solicitor General in the performance of his duties vis-à-vis the R.C.M.P.

240. WE RECOMMEND THAT the Inspector of Police Practices be a lawyer who has at least 10 years standing at the Bar, and that he have a small staff with experience in the field of police administration or criminal justice.

241. WE RECOMMEND THAT the Inspector of Police Practices be empowered to obtain on secondment experienced police investigators and other experts to conduct investigations, when appropriate, of misconduct on the part of R.C.M.P. members.

242. WE RECOMMEND THAT the Inspector of Police Practices report regularly to the Solicitor General on the results of investigations and annually to the Solicitor General on significant activities of his Office during the year. The Solicitor General should table this report in Parliament.

243. WE RECOMMEND THAT, subject to the restrictions which we have proposed when the R.C.M.P. are carrying out duties relating to the mandate of the security intelligence agency, the R.C.M.P. and the Inspector of Police Practices provide each provincial attorney general and each provincial police board with the following:

(a) information about all serious complaints in their province;

(b) reports on the disposition of such complaints;

(c) statistical analyses of complaints regarding R.C.M.P. misconduct.

244. WE RECOMMEND THAT the Inspector of Police Practices should

(a) obtain on secondment staff from provincial police forces, police boards, or appropriate provincial government departments when forming task forces to investigate allegations of R.C.M.P. misconduct;

(b) normally consult the appropriate provincial officials on recommendations he proposes to make arising out of a serious allegation in that province.

245. WE RECOMMEND THAT the Solicitor General

(a) initiate the establishment of a regular forum for Provincial and Federal ministers and officials to discuss problems and share information concerning complaint handling procedures; and

(b) ensure that provincial inquiries into allegations of R.C.M.P. misconduct, to the extent of their constitutionally proper scope, receive the full co-operation of the R.C.M.P. and the Inspector of Police Practices.

246. WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice relating to matters arising out of its administrative activities as an

agency of the Government of Canada from the federal Department of Justice.

247. WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice with respect to its federal law enforcement role from the federal Department of Justice, and with respect to its law enforcement role pursuant to a provincial or municipal contract from the appropriate provincial attorney general.

248. WE RECOMMEND THAT if the R.C.M.P. is in doubt as to which governmental level is the appropriate one from which to seek its legal advice in a particular matter it should get an opinion from the federal Department of Justice as to which is the appropriate level and abide by that opinion.

249. WE RECOMMEND THAT the Department of Justice assign sufficient counsel to satisfy the requirements of the R.C.M.P.

250. WE RECOMMEND THAT there be no Legal Branch of the R.C.M.P.

251. WE RECOMMEND THAT THE R.C.M.P. continue to have within the Force regular members with law degrees and to assign a sufficient number of such members to work with the Department of Justice counsel to ensure that the R.C.M.P.'s needs are explained and interpreted to those counsel.

252. WE RECOMMEND THAT no member of the Force with a law degree be assigned to any duty requiring him to give a legal opinion to another member of the Force, with the exception of the normal assistance given by any superior to a subordinate in the course of the investigation of an alleged offence.

253. WE RECOMMEND THAT members with law degrees who are assigned to represent other members in disciplinary proceedings be supervised by Department of Justice counsel.

254. WE RECOMMEND THAT the Department of Justice counsel assigned to the Force have a specific duty to report to the Deputy Attorney General of Canada any past or future acts which he believes may be unlawful, of any past or present member of the Force.

255. WE RECOMMEND THAT the Deputy Solicitor General be considered as the deputy of the Solicitor General for all purposes related to the R.C.M.P. and that the Commissioner of the R.C.M.P. report directly to the Deputy Solicitor General rather than to the Solicitor General as at present.

256. WE RECOMMEND THAT the Solicitor General have full power of direction over the activities of the R.C.M.P., except over the 'quasi-judicial' police powers of investigation, arrest and prosecution in individual cases.

257. WE RECOMMEND THAT the Commissioner of the R.C.M.P. keep the Deputy Solicitor General, and through him the Solicitor General,

fully informed of all policies, directions, guidelines and practices of the Force, including all operational matters in individual cases which raise important questions of public policy.

258. WE RECOMMEND THAT if the Commissioner considers that the Deputy Solicitor General is giving him direction based on partisan or political considerations, the Commissioner take the matter up directly with the Minister. We further recommend that if the Commissioner, after consultation with the Deputy Solicitor General, considers that the Solicitor General is giving him, the Commissioner, direction based on partisan or political considerations, he should take the matter up directly with the Prime Minister.

259. WE RECOMMEND THAT in the contracts with the provinces covering the provision of R.C.M.P. policing services, the respective roles of the responsible federal and provincial ministers be clarified, so that the R.C.M.P. members involved have an accurate understanding of the division of their obligations and duties vis-à-vis those ministers.

260. WE RECOMMEND THAT the contracts with the contracting provinces incorporate as far as possible the principles of ministerial direction recommended above for the federal level.

261. WE RECOMMEND THAT the Solicitor General, in concert with his counterparts in the provinces, initate a review of the current system of controls governing the use of the R.C.M.P.'s investigatory methods.

262. WE RECOMMEND THAT the Solicitor General refer to the Law Reform Commission of Canada the matter of whether or not the Criminal Code should be amended to allow peace officers in Canada, under defined circumstances and controls, to make surreptitious entries.

263. WE RECOMMEND THAT a committee be established with statutory powers to review the use of electronic surveillance by all police forces in Canada, including, but not limited to, the procedure by which authorizations are applied for.

264. WE RECOMMEND THAT section 178.2(1) of the Criminal Code be amended so that information obtained as a result of lawful electronic surveillance can be given to

(a) a foreign law enforcement agency;

(b) any person who is involved in the preparation of the Solicitor General's Annual Report to Parliament on the use of electronic surveillance;

(c) any person who is involved in the preparation of a provincial attorney general's Annual Report to a provincial legislature on the use of electronic surveillance; and

(d) any person authorized by federal legislation to review the use of this investigative technique.

265. WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device, providing the judge issuing the authorization sets out in the authorization

(a) the methods which may be used in executing it;

(b) that there be nothing done that shall cause significant damage to the premises that remains unrepaired;

(c) that there be no use of physical force or the threat of such force against any person.

266. WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to use the electrical power source available in the premises without compensation.

267. WE RECOMMEND THAT the Solicitor General seek the co-operation of the provinces to effect the necessary administrative and legislative changes to provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards in order to allow peace officers to install, operate, repair and remove electronic eavesdropping devices in a lawful manner.

268. WE RECOMMEND THAT, not withstanding the present provisions of the Post Office Act, R.C.M.P. peace officers be authorized by legislation to examine or photograph an envelope and to open mail in order to examine and test any substance found in the mail, subject to the following conditions:

(a) this power is exercisable only on judicial authorization, subject to the same safeguards as are now found in section 178 of the Criminal Code;

(b) the offences concerning which this power can be exercisable are limited to narcotic and drug offences;

(c) the reading of an accompanying written, printed or typewritten message other than a message accompanying an illicit drug or narcotic is an offence;

(d) there is a procedure established (such as a statutory declaration by the official supervising the opening of mail) to ensure that in executing the judicial authorization no one has unlawfully read any message contained in the mail. The declaration should be filed with the Solicitor General.

269. WE RECOMMEND THAT the Post Office Act should be amended so that it is clear that controlled deliveries of mail by R.C.M.P. peace officers or their agents may be made lawfully.

270. WE RECOMMEND THAT Schedule I of the Prohibited Mail Regulations be amended so that an article of mail is considered "non-mailable matter" if there are grounds for suspicion or reasonable belief that the article of mail contains an explosive.

271. WE RECOMMEND THAT

(a) legislation authorize the heads of federal government institutions to release information concerning an individual's name, address, phone number, date and place of birth, occupation and physical description on receiving a written request from the R.C.M.P. stating that such information is necessary for the purpose of conducting a criminal investigation.

(b) all other personal information held by the federal government with the exception of census information held by Statistics Canada, be accessible to the R.C.M.P. through a system of judicially granted authorizations subject to the same terms and conditions as are now found in section 178 of the Criminal Code with regard to electronic surveillance.

272. WE RECOMMEND THAT the R.C.M.P. obtain personal information held by government institutions under the jurisdiction of provincial governments only from persons legally authorized to release such information and that, with regard to any province in which there is no authorized means of access to information to which the Solicitor General of Canada considers that the R.C.M.P. should have access in order to discharge its policing responsibilities effectively, the Solicitor General should seek the co-operation of the province in amending its laws to make such access possible.

273. WE RECOMMEND THAT the amendments which we proposed in Part V, Chapter 4 to facilitate physical surveillance operations by the security intelligence agency be made applicable to physical surveillance in criminal investigations by the R.C.M.P.

274. WE RECOMMEND THAT the R.C.M.P. establish administrative guidelines concerning the use of undercover operatives in criminal investigations. These guidelines should be approved by the Solicitor General and should be publicly disclosed.

275. WE RECOMMEND THAT to facilitate the obtaining of false identification documents in a lawful manner for R.C.M.P. undercover operatives in criminal investigations, federal legislation be amended, and the co-operation of the provinces be sought in amending relevant provincial laws, in a similar manner to that recommended for the false identification needed in physical surveillance operations of both the security intelligence agency and the criminal investigation side of the R.C.M.P.

276. WE RECOMMEND THAT income tax legislation be amended to permit R.C.M.P. sources in criminal investigations not to declare as income payments received by them from the force and that other fiscal

legislation requiring deduction and remittance by or on behalf of employees be amended to exclude R.C.M.P. sources.

277. WE RECOMMEND THAT section 383 of the Criminal Code of Canada concerning secret commissions be amended to provide that a person providing information to the R.C.M.P. in a duly authorized criminal investigation does not commit the offence defined in that section.

278. WE RECOMMEND THAT the R.C.M.P. develop a programme designed to assist its members who serve as undercover operatives in criminal investigations to overcome the personality disorders associated with long-term assignments in this role.

279. WE RECOMMEND THAT the R.C.M.P. develop reporting and review procedures both at the divisional and the national levels to enable an internal review of the following cases:

(a) when a conviction is obtained even though the accused's confession is held inadmissible;

(b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained.

280. WE RECOMMEND THAT the R.C.M.P. adopt the following policies concerning interrogation:

(a) members of the Force have a duty to inform a person in custody, within a reasonable time after being taken into custody, of his right to retain counsel; and

(b) members of the Force should provide reasonable means to a person in custody to communicate with his counsel without delay upon the person making a request to do so.

281. WE RECOMMEND THAT the R.C.M.P. revise training materials and programmes relating to interrogation to include proper instructions on the right of an accused to retain and communicate with counsel.

282. WE RECOMMEND THAT members of the R.C.M.P. be required to advise persons in custody reasonably soon after their arrest that arrangements exist to enable them to apply for counsel, such counsel to be paid for by the state if they cannot afford to pay counsel.

283. WE RECOMMEND THAT the Criminal Code be amended to include the following provision:

(1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and

the manner in which the evidence was obtained shall be considered, including:

(a) the extent to which human dignity and social values were breached in obtaining the evidence;

(b) whether any harm was inflicted on the accused or others;

(c) whether any improper or illegal act under (a) or (b) was done wilfully or in a manner that demonstrated an inexcusable ignorance of the law;

(d) the seriousness of any breach of the law in obtaining the evidence as compared with the seriousness of the offence with which the accused is charged;

(e) whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

284. WE RECOMMEND THAT the Criminal Code be amended to include a defence of entrapment embodying the following principle:

The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable having regard to all the circumstances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police.

285. WE RECOMMEND THAT the administrative guidelines concerning the use of undercover operatives in criminal investigations which we recommended earlier be established by the R.C.M.P., include a direction that no member of the R.C.M.P. and no agent of the R.C.M.P. counsel, incite or procure an unlawful act.

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APPENDIX "A"

CHAPTER I-13

An Act respecting public and departmental inquiries

SHORT TITLE

1. This Act may be cited as the Inquiries Act, R.S., c.154, s.1.

PART I

PUBLIC INQUIRIES

2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof. R.S., c.154, s.2.

3. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted. R.S., c.154, s.3.

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine. R.S., c.154, s.4.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. R.S., c.154, s.5.

PART II

DEPARTMENTAL INVESTIGATIONS

6. The minister presiding over any department of the Public Service may appoint at any time, under the authority of the Governor in Council, a commissioner or commissioners to investigate and report upon the state and management of the business, or any part of the business, of such department,

either in the inside or outside service thereof, and the conduct of any person in such service, so far as the same relates to his official duties. R.S., c.154, s.6.

7. The commissioner or commissioners may, for the purposes of the investigation, enter into and remain within any public office or institution, and shall have access to every part thereof, and may examine all papers, documents, vouchers, records and books of every kind belonging thereto, and may summon before him or them any person and require him to give evidence on oath, orally or in writing, or on solemn affirmation if he is entitled to affirm in civil matters, and any such commissioner may administer such oath or affirmation. R.S., c.154, s.7.

8. (1) The commissioner or commissioners may, under his or their hand or hands, issue a subpoena or other request or summons, requiring and commanding any person therein named to appear at the time and place mentioned therein, and then and there to testify to all matters within his knowledge relative to the subject-matter of such investigation, and to bring with him and produce any document, book, or paper that he has in his possession or under his control relative to any such matter as aforesaid; and any such person may be summoned from any part of Canada by virtue of the subpoena, request or summons.

(2) Reasonable travelling expenses shall be paid to any person so summoned at the time of service of the subpoena, request or summons. R.S., c.154, s.8.

9. (1) If, by reason of the distance at which any person, whose evidence is desired, resides from the place where his attendance is required, or for any other cause, the commissioner or commissioners deem it advisable, he or they may issue a commission or other authority to any officer or person therein named, empowering him to take such evidence and report it to him or them.

(2) Such officer or person shall, before entering on any investigation, be sworn before a justice of the peace faithfully to execute the duty entrusted to him by such commission, and, with regard to such evidence, has the same powers as the commissioner or commissioners would have had if such evidence had been taken before him or them, and may, in like manner, under his hand issue a subpoena or other request or summons for the purpose of compelling the attendance of any person, or the production of any document, book or paper. R.S., c.154, s.9.

10. (1) Every person who

(a) being required to attend in the manner provided in this Part, fails, without valid excuse, to attend accordingly,

(b) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same,

(c) refuses to be sworn or to affirm, as the case may be, or

(d) refuses to answer any proper question put to him by a commissioner, or other person as aforesaid,

is liable, on summary conviction before any police or stipendiary magistrate, or judge of a superior or county court, having jurisdiction in the county or district

in which such person resides, or in which the place is situated at which he was so required to attend, to a penalty not exceeding four hundred dollars.

(2) The judge of the superior or county court aforesaid shall, for the purposes of this Part, be a justice of the peace. R.S., c.154, s.10.

PART III

GENERAL

11. (1) The commissioners, whether appointed under Part I or under Part II, if thereunto authorized by the commission issued in the case, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry.

(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

(3) The persons so deputed, when authorized by order in council, have the same powers that the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(4) The persons so deputed shall report the evidence and their findings, if any, thereon to the commissioners. R.S., c.154, s.11.

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel. R.S., c.154, s.12.

13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel. R.S., c.154, s.13.

PART IV

INTERNATIONAL COMMISSIONS AND TRIBUNALS

14. (1) The Governor in Council may, whenever he deems it expedient, confer upon an international commission or tribunal all or any of the powers conferred upon commissioners under Part I.

(2) The powers so conferred may be exercised by such commission or tribunal in Canada, subject to such limitations and restrictions as the Governor in Council may impose, in respect to all matters that are within the jurisdiction of such commission or tribunal. R.S., c.154, s.14.

APPENDIX "B"

P.C. 1977-1911

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 6 July, 1977

WHEREAS it has been established that certain persons who were members of the R.C.M.P. at the time did, on or about October 7, 1972, take part jointly with persons who were then members of la Sûreté du Québec and la Police de Montréal in the entry of premises located at 3459 St. Hubert Street, Montreal, in the search of those premises for property contained therein, and in the removal of documents from those premises, without lawful authority to do so;

WHEREAS allegations have recently been made that certain persons who were members of the R.C.M.P. at the time may have been involved on other occasions in investigative actions or other activities that were not authorized or provided for by law;

WHEREAS, after having made inquiries into these allegations at the instance of the Government, the Commissioner of the R.C.M.P. now advises that there are indications that certain persons who were members of the R.C.M.P. may indeed have been involved in investigative actions or other activities that were not authorized or provided for by law, and that as a consequence, the Commissioner believes that in the circumstances it would be in the best interests of the R.C.M.P. that a Commission of Inquiry be set up to look into the operations and policies of the Security Service on a national basis;

WHEREAS public support of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada is dependent on trust in the policies and procedures governing its activities;

AND WHEREAS the maintenance of that trust requires that full inquiry be made into the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, advise that, pursuant to the Inquiries Act, a Commission do issue under the Great Seal of Canada, appointing

Mr. Justice David C. McDonald of Edmonton, Alberta
Mr. Donald S. Rickerd of Toronto, Ontario
Mr. Guy Gilbert of Montreal, Quebec

to be Commissioners under Part I of the Inquiries Act:

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalance of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

The Committee further advise that the Commissioners:

1. be authorized to adopt such procedures and methods as the Commissioners may from time to time deem expedient for the proper conduct of the inquiry;
2. be directed that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined;
3. be directed, in making their report, to consider and take all steps necessary to preserve
   (a) the secrecy of sources of security information within Canada; and
   (b) the security of information provided to Canada in confidence by other nations;
4. be authorized to sit at such time and at such places as they may decide from time to time, to have complete access to personnel and information available in the Royal Canadian Mounted Police and to be provided with adequate working accommodation and clerical assistance;
5. be authorized to engage the services of such staff and technical advisers as they deem necessary or advisable and also the services of counsel to aid them and assist in their inquiry at such rates of remuneration and reimbursement as may be approved by the Treasury Board;
6. be directed to follow established security procedures with regard to their staff and technical advisers and the handling of classified information at all stages of the inquiry;
7. be authorized to exercise all the powers conferred upon them by section 11 of the Inquiries Act; and

8. be directed to report to the Governor in Council with all reasonable dispatch and file with the Privy Council Office their papers and records as soon as reasonably may be after the conclusion of the inquiry.

The Committee further advise that, pursuant to section 37 of the Judges Act, His Honour Mr. Justice McDonald be authorized to act as Commissioner for the purposes of the said Commission and that Mr. Justice McDonald be the Chairman of the Commission.

Certified to be a true copy
Copie certifiée conforme

H. Chassé

Assistant Clerk of the Privy Council
Le Greffier Adjoint du Conseil privé

APPENDIX "C"

COMMISSION

appointing

the Honourable Mr. Justice David C. McDonald,
Donald S. Rickerd, Esquire,
and
Guy Gilbert, Esquire

to be Commissioners under Part I of the Inquiries Act, to inquire into the relevant policies and procedures that govern the activities of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada, and the Honourable Mr. Justice McDonald to be the Chairman of the Commission.

DATED ..... 5th August, 1977
RECORDED ..... 10th August, 1977

Film 420 Document 60

L. McCann (signature)

DEPUTY REGISTRAR GENERAL OF CANADA

Brian Dickson (signature)

DEPUTY OF THE GOVERNOR GENERAL

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

Roger Tassé (signature)

DEPUTY ATTORNEY GENERAL

TO ALL TO WHOM these Presents shall come or whom the same may in anyway concern,

GREETING:

WHEREAS it has been established that certain persons who were members of the Royal Canadian Mounted Police at the time did, on or about October 7, 1972, take part jointly with persons who were then members of la Sûreté du Québec and la Police de Montréal in the entry of premises located at 3459 St. Hubert Street, Montreal, in the search of those premises for property contained therein, and in the removal of documents from those premises, without lawful authority to do so;

AND WHEREAS allegations have recently been made that certain persons who were members of the Royal Canadian Mounted Police at the time may have been involved on other occasions in investigative actions or other activities that were not authorized or provided for by law;

AND WHEREAS, after having made inquiries into these allegations at the instance of the Government, the Commissioner of the Royal Canadian Mounted Police now advises that there are indications that certain persons who were members of the Royal Canadian Mounted Police may indeed have been involved in investigative actions or other activities that were not authorized or provided for by law, and that as a consequence, the Commissioner believes that in the circumstances it would be in the best interests of the Royal Canadian Mounted Police that a Commission of Inquiry be set up to look into the operations and policies of the Security Service on a national basis;

AND WHEREAS public support of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada is dependent on trust in the policies and procedures governing its activities;

AND WHEREAS the maintenance of that trust requires that full inquiry be made into the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law;

AND WHEREAS pursuant to the provisions of Part I of the Inquiries Act, chapter I-13 of the Revised Statutes of Canada, His Excellency the Governor General in Council, by Order in Council P.C. 1977-1911 of the sixth day of July in the year of Our Lord one thousand nine hundred and seventy-seven, has authorized the appointment of Our Commissioners therein and hereinafter named

(a) to conduct such investigations as in their opinion are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the Royal Canadian Mounted Police that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further

action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

NOW KNOW YOU that, by and with the advice of Our Privy Council for Canada, We do by these Presents nominate, constitute and appoint the Honourable Mr. Justice David C. McDonald, of the City of Edmonton, in the Province of Alberta, Donald S. Rickerd, Esquire, of the City of Toronto, in the Province of Ontario and Guy Gilbert, Esquire, of the City of Montreal, in the Province of Quebec to be Our Commissioners to conduct such inquiry.

TO HAVE, hold, exercise and enjoy the said office, place and trust unto the said David C. McDonald, Donald S. Rickerd and Guy Gilbert, together with the rights, powers, privileges and emoluments unto the said office, place and trust of right and by law appertaining during Our Pleasure.

AND WE DO hereby authorize Our said Commissioners to adopt such procedures and methods as they may from time to time deem expedient for the proper conduct of the inquiry.

AND WE DO hereby direct Our said Commissioners to hold the proceedings of the inquiry in camera in all matters relating to national security and in all other matters where they deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

AND WE DO further direct Our said Commissioners, in making their report, to consider and take all steps necessary to preserve

(a) the secrecy of sources of security information within Canada; and

(b) the security of information provided to Canada in confidence by other nations.

AND WE DO hereby authorize Our said Commissioners to sit at such time and at such places as they may decide from time to time, to have complete access to personnel and information available in the Royal Canadian Mounted Police and to be provided with adequate working accommodation and clerical assistance.

AND WE DO further authorize Our said Commissioners to engage the services of such staff and technical advisers as they deem necessary or advisable and also the services of counsel to aid them and assist in their inquiry at such rates of remuneration and reimbursement as may be approved by the Treasury Board.

AND WE DO hereby direct Our said Commissioners to follow established security procedures with regard to their staff and technical advisers and the handling of classified information at all stages of the inquiry.

AND WE DO further direct Our said Commissioners to report to the Governor in Council with all reasonable dispatch and file with the Privy Council Office their papers and records as soon as reasonably may be after the conclusion of the inquiry.

AND WE DO hereby appoint the Honourable Mr. Justice McDonald to be the Chairman of the Commission.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed.

WITNESS:

THE HONOURABLE BRIAN DICKSON, a Puisne Judge of the Supreme Court of Canada and Deputy of Our Right Trusty and Well-beloved Jules Léger, Chancellor and Principal Companion of Our Order of Canada, Chancellor and Commander of Our Order of Military Merit upon whom We have conferred Our Canadian Forces' Decoration, Governor General and Commander-in-Chief of Canada.

AT OTTAWA, this fifth day of August in the year of Our Lord one thousand nine hundred and seventy-seven and in the twenty-sixth year of Our Reign.

BY COMMAND,
John Howard (signature)

DEPUTY REGISTRAR GENERAL OF CANADA

APPENDIX "D"

OPENING STATEMENT OF THE COMMISSION DECEMBER 6, 1977

This Commission has been given a complex and demanding task. Some of the legal issues it must consider are not as clear as some people think. Some of the factual issues require a marshalling of evidence which is far from simple in the circumstances, because one or more police forces are involved, and because in respect of some issues there are a large number of particular instances and people involved. The investigative and legal staff which this Commission has undertaken to organize which is of a high quality, is not readily available to the Attorney General of Canada or to his counterpart in the provinces, for after all, it is members of the national police force itself and the policies, past and present, of that force which are under investigation. Whether there is evidence which would justify prosecution in some particular case is not a question which could easily be answered by Crown attorneys, without there first having been undertaken the kind of cross-jurisdictional investigation which this Commission intends to carry out, and without the ability which this Commission has, anywhere in Canada, to require the fullest co-operation of the R.C.M.P. — a co-operation which is required by the terms of the Order-in-Council.

In its fact-finding function, in its consideration of the societal values which are invoked by the issues raised by the facts, and in considering the nature of the needs to protect the security of Canada and the laws and structures and policies which should be adopted to satisfy those needs, this Commission undertakes to the Canadian people that it will be unremitting and conscientious in its work. The Commission invites the co-operation and the assistance of the Canadian public.

Today the Commission continues its hearings into one allegation of an investigative practice or procedure alleged to be "not authorized or provided for by law". Next week we shall move to Ottawa to begin our hearings into another allegation. In January and the ensuing months we shall continue our hearings into these matters, and begin our hearings into other allegations. We shall begin our hearings into any particular matter, and we shall complete them only when our counsel are satisfied that they are prepared to begin and to complete the hearings. The Commission expects them to do a thorough job of investigation and preparation. Nothing else in the long run will justify public confidence in our inquiry. Nothing else will be fair either to the individuals whose conduct is investigated or against who a charge is made in evidence. We appreciate that there should be no dilatoriness in starting our inquiry into a particular factual allegation and pushing it to a conclusion. Everyone should bear in mind that starting an inquiry involves more than just starting a public

hearing. It involves investigation and preparation. It is urgent that the truth should be revealed to the public as speedily as possible. Nevertheless, taking more time in preparing the material for arriving at the truth is a small price to pay in order to avoid injustice. Further time in preparing for the public hearing will also give the Commission's counsel a better opportunity of discarding irrelevant evidence. It is of the greatest importance that irrelevant evidence should not be made public, particularly if it contains clearly groundless charges against anyone.

The importance of having sufficient time for preparation of the evidence before a public hearing is even greater in the case of this Commission than it is in the case of many Commissions of Inquiry, because of the number of factual allegations before it and, in some cases, the complexity of the facts. This Commission's terms of reference require it to inquire into — and I am referring to paragraph (a) — into the extent and prevalence of investigative activities "not authorized or provided for by law". "Extent" and "prevalence" may, in some cases, require protracted investigation by the Commission's staff before the Commission can decide what time should be spent in public hearings — for example — if there were a large number of openings of letters by the R.C.M.P., counsel will have to consider all those cases in order to decide what evidence will best be called at public hearings to enable the Commission to determine "extent" and "prevalence", and to assess the need for such a procedure. Only such preparation will enable the Commission to reach its decision in an informed manner yet without spending months at public hearings on the one subject.

Now, a few comments on procedure. First of all, a comment on the fact that this Commission does not examine witnesses first in camera and then publicly. It should be realized by those interested in the proceedings of the Commission, that as a general rule, the witnesses who testify in public will not previously have been seen or heard by the three Commissioners. Certainly, they may have been interviewed by counsel for the Commission, but they will not testify before the Commission first in private and then in public. The position this Commission adopts is that set forth in the Report of the Royal Commission on Tribunals of Inquiry, in England in 1966, which was chaired by Lord Justice Salmon, a report which has justly earned the respect of students of Royal Commissions in Commonwealth countries and, in particular, has been substantially followed by a report last year of a Committee of the Quebec Bar. This is what the Salmon Report stated on this subject:

THE CASE FOR AND AGAINST A PRELIMINARY HEARING OF EVIDENCE IN PRIVATE

A further suggestion has been made by some witnesses — that is, some persons who appeared before that Inquiry — although many have disagreed with it, that the Tribunal should hold a preliminary investigation in private. At this investigation evidence should be called and submissions made to enable the Tribunal to decide whether or not there was a prima facie case to

support any allegation against any of the persons concerned. The advantage of this course, so it is said, is that the Tribunal could thus protect innocent persons from having groundless allegations or rumours against them pursued in the fierce light of publicity. Whilst we fully recognize the importance of protecting innocent persons against any possible injury to their reputations which may be involved in a public hearing, we do not consider that a preliminary hearing in private is the best means of affording them this protection. Assuming that there are widespread rumours and allegations about the conduct of some innocent individual, it seems to us that if the evidence is heard in private at a preliminary hearing and the Tribunal thereafter announces that the rumours and allegations are groundless, there is a real risk that the public will not be convinced and may consider that something is being hushed up. Indeed a number of witnesses involved in recent Tribunals of Inquiry and those appearing on their behalf have stressed in evidence before us the importance they attach to being able to destroy the rumours and allegations by evidence given in public.

If on the other hand the Tribunal comes to the conclusion that there is enough in the rumours and allegations to warrant a public investigation, the impression that this would make upon the public might well be unfortunate from the point of view of the individual concerned. Moreover, there is something unreal about evidence being taken in private and then being rehashed before the same Tribunal in public. Besides, the untruthful witness who has done badly under cross-examination at the first attempt would be forewarned. This procedure would also entail considerable unnecessary delay for the publication of the Report would be postponed by the time taken by the preliminary hearing without any corresponding advantage being secured.

Now, some remarks about the holding of all hearings in public. There is a great interest in the extent to which this Commission will hold its hearings in camera, ou à huis-clos. The subject is one which concerns the Commission deeply. The subject arises for at least one good reason, namely: the following direction which is given to the Commission by the Order-in-Council which created it. It bears the number two. The Commission is directed:

> ... that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

From a hasty reading of this direction, some observers have inferred that there will be little evidence that the Commission will be able to hear in public. In the view of the Commission, that is a false conclusion which the Commission wishes to dispel in principle and in its practice. We cannot do better than publicly adopt as a cardinal principle guiding our deliberations what Lord Justice Salmon's Committee called the principle of publicity and these are the words of that Commission:

> It is... of the greatest importance that hearings before a Tribunal of Inquiry — which is what they call them in England — should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth....

> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigations carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
>
> It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however that although secret hearings may increase the quantity of evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view, be a small price to pay for the great advantages of a public hearing....

The same point was made as follows in June, 1976, by the study committee of the Quebec Bar on Commissions of Inquiry, the members of which were Me Harvey M. Yarosky (Chairman), Me Philippe Casgrain, Me Joseph N. Nuss and Monsieur le Bâtonnier Michel Robert, and this is what that report said under the title:

Public hearings v. In Camera hearings

> We feel that as a general rule, it is important for commissions of inquiry to be held in public. Only when the public is present, as has been the case with our tribunals for some time, can we be sure that the rights of witnesses and others will not be violated. Thus we can be confident that such commissions will enjoy the credibility essential to what they are seeking to achieve. Public presentation of arguments is the best guarantee of adherence to the basic principles of justice...
>
> ...We realize that in some cases the desirability of public hearings can be outweighted by other considerations. This may be so where matters involving public security or intimate personal, financial or other details are being disclosed. In such cases the embarrassment and harm resulting from such disclosures would outweigh the desirability of a public hearing.
>
> When faced with such situations, the commissioners should have the power to exclude the public from the hearings and to hold them in camera. We recommend the adoption of a legislative text similar to section 4 of Ontario's Public Inquiries Act, 1971, which reads as follows: [our translation]

and it was quoted by the Quebec Bar Reports as follows:

> All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that:
>
> (a) matters involving public security may be disclosed at the hearing; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the

> circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the commission may hold the hearing concerning any such matter in camera.

That is the end of the quotation from the Quebec Bar Report.

Now, having stated that publicity is the general principle by which the Commission will be guided, it is nevertheless the case that, even if the Order-in-Council creating this Commisson had said nothing whatsoever about hearing evidence in camera, the Commission would nevertheless be required by the general law to do so if, for example, the evidence to be given would, if given in public, prejudice the safety of the nation or its diplomatic relations in some other country. The Commission would be bound by the general law — not by any statutes or any Order-in-Council — to prevent the disclosure of such evidence, whether or not any Minister of the Crown, or any lawyer for any government, asked that that be done. The law is clear to that effect.

In addition, if any party contended that it would not be in the public interest that certain evidence be heard in public, then if the Commission agreed with that contention, the Commission could hear the evidence in camera — even if our Order-in-Council has said nothing whatsoever to that effect. There is ample judicial authority which makes it clear that the duty to decide these matters and exclude such evidence altogether, if the circumstances justify it, applies to the ordinary courts of law. That being so, it is not surprising that commissions of inquiry should generally be affected by the same considerations, although the procedural result may be different in that, instead of a commission of inquiry having to exclude the evidence altogether, as would be the case in a court of law, the commission may receive the evidence in camera.

In England, where the Inquiries Act gives the power to exclude the public when the tribunal is of the opinion that:

> . . . it is in the public interest expedient so to do by reasons connected with the subject matter of the inquiry or the nature of the evidence to be given,

the Salmon Report, 11 years ago, recognized that those words up until that time had only been construed in England as applying to cases in which hearing the evidence in public would constitute a security risk. The Report observed, however, that this was because no question had yet arisen as to whether a discretion might be exercised in other cases. The Report thought that there might be other cases in which such a discretion might be exercised, that is, when a public hearing would defeat the ends of justice.

I shall refer again in a moment to what the Salmon Report said in this regard.

I turn now to a specific consideration of the discretion contained in paragraph 2 of the terms of reference, having discussed what the law would be in any event. In respect of this direction, it is for the Commission, and not for

any other authority, to decide whether any of the criteria referred to in the paragraph applies in a particular situation.

The meaning of the words "matters relating to national security" cannot be defined exhaustively in advance of the need to apply the phrase to the facts of particular situations. No attempt made by the Commission to define the phrase can bind the Commission when it is faced with a particular situation. Nevertheless, it is possible for the Commission to make some observations.

In our view, the words "national security" must be taken to refer to the security or safety of the nation. The safety of the nation may be threatened by persons outside Canada or inside Canada. This double sense in which "national security" may be used properly was noted earlier this year by Lord Simon of Glaisdale, when he delivered one of the judgments in the highest court of England, the House of Lords, in *D. v. National Society for the Prevention of Cruelty to Children*, as follows:

> Then, to take a further step still from the public interest in the administration of justice, the law recognizes other relevant public interests which may not always even be immediately complementary. For example, national security. If a society is disrupted or overturned by internal or external enemies, the administration of justice will itself be among the casualties. *Silent enim leges inter arma.* So the law says that, important as it is to the administration of justice that all relevant evidence should be adduced to the court, such evidence must be withheld if, on the balance of public interest, the peril of its adduction to national security outweighs its benefit to the forensic process... .

On the other hand, in the Commission's present view of the matter, not every terrorist act or act of violence, actual or threatened, raises a question of national security. A threatened or actual kidnapping or hijacking of an aircraft or murder becomes a question of national security only if its object is the overthrow of the state or of an elected government. In other words, the threatened or apprehended or actual use of force, whether against one person or a group of persons, becomes a question of national security only if its object or one of its objects is the overthrow of the state or a government other than by democratic means.

However, having said that, it does not follow that, simply because the Commission may decide that a matter of police action does not relate to national security, evidence in respect of it will necessarily be heard in public, for it is still open to the Commission to hold, as it could have held without any direction in the Order-in-Council, that it would not be in the "public interest" to hear such evidence in public. In some cases, such as the examples just mentioned, it might be considered not to be in the public interest to hear evidence in public, the disclosure of which publicly would destroy the efficacy of present legal methods by which the police hope and attempt to prevent successful kidnappings or hijackings or murders for profit, unrelated to any attempt the safety of the state or its government. Likewise, just as in a court of law when evidence of the identity of an informer cannot be given — except in a crminal case where it is necessary to allow the name of the informer to be given in order to ensure that an accused person can present a legitimate defence

successfully — so a Commission of Inquiry, even if there were no direction such as is found in paragraph 2 of our terms of reference, would be bound to prevent the disclosure of the identity of an informer except, perhaps, in camera. As Lord Diplock said in the same case I mentioned a moment ago:

> The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers has to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by time of *Marks* v. *Beyfus* — which was decided about 1883 — had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer would help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure.

The matter is discussed by the Salmon Report as follows:

> We consider that the Tribunal should have a wider discretion, certainly as wide as the discretion of a judge sitting in the High Court of Justice. This discretion enables the public to be excluded in circumstances in which a public hearing would defeat the ends of justice, for example, where particulars of secret processes have to be disclosed — that is a reference, not to the secret processes of the police, but to patents and trade marks — and in infancy cases. We do not think however the discretion should necessarily be confined to infancy cases or to trade secrets. It is impossible to foresee the multifarious contingencies which may arise before a Tribunal of Inquiry. We can imagine cases in which for instance a name might be required of a witness and it would be just that he should be allowed to write it down rather than state it publicly. The Tribunal might consider it desirable to exclude the public from the inquiry for the purpose of making an explanation to a witness or admonishing him. The Tribunal might consider that the interests of justice and humanity required certain parts of evidence to be given in private. This would be only in the most exceptional circumstances which indeed may never occur. The discretion should however be wide enough to meet such cases in the unlikely event of their occurring. Clearly that discretion should be exercised with the greatest reluctance and care and then only most rarely.. . .

Finally, the Commission is directed by the Order-in-Council to hold its proceedings in camera when the Commission deems it desirable "in the interest of the privacy of individuals involved in specific cases which may be examined". The scope of this phrase may overlap with "the public interest" in hearing evidence in camera. Thus, it may be said not to be in the public interest, or it may be said to be in the interest of the privacy of a witness, to permit him to give some part of his evidence in camera if that part of the evidence, although relevant to the Inquiry, nevertheless discloses some personal matter not criminal in nature, which standing alone would be of no pertinence to the issue of the fact being investigated.

The Commission hopes that this discussion of the circumstances in which it may decide to hear evidence in camera will demonstrate to all that it has devoted considerable attention to the problem. We wish to repeat that the general principle guiding the Commission will be the desirability of hearing evidence in public.

When a question arises as to whether a particular item of evidence or line of inquiry should be received in camera, in some circumstances it may be possible to hear argument by counsel in public. In other instances the argument will be meaningful only if it itself, that is, the argument, is heard in camera, where counsel can refer specifically to the documents or to the oral evidence it is proposed to offer. In such an instance, the Commission reserves the right to decide what counsel may be present while arguments are being heard, and for that matter, what counsel may be present when evidence is being heard in camera. The Commission has an obligation in law to ensure that no persons, whether counsel or otherwise, will be placed in a position which might endanger national security.

In the process of deciding whether on any of these grounds certain evidence will be received in camera, the Commission will insist that its counsel formally present to it the arguments for and against the proposition.

If argument as to whether evidence should be heard in camera is heard in camera, and if the Commission then decides that the evidence will be heard in camera, the Commission will attempt to deliver in public some reasons for its decision which will convey some idea of the Commission's reasoning, although it may not be possible to give very detailed reasons for doing so without disclosing the very nature of the matter which it has been decided ought not to be disclosed in public.

Now, some comments on certain aspects of the terms of reference, or mandate of the Commission.

In making these remarks, we express our agreement with the Salmon Report that a Commission of Inquiry "... should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued".

First of all, some comments on the words "not authorized or provided for by law", which are found in paragraphs (a) and (b) of our terms of reference.

The Commission will, of course, inquire into the facts of any allegations made that persons who were at that time, at the time of the incidents in question — they may still be members of the R.C.M.P. — were involved in "investigative actions or other activities that were not authorized or provided for by law". While thus inquiring, we shall have to consider whether the facts of a particular case, once established, were such that members of the R.C.M.P. were involved in actions or activities "not authorized or provided for by law". What do those words mean, the words "by law"? Clearly, they include acts which the Criminal Code defines as offences. Clearly, they include also acts which other federal or provincial statutes define as offences. In addition, we consider that those words require us to decide whether particular acts, even if

they are not crimes or offences against statute, were nevertheless wrongs in the eyes of the law of tort in the provinces other than Quebec, or of the law of delict in Quebec.

Moreover, those broad words "not authorized or provided for by law", require us even to consider whether, in the facts of a particular case, there was a positive duty imposed upon the police by law to do the act — whether some specific duty, or their general duty to enforce the law.

We shall examine the very legislative and constitutional basis for the existence of the R.C.M.P. generally, and for the existence of the security service of the R.C.M.P. in particular.

It should be borne in mind that, in inquiring into actions or activities "not authorized or provided for by law", we are not limited to activities of the security service. Our terms of reference in paragraph (a) require us to inquire into "the extent and prevalence" of such activities generally, and to, in paragraph (b), "report the facts" relating to any such activities generally. These obligations, in our view, are not limited to the activities of the security service. In this manner our task may become very complex and large, and its effect on other functions of the Commission's task will be the subject of a watchful eye. Meanwhile, however, the Commission's investigative staff is at work investigating complaints received, which are unrelated to the work of the security service.

In addition to the legal questions I have just mentioned, which are raised by the use of the words "not authorized or provided for by law", it is not the Commission's intention to ignore the moral and ethical implications of police investigative practices.

As to all matters of interpretation of the law, we earnestly invite counsel to be of assistance to the Commission. During recent months, despite a great deal of public discussion of the facts, or presumed facts of a number of situations, some public analyses of whether particular acts were or were not crimes or otherwise contrary to law, have been superficial. Lawyers who appear before this Commission will be carrying out their duties to their clients and to the Commission if they give serious consideration to those questions and are able to provide argument in principle and on authority. Needless to say, counsel for the Commission and ultimately the Commissioners themselves, will be addressing their minds to these questions of law.

When the Commission makes its Report as to a particular allegation, it will give its view as to whether the conduct proved constituted an action or activity "not authorized or provided for by law". Not only is the Governor in Council, to which we are required to report, entitled to hear the answer to that question, but the present and future members of R.C.M.P. are entitled to have the benefit of the Commission's view as to the law.

Now, comments about the question of control of the R.C.M.P. by ministers of the Crown.

The Commission considers that, while inquiring into specific allegations, and generally, it is empowered and obliged to determine what, in the past and

present, have been and are the controls exercised by federal or provincial ministers over the R.C.M.P.'s security service, and what methods and channels have been used by the R.C.M.P.'s security service to report and account to federal and provincial ministers.

Any witness who has information which will shed light on these questions will be invited to testify before the Commission.

The Commission considers that these issues are raised by the obligations expressly imposed upon the Commission by the terms of reference, "to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada" — that paragraph (a) — and by the entirety of paragraph (c), which I take the liberty of reading in full:

> to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

The point is that, if any federal cabinet minister, or any provincial cabinet minister, has in law or in practice in the past or at the present time, some power of control over the security function of the R.C.M.P., that is a relevant policy or procedure that "governs" — or governed — "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada", and therefore it is relevant to both paragraph (a) and paragraph (c) of our terms of reference.

The issues involved in this respect are serious. They will not be approached by the Commission, any more than any other issues will be, until its counsel are thoroughly prepared, so that the examination of such witnesses will be diligent and meticulous.

In order to enable the Commission to reach an informed decision as to what were, are and should be the extent of control by federal or provincial ministers over the R.C.M.P.'s security service, when investigating particular factual situations which illustrate these issues, the Commission will be grateful to any counsel who can make learned and informed representations as to the law and constitutional conventions and/or practices which are relevant to these matters.

Now, some comments about the policies, procedures and laws governing the national security function of the R.C.M.P.

I have already read paragraph (c) of the terms of reference. That paragraph requires the Commission to make recommendations about the policies and procedures and the laws governing the national security function of the R.C.M.P.

The Commission will be obliged to decide what, in its view, the policies, procedures and laws should be. This will require the Commission to consider

what the needs of the security of Canada are, how those needs should be protected effectively in terms of police work, and how that protection can be achieved in a democracy which cherishes liberty. The assessment of these needs, means and values will constitute a major challenge to the Commission.

Apart from empirical and other research which the Commission's staff will undertake, the Commission will welcome the receipt of considered opinions about these issues from members of the public, including groups and associations. Written submissions will be welcome at any time. However, so as to guard against the possibility that silence will greet the Commission's requests for the opinions of the public, the Commission from time to time will hold public hearings for the purpose of encouraging written or oral submissions by persons, groups and associations in each of the provinces of Canada. These hearings will not be into particular factual situations. However, the opinions expressed may relate to issues which have been evoked by particular factual allegations already under investigation by the Commission, or which are otherwise in the public eye.

The first hearings for this purpose will be held in Montreal on January 16th — and I might say that the Commission expects that Me Sebastien will appear as counsel for the Commission on that occasion, and the hearings will be in this room — in Toronto on January 18th and Vancouver on January 20th. In due course, further such hearings will be held in other provinces. No doubt we will hold such hearings again in Ontario, Quebec or British Columbia, being the largest provinces of the country, before we write our final Report.

APPENDIX "E"

REASONS FOR DECISION OF THE COMMISSION DECEMBER 8, 1977

The starting point for the consideration of the matter of the representation by counsel before the Commission is the Inquiries Act of Canada, sections 12 and 13. They read as follows:

> The Commissioners may allow any person whose conduct is being investigated under this Act and shall allow any person against whom any charge is made in the course of such investigation to be represented by counsel.

Section 13:

> No report shall be made against any person unless reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel.

The Commission has given careful consideration to the submissions made on behalf of all interested parties on the issue of representation by counsel, in particular those made on behalf of the Canadian Civil Liberties Association, the Federation of Canadian Civil Liberties and Human Rights Associations and the Progressive Conservative Party of Canada. We appreciate the care that has been taken in preparing those submissions.

It is clear that representation is to be granted to counsel for the Commission and to the following who are expressly referred to in sections 12 and 13 of the Inquiries Act of Canada: (1) counsel for any person against whom any charge is made during the course of the investigation by this Commission; (2) counsel for any person whose conduct is being investigated by the Commission.

The second category, that is to say counsel for any person whose conduct is being investigated by the Commission, includes counsel for any witness, counsel for the Commissioner of the R.C.M.P. and counsel for the Solicitor General of Canada. The Commissioner and the Solicitor General are responsible by statute for the R.C.M.P., and in that sense the conduct of their offices is being investigated by the Commission.

Beyond those categories, it has been contended that the Commission ought not to grant standing because sections 12 and 13 of the Inquiries Act do not expressly provide for standing for any other persons.

We have examined the judicial decisions which have been referred to. Those arising under provincial legislation are based on statutory provisions very different from those of the Federal Inquiries Act. For example, the present Ontario Inquiries Act expressly requires a commission to give full standing to

> any person who satisfies it that he has a substantial and direct interest in the subject matter of the inquiry.

The previous Ontario Act was silent on the subject but in the case of Re *Ontario Crime Commission, Ex parte Feeley and McDermott* [1962] O.R. 872, the majority of the Ontario Court of Appeal held that persons against whom imputations of serious crimes were made should be allowed to have counsel with the power to cross-examine witnesses. Such persons are entitled under section 12 of the federal Inquiries Act to be represented by counsel. Thus, the Ontario Crime Commission case is of no assistance to us in deciding whether we should accord a privilege of counsel to persons who are not specifically referred to in sections 12 and 13 of the Inquiries Act.

One decision which arises under the Federal Act is *Advance Glass and Mirror Company Limited* v. *The Attorney General of Canada and McGregor* [1950] 1 D.L.R. 488. All it decided is that a person who does have the right to be "heard" under section 13 does not have the right to examine all witnesses. There is nothing in the decision to prevent a federal Commission of Inquiry granting a privilege or leave to a person's counsel to examine witnesses, even if that person is not expressly referred to in sections 12 and 13.

Having thus discussed some of the authorities, we prefer to approach the question on the basis that sections 12 and 13 do not limit the categories of persons who may be granted standing. The Commission is the master of its procedure. Subject to sections 12 and 13, it is within the discretion of the Commission to decide who shall be granted standing. The issue in particular is whether the two civil liberties groups and the Progressive Conservative Party of Canada should in the discretion of the Commission be granted standing. Each federal Commission of Inquiry must reach its decision as to how it exercises this discretion, based on the circumstances of the case and especially the origins of the Commission and the language of its empowering instrument.

A decision taken by one commission born of different circumstances cannot be taken as a precedent binding or even of serious persuasive value by a later commission. As far as the Berger Commission of Inquiry is concerned, counsel for the Federation of Civil Liberties and Human Rights Associations did not present us with a copy of the report of that Inquiry or whatever ruling Mr. Justice Berger may have made on the question of standing. This Commission must, therefore, today consider the Berger Inquiry without the benefit of such assistance.

It is not surprising that the Commission chaired by Mr. Justice Berger, inquiring into the proposal for a Mackenzie Valley Pipeline, granted standing to native persons groups and to the environmentalist groups. As far as the fact-finding function of that Commission is concerned, in effect, counsel for those groups were counsel for witnesses — for example, the many native persons who testified.

In the instance of the Dorion Inquiry into an alleged attempt to bribe counsel who was acting for the Government of the United States, applying on behalf of that government for the extradition of one Lucien Rivard, it is clear from Chief Justice Dorion's report that he regarded the matter as one arising from allegations made against appointees of the governing political party. The matter thus had a clear basis in allegations by the opposition political parties against the governing political party, as a political party. It is not surprising that Chief Justice Dorion, in the circumstances, granted standing to all the political parties, indeed invited their participation.

Since the manner in which the discretion is to be exercised must be decided in the circumstances facing a particular commission, we propose to turn to an examination of this Commission's mandate and proceed to decide the issue.

Paragraph (a) of the terms of reference requires the Commission to investigate certain facts. The facts in question are:

> The *extent* and *prevalence* of investigative *practices* or other *activities* involving members of the R.C.M.P. that are not authorized or provided for by law.

I have orally stressed the nouns which represent the facts that paragraph (a) requires us to examine. Paragraph (a) goes on:

> the relevant *policies* and *procedures* that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada.

Paragraph (b) requires the Commission:

> to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest.

These two paragraphs require the Commission to investigate facts and report what they were and then recommend what further action ought to follow. This aspect of the Commission's work is a factual inquiry. Whether members of the R.C.M.P. committed offences is a grave matter from the point of view of those against whom any charges are made in evidence.

If this were a trial of a criminal charge, there would be a Crown prosecutor and a defence counsel. No one else would be entitled to appear. No political party or public interest group would be entitled to come to court and claim either as a right or privilege that it should be allowed to examine and cross-examine witnesses. The Crown prosecutor would have the duty to produce all evidence that he has of the accused's guilt.

Similarly, before this Commission, Commission counsel must equally produce all evidence he has of the guilt of someone who is alleged to have done wrong and must not conceal evidence of that person's innocence. But, unlike a Crown prosecutor, he must also positively present to the Tribunal the existence of evidence of innocence and, in that sense, Commission counsel has no adversarial role.

Paragraph (a) and (b) of the terms of reference do not require this Commission to pass any political judgments on members of the R.C.M.P., but rather require it to undertake a task which is not dissimilar to the task that faces a criminal court.

The task that would be fulfilled in a criminal court by Crown counsel is fulfilled and gone beyond by Commission counsel. If he is as independent, well-qualified, diligent and able as we believe the several counsel for this Commission to be, the public is entitled to have confidence in the work of this Commission.

Moreover, to allow other counsel to appear with the right to cross-examine persons whose conduct is under investigation and suspicion, would be as unfair

to such a person as it would be to allow counsel other than the Crown prosecutor to cross-examine an accused and his Defence witness at a trial. At a criminal trial, the victims, after all, are not allowed to have their counsel cross-examine the accused. That function is left to the Crown prosecutor. No battery of counsel appears against an accused to wear him down one after another.

A commission of inquiry already has the power to require a person "charged" to testify to disclose his wrongdoing under oath, a power which no criminal court has over an accused person.

To compound the inquisitorial nature of a commission of inquiry by multiplying the number of cross-examiners a witness must face, would be to move the proceedings of the commission that much closer to the atmosphere of a Court of Star Chamber, a mechanism mercifully laid to rest in 1640.

In the Ontario Crime Commission case, Mr. Justice Schroeder said:

> It is no improper reflection upon counsel for the two political parties to observe that they may well be more concerned with doing what they deem best calculated to serve their own clients' ends and in so doing with promoting interests perhaps violently opposed to those of the applicants.

In that case, the applicants were the persons accused of crimes.

I turn now to the application by counsel for the Attorney General of Quebec. Counsel for the Attorney General of Quebec has asserted a right to appear, or in the alternative, has asked that in our discretion we grant leave to him to appear. With the greatest deference to the Attorney General, in the Commission's view he does not have a right to appear before this Commission. If there is an argument on the constitutional plane in support of the existence of such a right, and I mean not only constitutional in the sense of the British North America Act, but also in the sense of any constitutional convention or any unwritten constitutional law which is just as much a part of our Constitution as the British North America Act is — if there is an argument on the constitutional plane, then no such argument was placed before the Commission.

If the Attorney General wishes at some stage to place such a representation before the Commission, we shall be happy to consider it. Otherwise, today, we approach the question of the Attorney General's status in light of his counsel's statement to the effect that the Attorney General does not ask for full status. He said that the Attorney General does not wish to appear by counsel daily, but may have an interest in intervening actively, if the members of the Sûreté de Québec or of Municipal Police Forces in Quebec are referred to in evidence. It is not clear in such a case what role counsel for the Attorney General would wish to play.

As to counsel representing the interests of any members of the Sûreté du Québec who testify or against whom allegations may be made by witnesses, there is no difficulty in recognizing his standing. If counsel for the Attorney General should then wish to represent their interests, it may be that there would be duplication of representation. Perhaps the problem may be resolved if and when it arises.

As for the interests of members of municipal police forces — and no one has appeared before us asking for the right to appear on their behalf as yet — again, the problem can be answered if and when it arises — at which time we will know whether any other counsel comes forward, claiming to represent the interests of a member of a municipal force.

For the moment, therefore, the Commission will welcome the attendance at its hearings of counsel for the Attorney General without his being accorded any formal standing at this time.

We turn now to paragraph (c) of the terms of reference. This paragraph requires us to make recommendations as to laws and policies and procedures in the future. Obviously the Commission will welcome the suggestions of all persons, and even more so if those suggestions have been developed carefully and articulately with the assistance of counsel. There is no dobut about the Commission welcoming this form of participation by counsel.

To enable the Commission to formulate recommendations, the Commission must know what the present policies and procedures are and what they have been. One way to do that is to determine, in particular situations, what policy was applicable and what procedure was followed. For this purpose it may be necessary, in particular situations, to ask senior officers of the R.C.M.P. and Ministers of the Crown what communications were made to the Ministers, what the Ministers asked for, what they directed, and what they did not ask for or direct. In pursuing such matters, the Commission is satisfied that its counsel will ask the necessary questions and that before they ask the questions they will be properly prepared by meticulous investigation. If any other persons or counsel wish to suggest to Commission counsel some particular line of inquiry or some particular questions, Mr. Howard has already said that such suggestions will be welcomed. If the suggestions thus made are not acted upon, and no satisfactory explanation is given to the persons making the suggestions for Mr. Howard and other counsel not adopting them, the persons making those suggestions are at liberty to make such comments as they wish to this Commission and in other forums. The Commission is prepared to assume that its counsel will act upon constructive suggestions and, in this, if our counsel do not do so, the Commission's staff's decision can be the subject of proper comment to this Commission and in other forums. The Commission invites counsel for such entities as the Progressive Conservative Party of Canada, the Canadian Civil Liberties Association and the Federation of Canadian Civil Liberties and Human Rights Associations to cooperate fully with the Commission in a positive manner and not to retire from the scene because the position it has urged upon the Commission has not been accepted.

It is to be borne in mind that, even as to paragraph (c), the power to ask questions is directed only to the fact-finding process. At least as regards hearings in public, the associations and party which have applied for standing will be able to contribute, in the manner described, to that process. If they want questions asked, they have only to suggest. The facts will be explored exhaustively. No multiplication of counsel is likely to enhance the result.

The determination of what the proper policies and procedures should have been in the past, or should be today, or should be in the future, lies not in the domain of question and answer, but in that of representations and submissions

made to the Commission by all interested persons and organizations, by written and oral submissions made either at special hearings to receive such submissions, such as the one in Montreal on January 16th, which are being organized by the Commission and will continue to be organized by it. At such hearings, the opinions of political parties, civil liberties associations, and other groups, as well as individuals, will be welcomed.

If particular past or present policy or procedure is stated by a Minister as a fact in his evidence before us, the validity or propriety of such a policy or procedure may be the subject of comment by members of opposition political parties not only in briefs to this Commission, but of course, in Parliament or in the media. In Parliament, comment may be made fully and questions may be put to Ministers of the Government.

For the foregoing reasons, the Commission makes the following ruling:

1. The following counsel will be recognized as having the right to examine witnesses heard at public hearings of the Commission into any allegation of an "investigative action or other activity involving persons who are members of the R.C.M.P. that was not authorized or provided for by law" or into any fact relating to "policies or procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada":

   Counsel for any person against whom any charge is made in the course of the investigation by this Commission;

   Counsel for the Commission;

   Counsel for any person whose conduct is being investigated by the Commission.

(In the investigation of facts at public hearings, counsel for persons, groups or associations may draw to the attention of counsel for the Commission what areas of inquiry should be entered into or what evidence should be presented, and what specific questions should be asked.)

2. On matters of law, in public hearings or when argument is heard at the conclusion of the Commission's public hearings into any such allegations or facts, any other persons, groups or associations will have the right at that time to make submissions to the Commission in writing.

3. At hearings of the Commission held *in camera*, the Commission shall decide in the circumstances of the particular case who shall be permitted to attend, which counsel shall be permitted to attend and what conditions may be imposed upon any persons or counsel permitted to attend, all in the light of the law governing the inquiry.

In case anyone is in doubt, the effect of this ruling is that the following counsel may appear before the Commission to represent their clients and examine witnesses:

Counsel for the Commission;
Me Fortier;
Me Nuss;
Me Proulx;
Me Lamontagne;
Me Barakett.

APPENDIX "F"

REASONS FOR DECISION OF THE COMMISSION OCTOBER 13, 1978

1. *Introduction*

From an early stage in the work of the Commission, the Commission has had full access to the files of the Royal Canadian Mounted Police. In order to do its work effectively, including preparation for hearings, it was desirable that the Commission obtain documents or photocopies of the documents from the R.C.M.P. This need was expedited by the terms of the following letter dated November 6, 1977, from Mr. J.F. Howard, Q.C., Chief Counsel to the Commission, to Mr. Joseph Nuss, Q.C., Counsel for the Solicitor General of Canada:

> This will confirm arrangements made between us with respect to the delivery to the Commission of the documentary material relating to matters outlined in our letter of October 17th, in Commissioner Simmonds' letter to me of October 26th, and in telephone conversations of October 31 between the Secretary of the Commission and Assistant Deputy Commissioner Quintal. It is understood that the arrangements will apply to future delivery of documentary material to the Commission unless different arrangements are made at the time.
>
> The material being delivered to the Commission at its request is subject to the following understanding:
>
> 1. The material is being delivered to the Commission to avoid the inconvenience of reviewing all of the documentary material at the R.C.M.P. Headquarters at this time as contemplated by the paragraph numbered 4 in the Order-in-Council establishing the Commission;
>
> 2. By delivery of the material, the Solicitor General of Canada (the Minister) will not have been taken to waive the position that some of the documents delivered, or parts thereof, fall under the directive in the paragraph No. 2 of the Order-in-Council establishing the Commission, as being material to be dealt with by the Commission in camera and expressly reserve the right to make such contention;
>
> 3. Should there be a difference in the view of the Commission, and in the view of the Minister as to whether the direction in paragraph 2 referred to above applies to a particular document or part thereof and this difference of view cannot be resolved, it is understood that notwithstanding that the document has been delivered to the Commission, the delivery of such document shall not be invoked as a waiver of the right to the Minister to raise any objection, as to its introduction in evidence before the Commission and/or if so introduced that it be done at an in camera session, and the Minister shall be entitled to invoke any remedy

or any provision of law which may be applicable to the final disposition of such view.

It is also understood that only those members of the Commission's staff who have the requisite security clearance and who require a particular document for the purposes of their work with the Commission shall have access to such particular document amongst those delivered to the Commission.

Pursuant to the terms of that letter, all documents requested by the Commission, or photocopies of them, have been transmitted by the R.C.M.P. to the Commission. Among these documents are many that fall within the class of what Mr. Nuss calls "Government Documents". That class according to Mr. Nuss, is as follows:

> Documents relating to the proceedings of Cabinet and its Committees, documents relating to any other process of consultation among Ministers and/or officials, and documents emanating from Ministers and/or officials relating to the decision-making or policy formulation process including, but without limiting the generality of the foregoing:
>
> 1. Cabinet Papers
>
> (a) Cabinet agendas, memoranda, minutes and decisions;
>
> (b) Cabinet committee agendas, minutes and reports;
>
> (c) Treasury Board submissions, minutes and certain decision letters.
>
> 2. Ancillary Papers
>
> Ministerial briefing notes for use in Cabinet or in discussions or consultations among Ministers.
>
> 3. Other Records and Papers
>
> Letters, memoranda, notes, records or other documents exchanged by Ministers and/or officials or describing discussions or consultations among Ministers and/or officials.
>
> 4. Opinion, Advice or Recommendations
>
> Documents emanating from officials containing matter in the nature of opinion, advice or recommendation or notes or other matter that relates to the decision-making or policy formulation processes.
>
> 5. Documents containing quotations from any of the above documents.

Some of the documents in the R.C.M.P.'s possession originated in the R.C.M.P. Others are copies of documents theoretically originating from outside the R.C.M.P. but in part drafted by the R.C.M.P. — such as memoranda to Cabinet ultimately signed by a Solicitor General. Others are copies of documents originating outside the R.C.M.P., of which a copy had been sent to the R.C.M.P.

Outside the terms of Mr. Howard's letter, some documents falling within the categories enumerated by Mr. Nuss may be obtained by the Commission from sources other than the R.C.M.P., for example by subpoena, or from other Government Departments.

The examination of witnesses to date has not been hampered by the failure to resolvde whether documents within the categories enumerated by Mr. Nuss

may be received in evidence by the Commission in public. This is because the Commission has so far examined mostly witnesses who have been involved at the operationbal level in various investigative practices or actions, or other activities which, it may be argued, were "not authorized or provided for by law" (to use the words of paragraphs (a) and (b) of the Commission's terms of reference, which are set forth in Order-in-Council P.C. 1977-1911), and for everybody's convenience, a copy of the Order-in-Council is attached. Such witnesses, by reason of their status, are unlikely to have been authors or recipients of, or to have had knowledge of, documents in the classes enumerated by Mr. Nuss.

However, the Commission is about to commence the examination of present and past senior officials of the R.C.M.P. and of Ministers to the extent that their evidence may be relevant to any of the issues of fact so far inquired into. It is clear that the examination of these witnesses will in part require the production of a number of documents in the categories enumerated by Mr. Nuss, or at the very least the testimony of the witnesses about the contents of the documents or about the conversations or discussions recorded by the documents.

Some time ago the Commission indicated to counsel that it wished to hear representations as to whether such evidence should be received by the Commission in public or in camera. For that reason the Commission scheduled a day during which counsel might make their submissions. Those submissions were made on October 5. These reasons for decision have been prepared as promptly as possible, in order that counsel may have the benefit of the Commission's opinion during the preparation for the evidence of senior officials and Ministers.

The question has been considered on the basis of the contention by Mr. Nuss and Mr. Michel Robert, his co-counsel, that these documents as a *class* ought not to be produced in public. The counsel who were heard on the matter were Mr. Nuss and Mr. Robert, who represent the Solicitor General and "interests of the Departments..." and which in the original manner in which it was placed before the Commission was in the French ("ministères" in the French original) of the Government of Canada, including the Office of the "Prime Minister" (statement by Mr. Nuss to the Commission, September 11, 1978, vol. 72, p. 11407), and Mr. Howard, Chief Counsel for the Commission.

2. *The nature of a Commission of Inquiry*

In approaching this problem, it is desirable to keep in mind the purpose and function of a Commission of Inquiry.

The Commissioners were appointed under Part I of the Inquiries Act, R.S.C. 1970 ch. I-13 pursuant to section 2 of the Act which empowers the Governor in Council to

> cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

Clearly the matters which this Commission is directed to deal with are connected "with the good government of Canada" and with "the conduct of

any part of the public business" of the Government of Canada, and I will not bother reading quotation marks from now on.

When the Governor in Council deemed it "expedient" to cause such an inquiry to be made, it created an organism of the executive branch of government to "investigate", "inquire", "report the facts" and "to advise" with respect thereto. The Commission is not a court. It is not a branch of the judiciary. It fulfills executive or administrative functions. As Cattanach, J. observed in *Copeland* v. *McDonald, Rickerd and Gilbert* (Federal Court of Canada, August 4, 1978) the gulf is wide between "the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative notwithstanding that both hold hearings".

The Governor in Council, in creating such a Commission as this, asks this newly and specially created unit of the executive branch of government to examine some particular aspect of the government, (that is, the executive). The executive branch, through its chosen executive instrument, is examining itself. This must not be forgotten by those who expect the Commission to do as they wish and as it wishes (assuming they are one and the same). The Commission is created by the executive (the Governor in Council) and its terms of reference can be altered — indeed its very existence can be abrogated — by another Order-in-Council at any time.

On the other hand, a Commission of Inquiry is not a unit of the executive branch of government like other government departments and agencies. Short of direction by Order-in-Council, it cannot be directed by a Minister or even by the Cabinet to interpret its terms of reference in a particular manner, or to follow this procedural course or that. It is for the Commissioners to interpret the instrument that gave birth to the Commission.

Moreover, the Commissioners, unlike other arms of the executive branch, are by statute given powers which members of the executive branch — even "Royal Commissions" appointed under the Great Seal but not pursuant to statute — do not enjoy: the power to summon witnesses, and to require them to give evidence on oath or affirmation, and to produce documents and things (all under section 4 of the Inquiries Act), and "the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in a court of record in civil cases" (section 5). These are extraordinary powers, ordinarily available neither to the common citizen nor to members of the government service. These powers set commissions appointed pursuant to Part I of the Inquiries Act apart from the remainder of the executive.

In addition, commissioners are usually persons who have not been members of the executive branch. They are, in effect, brought temporarily within the ranks of the executive to carry out the task of diagnosis and prescription. Very often a judge is the sole commissioner or chairman of a group of commissioners. One reason a judge is chosen is that his livelihood is secure in that he can be removed from office only by joint address of the Houses of Parliament. This fact, which lies at the root of the cherished independence of the judiciary, increases the likelihood that the inquiry will not be influenced by considerations to which ordinary segments of the executive are susceptible. Putting it another way, it ensures that the inquiry will be conducted at arm's length from the executive. It further ensures that all decisions taken by the

Commission, whether procedural or substantive, will be commensurate with a judge's duty to honour the principle that the reciprocal of judicial independence is judicial, non-partisan impartiality. Commissioners are appointed because of some real or imagined distinction or ability which the Governor in Council hopes they will bring to a dispassionate inquiry into the issues. Also, it is hoped that these qualities will enhance the possibility that their recommendations will enjoy public as well as governmental respect, so as to restore confidence and trust in that part of the business of government which is under review. (Sometimes, commissioners may have no claim to merit other than stamina and a thick skin, which is all we claim for ourselves.)

Observers who expect that a commission of inquiry will be a mere instrument of the government that created it are wrong. It is true that a commission is part of the executive branch and does not exercise judicial functions. On the other hand, it is an instrument of self-criticism which, unlike the executive branch which has created it, nevertheless by tradition exercises a spirit of detachment from the wishes of its creator as it pursues its assigned tasks, except in so far as those wishes have been expressed in the creating instrument and the general procedural law.

3. *Who has the power to decide whether evidence shall be received in camera?*

(a) *Introductory*

The Commission's interpretation of its terms of reference in this regard has not changed since it made its opening statement in Montreal on December 6, 1977. At that time, we said:

> I turn now to a specific consideration of the discretion contained in paragraph 2 of the terms of reference. In respect of this direction, *it is for the Commission, and not for any other authority, to decide* whether any of the criteria referred to in the paragraph applies in a particular situation. . .

(Emphasis is added by us as is emphasis in other quotations.)

We then discussed briefly some perceptions of the words "matters relating to national security" and continued:

> However, it does not follow that, simply because *the Commission decides* that a matter of police action does not relate to national security, evidence in respect of it will necessarily be heard in public. For *it is still open to the Commission to hold* that it would not be in the "public interest" to hear such evidence in public.

The Commission then quoted a passage from the Salmon Committee's Report on Tribunals of Inquiry, published in England in 1966, which stressed that what the English called a Tribunal of Inquiry should have a wide discretion to meet cases where the public interest would require a hearing to be in camera. We then referred to the remaining criterion found in paragraph 2, which directs the Commission to hold its proceedings in camera when the Commissioners deem it desirable "in the interest of the privacy of individuals involved in specific cases which may be examined". We then concluded:

> The Commission hopes that this discussion of the circumstances in which *it may decide to hear evidence in camera* will demonstrate to all that it has devoted considerable attention to the problem. We wish to repeat that the

general principle guiding the Commission will be the desirability of hearing evidence in public.

Until the argument heard October 5, there had been no indication from any counsel that his client did not accept the statements just quoted. However, the matter now having been raised, the Commission will state in detail its reasons for its interpretation of paragraph 2, while emphasizing that the conclusion is the same as was stated last December 6.

(b) *Who has the power to decide whether evidence must be received in camera because it relates to national security?*

During the course of argument, Mr. Nuss asserted that where evidence "relates to national security", the Commission must accept the decision of the Solicitor General that the evidence relates to national security — and that should read where a question rises as to national security. The Commission does not accept that view. The Order-in-Council says that the Commissioners

> 2. *be directed that the proceedings of the inquiry be held in camera in all matters relating to national security* and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

The Commission's interpretation of the direction is that, if the Solicitor General makes a submission to the Commission that some particular evidence relates to national security, it is for the Commission to reach its own decision. While the Commission will give careful consideration and substantial weight to any reasonable submission made on behalf of the Solicitor General, or for that matter, on behalf of any other Minister of the Crown, that evidence relates to national security, the decision of the Minister is not conclusive.

While the Commission arrives by its own reasoning at this interpretation, it finds some comfort in knowing that at the time of the creation of the Commission the then Solicitor General shared it. On July 6, 1977, the Honourable Francis Fox said (Hansard p. 7378):

> The terms of reference are quite clear that if, *in the opinion of the Commission*, there is a matter of national security which is at stake, it has the power and is indeed directed to sit in camera.

(c) *Who has the power to decide whether it is desirable in the public interest that evidence be received in camera?*

During the course of argument the Commission came to realize that the submission made by Mr. Nuss was not only that, on principle and on the authorities, all the documents on his list ought not "*in the public interest*" to be disclosed in public, but that the decision as to that matter does not rest with the Commission at all but rather with (he said) the Privy Council. Assuming that he and Mr. Robert appeared before this Commission on behalf of "the Privy Council", which is far from clear to us, we understand his submission to mean that, once the Privy Council has decided that such documents are not to be produced in public, that decision is binding upon the Commission.

The practical result of that proposition would be the same as the result of the proposition which we first understood Messrs. Nuss and Robert to be making; namely, that in deciding whether the Commissioners "deem it desir-

able in the public interest" that the proceedings be held in camera, the authorities led to only one possible conclusion that such documents must be received in evidence in camera. If the Commission were to accept that view of the authorities, then, as we have just said, the result would be the same. However, there is an important difference between the decision being that of the Commissioners, on the merits of the case, and, on the other hand, the decision being that of "the Privy Council".

The question of the effect of such a decision of "the Privy Council" does not in fact arise for decision at this point, because Mr. Nuss did not advise the Commission that the Privy Council has decided that the Commission is not to receive any such documents in public. Such a decision could be made only by another Order-in-Council. If the Privy Council, by another Order-in-Council should so decide, the Commission would then have to re-examine its position in the light of the terms of the new Order-in-Council.

However, at the present time, the Commission must interpret and apply the terms of Order-in-Council P.C. 1977-1911, which created the Commission. The Order-in-Council states, in part, as follows:

> The Committee (of the Privy Council) further advise that the Commissioners:
>
> 2. be directed that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters *where the Commissioners deem it desirable in the public interest* or in the interest of the privacy of individuals in specific cases which may be examined.

Counsel for the Commission submits that the words of paragraph 2 of the Order-in-Council delegate to the Commission whatever power the Executive might otherwise have, to decide that certain evidence not be produced at all or not be produced in public. Mr. Nuss contends, however, that there can be no delegation of the power which, he says, must always rest with a Minister or the Privy Council to decide what it is in the public interest not to produce at all, or not to produce in public.

The Commission considers that by using the words found in para. 2 the Governor in Council has clearly directed the Commission to arrive at its own judgment as to whether, either in regard to a particular class of evidence or in regard to a particular item of evidence, it is "desirable in the public interest" that the proceedings be held in camera. It is well established by the authorities that the word "deemed" imports that a judgment is to be exercised: see *De Beauvoir* v. *Welch* (1827), 7 B. & C. 265, 108 English Reports 722 at 727.

For these reasons, the Commission's interpretation of Order-in-Council P.C. 1977-1911 leads it to reject the contention that the decision as to what proceedings should be held in camera on the ground of "public interest" rests outside the Commission.

4. *Considerations which the Commission may take into account in future specific cases*

It is true that in a number of court decisions, although comments on the question have frequently not been essential to the decision, judges in England, Australia and Canada have asserted an absolute privilege for government

documents originating at a high level. See, for example, *Smith* v. *East India Co.* (1841) 1 Ph. 50, and *Beatson* v. *Skeen* (1860) 5 H. & N. 838.

In *Conway* v. *Rimmer* [1968] A.C. 910, several members of the House of Lords spoke without limitation of the privilege from production which applies to such documents. For example, Lord Reid said:

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or capricious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan's* case, whether the withholding of a document because it belongs to a particular class is really necessary for the proper functioning of the public service.

Lord Hodson said the privilege applied to, for example, "Cabinet minutes, dispatches from ambassadors abroad and minutes of discussions between heads of departments" and heads of departments are the English equivalent of Deputy Ministers in the Canadian system. Lord Pearce added "Cabinet correspondence, letters or reports on appointments to office of importance and the like". Lord Upjohn added "high level interdepartmental minutes and correspondence pertaining to the general administration of the naval, the military and air force services" and "high level interdepartmental communications". Incidentally, Lord Upjohn expressly rejected, as a rationale for the privilege, that it would encourage candour and freedom of expression. Instead he said simply that the "reason for the privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high level communications, however innocent of prejudice to the state the actual contents of any particular document might be: that is obvious".

Australian cases in which the same view has been taken are *Lanyon* v. *Commonwealth* (1974) 3 A.L.R. 58, and *Australian National Airlines Commission* v. *Commonwealth* (1975) 132 C.L.R. 582.

On the other hand, in *Manitoba Development Corporation* v. *Columbia Forest Products Ltd.* (1973) 3 W.W.R. 593, Nitikman, J. refused to recognize a class claim for privilege for "documents pertaining to the policy-making and decision-making conduct of the Executive Council of the Government of

Manitoba". The privilege had been claimed on the ground that the production of the documents "would create or fan ill-informed or capricious public or political criticism", language which of course had been taken by the Minister there claiming privilege directly from the judgment of Lord Reid.

These cases are of great interest. However, the Commission is not a court of law. Principles of admissibility of evidence applicable to a court of law do not necessarily apply to the proceedings of a commission of inquiry. That is well established by court decisions. Moreover, some commissions of inquiry have as their subject matter questions of the conduct of high officers of state. Unlike the role of a court trying a case between private litigants or between a private litigant and the state, in a commission of inquiry such as this the very objects of the inquiry may include facts the disclosure of which — whether through government documents or not — may create or fan ill-informed or capricious public or political criticism.

Because of these differences between the role of a court and the role of a commission of inquiry, it is incorrect to suggest that procedural rules applicable to litigation are applicable automatically to commissions of inquiry.

Even in the courts, the recent judgment of Lord Widgery, C.J., in *Attorney General* v. *Jonathan Cape Ltd.* [1975] 1 Q.B. 752, is of great interest. There, the issue to be decided was whether, upon the application of the Attorney General, the court should grant an injunction to restrain the defendant from publishing the memoirs of the late R.H.S. Crossman, a Cabinet Minister in the 1960s, which included his record of discussions in Cabinet. At p. 764, Lord Widgery C.J. said:

> It has always been assumed by lawyers and, I suspect, by politicians, and the Civil Service, that Cabinet proceedings and Cabinet papers are secret, and cannot be publicly disclosed until they have passed into history. It is quite clear that no court will compel the production of Cabinet papers in the course of discovery in an action, and the Attorney General contends that not only will the court refuse to compel the production of such matters, but it will go further and positively forbid the disclosure of such papers and proceedings if publication will be contrary to the public interest.

The latter is a reference to the trial of the action as compared with production before trial on discovery. He continued:

> The basis of this contention is the confidential character of these papers and proceedings, derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel compelled to resign. It is contended that Cabinet decisions and papers are confidential for a period to the extent at least that they must not be referred to outside the Cabinet in such a way as to disclose the attitude of individual Ministers in the argument which preceded the decision. Thus, there may be no objection to a Minister disclosing (or leaking, as it was called) the fact that a Cabinet meeting has taken place, or, indeed, the decision taken, so long as the individual views of Ministers are not identified.

At p. 765, Lord Widgery, C.J. said:

> ... it must be for the court in every case to be satisfied that the public interest is involved, and that, after balancing all the factors which tell for or against publication, to decide whether suppression is necessary.

At p. 769, he said:

> ... The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility.
>
> It is evident that there cannot be a single rule governing the publication of such a variety of matters. In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.
>
> Applying those principles to the present case, what do we find? In my judgment, the Attorney General has made out his claim that the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussions are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.
>
> The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.
>
> There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.

He then held that, ten or eleven years having elapsed since the Cabinet discussions described in the memoirs, there ought not to be an injunction to restrain publication as he was not satisfied that "publication would in any way inhibit free and open discussion in Cabinet hereafter". He held likewise as to the disclosure of advice given by senior civil servants.

The Commission is not prepared to apply to its own proceedings a rule more absolute than that applied by Lord Widgery. The Commission will balance all the factors which tell for or against any document being made public.

The Commission does not intend to close its eyes to the importance which under certain circumstances the protection of state secrets could call for, whether this be done by keeping documents or oral evidence from public knowledge. But when this concern arises the Commission must invoke a number of factors which in each case will be weighed on their merits.

Without limiting the number of factors which may be pertinent in a particular case, the Commission readily recognizes that, faced by an objection to the giving of certain evidence in public on the grounds that it is of a secret nature the Commission could take into consideration:

1. The role of a Commission of Inquiry. The Governor in Council did not direct this Commission to receive all its evidence in camera. Thus the Governor in Council may reasonably be taken to have accepted the principle of publicity articulated in the Salmon Report, which I referred to earlier and was quoted in this Commission's opening statement on December 6th, 1977, as follows:

> It is... of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth...
>
> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
>
> It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view be a small price to pay for the great advantages of a public hearing...

2. Conflicting with the principle of publicity is the rationale of any privilege relating to state documents and discussions among officers of state. The Commission believes that the rationale must be found in more than an assertion that, as was said in one case, it would be wrong for such evidence to be disclosed, and it seems to us that the judgment of Lord Widgery C.J. in the *Jonathan Cape* case rested not on any such sphinx-like rationale but on that of the extent to which the suppression of such evidence is necessary to encourage candid exchanges of opinions about policy among persons at high levels of government, whether or not they actually had an expectation that the opinions were being exchanged in confidence. In most such situations there will have been an expectation of confidentiality, so that the effect is the same whether the rationale is the one or the other. It will be noted that this rationale is designed to protect exchanges of *opinions* about policy. The rationale is deserving of great weight where it is properly applicable. It is not applicable to statements of *fact*. The distinction was observed in *Halperin* v. *Kissinger*, 1975, 401 Federal Supplement 272, where the court said:

> ...Executive privilege

— as the Americans call it —

> exists to protect the decision-making process. The guarantee of confidentiality assures freedom "to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately..." The realm of advice, opinion, and policy formulation should be protected from public scrutiny in order to encourage candid discussion and independence by policy-makers in the executive branch.

It does not necessarily follow that statements of fact contained in records or in memories of discussions, or in letters, require the same protection in order to encourage candid discussion and independence by policy-makers. Disclosure of such statements of fact will not always impede the executive decision-making process, or deter future frank discussions by government officers.

3. "The public has an interest in preventing government malfeasance. Exposure of past wrongdoing might inhibit future abuses by government employees" (Wallace, (1976) 76 Columbia Law Review 142). Disclosure of crimes, frauds and misdeeds is permissible if the disclosure is justified in the public interest, in which case that public interest may override any private interest in confidence, as is established by, amongst others, two cases: *Garside* v. *Outram* (1856) 26 L.J.Ch. 113; *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396 (English Court of Appeal). The same view of the public interest in the administration of criminal justice resulted in rejection of a claim of "executive privilege" in *Nixon* v. *United States* (1974) 418 U.S. 683.

4. The status of the possessor or of the originator of the information may be significant. The older cases seemed to treat all documents of the central government as "state secrets" and accordingly, as a class, privileged from production. That view does not prevail today. Conversely, it cannot be assumed that documents of some other level of government are to be treated differently *as a class*: *D.* v. *National Society for the Prevention of Cruelty to Children* (1978) A.C. 171 (House of Lords).

5. As has already been observed, witnesses already heard by the Commission, whose conduct may lead the Commission to make a "charge" against them (to use the word found in sections 12 and 13 of the Inquiries Act), may have a proper interest in knowing of the testimony of senior officials of the Security Service and of persons in high levels of government from whom they may have received express or implied authority to carry out the acts under investigation.

This is not intended as an exhaustive list of the considerations which may be pertinent when the Commission must decide whether in regard to a particular document or oral evidence, the proceedings should, in the public interest, be held *in camera*.

In quantitative terms it may turn out to be rare that the Commission will have to reach a decision as to what is in the public interest. Frequently it should be possible for counsel to establish in public the existence of relevant facts without making specific reference to such documents and without eliciting oral testimony about discussions recorded by such documents. Again, in many cases a document in the class of "government documents" will be one which will, in any event, in the Commission's view, "relate to national security", and thus be receivable *in camera* on that ground.

The Commission is optimistic that in the future, as in the past, a spirit of reasonableness will enable counsel and the Commission to arrive at a result in a particular case which achieves the Commission's desire to hear as much evidence as possible in public while at the same time ensuring both that the national security is not endangered and that the public interest is served.

The Commission also wishes to point out that if the ingenuity and diligence of counsel fail to find a way of solving a problem involving a document, the Commission will not decide that the document should be received in public, without first giving all counsel the opportunity to make representations. Then, if the Commission does not accept the representations made against public disclosure it will not cause the document to be produced in public without giving counsel reasonable time to seek such remedies or take such action as they may wish.

5. *The Official Secrets Act, section 4(1)*

As was pointed out during argument, if the Commission, contrary to the submission of counsel for the government departments, including the Prime Minister's Office, should decide that a particular document should be received in evidence in public, it may be that the disclosure of the document would be a violation of section 4(1) of the Official Secrets Act, the relevant parts of which read as follows:

> 4.(1) Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or password, or any sketch, plan, model, article, note, document or information that... has been entrusted in confidence to him by any person holding office under Her Majesty, or tht he has obtained or to which he has had access... owing to his position as a person who holds or had held office under Her Majesty
>
> (a) communicates the... document or information to any person, other than a person to whom he is, authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it...

It might be said that a violation would occur in either of two situations:

First: One interpretation of the sub-section requires the adjectives "secret official" to be read as applicable only to the nouns "code word, or pass word". If so, it might be contended that any disclosure of a document or information entrusted to the Commission in confidence, would be a violation of section 4(1) even if the document or information were not "secret official". There may be a violation when the Commission communicates *any* document or information which it had received in confidence from the government (including the Privy Council Office or the R.C.M.P.), or has obtained it from the RCMP by virtue of the duty imposed upon the RCMP to provide access to the Commission to all its documents, or has obtained it from a government department by subpoena.

Second: If on the contrary, the adjectives "secret official" apply to "any... document or information", then it is only documents and information which are "secret" and "official" that are covered by section 4(1). Thus, the section would apply only to a document or information which is "Secret" or "Top Secret".

In each of these two situations, a violation would occur only if the Commission does not have the "authority" to disclose it in public. There is an unresolved issue here, as to whether such authority must be given expressly or may be given by implication.

Moreover, in each of these situations, a violation would occur only if it were not "in the interest of the State" to communicate the document or information to the public by receiving it in evidence in public. It would be a nice legal question whether, in a particular case, receiving a certain document or information in evidence in public would be in the interest of the State, for it might be contended that the receipt of the evidence in public is in the interest of the State in that the State has an interest in the public having confidence in the proceedings of a commission of inquiry before which there are questions of the conduct of persons holding high public office.

These are difficult questions as to which the Commission need not now reach a conclusion, and as to which the Commission has received no indication what the position of the Attorney General of Canada is. In *Attorney General* v. *Jonathan Cape Ltd.*, the Attorney General of England and Wales, conceded that the defendants were not in breach of the Official Secrets Act. During the course of argument, Mr. Nuss was unable to advise the Commission whether he and Mr. Robert appeared on behalf of the Attorney General, at most he could say that he appeared on behalf of government "Departments" (in French, "ministères") which would include the Department of Justice, but he was unable to assert that he had instructions to speak on behalf of the Attorney General of Canada. Moreover, he admitted that he did not have any instructions in respect of the applicability of section 4(1) of the Official Secrets Act.

So this aspect of the matter must be left, to be faced if and when a situation should arise which requires it to be considered by the Commission. In the absence of an opinion by the Attorney General of Canada that the disclosure in public of any particular document or information, or of any particular class of documents or information, would be a violation of the Official Secrets Act, this decision of the Commission has been reached on the assumption that no such question arises.

6. *Do the Terms of Reference preclude the Commission from hearing evidence of ministerial knowledge of activities by members of the R.C.M.P. unrelated to national security?*

During the course of argument, Mr. Nuss submitted that when the Commission is inquiring into "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada" (paragraph (c) of the terms of reference), it has jurisdiction to inquire into and report on "the policies and procedures governing" those activities. From his remarks we infer that, in his submission, the power to inquire into the "policies and procedures governing" those activities permits the Commission to hear the testimony of persons who are not and have not been members of the R.C.M.P. but have had a role in shaping or applying the "policies and procedures" governing "those activities", or to receive in evidence documents relating to the role of such persons — that is, when the question is one of the discharge of the responsibility of the R.C.M.P. to protect the security of Canada.

However, as we understand Mr. Nuss, his submission is that when the Commission is inquiring into the matters referred to in paragraphs (a) and (b) and which do not relate to "policies and procedures" that govern "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada", the Commission does *not* have the power to hear the testimony of persons who are not and have not been members of the R.C.M.P. but have had a role in shaping or applying the "policies and procedures" governing those activities, or the power to receive in evidence documents relating to the role of such persons. It would follow logically that objection would be taken also to evidence by any member of the R.C.M.P. or any other witness as to the statements or conduct of persons who, although never members of the R.C.M.P., nevertheless had a role in shaping the "policies and procedures" governing those activities.

This is a novel proposition as far as the Commissioners are concerned. It has not previously been advanced by counsel for the Solicitor General, who now are counsel for the Departments of the Government of Canada.

On May 25, 1978, during the hearings into the relationship between the R.C.M.P. Criminal Investigation Branch and the Department of National Revenue, when objection was taken to the production in public of correspondence between two Ministers it was on the ground that in the public interest such correspondence ought not to be disclosed in public. It was not asserted either formally or informally to the Commission that the correspondence was immaterial as relating to a matter beyond the Commission's terms of reference.

While it is for the Commission to interpret for itself the provisions of Order-in-Council 1977-1911, it is of interest to note the following statements made in the House of Commons on November 8, 1977, by the then Solicitor General The Hon. Francis Fox, M.P. in Hansard at p. 709.

> I believe that any fair observer would say the terms of reference that have been given to the Royal Commission are extremely wide.
>
> Why did we set up a Royal Commission of Inquiry? A Royal Commission of Inquiry was set up last July in response to a number of allegations that were made known to the government at that time. Prior to that the Leader of the Opposition was pressing for a royal commission. He then asks the following question during this debate: by whom were these acts committed and at whose direction? I would venture to suggest that the basic purpose of the Royal Commission of Inquiry is to get at the bottom of exactly who committed the acts and at whose direction. I think if you look at the terms of reference —
>
> Mr. Speaker, an hon. member on the other side says change the terms of reference. If you look at the terms of reference —

Mr. Clark:

> We have.

Mr. Fox:

> If you have, I suggest you re-read them. They are extremely wide. I should like to make one point very clear once again, a point that has been made time and time again in the course of debate in the House, that is, that the chairman and members of that commission have all the powers required

under the terms of reference to look at an illegal act, if there is one, and to follow the nexus all the way up to wherever leads.

The Solicitor General did not limit the applicability of his statement to illegal acts committed by members of the Security Service or relating to national security.

The Commissioners, who must themselves interpret P.C. 1977-1911 without relying on a statement by another person, such as that of Mr. Fox, do not accept the proposition now advanced by counsel for the Departments.

This Commission was appointed pursuant to Part I of the Inquiries Act, R.S.C. 1970 ch. I-13, entitled "Public Inquiries". The first section of that Part of the Inquiries Act is section 2, which reads as follows:

> 2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

The terms of reference of this Commission of Inquiry are clearly concerned with both "the good government of Canada" and "the conduct of (a) part of the public business" of the government of Canada. The preamble of Order-in-Council P.C. 1977-1911, dated July 6, 1977 which appointed the Commissioners and stated the terms of reference, makes it clear that the Governor in Council was concerned that there be "full inquiry" into "the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law", so as to "maintain" public "trust in the policies and procedures governing its activities" without which there cannot be "public" support of the R.C.M.P. "in the discharge of its responsibility to protect the security of Canada".

In other words, with respect to "investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law", the preamble indicates that the Commission is to inquire into "policies and procedures governing" the activities of the R.C.M.P. without limitation to the policies and procedures governing the Security Service of the R.C.M.P., for there can be public support for the work of the Security Service only if there is public trust in the policies and procedures governing all the investigative practices and other activities of the R.C.M.P. of which the Security Service is a part.

Paragraph (a), in so far as that paragraph relates to investigative practices and activities not relating to matters of the security of Canada, must be read together with paragraph (b). If the Commission finds that an "investigative practice" or "action" or "other activity" has involved members of the R.C.M.P. and "are" or "was" not authorized or provided for by law, then the Commission has a duty to "report the facts" relating to any such investigative action or other activity involving persons who were members of the R.C.M.P.

The effect of the contention by Mr. Nuss is that in the absence of any duty being specified in (b) to report on "policies and procedures" governing such investigative action or other activity, the scope of the inquiry must stop short of inquiring into whether, for example, a Solicitor General knew of an investigative practice that violated the provisions of a federal statute or that constituted a violation of the rights of citizens enforceable in the civil law and

yet authorized the investigative practice to continue or at least condoned it by not directing that the practice cease.

To accept that view of the meaning of the Order-in-Council, in the Commission's view, would mean that the Commission would be precluded from rendering a full and proper "report" on the facts "relating to" any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law. For it would require the Commission to attempt the difficult and artificial task of differentiating between the activities of the Criminal Investigation Branch of the R.C.M.P. and the Security Service of the R.C.M.P. in terms of considering the role and function of the Solicitor General and of other Ministers of the Crown. Such a distinction would not be founded upon any satisfactory rationale.

Moreover, if the Commission were to accept the contention of Mr. Nuss, it would find itself in an invidious position when deciding as required by paragraph (b) what advice to give to the Governor in Council "as to any further action that the Commissioners may deem necessary and desirable in the public interest". For example, the Commission will wish to consider what advice it will give to the Governor in Council as to whether the facts which the Commission reports, and the evidence of those facts, should be referred to the appropriate Attorney General for his consideration.

Among the facts which the Commission will wish to report in some cases will be whether members of the R.C.M.P. who, in the opinion of the Commission have, or might be held in a court to have, committed a wrongful act, were doing so upon the direction or with the consent or at least without the disapproval of a Minister of the Crown, for that might be a fact which any Attorney General might consider relevant to the process of his deciding whether or not to prosecute the members of the R.C.M.P.

Conversely, the Attorney General, while satisfied that he should launch a prosecution against a member or members of the R.C.M.P., if he were so satisfied, might wish to prosecute all those against whom there is evidence upon which a prosecution might be successful as parties to the offence under section 21 of the Criminal Code or to a conspiracy to commit an unlawful act.

Finally, to interpret the terms of reference in such a way as to permit the Commission to report on wrongful acts by members of the R.C.M.P. without also reporting on the extent to which they had from Ministers express or tacit authority to perform those acts would not only compel the Commission to deliver an incomplete report on the relevant facts but would also be unfair to the members of the R.C.M.P. who while "charged" by the Commission (to use the word found in sections 12 and 13 of the Inquiries Act) would have reason to feel that facts tending to exonerate them perhaps from guilt and perhaps from punishment had not been inquired into, or had not been reported upon, and would never come to the attention of the appropriate Attorney General.

APPENDIX "G"

REASONS FOR DECISION OF THE COMMISSION JULY 11, 1979

The Commission will now adjourn until September its public hearings into the numerous factual matters before it. This does not mean that the Commission is stopping work. Quite the contrary.

Counsel for the Commission will be preparing to complete the testimony of certain witnesses, and preparing for forthcoming witnesses. The evidence yet to be heard, on those issues which have already been before the Commission, relates to the questions of accountability by the R.C.M.P. and by Ministers. The evidence yet to be heard is not of interest only to historians: unless the story is told fully in terms of these issues, the Commission considers that any attempts to enhance accountability and control in the future are more likely to founder.

Only by going into the story fully will it be possible to judge fairly the extent to which investigative practices and activities not authorized or provided for by law were limited to one period of time or to one geographical area or to one part of the R.C.M.P. Likewise, only by detailed evidence will it be possible to judge, and to judge fairly, the extent to which there was a pattern at the senior levels of the R.C.M.P. of failing to report to the responsible Minister investigative practices not authorized or provided for by law, and a pattern of resistance by the R.C.M.P. to decided policies of government regarding the R.C.M.P. Similarly, only by detailed evidence will it be possible to judge fairly the extent to which Ministers and senior officials outside the R.C.M.P. were parties to, or knew of, investigative practices and activities not authorized or provided for by law.

It is not possible to reach fair and just conclusions on these issues without taking this further evidence. If we do not do so, the Commission will be open to criticism that we have failed to get to the bottom of issues of complicity, knowledge, accountability and control.

Part (c) requires the Commission to make recommendations on the policies and procedures governing the R.C.M.P. in the discharge of its responsibilities to protect the security of Canada. It also calls upon the Commission to render advice on the adequacy of the laws of Canada as they apply to such policies and procedures. In preparing its recommendations on these policy matters, the Commission is studying in depth the purpose and mandate of a security service, its structure, personnel policies, its methods of internal management and discipline, its methods of collecting, analyzing and disseminating information and its role in security screening for the public service, immigration and citizenship. The Commission must review the Security Service's relationship with provincial governments and police forces and with foreign

agencies. In considering all of these matters the Commission is concerned with both the consonance of Security Service activities with democratic values, and the effectiveness of the Security Service. In addition to examining the Security Service, the Commission must also be prepared to make recommendations on other branches of the R.C.M.P. which have responsibilities for protecting the security of Canada, for example in the areas protecting V.I.P.s and federal property.

The Commission has been giving careful consideration to the most effective means of government control of a security service, including the role of Parliament in this process. This part of the Commission's work includes an assessment of the way in which responsibility for the Security Service and security policy is divided between the Solicitor General's Department and an interdepartmental committee system based on the Privy Council Office.

Finally, the Commission is carrying out intensive research and review of those laws which have a direct bearing on the national security responsibilities of the R.C.M.P. This work includes consideration of possible reforms of the *Official Secrets Act*, alternatives to the *War Measures Act*, and the impact of the *Human Rights Act* and proposed Freedom of Information legislation on the work of a security service.

In respect to certain topics on the policy side of the Commission's programme, the work of the Commission is sufficiently advanced that it is now commencing preparation of its report on those topics. To move in this direction means that there must be time to write drafts of such reports. It is not possible to do so while hearings and other forms of Commission business are taking place.

The Commission repeats what it has made clear on other occasions: that it is determined to find answers to complex questions of policy and law. Some such questions have been known in one part or another of the R.C.M.P. for years. Others have been identified as legal issues only recently in the sense that they have been the subject of precise identification, discussion and disclosure, either to this Commission or to government. To many of them the final answers are not so clear and simple that they can be produced overnight by any one person, or group of persons. As for matters of law, the Commission repeats that it can countenance only police and security service activities which are lawful and proper: the rule of law must prevail. In saying that, as the Commission indicated in its opening statement on December 6, 1977, it is not just the criminal law that is to be taken into account. Applying the precept that the rule of law must prevail is not easy when it comes to deciding what may be permitted as *lawful* investigative or other practices.

Many of the legal problems, if they are to be solved by recognizing that the police or the security agency is to have the power to do certain things in certain circumstances, may require the attention of both Parliament and the provincial legislatures. The Commission's task is to make recommendations as to what powers are needed, what controls are needed, and what level of legislative authority will have to act in order to provide the solution.

APPENDIX "H"

REASONS FOR DECISION OF THE COMMISSION MAY 22, 1980

On January 24, 1980, Mr. J.F. Howard, Q.C., Chief Counsel to the Commission, wrote to counsel for the Commissioner and many members and past members of the R.C.M.P., as follows:

> . . . We are currently preparing detailed written Submissions of Counsel on the topics dealt with at the hearings of the Commission. These submissions will contain Statements of the Legal Issues which we consider to be raised by the Statements of Facts.
>
> The intention is to assist the Commission in determining whether or not conduct disclosed in the Statement of Facts is or may be lawful or on the other hand unlawful and thus conduct "not authorized or provided for by law". While it is not our general intention to argue for any particular conclusion as to the determination which should be made by the Commission, we do intend to attempt to identify aspects of the conduct reviewed which could constitute activities prohibited by law whether under the Criminal Code, other Statutes, or at Common Law. You will appreciate, however, that in some cases the absence of any dispute as to the facts or as to the applicable law may lead Commission Counsel to state their conclusion that it would appear that the conduct described in the Statement of Facts is clearly unlawful.
>
> We intend, upon the direction of the Commission, to forward copies of the written submissions to counsel who have been involved in the hearings with an invitation to make submissions as to the accuracy and completeness of the Submissions. Where individuals are named as participating in actions which the submissions indicate may amount to misconduct, copies will also be forwarded either to counsel for such persons or to the persons themselves. At that time an indication will be given as to the time of the formal presentation of the Submissions to the Commission and the time within which the persons concerned should indicate to the Commission whether or not they wish an opportunity to be heard in person or by counsel. It is our view that this procedure will constitute at least initial compliance with the requirements of s.13 of the Inquiries Act. . .

As a result of receiving this letter, counsel for the R.C.M.P. indicated that they wished to have an opportunity to make submissions about the extent to which the Commission should make reports against a person that he had committed an unlawful act, and about whether and to what extent notices should be given to members under section 13 of the Inquiries Act. The submissions of counsel for the R.C.M.P. and of counsel for the Commission were made orally on March 6, 1980. On April 9, 1980, counsel made an oral submission on behalf of the Attorney General of Canada (not, it should be

noted, on behalf of the Solicitor General). These reasons will consider the arguments that were presented on both dates.

It is necessary first to set forth the Commission's terms of reference and the provisions of the Inquiries Act that were referred to in argument.

The Commission's terms of reference (P.C. 1977-1911) are as follows:

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

The relevant portions of the Inquiries Act are as follows:

Part III — General

11.(1) The commissioners, whether appointed under Part I or under Part II, if thereunto authorized by the commission issued in the case, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry.

(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

(3) The persons so deputed, when authorized by order in council, have the same powers that the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(4) The persons so deputed shall report the evidence and their findings, if any, thereon to the commissioners.

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel.

13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he

has been allowed full opportunity to be heard in person or by counsel.

The Commission has now virtually completed its formal hearings concerning a number of investigative practices and activities which involved members of the R.C.M.P. It is therefore preparing to report the facts referred to in paragraph (b) of the terms of reference.

The position of Mr. Thomson, one of the several counsel who have appeared for the Commissioner and most of the members of the R.C.M.P. who have been witnesses, was supported by Mr. Yarosky, who appeared for several members. Mr. Nuss, on behalf of the Attorney General of Canada, made a submission as well. The issues they raised may be described as follows:

> I. Should the Commission report on the legal qualities of the acts of individuals in particular cases?
>
> (a) Is the Commission limited to making findings as to whether "practices" and "activities" were unlawful?
>
> (b) If the Commission finds legal fault in the conduct of a particular individual, does it impinge upon the functions of the courts or of the disciplinary process?
>
> II. Do the provisions of section 13 of the Inquiries Act apply to the Commission?

We shall now discuss these issues in detail:

I. *Should the Commission report on the legal qualities of the acts of individuals in particular cases?*

(a) *The Submissions of Mr. Thomson and Mr. Yarosky*: Is the Commission limited to making findings as to whether "practices" and "activities" were unlawful?

Mr. Thomson's principal submission is that this Commission does not have the power to conclude that the action or investigative activity of any particular member of the R.C.M.P. has been a criminal act or other form of misconduct. He contends that if appropriate, such matters should be dealt with in the courts or in disciplinary proceedings. Both he and Mr. Yarosky say that the Commission can make findings as to whether practices and activities were unlawful but not findings as to the blame to be assigned to any particular individual for any particular act. In other words, the Commission can make findings only as to what might be called systematic activities — not as to legal responsibility to be assigned to any particular individual in the case of any one of those systematic activities, or in any isolated case unrelated to a systematic practice.

If this view were accepted, it would be unnecessary for the Commissioners and their counsel to address their minds to the question of the manner in which section 13 of the Inquiries Act should be complied with. If the submissions by Mr. Thomson and Mr. Yarosky are accepted, the report would not make any "report... against any person" and consequently counsel for the Commission would not assert any charge of misconduct against any person. Consequently no notice need be given under section 13.

In support of his submissions, Mr. Thomson contends that some limiting significance ought to be attached to the failure of the Governor in Council, in

adopting Order-in-Council 1977-1911, to require the Commission to report as to "unlawful" or "illegal" acts. He argues that, if the Governor in Council had wished us to report on "unlawful" or "illegal" acts, those words would have been used in the Order-in-Council, and that the failure to use those words means that the Governor in Council expects us to report on something other than unlawful or illegal acts by particular persons. However, we attach no limiting significance to the failure to use such language. On the contrary, we consider that the phrase "not authorized or provided for by law" was chosen so as to extend the frontiers of the matters concerning which the Commission would investigate and report beyond offences against the Criminal Code or other federal or provincial statutes or regulations or municipal bylaws, and beyond civil wrongs. We pointed out in our statement on December 6, 1977:

> Moreover, those broad words. . . require us even to consider whether, in the facts of a particular case, there was a positive duty imposed upon the police to do the act — whether some specific duty, or their general duty to enforce the law.

We might now elaborate that point as follows: In addition to wrongdoing, the words "not. . . provided for by law" require us to report on any investigative action or other activity that, even though not an offence or a civil wrong, was nevertheless not authorized by the R.C.M.P. Act or by regulations made under that Act or by the standing orders of the Commissioners of the R.C.M.P. or by the orders of a superior.

(b) *The submission of Mr. Nuss on behalf of the Attorney General*: If the Commission finds legal fault in the conduct of a particular individual, does it impinge upon the functions of the courts or of the disciplinary process?

On this issue, Mr. Nuss pointed out quite accurately that a Commission of Inquiry is not a court of law and can render no judgment of acquittal or conviction. He warned that the proceedings and the report of the Commission ought not to appear to impinge (i.e. have an impact upon) or usurp the domain of the courts of law. Referring to Mr. Howard's letter, Mr. Nuss expressed the Attorney General's concern that:

> This manner of proceeding might lead to the Commission embarking on the type of consideration or examination of facts and law which is normally the exclusive preserve of our Courts of Justice, even though the Commission's purpose is not and cannot be the determination of guilt or innocence.

Mr. Nuss then observed that:

> If the Commission examines the incident on which it is going to report, by entertaining a detailed consideration of all the elements which constitute an offence, and then states whether the proof is such as to make out these elements; and if the Commission then is invited to consider possible defences and either rejects them or accepts them, then, for all practical purposes, a process so close to that of a trial has taken place as to be indistinguishable from it, except that instead of a formal verdict of guilt or innocence, one has a report.
>
> The Attorney General is apprehensive of the unfairness to the individual, real or perceived, which might result: a type of conviction without the safeguards of a trial by a body other than a Court of law.

Mr. Nuss did not express any concern about the fact that in most of the situations before the Commission in which there has been evidence concerning a specific incident the evidence has been heard in public. Indeed, in his representations he accepted that "at a Commission of Inquiry... the evidence is public right from the start". Yet he implied that hearing the evidence in public is "unfair" or "appears" to be unfair, for he said that:

> If as a result of the report, charges are brought before a Court against a person whose conduct has been so scrutinized by this Commission of Inquiry, which appears to be using the same test as a Court, then the unfairness or appearance of unfairness is compounded.

By speaking of "compounding", he appears to say that if the Commission hears argument and then reports as to whether on the facts of a situation the elements of an offence are to be found and as to whether any defences apply, and this is followed by charges in a court of law, that process itself would be unfair or would appear to be unfair to the accused. This unfairness or appearance of unfairness resulting from the evidence having been heard in public is "compounded" by the laying of charges. The Attorney General has not previously expressed concern that the hearing of the evidence before this Commission in public is itself unfair or would appear to be unfair. Perhaps his concern might be directed at the fundamental issue whether public commissions of inquiry, which have become so common in Canada, should be used as an instrument of the investigation of facts where the government reserves the right to proceed in the courts against the individuals whose conduct is investigated by the commission. In England, the Royal Commission on Tribunals of Inquiry (chaired by Lord Salmon), reporting in 1966, said:

> The publicity... which such hearings usually attract is so wide and so overwhelming that it would be virtually impossible for any person against whom an adverse finding was made to obtain a fair trial afterwards. So far no such person has ever been prosecuted. This again may be justified in the public interest because Parliament having decided to set up an inquiry under the Act has already considered whether or not civil or criminal proceedings would resolve the matter and has decided that they would not.

Such consideration does not appear so clearly to be given by the Governments of Canada or of the provinces when they appoint commissions of inquiry. In England a commission of inquiry, at least if it is to sit in public, is a mechanism of investigation that should be used only if the decision has been made not to prosecute the individuals whose conduct the Commission is bound to investigate if it is to carry out its mandate.

It appears that the present real concern of the Attorney General relates to (a) the content of the submissions which counsel for the Commission will make publicly to the Commission as to specific incidents in which the evidence names individuals who participated, and (b) the content of the report by the Commissioners.

With respect, the representations made on behalf of the Attorney General do not assist the Commission in resolving a fundamental dilemma. That dilemma arises as follows: On the one hand, as Mr. Nuss quite correctly observes, there is the possibility of unfairness or the appearance of unfairness if

the Commission makes a report against a person, and he is then charged with an offence. Mr. Nuss appears to be suggesting that therefore the Commission ought not to make a report against a person and that counsel for the Commission ought not to scrutinize the evidence to see whether the elements of an offence are present or whether any defence is available.

What is the alternative? Mr. Nuss does not say what the alternative is, other than to say that the Attorney General "trusts" that we "will proceed in such a manner as to lay" his concerns "to rest". So we are left to guess what manner would lay his concerns to rest. Would his view be that our report should narrate the facts of a particular incident, as we find them on the basis of the evidence placed before us, but that we refrain from any analysis of those facts as to whether they constitute an "activity not authorized or provided for by law"? We must carry out the duties imposed upon us by the Governor in Council pursuant to Part I of the Inquiries Act. We are required to "report the facts relating to any... activity that was not authorized or provided for by law". How can we decide to report a certain set of facts unless we have determined that the activity they disclose "was not authorized or provided for by law"? How can we determine that the activity they disclose "was not authorized or provided for by law" unless we analyze whether the facts, *as disclosed by the evidence before us*, constitute an offence or a civil wrong or in some other way conduct "not authorized or provided for by law"? The answer is that we must, if we are to undertake our duty according to law, undertake such an analysis. And, if we are required to undertake such an analysis, we prefer to have the fullest possible assistance of counsel for the Commission and such assistance as other counsel are prepared to provide to us. Thus there is a dilemma created on the one hand by our duty in law to carry out our directions, and on the other hand by our desire so far as possible to meet the legitimate concerns expressed by the Attorney General.

It should be borne in mind that the dilemma arises only in those situations in which:

(a) the Commission has detailed evidence of the specific acts in a specific case and the names of all or some of the participants, and when the activity may constitute a transgression of the Criminal Code or other statute law (other than the R.C.M.P. Act) or the law of tort or delict;

(b) the Commission has detailed evidence of specific acts in a specific case, the names of all or some of the participants, and perhaps, but not necessarily, evidence as to exactly what all the participants did, and where the activities are not likely to be a transgression of those laws referred to in (a) but where they may constitute a major service offence under sec. 25 of the RCMP Act. An example might be by the member conducting himself "in a scandalous... (or) ... disgraceful... manner".

The dilemma does not arise where, for one reason or another, the conduct concerning which the Commission may report cannot, as described by the Commission, give rise to any criminal or disciplinary proceedings against an individual. This may be because:

(i) the Commission's evidence is as to the general nature and purpose of the activities but the Commission does not have any evidence of the

names of participants or the particulars of any specific instances. There are a number of investigative techniques, the use of which by members of the RCMP may not have been authorized or provided for by law, which have been investigated by the Commission as to the "extent and prevalence" of the use of the technique without the Commission having obtained evidence of the particular cases in which over the years or decades the technique was used, or, consequently, of the identity of the individuals involved, whether members of the RCMP or not. To have collected such evidence in regard to the use of these techniques would frequently have been impossible, since no records were kept, or, if kept, records would no longer be available. Moreover, to try to reconstruct the individual situations would have required a much larger investigative and legal staff and would inevitably prove to be an exercise in futility; or

(ii) the Commission's evidence is as to a general practice or system and the names of some participants but not all of them, and as to which even if the Commission has the names of some participants it does not have the particulars of any specific case so that the Commission is in no sense considering any specific "offence"; or

(iii) the Commission's evidence is as to specific acts in a specific case but not the names of the participants, or at least not all of them, and as to which none of the participants has given evidence; or

(iv) the Commission has detailed evidence of the specific acts in a specific case, the names of all or some of the participants, and perhaps, but not necessarily, evidence as to exactly what all the participants did and the activities cannot be said to be a transgression of the Criminal Code or other statute law or of the law of tort or delict, or a major service offence under section 25 of the RCMP Act. Nevertheless, if they occurred, they may be, in the opinion of the Commission, conduct which is "not authorized by law" in the sense that it is beyond the duties of a member so to conduct himself: i.e., if such conduct is not within the phrase "such security and intelligence services as may be required by the Minister" (quoting sec. 44(e) of the Regulations).

It should also be borne in mind that, after reviewing the facts of a particular situation as disclosed by the evidence before the Commission, we may choose not to say that in our opinion the evidence discloses that a particular individual committed a particular offence. Instead, if the evidence justifies our doing so, we may choose to say that the evidence before us justifies the appropriate Attorney General considering laying a charge, or that it discloses no evidence of any offence by that individual. In so doing, we may identify the evidence which points to inculpation and that which points to exculpation. One cannot do that without reference to the legal principles that define what the facts in issue are with regard to a particular offence. However, it is possible that we may recommend to the Governor in Council that our analysis of the legal position in the particular case and our recommendation as to what should be done should not be published until the matter is finally disposed of by a decision either not to prosecute or launch disciplinary proceedings, or, if there is a decision to prosecute or launch disciplinary proceedings, the final disposition of such criminal or disciplinary proceedings.

Moreover, even if we do not make that recommendation, it is open to the Governor in Council to decide to follow that procedure.

We shall welcome the submissions of counsel as to whether any of these possibilities is appropriate to our report as to a particular matter, when counsel make their submissions about the various activities within a few weeks. There can be no more precise or detailed statement by us as to what would be appropriate in the particular circumstances of a particular case until we have heard the submissions of counsel for the Commission and of other counsel. All we can now say is that we do not accept the proposition that, in reporting on the participation of a particular individual, we are precluded from analysing the legal qualities that are attached to his conduct *as established by the evidence before the Commission.*

It is important that we lay stress upon the fact, whatever our report may say about the legal significance of the facts of a particular case, it does not follow that, if the same case were presented in a court of law, the court would necessarily reach the same conclusion. Counsel for the Commission have done their utmost to elicit all relevant evidence, whether favourable or unfavourable to an individual, but there may be evidence that has not been made known to our counsel and that would be placed before a court of law, either favourable or unfavourable to the accused, that would result in the facts having a different complexion. Moreover, some evidence which has been before the Commission might not be before a court, such as the evidence of an accused person whose evidence before this Commission, given under the protection of section 5 of the Canada Evidence Act, would not be admissible for the prosecution.

II. *Do the provisions of section 13 of the Inquiries Act apply to the Commission*?

(a) Mr. Thomson also argued that the Governor in Council by having, in Order-in-Council 1977-1911, expressly authorized the Commissioners to exercise all the powers conferred upon them by section 11 of the Inquiries Act, must be taken not to have intended that sections 12 and 13 of the Inquiries Act would apply. Sections 11, 12 and 13 together make up Part III of the Inquiries Act. We do not accept Mr. Thomson's contention. The powers set forth in section 11 are not available to a Commission of Inquiry unless the instrument creating the Commission of Inquiry expressly says so: that is the meaning of section 11(1) when it says:

> The Commissioners..., *if thereunto authorized by the Commission issued in the case...*

Only, therefore, if the Order-in-Council expressly incorporates, by reference (as it does) the powers contained in section 11 do we have, for example, the power to employ clerical staff, reporters, counsel and investigators. On the other hand, sections 12 and 13 apply to all Commissions of Inquiry without the creating instrument having to say so. Section 12 deals with when a Commission may allow a person to be represented by counsel, and when it must do so. Section 13 imposes a requirement of notice if a report is to be made against a person. These latter two sections, then, permit or require safeguards for the protection of the individual who is faced with extraordinary powers given to the

Commission of Inquiry. They apply whether the creating instrument says so or not. The fact that Order-in-Council 1977-1911 does not refer to them is of no significance.

(b) Mr. Thomson submitted that it is in the public interest that the work of this Commission be concluded as soon as possible. We agree. We also agree with him that a number of members of the RCMP have had to wait a long time without knowing what the final result of the revelations will be in terms of their position in law or their careers, and that no doubt their morale has been affected. We would add that if their morale has been affected adversely, probably their working effectiveness has been adversely affected as well. However, we wish to observe that the responsibility for that situation cannot be laid at the feet of this Commission. In almost all the cases of conduct involving possible offences which have come before the Commission, the evidence of wrongdoing — or possible wrongdoing — has been heard in public, or, if first heard in camera, it has been released to the public. The evidence has thus been available to the appropriate Attorneys General if they had wished to investigate further so as to enable them to reach decisions as to whether or not prosecute. In the case of one province, in which many of the acts occurred, that province was represented throughout many of our public hearings by counsel with a watching brief. In the case of matters not investigated on the basis of individual cases by this Commission, such as surreptitious entries in criminal investigations, one province — British Columbia — conducted its own investigation and reached a decision, announced publicly about seventeen months ago, that there would be no prosecutions. Therefore, in many cases it has been open to the appropriate authorities with prosecutorial discretion to execute that discretion one way or another. The absence of our report to the Governor in Council should not, in many cases, have hindered such action.

It is true that, as far as disciplinary proceedings within the R.C.M.P. are concerned, the Commissioner of the R.C.M.P. is awaiting this Commission's report before reaching a decision as to whether such proceedings are to be undertaken. However, we believe that it would have been inappropriate and unwise to attempt to report on some situations without reporting on them all at the same time. Only by adopting this procedure can we and others regard the conduct of various members of the R.C.M.P. as a whole.

We would have been pleased to be able to give our report on these factual matters sooner. However, from the beginning, we interpreted our terms of reference as requiring us to report not only as to the conduct of members of the R.C.M.P. — but also as to that of other persons, such as responsible Ministers of the Crown, who may have authorized or condoned conduct not authorized or provided for by law. Paragraphs (a) and (b) of our terms of reference use the words involving members of the R.C.M.P. but do not say that, in investigating extent and prevalence, and reporting the facts, we are to be limited to referring to members of the R.C.M.P. This interpretation of the terms of reference was adopted from the outset by the Government of Canada in public statements, and was in our own announced interpretations as well. We considered that, if the evidence did establish such ministerial implication, that would be a factor of great bearing upon our report on the facts and our advice as to what further

action we would deem necessary and desirable in the public interest. Put more simply, it might help the case of the member of the R.C.M.P. who acted if he knew of such purported authorization or actual condonation. As we have said often, to fail to explore this potential thoroughly, would have resulted in a Commission process that would be out of balance and unfair.

It is largely the exploration of this potential that has delayed our ability to report. We do not regret it, and in any event, apart from its importance to paragraphs (a) and (b), the evidence of these former Ministers and senior officials has had much significance in terms of paragraph (c) — that is in regard to the recommendations we shall make as to the laws, policies and procedures that ought to govern the R.C.M.P. in protecting the security of Canada.

(c) Some other points were made by Mr. Thomson or Mr. Yarosky, but they need not be commented on at this time. Some of them no doubt will be made again when argument is heard on the merits of the various situations, and we can take them into account in preparing our report.

Conclusion

Therefore, we are instructing counsel for the Commission to prepare their submissions, in which, in addition to summarizing the evidence, they will identify the legal issues and, where individuals are named, they may discuss the conduct of those persons in the light of the law. Then, before oral submissions are made to us, our counsel will, pursuant to section 13 of the Inquiries Act, give notice to any persons whose conduct is described in our counsel's submission as constituting actual or possible misconduct, of the charge of misconduct.

APPENDIX "I"

PRACTICE DIRECTION OF THE COMMISSION JUNE 20, 1980

Pursuant to the Commissioner's power to direct the practice and procedure before the Commission, we hereby give the following direction to counsel for the Commission and to other counsel appearing before the Commission.

In our reasons for decision dated May 22, 1980, we referred to a number of different categories of situation which are before us. Among them were the following:

(a) The Commission has detailed evidence of the specific acts in a specific case and names of all or some of the participants, and when the activity may constitute a transgression of the Criminal Code or other statute law (other than the R.C.M.P. Act) or the law of tort or delict;

(b) The Commission has detailed evidence of specific acts in a specific case, the names of all or some of the participants, and perhaps, but not necessarily evidence as to exactly what all the participants did, and where the activities are not likely to be a transgression of those laws referred to in (a) but where they may constitute a major service offence under sec. 25 of the R.C.M.P. Act. An example might be by the member conducting himself "in a scandalous...(or)... disgraceful-... manner".

In our reasons we indicated that in our report on such situations we were not precluded from analyzing the legal qualities that attach to the conduct of a participant as established by evidence before the Commission. In those reasons were were not asked to, and did not, deal in any way with the form or manner of presentation by counsel for the Commission in regard to the above two situations. We now do so.

In our reasons for decision we concluded as follows:

> Therefore, we are instructing counsel for the Commission to prepare their submissions, in which, in addition to summarizing the evidence, they will identify the legal issues and, where individuals are named, they may discuss the conduct of those persons in the light of the law. Then, before oral submissions are made to us, our counsel will, pursuant to sec. 13 of the Inquiries Act, give notice to any persons whose conduct is described in our counsel's submission as constituting actual or possible misconduct, of the charge of misconduct.

We observed in our reasons as follows:

> However, it is possible that we may recommend to the Governor in Council that our analysis of the legal position in the particular case and our recommendation as to what should be done should not be published until the matter is finally disposed of by a decision either not to prosecute or

launch disciplinary proceedings, or, if there is a decision to prosecute or launch disciplinary proceedings, the final disposition of such criminal or disciplinary proceedings. Moreover, even if we do not make that recommendation, it is open to the Governor in Council to decide to follow that procedure.

We shall welcome the submissions of counsel as to whether any of these possibilities is appropriate to our report as to a particular matter when counsel make their submissions about the various activities within a few weeks.

As we indicated, whatever our recommendations may bein that regard, the Governor in Council in the interest of fairness and the protection of the due process of the administration of justice, might decide not to publish our report as to those situations until the matter is finally disposed of in the courts or the disciplinary process. The intention of such a decision would be to ensure fairness for a person accused in the courts or subjected to disciplinary proceedings. Such an intention would be frustrated in advance if we were to have our counsel make public their notices of "charges of misconduct" given under section 13 of the Inquiries Act, or if there were to be public presentations by counsel for the Commission asserting that this person or that person had committed a particular offence.

If these steps were taken in public, the public identification of a person as, allegedly, a person who has committed an offence would make it that much more difficult for the person, if subsequently charged, to receive a fair trial, perhaps anywhere in Canada. If those steps were taken in public, we would thereby have contributed to the possibility of serious prejudice to those individuals. We do not intend to adopt procedures which would possibly have that result.

The policy of Parliament as to the publicity to be attached to pre-trial proceedings is demonstrated by the provisions of section 467 of the Criminal Code, which requires a justice holding a preliminary inquiry, prior to the taking of evidence, if an accused makes application for such an order, to make an order

> directing that the evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as
>
> (a) the accused who made the application is discharged, or
>
> (b) if the accused who made the application is committed for trial or ordered to stand trial, the trial is ended.

Application of that policy in the extreme to the circumstances of a commission of inquiry into whether there was activity "not authorized or provided for by law" would have required all the evidence of an individual's conduct to be heard in camera. From the beginning, however, we decided against that course.

In our opening statement, delivered on December 6, 1977, we said that we could not do better than publicly adopt as a cardinal principle guiding our deliberations what the English Royal Commission on Tribunals of Inquiry, chaired by Lord Justice Salmon, called the principle of publicity:

> It is... of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that

> the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth...
>
> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
>
> It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view be a small price to pay for the great advantages of a public hearing...

It will be observed that what Lord Justice Salmon's Report was speaking of was the *evidence* before an Inquiry and the desirability of the *investigation* of the facts being carried out in public. If the evidence is heard in public, then members of the public can form their own judgment as to the state of the public institution under investigation and the conduct of its members. It is another thing to extend the principle of publicity necessarily to the consideration by the Commission of the legal significance of the evidence. At this stage, no new evidence is presented. *No fact* will be hidden from the public's scrutiny if submissions are made in private by counsel for the Commission and counsel for the witnesses.

Therefore our conclusion is that, to be fair to the individuals concerned, and so as not to risk prejudice to the administration of justice, these steps should be taken by private communication. In reaching this conclusion, we have attempted to strike a balance between, on the one hand, the proper place of the principle of publicity and, on the other hand, the protection of the privacy of individuals in the sense that the due process of the administration of justice is not adversely affected by the procedure we follow.

Nevertheless, we wish to emphasize that, in regard to most of the situations that will be found in categories (a) and (b), the applicable legal issues will be the subject of public presentation, not in regard to specific cases but as to the situations generally, both by written submissions of counsel which are made public and by public oral submissions. Thus, for example, the various possible offences that arise from surreptitious entries as a general class of conduct will be analyzed publicly, both from the inculpatory and the exculpatory viewpoints.

For these reasons, the following procedure will be adopted:

1. Written submissions by Commission counsel and other counsel in so far as they relate to those two categories of situation referred to at the beginning of

this Practice Direction, will be communicated privately to the Commission and will not be released by the Commission to the public at this time.

2. Notices given to individuals under section 13 of the Inquiries Act will be given privately and will not be publicized by the Commission.

3. Any submissions which may follow the giving of such notices will be made in private.

This direction is, of course, subject to variation in the event that any person who wishes the Commission to follow some other procedure in his case should apply to the Commissioners to have any of the steps handled otherwise, and in that case the Commissioners will decide what the procedure will be.

APPENDIX "J"

P.C. 1979-887

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 22 March, 1979.

WHEREAS a commission of inquiry (hereinafter referred to as the "Commission") was established under Part I of the Inquiries Act by Order in Council P.C. 1977-1911 of July 6, 1977 to inquire into certain activities of the Royal Canadian Mounted Police;

WHEREAS the Honourable Mr. Justice David C. McDonald, Mr. Donald S. Rickerd and Mr. Guy Gilbert were appointed by such Order in Council as Commissioners to conduct such inquiry (hereinafter referred to as the "Commissioners");

WHEREAS the said Commissioners have requested access to and copies of Cabinet and Cabinet Committee minutes which are relevant to the matters within the Commission's terms of reference as set out in the said Order in Council;

WHEREAS it is a matter of convention and practice in Canada that access to records of Cabinet meetings and of Cabinet Committee meetings has been restricted to the Prime Minister and the Ministers who were members of the Cabinet at the time the meetings took place, the Secretary to the Cabinet, and such persons on the Secretary's staff as the Secretary authorizes to see them, on a confidential basis, where necessary for the proper discharge of their duties;

WHEREAS this convention and practice is, in the opinion of the Committee, essential for the proper functioning of the Cabinet system of government;

WHEREAS the Prime Minister, on behalf of his Ministry, has recommended to the Committee that, having regard to the particular nature of the inquiry being conducted by the Commission, an exception be made to the convention and practice in order to enable the Commissioners to ascertain whether any such documents relating to the terms of reference of the Commission contain evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, or evidence implicating a Minister in such act; and

WHEREAS the Secretary to the Cabinet, as the custodian of the records of all Cabinet and Cabinet Committee meetings of previous ministries, has recommended the adoption of such an exception in respect of such records.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, and with the concurrence of the Secretary to the Cabinet, advise that:

(1) subject to paragraph (5) the Commissioners shall be granted access to read the minutes of any Cabinet or Cabinet Committee meeting held prior to the establishment of the Commission which relate to the terms of reference of the Commission as set out in Order in Council P.C. 1977-1911 and which on reasonable and probable grounds they believe provide evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, or evidence implicating a Minister in such act;

(2) where the Commissioners are of the view that any minute or portion of a minute to which they have been granted access as provided for in paragraph (1) above contains evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, they may request the Secretary to the Cabinet to deliver a copy of any such minute, or portion thereof, to the Commission, and the copy of any such minute or portion thereof so requested shall be delivered to the Commissioners;

(3) if the Commission after a hearing on the issue, wishes to make public the contents of any such Minute or portion thereof referred to in paragraph (2), or to refer publicly to the existence of such Minute or portion thereof, it shall first request the Secretary to the Cabinet to secure from the appropriate authority declassification of such Minute or portion thereof;

(4) the Secretary to the Cabinet shall provide the Commissioners access to such indexes or other information as may reasonably be necessary to enable them to determine the minutes of the Cabinet or Cabinet Committee meetings to which they wish to be granted access for the purposes of paragraph (1) above;

(5) the Commissioners shall be granted access to the minutes of any Cabinet or Cabinet Committee meeting emanating from the Ministry of the Right Honourable John G. Diefenbaker only with the concurrence of the said the Right Honourable John G. Diefenbaker, it having first been communicated by him in writing to the Secretary to the Cabinet;

(6) this order being at variance with the normal conventions and practices of the Cabinet system of government, is:

(a) subject to paragraph (3) above, for the sole purpose of enabling the Commissioners personally to have access to minutes of Cabinet or Cabinet Committee meetings as provided in paragraph (1) above; and,

(b) to have effect only until such time as the Commission acting under the authority of Order in Council P.C. 1977-1911 shall have made its final report to the Governor in Council.

Certified to be a true copy - Copie certifiée conforme
P.M. Pitfield (signature)
Clerk of the Privy Council - Le Greffier du Conseil privé

APPENDIX "K"

P.C. 1979-1616

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 2 June, 1979.

WHEREAS a commission of inquiry (hereinafter referred to as the "Commission") was established under Part I of the Inquiries Act by Order in Council P.C. 1977-1911 of July 6, 1977 to inquire into certain activities of the Royal Canadian Mounted Police;

WHEREAS the Honourable Mr. Justice David C. McDonald, Mr. Donald S. Rickerd and Mr. Guy Gilbert were appointed by such Order in Council as Commissioners to conduct such inquiry (hereinafter referred to as the "Commissioners");

WHEREAS, for the purposes of the said Inquiry, by Order in Council P.C. 1979-887 of March 22, 1979, an exception was made to convention and practice in Canada governing access to records of Cabinet and Cabinet Committee meetings;

AND WHEREAS it is desirable to amend paragraph 5 of the said Order in Council P.C. 1979-887 by extending to the Right Honourable Pierre E. Trudeau the same rights and privileges in respect of his Ministry as are by that paragraph extended to the Right Honourable John G. Diefenbaker in respect of his Ministry.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister advise that paragraph (5) of the said Order in Council P.C. 1979-887 be revoked and the following substituted therefor:

> "(5) the Commissioners shall be granted access to the minutes of any Cabinet or Cabinet Committee meeting emanating from the Ministry of the Right Honourable John G. Diefenbaker only with the concurrence of the said the Right Honourable John G. Diefenbaker, it having first been communicated by him in writing to the Secretary to the Cabinet;
>
> (5.1) the Commissioners shall be granted access to the minutes of any Cabinet or Cabinet Committee meeting emanating from the Ministry of the Right Honourable Pierre E. Trudeau only with the concurrence of the said the Right Honourable Pierre E. Trudeau, it having first been communicated by him in writing to the Secretary to the Cabinet for Federal-Provincial Relations or such other person as may from time to time be designated by the Right Honourable Pierre E. Trudeau for such purposes."

The Committee, recognizing that there is a distinction between the authority to declassify a document and the authority to release a confidence of

the Queen's Privy Council for Canada, further advise that paragraph (3) of the said Order be amended to read

"(3) If the Commission after a hearing on the issue, wishes to make public the contents of any such Minute or portion thereof referred to herein or to refer publicly to the existence of such Minute or portion thereof, it shall first request the Secretary to the Cabinet or in the case of a Minute or portion thereof to which paragraph 5.1 applies, the Secretary to the Cabinet for Federal-Provincial Relations or such other person as may from time to time be designated by the Right Honourable Pierre E. Trudeau for such purposes to secure from the appropriate authorities release of the confidences of the Queen's Privy Council for Canada contained in any such Minute or portion thereof and declassification of the same."

Certified to be a true copy - Copie certifiée conforme

P.M. Pitfield (signature)

Clerk of the Privy Council - Le Greffier du Conseil privé

APPENDIX "L"

COMMISSION PERSONNEL
(Full- and Part-time, 1977-1981)

Administrative Staff

Linda Anderson
Paula Barry
Ann Bowering
William Brennan
Yvette Collins
Rita Cook-Lauzier
Jane Davey
Madeleine De Carufel
Irene Duy
Maureen Fermoyle
Peter Glarvin
Barbara Glover
Keith Gorman
Anne Hooper
Alix Houston
Joan Huston
Vicky Hallé
Kristina Jensen
Harry Johnson
Laurie Klee
Marcel Lacourcière
Valerie Madden
Henriot Mayer
Gisèle McIntyre
Ronald McKinnon
Paulette Monette
Linda Newman
Larry O'Brien
Paul O'Brien
Marcelle Pilet
Louise Plummer
Paulette Proulx
Jo-Anne Rankin
Guy Robitaille
Mary Rous
Peter Schofield
Mary Shae
Lise Sicotte
Moyra Tooke
Dorothy Villeneuve

Investigative Staff

Guy Bélanger
Clifford Christian
Wilbert Craig
Henry Kostuck
Alistair Macleod
Ernest Martin
John McKendry

Legal Counsel

David Abbey
Pierre Barsalou
Hon. Angelo Branca, Q.C.
*A.J. Campbell, Q.C.
Brian Crane, Q.C.
*Eleanore Cronk
Winston Fogarty
Dale Gibson
Colin McNairn
John Nelligan, Q.C.
Simon Noël
*Eugene Oscapella
*Mark Paci
*Bruno Pateras, Q.C.
*Timothy Ray
*J.J. Robinette, Q.C.

*Ross Goodwin
Margaret Hodgson
*John Howard, Q.C.
*W.A. Kelly, Q.C.
*Louis LeClerc
*Sydney Lederman
*Eva Marszewski
*Allan Rock
*Pierre Sébastien, Q.C.
*Richard Scott, Q.C.
*John Sopinka, Q.C.
*Yvon Tarte
Keith Turner, Q.C.
Bryan Williams

Those persons indicated by an asterisk (*) have appeared before the Commission as Commission Counsel, or in Court on behalf of the Commissioners.

Research Staff

Yolanda Banks
Patricia Close
Judy Doyle
John Ll.J. Edwards
Richard Elson
M.L. Friedland
Greg Goldhawk
John Graham
Alasdair MacLaren
Kenneth McFarlane
Leonard Preyra
Marke Raines
Claudine Roy
Peter Russell
Elizabeth Saunderson
Denise Vezina

COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE

Notice as to submissions by members of the public

Order-in-Council P.C. 1977-1911 dated July 6, 1977, appointed the undersigned as Commissioners under Part I of the Inquiries Act

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

Pursuant to its mandate, the Commission proposes to investigate and in due course to hold hearings concerning matters brought to its attention which fall within the terms of the foregoing.

The Commission invites individuals and organizations having knowledge of any facts relating to such matters, or wishing to express any opinions in respect of such matters, to communicate with the Commission, if possible in writing. Such individuals and organizations are not asked to communicate in detail to the Commission now if they would prefer not to give such details until the Commission's staff is able to interview them.

Any written communications should be sent by mail to:

Commission of inquiry concerning
certain activities of the R.C.M.P.
P.O. Box 1982
Station "B"
Ottawa, Canada
K1P 5R5
Tel. (613) 593-7821

Such communications should contain the signature, printed name, address and telephone number of the person or organization making the communication.

Any other persons who wish to be placed on the Commission's general mailing list should write the Commission at the address given above, asking that that be done. Please be sure to give your address.

In due course a further notice will be published as to such public hearings as the Commission may deem expedient for the proper conduct of the inquiry.

Mr. Justice D. C. McDonald, Chairman
of the Commission
D. S. Rickerd, Commissioner
Guy Gilbert, Q.C., Commissioner

Chief Counsel to the Commission:
J. F. Howard, Q.C.

Secretary of the Commission:
H. R. Johnson

COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE

NOTICE

The Commission will not be in a position to investigate any allegations by members of the public of investigative practices or other activities involving members of the RCMP that were not authorized or provided for by law, if such allegations are received by the Commission after November 19, 1979.

This termination date is necessary to allow the Commission to complete its work in this area. Any allegation received after that date will be referred back to the sender with the Commission's advice as to where it might most appropriately be sent in the alternative.

Any allegations should be made in writing to the Commission of Inquiry, PO Box 1982, Station B, Ottawa, Ontario, K1P 5R5.

Mr. Justice D. C. McDonald, Chairman
of the Commission
D. S. Rickerd, Q.C., Commissioner
Guy Gilbert, Q.C., Commissioner

Chief Counsel of the Commission
J. F. Howard, Q.C.
Secretary of the Commission
H. R. Johnson
P.O. Box 1982 Station "B"
Ottawa, K1P 5R5
Tel. (613) 593-7821

APPENDIX "O"

WITNESSES WHO TESTIFIED BEFORE THE COMMISSION

Ex-Staff Sergeant Gilbert Albert — R.C.M.P.

The Honourable Warren Allmand

Staff Sergeant Leonard F. Andrichuk — R.C.M.P.

Rita Baker — R.C.M.P.

Robert Joseph Bambrick — Canadian Employment and Immigration Commission

Superintendent Patrick Banning — R.C.M.P.

Superintendent Archibald Barr — R.C.M.P.

Robert Lawlor Beatty — Canadian Employment and Immigration Commission

Donald Beavis — Retired employee of Privy Council Office

Sergeant Pierre Bédard — R.C.M.P.

Chief Superintendent Gustav Begalki — R.C.M.P.

Inspector Bernard Blier — R.C.M.P.

Sergeant Dale Boire — R.C.M.P.

Paul Boisvert — Canada Post Office

Sergeant Serge Boisvert — R.C.M.P.

Inspector Luc Boivin — R.C.M.P.

Corporal Guy Bonsant — R.C.M.P.

Staff Sergeant Gérard Boucher — R.C.M.P.

Robin Bourne — Assistant Deputy Minister — Department of the Solicitor General

Maurice Bradshaw — Department of National Revenue

Superintendent Pierre Jacques Brière — R.C.M.P.

Sergeant Claude Brodeur — R.C.M.P.

Ex-Sergeant Ian Douglas Brown — R.C.M.P.

Ex-Staff Sergeant Gilles Brunet — R.C.M.P.

Inspector Alan Donald Spencer Burchill — R.C.M.P.

Kenneth Burnett — Former civilian member — R.C.M.P.

Arthur Butroid — retired employee of Canadian Employment and Immigration Commission

Corporal Robert Cadieux — R.C.M.P.

Sergeant Barry Charles Cale — R.C.M.P.

John Ralph Cameron — Former employee of the Department of the Solicitor General

Deputy Commissioner (Retired) Raoul Carrière — R.C.M.P.

Jean Castonguay

André Chamard

Corporal Normand Chamberland — R.C.M.P.

Pierre Champagne — Québec Police Force

Yvon Charlebois — Executive Secretary — Unemployment Insurance Commission

Assistant Commissioner Stanley Vincent Maurice Chisholm — R.C.M.P.

Donald Henry Christie, Q.C. — Department of Justice

Jérôme Choquette, Q.C.

Inspector Randil Bruce Claxton — R.C.M.P.

Sylvain Cloutier — Deputy Minister of Transport

Darryl Allan Clute — Senior Projects Officer — Department of National Revenue

Chief Superintendent Donald Cobb — R.C.M.P.

Lieutenant Roger Cormier — Montreal Urban Community Police Force

Ernest Côté — Former Deputy Solicitor General

Detective Inspector Jean Coutellier — Québec Police Force

Inspector Richard Doublas Crerar — R.C.M.P.

Superintendent Marcellin Coutu — R.C.M.P.

The Honourable Bud Cullen

Constable Richard Daigle — R.C.M.P.

Director General Michael Reginald Joseph Dare — R.C.M.P.

Inspector James Nathaniel Dawe — R.C.M.P.

Ex-Staff Sergeant François D'Entremont — R.C.M.P.

Bernard Dertinger — Canadian Employment and Immigration Commission

Assistant Commissioner (Retired) Howard Crossfield Draper — R.C.M.P.

Sergeant Bernard Dubuc — R.C.M.P.

Superintendent Robert Layton Duff — R.C.M.P.

Sergeant Louis Duhamel — R.C.M.P.

Corporal James Michael Dupuis — R.C.M.P.

Superintendent Joseph Ferraris — R.C.M.P.

Constable Gilles Forgues — Montreal Urban Community Police

Force Staff Sergeant Hughes Fortin — R.C.M.P.

The Honourable Francis Fox

Inspector Jean Gagnon — R.C.M.P.

Corporal Michel Gareau — R.C.M.P.

Superintendent Robert Bruce Gavin — R.C.M.P.

Assistant Commissioner Bertrand Giroux — R.C.M.P.

Sergeant Maurice Goguen — R.C.M.P.

The Honourable Jean-Pierre Goyer

Corporal Jean Michel Hanssens — R.C.M.P.

Warren Hart

Sergeant John Douglas Hearfield — R.C.M.P.

Commissioner (Retired) William Leonard Higgitt — R.C.M.P.

Sergeant Richard George Hirst — R.C.M.P.

Staff Sergeant Kenneth Hollas — R.C.M.P.

Superintendent Foster Archibald Howe — R.C.M.P.

Inspector Laurent Hugo — R.C.M.P.

Chief Superintendent Bruce James — R.C.M.P.

Assistant Commissioner Henry Jensen — R.C.M.P.

Robert Howell Jones — R.C.M.P.

Staff Sergeant Arnold Kay — R.C.M.P.

Deputy Commissioner (Retired) William Henry Kelly — R.C.M.P.

Sergeant Tony Kozij — R.C.M.P.

André Laforest

Ex-Constable Robert James Laird — R.C.M.P.

The Honourable Marc Lalonde

Sergeant Paul Langlois — R.C.M.P.

Superintendent Raymond Hugh Lees — R.C.M.P.

Jean-Marc Legros — Canadian Employment and Immigration Commission

Michel Lemay

Staff Sergeant Joseph Albert Bernard Limoges — R.C.M.P.

"M" — a retired employee of Canadian Employment and Immigration Commission

Kenneth John MacDonald — Department of the Solicitor General

Inspector Robert Ian MacEwan — R.C.M.P.

Inspector Stanley Maduk — R.C.M.P.

John Lawrence Manion — Secretary of the Treasury Board

Sergeant Detective Claude Marcotte — Montreal Urban Community Police Force

Superintendent Ernest Allan Marshall — R.C.M.P.

Corporal Peter Marwitz — R.C.M.P.

Donald Spencer Maxwell — former Deputy Minister of Justice

Ex-Staff Sergeant Donald McCleery — R.C.M.P.

The Honourable George McIlraith
Sergeant Wayne Arthur McMorran — R.C.M.P.
Raynald Michaud
Jean Pierre Mongeau
Commissioner Maurice Nadon (Retired) — R.C.M.P.
Inspector Georges Noël — R.C.M.P.
Superintendent Joseph Albert Nowlan — R.C.M.P.
Katharine O'Malley
John Gordon Palmer — Canadian Employment and Immigration Commission
Sergeant Henri Pelletier — R.C.M.P.
Staff Sergeant Ervin Pethick — R.C.M.P.
Peter Michael Pitfield - Secretary to the Cabinet
Ex-Staff Sergeant John Robert Plummer — R.C.M.P.
Staff Sergeant James Pollock — R.C.M.P.
Inspector Paul Pothier — R.C.M.P.
Ex-Staff Sergeant Robert Potvin — R.C.M.P.
Corporal Richard Presseau — Québec Police Force
Sergeant Victor Probram — R.C.M.P.
Inspector Thomas Marvin Quilley — R.C.M.P.
Sergeant George Rehman — R.C.M.P.
Maurice Richer
Chief Superintendent James Andrew Baron Riddell — R.C.M.P.
Robert Gordon Robertson — former Secretary to the Cabinet
Chief Superintendent Henry Francis Robichaud — R.C.M.P.
Sergeant Edmund Philip Rockburne — R.C.M.P.
Ex-Constable Robert Samson — R.C.M.P.
Assistant Commissioner Murray Stanley Sexsmith — R.C.M.P.
Chief Superintendent Roger Shorey — R.C.M.P.
Commissioner Robert Henry Simmonds — R.C.M.P.
Staff Sergeant Charles Victor Smith — R.C.M.P.
John Starnes — Former Director General — R.C.M.P.
Maurice St-Pierre — former Director General, Québec Police Force
Fernand Tanguay
Roger Tassé — Deputy Minister of Justice
Staff Sergeant James Thompson — R.C.M.P.
Jean-Guy Tremblay
Rt. Honourable Pierre Elliott Trudeau — Prime Minister of Canada
Leonard Lawrence Trudel — Former employee of Privy Council Office
The Honourable John N. Turner

Marie-Claire Dubé-Vani — former Civilian Member — R.C.M.P.

Assistant Commissioner Thomas Stanley Venner — R.C.M.P.

Inspector Claude Vermette — R.C.M.P.

Inspector James Warren — R.C.M.P.

Hugh Williams — Canadian Employment and Immigration Commission

Inspector James Sutar Worrell — R.C.M.P.

Superintendent William John Wylie — R.C.M.P.

Mr. "X"

"X"

Superintendent Ronald Yaworski — R.C.M.P.

Inspector Alcide Yelle — R.C.M.P.

Chief Superintendent Charles Yule — R.C.M.P.

APPENDIX "P"

COUNSEL WHO HAVE APPEARED BEFORE THE COMMISSION OTHER THAN COUNSEL FOR THE COMMISSION

Name	Representing
G. Lapointe, Q.C. Raphael Schachter	— The Commissioner and members of the R.C.M.P. (until November 10, 1977) — Certain employees of the Post Office Department.
Pierre Lamontagne, Q.C. Richard Mongeau Michèlle Gouin Hélène Leroux Victoria Percival Philippe Roy	— The Commissioner and certain past and present members and employees of the R.C.M.P.
Jacques Tetrault, Q.C.	— The Commissioner of the R.C.M.P. (relative to the hearing on February 6, 1979, with respect to liaison with the Department of National Revenue.)
Claude Thomson, Q.C. Mark P. Frawley Jeffrey S. Leon	— The Commissioner and members of the R.C.M.P. for hearings relative to Warren Hart and J.S. Warren and for various other matters.
Joseph R. Nuss, Q.C. Le bâtonnier Michel Robert H. Lorne Murphy, Q.C. Allan Lutfy (except between June 30, 1978 and March 4, 1980)	— The Government of Canada, including present and former ministers and officials not otherwise represented.
Allan Lutfy* Stephen Foster* (from June 5, 1979 to March 4, 1980)	— the Right Honourable Pierre Elliott Trudeau
Harvey Yarosky Natalie Isaacs	— Bernard Blier — Michael Gareau — Robert Potvin — Stanley Maduk

Mark Jewett	—	The Department of National Revenue
Claude Lanctot	—	Robert Samson
G.A. Allison, Q.C.	—	Jérome Choquette, Q.C.
Jean C. Sarazin	—	Certain employees of the Unemployment Insurance Commission
Warren Black	—	Canada Employment and Immigration
Pierre Cloutier	—	André Chamard
J.C. Major, Q.C.	—	Certain employees of the Department of National Revenue
Guy Lafrance	—	Montreal Urban Community Police
Michael A. Meighen	—	The Progressive Conservative Party of Canada
Gerald Tremblay Jean Bellevue Mario Bilodeau Claude Gagnon B.F. Flynn	—	Le Procureur Général du Québec
Michel Proulx	—	La Sûreté du Québec et ses membres
David Gibbons	—	Canadian Federation of Civil Liberties and Human Rights Association of Canada
Normand Caron	—	La ligue des droits de l'homme
Walter Tarnopolsky Alan Borovoy Irwin Cotler Edward Greenspan, Q.C. Allan Strader	—	Canadian Civil Liberties Association
Paul Lamoureux	—	Patricia Metivier
L. Yves Fortier, Q.C. Simon V. Potter	—	The Hon. Jean-Pierre Goyer and Lt. Col. J.R. Cameron
Robert J. Carter, Q.C.	—	L.D. Brown, J.R. Plummer and W. McMorran
Raymond Barakett	—	The Hon. Warren Allmand and J. MacDonald
A.H. Campeau	—	Donald R. McCleery, Gilles Brunet and Gilbert Albert
John E. Rouatt	—	The Hon. Bud Cullen
David W. Scott, Q.C. George D. Hunter	—	Senator the Hon. George J. McIlraith
Richard E. Shadley	—	Paul Potvin
	—	Michel Hanssens
Pierre A. Michaud, Q.C.	—	The Hon. Francis Fox
André Wery	—	Jean-Pierre Mongeau
Barry S. Wortzman	—	Warren Hart
Hubert Mantha	—	Hugh Williams

APPENDIX "Q"

PLACES AND DATES OF HEARINGS TO RECEIVE BRIEFS AND PERSONS AND ORGANIZATIONS THAT PRESENTED BRIEFS AT THOSE HEARINGS

MONTREAL — October 19, 1977.
La ligue des droits de l'homme du Québec Canadian Civil Liberties Association

MONTREAL — January 16, 1978
La ligue des droits de l'homme du Québec
Syndicate des Postiers du Canada — Canadian Union of Postal Workers
L'association des vétérans de la Gendarmerie Royale du Canada — R.C.M.P. Veteran's Association

TORONTO — January 18, 1978
Canadian Labour Congress
Quaker Committee on Jails and Justice
Mr. D. Campbell
Mr. X
Church of Scientology
Communist Party of Canada
Peoples' Republic of Poetry
North American Labour Party
Revolutionary Workers League
Mr. O. Batchelor
The Law Union of Ontario
Professor J. Arvay
Mr. Samuel Ross

VANCOUVER — January 20, 1978
Law Union of British Columbia
Francis Wingate
British Columbia Civil Liberties Association
Canadian Bar Association, Criminal Justice Sub-section of the British Columbia Branch
Ricardo Tettimanti
Kenneth McAllister

REGINA — January 30, 1979
Regina Chamber of Commerce
Buckland Consultants Ltd.
Mr. C.F. Platt

FREDERICTON — January 8, 1979
Hon. R. Logan, Q.C. — Attorney General of New Brunswick
Nova Scotia Civil Liberties Association

OTTAWA — January 23, 1979
Canadian Association of University Teachers
Foundation for Human Development
Mr. Lawrence A. Greenspon
Mr. Arthur A. Wardrop

OTTAWA — January 24, 1979
National Capital Region Civil Liberties Association
Professor Richard D. French
Mr. J. Ross Colvin

VANCOUVER — January 31, 1979
Rev. James Manly
British Columbia Civil Liberties Association

VANCOUVER — February 1, 1979
Law Union of British Columbia

OTTAWA — October 2, 1979
Canadian Bar Association

OTTAWA — October 3, 1979
Canadian Civil Liberties Association

OTTAWA — April 17, 1980
Canadian Civil Liberties Association

OTTAWA — July 23, 1980
Canadian Bar Association

APPENDIX "R"

FORMAL BRIEFINGS

1. Surveillance of Members of Parliament and Candidates
2. Surveillance of Separatist Movements in the Parti Québecois
3. R.C.M.P. Security Service — Human Sources
4. R.C.M.P. Security Service — Records Management
5. R.C.M.P. Security Service Automated Information Services
6. R.C.M.P. Security Service — Surveillance
7. Surveillance of Labour
8. Internal Control Mechanisms
9. R.C.M.P. Security Service — Technical Services
10. R.C.M.P. Security Service Relations with the Provinces
11. The Mandate of the Security Service
12. R.C.M.P. Security Service — Security Screening
13. Surveillance of Native Organizations
14. R.C.M.P. Personnel and Management Policies
15. Criminal Intelligence
16. Commission of Offences by Sources
16. 17. R.C.M.P. Legal Branch
18. R.C.M.P. Security Service — Counter-Espionage
19. R.C.M.P. Security Service — Counter-Subversion
20. Public Service Security Clearance
21. Immigration Security Clearances
22. Citizenship Security Clearances
23. R.C.M.P. Security Service Key Sectors Targetting
24. R.C.M.P. Security Service and the Media
25. R.C.M.P. "P" Directorate (Protective Policing)
26. Security Service Activities Outside Canada

APPENDIX "S"

MEETINGS WITH ACADEMICS

In Toronto	In Montreal
W.F. Bowker, Q.C.	J.M. Piotte
B.A. Grosman, Q.C.	G. Côté-Harper
J. Hogarth	A. Normandeau
C.D. Shearing	H. Brun
R.S. Mackay, Q.C.	C. Hector
T. Elton	A. Jodouin
A. Morel	A. Morel
P. Garant	P. Garant
G. Marshall	A. de Mestral
L. Taman	
J.Ll.J. Edwards	
J.D. McCamus	
P.H. Russell	

APPENDIX "T"

CONTRACTED STUDIES AND CONSULTANTS

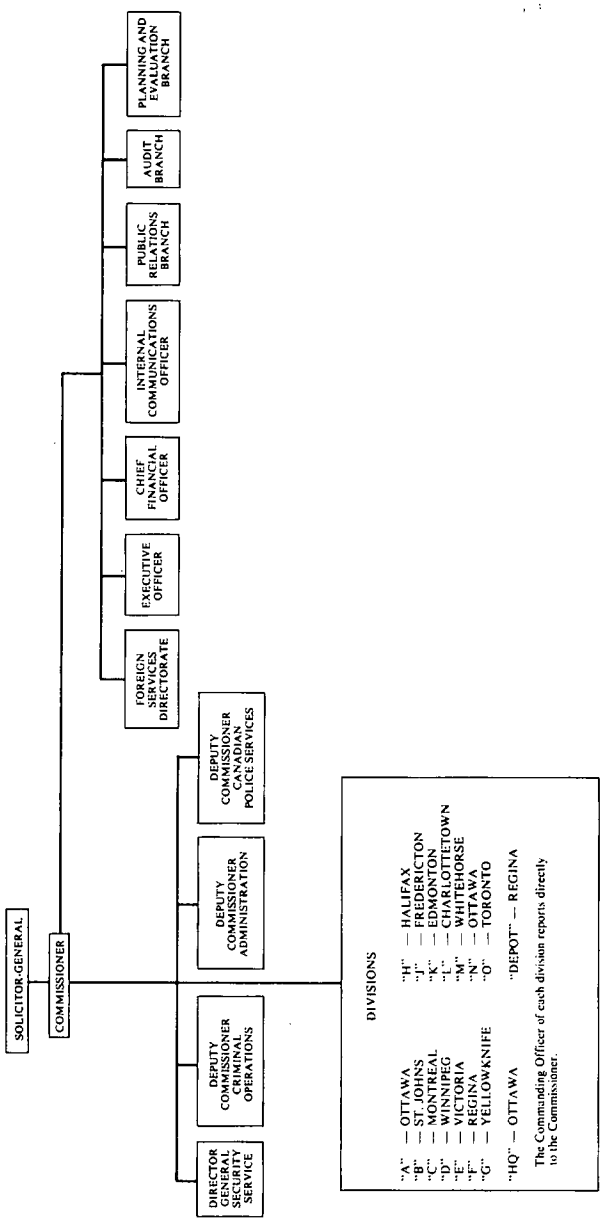
1. *Brun, Henri:* The Division of Constitutional Jurisdiction Between the Federal Government and the Provincial Governments with respect to National Security
2. *Brooks, Neil*: Admissibility of Illegally Obtained Evidence
3. *Chapman, Brian*: Consultant on the Structure and Organization of Police and Security Forces in Foreign Countries
4. *Edwards, J.Ll.J.*: Ministerial Responsibility as it relates to the offices of Prime Minister, Attorney General and the Solicitor General of Canada
5. *Fox, Richard* and *Waller, P. Louis*: Police and Security in Australia
6. *Franks, C.E.S.*: The Role of Parliament in Security Matters
7. *Friedland, Martin L.*:
   (1) National Security: The Legal Dimensions
   (2) Review of the Law relating to Entrapment
8. *Grant, Alan*: R.C.M.P. Interrogation Techniques
9. *Green, L.C.*: Section 63 of the Criminal Code
10. *Hogg, Peter*: The Constitutional boundaries between Federal and Provincial authority with respect to the investigations and prosecutions of criminal offences
11. *Larouche, Angers*: Legal Opinion on the Legal Position in Quebec Civil Law with respect to Surreptitious Entries as that problem has been developed in evidence before the Commission
12. *Leigh, L.H.*: Consultant on the recent experiences of the United Kingdom Administration in dealing with activities of the Security Service
13. *Magnet, Joseph*:
   (1) Privacy and Commissions of Inquiry
   (2) Public Intervention Before Commissions of Inquiry
   (3) Definition of National Security
   (4) Definition of Public Interest
14. *Marshall, Geoffrey*: Consultant on Police and Government in Britain
15. *Meredith, Harry A.*: Consultant on Personnel Management
16. *Nolan, John E. Jr.*: United States Law Governing Mail Surveillance
17. *Robson, J.L.*: New Zealand Experience with National Security Issues
18. *Ryan, Stuart*: Judicial Authorization of Electronic Surveillance

19. *Scalia, Antonin*: United States Intelligence Law
20. *Stenning, Philip C.*: Police Commissions, their development, composition, duties and powers
21. *Williams, D.G.T.*: The British Experience with respect to matters under the mandate of the Commission of Inquiry

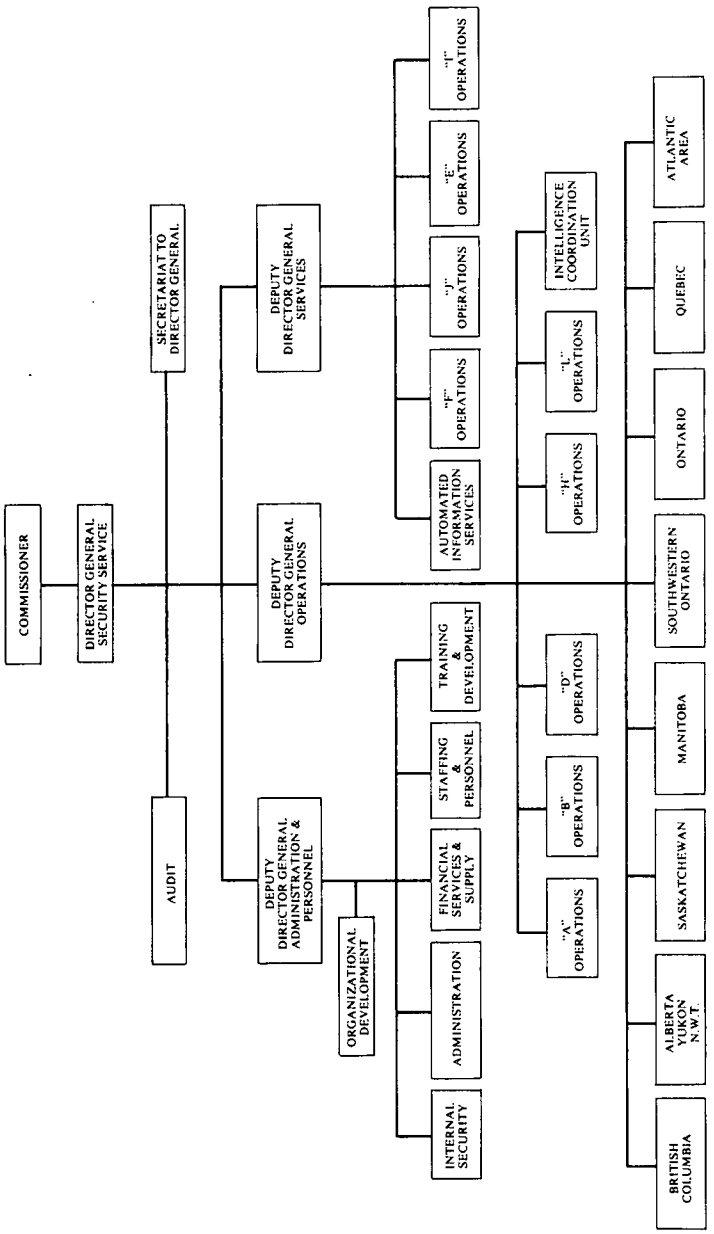
We are also indebted to the Honourable Mr. Justice Campbell Grant, the Honourable Mr. Justice G.-R. Fournier and the Honourable Angelo Branca, Q.C., for their assistance in reviewing the practice of applications for judicial authorization of electronic surveillance.

APPENDIX "U"

ORGANIZATION of the R.C.M.P.



ORGANIZATION of the SECURITY SERVICE



APPENDIX "W"

INFORMAL MEETINGS

1. R.H. Vogel, Q.C., Deputy Attorney General, British Columbia
2. A. Leal, Q.C., Deputy Attorney General, Ontario
3. R. Gosse, Q.C., Deputy Attorney General, Saskatchewan
4. A. Bissonnette, Deputy Solicitor General
5. E.P. Black, Deputy Under Secretary of State for External Affairs
6. R.P. Bourne, Assistant Deputy Solicitor General
7. M.R. Dare, Director General of the Security Service
8. T.D. Finn, Assistant Secretary to the Cabinet
9. A.E. Gotlieb, Under Secretary of State for External Affairs
10. M.W. Mackenzie, Chairman, Royal Commission on Security (1969)
11. M. Massé, Secretary to the Cabinet
12. D. Maxwell, Q.C., Former Deputy Minister of Justice
13. C.R. Nixon, Deputy Minister of National Defence
14. K. O'Neill, Chief, Communications Security Establishment, Department of National Defence
15. P.M. Pitfield, Q.C., Secretary to the Cabinet
16. R.G. Robertson, Former Secretary to the Cabinet
17. Commodore J. Rodocanachi, Director General of Intelligence and Security, Department of National Defence
18. R.H. Simmonds, Commissioner of the R.C.M.P.
19. J. Starnes, Former Director General of the Security Service
20. R. Tassé, Q.C., Deputy Minister of Justice and Former Deputy Solicitor General
21. R. Watson, Q.C., Department of Justice, R.C.M.P. Counsel

APPENDIX "X"

In the Federal Court of Canada

Trial Division

OTTAWA, Friday, the 4th day of August, 1978

PRESENT: THE HONOURABLE MR. JUSTICE CATTANACH

IN THE MATTER of the Inquiries Act, R.S.C. 1970 c. I-13

— and —

IN THE MATTER of a Commission under the Great Seal of Canada issued pursuant to Order in Council P.C. 1977-1911 to MR. JUSTICE DAVID C. McDONALD, MR. DONALD S. RICKERD and MR. GUY GILBERT to be Commissioners under Part I of the Inquiries Act to inquire into certain activities of the Royal Canadian Mounted Police;

— and —

IN THE MATTER of an Application for a Writ of Prohibition under section 18(a) of the Federal Court Act, R.S.C. 1970 c. 10 (2nd Supp.):

BETWEEN:

PAUL D. COPELAND on his own behalf and on behalf of all members of the Law Union of Ontario,

Applicant,

— and —

MR. JUSTICE DAVID C. McDONALD, DONALD S. RICKERD and GUY GILBERT, members of the Commission of Inquiry into certain activities of the Royal Canadian Mounted Police,

Respondents.

JUDGMENT

THIS application having come on for hearing before this Court at Toronto on the 26th and 29th days of June, 1978, in the presence of counsel for the respondents as well as for the applicant, and the Court after hearing what was alleged by counsel having reserved its decision,

IT IS THIS DAY ORDERED AND ADJUDGED that the said application be and it is dismissed with costs.

In The Federal Court of Canada

Trial Division

IN THE MATTER of the Inquiries Act, R.S.C. 1970 c. I-13.

— and —

IN THE MATTER of a Commission under the Great Seal of Canada issued pursuant to Order In Council P.C. 1977-1911 to MR. JUSTICE DAVID C. McDONALD, MR. DONALD S. RICKERD and MR. GUY GILBERT to be Commissioners under Part I of the Inquiries Act to inquire into certain activities of the Royal Canadian Mounted Police;

— and —

IN THE MATTER of an Application for a Writ of Prohibition under section 18(a) of the Federal Court Act, R.S.C. 1970 c.10 (2nd Supp.):

BETWEEN:

PAUL D. COPELAND on his own behalf and on behalf of all members of the Law Union of Ontario,

Applicant,

— and —

MR. JUSTICE DAVID C. McDONALD, DONALD S. RICKERD and GUY GILBERT, members of the Commission of Inquiry into certain activities of the Royal Canadian Mounted Police,

Respondents.

REASONS FOR JUDGMENT

CATTANACH, J.

As indicated in the style of cause this is an application by way of an originating notice of motion pursuant to section 18(a) of the Federal Court Act for a writ of prohibition prohibiting the respondents, as members of a Commission of Inquiry for the purpose of inquiring into certain activities of the Royal Canadian Mounted Police, from continuing their inquiry on the ground of the bias, in the legal sense, of each commissioner.

Immediately antecedent to the hearing of this motion the applicant moved for leave to call the respondents and two newspaper reporters to testify orally in open court in relation to issues of fact raised by the present application pursuant to Rule 319(4).

I declined to grant the leave requested because, in my opinion, no special reason was established for so doing.

By virtue of Rule 319, the rule is that the allegations of fact on which a motion is based shall be proved by affidavit. That a witness may be called to testify in open court in relation to an issue of fact raised in the application, is

the exception. The exception is granted only by leave when special reason is shown.

The adverse party to a motion may file an affidavit in reply and that affidavit too is to be directed to the facts. That is all an adverse party is required to do and he need not file an affidavit in reply unless he considers it expedient to do which the respondents in this matter did not.

As I appreciated the purpose of calling the three respondents to testify orally as well as the two newspaper reporters, it was to exact an admission or denial from the commissioners of the allegations of fact in the supporting affidavit to the principal motion, from which an inference of bias might be made, and the source of the information of the newspaper reporters for their published stories.

I failed to see the necessity for so doing. I expressed the view that there were adequate allegations of fact in the supporting affidavit to the principal motion from which bias, in its legal sense, may be inferred, but in so stating I did not make a finding of bias and I made it clear that I did not intend to so imply.

An application by way of motion is in no way akin to the trial of a cause of action which is based on antecedent pleadings.

I did not fault the applicant in adopting the procedure which he did and as he is entitled to do but I could not refrain from expressing the view that if the applicant wished to examine the respondents (and he could not cross-examine them on their affidavits because the respondents did not consider it necessary to file such affidavits and were under no obligation to do so) then if the applicant had adopted the alternative course open to him of filing a statement of claim an examination for discovery of the respondents would have been available to him.

While I verbally rejected the application I have considered it expedient to reduce to writing at this stage the reasons I gave orally for doing so.

There is a further matter also preliminary in its nature which may be considered also at this stage.

The applicant brings this motion on his own behalf and on behalf of all members of the Law Union of Ontario.

Thus it is a class motion. For a matter to be appropriate for the institution of a class or representative action (and for the purposes of this particular subject matter only I shall consider a class motion as synonymous with a class cause of action) the persons in the class must have the same interest. There must be a common interest and a common grievance and the relief sought in its nature must be beneficial to all.

In *Naken et al.* v. *General Motors of Canada Ltd.* (17 O.R. (2d) 193) Griffiths J. speaking for the Divisional Court said at page 195:

> "The first important principle to be extracted from these cases is that a plaintiff is only permitted to sue in a representative capacity on behalf of a class when the cause of action being asserted is common to all members of the class, not similar, but identical."

In the affidavit of Paul D. Copeland in support of the motion it is alleged that the members of the Law Union of Ontario is an unincorporated association of one hundred and eighty progressive and socialist lawyers, law students

and legal workers. Thus the Law Union of Ontario is but a collection of individuals.

In paragraph 10 of Mr. Copeland's affidavit he alleges that he verily believes that he has been the victim of criminal and other illegal activity by members of the Royal Canadian Mounted Police on the grounds that his clients have been the victims of such activities, that confidential telephone communications with a potential witness had been illegally intercepted, that his office has been the subject of surveillance, that he was regarded as a threat to the security of the Canadian Penitentiary Service and because his legal partner was the victim of illegal acts by the R.C.M.P. and that because of that association he was also a victim.

These allegations are personal to Mr. Copeloand. They are not common to him and the members of the Law Union of Ontario nor are there such allegations with respect to all or any members of the Law Union of Ontario.

Therefore this motion is not properly brought by Mr. Copeland in a representative capacity on behalf of all members of the Law Union of Ontario and I have entertained the motion as being brought on his own behalf exclusively.

With respect to the members of the Law Union of Ontario the motion is therefore dismissed.

Counsel for Mr. Copeland, because of the allegations in his affidavit above mentioned, contended that he was a victim of R.C.M.P. illegal activity which may well be the subject of investigation by the Commission and in fact Mr. Copeland has so requested and there has been a tentative indication given that these particular matters will be investigated if deemed appropriate and at the appropriate time.

Accordingly it is contended that Mr. Copeland is entitled to have his allegations of illegal activities by the R.C.M.P. with respect to himself investigated by a completely unbiased panel.

It was then contended Mr. Copeland could reasonably apprehend that the Commission might not act in an entirely impartial manner and that is a ground for disqualification.

The supporting affidavit to the motion has many allegations and has annexed thereto numerous exhibits running through the alphabet and starting through the alphabet a second time, the gist of which may be summarized.

The allegations are that Mr. Justice McDonald, prior to his appointment, had been an active, energetic and political partisan in the Province of Alberta for the political party which now forms the Government of Canada and which was responsible for the appointment of all three commissioners. Similar allegations are made of political partisanship by Mr. Rickerd and Mr. Gilbert. It is further alleged that Mr. Justice McDonald, after his appointment accompanied the present Prime Minister in a private DOT aircraft on an official visit to the Orient in the capacity of a news correspondent. It is also alleged that Mr. Rickerd and Mr. Gilbert had close personal and business relationships with members of the Cabinet particularly the then Solicitor General responsible for the R.C.M.P. It is alleged that the Commission has expressed the view that certain alleged illegal activities by the R.C.M.P. may have been justified by the interests of national security. It is a function of the

Commission to determine the extent to which the members of the Government, the Cabinet and the Liberal party were aware of, authorized or were in any way complicit in illegal activities of the R.C.M.P.

These allegations were the subject matter of many newspaper reports, given wide distribution and prominence in the newspapers because the stories were newsworthy. The press clippings are among the exhibits to the affidavits.

Still further summarized the gist of the allegations is that these circumstances lead to the suspicion, to be reasonably entertained that the Commission will serve as a whitewash of the R.C.M.P. and members of the Government and that Mr. Copeland, as a victim of these activities, cannot expect a fair shake from a Commission so appointed and so comprised.

The most recent test of bias to be applied and a discussion thereof is in the reasons for judgment delivered by Laskin C.J.C. for the majority of the Supreme Court of Canada in *Committee for Justice and Liberty et al.* v. *National Energy Board* ([1976] 68 D.L.R. (3d) 716) where he said at pages 732-3:

> (The past activity of the Chairman of the Board), in my opinion, cannot but give rise to a reasonable apprehension, (of bias) which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined on a s. 44 application.
>
> This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi* v. *Minister of Highways (B.C.) (1966)*, [1966] S.C.R. 367 and again in *Blanchette* v. *C.I.S. Ltd.* [1973] S.C.R. 833 (where Pigeon J. said that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand J., said in *Szilard* v. *Szasz*, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it may be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

The majority held that Mr. Crowe, the Chairman of the National Energy Board, because of his previous association with a party before the Board, was the object of a reasonable apprehension of bias. Similar circumstances applied in *Szilard* v. *Szasz*.

In the plethora of decided cases expressions such as "reasonable apprehension of bias", "reasonable suspicion of bias" and "real likelihood of bias" have been used interchangeably without distinction.

In his dissenting judgment in the National Energy Board case, de Grandpré J. with whom Martland and Judson J.J. concurred, applied the same test as did Laskin C.J.C. but arrived at a different result.

de Grandpré J. said at pp. 735-6:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.

He could:

> ... see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

I can perceive no difference in principle to the approaches between the judgment of Laskin C.J.C. and de Grandpré J. but it is significant that de Grandpré J. does refer to "real likelihood of bias" whereas the majority excluded that formula.

It may be that a "real likelihood of bias" imposes a higher standard on an applicant for prerogative relief than does a "reasonable apprehension of bias" but in view of the majority's silence as to the test of a "real likelihood" such expressions of the test as to whether "a reasonable man would consider there was a likelihood of bias", which has been frequently propounded, may not be an accurate statement of the law.

Accordingly the question immediately arises as to what issues are to be determined by the Commission.

For there to be an issue to be determined there must be a *lis inter partes*, that is to say a dispute between parties to be decided by the Commission.

Lord Simmonds in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* ([1948] 4 D.L.R. 673) said at page 680:

> It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties,...

Thus if there is a *lis inter partes* the function is judicial in the case of courts of law and equally so in the case of a tribunal where issues between parties are decided where the function is more properly described as quasi-judicial.

Conversely if there is no issue or *lis* to be determined then the function of the tribunal is described as administrative and the principles of natural justice, particularly the common law concept of bias, do not apply with the same full force and effect to such a tribunal as they apply to a quasi-judicial tribunal which is required to determine a quasi-*lis*.

Incidentally in *Committee for Justice and Liberty* v. *National Energy Board* (supra) there was such a quasi-*lis*. There the Board had before it the question for decision whether to issue a certificate in respect to the proposed Mackenzie Valley pipeline to an applicant therefor to which other interested parties upon whom the Board had conferred status were opposed.

In *Guay* v. *Lafleur* ([1965] 47 D.L.R. (2d)226) Cartwright J. (as he then was) said that the maxim, *audi alteram partem* (one of the cardinal principles of natural justice) does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power to impose a liability or to give a decision affecting the rights of parties.

In re Pergamon Press Ltd. ([1970] 3 W.L.R. 792) the English Court of Appeal held that inspectors appointed to investigate the affairs of a company under Companies legislation were masters of their own procedure but were required to act fairly and, therefore, were required to give anyone whom they

proposed to condemn or criticize in their report a fair opportunity to answer what was alleged against him.

In the *Federal Companies Act* as I once knew it, that right was the subject of precise statutory enactment.

But Lord Denning M.R. in his characteristically precise and incisive language said:

> They are not even quasi-judicial, for they decide nothing, they determine nothing.

Accordingly a tribunal is to be categorized as either quasi-judicial or administrative by the function it performs and its powers. The category into which a tribunal falls is of paramount importance in determining what common law principles of natural justice are applicable and consideration must also be given to the legislation to which the tribunal owes its existence.

The present Commission of Inquiry, of which the respondents are members, owes its existence to the *Inquiries Act*, as stated in the style. Under Order in Council, P.C. 1977-1911 a Commission issued appointing the respondents to be commissioners under Part I of the *Inquiries Act*.

Their functions are therein outlined to be:

> (a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;
>
> (b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and
>
> (c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

I have omitted the introductory portion and the procedure provisions.

Paragraph (a) requires the Commission to "investigate" and to "determine" the extent and prevalence "of certain investigative practices" of and to "inquire into" certain policies of the R.C.M.P.

By paragraph (b) the Commission is required to "report the facts", and to "advise as to any further action that the commissioners deem necessary and desirable in the public interest".

By paragraph (c) the Commission is required "to advise and make such report as the commissioners deem necessary and desirable".

In the procedural portion of the Order in Council which I have not reproduced, the commissioners are "directed to report to the Governor in Council".

The key words in the functions of the Commission are to "investigate", "inquire", "report the facts" and "to advise" with respect thereto.

Thus at its very highest the Commission is but a fact-finding, reporting and advisory body.

Paraphrasing and applying the words of Lord Denning, M.R. to the commissioners herein, they are not even quasi-judicial, for they decide nothing, they determine nothing.

The Commission reports to the Governor in Council and it is for him to decide what shall be done. He may implement the advice given in the report in whole or in part or he may consign the report to oblivion. The Action to be taken thereon is exclusively his decision.

In contrasting the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative, notwithstanding that both hold hearings, the gulf is so wide between them that the common law standards of bias are not applicable to the latter.

In my view bias in the Commission, even if it should be found to exist and I make no such finding, is irrelevant.

In so stating I have not overlooked the comment *In re Pergamon Press* (supra) that the inspectors appointed under Companies legislation to give to anyone whom they propose to condemn or criticize, "a fair opportunity to answer what was alleged against him".

In *Maxwell* v. *Department of Trade and Commerce* (Times Newspaper L.R. June 25, 1974) the Court of Appeal dealt with the same inquiry as that dealt with in the *Pergamon Press* case and refused to apply any requirement other than the inspectors must be "fair to the best of their ability".

If a person is aggrieved by a decision that should have been made on a quasi-judicial basis then that person, in my view, may resort to proceedings in the nature of *certiorari* or may invoke a review of that decision under section 78 of the *Federal Court Act*.

But if a person is aggrieved by a decision that is required to be made on the basis of it being fair to the best ability of those who decide, then the remedy is political not judicial.

That being so it applies with much greater force to a tribunal which makes no decision.

Counsel for Mr. Copeland relied strongly on the judgment of the Supreme Court in *Saulnier* v. *Quebec Police Commission and Montreal Urban Community* ([1976] 1 S.C.R. 572) in support of his position that, even though the respondent commissioners would not have any decision to make, their recommendations would or might form the basis for action to be taken by the Governor in Council which might prejudicially affect Mr. Copeland's interests. In that case, Pigeon J. speaking for the Court, distinguished the case of *Guay* v. *Lafleur* in the following passage at page 578:

> With respect, I must say that the function of the Commission is definitely not that of the investigator concerned in *Guay* v. *Lafleur*. That investigator was charged only with collecting information and evidence. The Minister of National Revenue could then unquestionably make use of the documentary evidence collected, but not of the investigator's conclusions. It is for this reason that it was held the investigator could refuse to allow the

taxpayer concerned to be present or be represented by counsel at the kind of investigation provided for by the *Income Tax Act*. The situation is quite different under the *Police Act*, s.24 of which reads as follows:

> 24. The Commission shall not, in its reports, censure the conduct of a person or recommend that punitive action be taken against him unless it has heard him on the facts giving rise to such censure or recommendation. Such obligation shall cease, however, if such person has been invited to appear before the Commission within a reasonable delay and has refused or neglected to do so. Such invitation shall be served in the same manner as a summons under the Code of Civil Procedure.

This provision indicates that in this essential particular the *Police Act* differs fundamentally from the *Income Tax Act*. If this Court held that the latter Act did not require application of the audi allenam partem rule, this was because it had first concluded that the kind of investigation provided for by the Act involved no conclusion or finding as to the rights of the taxpayer concerned. The *Police Act*, on the other hand, besides expressly recognizing the application of the *audi alteram partem* rule, clearly indicates that the investigation report may have important effects on the rights of the persons dealt with in it. It does not appear necessary for me to labour this point, as I cannot see how it can be argued that the decision is not one which impairs the rights of appellant, when it requires that he be degraded from his position as Director of the City of Montreal Police Department, and the sole purpose of subsequent proceedings is to determine the lower rank to which he should be assigned, that is the extent of the degradation.

In my opinion Casey J.A., dissenting, properly wrote, with the concurrence of Rinfret J.A.:

> I believe that the *Lafleur* case is clearly distinguishable from the one now being discussed. In *Lafleur* the Supreme Court was concerned with the *Income Tax Act* — here we have a Quebec statute. In that case it had to decide whether the doctrine *audi alteram partem* applied: here it is written right into the Act by sec. 24. Finally there it was said that "... the appellant has no power to determine any of the former's (Respondent's) rights or obligations". In my opinion Appellant (i.e. the Commission) has done just that.
>
> Appellant has rendered a decision that may well impair if not destroy Respondent's reputation and future. When I read the first and fourth considerants and the conclusions of the sixth recommendation and when I recall that the whole purpose of these reports is to present facts and recommendations on which normally the Minister will act the argument that no rights have been determined and that nothing has been decided is pure sophistry.

In the *Saulnier* case the inquiry was into the conduct of Saulnier as a police officer under the applicable statutory provision. The report, from which there was no appeal, was held to have impaired his rights while in the *Lafleur* case the rights of the person investigated under the *Income Tax Act* remnained intact, since he had access to the courts by way of appeal from any assessment that might arise from information collected by the investigator.

Here the situation is that it is not even the conduct of Mr. Copeland, but that of the R.C.M.P., that is to be investigated, and while there is no appeal neither is there any report to be made on Mr. Copeland's conduct. No

prejudice to any personal right or interest of his is foreseeable as a result of the inquiry or of any action that may be taken by the Governor in Council on the report of the Commission when eventually submitted. At most Mr. Copeland may, and perhaps will be a witness at some stage of the inquiry, in which event he will undoubtedly be entitled to the same rights and protections as any witness.

In the event that any adverse report is to be made against him as a witness, he will also be entitled to the protection afforded by section 13 of the *Inquiries Act*, that is to say the right to be told what is alleged against him as misconduct on his part and the right to a full opportunity to be heard in person or by counsel on his behalf. But this will be the full extent of his rights in respect of the making of such an adverse report. Though prescribed here by the statute, these rights are, in my opinion, precisely the same as those upheld by the Court of Appeal in the absence of a like statutory provision in the *Pergamon Press* case.

The application therefore fails and it will be dismissed with costs.

A. Alex. Cattanach
J.F.C.C.

Ottawa, Ontario
August 4, 1978

APPENDIX "Y"

In the Federal Court of Canada

DATES OF HEARING: June 26 & June 29, 1978

PLACES OF HEARING: Toronto, Ontario

COUNSEL:

Court No. T-2550-78

Michael Mandel, Esq.
J. House, Esq. for the Applicant

BETWEEN

J.J. Robinette, Q.C. for the Respondent

PAUL D. COPELAND et al.,

SOLICITORS OF RECORD:

Applicant,

Michael Mandel, Esq.
Barrister and Solicitor
Room 327, Osgood Hall Law School
York University
4700 Keele Street
Downsview, Ontario for the Applicant

— and —

MR. JUSTICE DAVID C. McDONALD et al.,

Respondents.

Messrs. McCarthy & McCarthy
Barristers and Solicitors
Toronto, Ontario for the Respondent

REASONS FOR JUDGMENT

Federal Court of Canada
Trial Division

TORONTO, MONDAY THE 2nd DAY OF JUNE, 1980

PRESENT: THE HONOURABLE MR. JUSTICE GIBSON

IN THE MATTER of the Inquiries Act, R.S.C. 1970 c. I-13

IN THE MATTER of a Commission under the Great Seal of Canada issued pursuant to Order in Council P.C. 1977-1911 to MR. JUSTICE DAVID C. McDONALD, MR. DONALD S. RICKERD and MR. GUY GILBERT to be commissioners under Part I of the Inquiries Act to inquire into certain activities of the Royal Canadian Mounted Police;

- and -

IN THE MATTER of an Application for a Writ of Certiorari with mandamus in aid under section 18(a) of the Federal Court Act, R.S.C. 1970 c. 10 (2nd Suppl):

BETWEEN:

ROSS DOWSON AND JOHN RIDDELL, on their own behalf and on behalf of all former members of the League for Socialist Action

Applicants

- and -

The Commission of Inquiry into certain activities of the Royal Canadian Mounted Police

Respondent

Upon motion dated the 20th day of May, 1980 on behalf of the Applicants for a Writ of Ceretiorari with Mandamus in aid quashing the decision of the Respondent, dated the 9th day of April, 1980, refusing the Applicants the right to examine witnesses before the Commission of Inquiry into certain activities of the Royal Canadian Mounted Police, and requiring the Commission to reconsider and to grant the Applicants such right.

ORDER:

Order-in-Council P.C. 1977/1911 authorised the Commissioners referred to in such Order to investigate certain conduct of the R.C.M.P. only and not the Applicants.

Such Commissioners are "a fact finding, reporting and advisory body" (C.F. Copeland case (1978) 2 F.C. 815 Cattanach, J.)

The submission that the Commissioners have breached Section 12 of The Inquiries Act or acted unfairly within the meaning of the cases is without merit. Not only is the applicants' conduct not under investigation but also no charge has been made against the applicants within such statutory provision or within the meaning of the cases where the concept of fairness is discussed and relevant.

For these and other reasons this application accordingly is dismissed with costs.

For these and other reasons this application accordingly is dismissed with costs.

"H.F. Gibson"

APPENDIX "Z"

REASONS FOR DECISION OF THE COMMISSION DELIVERED ON FEBRUARY 23, 1979

(Note by the Commissioners:

On February 23, 1979, the Commissioners delivered to counsel for the principal interested parties reasons for decision as to certain documents which had been made exhibits at hearings *in camera*. These reasons led to the release of a number of documents where a considerable amount of testimony that had been received *in camera* was released to the public on March 28, 1979. It is not proposed here to publish reasons that were given in regard to certain specific documents. However, the following portions are of more general interest and the Commissioners believe that they should be declassified and published.)

1. KNOWLEDGE BY CABINET MINISTERS AND SENIOR OFFICIALS OF TRANSGRESSIONS OF THE LAW BY R.C.M.P.

Introductory Comments

The Commission has approached consideration of those of the following documents which might be described as 'Government documents' in the light of the statement made by the Commission on October 13, 1978. As it then said:

> The Commission will balance all the factors which rest for or against any document being made public.

It will be recalled, too, that the Commission itemised some considerations that would be appropriately taken into account when considering whether it would decide that a particular document or particular evidence of a meeting or of the contents of a document would or would not be released in public.

At the risk of repetition, it will be recalled that the Commission itemised these factors:

(a) The role of a Commission of Inquiry in investigating allegations of misconduct, and the importance of a public hearing in that the public will derive from it complete confidence that everything possible has been done for the purpose of arriving at the truth.

(b) The importance of encouraging candid exchanges of opinion about policy among persons at high levels of government, by not disclosing records of expressions of opinion. Statements of fact are to be distinguished from expressions of opinion.

(c) The desirability of disclosing government misconduct or wrongdoing.

In addition to the authorities referred to by the Commission in its reasons delivered October 13, 1978, reference may be made now to the decision of the

High Court of Australia delivered November 9, 1978 in *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505. In that case, as Gibbs A.C.J. said at p. 26:

> If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by ministers in the execution of their office.

Stephen J. said, at p. 34:

> ... the need to safeguard the proper functioning of the executive arm of government and of the public service (seems) curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it... if (the charges) are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest in non-disclosure should be shown before this privilege should be accorded.

(d) The status of the possessor or originator of the information.

(e) The interest of persons who have already been witnesses before the Commission, in knowing of documents containing evidence of the conduct of senior officials of the R.C.M.P. and of persons in high levels of government, which may have a bearing on whether the conduct of those witnesses was authorized expressly or by implication, or at least tolerated or condoned.

The Commission also pointed out that the foregoing was not intended to be an exhaustive list of pertinent considerations.

Thus, for example, the evidence given in public by Mr. Higgitt included statements reflecting on the conduct of senior officials and Cabinet Ministers, and an indication that certain specified documents supported adverse inferences against such persons. A pertinent consideration in respect to some of the documents under consideration is that those persons would have no way to meet that evidence in public without their counsel being able to refer to the actual content of such documents in public. Not to allow them to do so would expose the Commission to the risk of being an instrument of injustice and unfairness, a consideration far more important in the generally accepted scale of values than such possibility as there may be that disclosure in these instances would adversely affect the efficiency of the governmental process.

Of considerable importance is the evidence of Mr. Starnes generally as to the extent to which senior officials and cabinet ministers knew that members or agents of the R.C.M.P. had committed offences. It is true that all of Mr. Starnes' evidence in this regard has been given in camera. Not to disclose publicly the documents to which Mr. Starnes refers in his in camera evidence would have the result that in effect none of his testimony on this vital issue could be made public — whether his testimony upon being examined by counsel for the Commission or that upon being cross-examined. In other words, his testimony on this issue would remain behind closed doors. Yet it is obvious to all that, as Director General of the Security Service, he had access in writing and in person to senior officials and to Cabinet Ministers. To keep his

testimony, and the documentary passages which form such an important part of his testimony, from the public eye would not engender "confidence that everything possible has been done for the purpose of arriving at the truth".

Another pertinent consideration is that the documents to be considered are now at least eight years old. In *Sankey* v. *Whitlam*, at p. 69, Mason J. said:

> I would also agree with (Lord Reid) that the efficiency of government would be seriously compromised if Cabinet decisions and papers were disclosed whilst they or the topics to which they relate are still current or controversial. But I base this view, not so much on the probability of ill-informed criticism with its inconvenient consequences, as upon the inherent difficulty of decision-making if the decision-making processes of Cabinet and the materials on which they are based are at risk of *premature* publication... I should have thought that, if the proceedings or the topics to which those proceedings relate, are no longer current, the risk of injury to the efficient working of government is slight and that the requirements of the administration of justice should prevail... (The documents) are Cabinet papers, Executive Council papers or high level documents relating to important policy issues (... but...) they are not recent documents; they are three and a half to five years old. They relate to issues that are no longer current, for the most part policy proposals of Mr. Whitlam's Government which were then current and controversial but have long since ceased to be so, except for the interest which arises out of the continuation of these proceedings.

The third of the considerations in the list given in the Commission's reasons of October 13, 1978, did not include, but could have included, the observation that it is desirable and in the public interest not only to produce in public such documents as disclose government malfeasance, but also, when government malfeasance is alleged or suspected, to produce such documents as exonerate those suspected from any such suspicions. In the courts, what is commonly described as Crown privilege does not apply in criminal cases, as Viscount Simon said in *Duncan* v. *Cammell Laird* [1942] A.C. 624. We have already observed that it does not apply to protect an accused, nor ought it to apply so as to prevent an accused from raising a defence. As Kellock J. said in the Supreme Court of Canada in *Reg.* v. *Snider* [1954] 4 D.L.R. 483 at p. 490-1:

> ... there is... a public interest which says that 'an innocent man is not to be condemned when his innocence can be proved': per Lord Esher M.R. in *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 at p. 498.

Thus evidence of sources of police information "must be forthcoming when required to establish innocence at a criminal trial": per Lord Simon of Glaisdale in *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 2 W.L.R. 201 at p. 221. It is true that the proceedings before this Commission are not criminal proceedings and this is not a court of law. Nevertheless, questions have arisen before this Commission as to whether members of the R.C.M.P. have committed criminal acts, and the Commission may conceivably in its report make a 'charge' of misconduct against them. Those members have a legitimate interest in being able to make representations to the Commission, if the facts permit them to do so, that their conduct

was in accordance with policy accepted, condoned, or even encouraged by senior officials of government and cabinet ministers. Yet they are in no position to do so unless the evidence in this regard is made public. (This is the fifth of the considerations listed in the Commission's reasons of October 13, 1978). Moreover, the conduct of such senior officials and Cabinet Ministers may be the subject of a 'charge', and they cannot effectively make representations to the Commission unless the documents disclosing policy vis à vis the R.C.M.P. in relation to these matters are made public.

2. SPARG

It was alleged by Mr. Eldon Woolliams, M.P., on September 7, 1971 that "secretly and without notice to the public and without the consent of this Parliament, the government has organized a civilian security force, so-called, operating solely... under and accountable only to the Solicitor General". (House of Commons, *Debates*, September 7, 1971, p. 7546.)

It was alleged by Mr. Robert McCleave, M.P., on September 9, 1971 that "some in the Mounted Police, I think, feel (the security planning and research group) constitutes an infringement upon themselves" and that "the group has no statutory basis and no accountability". He also asked whether the group would be "a Canadian version of the Central Intelligence Agency". (House of Commons, *Debates*, September 9, 1971, pp. 7698-9.)

On September 21, 1971, the Solicitor General, the Hon. Jean-Pierre Goyer, made a statement on the establishment of the Security Planning and Research Group. (House of Commons, *Debates*, September 21, 1971, pp. 8026-27.)

Immediately thereafter Mr. Woolliams expressed "suspicion" about the statement, and questioned whether the Minister's "word" was "sufficient to satisfy Parliament in this regard". (House of Commons, *Debates*, September 21, 1971, p. 8027.)

These are just some examples of doubts and suspicions that were cast upon the original role and function of the group.

The implication was that an agency had been established that would parallel or even replace, the Security Service.

The net impression which it was possible to draw from the suspicions was that in some irregular and sinister fashion, however ill-defined such might be, the Security Service was being supplanted and the R.C.M.P.'s legitimate role was being suppressed.

If such had been the case, it might accurately have been characterized as an improper circumscription of the duty imposed by the R.C.M.P. Act upon all members of the force who are peace officers "to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada" and "to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner".

The evidence of Mr. John Starnes, if accepted, makes it clear that, far from his opposing the establishment of SPARG, he supported the development.

Thus this is a case in which it is desirable, not only that the report of the Commission clarify the origins and functions of the body, but that any loss of confidence in the Security Service that may have come about in consequence of

these suspicions and allegations should be allayed (if the evidence so justifies) by the investigation being conducted so far as possible in the open.

There may be portions of the evidence in relation to SPARG, the publication of which would not advance the interests of clarifying the origins and functions of SPARG and would at the same time adversely affect national security or in some other way damage the public interest.

It will therefore be necessary to strike the balance line by line, or document by document, of the evidence. If counsel are not able to agree, the Commission will render the necessary decisions as to specific areas of disagreement.

DATE DUE

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