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

Second Report — Volume 1

**Freedom and Security
under the Law**

August, 1981

FREEDOM AND SECURITY UNDER THE LAW



COMMISSION OF INQUIRY
CONCERNING CERTAIN ACTIVITIES OF THE
ROYAL CANADIAN MOUNTED POLICE

Second Report—Volume 1

FREEDOM AND SECURITY
UNDER THE LAW

August, 1981

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January 23, 1981

TO HIS EXCELLENCY
THE GOVERNOR IN COUNCIL

MAY IT PLEASE YOUR EXCELLENCY

We, the Commissioners appointed by Order in Council P.C. 1977-1911 dated 6th July, 1977, to inquire into and report upon certain activities of the Royal Canadian Mounted Police,

BEG TO SUBMIT TO YOUR EXCELLENCY
THIS SECOND REPORT ENTITLED:
"FREEDOM AND SECURITY UNDER THE LAW"

Mr. Justice D.C. McDonald (Chairman)



D.S. Rickerd, Q.C.



Guy Gilbert, Q.C.



le 23 janvier 1981

A SON EXCELLENCE
LE GOUVERNEUR EN CONSEIL

QU'IL PLAISE A VOTRE EXCELLENCE

Nous, les Commissaires nommés en vertu du décret du conseil C.P. 1977-1911 du 6 juillet 1977 pour faire enquête sur certaines activités de la Gendarmerie royale du Canada et faire rapport,

AVONS L'HONNEUR DE PRÉSENTER A VOTRE
EXCELLENCE CE DEUXIÈME RAPPORT INTITULÉ
"LA LIBERTÉ ET LA SÉCURITÉ DEVANT LA LOI"

M. le président D.C. McDonald

A handwritten signature in black ink, appearing to read "McDonald", with a long horizontal flourish extending to the right.

D.S. Rickerd, c.r.

A handwritten signature in black ink that reads "Donald S. Rickerd" in a cursive style.

Guy Gilbert, c.r.

A handwritten signature in black ink that reads "Guy Gilbert" in a cursive style, with a large flourish at the end.

FOREWORD

We wish to express our gratitude to all the members of our staff, whose names appear in Appendix "L". It is impossible here to name everyone specifically, but we feel impelled to mention certain members of our staff whose assistance was of marked importance to the success of our work.

We were fortunate throughout the life of the inquiry to have the services of our Secretary, Mr. H. R. Johnson, formerly of Edmonton and Victoria. His background as a private lawyer and his extensive knowledge of the processes of the federal government resulted in his being of help in a variety of ways above and beyond his administrative responsibilities.

The two main components of our staff were "legal" and "research". We hesitate to express specific thanks to members of one team first, in apparent precedence over the other. Only necessity makes us do so. The contribution of each group to the result was of equal importance.

Of our legal staff, we single out, for special mention, those counsel who devoted particularly long periods of time and assumed special responsibilities: our Chief Counsel, Mr. J. F. Howard, Q.C., of Toronto; Me Ross Goodwin, of Quebec City; Mr. W. A. Kelly, Q.C., of Toronto; and Me Yvon Tarte, of Ottawa.

Our excellent research staff was ably directed for more than two years by Professor Peter Russell, of the University of Toronto, and his deputy, Mr. John Graham, of Ottawa. We counted persistently on the readily available advice of our special adviser, Professor J. Ll. J. Edwards, of the University of Toronto.

As most of our work was necessarily in Ottawa, many members of our legal and research teams spent long periods of time away from their home cities. We wish to record our awareness that this physical burden extracted a heavy toll in personal terms, for which monetary reward and their interest in the subject-matter of our inquiry could not entirely compensate.

Several hundred allegations of misconduct on the part of members of the R.C.M.P. were sent to us by individuals and organizations. When we began our inquiry we knew that to investigate them we needed not only the involvement of legal counsel but also that of highly qualified investigators independent of the R.C.M.P. Thanks to the recognition by their superiors of the importance which our work would have for policing in Canada generally, we secured the services of four members of the Ontario Provincial Police, two members of the security division of the Directorate General of Intelligence and Security of the

Department of National Defence, and one member of the National Harbours Board Police. These were all men of experience and maturity, who devoted many months to their responsibilities on our behalf, conducting interviews in every province of Canada. We wish to record our particular appreciation to Commissioner H. H. Graham of the Ontario Provincial Police, to the Honourable John P. MacBeth, who was Solicitor General of Ontario when arrangements were made for the secondment of the four members of the Ontario Provincial Police, to Mr. D. N. Cassidy, head of the National Harbours Board Police, and to the Department of National Defence. We dare to express the hope that our experience in this regard has demonstrated that one police force can be investigated by members of another force without the materialization of those fears that are sometimes expressed about such a phenomenon.

Our Registrar, Mr. W. J. Brennan, brought to us a wealth of experience he had acquired with previous Commissions of Inquiry. His duties were not only those of Registrar; under his direction the administrative and clerical staff have been loyal and diligent, and cheerful even in periods of heavy pressure.

Mr. Oscar Boisjoly and his associates provided us with excellent "court reporting" services for our hearings, in both official languages. Each day's testimony was typed, reproduced, bound and in our hands by the following morning.

We wish to express our appreciation to Commissioner R. H. Simmonds, Mr. M. R. Dare, Director General of the R.C.M.P. Security Service, and the many members of the Royal Canadian Mounted Police and of departments and agencies of the Government of Canada, and to the many counsel for witnesses, whose courtesy, diligence and co-operation have helped to facilitate the execution of our complex task.

The process of preparing our Reports in final publishable form was rendered possible by our English-language editor, Mrs. Moyra Tooke, our team of translators from the Department of the Secretary of State, and our French-language editors, Messrs. Henriot Mayer and Marcel Lacourcière. Our appreciation of the subtleties of both of our official languages has been enhanced by our close work with these persons.

We have appreciated the co-operation of the provincial attorneys-general and their deputies, and of those Members of Parliament who gave us valuable advice.

Finally, we wish to express our gratitude to the numerous individuals and organizations who submitted briefs to us. We wish to assure them that their briefs were read carefully and that the ideas contained in them helped to shape the recommendations which we ultimately settled upon.

Ottawa
August 5, 1981

NOTE

All references to “Ex. —” are to exhibits filed at our hearings. Those exhibits filed *in camera* are indicated by the letter “C” in the exhibit number.

Similarly, all references to “Vol. —, p. —” are to the indicated volume and page of public testimony before the Commission, or of testimony originally given *in camera* but later made public in the volume indicated. However, if the Volume number has a “C” before it, that indicates that the testimony was given *in camera* and has not been made public.

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PART I

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GENERAL INTRODUCTION STRUCTURE AND CONTENT OF THE REPORT

1. Our full Report actually encompasses several separate reports, which we number in the order of their submission. Thus the First Report, entitled "Security and Information", was submitted on November 26, 1979. It dealt with sections 3 and 4, and certain related sections, of the Official Secrets Act.¹ It also dealt with access to government information concerning security and the administration of justice, and the release of that information, whether under "freedom of information" legislation or otherwise. In that First Report we deliberately left for future consideration other aspects of the Official Secrets Act, such as search and seizure and the interception and seizure of communications.² We also did not tackle in that Report the very significant task of fully defining the phrase "the security of Canada",³ nor did we attempt a resolution of the problem of the delineation "between the legitimate 'lobbying' activities of a foreign government and the work of an agent of influence."⁴ We also indicated that we would be reporting later on the overseeing and control of the government's security activities.⁵ All of these subjects are dealt with in this our Second Report.

A. HOW THE SECOND REPORT IS ORGANIZED

2. In this Second Report we deal with most of the central issues requiring analysis and recommendations, and we have again divided the Report into several parts.

3. Part I is an attempt to put our work into context, through an examination of the organization of our Report, events leading to the creation of the Commission, an analysis of the terms of reference, a description of the way in which we proceeded in order to fulfill our mandate, and finally, a list of the names and positions of those who figure in our Report to allow our references to them to be placed in context.

4. Part II begins with a general analysis of the need for security — and it is here that we give our view of how the phrase "the security of Canada" should be interpreted — and continues with a detailed statement of the democratic norms which a security system ought to protect and must not violate in the

¹ R.S.C. 1970, ch.O-3.

² The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, First Report, *Security and Information*, Ottawa, Department of Supply and Services, 1979, Foreword, Page x.

³ *Ibid.*, paragraphs 40 and 119.

⁴ *Ibid.*, paragraph 47.

⁵ *Ibid.*, paragraph 100.

process. The organizational response of the government to this need is reviewed, including the relevant legislation, the current structure of the R.C.M.P., and the historical evolution and current organization of the Security Service. The current roles in the Canadian security system played by the Security Service itself, the R.C.M.P., other federal departments and agencies, the Cabinet and the interdepartmental committees are also considered.

5. Having thus examined the present system, we turn, in Part III, to a study of activities engaged in by members of the R.C.M.P. which might be described as institutionalized wrongdoings. These are examples of conduct carried on within the R.C.M.P. as a matter of practice with either direct or tacit approval by the managers of the Force. In Part III we look at general practices which we consider to be "not authorized or provided for by law" rather than particular acts which will be the subject of a separate Report. The practices which will be analyzed are: improper acts of a deceitful character, surreptitious entries, electronic surveillance, mail checks, access to and use of confidential information, countering, physical surveillance, violation of the law by undercover operatives, interrogation of suspects and acts beyond the Security Service mandate. We shall state briefly our recommendations as to whether and how certain of those practices — those which involve investigative techniques — ought to be made legal. A more detailed discussion of such recommendations will be set out in Part V and Part X.

6. In Part IV we consider the reasons advanced by the participants in the various activities to justify their conduct. We examine the legal and policy defences put forward by them with respect to any charges of misconduct which might be levelled against them, including their proposition that the pursuit of national security objectives provides, in itself, a justification for what would otherwise be acts "not authorized or provided for by law".

7. Parts V, VI, VII and VIII together, under a common heading, "A Plan for the Future", form a sort of 'manual' for a security intelligence agency. Part V, after describing the need for such an agency at the federal level, recommends the specific threats to national security with which the agency ought to be concerned, the methods it should use in collecting intelligence related to those threats, and the manner in which it ought to analyze and report that intelligence. We also discuss and make recommendations about: the powers and authority which the agency ought to have in responding to the threats; the circumstances in which it ought to be allowed to function outside Canada; and the relationships it ought to have with foreign agencies, other federal departments and agencies and provincial and municipal authorities. We also consider briefly, but make no recommendations about, the necessity or desirability of creating a Foreign Intelligence Service. After completing this study of the roles, functions and methods of the agency, we come, in Part VI, to deal with management and personnel policies it should adopt internally, and how the agency should be structured to fulfill its mandate most effectively and to avoid the problems which have arisen in the past. This analysis includes the question of where the agency ought to be located in the government structure. The recommendations in this regard are preceded by a review and critique of previous studies of the Security Service and its predecessors within the Force.

8. One of the major uses of security intelligence has been in the security screening process, especially in the areas of Public Service employment, immigration, and citizenship. In Part VII we make recommendations for a more limited, but more appropriate, role for the security intelligence agency in this field, and we make proposals for the disposition of the deleted parts of that role.

9. While Part VI outlines various control systems within the agency, Part VIII proposes a series of control systems which are external to the agency and thus beyond its direction. These include a modified role for Cabinet, a slightly revised interdepartmental committee system and changes in the system of analyzing and disseminating intelligence reports, whether produced by the security intelligence agency or by other departments and agencies. In Part VIII also, we make recommendations for significant changes in the exercise of ministerial direction over the agency and in the relationship of the agency to the responsible Minister and his deputy. The extent of control exercised by other government agencies is also examined. We then consider existing controls outside the government, including the Federal Court of Canada and Parliament, and examine the need for an independent review body for security matters, and for a revised role for Parliament.

10. The 'manual' found in Parts V, VI, VII and VIII responds partially to our mandate to advise and report regarding "policies and procedures" and "the adequacy of the laws of Canada as they apply to such policies and procedures". However, we present in Part IX further proposals with respect to changing inadequate laws. We recommend major revisions of the War Measures Act, as well as a proposed role for the security intelligence agency in situations of crisis. We also summarize the recommended changes to the Official Secrets Act contained in our First Report, and make proposals for further changes. Further, we take up another matter left in abeyance in the First Report: the extent to which activities of agents of foreign powers ought to be proscribed. Part IX concludes with an analysis of the need to legislate a clear definition of the meaning of 'sedition'.

11. Our terms of reference, in addition to directing us with respect to policies, procedures and laws in the security field, direct us generally "to advise as to any further action that [we] may deem necessary and desirable in the public interest" with respect to "activities not authorized or provided for by law". This latter direction is not confined to security matters. Part X contains our advice as to such "further action". It begins with advice on changes that ought to be made in the policies of the Force to instill and maintain in its members a respect for the law. We look at the current system within the Force for investigating and eradicating unlawful or improper activities by members, and propose a new system which includes external review. We also examine the way in which the R.C.M.P. obtains its legal advice. As with the Security Service earlier, we study ministerial direction and control of the R.C.M.P. and propose changed relationships between the Commissioner and the Minister and Deputy Minister. Part X is completed by a series of recommendations relating to methods of criminal investigation and their control. Some of them — for example, surreptitious entries, electronic surveillance, mail checks, access to

confidential information, physical surveillance, activities of undercover operatives and interrogation of suspects — will have been partially dealt with in Part III. Part X also covers fully the admissibility of evidence obtained by illegal or improper means, and entrapment.

12. We have not, in this Second Report, included our summary of the facts and applicable law relating to the various specific incidents about which we received evidence, nor have we dealt with the knowledge, approval and response of R.C.M.P. supervisors, senior officials and Ministers with respect to the investigative practices described in Part III. These will be covered in a separate Report. We also have not dealt in this Report with the many complaints received from the public alleging misconduct by members of the Force. The results of our investigations of those allegations will also be reported on separately.

B. THE COMMISSION'S TREATMENT OF MATTERS THAT CANNOT BE REPORTED PUBLICLY

13. In this Report we have identified all information obtained from sections of classified documents. In our opinion a number of these sections no longer need to be classified and could be released to the public.* On the other hand, there is considerable evidence gathered by the Commission itself which ought not to be released, on one or more of the grounds stated in the Order-in-Council setting up the Commission. In that Order-in-Council we were directed to hold our proceedings "...*in camera* in all matters relating to national security and in all other matters where [we] deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases...". Certain matters, such as reports dealing with individuals whose conduct may have been a breach of the law, may need to be kept confidential only for the time required for decisions to be made regarding prosecution. Other matters will have to be kept secret until their release would no longer adversely affect national security, unnecessarily infringe on the privacy of individuals, or otherwise prejudice the public interest.

* Since presentation of this Report, all classified documents, or portions of them, quoted herein not previously declassified, have been declassified.

THE ESTABLISHMENT OF THE COMMISSION

14. We shall now outline briefly the events which led to the establishment of the Commission. In March 1976, Robert Samson, a former constable of the Royal Canadian Mounted Police and a member of the Security Service, testified at his own trial in Montreal on a charge arising from the bombing of a private residence in 1974. That occurrence had resulted in his discharge from the Force. At his trial he testified that he had done much worse things. When asked what he meant, he referred to the Agence de Presse Libre du Québec (A.P.L.Q.), "a break-in with... certain members of the Q.P.P. and the R.C.M.P. . . to take documents which were files of the most militant members [of the A.P.L.Q.] as well as other pertinent documents. The Agence de Presse Libre always had a fairly big list of Quebec leftists"⁶. (The evidence before us clearly indicates that members of the Montreal City Police were also involved in the operation.) The publication of this testimony in the press resulted in considerable public interest, and concern at the higher levels of government, especially on the part of Solicitor General Warren Allmand and Prime Minister Trudeau. The R.C.M.P. reported on the A.P.L.Q. incident to Mr. Allmand and to the Prime Minister. The setting up of a commission of inquiry was considered but was decided against because assurances were given to the Solicitor General and the Prime Minister by Commissioner Nadon and Mr. Michael Dare, Director General of the Security Service, that the A.P.L.Q. matter was an isolated incident. The facts of the incident were reported immediately to the Quebec Department of Justice by the federal government.

15. During the months following March 1976, the Quebec Department of Justice investigated the A.P.L.Q. matter. This resulted in charges being laid against three police officers, one from each of the Royal Canadian Mounted Police, the Quebec Police Force and the Montreal Urban Community Police.

16. Early in 1977 further assurances were given to the new Solicitor General, the Honourable Francis Fox, by Commissioner Nadon and a senior officer that the A.P.L.Q. matter was an isolated incident.

17. The next development arose out of the persistent attempts of two former members of the Royal Canadian Mounted Police to have their involuntary discharges from the Force reviewed by the Solicitor General. They were ex-Staff Sergeant Donald McCleery and ex-Sergeant Gilles Brunet, who had been discharged in 1973. They also lived in Montreal and had been members of the Security Service in Montreal. They took strong issue with their having been discharged, commenced litigation against the R.C.M.P., and sought to have their dismissal reviewed by the Solicitor General. Late in May 1977, they decided to try to see Mr. Fox. Mr. Fox arranged for them to see Deputy

⁶ As reported in the *Montreal Star*, April 1, 1976.

Solicitor General Roger Tassé, and Assistant Deputy Attorney General Louis-Philippe Landry on June 6. The meeting was largely devoted to discussion of the circumstances of their discharge, but they made some allegations, of a general nature, that members of the Force had committed offences. That same day Mr. Tassé reported the conversation to Mr. Fox at one of Mr. Fox's regular weekly meetings with Commissioner Nadon, Mr. Dare, and other senior officers of the Force. Commissioner Nadon, at the meeting, said that the allegations would be investigated. According to Mr. Nadon, he told Mr. Fox and Mr. Tassé at that meeting that the information reported to the meeting by Mr. Tassé was exactly the same information that he, Nadon, had received on June 1, 1977, and that he had the allegations under investigation. It is the recollection of both Mr. Fox and Mr. Tassé, and Commissioner Simmonds, who was also present at the meeting, that there was no mention at the meeting by Mr. Nadon, or anyone else, about the R.C.M.P. already being in possession of allegations similar to, or in any way related to, those reported to the meeting by Mr. Tassé.

18. On May 26, 1977, the R.C.M.P. officer who had been charged arising out of the A.P.L.Q. matter entered a plea of guilty, as did the other accused. On June 16 he was sentenced, and received an absolute discharge. Mr. Fox then felt free to make a statement in the House of Commons, the contents of which he had been preparing for more than two weeks. In his statement he said:

The former Solicitor General undertook in the days immediately following March 16, 1976, to discuss the matter with the Prime Minister who was told for the first time of the R.C.M.P. participation in the unlawful entry. The government seriously considered the creation of a royal commission of inquiry at that time. The government received, however, repeated and unequivocal assurances from the R.C.M.P. that the A.P.L.Q. incident was exceptional and isolated and that the directives of the R.C.M.P. to its members clearly require that all of their actions take place within the law.⁷

He also said (translation as given in Hansard):

In a democratic society, Mr. Speaker, it is essential that those on whom, like the R.C.M.P. and the Security Service, falls the task of enforcing the law and protecting our basic liberties, can count upon the complete support of the people. This support, in return, must be based on the faith that those protecting these rights do themselves feel bound and indeed are bound by our laws in fulfilling their duties.⁸

19. Mr. Tassé had already, on June 9, written to Messrs. McCleery and Brunet asking them to give fuller particulars of the allegations they had made. This resulted in arrangements being made for a meeting, which was held in Montreal on June 23, between Messrs. McCleery and Brunet on the one hand, and Mr. Landry and Mr. Maurice Handfield of the Department of Justice on the other. Again, most of the meeting was taken up with the immediate problems of Messrs. McCleery and Brunet, but the meeting also resulted in their elaboration of the same allegations they had previously made, together with some additional ones. A number of these, if true, involved the commission

⁷ House of Commons, *Debates*, June 17, 1977, p. 6793.

⁸ *Ibid.*, p. 6795.

of offences by members of the R.C.M.P.; some of them indicated that practices which were or might be unlawful were being conducted by the R.C.M.P., while others referred to specific incidents. In a memorandum dated June 24 to Mr. Tassé, Mr. Landry described the information given to him. A copy of this memorandum was delivered to Commissioner Nadon on June 27.

20. This resulted in immediate high-level discussions in the R.C.M.P. On June 27, four senior members of the Security Service, having read Mr. Landry's memorandum, wrote a memorandum to the Director General, Mr. Dare, who spoke to Commissioner Nadon, Mr. Fox and Mr. Tassé. According to one of the senior officers of the Security Service, Superintendent Barr, they were concerned about allegations that were being made and that some of the members of the R.C.M.P. involved in some of the "problems"

would not, from where we sat, be able to receive a fair hearing, if the process was allowed to unfold on a piecemeal basis, because of the nature of some of their duties and some responsibilities, if some of these matters, for example, wound up in Criminal Court. It would possibly be unfair, the process would not necessarily be fair to them and the entire story would not get out.

They were also concerned that:

there was a great need to bring about some significant reform in the country and that perhaps this was the time and the opportunity to do that.

What Superintendent Barr had in mind when he said that was presumably reflected by the operative sentence in the memorandum:

We wish here to reiterate and emphasize most strongly the need for a co-ordinated and total review of former Security Service operational techniques.

The reasons given in the memorandum were:

- concern that if criminal charges resulted from the investigation then under way in the Montreal area the publicity would cause major damage to the credibility of the Security Service;
- the public view of the Security Service would be worsened by responses on behalf of the Security Service, in Parliament, the media or in criminal court, to continuing sporadic attacks on the Service's investigative techniques by persons "who have knowledge, or think they have knowledge, of unorthodox practices";
- the "disastrous" effect on the morale and effectiveness which would flow from the singling out of individual serving members "for discipline, public criticism, or even criminal charges" when "very often it was the most talented and energetic investigators who were involved", and others would not be subject to such proceedings even though they were involved in similar activities;
- the desirability of having an impartial tribunal that would see the Security Service in a more favourable light than would the general public if cases arose one by one, sometimes in criminal proceedings;
- the need to have the activities of the Security Service examined "in the context of the time with the inherent pressures, different public attitudes and inadequate legislation" under which the activities occurred;

- that “in the calmer atmosphere of a Commission of Inquiry, it could be amply demonstrated that criminal intent or thoughts of personal gain were totally absent in members who undertook such activities”;
- that “a Federal Inquiry may well have the effect of limiting the current Quebec judicial enquiry into the A.P.L.Q. affair” and that “there are indications that the Quebec Government’s intentions may well exceed the simple desire to see that justice is done and the public informed”;
- that if the R.C.M.P. took the initiative “we could perhaps have some influence in drafting terms of reference which could limit the enquiry to the Security Service” and so “avoid the prospect of the entire Force being subjected to the tortuous procedure and consumption of time that such investigations could impose”.

21. The memorandum concluded by asserting that an inquiry would

give us the time and the opportunity to present a broad detailed explanation of our operating procedures, properly set in a historical context and illustrating an inadequate working mandate

and that

these conditions forced many totally loyal and dedicated members to resort to methods which were at least unorthodox and often bordering on illegality to carry out the duties required of them by the Canadian people. It is only by having the opportunity to present this picture in its entirety that we can hope in any way to define these actions.

22. Superintendent Barr explained to us that in expressing the hope that the inquiry could be limited to the Security Service, he was not aware that the same problems existed on the criminal investigation side of the Force (Vol. 198, p. 29189). Very shortly thereafter Commissioner Nadon asked the Solicitor General to have a commission of inquiry appointed under the Inquiries Act. The result was our appointment on July 6. In the House of Commons, Mr. Fox, announcing the appointment, said:

Since making my statement in the House concerning the A.P.L.Q. incident, allegations have been made that members of the R.C.M.P., and more particularly members of the security service, have, on other occasions, been involved in unlawful actions in the discharge of their duties. The A.P.L.Q. incident, according to those who made the allegations, was not of an isolated and exceptional character.

These allegations received our immediate attention. At my request, the deputy Solicitor General of Canada and the assistant Attorney General, criminal law, personally met with some of the individuals who made these allegations. In addition, I asked the Commissioner of the R.C.M.P. to undertake the investigations which were warranted. He later informed me, after having made preliminary inquiries, that some of these allegations might well have some basis in fact. According to the Commissioner, it would appear that some members of the R.C.M.P. in the discharge of their responsibility to protect national security could well have used methods or could have been involved in actions which were neither authorized nor provided for by law. As a result, the Commissioner has modified his position and has recommended that the government establish a commission of inquiry into the operations and the policies of the R.C.M.P. security service, on a national basis.

In the circumstances, Mr. Speaker, and considering these new developments, the government has decided to establish an inquiry commission composed of three members who will be responsible for determining the scope and frequency of inquiry practices and other activities which are not permitted or provided for in the law, involving members of the R.C.M.P., and for examining the policies and procedures regulating R.C.M.P. activities in their task, which consists in protecting the country and ensuring its security.⁹

The following passage was delivered in French. The translation is by Hansard:

... beyond particular incidents which might be brought before the commission, it is important to think about the lessons to be learned for the future. That is why the government has asked the commission's advice in terms of policies and procedures that govern or should govern R.C.M.P. activities in the accomplishment of their task, namely to see to the protection and the security of the country, of necessary mechanisms for implementing these policies and procedures, and finally of the amendments to the legislation which could be necessary, in keeping with the security requirements of our country.

Even if the commission is particularly requested to inquire into matters related to the security service of the R.C.M.P., the government has also requested to have brought to its attention any incident involving illegal action on the part of R.C.M.P. members, outside of security service operations. Regular police operations are more immediately submitted to the control and surveillance of the courts. Nevertheless, the government prefers not to restrict the terms of reference of the commission to the security service, so that eventually it could know about incidents involving unlawful acts that could be drawn to the attention of the commission. Thus, the government will be able to take the necessary steps at the appropriate time.¹⁰

23. Robert Simmonds became Commissioner of the R.C.M.P. on September 1, 1977, almost at the same time as this Commission was established. Before that, since 1976, he had been the Deputy Commissioner responsible for administration, and his brief time in that position was his only prior experience at Headquarters; all his earlier career, from the time he joined the R.C.M.P. in 1947, was spent in Alberta and B.C. Managing a police force the size of the R.C.M.P. is a difficult task at the best of times. Commissioner Simmonds' burden has been increased greatly during the past three and one-half years by the activities of our Inquiry and those of the provincial Inquiries. His stance *vis-à-vis* this Commission has been, throughout, one of total co-operation. We are conscious of the fact that he has put 'on hold' certain plans and proposals that he had for change within the Force, pending receipt of our Report, and also that he has felt constrained to suspend or terminate certain practices merely because to continue them *might* have meant to continue unlawful conduct. Our Inquiry and Report touch only occasionally upon Commissioner Simmonds. He inherited the situation which led to our Inquiry and participated in neither the formulation nor the continuation of the policies which have been its substance.

⁹ *Ibid.*, July 6, 1977, p. 7365.

¹⁰ *Ibid.*, pp. 7365-6.

THE TERMS OF REFERENCE

A. GENERAL APPROACH

24. The legal framework within which our Commission has operated consists of a specific 'Commission' issued pursuant to an Order-in-Council, the relevant provisions of the Inquiries Act together with judicial decisions interpreting it, and the laws of procedure and evidence generally applied to commissions of inquiry. Throughout our work, rarely has a week gone by in which we have not addressed ourselves to the language of our 'Commission' and sought to interpret it as a guide to resolving an issue.

25. The Commissioners appointed to any Inquiry must arrive at their own interpretation of their mandate so as to determine its true intent. It is then their task to direct the course of the Inquiry towards realizing that interpretation. They are not at liberty to inquire into matters beyond those specified by their authority, nor to adopt procedures other than those set out in their terms of reference, yet they must interpret their mandate broadly enough to avoid so rigid a construction of its language that its intent would be frustrated. This chapter is an attempt to convey the essence of our interpretation — as it has evolved over the past three years — of the language of the Order-in-Council that established our Commission.

26. Basic to our interpretation, it will be seen, is our adherence to the core element that has guided our procedural decisions — that a tribunal such as our Commission of Inquiry is created to restore public trust in a public institution which has fallen under suspicion. It was this belief that led us to conclude that as a general rule only public hearings would engender public confidence in our findings.

27. The Commission for an Inquiry such as ours is issued by the Governor in Council pursuant to the authority granted by Part I of the Inquiries Act (reproduced as Appendix A). The specific authority to issue our 'Commission' is contained in Order-in-Council P.C. 1977-1911, passed on July 6, 1977 and tabled in the House of Commons that same day. The Commission under the Great Seal is our governing instrument. Our terms of reference — what we are to inquire into — are found in paragraphs (a), (b) and (c). The remainder of the text consists of procedural directions as to how the Inquiry is to be conducted. Although the entirety of the Order-in-Council is reproduced in Appendix B, and our 'Commission' is reproduced in Appendix C, for ease of reference we reproduce here the preamble and the terms of reference.

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;

AND 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;

AND 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;

AND 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. Rickard
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 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 need for trust

28. The most important word in the Commission governing this Inquiry is "trust". No police force protecting the peace can be effective unless it has the trust of the people it seeks to protect; no security intelligence agency can be effective without the trust of citizens. Moreover, neither can be effective without the trust of government.

29. Our mandate stresses the role of the R.C.M.P. in protecting the security of Canada. It correctly notes that unless the R.C.M.P. has and deserves the trust of Canadians, it cannot perform that task effectively. Without the full co-operation of citizens, confident that the task is being performed competently and lawfully and with due regard for the freedom of the individual, it will not receive from government the material support which it needs, whether for its work collecting security intelligence or its law enforcement duties.

Policy and procedures and the adequacy of laws

30. Paragraph (c) of our terms of reference requires us to advise and report regarding "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 Concise Oxford Dictionary defines "adequate" as "proportionate (to the requirements)". Therefore, when considering the various investigative techniques and processes that the law at present makes available to the R.C.M.P. Security Service, we have asked ourselves in each instance whether the law is clearly stated, whether it deals fully with the subject and whether it provides too little or too much power, in relation to the need to protect the security of Canada.

31. One of the concerns that "adequacy" invokes is essentially the need for laws, policies and procedures that ensure that the Security Service is effective. Therefore, we have examined what the functions of a security intelligence organization should be, and what kinds of people and structure would be required in order to carry out that work effectively. It is difficult not to approach this aspect of our task as if it were separate from that part of our terms of reference which requires us to investigate and report the facts of, and the extent and prevalence of, activities involving members or past members of the R.C.M.P. that were not authorized or provided for by law. Those words apply to both the criminal investigation and security service work of the R.C.M.P. As we bring many of the strands together in this Report, we have attempted to surmount this difficulty, for the heart and soul of the concern expressed in our mandate is the importance of ensuring that, in the future, conditions will exist that will justify public trust in the R.C.M.P.

32. In making our recommendations for the future, therefore, we have not only constantly asked ourselves what powers are absolutely necessary to ensure that the work of a security intelligence organization is effective. We have also,

to balance this, searched for methods, within and outside the organization, which will enhance the likelihood that its personnel will respect the rule of law, the right of dissent, and the duty of accountability, but which will not strangle the organization's legitimate efforts.

The historical period

33. In inquiring into activities "not authorized or provided for by law" we have not, as a general rule, tried to investigate practices preceding 1969. Keeping to the past decade has not always been possible since the history of several of the practices we shall report on begins in earlier years. We, however, felt that some realistic time limit had to be placed upon our review of the past. 1969 seemed appropriate as that year saw the publication of the Report of the Royal Commission on Security, the appointment of a new Commissioner, the appointment of the first civilian Director of Security and Intelligence, and (at roughly that time) a perception by the R.C.M.P. of new international and domestic terrorist threats as well as new domestic threats of subversion arising from the separatist movement in Quebec and other movements across the country. Another reason was that any inquiry into an earlier period was likely to be frustrated by poor memories or the unavailability of witnesses. Finally, it seemed to us that the past decade was roughly the relevant period to determine the extent to which activities "not authorized or provided for by law" existed which might damage *present* public trust and confidence in the R.C.M.P.

34. However, we did not consciously limit, by time, our inquiry into the policies and procedures of the R.C.M.P. called for in paragraphs (a) and (c), especially in our research among R.C.M.P. files. In our intensive analyses of such topics as management and personnel policies in the R.C.M.P. (particularly as they have affected the Security Service), its relationship with the Solicitor General and the Prime Minister and other departments of government, the committee system, and the relationship of the R.C.M.P. Security Service with foreign agencies, our inquiry frequently took us back several decades.

The rights of witnesses

35. In conducting our inquiry, particularly at hearings at which evidence has been received under oath, we have been conscious of the importance of exercising with care the broad powers given to us, especially the power to compel a witness to give evidence as to his own misconduct. In a court of law, in a criminal trial, the accused in our system cannot be compelled to testify. However, a Commission of Inquiry may subpoena the same person, and may compel him to answer incriminating questions, although, by virtue of the Canada Evidence Act,¹¹ his answers cannot be used against him in a subsequent prosecution if he has objected to answering and he is compelled by the Commissioners to answer. A Commission of Inquiry has the same powers as a court to compel attendance of persons as witnesses and the production of documents, so long as the testimony and documents are relevant to the terms of reference of the Inquiry. Yet, unlike proceedings in a court of law, where an

¹¹ R.S.C. 1970, ch.E-10, sec.5.

indictment or summons defines the charge, an Inquiry has no need to justify the subpoena of a person or of documents by a particularized written definition of the issues. Where suspicion of wrongdoing is among the reasons for the Inquiry, witnesses can be exposed to public comment without the protection that, in the case of a prosecution, would be afforded by the law of contempt of court. These powers given to Commissioners are extraordinary powers, which Parliament has decided should be available for use when the executive considers that no other means of investigation of facts appears to be effective.

36. In preparing our First Report and this Report on laws, policies and procedures, and subsequent Reports on the activities of individuals, we have approached the issues of fact not as angels of vengeance but as dispassionate inquirers after the truth. Our task has been, not to destroy an institution or inflict wounds on its members or on public servants or persons elected to public office, but to suggest the means by which trust in an institution may be restored on the basis of truth about the past and justice for its members.

B. SPECIFIC INTERPRETATIVE RULINGS

37. We turn now from reflections on the essence of the Order-in-Council as interpreted by us, to a summary of some of the specific interpretative rulings which we have made publicly, together with supplementary remarks. This summary refers mainly to decisions that affected the scope of the inquiry rather than decisions as to procedure.

"...Not authorized or provided for by Law..."

38. In our opening statement on December 6, 1977 (Appendix D), we stated that the words "not authorized or provided for by law" directed us to inquire into and report on acts which were offences under the Criminal Code or under other federal or provincial statutes, or were wrong in the eyes of the law of tort in the common law provinces or of the law of delict in Quebec. We stated also that in interpreting those words we did not intend to ignore the moral and ethical implications of police investigative procedures.

39. Also in our opening statement we pointed out that those words required us to examine the 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.

40. In reasons for decision pronounced on May 22, 1980 (Appendix H), we added that those words also require us to examine whether a particular act or practice, even if not an offence or civil wrong, was nevertheless beyond the statutory authority of the R.C.M.P., or was itself not authorized by normal procedures within the R.C.M.P.

41. In our opening statement we stated that in our report of a particular allegation we would give our view as to whether the conduct established by the evidence constituted an action or activity "not authorized or provided for by law". We confirmed that position in the reasons for decision dated May 22, 1980, but noted that our functions were not those of a court of law and that we

could not render a judgment of acquittal or conviction. We stated that the duty imposed upon us to "report" facts that disclose an activity which was "not authorized or provided for by law" could not be performed unless we undertook an analysis as to whether the facts, *as disclosed by the evidence before us*, constituted an offence or a civil wrong or in some other way conduct "not authorized or provided for by law". At the same time, we recognized that, in situations where there is evidence as to the acts of specific individuals in specific cases, a dilemma arises as to how we can "report" publicly, including a commentary on the legal status of the acts as it appears on the evidence before us, without causing unfairness or the appearance of unfairness to any such individual if he is then tried on a criminal or other charge after all the publicity that the report may be given. In our separate Report on activities in which there is such evidence of specific cases we shall face this dilemma. It does not require further comment here. However, we might say that in a Practice Directive dated June 20, 1980 (Appendix I), we attempted to reduce the scope of the dilemma by directing that legal submissions concerning such cases where there is evidence about individuals (as compared with cases where there is merely evidence about general practices) be given to us in private.

"...The relevant policies and procedures..."

42. In our opening statement we interpreted the words of part of paragraph (a) ("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") and the entirety of paragraph (c) of our terms of reference as requiring us to determine what have been and are the controls exercised by federal or provincial Ministers over the R.C.M.P. Security Service, and what methods and channels have been used by the R.C.M.P. Security Service to report and account to federal and provincial Ministers.

"...The security of Canada..."

43. In our opening statement we interpreted paragraph (c) of our terms of reference as requiring us to consider what the needs of the security of Canada are, how those needs should be protected effectively in terms of investigative work, and how that protection can be achieved in a democracy which cherishes liberty.

"...Activities of the R.C.M.P...."

44. In reasons for decision delivered on October 13, 1978 (Appendix F) concerning the Commission's procedure in regard to certain classes of 'government documents', we noted that the preamble in the Order-in-Council referred to the need for a 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 full public support of the R.C.M.P. "in the discharge of its responsibility to protect the security of Canada". We inferred from this language that our inquiry into "policies and procedures" governing the activities of the R.C.M.P. was not limited to the policies and procedures governing

the Security Service, for there can be public support for the work of the Security Service (so long as it is within the R.C.M.P.) only if there is public trust in the policies and procedures governing all activities of the R.C.M.P. We should note here that we have not in fact inquired into *all* the policies and procedures governing the R.C.M.P. However, when a policy of the R.C.M.P. has given rise to concern, the fact that it does not relate directly to the Security Service has not been regarded as a reason for refusing to examine it.

The involvement of Ministers

45. In the reasons of October 13, 1978, we concluded that our duty to report on the facts "relating to any investigative action or other activity" involving "members of the R.C.M.P. that was not authorized or provided for by law" might result in our reporting "whether members of the R.C.M.P. who, in our opinion, 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.". We added that our Report would be incomplete as to relevant facts, and unfair to any members of the R.C.M.P. against whom in our Report we might make a "charge of misconduct" (to use the language of section 13 of the Inquiries Act) and who might otherwise feel that facts tending to exonerate them had not been brought to light, unless we inquired into and reported on the extent to which such members had express or tacit authority from Ministers to perform wrongful acts. We now add that the considerable time we have taken to examine the issues of approval or knowledge or toleration, express or implied, by government officials of wrongful acts by members of the R.C.M.P. has led us inevitably into the receipt of much testimony and the examination of many documents which relate to the relationship between government officials and the R.C.M.P. This testimony and these documents have been invaluable to us in giving us a comprehension of that relationship as a formulation for our recommendations under paragraph (c). As we, in this Report, summarize this evidence as a preliminary to making recommendations as to the future relationship between the government and the R.C.M.P. or between the government and the security intelligence agency, it will be difficult to avoid using language which may appear to some readers as an expression of opinion about the quality of the conduct of a Minister or his competence. Because of this, we think that it is important that we say something about our interpretation of our terms of reference as they may relate to the review of political judgment or the quality of decisions made by Ministers of the Crown.

46. We have had no hesitation in considering ourselves entitled to inquire into, and report on, any implication on the part of such persons in specific acts "not authorized or provided for by law" in which members of the R.C.M.P. are involved, or any implication on the part of such persons in wrongdoing generally by members of the R.C.M.P. This would include complicity or knowledgeable acceptance before the event, and also knowledge after the event. Moreover, we have inquired into, and will report on, the extent to which such

persons knew of the existence of any policies or practices of the R.C.M.P., the implementation of which would result in acts not authorized or provided for by law.

47. When the facts pass from the domain of issues of complicity in, or encouragement or tolerance or knowledge of, wrongdoing, to that of the quality of the conduct of a Minister or public servant in a general sense, we consider that we should be very cautious. While, in so far as the R.C.M.P.'s duties in connection with the protection of the security of Canada are concerned, paragraph (c) permits us to inquire broadly into laws, policies and procedures that affect the exercise of those duties, we draw a distinction between (i) inquiring into past and present laws, policies and procedures and reporting upon them as matters of fact, and (ii) passing judgment on the correctness of the decisions, or sometimes the lack of decision, that have led to the existence or absence of a law or a policy or a procedure. We have tried to avoid the latter as much as possible, for we do not consider that we are empowered to pass judgment on the quality of a Minister's "management". Yet we emphasize that our caution does not apply so as to cause us to refrain from comment if a Minister has been involved in illegality — whether by active participation before or after the event, knowledge of illegal activity combined with a failure to stop it or deal with it in some other proper way, or wilful blindness.

48. One of us is a judge, but what Dean G.E. Le Dain (now Mr. Justice Le Dain), chairman of the Commission Into the Non-Medical Use of Drugs, has written of judges is true also of Commissioners of Inquiry who are not judges:

... their experience is limited when it comes to passing judgment on political conduct. For one thing, a judge has no particular qualifications for the task, and secondly, the proper forum for the trial of such an issue is Parliament, and ultimately appeal to the electorate.¹²

As he points out, there have been instances in Canada when the terms of reference of a Commission of Inquiry appointed under Part I of the Inquiries Act have been broad enough that the Commission has had a duty not only to report facts but in effect to pass judgment on a Minister. However, the lesson we draw from his invaluable review of those instances is that it is only when the terms of reference clearly impose a duty to make comments or express opinions on the quality of the acts of Ministers or public servants (apart from wrongdoing) that a Commission of Inquiry should do so. As far as a judge who is a Commissioner is concerned, only adoption of such a view can minimize the danger where, in Dean LeDain's words, "serious political issues" are involved and "the life of the government itself may even be at stake". The confidence that is generally reposed by the public in the independence of the judiciary may be compromised if a Commissioner who is a judge does not avoid comment on such matters unless comment is required by his terms of reference.¹³ On the other hand, it would be unrealistic to expect that a clear line can be drawn

¹² Gerald E. Le Dain (now the Honourable Mr. Justice Le Dain), "The Role of the Public Inquiry in our Constitutional System", in J.S. Ziegel (ed.), *Law and Social Change*, Toronto, Osgoode Hall Law School, York University, 1973, p. 86.

¹³ *Ibid.*, p. 91.

between finding the facts about ministerial conduct or that of public servants and expressing an opinion or judgment about those facts. Despite efforts to clarify the distinction, findings of fact may sound like the expression of judgment about those facts. Moreover, the very use of judges in any inquiry which has any political implications inevitably produces what Professor John Willis, commenting on Dean LeDain's remarks, has called "an uneasy see-saw between the two irresistible desires" — one being "a desire to keep the judges' hands-off policy and the judges themselves out of politics", the other "a desire to give to the citizen the only decision-maker that he, whether rightly or wrongly, regards as truly independent and truly impartial, viz., a judge".¹⁴

The rights of individuals

49. In a statement made at a hearing on July 11, 1979 (Appendix G), we referred to a number of the policy and legal issues concerning which we intended to make recommendations pursuant to paragraph (c). As to these issues we observed that in considering them we were concerned with "both the consonance of Security Service activities with democratic values, and the effectiveness of the Security Service". Order-in-Council P.C. 1966-2148, which appointed the members of the Royal Commission on Security, expressly directed those Commissioners to have "regard to the necessity of maintaining (a) the security of Canada as a nation; and (b) the rights and responsibilities of individual persons" when they advised "what security methods and procedures are most effective". The point of our remark was to provide reassurance that, even though our Order-in-Council does not refer to the rights of individuals, we intended from the outset to place them on the scales as we weighed the policy and legal recommendations we might make. We have endeavoured, in this Report, to honour that commitment.

Our access to documents

50. A great deal of testimony received by us, particularly since October 1978, has been testimony of past and present Ministers of the Crown and public servants. In preparation for their testimony, and for that of past Commissioners of the R.C.M.P. and the previous Director General of the Security Service, and of the present Commissioner and Director General, we have obtained many documents that have been in the possession of departments of the government or that originated with them but were found by us in the possession of the R.C.M.P. There has been no difficulty in obtaining most such documents, except that, after the administration of the Right Honourable Joe Clark took office on June 5, 1979, the process of obtaining documents originating during the period when the Right Honourable Pierre Elliott Trudeau was Prime Minister, was complicated by the need to comply with Order-in-Council P.C. 1979-1616, dated June 2, 1979 (Appendix K). Even before that, however, there were two important developments in regard to government documents. One was our statement of October 13, 1978, in which we said that the decision as to whether documents might not be produced in public on the grounds of

¹⁴ Professor Willis was commenting on Dean Le Dain's paper. His comments are found in the same volume, at p. 100.

national security was for us to make and not the Solicitor General, and that, similarly, the power to decide whether documents such as Cabinet Ministers' memoranda to Cabinet and letters between Ministers should be disclosed publicly rested with ourselves rather than the Privy Council. In reaching the latter decision, we itemized a number of considerations which we might properly take into account in deciding particular cases. We expressed optimism that in particular cases in the future the Commissioners and counsel for all parties (including the government) would be able to arrive at a mutually satisfactory result. We are happy to say that so far, one way or another, that has been possible. The second development that we should note was that, in order to facilitate our inquiry into possible implication of Ministers in acts not authorized or provided for by law, the government adopted Order-in-Council P.C. 1979-887, dated March 22, 1979 (Appendix J). It provided a detailed procedure to govern our access to a particular class of government documents, namely, the minutes of any Cabinet or Cabinet Committee meeting. It allowed us access to the minutes of any such meeting "held prior to the establishment of the Commission which relate to the terms of reference of the Commission... and which on reasonable and probable grounds [we] believe provide evidence establishing the commission of any act involving members of the R.C.M.P. or persons who were members of the R.C.M.P. that was not authorized or provided for by law, or evidence implicating a Minister in such act". We took advantage of this provision and shall report on the result in a subsequent Report.

THE WORK OF THE COMMISSION

A. ORGANIZATION

51. As pointed out earlier in this part of our Report, the terms of reference of this Commission are unusual in that they require not only the examination of specific acts, but also a general review and reporting on policies, procedures and laws. To fulfill this dual role it has been necessary to create two sections in the Commission, one engaged in legal matters ranging from investigations to hearings to legal arguments, and the other doing research into policy issues with and without legal ramifications. Clearly there had to be close cooperation between the two groups, but their functions were distinct in many regards. To keep duplication to a minimum, common administrative services were developed. As preparation of this Report progressed, the work of the two sections gradually merged to ensure a comprehensive whole.

B. PERSONNEL

52. Our initial concern was to recruit a Secretary, Chief Counsel, and Director of Research. Because of the magnitude of the task assigned, both at the outset and as it unfolded almost daily during the weeks following our appointment, it took some time to recruit persons with the qualifications necessary for those positions. In consultation with them we recruited the rest of the staff as the need arose. Because of the nature of the issues, we sought to obtain legal and research personnel who were previously unassociated with the Government of Canada or the R.C.M.P. We needed a team of trained investigators because of the numerous allegations made with respect to the activities of the R.C.M.P. and our mandate to investigate them. These investigators had to be independent and objective, to gain the confidence of the public, and also competent and fair, to win the confidence of the R.C.M.P. To that end, from within the federal government we obtained two investigators from the Department of National Defence, one from the National Harbours Board Police, and four officers of the Ontario Provincial Police.

53. Appendix L to this report is a list of the personnel who have worked for the Commission for varying periods of time.

C. WORK AND ACTIVITIES

54. The work and activities of the Commission can conveniently be broken down into several categories: investigations, hearings, formal briefings, informal meetings, visits to other countries, and research.

Investigations

55. In October 1977, we advertised in most of the daily newspapers and a number of the ethnic newspapers across Canada, inviting the public to submit to us any allegations they wished to make regarding conduct which fell within parts (a) and (b) of our terms of reference, and also any opinions they wished to express with respect to part (c) of those terms of reference (Appendix M). In October 1979, we advised the public, through advertisements in the daily newspapers, that no allegations would be investigated by us if received subsequent to November 19, 1979 (Appendix N). Over the course of our work we have received from individuals and organizations 292 allegations which *prima facie* fell within our mandate and 124 written submissions with respect to policies, procedures and laws. In addition, a number of allegations were brought to our attention indirectly through the news media. All allegations have been investigated, or are still in the process of being investigated, by us. A full examination of what we have done in this regard will be contained in a subsequent Report.

Hearings

56. The hearings have been of two kinds, those to receive evidence and those to receive presentations of briefs. The evidentiary hearings were both in public and *in camera*. Since October 18, 1977, the date of our first hearing, we have held 169 public hearings and 144 *in camera* hearings at which we have examined 149 witnesses (Appendix O) and have received 805 exhibits. A great deal of the *in camera* testimony was later made public. The evidentiary hearings have dealt with a number of major topics, which for brevity are described as follows:

- Operation Bricole — the A.P.L.Q. Incident
- Operation Ham — the removal and copying of Parti Québécois tapes
- Surreptitious Entries (generally)
- Certain cases of attempted recruitment of Human Sources
- Mail Checks
- Burning of a Barn
- Removal of Dynamite
- Access to information in the possession of the Department of National Revenue, the Unemployment Insurance Commission and other government departments
- Operation Checkmate — countermeasures and disruptive tactics
- Miscellaneous topics relating to the accountability of the R.C.M.P. to Government
- The Relationship between the Security Service and its Human Sources

Evidence was received on those topics first as to the activities which took place at the field level and then with respect to the knowledge and responsibility of senior officials and Ministers. We heard evidence of the extent to which those senior officials and Ministers had knowledge of either specific acts or general practices which it was our responsibility to investigate.

57. It was our view from the outset that as much as possible of the evidence relating to "acts not authorized or provided for by law" should be made public. This was subject, of course, to the restrictions imposed upon us by our mandate as to matters related to "national security", "public interest" or "the interest of the privacy of individuals". Most of the evidence was heard in public. Evidence that was heard initially *in camera* was reviewed by us and, after receiving representations from all interested parties, was expurgated by us as was considered necessary in the light of the restrictions mentioned, and released publicly. Evidence was received publicly on 142 days, each one represented by a volume of transcript. In addition, 52 volumes of transcript originally heard *in camera* have been edited and released in 45 volumes. During the course of the hearings we have been called upon to render a number of decisions with respect to both procedural and substantive questions. Copies of the reasons for a number of the major decisions are also annexed (Appendices E, F, G, H, I, and Z). Most of the witnesses who appeared before us have been represented by counsel. In Appendix P, we have set out the various counsel who have so appeared and the clients whom they represented.

58. The hearings to receive public briefs were held in Vancouver (twice), Regina, Toronto, Montreal, Fredericton and Ottawa (five times). The places and dates of such hearings and the names of the persons appearing at them are found in Appendix Q. We had also scheduled such hearings for Victoria, Calgary, Edmonton, Winnipeg, Halifax, Charlottetown and St. John's, and additional hearings in Toronto and Montreal. In spite of considerable advertising in the printed media, the response from the public was less than we had expected and we therefore consolidated the hearings regionally in the cities previously noted. When a hearing in any centre was cancelled the Commission paid the travelling expenses to another centre of all persons wishing to present submissions.

Formal briefings

59. The purpose of these briefings was to help us to inform ourselves as to both facts and opinions on matters which could not in any way be characterized as "misconduct" on the part of any person. The briefings were to assist us in carrying out our responsibilities under part (c) of the terms of reference. Before commencing hearings and setting up our research programme, we met with officials of a number of departments which have some security role in the government. In this way we could familiarize ourselves with the extent of the federal government involvement in security and the relationships those departments with security roles have with the Security Service of the R.C.M.P. Since those initial briefings, we have had, during the course of the work of the Commission, numerous others from the R.C.M.P. and government departments covering, in great detail, all aspects of the role played by the R.C.M.P. and those departments in security matters. A list of the topics on which we have had briefings is found in Appendix R.

Informal meetings

60. To supplement the information that we obtained at the hearings and the formal briefings, we met informally with a number of groups and individuals to

obtain their opinions on various topics relating to the policies, procedures and laws which ought to apply to security matters.

61. We began this process of informal consultation by bringing together groups of academics on two separate occasions: November 25 and 26, 1977, in Toronto, and February 24 and 25, 1978, in Montreal. The Toronto meeting was conducted in English and the Montreal meeting in French. Those attending are listed in Appendix S. We wished to obtain from these academics and scholars guidance as to the direction which our research programme ought to take, and some general ideas as to how we ought to implement that programme. The meetings accomplished both of those purposes as well as providing us with some useful contacts for carrying out the programme.

62. In January 1979, in Regina, we held a seminar to which we invited representatives of those sectors of society whose lives might be more directly affected by the activities of the Security Service or who for some other reason had a particular interest in the subject.

63. In addition to a number of visits which we made to R.C.M.P. Headquarters in Ottawa for specific purposes, one or more of us toured Security Service offices in Montreal, Toronto, Ottawa, Vancouver and Edmonton where we spent some time discussing with members at all levels their job functions and problems they might be experiencing. This gave us a sense of the organization that we would not otherwise have had. We attempted to get some feeling for the role played by the recruit training programme at Regina in shaping future regular members and more particularly members assigned to the Security Service. To that end we visited the Regina depot observing classes in progress and discussing with the teaching staff the curriculum, the recruits' lifestyle during training and what the training is designed to accomplish.

64. In a further attempt to identify problems that might be facing the Force, and particularly the Security Service, in the different regions, we met with divisional Commanding Officers and Heads of the Security Service in British Columbia, Saskatchewan, Southwestern Ontario, Ontario, Quebec and New Brunswick. We also attended a Commanding Officers' Conference in Ottawa where we had a round table discussion with the Commanding Officers and senior officers from Headquarters.

Foreign study and visits

65. It became apparent to us early in our mandate that the nature of the problems we had been asked to examine was not unique to Canada. We also became aware that a number of reviews such as that which we had been commissioned to undertake had been carried out in other countries with similar backgrounds to our own. To obtain a clear picture of the current situations in the U.S.A., the United Kingdom, Australia and New Zealand, we asked leading academics in the security field in each of those countries to provide us with a comprehensive report based on publicly available material. The authors of those studies are included in Appendix T. Having obtained those composite studies and after talking to a number of officials at the most senior levels in the Canadian government security community, we realized that there are very few

people with a broad perception of the problems, or who have given any serious and informed consideration to their resolution. To assist us in our task we therefore visited those four countries (U.S.A., United Kingdom, New Zealand and Australia) where we had discussions with past and present politicians and senior officials who have played a major role in police and security matters. It was a condition of the consent of each of those countries to these discussions that our visits be kept confidential. We have therefore not included here a list of the persons with whom we met. Details of the meetings are to be found in our Commission records. We would not, however, be breaching any confidence by disclosing that we met with Mr. Justice R.M. Hope of Australia and Sir Guy Powles of New Zealand, both in Canada and in their respective homelands. Each of those gentlemen has conducted an examination similar to ours for his own country.

66. In addition we instructed our Director of Research and Secretary to visit the Netherlands and the Federal Republic of Germany, and the Director of Research and one of our counsel to visit France, to determine whether there were any aspects of policing and security in those countries which were sufficiently similar to our own that we could benefit from a visit to them. The reports which we received after those visits disclosed some very helpful information but we determined that a visit by us would not be of sufficient further benefit having regard to the necessary rationing of our time. In reaching this decision we took into account that of those countries we did visit, the United Kingdom, New Zealand, and Australia have constitutional systems most similar to our own, and the United States, while it has a different Constitution, has undertaken serious examination of its intelligence community in recent years.

Research studies

67. Our research and legal staffs have done extensive background studies for us covering many facets of our work. However, during the course of the Commission some matters have required such a major study or such a special expertise that they had to be carried out by researchers outside the Commission. Including the four studies by foreign academics previously mentioned, 21 such research papers have been written for us. Also, in certain areas of research we felt that we needed assistance from experts. We therefore retained consultants to help us. The titles of the papers and the authors and the names of the consultants and the areas of consultation are set out in Appendix T. Three of the major studies have been published by the Government of Canada at our request and are available to the public through the usual distribution channels for government publications. Those studies are:

1. *Parliament and National Security*, by Prof. C.E.S. Franks of Queen's University.
2. *Ministerial Responsibility for National Security*, by Prof. J.L.I. J. Edwards of the University of Toronto.
3. *National Security : The Legal Dimensions*, by Prof. M.L. Friedland of the University of Toronto.

We sought the publication of those studies in the hope of obtaining public response to the views taken by the authors. We hoped in that way to obtain some fresh insights into the problems. We also hoped that such additions to the sparse background material relating particularly to Canada might assist in any future consideration of the problems and might also generate future studies.

Meetings with Ministers, Members of Parliament and Senior Officials

68. As we began to clarify the problems facing us and to formulate tentative solutions, we considered it advisable to discuss the problems with those people in government who might have further information or opinions, or who might be required to play a role in implementing our recommendations. Consequently, we undertook a series of meetings with past and present Ministers of the Crown, Members of Parliament, and senior officials at both the federal and provincial level. Thus, we met privately with the following past and present Solicitors General:

Hon. Jean-Pierre Goyer
Hon. W.W. Allmand
Hon. Francis Fox
Hon. Jean-Jacques Blais
Hon. Allan Lawrence
Hon. Robert Kaplan,

the following past and present party leaders:

Rt. Hon. J.G. Diefenbaker
Rt. Hon. J. Clark
Hon. R.L. Stanfield
Mr. T.C. Douglas
Mr. E. Broadbent,

and the following past and present Members of Parliament:

Hon. Mark MacGuigan
Hon. Wm. Jarvis
Hon. Elmer MacKay
Mr. G.W. Baldwin
Mr. G.W. Fairweather,

The past and present senior officials of both the government of Canada and some provincial governments with whom we have met privately are set out in Appendix W. Of course, in addition to those persons mentioned above with whom we met personally, our researchers have had numerous interviews with government officials at all levels to obtain information and assistance in preparing reports for us.

D. LAW SUITS

69. Two separate law suits have been brought against us in the Federal Court of Canada. The first was launched by Paul D. Copeland on his own behalf and on behalf of all members of the Law Union of Ontario. It was an application

for a writ of prohibition having the effect of preventing us from continuing our inquiry. The application was dismissed on August 4, 1978. The judgment and reasons for decision of Mr. Justice Cattanach, are found in Appendix X. The second suit was brought against us by Ross Dowson and John Riddell. This application was for a writ of certiorari with mandamus in aid to quash our decision refusing Messrs. Dowson and Riddell the right to examine witnesses before us and requiring us to grant the applicants such right. That application was dismissed by Mr. Justice Gibson on June 2, 1980. A copy of the Order of dismissal is found in Appendix Y.

BIOGRAPHICAL REFERENCE

Ministers, senior officials
and senior R.C.M.P.
officers who figure in this Report

In alphabetical order:

ALLMAND, The Hon. Warren W.: Solicitor General, November 27, 1972, to September 14, 1976.

BARRETTE, J.E.M.: Assistant Commissioner of R.C.M.P. (ret.). Assistant Director of R.C.M.P. Security and Intelligence, August 29, 1967, to August 8, 1969; Director of R.C.M.P. Security and Intelligence, August 9, 1969, to December 31, 1969.

BISSONNETTE, P.A.: Deputy Solicitor General, November 28, 1977, to present.

BLAIS, The Hon. Jean-Jacques: Solicitor General, February 2, 1978, to June 4, 1978.

BOURNE, Robert (Robin) Colonel (ret.): Head, SPARG (Security Planning and Research Group now known as Police and Security Branch), June 1, 1971, to June 1, 1979. In July 1972, he was also made Assistant Deputy Solicitor General.

CLARK, The Rt. Hon. Joe: Prime Minister and Chairman of the Cabinet Committee on Security and Intelligence, June 5, 1979, to March 4, 1980.

COTE, Ernest A.: Deputy Solicitor General, December 14, 1968, to July 31, 1972.

DARE, Michael R. Lt. General (ret.): Director General, R.C.M.P. Security Service, May 1, 1973, to present.

DRAPER, Howard C.: Assistant Director of R.C.M.P. Security and Intelligence, September 8, 1969, to August 17, 1971; Assistant Deputy Director General (Operations), R.C.M.P. Security Service, August 17, 1971, to September 1, 1972; Deputy Director General (Operations), R.C.M.P. Security Service, September 1, 1972, to July 31, 1975.

FOX, The Hon. Francis: Solicitor General, September 14, 1976, to January 28, 1978.

GIROUX, J.E.J.B.: Assistant Commissioner of the R.C.M.P.; Deputy Director General (Operations), R.C.M.P. Security Service, January 3, 1978, to present.

GOYER, The Hon. Jean-Pierre: Solicitor General, December 22, 1970, to November 27, 1972.

HIGGITT, W. Leonard: Assistant Director of R.C.M.P. Security and Intelligence, October 19, 1964, to July 31, 1967; Director of R.C.M.P. Security and Intelligence, August 1, 1967, to September 7, 1969; Commissioner of the R.C.M.P., October 1, 1969, to December 31, 1973.

KAPLAN, The Hon. Robert P.: Solicitor General, March 4, 1980, to present.

KELLY, William H.: Deputy Commissioner of the R.C.M.P. (ret.). Director of R.C.M.P. Security and Intelligence, October 19, 1964, to August 10, 1967.

LAWRENCE, The Hon. Allan F.: Solicitor General, June 4, 1979, to March 4, 1980.

LINDSAY, M.F.A.: Commissioner of the R.C.M.P., August 15, 1967, to September 30, 1969.

MASSE, Marcel: Clerk of the Privy Council and Secretary to the Cabinet, June 1979 to March 1980; Chairman of the Interdepartmental Committee on Security and Intelligence, June 1979 to March 1980.

MacDONALD, T.D.: Deputy Solicitor General, October 1, 1966, to December 13, 1968.

McCLELLAN, George B.: Commissioner of the R.C.M.P., November 1, 1963, to August 14, 1967.

McILRAITH, The Hon. George J.: Solicitor General, July 6, 1968, to December 22, 1970.

NADON, Maurice: Commissioner of the R.C.M.P., January 1, 1974, to August 31, 1977.

PEARSON, The Rt. Hon. Lester B.: Prime Minister and Chairman of the Cabinet Committee on Security and Intelligence, April 22, 1963, to April 20, 1968.

PENNELL, The Hon. Lawrence: Solicitor General, July 7, 1965, to April 20, 1968.

PITFIELD, P. Michael: Clerk of the Privy Council and Secretary to the Cabinet, January 1972 to June 1979, and March 1980 to present; Chairman of the Interdepartmental Committee on Security and Intelligence, December 1977, to June 1979 and March 1980, to present.

ROBERTSON, R.G.: Clerk of the Privy Council and Secretary to the Cabinet, and Chairman of the Security Panel, July 1963, to January 1972; Chairman of the Interdepartmental Committee on Security and Intelligence, January 1972, to December 1977.

SEXSMITH, Murray: Assistant Commissioner; Deputy Director General (Operations), R.C.M.P. Security Service, July 16, 1975, to January 28, 1978.

SIMMONDS, Robert H.: Commissioner of the R.C.M.P., September 1, 1977, to present.

STARNES, John: Director General, R.C.M.P. Security Service, January 1, 1970, to April 30, 1973.

TASSE, Roger: Deputy Solicitor General, August 1, 1972, to November 27, 1977; Deputy Minister of Justice, November 27, 1977, to present.

TRUDEAU, The Rt. Hon. Pierre E.: Prime Minister and Chairman of the Cabinet Committee on Security and Intelligence, April 20, 1968, to June 5, 1979 and March 4, 1980, to present.

TURNER, The Hon. John N.: Solicitor General, April 20, 1968, to July 6, 1968.

By position:

Prime Ministers

April 22, 1963, to April 20, 1968.

The Rt. Hon. Lester B. Pearson.

April 20, 1968, to June 5, 1979.

The Rt. Hon. Pierre E. Trudeau.

June 5, 1979, to March 4, 1980.

The Rt. Hon. Joe Clark.

March 4, 1980, to present.

The Rt. Hon. Pierre E. Trudeau.

*Chairmen — Cabinet Committee on
Security and Intelligence*

April 22, 1963, to April 20, 1968.

The Rt. Hon. Lester B. Pearson.

April 20, 1968, to June 5, 1979.

Rt. Hon. Pierre E. Trudeau.

June 5, 1979, to March 4, 1980.

The Rt. Hon. Joe Clark.

March 4, 1980, to present.

The Rt. Hon. Pierre E. Trudeau.

Solicitors General

July 7, 1965, to April 20, 1968.

The Hon. Lawrence Pennell.

April 20, 1968, to July 6, 1968.

The Hon. John N. Turner.

July 6, 1968, to December 22, 1970.

The Hon. George J. McIlraith.

December 22, 1970, to November 27, 1972.

The Hon. Jean-Pierre Goyer.

November 27, 1972, to September 14, 1976.

The Hon. Warren W. Allmand.

September 14, 1976, to January 28, 1978.

The Hon. Francis Fox.

February 2, 1978, to June 4, 1978.

The Hon. Jean-Jacques Blais.

June 4, 1979, to March 4, 1980.

The Hon. Allan F. Lawrence.

March 4, 1980, to present.

The Hon. Robert P. Kaplan.

Chairman — Security Panel

(existed only until 1972)

July 1963, to January 1972.

Mr. R.G. Robertson.

*Chairmen — Interdepartmental Committee
on Security and Intelligence (formed 1972)*

January 1972, to December 1977.

Mr. R.G. Robertson.

December 1977, to June 1979.

Mr. P.M. Pitfield.

June 1979, to March 1980.

Mr. Marcel Massé.

March 1980, to present.

Mr. P.M. Pitfield.

Deputy Solicitors General

October 1, 1966, to December 13, 1968.	Mr. T.D. MacDonald.
December 14, 1968, to July 31, 1972.	Mr. Ernest A. Côté.
August 1, 1972, to November 27, 1977.	Mr. Roger Tassé.
November 28, 1977, to present.	Mr. P.A. Bissonnette.

Heads — Security Planning and Research Group
(now known as Police and Security Branch,
Department of the Solicitor General)

June 1, 1971, to June 1, 1979.	Colonel (ret.) Robert (Robin) Bourne.
June 1, 1979, to present.	Mr. Michael Shoemaker.

Commissioners of the R.C.M.P.

November 1, 1963, to August 14, 1967.	Mr. George B. McClellan.
August 15, 1967, to September 30, 1969.	Mr. M.F.A. Lindsay.
October 1, 1969, to December 31, 1973.	Mr. W. Leonard Higgitt.
January 1, 1974, to August 31, 1977.	Mr. Maurice Nadon.
September 1, 1977, to present.	Mr. Robert H. Simmonds.

Directors of R.C.M.P. Security and Intelligence
(1964-69)

October 19, 1964, to August 10, 1967.	Mr. William H. Kelly.
August 1, 1967, to September 7, 1969.	Mr. W. Leonard Higgitt.
August 9, 1969, to December 31, 1969.	Mr. J.E.M. Barrette.

Directors General of the R.C.M.P. Security Service
(1970 to present)

January 1, 1970, to April 30, 1973.	Mr. John Starnes.
May 1, 1973, to present.	Mr. Michael R. Dare.

Assistant Directors of R.C.M.P. Security and Intelligence
(1964-71)

October 19, 1964, to July 31, 1967.	Mr. W. Leonard Higgitt.
August 29, 1967, to August 8, 1969.	Mr. J.E.M. Barrette.
September 8, 1969, to August 17, 1971.	Mr. Howard C. Draper.

Assistant Deputy Directors General (Operations)
of R.C.M.P. Security and Intelligence
(1971-72)

August 17, 1971, to September 1, 1972.	Mr. Howard C. Draper.
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Deputy Directors General (Operations)
of R.C.M.P. Security Service
(1972-)

September 1, 1972, to July 31, 1975.
July 16, 1975, to January 28, 1978.
January 3, 1978, to present.

Mr. Howard C. Draper.
Mr. Murray S. Sexsmith.
Mr. J.E.J.B. Giroux.

PART II

THE SECURITY SYSTEM: THE NATURE OF GOVERNMENTAL CONCERN AND INVOLVEMENT

CHAPTER 1: Security and Democracy: Interests Requiring Protection and
Threats to Those Interests

CHAPTER 2: The Organizational Response by Government

INTRODUCTION

1. In this part of our Report we provide an account of the basic elements of Canada's security system, its underlying purpose and principles, and the structures which have been put in place to provide security and intelligence. The focus here is on the Security Service of the R.C.M.P. In Part III, which deals with what might be called a breakdown in the system, we report on R.C.M.P. practices and activities "not authorized or provided for by law" on both the criminal investigation side of the Force and on the Security Service side. This is, of course, in conformity with the Commission's terms of reference which instruct it to report on the extent and prevalence of such activities and practices on both sides of the R.C.M.P. but require a *comprehensive* review of policies, procedures and laws only with respect to the security responsibilities of the Force.

CHAPTER 1

SECURITY AND DEMOCRACY: INTERESTS REQUIRING PROTECTION AND THREATS TO THOSE INTERESTS

A. THE NEED FOR SECURITY

2. Paragraph (c) of our terms of reference calls upon us to report and make recommendations on the policies, procedures and laws governing the activities of the R.C.M.P. in the discharge of its responsibility to protect "the security of Canada". The terms of reference do not explain what is meant by the phrase "the security of Canada", and yet some explanation is surely required. In recent years in our own country and other Western democracies, we have experienced the dangers of using such a term too loosely. All manner of questionable activities encroaching on civil liberties may be perpetrated on the citizens and residents of a country in the name of national security. In response to this experience there has been a tendency in some quarters to reject the concept of 'national security' entirely and to rely instead on concepts that are more readily understood, such as 'national defence' and 'law enforcement'. But we question whether these alternative phrases adequately cover the security activities that, in our view, need to be carried out in all states, including Canada.

3. The Royal Commission on Security which reported in 1968 on the operation of Canadian security methods and procedures gave its understanding of the meaning of the "security of Canada". In its view, it was the indisputable duty of the state

... to protect its secrets from espionage, its information from unauthorized disclosure, its institutions from subversion and its policies from clandestine influence.¹

In our First Report on *Security and Information*, without attempting to be exhaustive, we stated that, in our opinion, there were two concepts involved in the "security of Canada":

The first is the need to preserve the territory of our country from attack.
The second concept is the need to preserve and maintain the democratic

¹ *Report of the Royal Commission on Security*, Ottawa, 1969, paragraph 28.

processes of government. Any attempt to subvert those processes by violent means is a threat to the security of Canada.²

Fundamental to both these definitions are two basic needs: first, the need to protect Canadians and their governments against attempts by foreign powers to use coercive or clandestine means to advance their own interests in Canada, and second, the need to protect the essential elements of Canadian democracy against attempts to destroy or subvert them. These, we believe, are fundamental security requirements which must be met in Canada if our country is to be truly self-governing.

4. The threats to Canada's security against which protection is needed today and in the foreseeable future fall into three basic categories: activities of foreign intelligence agencies, political terrorism, and subversion of democratic institutions. We will be expanding on these three threats throughout this Report and will make only a few germane comments about them here.

5. First, there are the clandestine activities of agents of foreign powers in Canada. These have not lessened, although Canada has not been at war for many years and a relaxation of international tensions has been associated with what is perhaps somewhat optimistically referred to as East-West détente. On the contrary, in recent years, the number of foreign intelligence agencies has increased, as have the attempts to use these agencies against Canada, both to obtain intelligence and to influence Canadian policies.

6. A second type of threat to Canadian security arises from politically motivated acts of violence and threats of violence aimed at forcing governments to act in a certain way. Today, the popular word for activities of this kind is 'terrorism'. The internationalization of terrorist activities since the late 1960s has significantly increased the severity of this threat to the security of Canada. (It is interesting to note that the 'terrorist' threat to security was not even mentioned in the Report of the Royal Commission on Security, which reported in 1968.) It would be rash to predict a disappearance of the 'terrorist' threat in the future: political fanaticism is not on the wane, and modern technology increases the power of a few to threaten the many. Protection against terrorism is likely to be a security requirement for many years to come.

7. The third category of threat to Canada's security today and in the future concerns activities of those whose objectives are to subvert or destroy the democratic system of government in Canada. Fortunately, since the Second World War subversive organizations on the extreme left and the extreme right of the political spectrum have not posed a serious threat to the democratic process in Canada. There remain, however, a few small groups, some with considerable foreign support, which are committed to the destruction of democracy in Canada. A democratic state such as Canada has a duty to protect itself against those who work actively to overthrow the foundations of our parliamentary democracy: namely, free elections with universal adult

² *Security and Information, First Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, Ottawa, 1979, paragraph 38.

suffrage, free public discussion about public affairs, freedom of the press, freedom of assembly for the purpose of organizing and marshalling public opinion about political matters, and the application of the rule of law.

8. One way in which Canada's internal security is protected is through the enforcement of the criminal law. Law enforcement agencies at the federal, provincial and municipal levels have an important role to play in apprehending those who conspire or attempt to carry out, or who have carried out, an act of espionage, terrorism or subversion against the democratic system. But the security of Canada would be badly served if this were the only form of protection. Advance intelligence is needed to prevent espionage networks or terrorist support systems being established in Canada. Government departments need reliable information on which to judge whether persons being considered for positions involving access to secret information are security risks. Immigration and Citizenship officials similarly require reliable information as to whether persons applying for entry to Canada or for Canadian citizenship are participants in activities endangering the security of Canada. Those responsible at the federal and provincial levels for securing strategic installations, such as nuclear power stations or defence production centres, from sabotage or espionage need advice on the nature of possible attacks and on appropriate protective measures. Similarly, the security of international events in Canada, such as the Olympic Games, the Habitat Conference and the Commonwealth Games, and of visiting international dignitaries and our own political and governmental leaders, requires timely advance assessments of the source and techniques of possible terrorist attacks.

9. In a word, a democratic state needs security intelligence to protect itself against attack on its democratic values and procedures. That is why all of Canada's democratic allies have developed organizations, either within or alongside their police forces, which specialize in security intelligence work, collecting and reporting intelligence about threats to internal security to appropriate government departments and law enforcement agencies. A security system thus requires the capacity to obtain and report timely intelligence to those executive agencies responsible for taking lawful protective measures against threats to security.

10. But in our mind there is more than just an internal need for a security intelligence agency. Canada's international alliances require that it be able to assure its allies, with whom it participates in common defence arrangements, that it has a sound system of internal security. Allied countries will not entrust Canadian officials and political leaders with secret information unless Canada has in place effective structures and procedures for detecting and preventing foreign espionage. Similarly, Canada is a signatory to a number of international agreements providing for cooperation in combatting terrorism.³ These agreements provide Canada with international support in the event of a terrorist attack on Canadians at home or abroad, and they entail a correspond-

³ L.C. Green, "Terrorism — The Canadian Perspective", in *International Terrorism: National, Regional and Global Perspectives*, ed. by Y. Alexander, New York, Praeger, 1976.

ing responsibility for Canada to assist other countries subjected to terrorist attacks.

11. The security of Canada, as we understand it, is a concern of both levels of government in Canada. Canada is a federal state: it is essential that the democratic character of government, both federal and provincial, be secured from clandestine foreign interference and attempts at violent subversion.

12. The British North America Act⁴ does not explicitly assign legislative jurisdiction over security to either level of government. The federal Parliament's power to make laws for the peace, order and good government of Canada in relation to all matters not exclusively assigned to the provinces, undoubtedly provides constitutional support for a large federal role in security, especially in emergency situations. In the *Alberta Press Act* case in 1938, Chief Justice Duff of the Supreme Court of Canada held that

... the powers requisite for the protection of the constitution itself arise by necessary implication from the British North America Act as a whole...and since the subject matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.⁵

Mr. Justice Fauteux of the Supreme Court, in the case of *Switzman v. Elbling* in 1957, stated that

... questions which are of the order of the security of the state cannot be considered a matter of a purely local or private character within the province.⁶

Further constitutional support for the federal government's role in safeguarding the security of Canada may be found in its exclusive jurisdiction over Defence and over Criminal Law and Criminal Procedure. Under the latter power the federal Parliament has identified the criminal offences which relate to security, for example, treason, seditious libel, seditious conspiracy, uttering seditious words, sabotage, and espionage.

13. However, the provinces too have security concerns and responsibilities. The provinces are concerned with securing provincial and municipal institutions against subversive attack. In exercising their responsibility for the appointment of provincial officials, provincial governments need information about persons who constitute security risks. The provinces' responsibility for the administration of justice gives them a primary role in taking police and prosecutorial measures against persons, such as terrorists, when their activities against Canadian security have escalated to the point of becoming criminal offences.

14. Whatever the constitutional niceties, it is clear that from a practical point of view both levels of government have important roles to play in meeting Canada's security requirements. Most of the activities threatening Canada's security have national and international dimensions. The federal government should have the primary responsibility for collecting intelligence about these

⁴ (1867) 30 & 31 Vic., ch.3 (U.K.). Reproduced in R.S.C. 1970, Appendices.

⁵ *Reference re: Alberta Statutes* [1938] S.C.R. 100, at pp. 133-134.

⁶ *Switzman v. Elbling and Attorney General for Quebec* [1957] S.C.R. 285, at p. 324.

threats and for coordinating measures to protect Canadians and international visitors from them. Provincial and municipal authorities have a primary responsibility for the enforcement of law and maintaining peace at the local level. In security matters these respective responsibilities will frequently intersect. In relation to terrorism, for example, federal agencies should endeavour to obtain intelligence about the identity, movement and techniques of persons in Canada who are associated with international terrorist groups or who receive support for terrorist activities from foreign countries. This intelligence should be shared with provincial and municipal authorities to assist them in taking measures to protect foreign visitors and Canadian V.I.P.s within their jurisdictions, and to assist local police in apprehending persons participating in acts of political violence.

15. The effective provision of security in a federal state requires close cooperation among all levels of government. For this reason, we believe it would be a mistake to assume that the security requirements and functions we have identified above can be swept into a sphere of exclusive federal jurisdiction simply by attaching the label 'national security' to them. Safeguarding Canada from attempts by foreign-directed or purely domestic groups to subvert Canadian democracy will be jeopardized if 'national security' becomes a subject of federal-provincial rivalry. Later in this Report, when we turn to our proposals for a Security Plan for the Future, we shall make some recommendations about ways and means of improving federal-provincial cooperation with regard to the security of Canada.

B. SECURITY AND THE REQUIREMENTS OF LIBERAL DEMOCRACY

16. Liberal democracies face a unique challenge in maintaining the security of the state. Put very simply, that challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process. Authoritarian and totalitarian states do not have to face this challenge. In such countries there is no need to ensure that security agencies, whose techniques inevitably involve a great deal of secrecy, be accountable to an elected legislature. Nor is there a requirement in such states that all of their security measures be authorized or provided for by law and that none of their officials be above the law. Only liberal democratic states are expected to make sure that the investigation of subversive activity does not interfere with the freedoms of political dissent and association which are essential ingredients of a free society.

17. Canada must meet both the requirements of security and the requirements of democracy: we must never forget that the fundamental purpose of the former is to secure the latter. Those who seek to subvert Canada's democratic institutions would realize an ironic victory if Canadians were to permit their governors to violate the requisites of democracy in the course of protecting them from its opponents.

18. Providing effective security within a liberal democracy has in recent years come to be acknowledged as a major problem of public policy in most Western

democracies. That challenge, which is at the centre of our work, has been the underlying purpose of inquiries into the activities of security and intelligence agencies in Australia, New Zealand, the United Kingdom and the United States. In Australia, Mr. Justice Hope was appointed in 1974 as a single Commissioner to carry out a comprehensive study of Australia's security system. His reports, submitted in 1977, led to the enactment in 1979 of a new charter for the Australian Security Intelligence Organization. In 1976, Sir Guy Powles, the Chief Ombudsman of New Zealand, completed a study of the practices, procedures and organization of that country's security intelligence agency. In the United Kingdom there has been a series of special studies and reports on security problems going back to the 1955 Privy Councillors' Report on Security, and including the Radcliffe Report in 1962 on Security Procedures in the Public Service and Lord Denning's Report on the Profumo affair in 1963. In March 1980, the Secretary of State for the Home Department (the Home Secretary) submitted a report to Parliament on the interception of communications in relation to security and criminal investigations. In the United States, a Commission chaired by Vice-President Rockefeller reported in 1975 on C.I.A. activities within the United States. A year later, a Select Committee of the United States Senate, chaired by Senator Church, completed a six-volume report on the intelligence activities of the United States. The Church Report provided the foundation for the drafting of proposed comprehensive legislative charters for intelligence agencies in that country. The opening page of the Rockefeller Report sets out the following statement (which quotes, in part, President Ford's announcement of the establishment of the Commission) of the challenge which confronts all democracies with regard to their security arrangements:

While it is vital that security requirements be met. . . it is equally important that intelligence activities be conducted without impairing our democratic institutions and fundamental freedoms.⁷

19. In taking the position that the requirements of security in Canada must be reconciled with the requirements of democracy, let us be clear that we regard responsible government, the rule of law, and the right to dissent as among the essential requirements of our system of democracy.

20. By responsible government we mean that there must be effective procedures for ensuring that those who carry out security investigations and other security measures are accountable to Ministers of the Crown, who in turn are responsible to Parliament. Security activities of necessity involve a great deal of secrecy because they are normally being carried out to detect and prevent secret activities. Security operations, to be effective, cannot be an open book to the whole world, but it does not follow that they cannot be an open book to responsible Ministers. The Honourable Robert Stanfield, then Leader of the Opposition, put this point very well in 1969 when he said in the House of Commons:

⁷ *Report to the President by the Commission on C.I.A. Activities within the United States*, p. 3.

What would be cause for grave concern would be any thought that much of the operation is beyond the ken of the ministry or the Prime Minister; that there are not ministers, elective and responsible members of government, to whom the entire security operation is an open book, who have continuing access to everything that is going on in that area, and who give proper, responsible, political, civilian direction to the operation on a continuing basis.⁸

We would add that not only must responsible Ministers have knowledge of and give direction to security operations, but there must also be means for ensuring that representatives of the opposition parties in Parliament are adequately informed of these activities.

21. Second, the rule of law must be observed in all security operations. Several meanings have been given to this phrase. The meaning which we have in mind is that expressed by the English writer, A.V. Dicey, when he wrote that

... here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. ... With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.⁹

In our context this means that policemen and members of a security service, as well as the government officials and ministers who authorize their activities, are not above the law. Members of the security organization must not be permitted to break the law in the name of national security. If those responsible for security believe that the law does not give them enough power to protect security effectively, they must try to persuade the law-makers, Parliament and the provincial legislatures, to change the law. They must not take the law into their own hands. This is a requirement of a liberal society. It is, therefore, unacceptable to adopt the view, which we have found expressed within the R.C.M.P., that when the interests of national security are in conflict with the freedom of the individual, the balance to be struck is not for a court of law but for the executive. In very recent years within the R.C.M.P. there has been a view that this conclusion is supported by a 1977 English case, *R. v. Secretary of State for the Home Department, ex parte Hosenball*.¹⁰

But this is no ordinary case. It is a case in which national security is involved, and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place.

However, it is misleading to quote this statement out of context. The case concerned an alien whom the Home Secretary ordered to be deported in the interests of national security because he had information that the alien had obtained information for publication harmful to the security of the nation, including information prejudicial to the safety of servants of the Crown. The alien claimed that he was entitled to see the report which was made about him

⁸ House of Commons, *Debates*, June 26, 1969, p. 10639.

⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Tenth edition, London, Macmillan, 1959, p. 193.

¹⁰ [1977] 3 All E.R. 452 at 457.

by a non-statutory advisory Committee which reported to the Home Secretary before the deportation order was made. He contended that natural justice so entitled him. It was in answer to that contention that the above statement was made by Lord Denning, who then continued:

Even natural justice itself may suffer a set-back. . . In the first world war, in *R. v. Halliday*,¹¹ Lord Finlay L.C. said: 'The danger of espionage and of damage by secret agents. . . had to be guarded against.' . . . But times of peace hold their dangers too. Spies, subverters and saboteurs may be mingling amongst us, putting on a most innocent exterior. . .

If they are British subjects, we must deal with them here. If they are foreigners, they can be deported. The rules of natural justice have to be modified in regard to foreigners here who prove themselves unwelcome and ought to be deported.

It is thus quite inappropriate to quote what Lord Denning said outside the context of whether the principles of natural justice apply to the exercise of a power to deport, as if it were authority for altering the norms that bind members of the R.C.M.P. when national security is involved.

22. Third, the right of democratic dissent requires that the advocacy of unpopular ideas not be confused with attempts to subvert democracy. A democracy is not liberal unless it permits those of its citizens who seek very basic social, economic or even constitutional change within the democratic system to expound their viewpoint in public and seek adherents to their cause. If citizens who exercise this freedom have their activities noted in secret security dossiers to be used against them by the state, the enjoyment of such freedom is imperilled. The political freedom essential to our democratic system requires that security measures properly distinguish between democratic dissent and true subversion.

23. Those who are responsible for carrying out Canada's security measures must constantly bear in mind that the right to dissent is a constitutional requirement in Canada. This requirement was aptly expressed by Mr. Justice Rand of the Supreme Court of Canada when he stated that under our Constitution

. . . government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and the Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas.¹²

In a similar vein, Mr. Justice Abbott of the Supreme Court of Canada held that

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.¹³

¹¹ [1917] A.C. 260 at 270.

¹² *Saumur v. Quebec and Attorney General for Quebec* [1953] 2 S.C.R. 299, at p. 330.

¹³ *Switzman v. Elbling and Attorney General for Quebec* [1957] S.C.R. 285, at p. 326.

The investigation of security threats by the state must respect this constitutional right to dissent. The exercise of that right must not become an invitation to be spied upon by state security agencies.

24. Canada must have effective security. Security measures have the basic objective of securing our democratic system. The means used to achieve security must meet the requirements of democracy. Effective security within a democratic framework — that is the fundamental precept which has guided our diagnosis of past failures and wrongdoings in Canada's security system, as well as our prescription for reform of the system.

CHAPTER 2

THE ORGANIZATIONAL RESPONSE BY GOVERNMENT

Introduction

1. In the preceding chapter we have set out our understanding of the interests requiring protection by Canada's internal security arrangements. We now describe the institutions through which the Government of Canada has responded to the need for security. We begin with a brief account of the R.C.M.P.'s development as a national police force and then turn to a more detailed account of the historical evolution of the R.C.M.P. Security Service, its current organization and mandate. This is followed by a description of the security and intelligence responsibilities of other branches of the R.C.M.P. and of other departments and agencies of the federal government, and an account of the Cabinet and interdepartmental committee system which co-ordinates and directs the security and intelligence activities of the federal government.
2. This chapter, we must emphasize, is basically descriptive: the analysis and evaluation of events and practices will come later. Here our primary purpose is to provide a factual account of the institutional setting in which the R.C.M.P.'s discharge of its responsibilities for the security of Canada has taken place.

A. THE HISTORICAL CONTEXT AND CURRENT STRUCTURE OF THE ROYAL CANADIAN MOUNTED POLICE

1. The Royal Canadian Mounted Police is a famous and respected national institution. From its beginnings in 1873 and during its earliest days on the western prairies it kept the peace with small numbers of personnel, using careful diplomacy rather than the "triggerhappy" approach with which, rightly or wrongly, law and order are perceived to have been brought to the American frontier. The Force's military structure and practices produced what was seen by the public to be a disciplined corps of dedicated men reputed to be incorruptible and fair. Whether dealing with Indians, settlers, or the highly volatile situation in the Yukon gold rush they had a reputation for administering the law with an even hand and malice to none.
2. The Force was indeed a small organization. Until the end of the First World War, its responsibility was limited to Saskatchewan, Alberta and the Territories: the other provinces were served by provincial police forces. On

February 1, 1920, by Act of Parliament, the Royal North-West Mounted Police absorbed the much smaller Dominion Police, a civilian group that protected federal buildings in Ottawa and hired civilian detectives, and was renamed the Royal Canadian Mounted Police. The Force established small complements in the other provinces although it was far from clear to what extent it would enforce federal laws that by and large had until then been enforced by provincial and municipal authorities. During the period from 1920 to 1950, with the exception of Ontario and Quebec, provinces abandoned their own provincial forces and began the practice, continued today, of contracting with the R.C.M.P. to carry out police duties. After August 15, 1950, when it absorbed the British Columbia Provincial Police, the Force was established as we know it today: an agency of the federal government with a strong presence in the 'contract provinces', the Territories and even in the two provinces, Ontario and Quebec, where it does not have any contractual duties.

3. In all the provinces it is the responsibility of the R.C.M.P. to enforce federal legislation apart from the Criminal Code. In the Territories it also enforces the Criminal Code. The federal government has also assigned the responsibility of protecting the security of Canada to the R.C.M.P. Those two roles have resulted in the R.C.M.P.'s having a significant number of members in each province whose duties are not related to enforcement of the Criminal Code. In addition to those federal policing and security roles, the Force has entered into contracts with provincial and municipal governments to act as the police force for particular regions, enforcing the Criminal Code and provincial and municipal laws. Such contracts exist in all provinces except Ontario and Quebec. In performing their duties under such contracts the R.C.M.P. have a responsibility toward the attorneys general of the various provinces, although the precise nature of that responsibility has not been clearly defined. As of November 1980, total R.C.M.P. strength was made up as follows: 12,864 regular members; 1,527 special constables; 2,089 civilian members; and, 3,757 public servants, making a total of 20,237. Of this total, over 40%, it would appear, are involved in contract policing.

4. In its origin, the Force was military in personnel, structure and orientation. Until after the First World War its members regarded themselves as a military force with the additional powers of peace officers. The Force sent cavalry units to the Boer War, to the western front in 1918 and to Siberia in 1919. While the members were in style a military force, they were intended from the outset to be policemen and (if only because violence by large groups of people seldom erupted in the Canadian west) there were only rare occasions other than for ceremonial purposes when the "horsemen" acted as a military formation. Indeed, after automobiles replaced horses, the cavalry or 'mounted' element became entirely ceremonial.

5. Members acted similarly to members of other police forces in the country, learning the tradecraft and ethics that were developed in London by the professional police force established by Sir Robert Peel in 1829. They learned to interpret the Criminal Code and other federal statutes, and, following the First World War, such increasingly pervasive provincial legislation as the highway traffic acts and statutes first prohibiting and then regulating the sale

and consumption of alcoholic beverages. Until long after the Second World War they were usually the prosecutors in the magistrates' courts in respect of cases investigated by them, for it was not until recent years that in most of the contract provinces the provincial departments of the attorneys general expanded their complement so that lawyers in the departments acted as prosecutors in those courts.

6. In addition to its law enforcement functions the R.C.M.P. accepted the role that other police forces have assumed since Peel's day, which, as stated by the British Royal Commission on the Police, 1962, is as follows:

... they have by long tradition a duty to befriend anyone who needs their help, and they may at any time be called upon to cope with minor or major emergencies.¹

7. In the contract provinces much of the work of the Force in the past has been law enforcement in smaller communities. Large cities in those provinces are policed by municipal forces except in the recently swollen municipalities adjoining the city of Vancouver. They investigated crimes against person and property as well as driving offences and violations of hunting regulations. However, the Force increasingly addressed its attention to the national planning and systematic cooperation with provincial and municipal forces involved in developing programmes to combat the growing international and domestic traffic in narcotics and other drugs, other so-called 'organized crime' including illegal gambling, and 'white-collar crimes' of stock fraud, bankruptcy fraud and even theft of computer-stored information.

8. Moreover, during recent decades, advances in forensic technology, such as new methods of handwriting analysis, serology and ballistics, have demanded increasing investment in personnel and equipment. The need continues for specialized research and development of sophisticated radio communication within the Force and of electronic means of intercepting the communications of suspects.

9. Thus, in addition to 'traditional' police methods, the Force has in recent years been faced with the need to ensure that it has the capacity, in terms of personnel and equipment, to mount investigations employing technology the equal of that employed by police forces in other advanced countries. This need, together with the need to have a security service capable of meeting changing threats, produced an immensely complex problem of evolution for a Force with personnel mostly trained to enforce the law in traditional ways. Many of the problems associated with this evolution are beyond the scope of our terms of reference.

10. Although much of our work has referred to the Security Service, as demanded by paragraph (c) of our mandate, this concentration would be out of focus were we not constantly aware of the historical background and present complexities of the R.C.M.P. as a whole.

¹ Cmnd. 1728 at p. 22.

11. Moreover, as we shall point out, some of our observations about the Security Service may well be true of the Force as a whole, and should be taken into account by the Government of Canada and those charged with the future administration of the Force if it is to continue to deserve its reputation as an excellent law enforcement agency.

12. We now wish to summarize the current organizational structure of the Force in order to place in context the more detailed examination of the history and organization of the Security Service which follows in Section B of this chapter.

13. The Commissioner of the R.C.M.P. is appointed by the Governor in Council pursuant to Section 5 of the Royal Canadian Mounted Police Act.² That Section provides as follows:

5. 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.

Section 6 of that Act authorizes the Governor in Council to appoint and promote the officers of the Force, the maximum number of such officers to be prescribed by the Treasury Board. By virtue of section 13 of the Act such officers hold office during the pleasure of the Governor in Council. It is the Commissioner's responsibility to appoint all members other than officers (section 7 of the Act), the number again being prescribed by the Treasury Board.

14. Members of the Force are either regular members or 'civilian' members.³ Civilian members may perform only certain duties.⁴ Included in the category of 'regular' members is a group known as 'special constables' who are also limited in the duties which they may perform.⁵ In addition to officers and members, the Force has civilian staff "appointed or employed under the Public Service Employment Act" pursuant to section 11 of the Royal Canadian Mounted Police Act. They are employed by the Commissioner.

15. Section 21 of the Royal Canadian Mounted Police Act delegates authority to the Governor in Council and the Commissioner with respect to the organization of the Force. It reads as follows:

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.

² 1970 R.S.C., ch.R-9.

³ C.R.C., ch.1391, s.2.

⁴ *Ibid.*, s.51(3).

⁵ *Ibid.*, s.51(2).

The Governor in Council has prescribed by regulation 3 of the Royal Canadian Mounted Police Regulations⁶ that the Force shall be divided into divisions and by regulation 7 that "the organization of the Headquarters of the Force shall be as the Commissioner directs".⁷

16. Those, then, are the legal bases for the structure of the Force from which the following organizational picture emerges.

17. At Headquarters, responsibility below the Commissioner is first divided into four areas, each headed by a Deputy Commissioner or, in the case of the Security Service, the Director General who has Deputy Commissioner status. The four areas are: Administration, Criminal Operations, Canadian Police Services and the Security Service.

18. Both Canadian Police Services and the Security Service are centralized in that all of their operations across the country are controlled directly from Headquarters and the people working in those Services do not report through Divisional Commanding Officers. The rest of the Force's operational components report through the Divisional Commanding Officers, of whom there are 13, each responsible for a geographic division of the Force.

19. Those geographic divisions have essentially the same boundaries as the provinces and the Territories, with the exception of Ontario, which has two such divisions. There are two other divisions not based on geography: the R.C.M.P. Academy 'Depot' Division in Regina, and the Training Division in Ottawa. There are, therefore, 15 divisions in all, and the Commanding Officer of each of them reports directly to the Commissioner. The Deputy Commissioner of Criminal Operations and the Deputy Commissioner of Administration speak on behalf of the Commissioner on specific cases to give direction to the Divisional Commanding Officers (Vol. 6, p. 681).

20. The Commissioner also has seven other components reporting directly to him: the Foreign Services Directorate, the Chief Financial Officer, the Internal Communications Officer, the Public Relations Branch, the Audit Branch, the Planning and Evaluation Branch and his own Executive Officer. An organizational chart of the R.C.M.P. appears in Appendix "U".

21. In the outline of the organization of the Security Service which follows, details of the centralization of the Security Service will be made clear. At this point we simply wish to note that, although an Area Commander of the Security Service, such as, for example, the Saskatchewan Area Commander, reports directly to Security Service Headquarters in Ottawa, he must also keep the Divisional Commanding Officer (in this case "F" Division) informed of any Security Service activities within that Division which might affect the Commanding Officer's ability to carry out his responsibilities.

⁶ *Ibid.*

⁷ *Ibid.*

B. THE R.C.M.P. SECURITY SERVICE: HISTORICAL EVOLUTION AND CURRENT ORGANIZATION

22. The primary function of the R.C.M.P.'s Security Service is to collect, analyze and report intelligence⁸ about threats to the security of Canada. A brief account of the historical evolution of the Security Service is instructive: it shows that there has never been a clear and comprehensive public policy on the purpose, methods and structures of security intelligence in Canada. We think that this basic fact may have a good deal to do with the events that have prompted the establishment of our Commission.

The origins of security intelligence

23. Canada's first security intelligence organization was established by Sir John A. Macdonald before Confederation. In 1864 a group of men dressed as Confederate soldiers⁹ crossed over the border into Vermont and raided the town of St. Albans. Canadian and British neutrality in the American Civil War was jeopardized. To prevent other such incidents, Macdonald, who was then the Premier and Attorney General West for the United Province of Canada, organized the Western Frontier Constabulary, a small contingent of detectives under the supervision of Gilbert McMicken, a stipendiary magistrate. The main purpose of this force was to collect and report information on "the existence of any plot, conspiracy or organization whereby peace would be endangered, the Queen's Majesty insulted, or her proclamation of neutrality infringed".¹⁰ McMicken's investigators soon had their first threat to contend with: Fenians were drilling and collecting arms in the United States in order to invade the British North American colonies.

24. In 1868, when the Dominion Police Force was established, McMicken became a Dominion Police Commissioner. The primary public role of the Dominion Police was the protection of public buildings in Ottawa, and for this purpose it maintained a small force of about 12 men. However, McMicken continued to supervise a network of undercover agents operating on both sides of the Canada-U.S. border to provide intelligence reports about Fenian activities. When Charles Joseph Coursol, a Montreal Sessions Court Judge, also became a Dominion Police Commissioner, he too supervised a small frontier detective force. As a modern historian testifies, "Macdonald usually knew more about the plans of the Fenians than the Fenians did themselves".¹¹

⁸ The word 'intelligence' in the vocabulary of intelligence agencies refers to information which has been assessed and analyzed for its validity and significance by the intelligence agency. Thus intelligence is distinguished from raw information. We will follow this usage throughout our Report.

⁹ The manner of dress is so described in documents in R.C.M.P. files. To the opposite effect Professor Donald Creighton states that the men were Confederate soldiers but were not in uniform: *John A. Macdonald, The Young Politician*, Toronto, Macmillan, 1952, p. 385.

¹⁰ Macdonald Papers, Vol. 234, pp. 100852-4.

¹¹ Donald Creighton, *John A. Macdonald, The Young Politician*, Toronto, Macmillan, 1952, p. 439.

25. The collection of information and the reporting of intelligence about Fenian threats from 1864 to 1871 was the first security intelligence activity of the Canadian government, but it had many features which were to characterize later activities in this field. For one thing, the methods of investigation were highly secretive. The primary method of collecting information was to infiltrate undercover agents into Fenian organizations. They often spent years within the organization, in some cases working their way into influential positions.

26. Again, the Macdonald papers indicate that the interception of mail and telegrams was another source of information, as was following persons surreptitiously to observe their contacts. The intelligence reports based on information received were sent directly to Ministers, often to the Prime Minister. The Prime Minister, in turn, gave directions to McMicken and Coursol as to the kind of intelligence the government required. Usually the reports were used by the government as a means of assessing the seriousness of the Fenian threat rather than for criminal prosecutions. Intelligence on individual Fenians was used as a basis for screening persons entering Canada or applying for government positions. On occasion reports prompted McMicken to meet with Fenians and their arch opponents, the Orange Lodge, to dissuade them from behaviour which might lead to riotous confrontations.

27. There was no explicit statutory authorization for these secret surveillance activities nor any official statement of government policy with respect to them. Between 1866 and 1873 apparently \$133,000 was spent from a Secret Service Fund. These expenditures were not subject to any audit. Allegations of mismanagement of these funds were debated in the House of Commons in 1877 in response to the report of the Select Standing Committee on Public Accounts. That Committee brought forward the first resolution calling for a confidential committee of the House, which would include Opposition members, to review 'Secret Service' matters.¹²

28. One dimension of these early Secret Service activities which was *not* to be an enduring feature of Canada's security intelligence programmes was the collection of information by undercover Canadian agents *outside* Canada. Many of McMicken's undercover agents operated in the United States.

The 1870s to World War I

29. From the early 1870s until the First World War, security intelligence activities at the federal level were much more intermittent. Agents supervised by Commissioners of the Dominion Police continued to play the prime role in collecting information about politically motivated violence in Canada. There were sporadic investigations of Fenian organizations and 'anarchist' episodes (including the dynamiting of the Welland Canal in 1900), but there was no sustained intelligence collection programme. The greatest threat to Canadian security during this period was the North-West Rebellion of 1885. The North-West Mounted Police did not employ undercover agents to collect

¹² *Journals of the House of Commons*, Vol. XI, 1877 Session, Appendix (No. 2). Third Report of the Select Committee on Public Accounts Relating to the Expenditure of Certain Secret Service Funds, p. 10.

security information. Their reports to the government on the insurrection and the need for reinforcements were based on information obtained through their regular police work in the territory.

30. The visit in 1901 of Their Royal Highnesses, the Duke (later King George V) and Duchess of Cornwall, was the first occasion for certain security operations which were to become frequent in the future: V.I.P. protection and countering actions. Percy Sherwood, the Commissioner of the Dominion Police at the time, personally accompanied the royal party on the tour, directed the collection of information by the police about suspected anarchists, and, on one occasion ordered a member of an anarchist group to be detained for the duration of the royal visit.

31. The first time the North-West Mounted Police took on a major responsibility for the collection of security intelligence came in connection with their policing of the Yukon Territory during the gold rush at the turn of the century. Under the direction of Clifford Sifton, Minister of the Interior, and of N.W.M.P. Comptroller Fred White, the N.W.M.P. was asked to investigate rumours of American plots to annex the Yukon territory. Undercover agents, with assistance from the Pinkerton Detective Agency in the United States, conducted surveillance of suspected plotters both in the United States and Canada, and infiltrated American miners' organizations such as the Order of the Midnight Sun. Intelligence reports based on these operations were an important factor in enabling the Canadian government to gauge the seriousness of the threat and take appropriate precautionary measures.

World War I and its aftermath

32. Canada's participation in World War I created the need to investigate and take preventive measures against espionage and sabotage. The manpower resources available to the Government of Canada for this purpose were quite meagre and decentralized. The chief role was played by the small Dominion Police Force which, even after some strengthening during the war, in 1919 reached a total strength of only 140 men. The Dominion Police carried out some investigative work themselves through secret agents, most of whom were hired from American detective agencies, but relied extensively on information collected by police forces across Canada and by officials of the Departments of Customs and Immigration. The situation in British Columbia gives some indication of the decentralized nature of security intelligence activities in Canada during World War I. In that province a former Immigration Agent was appointed a Commissioner of Police for British Columbia under the Dominion Police Act, and was responsible for investigating enemy aliens and suspected pro-German sympathizers. Information collected by his secret agents was reported not only to Dominion Police headquarters in Ottawa but also to the Chief Censor in Ottawa and to British authorities.

33. During the First World War the Royal North-West Mounted Police¹³ had the major responsibility for collecting security intelligence in the Prairie

¹³ The North-West Mounted Police became the Royal North-West Mounted Police in 1904.

Provinces. Their work in this area stemmed mainly from regulations under the War Measures Act providing for the registration and internment of suspected enemy aliens. Through nearly 200 detachments, they investigated allegations concerning pro-German sympathies and activities of immigrants from Europe. The R.N.W.M.P. did not have a security service division nor had it encouraged the development of plain clothes work for criminal investigations. Consequently, it relied on private detective agencies and secret agents paid with Dominion Police Force funds for undercover counter-espionage investigations. These security agents infiltrated social institutions in immigrant communities, often in response to reports of suspected conspiracies received from citizens. During 1915 alone, the Mounted Police and their agents made 2,309 individual investigations resulting in the internment of 396 persons. After Saskatchewan and Alberta took over responsibility for provincial policing in 1917, the R.N.W.M.P. closed most of its detachments in these provinces and concentrated on preventing German agents from crossing the border into Canada.

34. Throughout the war, Commissioner Perry directed Canadian security investigations in the United States from R.N.W.M.P. Headquarters in Regina. The American authorities were not always notified. At this time there appeared to be no jurisdictional limits for 'friendly foreign agencies'. Just as Canada conducted security operations in the United States, the British ran agents in Canada without informing the Canadian government. At times this led to embarrassment. In 1917, for instance, the British Navy intercepted the Bolshevik leader Leon Trotsky off the coast of Nova Scotia on his way home to Russia after the abdication of the Czar, and, without consulting Ottawa, had him interned in that province. The Canadian authorities were unhappy about the Admiralty's action, and were relieved when Trotsky was allowed to continue his journey some three weeks later.¹⁴

35. In the period of social dislocation, economic instability, and political upheaval which followed World War I, federal security intelligence agencies focussed on what was perceived to be a new threat to Canada's internal security: radical labour agitation — especially in Western Canada. At this time security intelligence work at the federal level was far from unified. By the fall of 1918 the federal government was receiving reports from four security agencies. Security intelligence was collected in Saskatchewan and Alberta by the Mounted Police, whose Commissioner reported to the President of the Privy Council, and in the other provinces by the Dominion Police, whose Commissioners were responsible to the Minister of Justice. In addition, the Chief Censor's Office and a Directorate of Public Safety, established in the Justice Department, supplied the government with assessments of the internal security threat. The Cabinet feared that the post-war labour agitation was nurtured by revolutionary international forces and directed the security agencies to investigate these international connections. Both the Dominion Police and the R.N.W.M.P. carried out extensive undercover investigations into the labour movement. Although intelligence reports from R.N.W.M.P. Headquarters do not appear to have corroborated the politicians' fears of internationally

¹⁴ William Rodney, "Broken Journey: Trotsky's Canada", 1917. *Queen's Quarterly*, Winter, 1967.

inspired revolutionary plots, Ministers continued to assess the situation differently, partly on the basis of assessments of the internal security threat received from British sources.¹⁵ In his memoirs Sir Robert Borden described the Winnipeg General Strike of 1919 as "a definite attempt to overthrow the existing organization of the government and to supercede it by crude, fantastic methods founded upon the absurd conceptions of what has been accomplished in Russia".¹⁶

The development of security intelligence as an R.C.M.P. responsibility: 1920-46

36. The Dominion Police Force was absorbed into the Mounted Police under legislation which came into effect on February 1, 1920. The Royal Canadian Mounted Police was now a national police force with federal law enforcement responsibilities. One of the principal purposes of this change was to unify and strengthen the federal security intelligence capability.

37. Although the R.C.M.P. was now the sole federal agency responsible for the collection of security intelligence there were neither statutory nor ministerial guidelines for carrying out this intelligence role. In the parliamentary debate on the R.C.M.P. Act no mention was made of the Force's security intelligence role. In the decades between the wars, government direction was provided informally through frequent meetings between the Minister of Justice (who was responsible for the R.C.M.P.) and the Commissioner of the R.C.M.P., and through the response of Ministers to weekly and monthly intelligence reports from the R.C.M.P. Until 1933 a senior civilian employee of the Force, who was often referred to as Director of Intelligence, was chiefly responsible for liaison with government departments on security intelligence matters.

38. From 1920 until the establishment of the R.C.M.P.'s Special Branch in 1946, security service activities were the responsibility of the Criminal Investigation Branch (C.I.B.) of the R.C.M.P. Until the mid-1930s there was little to differentiate security investigations from other investigative work of the C.I.B. At Headquarters, the Director of Criminal Intelligence was responsible for security and intelligence investigations. In the field, C.I.B. detectives investigated alleged subversives as well as criminal cases. A secret agent who had penetrated a subversive group reported to C.I.B. detectives, or, if the agent was a member of the Force, to the Director of Criminal Intelligence at Headquarters. In 1936 a distinct 'Intelligence Section' in the C.I.B. was established at Headquarters.

39. On the eve of World War II, although some specialization of security intelligence activities had begun to develop both at Headquarters and in the field, the number of R.C.M.P. members involved in these activities was extremely small. The Headquarters group involved in security intelligence

¹⁵ S.W. Horrall, "The Royal North-West Mounted Police and Labour Unrest in Western Canada, 1919", *Canadian Historical Review*, Vol. 61, LXI, No. 2, June 1980.

¹⁶ *Robert Laird Borden: His Memoirs*, Toronto, Macmillan of Canada, 1938, Vol. II, p. 972.

work consisted of only six persons, some of whom were part-time. The senior intelligence officer, Inspector C.E. Rivett-Carnac, for example, was also the editor of the *R.C.M.P. Quarterly*.

40. World War II significantly increased the security intelligence responsibilities of the R.C.M.P. and led to a rapid expansion of the Intelligence Section. At its peak in 1943 the strength of the Intelligence Section at Headquarters had grown to three officers and 95 others. Similarly the field Divisional Headquarters developed units specializing in security work, especially the analysis of information obtained from internees. The largest of these units were in Toronto (20), Montreal (19) and Vancouver (9). By the end of the war the scale of specialized security intelligence work within the R.C.M.P. had contracted considerably.

41. In the years between the wars R.C.M.P. security intelligence activities were almost entirely centred on counter-subversion. The main targets were Communist groups and Communist-led labour organizations. Successive governments wished to be kept informed about the possibility of revolutionary plans and international sources of support of such organizations. To obtain this information the R.C.M.P. frequently had its own members infiltrate the organizations. In a number of cases, these R.C.M.P. members remained undercover for years as active members of Communist organizations. However, section 98 of the Criminal Code, which was enacted in response to fear engendered by the 1919 Winnipeg General Strike, made membership in such organizations a criminal offence.

42. In the 1930s, as a result of co-operation between the federal and Ontario governments, the Ontario government decided to prosecute six leading members of the Communist Party for offences under section 98. An R.C.M.P. undercover agent gave evidence at the trial and in so doing disclosed the nature and extent of R.C.M.P. penetration of the Communist movement in Canada. The six leaders were found guilty of offences relating to their membership in the Party but were acquitted of the more serious charge of acting in a seditious manner to overthrow the state. The trial stimulated opposition to section 98 of the Criminal Code, and, following a change of government in 1935, section 98 was repealed. Following these events, some curtailment of undercover activity occurred.

43. One consequence of this focus on Communist political groups and labour organizations was that the R.C.M.P.'s involvement in security intelligence activities became a subject of political controversy, and frequent criticisms were voiced in the House of Commons about suspected R.C.M.P. surveillance of left-wing political activity. No official explanation of these activities was provided by Ministers; indeed, it was not until 1934 that a Minister of Justice reluctantly acknowledged in Parliament that there was a 'secret service' within the R.C.M.P.

44. The rise to power of Hitler and Mussolini was followed by the formation of Fascist and Nazi political organizations in Canada. In the latter part of the 1930s, these organizations became a major target of R.C.M.P. surveillance. Information obtained about membership in such organizations was of great

importance in identifying suspected saboteurs immediately after war was declared in September 1939. Besides using informants and undercover agents, the R.C.M.P. intelligence section used 'wire supervision' (the interception of telephone calls) for the first time in the late 1930s as a means of gathering information about suspected subversive organizations. There was no statute making such a technique a crime at that time.

45. When the R.C.M.P. became responsible for the collection of security intelligence in 1920, it adopted the policy of restricting the covert operations of R.C.M.P. intelligence personnel to Canada's territorial limits. There is no evidence that this policy was the result of a conscious decision by the Canadian government. Nonetheless, it reversed the practice which Canada had followed in the past, and it is now government policy. It meant, in effect, that Canada, unlike her major allies, did not develop a capacity for using secret means to collect in foreign countries information pertinent to Canada's security or national interests. It also meant that the only way of obtaining foreign information relevant to Canada's internal security and not available through open sources was from 'friendly' foreign agencies. Consequently, during the inter-war years the R.C.M.P. took steps to develop a liaison relationship with British and American intelligence agencies. As World War II approached, arrangements for sharing intelligence with the F.B.I. and the British secret agencies were strengthened.

46. During World War II the national security functions of the R.C.M.P. were considerably expanded. As in the 1914-1918 war, the largest intelligence function was in relation to the registration and internment of enemy aliens. The Commissioner of the R.C.M.P. was appointed Registrar General of Enemy Aliens and 16,000 Germans were registered by March 1940. When Italy entered the war in June 1940, R.C.M.P. files permitted the rapid identification, arrest and detention of Italian immigrants suspected to be dangerous to the security of Canada. Fear of undercover enemy agents led to continual reports by suspicious citizens, and each case was investigated by a member of the Intelligence Section. By March 1941, all Canadian residents of Japanese citizenship who had not become Canadian citizens by 1922 were registered. R.C.M.P. intelligence reports indicated that only a small number of these persons were security threats. However, after the outbreak of war with Japan, in response to strongly expressed public apprehension, the government, using powers available to it under the War Measures Act, relocated all Japanese Canadians from the West Coast to inland areas and detained them there, and confiscated their property.

47. Another security intelligence function assigned to the R.C.M.P. during the war was to advise about industrial and military sites within Canada which might be vulnerable to sabotage. A special subsection of the Intelligence Section was established for this purpose.

48. The R.C.M.P.'s counter-espionage activities during the war were not extensive, perhaps because the large internment programme may have deprived enemy agents of Canadian contacts. In the early years of the war, before the Soviet Union became an ally, the prime target of counter-subversion activities

was suspected Communist attempts to disrupt the war effort. Surveillance was also maintained on the anti-conscriptionist movement in Quebec and on the Jehovah's Witnesses. The latter group, like the Communists, had been declared an illegal organization under the Defence of Canada Regulations.

The expansion of security intelligence activities after World War II

49. In 1945 the revelations of the Soviet cypher clerk, Igor Gouzenko, created a turning point in the development of Canada's security intelligence activities. Gouzenko revealed that the Soviet Union had organized an extensive espionage network in Canada. This network operated largely through the 'recruitment' of civil servants and scientists into Communist front groups and Communist Party cells. Members of the network, through their positions in government departments and research agencies, had obtained and passed over to their Soviet 'handlers' information of vital importance to the defence of Canada and her allies. These disclosures alerted the Canadian government, as well as the British and American governments, to the urgent need to strengthen their defences against Soviet espionage and clandestine Communist involvement in political life.

50. In 1946, in direct response to the Gouzenko spy revelations, the Canadian government introduced a programme of security screening in the federal Public Service to ensure as far as possible that persons with access to secret information were trustworthy. Such a screening programme was one of the main recommendations of the Royal Commission on Espionage which had investigated the Gouzenko disclosures. The Commissioners were Mr. Justice Robert Taschereau and Mr. Justice R.L. Kellock of the Supreme Court of Canada. Under the screening programme the R.C.M.P. was designated as the agency responsible for investigating the personal lives and political associations of persons requiring security screening. Government departments would decide whether to grant or deny clearance largely on the basis of R.C.M.P. reports.

51. The security screening work of the R.C.M.P. has been authorized by a series of Cabinet Directives. These Directives have established criteria for identifying the kinds of political activity which, in the government's view, represent threats to the security of Canada. Originally these criteria specified membership in or association with Communist or Fascist organizations as the basis for denying a security clearance. But over the years these criteria have been widened to embrace more generic categories of political activity. Cabinet Directive 35, which since 1963 has governed the security screening of government employees, sets out the criteria of 'disloyalty' and 'features of character' which it is considered might severely affect a person's 'reliability'. Greed, debt, illicit sexual behaviour, drunkenness, drug addiction and mental imbalance are listed as examples of 'unreliability'. In 1972 the Security Advisory Committee authorized the R.C.M.P. to include in its security screening reports information on a candidate's "separatist sympathies, associations and activities". This formalized an R.C.M.P. practice which had arisen out of an arrangement made between the R.C.M.P. and the Privy Council Office seven years earlier.

52. In Part V and Part VII of this Report we will examine in detail the policy issues associated with these criteria. Here we wish to note the impact these

criteria have had on the surveillance and investigative work of the security side of the R.C.M.P. The Security Service systematically collects and stores information on individuals and groups who fall within these criteria. This provides the basic data for 'subversive indices' checked by the security screening branch for every person who is screened. Beginning in 1946, the systematic collection of information about Canadians who fall within the security screening criteria has been a major function of the security intelligence division of the R.C.M.P. Yet, until 1975, the Cabinet Directive on security screening for the federal Public Service was the only written instruction from the Cabinet concerning the kinds of security intelligence to be collected by the R.C.M.P.

53. Three other security screening programmes came to rely heavily on the R.C.M.P. for security intelligence. These were for citizenship, certificates of identity (i.e. travel documents for non-citizens) and immigration. Of these three, the immigration screening programme had the greatest impact on the R.C.M.P. The Immigration Act of 1952 established "prohibited classes" of persons who were to be refused admission to Canada on security grounds. Some modifications in these criteria were made when the new Immigration Act¹⁷ was passed in 1976. Section 19(1) of the new Act set the criteria for excluding persons from entry to Canada on security grounds. The R.C.M.P. established a visa control section to assess the extent to which each of the thousands of post-war refugees wishing to emigrate to Canada might fall within the prohibited categories of the Immigration Act. The establishment of this section led for the first time to the posting abroad of R.C.M.P. members to serve as visa control officers.

54. Another government security programme in the post-war years, which added to the security intelligence mandate of the R.C.M.P., was aimed at preparing lists of persons to be interned in the event of an emergency. This programme was originally based on the Defence of Canada regulations passed pursuant to the War Measures Act during World War II. These regulations were revised in 1959-61 and replaced by the draft Internal Security Regulations. The draft regulations are designed to be used if a proclamation is issued invoking the War Measures Act. They provide that the Minister of Justice may order an individual or group of individuals to be interned and the Governor in Council may declare a group to be an illegal organization. The R.C.M.P.'s role in the preparation for internment has been to provide information on individuals and groups to an Advisory Committee on Internment which was appointed by the Department of Justice. The Committee, on the basis of established criteria, decided which names to put on the internment list. In the atmosphere of the Cold War, the focus was on the Communist Party and Communist front organizations. This programme was given a high priority by the R.C.M.P. until the mid-1960s.

55. The increased security intelligence functions assigned to the R.C.M.P. after World War II led to a more specialized organizational structure within the R.C.M.P. In 1946, the Intelligence Section, which at Headquarters had been part of the Criminal Intelligence Branch, was organized into a Special

¹⁷ Immigration Act, 1976, S.C. 1976-77, Vol. 1, ch.52.

Branch. Four years later the Officer in Charge of the Special Branch, Superintendent McClellan, began to report directly to the Commissioner of the R.C.M.P. rather than to the Director of the Criminal Investigation Branch. In 1956, the Special Branch was elevated to the Directorate level and became known as the Directorate of Security and Intelligence or "I" Directorate. Assistant Commissioner Harvison (who, like Superintendent McClellan, would later become a Commissioner of the R.C.M.P.) was the first officer in charge of this Directorate. This structure remained intact until 1970. In that year, the new head of "I" Directorate, John Starnes, was appointed Director General, with a rank equivalent to that of Deputy Commissioner, and the name of "I" Directorate was changed to the Security Service, underlining the difference between security intelligence work and regular police work.

56. The number of persons involved in the R.C.M.P.'s security intelligence work increased rapidly in the years following World War II. From the small group at Headquarters, which constituted the Intelligence Section at the end of World War II, Special Branch had grown considerably by 1951. By 1960, "I" Directorate's membership had tripled and had doubled again by the time Mr. Starnes took over as Director General a decade later. In a little over 20 years, the R.C.M.P.'s manpower specializing in security intelligence activities had increased more than fifty-fold.

57. Not all of those in the R.C.M.P.'s Special Branch and its successors, "I" Directorate and the Security Service, have been regular members of the R.C.M.P. Since 1951 there have been four different categories of personnel which reflect the make-up of the Force as a whole:

- Regular Members of the R.C.M.P.
- Special Constables of the R.C.M.P.
- Public Servants
- Civilian Members of the R.C.M.P.

The largest component of the Security Service is made up of regular members of the R.C.M.P. who have joined the Force as young men (there have been only two women), have gone through the basic training at Regina, and at different points in their career have moved over from regular police work to the part of the Force which does security intelligence work. Since 1951 regular members of the R.C.M.P. have constituted at least 44 per cent of the personnel on the security side. Special constables have been recruited into the Security Service to perform specialized investigative work and are not on the career path of a regular R.C.M.P. member. The public servants carry out support staff functions such as clerical and stenographic work and are drawn from the staffing pool of the Public Service.

58. The fourth category of security intelligence personnel — the civilian member — is of particular importance for it is the effective melding of this component into the security intelligence team that has created a severe organizational challenge. The R.C.M.P. began to recruit civilian members into the Special Branch as Reader Analysts in the early 1950s. Their primary role was to analyze information from the field and to write intelligence reports for

Ministers and government departments. The intellectual and literary skills of these civilian members could be of crucial importance for the quality of intelligence reports, but as outsiders their career prospects in security intelligence work were dim. This was soon identified as a serious organizational problem. In 1957, Deputy Commissioner Brunet, writing to the Commissioner about general conditions in "I" Directorate, made this comment:

The situation as regards Reviewer Analysts is a problem and a source of worry at times. As you know, they are all civilians and, there not being much future for them, with a few exceptions we have not been able to keep these people very long and they are hard to replace. We never know which one may go next.

Later on in this Report we shall analyze this problem in detail and consider the various attempts to deal with it. But in this historical overview we wish only to note that this major problem in the organization of Canada's security intelligence capability, a problem which still exists today, first surfaced nearly 25 years ago.

59. While the security screening programmes provided the basis for routine security intelligence collection and reporting by the R.C.M.P., there was also a steady expansion after World War II and until the early 1970s, of R.C.M.P. investigative and preventive activities with respect to both foreign intelligence agencies in Canada and various forms of domestic 'subversion'. There was no explicit administrative or statutory authorization for this expansion. We have previously noted that the original R.C.M.P. Act of 1920 made no explicit reference to the security intelligence responsibilities of the Force and nothing has been added to the R.C.M.P. Act since then. The only specific reference to security intelligence activities is to be found in section 24 of the R.C.M.P. Regulations,¹⁸ which lists the following amongst the duties of the Force:

(e) to maintain and operate such security and intelligence services as may be required by the Minister.

Subsequent parts of this Report will describe a number of the operations carried out in recent years by the Security Service and will analyze the legal and policy issues arising from them. The following is simply an outline of the main features of security operations as they developed since World War II.

60. Following the Gouzenko revelations, the R.C.M.P.'s counter-intelligence operations (efforts to detect and prevent activities of foreign intelligence agents in Canada) increased in scale and sophistication. By the end of World War II all of the major powers and a number of lesser countries had developed very substantial secret services to gather intelligence and promote their national interests in foreign countries. The relaxation of international tensions in the détente period did not lead to an abatement in the 'secret war'. Although Canada did not develop an espionage capacity of its own, there was no indication that Canada was regarded as 'off limits' by the foreign intelligence agencies of other countries. A major security intelligence role of the R.C.M.P. has been the responsibility for keeping track of these foreign intelligence activities in Canada and of taking certain preventive actions against them.

¹⁸ C.R.C., ch.1391.

61. The vocabulary of counter-intelligence distinguishes 'legal' from 'illegal' operations. There is no consistency within the intelligence community as to precise definition of what is a 'legal' agent and what is an 'illegal' agent. One distinguishing factor is that the 'legal' agent is one who operates under diplomatic cover out of his mission, while an 'illegal' is an agent who operates independently under deep cover, often with false identity documents, and sometimes communicates directly with the intelligence headquarters of the country which he serves. R.C.M.P. counter-intelligence investigations have been concerned with detecting the activities of both kinds of agents. This has involved the surveillance of diplomats suspected of carrying out secret intelligence functions in Canada as well as the investigation of persons suspected of being long-term, deep cover foreign agents.

62. Foreign intelligence agents, whether 'legal' or 'illegal', are usually highly trained in evading detection. The 'tradecraft' of espionage which developed during World War II was continually refined in the post-war years, thereby creating pressure on counter-intelligence agencies to keep pace. The counter-intelligence branch of the R.C.M.P. made considerable efforts to increase its technical competence in detecting and countering foreign intelligence agencies. Among other things, this led to an increased use of technical means of intercepting oral and written communications, technical visual surveillance and the use of mobile physical surveillance teams. Efforts to detect 'illegals' also led to the use of confidential personal information to check individual identities. In Part III of this Report we shall be reporting on the legal implications of these techniques; in Part V we shall put forward our recommendations on the laws, policies and procedures which should govern the use of these techniques.

63. Counter-intelligence operations have been concerned not only with collecting information about foreign intelligence activities but also with preventing such activities. In a number of cases, R.C.M.P. investigations led to prosecutions of individuals for espionage offences under the Official Secrets Act or decisions of the Government of Canada to declare foreign diplomats *personae non gratae* and expel them from Canada. Since World War II there have been 20 cases involving persons charged with espionage offences under the Official Secrets Act (see paragraphs 9 to 19 of our First Report for a discussion of these cases) and 42 diplomats have been declared *personae non gratae*. But considerably more frequent are less formal preventive actions such as warning Canadians who are in danger of being compromised or recruited by foreign intelligence agents. The rarest but most valued preventive activity is the 'turning' of a member of a foreign intelligence agency into a 'double agent' of the counter-intelligence agency. Like counter-intelligence agencies in all countries, the R.C.M.P. counter-intelligence service has expended much energy on preventing the development of double agents in its own ranks and developing double agents within 'hostile' intelligence agencies.

64. In the immediate post-war years, the Soviet Union's intelligence activities in Canada were the major 'target' of the R.C.M.P.'s counter-intelligence work. More recently, while the Soviet Union has remained a target, considerable investigative resources have also been directed towards the agents of a number

of other countries as well as a number of organizations and certain countries associated with international terrorism.

65. 'Foreign intelligence' activity investigated by the R.C.M.P. has often had little to do with espionage as that term is normally understood. Much of it has taken the form of what in the jargon of counter-intelligence is known as "active measures of foreign intervention". Such measures include, for example, efforts to induce members of an immigrant community in Canada to support the government of their native land and efforts to induce a Member of Parliament or a senior official of the Canadian government to support the interests of a foreign government in Canadian policy-making. Foreign intelligence programmes of this kind in Canada are apt to embrace activities which are well within the ambit of acceptable diplomatic activity or lobbying as well as activities which involve stealth and blackmail and clearly go beyond conduct compatible with the values of Canadian society and its system of government. In Part V of this Report we shall discuss the principles which should apply to counter-intelligence investigations against active measures of foreign interference. In this brief historical survey we wish only to report that in the last two decades active measures of foreign interference have been of increasing concern to the security intelligence arm of the R.C.M.P. and that no clear policies or procedures have been developed by the government for identifying which kinds of foreign intelligence activities are legitimate targets of investigation and which are not.

66. The surveillance and investigation of domestic subversion by the R.C.M.P. also increased greatly in the post-war years. Earlier, in the years between the two World Wars these counter-subversion investigations focussed on Communist organizations and suspected Communist front organizations. The Gouzenko spy trials and the political atmosphere of the Cold War encouraged concentration in these areas. However, in the 1960s, R.C.M.P. counter-subversion activity began to extend far beyond Communist groups.

67. One of the major new concerns was terrorism. In one sense terrorism was not new — in the 19th century and early 20th century, Canada had contended with groups such as the Fenians and "anarchists" who used violence for purposes of political propaganda or to force concessions from government. What was new in the 1960s was the scale, the intensity and the publicity associated with terrorism. The terrorist groups which have emerged in the last two decades have had much more money and much more help from foreign governments than was ever the case in the past. They have also taken advantage of the freedom of movement and relative permissiveness of liberal democracies such as Canada. In particular they have relied on the mass media to derive the maximum political impact from an act of violence. As one historian of terrorism has put it, they have learned

that the terrorist act by itself is next to nothing, whereas publicity is all.¹⁹

68. A major responsibility of the R.C.M.P.'s "I" Directorate and its successor, the Security Service, in the 1960s and 1970s has been the investigation of

¹⁹ Walter Laqueur, *Terrorism*, London, Weidenfeld and Nicholson, 1977, p. 223.

domestic terrorist organizations, especially those like the Front de Libération du Québec (F.L.Q.) in Quebec. The 1970 October Crisis increased the priority given to the need for good intelligence about terrorist threats in Quebec. Prime Minister Trudeau subsequently told the House of Commons that after

... the events of October 1970, when there had been terrorism, murder and kidnapping, we directed the R.C.M.P. — and I believe this was the will of the House — to pay a little more attention to internal subversion caused by ideological sources in Canada and not only concentrate on externally sponsored types of subversion.

It then became obvious that one of the groups they were going to look at was one composed of those who were trying to break this country, separate it, and who had been using force in order to do it. There was a great deal of indignation on the part of members opposite, and indeed many people across the country, because at the time of the October, 1970, events the police had to throw a very wide net indeed and arrest many people who were apparently guilty of nothing because the police were misinformed. They did not have inside information on the terrorists, those who had kidnapped Mr. Cross and Mr. Laporte. So obviously we told them — we did not have to tell them because they would have done it by themselves — to concentrate a little more on this threat. So I suppose that as a result of that they began infiltrating the F.L.Q. and they began trying to get more information on those who would destroy the country by force, whether they be in Quebec or in other parts of the country.²⁰

A number of the events examined and reported upon by our Commission are related to the efforts of the R.C.M.P. Security Service to obtain intelligence about terrorist organizations in Quebec.

69. Intelligence concerning the activities of foreign terrorists also became a major priority of the Security Service in the 1970s. The tragic terrorist assault on the Munich Olympics in 1972 and the awarding of the 1976 Olympics to Montreal highlighted the importance to Canada's security of prompt and accurate intelligence about foreign terrorist organizations. Largely through the Security Service, Canada has been both a consumer and a producer of international intelligence about terrorism. Canada's obligation to contribute to the international pool of intelligence about terrorist groups was strengthened in 1974 when Canada signed the United Nations' Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.²¹

70. The terrorist component of R.C.M.P. counter-subversion investigations has been the least controversial element in the expansion of counter-subversion activities. Much more contentious has been the investigation of 'radical' or 'extremist' groups, many of which do not participate in political violence. Student radicalism of the mid- and late-1960s and the so-called 'New Left' became areas of concern to the R.C.M.P., as did native and black 'extremism'. Exponents of Quebec independence using democratic means to promote their

²⁰ House of Commons, *Debates*, November 2, 1977, p. 564.

²¹ Resolution adopted by the General Assembly A/RES/3166 (XXVIII), February 5, 1974.

political objectives, a number of trade unions, and Canadian supporters of the anti-Viet Nam war movement, among others, became targets of security intelligence surveillance by the R.C.M.P.

71. In Part V of this Report we shall analyze in some detail past policies with respect to the targetting of domestic subversion and advance our own recommendations as to how domestic subversion should be defined as a legitimate area of surveillance. Here we wish only to record the general growth of domestic subversion investigation by the R.C.M.P. in the 1960s and '70s and the fact that at that time there was no clear basis in law or government policy for determining the proper scope of counter-subversion investigation by the R.C.M.P. Aside from the criteria of 'disloyalty' set out in the Cabinet Directive governing security clearance, there were no government guidelines as to where legitimate dissent ended and subversion began.

72. Outside the terrorist field, counter-subversion investigation resulted in few criminal prosecutions. Some of the information collected was used as a basis for advising police forces of the participation of members of 'subversive' organizations in political demonstrations and picketing. Intelligence about 'subversive' organizations was also used to advise those responsible for protecting vital points and V.I.P.s, and for providing security for major international events in Canada such as the Habitat Conference and the Olympic and Commonwealth Games. Information was also passed on to federal government departments for a variety of purposes. Often information about members of 'subversive' organizations was reported as provided for under the legislation and directives governing security screening programmes. On other occasions reports were designed to advise departments as to the presence or absence of 'subversives' in activities of concern to the departments. One example of such a report was an R.C.M.P. brief on the "Extra Parliamentary Opposition" which was sent to the Solicitor General on May 12, 1971, the policy implications of which we shall examine in subsequent chapters.

73. As with counter-intelligence activities, the R.C.M.P.'s counter-subversion operations were not confined to collecting and reporting information. A wide range of 'countering' measures were employed to disrupt or break up groups considered to be subversive. We have inquired into the nature of these measures and have heard a great deal of evidence about their use especially in the 1970s. In Part III we shall report on those countering techniques which were not authorized or provided for by law and in Part V we shall analyze the full range of countering techniques and present our recommendations with regard to their use.

74. Throughout the period of expanded counter-subversion activity, the Security Service relied mainly upon the collection of information from covert rather than overt sources. The primary information on which its intelligence reports have typically been built has been garnered from investigations using clandestine investigative techniques. Many of these techniques were originally developed for counter-intelligence work against secret foreign agents. In the 1960s and 1970s they were increasingly used against Canadian citizens and organizations suspected of subversive activities. Our Report will indicate later the

extent to which electronic surveillance, mail opening, searches without warrant and the use of confidential personal information have been used in the counter-subversion and in the counter-intelligence spheres. 'Human sources' tended to be used to a greater extent in counter-subversion activities than in counter-intelligence operations. Paid informants and undercover members of the Security Service have been frequently used as a means of obtaining information about the membership, plans and activities of domestic political groups suspected of being involved in subversive activities.

75. While in the years between the end of World War II and the appointment of the Royal Commission on Security in 1966 the security intelligence activities of the R.C.M.P. were increasing rapidly, both in volume and in the use of intrusive investigative techniques, there was relatively little change in governmental arrangements for directing or reviewing this activity. Parliament still played no active role in either approving or reviewing security intelligence activities. On the executive side, the Prime Minister continued to have the ultimate responsibility for matters relating to national security, and the Minister of Justice continued to be the Minister responsible for the R.C.M.P., but there were no established procedures whereby either was kept informed on a regular or systematic basis of the scope of R.C.M.P. security intelligence activities or the methods employed in these investigations.

76. In the early 1960s, as security issues became increasingly controversial, it was the Prime Minister who most often took the chief responsibility for responding to Opposition questions in the House of Commons and stating government policy. On October 25, 1963, Prime Minister Lester B. Pearson, responding to public concerns about security investigations, announced in the House of Commons changes in security clearance procedures. These procedural changes were designed to provide some safeguards to government employees by requiring that doubt about their security status be disclosed to them and that a panel of senior officials review cases in which departments were proposing to deny a security clearance. Later, in November 1963, in response to concerns voiced by the Canadian Association of University Teachers, Prime Minister Pearson issued the following policy statement with respect to R.C.M.P. surveillance of university campuses:

There is at present no general R.C.M.P. surveillance of university campuses. The R.C.M.P. does, in the discharge of its security responsibilities, go to the universities as required for information on people seeking employment in the public service or where there are definite indications that individuals may be involved in espionage or subversive activities.²²

It is worth noting that this was the only occasion during this period when the government publicly disclosed policy in relation to the R.C.M.P.'s gathering of security intelligence.

²² "R.C.M.P. Activities on University Campuses", *C.A.U.T. Bulletin*, Vol. 13, No. 2, October 1964.

The Royal Commission on Security and its implementation

77. On March 7, 1966, Prime Minister Pearson announced the establishment of the Royal Commission on Security, popularly referred to as the Mackenzie Commission after its Chairman, Mr. Maxwell Mackenzie. Mr. Yves Pratte and the Honourable M.J. Coldwell were Mr. Mackenzie's fellow Commissioners. Although the decision to establish the Commission had been triggered by public controversy surrounding the case of Mr. George Victor Spencer, a postal employee dismissed for security reasons, the Commission's terms of reference went far beyond this case and directed it "... to make a full and confidential inquiry into and report upon the operations of Canadian security methods and procedures".

78. Mr. Pearson linked the Commission's mandate to the establishment of the Department of the Solicitor General. Under the Government Organization Act, 1966, the Solicitor General of Canada took over the duties and functions previously exercised by the Minister of Justice with respect to penitentiaries, parole and the R.C.M.P. The Prime Minister emphasized the importance of the security work amongst the responsibilities of the newly created Department. He told the House of Commons that "... a high priority function of the new Department will be to examine in detail the problems of espionage and subversive activities, and to determine how best to deal with them". It was, he said, "in order to assist the Solicitor General in his particular and new responsibility..." that the government had decided to establish the Commission.²³

79. The Royal Commission on Security submitted its Report to the government in October 1968, and the government published an abridged version in June 1969. We have had the opportunity of comparing the abridged and unabridged versions and would note that very little was deleted from the published Report. Most of the Commission's recommendations dealt with ways and means of improving government security procedures in such matters as security screening, departmental security and industrial security. We shall be referring to many of these recommendations in Part VII of this Report.

80. The Royal Commission also recommended three important structural changes in Canada's security system. First, it called for the establishment of a Security Secretariat in the Privy Council Office to formulate and supervise the implementation of security policy and procedures. Second, and most importantly for the R.C.M.P. Security Service, it recommended the establishment of a civilian agency outside the R.C.M.P. "... to perform the functions of a Security Service in Canada".²⁴ And third, the Commission called for the establishment of a Security Review Board to hear appeals in security screening cases affecting the Public Service, immigration and citizenship. The Board would also receive periodic reports from the Head of the Security Service and "have authority to draw to the direct attention of the Prime Minister any matters it considers appropriate."²⁵

²³ House of Commons, *Debates*, March 7, 1966, pp. 2296-97.

²⁴ *Report of the Royal Commission on Security*, paragraph 297.

²⁵ *Ibid.*, paragraph 66.

81. The Commission did not contemplate any significant change in the new Security Service's mandate from that of the R.C.M.P. Security Service. Its primary role would continue to be the collection, evaluation, and reporting of information or intelligence "concerning espionage and subversion".²⁶ The Royal Commission also recommended that future legislation should provide for the interception of telephone conversations, electronic surveillance and the examination of mail for security purposes.²⁷

82. The government did not accept the Royal Commission's recommendation to establish a civilian Security Service separate from the R.C.M.P. Instead, it opted for something of a compromise. In tabling the Commission's report in the House of Commons in June 1969, Prime Minister Trudeau announced that the Security Service would remain under the Commissioner of the R.C.M.P. but it would become "increasingly separate in structure and civilian in nature". Under new and more flexible policies relating to recruiting, training and career planning, it would be possible, according to the Prime Minister, for

... an increasing number of university graduates from all parts of Canada to join the [Security Service] in a civilian capacity and to aspire to positions at the top of that organization.²⁸

In Part VI of this Report, we provide a detailed account of the extent to which Prime Minister Trudeau's policy was implemented. Here we will record only the highlights.

83. So far as 'civilianization' is concerned, the most dramatic development was the appointment of persons who were not R.C.M.P. members as Directors General of the Security Service: first, Mr. John Starnes from the Department of External Affairs who served from January 1, 1970 to April 30, 1973, and then Lieutenant-General Michael Dare from the Department of National Defence, who has served from May 1, 1973 until the present. But aside from these appointments there was little progress towards the Prime Minister's objective. Between 1969 and 1979 the civilian member component increased from 9.9 to 17.2 per cent of the Security Service's strength, but nearly all of the increase has been at the lower ranks or in the service and administrative branches. By the end of the decade not a single civilian was in an officer-equivalent position in an operational or planning branch. However, programmes to assist R.C.M.P. members in returning to university have substantially raised the formal education levels of Security Service members since 1969.

84. As for autonomy, there was little change until 1976 when the Security Service was given "National Division" status within the R.C.M.P. This meant that more administrative responsibilities were delegated to the Director General of the Security Service and, operationally, Security Service field units would report to Security Service Headquarters in Ottawa rather than to the heads of the R.C.M.P.'s geographic divisions. Under Commissioner Simmonds, who

²⁶ *Ibid.*, paragraph 63.

²⁷ *Ibid.*, paragraph 306.

²⁸ House of Commons, *Debates*, June 20, 1969, p. 10637.

became Commissioner in 1977, the change has been somewhat in the opposite direction. Largely in response to the events that led to the appointment of this Commission, Commissioner Simmonds has taken steps to bring the supervision of Security Service practices and policies more closely under his control.

Current organization and strength of the Security Service

85. To complete this account of the evolution of the R.C.M.P. Security Service we shall provide a brief account of its internal organizational structure, the size of the Service and the distribution of members amongst its various functions and services.

86. The head of the Security Service is the Director General. The Director General reports to the Commissioner of the R.C.M.P. who, under the direction of the Minister (the Solicitor General), "has the control and management of the force and all matters connected herewith".²⁹ The Director General has a rank equivalent to a Deputy Commissioner, the second highest rank in the R.C.M.P. There are now four persons at this rank at Headquarters: besides the Director General, there are Deputy Commissioners for Criminal Operations, Administration and Canadian Police Services. Since 1977 an executive committee, constituted by these four and chaired by the Commissioner, advises the Commissioner on policy matters relating to all aspects of R.C.M.P. activity, including the Security Service.

87. Within the Security Service, immediately under the Director General, are three Deputy Directors General, one for Administration, one for Services and one for Operations. The Deputy Director General for Administration directs the financial and personnel administration of the Service, its training programmes and its office of internal security. Under the Deputy Director General for Services are branches which provide technical services directly to the operational branches. These branches include the Security Service's records section and automated information retrieval facility and branches responsible for physical surveillance and all aspects of electronic surveillance. The operational branches of the Security Service report to the Deputy Director General for Operations (D.D.G. Ops.).

88. Intelligence collection and countering responsibilities are assigned to three operational branches reporting to the Deputy Director General of Operations. Two of these branches concentrate on counter-intelligence activities against foreign intelligence agencies. The third of these operational branches is concerned with domestic subversion and is roughly equivalent in size to the two counter-intelligence branches combined. The only major fluctuation in these arrangements during the 1970s was the rise and fall of "G" Operations branch between 1971 and 1976. This branch focussed on 'subversive activities' related to separatism in Quebec. Its activities resulted in incidents which gave rise to this Commission and which will be fully reported upon later in our Report. "G" Operations was phased out in 1976. In addition to these investigative operational branches, there are three other branches

²⁹ R.S.C. 1970, ch.R-9, s.5.

which have operational roles: one is devoted to carrying out the R.C.M.P.'s security screening functions, a second specializes in the development and administration of 'human sources', and the third performs an intelligence co-ordination function.

89. There are two additional organization units directly under the Director General. The Security Service has a small audit group which we describe in some detail in Part VI of this Report. The Director General also has a secretariat which provides staff support services to him in a number of areas: co-ordinating Security Service contributions to the interdepartmental committee system exclusive of any intelligence co-ordination function; operating the yearly planning cycle; conducting policy studies; and initiating research. An organizational chart of the Security Service is annexed as Appendix "V".

90. The total establishment of the Security Service (including public service employees) actually declined as a percentage of the R.C.M.P.'s total establishment. Slightly less than half of the Security Service's staff is located at R.C.M.P. Headquarters in Ottawa. Field units are located in a number of the geographic divisions of the R.C.M.P. As was explained earlier, since the Security Service was given National Divisional Status in 1976, these field personnel report through Security Service Area Commanders to Security Service Headquarters in Ottawa.

91. Expenditures by the Security Service do not represent the full costs incurred, as the Security Service receives a number of services and forms of support (for example, accommodation in R.C.M.P. buildings, R.C.M.P. administration and pension payments) which are not billed to it directly.

C. THE R.C.M.P. SECURITY SERVICE: CURRENT ROLE

The Cabinet Directive of 1975

92. In the 1970s there was increasing concern on the part of the Security Service and the Solicitor General over the lack of a clear government mandate for the surveillance and preventive activities of the Security Service. The scope of these activities had, as we explained earlier, widened considerably in the 1960s and early 1970s. The only explicit government guidelines on security threats — the Cabinet Directives, regulations and legislation relating to security screening and internment in preparation for war — had been drawn up in the Cold War period. At that time threats to Canada's internal security were identified basically in traditional ideological terms as espionage conducted by Communist régimes, Communist groups on the far left of the ideological spectrum, and to a lesser extent, groups on the far right. But the perception of threats to security and the concept of subversion were gradually extended to encompass a wide spectrum of groups associated with radical dissent, political, social and constitutional change and the use of demonstrations and confrontations for political purposes. Security Service surveillance of these groups was not directed by any explicit government policy or guidelines. Nor was there explicit authorization for a number of the investigative and countering activities developed over the years by the R.C.M.P. in its security work.

93. The absence of clear authorization for R.C.M.P. security activities was partially alleviated on July 1, 1974, when section 16 of the Official Secrets Act came into force. This legislation³⁰ empowered the Solicitor General of Canada to issue a warrant authorizing the interception or seizure of communications for security purposes. The relevant parts of section 16 are as follows:

2. The Solicitor General of Canada may issue a warrant authorizing the interception or seizure of any communication if he is satisfied by evidence on oath that such interception or seizure is necessary for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada or is necessary for the purpose of gathering foreign intelligence information essential to the security of Canada.

3. For the purposes of subsection (2), "subversive activity" means:

- (a) espionage or sabotage;
- (b) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
- (c) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;
- (d) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada; or
- (e) activities of a foreign terrorist group directed toward the commission of terrorist acts in or against Canada.

This section went some way towards implementing the Royal Commission on Security's recommendation for legislation authorizing the Security Service's use of certain investigative techniques. But it fell well short of providing a clear and comprehensive authorization for Security Service operations.

94. In his testimony before us the Honourable Warren Allmand explained that soon after he became Solicitor General in 1973 he came to the conclusion that the R.C.M.P. Security Service "needed a clearer and more understandable mandate", a mandate, as he put it, "that was up with the times" (Vol. 114, pp. 17536, 17543). Mr. Allmand has testified that he was seeking more than clarity. He also felt that there should be some reduction in the scope of Security Service surveillance. He told the Commission that:

Well, what existed before was unclear, but in my mind the guidelines would make clear that certain targets which had been targets in the past should not be targets in the future. . . There was sometimes a tendency to consider a left wing activist group as subversive even though they did not believe in carrying out their work contrary to the law or in a violent way, and I felt that was wrong, even though we may disagree with the purpose of those groups.

(Vol. 116, pp. 17917-18.)

95. Mr. Dare, the Director General of the Security Service, told the Commission that the Security Service was at that time, independently of the Solicitor General, coming to the view that a new government 'mandate' was needed. Indeed in Mr. Dare's view, "the whole of the initiative to seek a mandate came

³⁰ Protection of Privacy Act, S.C. 1973-74, ch.50.

from within the Security Service". He explained that the impetus for this initiative came from the "allegations of impropriety" associated with the Watergate affair in the United States. The need for a new mandate was confirmed at a meeting of senior field officers of the Security Service in the fall of 1974 which was addressed by Mr. Gordon Robertson, the Secretary to the Cabinet. According to Mr. Dare, Mr. Robertson told the Security Service officers that "it is quite obvious that your people are in need of clear direction" (Vol. 125, pp. 19463-65).

96. A memorandum proposing a new mandate was prepared within the Security Service, reviewed by the Solicitor General and his senior advisers and submitted by the Solicitor General to the Cabinet for final approval in March 1975. On March 27, 1975, the Cabinet approved the following guidelines for Security Service activities:

*The Role, Tasks and Methods of the R.C.M.P.
Security Service*

The R.C.M.P. Security Service be authorized to maintain internal security by discerning, monitoring, investigating, deterring, preventing and counter-ing individuals and groups in Canada when there are reasonable and probable grounds to believe that they may be engaged in or may be planning to engage in:

- (i) espionage or sabotage;
 - (ii) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
 - (iii) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;
 - (iv) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada;
 - (v) activities of a foreign or domestic group directed toward the commission of terrorist acts in or against Canada; or
 - (vi) the use or the encouragement of the use of force, violence or any criminal means, or the creation or exploitation of civil disorder, for the purpose of accomplishing any of the activities referred to above;
- (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;
- (c) the Solicitor General prepare for consideration by the Prime Minister a public statement concerning the role of the R.C.M.P. Security Service.

We will have much to say about this Security Service mandate in subsequent chapters and, indeed, in Part V we will be advancing our own proposals for what we consider to be, in form and in substance, a more appropriate authorization for security intelligence activities. In this historical overview we wish only to note the most significant features of this mandate.

97. At the outset it is important to note the legal status of the Cabinet decision with respect to the Role, Tasks and Methods of the R.C.M.P. Security

Service. This decision took the form of a Cabinet Directive. Such a directive does not become part of the *laws* of Canada. When we speak of the *laws* of Canada, in either the federal or provincial context, we mean statutes, subordinate legislation in the form of statutory instruments and the decisions of the courts in interpreting statutory provisions or in applying the common law. Cabinet Directives and Records of Cabinet decisions do not have the status of law in the sense described above. This means, among other things, that such a directive cannot be invoked as authority to do what is otherwise contrary to law. The fact that the March 1975 Cabinet Directive did not constitute a law was clearly appreciated by the head of the R.C.M.P. Security Service, Director General Dare. On May 22, 1975, Mr. Dare wrote to all of the senior officers of the Security Service explaining the purpose and meaning of the Cabinet Directive. In that letter he wrote:

While at first glance the ingredients of our guidelines appear to be strict legal precepts, they are not.

98. The phrasing of the 1975 Cabinet Directive closely resembles a statement made by Prime Minister Trudeau in the House of Commons on July 11, 1973, concerning the criteria used to determine whether a group or an individual constitutes a security risk:

With respect to other individuals, groups or members of groups the following criteria are applied: those engaged in or planning to engage in espionage; sabotage; foreign intelligence activity directed towards gathering intelligence information about Canada; activities directed towards creating civil disorder or accomplishing governmental change within Canada or elsewhere by force or violence or any criminal actions; or activities directed towards actual or potential attack or other hostile acts against Canada.³¹

It should also be noted that the list of authorized Security Service targets in the 1975 Cabinet Directive was built upon the definition of 'subversive activity' in section 16(3) of the Official Secrets Act. The phrase "governmental change" in the third paragraph of the mandate was rendered somewhat more ambiguous by the fact that the French version of the Directive also referred to "*un changement gouvernemental*" whereas the counterpart to this paragraph in section 16(3) of the Official Secrets Act used the words "*un changement de gouvernement*". This change would appear to broaden Security Service surveillance to cover activities involving the use of force, violence, or criminal means to change a government policy as well as to change a government. Terrorist activities of *domestic* groups were added to terrorist activities of foreign groups. Paragraph (vi) referred to a new category of activity not included in the Official Secrets Act list.

99. The addition of the sixth paragraph was quite significant. So far as the Security Service is concerned, it was clearly intended to add a good deal as the Security Service had pressed for an additional clause of this kind precisely on the grounds that it felt unduly constrained if *all* of its activities had to be confined to the limits imposed on the use of electronic surveillance by section 16 of the Official Secrets Act. Also, the Memorandum to Cabinet accompan-

³¹ House of Commons, *Debates*, July 11, 1973, p. 5499.

ying the March 27 guidelines explained that the addition of the sixth clause meant that there need be no change in the existing range of Security Service activities. This would appear to have been the Director General's understanding of the Directive. In his letter of May 22, 1975, to senior officers of the Security Service, the Director General, Mr. Dare, emphasized that the guidelines were intentionally broad and were not intended to alter fundamentally the Security Service's current activities. The Security Service, he wrote:

... will continue to monitor traditional areas of interest — such as Communists, Trotskyists, Marxists, separatists, bloc revolutionaries, native extremists, right-wing extremists and revolutionaries from other countries resident in Canada.

100. The 1975 Cabinet Directive did not specify the methods of investigation or of countering which would be employed by the Security Service. It simply indicated that the Security Service could carry out a number of activities — namely, discerning, monitoring, investigating, deterring, preventing and countering — in relation to a list of activities. Mr. Dare's letter of May 22 interpreting the Cabinet Directive emphasized that:

Members of the Security Service must act within the limits of the guidelines and within the limits of the law. (The italics were his)

101. The 1975 Cabinet Directive was not publicly disclosed at the time it was agreed to. On October 28, 1977, Mr. Francis Fox, then Solicitor General, paraphrased the main terms of the Directive in the House of Commons, and it was publicly disclosed in its entirety for the first time, by us, on July 31, 1978.

Other components of the Security Service

102. The 1975 Cabinet Directive did not purport to be an exclusive and comprehensive statement of the Security Service's role. As we have related in section B of this chapter, in the years following World War II the R.C.M.P. was designated the investigative agency for security screening programmes in relation to Public Service employment, immigration, citizenship and certificates of identity. The correspondence, memoranda and Cabinet Directives establishing these programmes continue to be sources of authority for Security Service activities.

103. Here we will state only that under one or the other of these security screening programmes the Security Service might be asked to collect and report intelligence about a subject which does not fit within the list of activities in the 1975 Cabinet Directive. One example of this with respect to security screening of the Public Service is that beginning in 1965, as a result of views expressed at a meeting of a committee of senior government officials the previous year, the R.C.M.P. included in its reports information about the separatist associations of candidates for security clearances. Some confusion arose after March 1975 as to whether the Security Service should continue to provide this information. The Cabinet appeared to settle this point by deciding on May 27, 1976 that:

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 Québécois, is relevant to national security and is to be brought to the attention of the appropriate authorities if it is available;

However, the Cabinet did not clarify how information about separatists who were not engaging in activities listed in the 1975 Cabinet Directive should become "available" to the Security Service. The policy problems inherent in this situation will be reported upon in more detail in Part V of this Report.

104. Another government programme which has formed part of the R.C.M.P.'s security intelligence mandate concerns the preparation in advance of lists of persons to be interned under the War Measures Act in the event of a proclamation under the Act. As we indicated above, this programme was actively maintained at the peak of the Cold War and the R.C.M.P.'s contribution to it constituted one of the Force's major responsibilities in the field of security intelligence. In recent years it has been relatively dormant. We shall examine this programme in detail in Part IX of this Report and make our recommendations with regard to it.

105. In addition to formal programmes of intelligence collection discussed in the preceding paragraphs, there are many other contexts in which the R.C.M.P. Security Service is asked or expected to provide intelligence to governments and police forces for the protection of security. For instance, the Security Service is expected to provide those who are responsible for protecting international dignitaries visiting Canada with assessments of possible threats to the safety of such persons. The Security Service plays a similar role with respect to Canadian V.I.P.s, international events in Canada, and airport security. In all of these, and other contexts, the Security Service's role is not to provide the actual protection but the intelligence upon which those responsible for the protection can base their security measures. Similarly, in responding to security crises brought about by terrorist actions or other forms of political violence the Security Service's role is to provide intelligence to federal and provincial authorities responsible for dealing with the crises.

106. The Government of Canada has developed plans for responding to emergencies. The Civil Emergency Planning Order,³² passed on June 8, 1965, requires that the Minister of Justice (now, presumably, the Solicitor General):

- (2) Through the Royal Canadian Mounted Police,
 - (a) exercise responsibility for
 - (i) the internal security of Canada in all matters of subversion and espionage,
 - (ii) the protection of specified Vital Points;
 - (iii) Port and Travel Security Control;
 - (iv) the administration and operation of civilian internment camps, and
 - (v) the providing of assistance to other services and departments in the identification of persons unable to identify themselves;
 - (b) exercise responsibility in accordance with the police jurisdiction of the R.C.M. Police and in co-operation with other police forces, for the

³² P.C. 1041.

internal security of Canada in all matters of sabotage and police assistance in the enforcement of federal statutes and emergency legislation; and

- (c) assist provincial and municipal governments and their police forces, as requested, in all matters pertaining to the co-ordination of emergency police planning and operations.

107. Similarly the Government War Book assigns a number of functions to the R.C.M.P. in the event of war. While these emergency and wartime plans do not specifically refer to the Security Service or its predecessors, it is reasonable to infer that it would be this Service of the R.C.M.P. which would be expected to provide the security intelligence required by the R.C.M.P. to carry out the duties assigned to it in emergency and wartime situations.

D. THE R.C.M.P. "P" DIRECTORATE, FOREIGN SERVICES DIRECTORATE AND EMERGENCY RESPONSE TEAMS: CURRENT ROLES

108. During the 1970s three changes were made in the internal organization of the R.C.M.P. which relate to the Force's security responsibilities. The first was the establishment in 1973 of the Protective Policing Directorate ("P" Directorate) which grouped together in a single directorate those branches and sections of the Force involved in providing protective services for government property, personnel and information. The formation of "P" Directorate stemmed in part from the Royal Commission on Security's recommendations that all agencies concerned with protection against electronic eavesdropping

... should be combined in one part of the protective security branch of the Security Service.³³

109. "P" Directorate is not part of the Security Service. Its Director reports to the Deputy Commissioner, Criminal Operations. Most of the component parts of "P" Directorate had previously been part of the Criminal Investigation Branch. Counter-technical intrusion responsibilities constituted the only function previously performed by the Security Service. Other responsibilities assigned to "P" Directorate include airport policing, security engineering, V.I.P. protection, advice to government departments on physical security, and administration of the Canadian Human Rights Act as it applies to the R.C.M.P.

110. The emphasis in "P" Directorate is on the provision of protective services rather than investigation. Where intelligence about groups or individuals who may threaten security is required by those providing the protective service (for example, in protecting airports or visiting dignitaries), it would normally be supplied by the R.C.M.P. Security Service.

³³ *Report of the Royal Commission on Security*, paragraph 229.

111. The second change occurred in 1979 with the establishment of a Foreign Services Directorate to co-ordinate all R.C.M.P. foreign liaison activity. The Foreign Services Directorate brought together the Security Service and Criminal Investigation Directorate components of the R.C.M.P.'s Foreign Liaison Services under a single commanding officer who reports to the Commissioner of the R.C.M.P. through a committee of senior officers whose membership includes the Director General of the Security Service. This change affects the R.C.M.P. liaison officers who are stationed abroad at 28 Canadian missions and who, among other duties, are responsible for the security vetting of all persons applying to emigrate to Canada as permanent residents. These liaison officers, whether involved in police liaison, security liaison, or screening for visas are now members of the Foreign Services Directorate.

112. Creation of the R.C.M.P.'s Emergency Response Teams was the third change. They constitute one other component of the Force which has a role in emergency situations threatening the security of Canada. As their name implies, the function of these units is not to gather intelligence about threats to security but to respond to an emergency once it occurs. A number of municipal police forces have developed similar units. The R.C.M.P. Emergency Response Teams are now established at both the divisional and detachment level at various locations across Canada. These teams may be called upon in emergency situations such as an embassy takeover, a V.I.P. hostage-taking, an airline hijacking or a prison riot. Through courses at the Canadian Police College, the R.C.M.P. also provides educational assistance to the special crisis teams of other police forces.

E. THE DEPARTMENT OF THE SOLICITOR GENERAL

113. The Government Organization Act of 1966 created the Department of the Solicitor General and transferred to it the powers, duties and functions previously exercised by the Minister of Justice and Attorney General for Canada with respect to:

- (a) reformatories, prisons and penitentiaries;
- (b) parole and remission; and,
- (c) the Royal Canadian Mounted Police.³⁴

One reason for establishing this new Department was the need to give more ministerial attention to security issues. This reason was emphasized by Prime Minister Pearson in explaining the government's intention to introduce the legislation establishing the Department of the Solicitor General:

We hope to introduce legislation shortly which will establish, among other things, the department of the Solicitor General under a minister who will have responsibility for the R.C.M.P. and for security matters. This will be a responsibility to which he will be able to give considerable time, because this increasingly important aspect of the work of the present Department of Justice will then become the responsibility of a separate minister. The new

³⁴ R.S.C. 1970, ch.S-12, s.4.

minister will be able to give much closer attention to these difficult problems than has been possible in the past. A high priority function of the new department will be to examine in detail the problems of espionage and subversive activities, and to determine how best to deal with them.³⁵

114. The newly created department of the Solicitor General was organized on what has been referred to as "The Swedish Ministry" concept. The Deputy Solicitor General and a small departmental secretariat were to play a limited research and policy role. They were not to manage the three agencies, the Canadian Penitentiary Service, the National Parole Board and the R.C.M.P., which constitute the operational components of the Department. The Order-in-Council³⁶ which transferred responsibility for the three agencies to the Solicitor General designated the Commissioner of the R.C.M.P., the Commissioner of Penitentiaries and the Chairman of the National Parole Board as deputy heads of these agencies for the purposes of the Civil Service Act. The heads of these agencies, including the Commissioner of the R.C.M.P., report directly to the Solicitor General, and not to the Deputy Solicitor General.

115. The legal framework of the Department of the Solicitor General created doubts and controversy as to the powers and role of the Deputy Solicitor General in relation to all three of the agencies under the Solicitor General, and especially in relation to the R.C.M.P. In subsequent chapters of this Report we will examine this issue in more detail and make recommendations on its resolution. But here we should note that this legal controversy about the position of the Deputy Solicitor General was one of the factors which contributed to a situation in which the Solicitor General had very little access to informed advice about policy issues arising from R.C.M.P. activities, other than from the Commissioner of the R.C.M.P. and other members of the Force. Another factor which contributed to this situation was a tradition of independence from government direction which had characterized government-police relations prior to 1966. This tradition was fortified by a loosely defined legal doctrine according to which the police as peace officers are answerable only to the law, and police operations should not be interfered with by politicians. We shall examine later the validity of this doctrine as it applies to Canada. The expectations and attitudes engendered by this doctrine affected the quality of ministerial involvement in R.C.M.P. policies with respect to both criminal investigation and security intelligence activities. A point of fundamental importance, of which we became acutely aware as we conducted our inquiry, was the absence of a clear and shared understanding by Ministers, government officials and R.C.M.P. members of the policy issues relating to police and security operations about which responsible Ministers ought to be informed and on which they should be able to give direction.

116. Since 1966, the only significant change which has taken place in the organization of the Solicitor General's Department so far as security matters are concerned is the establishment of the Security Planning and Research Group (SPARG) within the Department in 1971. The original purpose of

³⁵ House of Commons, *Debates*, March 7, 1966, p. 2296.

³⁶ P.C. 1965-2286.

SPARG was to assist the Solicitor General in assessing the significance of security intelligence reports received from the R.C.M.P. The Solicitor General at the time, the Honourable Jean-Pierre Goyer, likened its role to that of Crown Attorneys who assess the significance of police reports of criminal activity. He told the House of Commons that the functions of this group were as follows:

1. To study the nature, origin and causes of subversive and revolutionary action, its objectives and techniques as well as the measures necessary to protect Canadians from internal threats.
2. To compile and analyze information collected on subversive and revolutionary groups and their activities, to estimate the nature and scope of internal threats to Canadians and to plan for measures to counter these threats.
3. To advise me on these matters.³⁷

Prior to Mr. Goyer's announcement there was much speculation in Parliament and in the media that what was being created was a parallel and civilian security service. Mr. Robin Bourne, the Assistant Deputy Solicitor General who headed the Group from its inception until 1979, testified before us as follows:

It certainly was the perception in the public mind and in the mind of some members of Parliament, that the Government... was setting up a civilian security service...

(Vol. 140, p. 21503.)

He went on: "I guess we were not very clever at explaining ourselves" (Vol. 140, pp. 21503-4). SPARG was not a civilian security service. The intention of the government in establishing the Group was as explained by Mr. Goyer in outlining its terms of reference. It was to provide the Solicitor General with information on internal threats to the security of Canada and to plan for measures to counter those threats. It was hoped to carry out this long-term research by recruiting personnel with strength in a variety of disciplines so that different perspectives could be brought to bear on the assessment of security threats reported by the R.C.M.P. Security Service.

117. There is no doubt that this Planning and Research Group did stay out of operational matters. It did not become an intelligence collection agency, and an allegation to the contrary made in the House of Commons as recently as October 1977 has been firmly rebutted by Mr. Bourne in his testimony:

Q. Now, I am asking you those questions — I want to make it clear that I am not going to ask you questions as to whether SPARG conducted any research or did any analysis in regard to the movements with which any of them may be connected. My only question is related to the placing of agents and the using of people to conduct any form of monitoring or surveillance or investigation?

A. No, sir.

(Vol. 142, pp. 21811-12.)

³⁷ House of Commons, *Debates*, September 21, 1971, p. 8026.

Mr. Goyer testified to the same effect when he said:

The Security Planning and Research Group was to advise the Minister. Therefore, it had no operational role. It had no role in investigations. It was not involved in gathering any information other than what was available to the general public...

(Vol. 120, p. 18848, translation.)

We are satisfied by this testimony and our own examination of R.C.M.P. files that SPARG did not become an intelligence collection agency. Indeed, Mr. Starnes, who was Director General of the Security Service when SPARG was created, was consulted about its creation and was an enthusiastic supporter. He testified:

Q. There was debate at the time of SPARG coming into existence, about the fact that this might be a civilian security service. What is your appreciation of that comment?

A. Uninformed.

Q. Did you feel at any time that this could have become a civilian security service?

A. Impossible.

(Vol. 124, p. 19437.)

He also told us

... that it would have been manifestly impossible for a group of twenty to thirty persons of the kind that had been assembled, with different backgrounds and different disciplines, to carry out an operational role. They, like me, ... would not have known one end of a microphone from the other, and it is manifestly absurd, and I say that there was a lot of uninformed public debate at the time about it, which was largely of a partisan political flavour, I suspect.

(Vol. 124, p. 19438.)

The frequent allegations made about SPARG, to the effect that it had an operational role, as well as a more general public suspicion of the Group's activities, prompted us to examine R.C.M.P. files on SPARG and its successors. Clearly, the Force had a major interest in knowing if another Security Service was being created. Our examination of R.C.M.P. documents revealed that the Group had no operational duties of any sort and was in no way a 'parallel' civilian Security Service. Its functions were as described by Mr. Goyer to the House of Commons in September 1971. One of those functions, SPARG's role as an assessor of R.C.M.P. security intelligence reports, did not materialize to the degree originally envisioned. In part, this was because it experienced difficulty in obtaining appropriate material from the R.C.M.P. As Mr. Bourne explained to us:

One of the reasons that SPARG really decided... to drop our initial intention to do long-term research, was that we just could not get our hands on the information that we needed to do that job.

(Vol. 140, p. 21774.)

He explained that, "...I think it would have been wrong for analysts in an outside organization to have direct access to operational files" (Vol. 140, p. 21501). In recent years the Group's major contribution to assessing the significance of R.C.M.P. reports and distributing assessments to government departments has been made through an interdepartmental committee, the Security Advisory Committee, for which the Group (or Branch as it is now called) in the Solicitor General's Department provides the Chairman and support staff. We shall examine this arrangement further in section G below.

118. In December 1972, the role of the Group was expanded to include certain responsibilities for crime prevention and law enforcement matters. This change was reflected in the Group's name which became Police and Security Planning and Analysis Group. The Group was to review and analyze criminal activities, trends and developments and formulate proposals for legislative policy concerning criminal investigations and police procedures. In 1974 the Group's title was changed again, this time to Police and Security Planning Branch (P.S.P.B.). By this time it had also taken on the primary responsibility for research and development in relation to the government's capacity to respond to civil emergencies and natural disasters. The rise of terrorism as a global phenomenon, together with the need for a co-ordinated government response to natural disasters and accidents, gave increasing importance to this role.

119. The Branch, now called the Police and Security Branch (P.S.B.), is responsible for analyzing and proposing measures in response to:

- threats to the internal security of Canada from organizations, groups and individuals either in Canada or elsewhere;
- policy formulation for the protection of personnel, property and equipment in the federal government, including the security of government information;
- the role of the federal government in law enforcement in Canada; and
- contingency planning for Ministry crisis handling in emergency situations.

The Branch has three divisions which cover the functions just outlined: Security Information Analysis and Contingency Planning; Police and Law Enforcement; and Security Policy.

120. In 1973 the Cabinet established a 'lead Ministry' system under which Ministers were assigned the responsibility for co-ordinating the government's response to different types of emergency. For internal security crises, including situations ranging all the way from isolated terrorist attacks to large scale insurrection, the Solicitor General is designated as the lead Minister. In the event of such an emergency, a Crisis Centre in the Solicitor General's Police and Security Branch comes into operation.

F. THE ROLE OF OTHER DEPARTMENTS IN SECURITY AND INTELLIGENCE

121. While the R.C.M.P. Security Service has the primary responsibility for security intelligence, there are other departments of the federal government

which have responsibilities in relation to security and intelligence. An examination of the security and intelligence activities of these other federal departments is not within our terms of reference. Nonetheless, we think a brief outline will fit the role of the R.C.M.P. Security Service into the total context of the federal government's security and intelligence arrangements.

122. All of the departments and agencies of the federal government have Security Officers. These Departmental Security Officers are responsible for the physical security of departmental premises, property and communications. They also have responsibilities with respect to personnel security. Decisions as to whether a person should be granted a security clearance are made by the Deputy Minister of each Department on the basis of information given to the Department by an individual applicant and information supplied by the R.C.M.P. Security Service. Departmental Security Officers co-ordinate this security clearance process within each department.

123. A number of departments have special security and intelligence functions in addition to the physical and personnel security functions which are carried out by all departments and agencies of the federal government. We shall briefly describe these more specialized security and intelligence activities below. The organizations in the federal government which perform these activities, together with the R.C.M.P., form what is sometimes referred to as the "security and intelligence community". We now turn to a consideration of those organizations. They are: the Department of External Affairs, the Department of National Defence, the Communications Security Establishment, the Department of Supply and Services and the Canada Employment and Immigration Commission.

The Department of External Affairs

124. The security and intelligence responsibility of the Department of External Affairs is carried out by three components of that Department: (a) the Security Division and (b) the Intelligence Analysis Division (which together make up the Bureau of Intelligence Analysis and Security), and (c) the Bureau of Economic Intelligence. A Deputy Under-Secretary of State (Security and Intelligence) directs the work of these three units.

125. The Security Division of the Department of External Affairs has responsibilities which are closely related to the R.C.M.P. Security Service. Its responsibilities with respect to personnel and physical security, especially in Canadian missions abroad, have a very important bearing upon Canada's counter-espionage capacity. Foreign intelligence agencies have attempted to penetrate the Canadian government by compromising its personnel posted abroad and gaining access to communications emanating from Canadian missions.

126. The National Security section of the Security Division has the most extensive links with the R.C.M.P. Security Service. One of its functions concerns the activities of foreign diplomats in Canada who are suspected of engaging in unacceptable intelligence activities. Such cases sometimes lead to decisions by the Canadian Government to declare a diplomat *persona non*

grata and to expel him from Canada. In these situations, the case against a diplomat is based primarily on information gathered by the R.C.M.P. Security Service and reviewed jointly by that agency and the National Security section. Close co-operation is needed to ensure that the diplomatic consequences of expulsion are balanced against the threat to Canada's security if the suspected diplomat remains in Canada. The National Security section also has responsibilities with respect to the granting of visas to foreign diplomats. The decision to grant or deny a diplomatic visa will have an important effect on the extent to which foreign intelligence officers in the guise of diplomats are admitted to Canada. The National Security section works closely with the R.C.M.P. Security Service in reviewing these applications. The Security Service is asked to provide information as to an applicant's previous involvement in intelligence activities during previous postings.

127. The Intelligence Analysis Division's principal function is to maintain a compendium of information on various geographic areas of the world based on information from the regional desks of the Department and from allied countries. The information received concerns political, economic and social trends and has been collected overtly, that is from open sources. Some of the information may relate to political developments abroad which affect the internal security of Canada. This Division does not prepare assessments of intelligence reports. Some of the information it assembles is distributed to interested government departments and agencies (including the R.C.M.P.) and to the Intelligence Advisory Committee. That committee (whose function will be described in section G below) combines reports received from various departments and agencies of the federal government, makes assessments of these reports and distributes these assessments to interested departments and agencies.

128. The Bureau of Economic Intelligence in External Affairs is responsible for the collation, storage and reporting of economic intelligence. It carries out basic assessments relevant to the intelligence priorities of 'economic' departments and agencies such as Finance, Industry, Trade and Commerce, Energy, Mines and Resources, and the Bank of Canada. These priorities are established by an Economic Intelligence subcommittee of the Intelligence Advisory Committee.

129. There is one further intelligence activity in the Department of External Affairs related to security. That is the work of the Co-ordinator for Emergency Preparedness who reports to the Director General of the Bureau of Intelligence Analysis and Security of the Department. This officer is responsible for preparing plans to deal with terrorist attacks on Canadian missions or Canadian citizens abroad. This responsibility stems from the fact that under the Government's emergency measures organization, the Department of External Affairs is the 'lead ministry' (i.e. the Department responsible for co-ordinating the government response) in the event of such emergencies occurring outside Canada. To fulfill his responsibilities the Co-ordinator uses information from open sources and overseas missions as well as intelligence reports from the R.C.M.P. Security Service.

The Department of National Defence

130. While this department has an obvious responsibility for the security of Canada in terms of the protection of Canadian sovereignty and contributing to the maintenance of world peace, it also has a number of functions which relate to the internal security of Canada and to intelligence. The security and intelligence components of the Department report to the Director General of Security and Intelligence.

131. In the area of security clearances, under the provisions of Cabinet Directive 35, the Department of National Defence conducts its own security clearance programme. While it uses its own Special Investigation Unit to conduct inquiries on the personal reliability of applicants for positions in the Canadian Armed Forces, it relies heavily on the R.C.M.P. for information about the criminal record of applicants or their participation in 'subversive' activities. In the area of technical security, the Department of National Defence, with the R.C.M.P. and the Department of External Affairs, maintains teams for the inspection of premises to detect eavesdropping devices or unacceptable audio emissions both within their own departments and agencies, and elsewhere in government. The Department of National Defence also has contact with the Departments of Supply and Services, External Affairs, and Industry, Trade and Commerce in such areas as the control of visits to and from National Defence establishments and firms employed on classified contracts, the release of classified information, the export of military equipment to foreign countries, and patent applications on military equipment.

132. With regard to intelligence, the Department of National Defence requires domestic security intelligence to fulfill its role in maintaining internal security. The phrase "internal security" as used by the Department refers to the role of the Canadian Armed Forces in support of the civil authority and can be distinguished from the fundamental *raison d'être* of the Canadian Armed Forces in the defence of Canada from foreign military aggression. Examples of internal security operations include: operations in aid of the civil power under section 235 of the National Defence Act³⁸ when a civil disorder or disturbance reaches a magnitude where the attorney general of a province may request the Chief of the Defence Staff to provide troops; armed assistance to another federal department, such as the provision of troops to a federal penitentiary in response to a request from the Solicitor General; and security precautions at Department of National Defence installations directly or indirectly threatened by a civil disturbance in their vicinity.

133. All units of the Canadian Armed Forces are required to investigate minor security infractions or incidents. Actual or suspected security incidents, particularly where espionage, subversion, sabotage or arson is a possibility, are investigated by the Department's Special Investigation Unit and, if there is evidence to suggest that any of these acts have been committed, the R.C.M.P. is informed. The Special Investigation Unit also maintains a Police and Security Liaison Programme under which it combines information obtained

³⁸ R.S.C. 1970, ch.N-4.

from the R.C.M.P. and other police forces with information from open sources to provide intelligence on possible threats to military installations or personnel. The Special Investigations Unit does not have a mandate to collect intelligence about such threats by covert means.

The Communications Security Establishment (C.S.E.)

134. This organization is a separately organized establishment under the general management and direction of the Minister of National Defence. The Chief of C.S.E. reports to the Minister through the Deputy Minister and the Chief of the Defence Staff. One function of the Communications Security Establishment is to manage and direct a communications security programme. Policy control of this programme comes through the Interdepartmental Committee on Security and Intelligence under the general direction of the Cabinet Committee on Security and Intelligence. (A description of these committees is set out in section G below.) The object of the communications security programme is to deny to foreign powers any valuable national information which they might acquire by exploiting Canadian governmental communications. Work in this area includes providing cryptographic advice on the security of coded communications.

The Department of Supply and Services

135. This Department's responsibilities with respect to physical and personnel security are especially important in the field of industrial security. The Department's programme of industrial security is concerned with the protection of classified and sensitive information in the hands of Canadian companies undertaking work on behalf of the Canadian or other governments. The programme is intended to meet the Canadian government's national and international industrial security commitments. This programme includes responsibility for the security clearance of personnel under Cabinet Directive 35. In carrying out its responsibilities for industrial security, the Department depends on reports of security threats from the R.C.M.P. Security Service. The Industrial Security Division is sub-divided into a number of functional areas: information security; personnel security clearance; electronic data processing (E.D.P.) security; training; and field and industrial security officers. The Protective Security Division is concerned with hardware security and closed circuit television (C.C.T.V.) systems in new buildings, and with surveys of regional supply centres and printing units. The Department also has an Emergency Supply Planning Division which is concerned with the establishment of a war supplies agency in the event of war, the development of emergency supply plans to support national emergencies, the management of the government-sponsored stockpile of supplies, and with the development of an industrial preparedness programme.

Canada Employment and Immigration Commission

136. Within the Enforcement Branch of this department is the Intelligence Division. This Division is concerned chiefly with analyzing and reporting on the long-term trends in illegal immigration and in collecting and analyzing information on immigrants active in organized crime. The Division receives infor-

mation from Canadian and American police and security forces through formal and informal channels and, in co-operation with the R.C.M.P., assesses it as a prelude to expulsion or to changing the immigrant's status.

137. Within the Foreign Branch, the Security Review Division looks at applicants for entry to Canada from the security point of view. The review involves liaison between local police and security forces and the R.C.M.P. Security Service here. This process is applied in the case of information on some categories of visitors, on suspected or known terrorists who may be coming to Canada, suspected or known intelligence officers and 'subversive' or 'front' organizations of which immigrants may be members.

G. THE ROLE OF THE CABINET AND INTERDEPARTMENTAL COMMITTEES

Background

138. Since the end of the Second World War, interdepartmental committees composed of senior civil servants have been the main centres for developing and monitoring policy in relation to security and intelligence. With regard to security policy, the most active body was the Security Panel. This committee was made up of senior officials and formed under the auspices of the Privy Council Office in 1946. It was chaired by the Secretary to the Cabinet. Initially its membership consisted of the Directors of Intelligence of the three military services, the Director General of the Defence Research Board, and representatives from the Department of External Affairs and the R.C.M.P. Later on, the membership of the Committee was expanded to reflect the broader concerns of the security community: the Department of Manpower and Immigration, Supply and Services, the Solicitor General (from 1966), and the Public Service Commission. In this later period, military representation was provided by the Deputy Minister of National Defence and the Chief of the Defence Staff. After 1953, all representatives on the Security Panel were of deputy minister rank, or its equivalent. The Commissioner represented the R.C.M.P. In 1953, in addition to the Security Panel, there was formed a Security Sub-Panel made up of officials from the same departments as were represented on the senior committee, but who were of lower rank. This body was chaired by an official in the Privy Council Office. The Security Sub-Panel carried out much of the preparatory work in formulating policy proposals for the Security Panel.

139. The main function of the Security Panel was to formulate security policy for the approval of Cabinet. The security issues with which it was primarily concerned related to physical and personnel security in government departments. For example, the Security Panel developed the security screening policies which were incorporated in Cabinet Directives after 1946. It also assumed some responsibility for the interpretation and application of government security policies. The 1963 Cabinet Directive on Security Clearance gave the Security Panel a formal part in the security screening process by requiring that the Secretariat of the Panel review all cases in which a department was

proposing to deny an employee a security clearance. Aside from security screening policies, the Security Panel had relatively little direct impact on the security intelligence collection activities of the R.C.M.P. One important exception was in relation to the collection of intelligence about Quebec separatism. In the summer of 1967, the Security Panel encouraged the R.C.M.P. to make a much greater effort to keep the government informed about the separatist movement in Quebec — its democratic and constitutional manifestations as well as its terrorist manifestations, and its connection with foreign interference activities.

140. On the intelligence side of security and intelligence affairs, the Joint Intelligence Committee, that had been established in 1942, continued after the war, until 1972 when it became the Intelligence Advisory Committee. Its function was to collate current intelligence gathered, to a large extent, from allied countries so as to alert relevant departments and agencies of government to international developments. Given the essentially international character of the intelligence procured through this Committee, it had little to do with the domestic intelligence gathering activities of the R.C.M.P. In 1960, an additional body, the Intelligence Policy Committee, was formed with membership of the deputy ministers from National Defence, Finance and Communications (after 1967), the Chairman of the Defence Research Board, the Commissioner of the R.C.M.P. and the Secretary to the Cabinet. It was chaired by the Under-Secretary of State for External Affairs. The Committee exercised general policy direction of the Canadian intelligence programme.

141. Until 1963 the Intelligence Policy Committee reported to the Defence Committee of the Cabinet, while Security Panel proposals went directly to the full Cabinet. In 1963, a Cabinet Committee on Security and Intelligence was formed to consider policy proposals brought forward by the Security Panel and the Intelligence Policy Committee. This Cabinet Committee has always been chaired by the Prime Minister. One of the Committee's first acts was approval of the revised security screening policy in the form of Cabinet Directive 35. It met only once more before the end of 1965 but was active between 1968 and the end of 1970 when it was concerned, first with the report of the Royal Commission of Security and, later, with the October crisis of 1970.

142. Until 1975, the Cabinet Committee on Security and Intelligence did not concern itself with defining the scope of Security Service surveillance. The only aspect of security intelligence targetting on which it appears to have given direction to the R.C.M.P. was with regard to Quebec separatism. In this field it urged the intensification of effort in the same direction as that advocated by the Security Panel and, at a meeting on December 19, 1969, agreed that the R.C.M.P. should be asked to provide a detailed report on the state of separatism in Quebec in terms of organizational relationships, numbers involved, strategies, tactics and foreign influence. No distinction was made between separatist groups employing legal means of advocacy and organization and those suspected of using illegal means.

143. The Royal Commission on Security recommended, *inter alia*, that a "formalized" Security Secretariat be established in the Privy Council Office to

formulate security policy and procedures and "with effective authority" to supervise their implementation. The Secretariat was to be concerned with programmes concerning physical and personnel security, and, significantly, it was to

... provide the link between the investigative and operational security service and government departments, and between this service and the public.³⁹

In implementing this recommendation the government encountered some difficulty in determining the appropriate division of responsibilities between the Security Secretariat in the Privy Council Office and the Solicitor General who, it will be recalled, had been given a major responsibility for security policy in 1966. This question was not clearly resolved. A large security secretariat with responsibility for all major aspects of security policy was not created. A small secretariat, consisting of an Assistant Secretary to the Cabinet and one assistant, continued to deal with the security policy activity generated by the interdepartmental committee system. At the same time the capacity of the Secretariat of the Solicitor General's Department to assist with security policy matters was, as we have seen, strengthened by the establishment in 1971 of the Security Planning and Analysis Research Group.

The reorganization of the committee system

144. A major change in the interdepartmental committee system occurred in 1972 when the Security Panel and the Intelligence Policy Committee were combined to form the Interdepartmental Committee on Security and Intelligence (I.C.S.I.). The reason for merging these committees was recognition of the close relationship between external intelligence and domestic security, especially in an era of international terrorism and increasing activity by foreign intelligence agencies. Like its predecessors, this Committee's membership was at the deputy minister level. Both the Deputy Solicitor General and the Commissioner of the R.C.M.P. were members. This committee, under the general direction of the Cabinet Committee on Security and Intelligence, was to keep under review Canadian security and intelligence organization and activities. However, procedures were not established for regularly reviewing the activities of the R.C.M.P. Security Service. At first I.C.S.I. was chaired by Mr. Gordon Robertson, who was then Secretary to the Cabinet and later Secretary to the Cabinet for Federal/Provincial Relations. Successive Secretaries to the Cabinet have assumed the chairmanship.

145. Under I.C.S.I. two new committees were created — the Security Advisory Committee (S.A.C.) and the Intelligence Advisory Committee (I.A.C.). Of these the Security Advisory Committee has had the closest links with the R.C.M.P. Security Service. S.A.C. became in effect a principal bridge between the Security Service and government. The Chairman of S.A.C. until 1979 was Mr. Bourne in his capacity as Assistant Deputy Minister for Police and Security matters in the Department of the Solicitor General. His successor as Assistant Deputy Minister, Mr. Michael Shoemaker, also assumed the

³⁹ *Report of the Royal Commission on Security*, 1969, paragraph 46.

chairmanship. The Director General of the Security Service is the Vice-Chairman. Its membership includes the heads of the intelligence and the security branches of other government departments, namely External Affairs, National Defence, Supply and Services, Employment and Immigration, and the Assistant Secretary to the Cabinet for Security and Intelligence. The support staff for S.A.C. has come principally from the Police and Security Branch in the Solicitor General's Department.

146. S.A.C. has had two principal functions. First, it has been responsible for reviewing the adequacy of policies concerning personnel and physical security in government departments and bringing forward proposals for new policies. The responsibility concerns what might be referred to as the 'nuts and bolts' issues of government security policy. A network of sub-committees and working groups operates under the aegis of S.A.C. to deal with specialized aspects of security such as communications and computer security, the protection of nuclear materials and crisis management. S.A.C.'s second responsibility is related to security intelligence: it is to produce assessments of the internal security situation in Canada for the I.C.S.I. and the Cabinet Committee on Security and Intelligence. These assessments are based primarily on information reported by the R.C.M.P. Security Service. For a number of years such threat assessments were produced on a quarterly basis, but since 1976 these have been replaced by short weekly security intelligence reports on current domestic security developments. These reports are written by an interdepartmental drafting group attached to S.A.C., relying almost exclusively on Security Service information. Aside from security clearance reports, which are sent directly from the Security Service to government departments, S.A.C.'s weekly security intelligence reports provide the main opportunity for Ministers (other than the Solicitor General) to see security intelligence products emanating from the R.C.M.P.

147. The Intelligence Advisory Committee's sphere of responsibility is in the area of external intelligence. (One of the linguistic quirks of the intelligence community in both Canada and abroad is that at the level of government co-ordination and direction, 'intelligence' usually refers to intelligence about foreign rather than domestic matters (see footnote 8)). In contrast to S.A.C., I.A.C.'s role is primarily the collation and dissemination of external intelligence and the preparation of periodic intelligence assessments. It is chaired by the Deputy Under-Secretary of State (Security and Intelligence), for External Affairs. Its membership includes the Director General of the Security Service and the heads of branches of other departments with responsibilities in the field of external intelligence. One of I.A.C.'s sub-committees is responsible for identifying intelligence requirements and priorities, but this identification of intelligence priorities has had very little impact on the activities of the R.C.M.P. Security Service. I.A.C. has a small support staff, consisting of three seconded officers and a committee secretary, in the Privy Council Office. Through interdepartmental drafting groups and with the help of the seconded staff, I.A.C. produces special and general assessments of particular subjects as well as a weekly collation of external intelligence. The R.C.M.P. Security Service contributes to both kinds of product, but given the domestic focus of its work, its contributions have not been a major component of I.A.C. reports.

148. The Cabinet Committee on Security and Intelligence continued through the 1970s to preside at the apex of the interdepartmental committee system. Its most important contribution to the direction of the R.C.M.P. Security Service was its approval in March 1975 of a new mandate for the Security Service. That decision called for an annual Report to the Cabinet Committee of the Security Service's activities. (Before that, in the 1970s, there had been three audio-visual presentations by the Security Service to the Committee providing a very general overview of its work.) Since 1975 the Security Service has submitted only two 'annual' reports to the Cabinet Committee describing its main achievements and difficulties.

PART III

PROBLEMS IN THE SYSTEM: R.C.M.P. PRACTICES AND ACTIVITIES “NOT AUTHORIZED OR PROVIDED FOR BY LAW”. INSTITUTIONALIZED WRONGDOING

INTRODUCTION

- CHAPTER 1: Improper Acts**
- CHAPTER 2: Surreptitious Entries: Security Service and C.I.B.**
- CHAPTER 3: Electronic Surveillance: Security Service and C.I.B.**
- CHAPTER 4: Mail Check Operations: Security Service and C.I.B.**
- CHAPTER 5: Access to and Use of Confidential Information — C.I.B.**
- CHAPTER 6: Access to and Use of Confidential Information — Security Service**
- CHAPTER 7: Countering: Security Service**
- CHAPTER 8: Physical Surveillance**
- CHAPTER 9: Undercover Operatives**
- CHAPTER 10: Interrogation of Suspects**
- CHAPTER 11: Acts Beyond the Mandate**

INTRODUCTION

1. In this and the next three parts we express a number of serious concerns about the ability of the Security Service, both in recent years and in the future, to perform adequately and effectively those functions which we think are appropriate for Canada's security intelligence agency. Before we explain our concerns, however, we think it fair to observe that the many dedicated men and women in the Security Service are far from having failed on all fronts. Indeed, putting it positively, they have had successes. Success is not measured easily in security intelligence work: it is not always clean cut and only rarely known to the public. The public learns of successes when for instance, a defector from the intelligence service of a foreign country, such as Igor Gouzenko, brings positive evidence of espionage, so that charges can be laid under the Official Secrets Act and any foreign diplomats involved can be declared *personae non gratae*. Such an expulsion of diplomats is often the public's signal of a success of the Security Service. In 1978, thirteen members of the Soviet mission were declared *personae non gratae* after they attempted to develop a member of the R.C.M.P. Security Service as an agent. Between 1976 and 1980, four members of Soviet military intelligence have been either declared *personae non gratae*, or not had their visas renewed as a result of their efforts to develop agents in Canada who had access to classified technical information. Another publicly known 'success' led to the expulsion of members of the Cuban mission in 1977. As a result of our inquiry the public has become aware of the detection and apprehension in 1976 of a visitor to Canada who was a member of the Japanese Red Army. The detection of the use of Mr. George Victor Spencer by the Soviets became public in 1966.¹ We have made public the essential details of an operation in which agents of a foreign intelligence service were detected and their activities frustrated (Vol. 315, pp. 301402-12). The trial of Mr. Bower Edward Featherstone in 1967 resulted in his conviction on a charge of espionage.²

2. Those are among the successes of the Security Service that are publicly known and officially acknowledged. From time to time other successes attributed to the Security Service by the media have been neither confirmed nor denied.³ Others have not been publicized for operational or diplomatic reasons. Foreign diplomats whose activities as agents have been established are not always asked to leave Canada; sometimes their visas are allowed to expire, or the Department of External Affairs advises their ambassador that their return from home leave would not be welcomed. In such cases there is no official publicity and frequently the matter is not discovered by the media.

¹ *Report of the Commission of Inquiry into Complaints made by George Victor Spencer*. Ottawa, 1966.

² Referred to in our First Report, *Security and Information*, paras. 10 and 12.

³ e.g., Articles in the *Toronto Sun*, August 24 and August 25, 1980, reporting claims by a Canadian citizen who had immigrated from the U.S.S.R. that he had been an illegal agent of the K.G.B. and had been detected by the Security Service.

3. In some areas of counter-espionage and the detection of unacceptable foreign interference in Canadian affairs the Security Service has been more effective than in others because their personnel involved in those areas have been less severely hampered by constant transfers.

4. In some investigations of leaks of classified government documents the Security Service have identified the source without being able to collect enough evidence to obtain a conviction, and steps have been taken to prevent the suspect from doing further damage. The Security Service's role in the security screening programme, which we report on in Part VII, would appear to have at least been partially successful in ensuring that classified information and classified installations of the federal government are protected. The Security Service, by the collection of intelligence, has contributed significantly to the programme that involves "P" Directorate of the R.C.M.P., local detachments of the R.C.M.P. and other police forces in the protection of visiting foreign dignitaries and Canadian public figures who are open to physical attack. We must mention the work of the Security Service in planning and carrying out security arrangements for the Olympic Games in Montreal in 1976, the Habitat Conference in Vancouver in 1977, and the Commonwealth Games in Edmonton in 1978, all of which had the potential for terrorist acts of the kind seen at Munich in 1972.

5. This is an impressive list. It reflects the investigative skills of well-trained policemen — skills which we think the Canadian security intelligence agency should be able to continue to include in its arsenal. Nevertheless, in this Part, we shall demonstrate the breakdown of the rule of law in the Security Service, and in Part V show the deficiencies in the Security Service and in the R.C.M.P. itself that reduce the effectiveness of the Security Service. We shall also describe the failures in the R.C.M.P. to appreciate and accept the proper relationship between the civilian authority (the government) and a police force or security intelligence agency. There is of course no way in which all these deficiencies can be established as having caused failures in *particular* cases of counter-espionage operations, counter-subversion activities, security screening or the protection of V.I.P.s. Often a failure is not easy to detect, or to prove conclusively; when it is, it is not always possible to pinpoint the organizational deficiency (if there was one) that caused it.

6. The most we can do is point to the deficiencies and balance them against the successes. Our conclusion will be that to ensure the level of effectiveness which Canada is entitled to expect of a security service, respect for the law, acceptance of civilian authority, and respect for the liberties of the individual, significant changes are necessary in the present philosophy and structure of the security intelligence agency, and of the methods by which it accounts to government and Parliament and is controlled by government.

7. In Part II we described the evolution of the system developed for responding to security threats. In this Part we turn to what might be described as a breakdown in the system. Here we shall report on the history and development of a number of investigative practices used by the R.C.M.P. in both criminal investigations and the work of the Security Service. Where we speak of the

“C.I.B.” we refer to the Criminal Investigation Branch, now known officially as “C” Directorate.

8. As we examine these investigative practices we shall analyze whether their use has constituted conduct “not authorized or provided for by law” — whether the criminal law, some other federal or provincial statute that creates an offence or contains a prohibition, or the civil law enforceable by actions in the courts for damages, declaratory judgments or injunctions. This analysis is as comprehensive as we have been able to make it. We have considered not only those issues that have attracted considerable public attention but many that have gone relatively unnoticed. Given our commitment to the principle that both our national police force and the security intelligence agency should operate within the law, we have considered it our duty to analyze and make recommendations about all legal issues that have come to our attention in regard to investigation methods and other methods of carrying out duties. Many of these are issues which the R.C.M.P. itself has asked us to consider; others have been raised by ourselves.

9. This part of our Report will contain a reasonably detailed summary of the history of each practice and the development of the policies concerning it. This is an essential preliminary, first to the analysis of the legal issues that is found in this Part, and second to our recommendations for legislative reform found in Part V, Chapter 4 (as to the security intelligence agency) and in Part X, Chapter 5 (as to criminal investigations by the R.C.M.P.). They are also important as background to matters that will be reported on in our Third Report, which will, among other things, consider the extent to which senior members of the R.C.M.P., Cabinet ministers and public officials have been aware of those practices that are contrary to law.

10. Some of what is said in this Part as to the extent and prevalence of each practice will also form the foundation for our observations as to the need for each of the practices that has given rise to legal problems. Those observations are found in Parts V and X as a preliminary to our recommendations for legislative reform.

11. In some of the chapters of this Part the analysis of the legal issues will be thought lengthy by some readers. We make no apology. We believe that the R.C.M.P., the government and the public are entitled to have not only our conclusions as to lawfulness but also the reasons for our conclusions. Moreover, at times our conclusions are different from those that have been expressed by agencies of government, and we think that if we are going to differ we should say why.

12. In addition to practices that were contrary to law, there were activities that, while not contrary to law, were nevertheless “not authorized. . . by law” in the sense that they cannot be said to have been within the authority given to the R.C.M.P. by the R.C.M.P. Act or by regulations or ministerial directives made under that Act. It is that category of activities which we examine first.

CHAPTER 1

IMPROPER ACTS

13. We propose to discuss here a topic which is of the utmost importance but which is very difficult to examine at length without reference to specific incidents. The specific incidents on which we base our general conclusions here will be described in detail in a later Report. For reasons which we shall mention shortly we consider that it would not be proper to set out those incidents in this Report.

14. In Part I, we outlined the interpretation we have placed on our terms of reference. We pointed out that we have not considered that, in examining conduct of members of the R.C.M.P., we were restricted to looking at activities "not authorized or provided for by law". We indicated in our opening statement on December 6, 1977, that it was our intention to look at the moral and ethical implications of the conduct of members of the Force.

15. The general standards of conduct for the R.C.M.P. are explicitly laid down in section 25(o) of the R.C.M.P. Act which makes it a major service offence if a member

- (o) conducts himself in a scandalous, infamous, disgraceful, profane or immoral manner.

During the course of our examination of the R.C.M.P. and its Security Service a number of incidents have come to our attention which in our opinion constitute improper conduct and which we consider form enough of a pattern to be considered "institutionalized". Because each of them discloses conduct on the part of members which may constitute a major service offence under the R.C.M.P. Act, we do not propose to discuss details of the incidents in this Report. They will be dealt with in the Report which covers other incidents involving specific members whose conduct may have been illegal.

16. The common thread which we have detected running through these incidents is that of a willingness on the part of members of the R.C.M.P. to deceive those outside the Force who have some sort of constitutional authority or jurisdiction over them or their activities. We have come to this conclusion reluctantly and regretfully because in our view it might well be the most serious charge which we are levelling against the Force in our Report. Nevertheless, we are convinced that the practice existed. We have received evidence that federal Ministers of the Crown responsible for the R.C.M.P. were misled by the R.C.M.P. and that on other occasions relevant or significant information was intentionally withheld from Ministers. There is evidence that the same thing has occurred at the provincial level with respect to a provincial minister. There is also evidence that there was a similar approach adopted by the Force in dealing with senior public servants. The extent to

which such matters are established and form part of a widespread attitude by the Force that it need not be responsible to civilian authority will be looked at in Part X.

17. The purpose of this practice of deception does not appear to be to protect any particular member or members who might have been involved in some unlawful or improper conduct. Rather, it is based on one or the other of two misguided notions. One such notion is that the Minister responsible for the R.C.M.P. should not be fully informed of a questionable activity by the Force so that, if asked, the Minister can deny any knowledge about it. To inform him would, according to this notion, put him in an untenable position. Such a strategy should not be confused with the notion of "plausible deniability", a concept used in the United States to describe an "aversion to making written records of presidential authorization of sensitive intelligence-related operations.¹ The practice we are referring to did not involve avoidance of written evidence of high level approval but a decision not to inform Ministers of operations and policies which it would be difficult for a Minister to justify if questioned in the House of Commons. Each Solicitor General who appeared before us stated emphatically that he did not accept, as a norm to be applied to the accountability of the R.C.M.P. to the responsible Minister, the proposition that the Minister should not be informed of unlawful or even questionable acts. We agree wholeheartedly that withholding such information is unacceptable, even though there may be circumstances where the result of candour is extremely difficult and embarrassing for the Minister.

18. The other notion which has given rise to the practice of deception is that exposure to the Minister, and then perhaps publicly, of any questionable activity on the part of its members would inflict damage to the good reputation of the Force and that this concern is of greater weight than any need for candour, truth and forthrightness. This notion arises in part from the fact that the Force has become a national symbol, probably more so than any other Canadian institution or object. Protecting the Force's reputation is also a manifestation of a broader problem, which we will examine in Part VI, related to the unquestioning loyalty to the Force engendered in its members. We there point out that the R.C.M.P., through its recruiting, training and management practices, engulfs its members in an ethos akin to that found in a monastery or religious order. Extreme loyalty, untempered by an awareness that, among other things, the Force has a duty to be candid and forthright with the civilian authority, has contributed to both the practice of deception and an unwillingness, on the part of members not a party to a deception but aware of it, to disclose the deception to the Minister.

¹ *Report of Department of Justice Concerning Its Investigation and Prosecutorial Decisions with respect to Central Intelligence Agency Mail Opening Activities in the United States*, Department of Justice, Washington, Jan. 14, 1977, p. 11.

CHAPTER 2

SURREPTITIOUS ENTRIES — SECURITY SERVICE AND C.I.B.

INTRODUCTION

1. The practice by police forces of secretly entering premises, in the course of an investigation, without the consent of a person entitled to give consent is a serious intrusion into civil liberties, and deserves a detailed scrutiny. The need for such a practice, the implications of the search and handling of private property and possessions and the installation of devices for intercepting private communications, and above all, the assumptions of police forces as to their rights under the law, are the focus of discussion in this chapter. The practices of the two arms of the R.C.M.P., the C.I.B. and the Security Service, are examined separately, since the purpose of and policies relating to surreptitious entry by each of them are somewhat different. What is the same in both cases is the overriding misapprehension of the R.C.M.P. about the lawfulness of this practice, and for this reason we detail some of the areas of the law under which policemen might be liable to be charged as a result of this investigative practice.

A. NATURE AND PURPOSE OF THE PRACTICE: SECURITY SERVICE AND C.I.B.

The nature of the practice

2. We use the phrase “surreptitious entries” to describe entries into premises to which the public does not have access, without a search warrant or other lawful authority, and without the consent of the person who has the right in law to give or refuse it. Surreptitious entries are often made to survey premises in preparation for the installation of an electronic listening device, and then for the installation, monitoring, repairing and removal of the device, or to search premises, examine what is found there, and copy or photograph objects or documents. Sometimes objects or documents have been removed from the premises to be photographed and returned as soon as possible. Sometimes objects or documents thus removed have not been returned; sometimes they have been destroyed. In all these situations of surreptitious entry a common element is that the R.C.M.P., whether in the work of criminal investigation or of security, intend that the person whose premises are under investigation should not become aware of the operation, either at the time or later.

Consequently, the investigators are careful not to leave any evidence of their having been present.

3. Most of the formal policy developed by the R.C.M.P. concerning surreptitious entries and, accordingly, most of the evidence before us, relates to technical installations intended to intercept communications from, to, or among suspects, either by wiretaps or microphones. Many, but not all, of these installations require surreptitious entry to premises occupied or about to be occupied by the suspects. Sometimes entry is not needed, either because of the nature of the target or the technique employed. On other occasions installations can be completed with the consent of the owner or occupier of premises, either before or during a period of temporary occupancy by the suspect.

4. Some technical aspects of possible legal interest in the consideration of this subject should be mentioned. The installation of microphones or wiretaps does not, for obvious reasons, involve any substantial damage to the structure of a building, but on some occasions temporary physical damage is caused, and then is patched and disguised. In addition, while most installations supply their own power from batteries, on occasion a minor amount of electric power may be obtained from the supply on the premises, past the meter, as has been disclosed publicly on occasion in the trials of criminal cases.

5. It is certain that the development of the sophisticated skills necessary for surreptitious introduction of technical devices has led to an increase in the use of surreptitious entries over the past 20 years. However, the evidence is clear that surreptitious entry by members of the R.C.M.P. to secure intelligence concerning criminal activities, or activities of special interest to the Security Service, preceded the development of the techniques for electronic surveillance. The evidence before us indicates clearly that before the widespread use of electronic surveillance both the C.I.B. and the Security Service employed such entries to observe and photograph objects and documents. In addition to obtaining information and photographs the C.I.B. on occasion has removed items, such as suspected drugs, for subsequent confirmation. On the Security Service side, the cases of Operation Bricole and Operation Ham provide specific examples of permanent and temporary removal of objects and documents. In some cases, for example to install a listening device in an automobile, the personal property of a suspect — namely his car — may be removed temporarily and returned without detection.

The purpose of the practice

(a) Security Service

6. In July 1978, in public testimony, Assistant Commissioner Chisholm testified as follows:

Surreptitious Entry is an investigative practice which the R.C.M.P. Security Service has and does utilize in investigations relating to subversion, terrorism and activities of foreign intelligence agents in Canada. This practice has been utilized on a selective basis in excess of 20 years.

(Vol. 69, p. 11093.)

7. Then, by way of identifying the objectives of such entries, he quoted from the Report of the Australian Royal Commission on Intelligence and Security,¹ where Mr. Justice Hope spoke of search procedures as follows:

163. There are some special circumstances, other than those described in sections 10 and 8 of the Crimes Act, particularly associated with espionage, when it would be proper for A.S.I.O., if it had the power, to search premises for documents and records. The purpose of such a search would not be to obtain evidence, but to obtain intelligence. Thus if a person has been seen on numbers of occasions associating with a known member of an unfriendly foreign intelligence service it may be quite proper for A.S.I.O. to search premises occupied by that person to see whether there is any document or record which would throw light on the nature of that relationship. If some document or record is found it may establish that the offence of espionage has already been committed, and may show what it is the foreign intelligence officer is seeking. Without going this far it may show that, although the offence of espionage has not yet been committed, the foreign intelligence agent has established, or is in the course of establishing, a relationship with the other person which is likely to result in espionage.

8. Part of Assistant Commissioner Chisholm's testimony as to the need for search powers will now be quoted at length as it describes the purpose of the practice:

ESPIONAGE: ... Some foreign diplomatic missions provide official cover and immunities for a number of staff personnel who are actually intelligence officers specifically assigned to engage in activities beyond the scope of their official status as recognized by international convention or accord. In addition, some of these foreign countries maintain a second and separate intelligence network involving "deep cover operatives" who also perform intelligence functions detrimental to the security of Canada. In espionage parlance, the latter network is referred to as "Illegal" while the former is designated "Legal"; primarily because the network's personnel are legally in the country under official accreditation rather than under false identity. In both cases these hostile intelligence operatives are highly trained, supported by impressive resources to pursue strategic objectives often spanning decades. Both networks operate mainly to recruit and control people with access to the desired intelligence. Some are also known to possess the technical expertise and equipment necessary to systematically monitor Canadian military and other sensitive communications. Intricate clandestine methodology and the use of sophisticated espionage paraphernalia permits [sic] them to operate in relative security, yet their communications remain vulnerable to some degree inasmuch as the paraphernalia they commonly employ, if discovered, is highly incriminating.

Most intelligence operations are strategic in nature and the positive identification of hostile intelligence officers by the Security Service frequently represents only the beginning of our efforts. It is then necessary to identify other agents acting on their behalf, targets to which they are assigned and the potential damage that may be done to Canada. Accordingly, Surreptitious Entries, selectively conducted, have been and must continue to be a

¹ Australia, *Fourth Report of the Royal Commission on Security and Intelligence* (The Hope Report), Canberra, 1978, paragraph 163.

valuable counter-espionage measure enabling the Security Service to quietly identify and exploit hostile intelligence vulnerabilities.

It is clearly the responsibility of the Security Service in its conduct of counter-espionage operations to discern which foreign missions engage in inappropriate intelligence activities in this country, and to inform the Canadian government so that deterring and countering procedures can be considered at the appropriate time. The mission as a whole does everything to conceal the existence of intelligence operatives, frustrating attempts to distinguish them from among other personnel in their diplomatic mission. While Canadian missions abroad are often required to employ local staff, many of whom are believed to be informants of the state security forces, some foreign missions in Canada generally refuse to hire Canadians and consequently eliminate a potentially valuable source of information to the Canadian Security Service.

In spite of such difficulties, ongoing analysis of the behaviour of mission personnel in Canada, together with other information, contributes significantly to the identification of intelligence officers. This information is used to establish operational priorities and to evaluate potential damage to Canadian security interests. While much information on suspected and known intelligence officers can be generated through other investigative techniques, Surreptitious Entries may provide tangible confirmation of intelligence involvement. Items such as sophisticated electronic devices, antennae, note books, and address books, etc., come readily to mind. As well, they can yield data on the target's status, life style, personality, intelligence interests and cover story inconsistencies, all of which contribute to the accurate evaluation of the intelligence officer.

The entry must be surreptitious by its very nature for, if our activities become known to the intelligence officer, he would in all likelihood alter his intelligence activities and possibly hand over the operation to a colleague unknown to us. Of equal importance, knowledge of the entry would provide the opposition with valuable intelligence as to our current counter-espionage capabilities and frustrate our attempts to gain intelligence about their activities and safeguard Canadian interests.

The investigational complexities of detecting illegal networks are even greater, primarily a result of the sophisticated clandestine procedures employed. Any indication that his activities are under investigation will immediately cause an illegal agent to cease operations and, if the danger of exposure is high, flee Canada after destroying incriminating evidence. As with the legal network, the identification of the illegal agent is merely the first step in an operation designed to identify the complete illegal network targets and evaluate the potential damage to Canadian security interests.

To function, the illegal agent must employ communications equipment and other paraphernalia such as code books, one time pads, micro dot readers, secret writing materials which are elaborately concealed when not in use. Clearly, a Surreptitious Entry of a suspected illegal agent's premises may, in some instances, be the only productive technique for confirming or disproving his role. Therefore, it can be a vital tool to effectively prove the existence of an illegal agent operation.

As an investigative tool in counter-espionage operations, Surreptitious Entries are used prudently. Given the practice of intelligence officers being

conscious of potential entry of their premises, there is considerable risk which must be balanced against the potential gains. Nevertheless, after most careful consideration, Surreptitious Entries may in some instances be the only course of action which will provide a material contribution to an important espionage investigation.

SUBVERSION: Subversive activity is normally conducted in a covert manner and usually involves an underground apparatus or rigidly disciplined cells. The immediate problem of gathering intelligence in this situation is evident and can be further complicated when a foreign power fosters and exploits a subversive group as a sphere of influence within Canada. All major Canadian centres have at various times had groups who have advocated violence as the means to bring about governmental change in Canada. In most instances, the life of various organizations is relatively short-lived due largely to the lack of popular support. However, their leaders often seek to support, manipulate or exploit other groups which satisfy their own particular political philosophy and subversive objectives.

How is the Security Service, therefore, to penetrate this area of activity? Surreptitious Entry is one such technique available to the Security Service to gather intelligence to ascertain the plans of a subversive group and the extent of foreign interference. It is entirely possible in a particular case that a Surreptitious Entry may be the only reliable means to determine, without the knowledge of the target, the depth of his or her activities in a subversive organization.

TERRORISM: ... Surreptitious Entry is considered to be a procedure entirely consistent with a "Domestic Security Surveillance Program" leading towards the identification of those committed to terrorism and other acts of political violence.

(Vol. 69, pp. 11095-11103.)

9. Mr. Justice Hope recognized that "although collected as intelligence, some material obtained in such a search may later be used as evidence" in a trial. This is theoretically so in Canada as well, but the likelihood of its occurring is slight, as in the normal case, prosecution is the last thing in the minds of the Security Service investigators; they are likely to be more interested in avoiding prosecution and thus enabling their continued surveillance of contacts made by the targetted person.

10. Assistant Commissioner Chisholm stated that

As an investigative practice, Surreptitious Entries are only undertaken when other avenues of investigation have failed or are unlikely to succeed in the production of the intelligence required.

(Vol. 69, p. 11094.)

Thus, for example, the contents of documents may be ascertained without surreptitious entry if the Security Service has a paid or voluntary source who has a lawful right to be on the premises. The source may have achieved a position in the organization under scrutiny, and so have access to documents of the kind that the Security Service is interested in.

(b) *C.I.B.*

11. The C.I.B. considers surreptitious entry techniques to be an essential part of the process of electronic interception. It is not necessary here to reiterate in

any detail the reasons for using telephone taps and listening devices in criminal investigations. The points advanced before us to support the need for this technique were made by the C.I.B. and others during the almost ten years of public and Parliamentary discussion which preceded the enactment of the Protection of Privacy Act, which introduced Part IV-1 of the Criminal Code effective July 1, 1974. The C.I.B. concluded that the provision in that legislation for judicial authorization to intercept communications during the investigation of many offences implied parliamentary acceptance of the need for surreptitious entry to install listening devices, and monitoring, repairing and removing them. It was also considered by the C.I.B. (at least until the decision of the Manitoba Court of Appeal in *R. v. Dass*²) that a court order authorizing the interception of oral communications within premises, even if it contained no express term authorizing entry, *implicitly* gave the right to enter the premises to install devices to implement the interception. The grounds for this conclusion are examined more closely in section D of this chapter.

12. In the case of some kinds of offence, notably in the drug, alcohol and commercial crime area, some of the key persons involved are generally described as sophisticated 'white-collar' types or 'organized crime' types. Either the nature of the crime or the cunning of the persons involved will sometimes make it unlikely that electronic surveillance will provide the desired information or evidence. Therefore it is not surprising that the justification of the use of surreptitious entry for electronic surveillance before 1974 was also invoked both before and after 1974 (indeed until our work was fairly well advanced) to justify surreptitious entry unconnected with electronic surveillance. Surreptitious entry was considered to be justified when the purpose of the entry was to secure information or to confirm that an offence was in the planning stage, or was being or about to be committed, even though a search warrant could not be obtained because there were not reasonable and probable grounds of belief, as required by section 443 of the Criminal Code. In addition, on some occasions where a search warrant might well have been obtained, surreptitious entry without warrant was used because the police needed to ensure, before formal entry and seizure under a search warrant, that the activity under surveillance had reached a stage that the evidence found upon the search would be in such a form as to support a successful prosecution. This type of entry has been described by a C.I.B. witness as a method of conducting an "intelligence probe" (Vol. 36, pp. 5779-80). While such surreptitious entries for criminal investigation purposes have now been prohibited within the C.I.B. pending the Report of this Commission, the R.C.M.P. has submitted that they should be authorized by law in circumstances similar to those in which interception of private communications is authorized.

13. There is also the situation in which there is not only an intelligence probe but the removal of some article from the premises. Examples that are in the public domain were given in the report made by the Deputy Attorney General of British Columbia in December 1978, to which reference will be made in section C of this chapter. That report described four cases in which members of

² [1979] 4 W.W.R. 97.

the R.C.M.P. had entered premises without the knowledge of the occupant or lawful authority and had taken an object away with them. They are:

- (a) In an investigation of theft from the mails being transported by an airline, a locker which was the property of an airline employee was opened and a pair of pliers was removed. It was suspected that the pliers had been used to create false crimp impressions for postal seals.
- (b) While in a place where a listening device was being installed pursuant to an authorization granted by a judge under section 178 of the Code, the members made a search and found a letter in the Chinese language, which they removed and retained. The letter was "to be used in evidence" and therefore presumably had evidential value. However, the accused pleaded guilty. Consequently, no evidence had to be introduced.
- (c) In a counterfeit investigation, an interception of a communication pursuant to an authorization under section 178 revealed that counterfeit money was located in a warehouse. As a result an entry was made into the warehouse. Two boxes were found, containing counterfeit United States \$20 banknotes with a face value of approximately \$1,300,000. They were taken away, some samples were retained, and the balance of the banknotes were returned with secret ultra violet pencil marks placed on some of the notes and on the boxes. The R.C.M.P. commented to the Department of the Attorney General that, while a search warrant might have been obtained, the investigator may have been reluctant to obtain a search warrant because the investigation was still continuing and it was essential to prove knowledge and control of the money on the part of the counterfeiter.
- (d) A person was suspected of making obscene movies using juvenile and adult females. It was suspected that he used an apartment for the purpose. The premises were entered in order to substantiate that the suspect was, in fact, engaged in the activity. Several negatives were removed and prints made by the Identification Branch, and the negatives were then returned to the premises in question the same night. Once prints were made of the negatives, steps were then taken to identify the unknown females, especially the juveniles, so that evidence relating to the making or distribution of obscene material under section 159 of the Criminal Code could be gathered. While the foregoing steps were being taken the subject left the area. Upon his return, approximately ten months later, the investigation was re-activated, a search warrant was obtained and search was effected at premises where the obscene material was suspected to be located. The material had been moved from the office darkroom. The suspect was charged with three counts under the Juvenile Delinquents Act. He was convicted, sentenced to five months imprisonment, placed on probation for 18 months with psychiatric treatment ordered.

B. R.C.M.P. POLICIES CONCERNING SURREPTITIOUS ENTRIES — SECURITY SERVICE AND C.I.B.

(a) *Security Service*

14. The Security Service has had detailed operational policies in writing for the use of investigative techniques involving surreptitious entry since the

beginning of the use of technical aids. The following description is based on the testimony of Assistant Commissioner Chisholm (Vol. 69, pp. 11103 et seq.).

15. Until 1959 these techniques could be authorized by the officers in charge of the Security and Intelligence units at the divisions without the need for prior approval from Headquarters. In that year entries for intelligence probes (i.e. to obtain intelligence about documents or objects) were suspended pending a re-examination of the use of such techniques. In 1959, the suspension was lifted and a policy was established which required that the Director of Security and Intelligence (D.S.I.) should approve a surreptitious entry before it took place. An exception was permitted for short-term microphone installations when urgency precluded prior authorization. These operations could be authorized by the officer in charge of a unit in the field.

16. This policy applied until 1966. At that time a moratorium was placed on intelligence probes as such but not upon wiretaps or microphone installations. The moratorium continued for three years until 1969, but even during this period the policy indicated that individual proposals from the field would be considered by the D.S.I. on their individual merit. It is interesting to note that the moratorium coincided with the period during which the Royal Commission on Security was studying the Security Service. That Commission did not refer in its Report to surreptitious entries for the purpose of intelligence probes.

17. In 1969, the D.S.I. lifted the moratorium on surreptitious entries and permitted proposals to "intercept documentary and physical intelligence" to be considered on their individual merit.

18. Since 1971, a Headquarters policy direction has provided that all surreptitious entry techniques require the approval of Headquarters, except that the policy allows for individual discretion in urgent situations to be exercised by officers in charge of Security Service units in the field; reports of all such activities were to be forwarded to Headquarters as soon as possible after the fact. Until June 1974, this policy also applied to surreptitious entry for the installation of listening devices.

19. Since July 1, 1974, the policy with respect to surreptitious entry procedures for the purpose of interception of communications has required compliance with section 16 of the Official Secrets Act. This is a subject that will be considered separately under "Electronic Surveillance" in Chapter 3 of this Part. It need not be discussed in detail here, for no special policies or procedures have been developed that differentiate between the interception of telephonic communications and the interception of other communications. In particular, no express provision for entry into premises has been included in the warrants issued by the Solicitor General under section 16 of the Official Secrets Act.

(b) *C.I.B.*

20. On the C.I.B. side, the development of policy on surreptitious entries apparently was restricted to the use of such entries for installing a listening

device on a telephone or installing a microphone elsewhere on the premises. There does not appear to have been any development of policy concerning intelligence probes.

21. Although the use of 'technical aids' — that is, listening devices — began as early as 1936, the first comprehensive policy covering their use was issued to all operational divisions in 1963 (Vol. 33, pp. 5393-5). This required that technical aids might be used to gain intelligence "to support continued investigations for prosecution" if the intelligence was not available through "usual sources". The policy also recognized that in "abnormal circumstances" technical aids could be used to obtain evidence vital to prosecution. (The reluctance to use such aids was due to a desire to avoid public disclosure of the technique so far as possible.) The policy distinguished between minor and major installations. Minor installations were "routine-type overnight or several-day microphone installations" which could be authorized by the Division Commanding Officer or his designate. Major installations were those involving extensive and complicated technical installations. All major installations had to be submitted to Headquarters for authorization. In early 1964 this policy was supplemented by a requirement that all minor installations were required to be reported to Headquarters.

22. A fully revised policy was issued in 1967, dealing much more extensively with security requirements and limitations upon the use of information received. These additions were felt to be necessary because of increased publicity given to the use of technical aids. The policy did not emphasize pre-requisite conditions to the use of technical aids: it did add to the policy on minor installations a provision that, while such installations could be made in commercial premises, hotels and motels, they could only be extended to private residences with the consent of the occupants. All other residential installations were to be defined as major installations, regardless of the intended duration.

23. In January 1973 a further revised policy on surreptitious entries was implemented, containing criteria as set out in the Protection of Privacy Act then before Parliament, namely that other investigative procedures had been tried and failed, or that they were unlikely to succeed, or that the urgency of the matter was such that it would be impractical to carry out the investigation using only other investigative procedures. The distinction between minor and major installations with respect to private residences was removed. Minor installations were limited to 30 days and a new qualification with respect to the difference between minor and major installations, based upon degree of security risk, was introduced.

24. Since July 1, 1974, the provisions in Part IV.1 — that is, section 178 of the Criminal Code — with respect to judicial authorization have dictated the policy of the C.I.B. governing the use of technical installations.

25. The evidence indicates that no formal or written policy with respect to intelligence probes existed in the C.I.B. before the work of this Commission of Inquiry began.

C. EXTENT AND PREVALENCE OF THE PRACTICE OF SURREPTITIOUS ENTRY

(a) *Security Service*

26. The evidence before us shows that, according to the R.C.M.P., there were 47 entries made from 1971 to February 1978, "to intercept documentary or physical evidence" (Vol. 69, p. 11094). The word 'intercept' is intended to cover cases in which entry was made to search for documents and objects and to inspect and photograph them. We have examined these 47 cases, which include such well-known examples as Operation Bricole (the A.P.L.Q. case) and Operation Ham (the P.Q. tapes case), although in most of the cases our examination of the files has been aimed at determining the objectives and the general circumstances of the operations. In the 47 cases, there were in fact only 34 targets, but in the case of 13 of those targets two surreptitious entries were made. Two of the entries included in the 47 were really not intelligence probes: they were for the purpose of surveying the premises preparatory to installing a listening device. In the field of counter-espionage and the detection of foreign interference, premises and baggage were searched in 17 cases; in six of those the paraphernalia of a foreign intelligence agent, or documents relevant to espionage activity, were found and examined. In counter-terrorist work, ten cases involved searches of premises and baggage, one of which was a case of "rummaging" while a listening device was being installed. One case involved a search of a domestic organization believed to be subversive and suspected of being financed by foreign sources. One case (Operation Ham) involved search of premises in order to gain access to a computer tape belonging to a domestic political party, the tape being temporarily removed in order that it could be copied. One case involved a search of baggage in circumstances in which the activity of the target was possibly outside the mandate of the Security Service. In addition to the 47 cases summarized, we have examined the file relating to one other search; that of a person's residence more than ten years ago. The purpose of that search was to determine whether money from foreign sources was kept on the premises searched.

27. In 1977 and 1978 there were only two completed PUMA operations — one each year (PUMA was the Security Service codeword for surreptitious entries to inspect what could be found on premises). In the previous six years the number carried out averaged seven a year (Vol. C88, p. 12119). Mr. Dare testified that the reason there were so few PUMAS in 1977 and 1978 was that there was no operational need for them during that time (Vol. C88, p. 12122). However, after an adjournment in the hearing he asserted that there is an operational need for PUMAS (Vol. C88, p. 12145). He also said that after the publicity generated by the charges which gave rise to and were made during the course of this Commission of Inquiry, "we became terribly, terribly careful". He added "we have been literally squeezing the operational system" and "we have been constraining ourselves".

28. The cases of which summaries were provided to us included a case which occurred during the past decade, which was referred to in guarded terms in Chief Superintendent Cobb's early testimony (Vol. 10, p. 1353). It was a case

outside Quebec, in which Chief Superintendent Cobb was in no way involved. We have examined the circumstances. They involved entries into the same premises on two occasions, in an attempt to locate and examine certain paraphernalia of espionage. The entries occurred during the early months of the operation of section 16 of the Official Secrets Act. The Solicitor General had granted warrants under section 16 for the interception of telephone conversations and the installation of a "bug". It was purportedly in reliance on these warrants that the entries were made. Documents were photographed and an article was taken away and kept. The Solicitor General was not advised of the entries, nor of the intention to search. The members of the Security Service who planned and authorized the search did not intend in advance that anything be removed from the premises.

29. In addition to entries for the purpose of examining documents and objects, entries have been made to install listening devices (microphones). These include entries to determine the feasibility and mechanics of a possible installation, entries to make an installation, entries to check a device, to effect repairs, and to remove a device. Before July 1, 1974, there were many such installations and, consequently, many such entries. Statistics placed by the R.C.M.P. before the Standing Committee on Justice and Legal Affairs in June 1973, when that Committee was considering the Protection of Privacy Bill, showed that in 1972 the Security Service had made 42 major microphone installations (17 were said to be in counter-espionage, 25 in counter-subversion) and 42 minor installations (23 in counter-espionage, 19 in counter-subversion). The statistics did not indicate whether these entries involved trespass.

30. As for the installation of microphones during the period from 1971 to February 1978, Assistant Commissioner Chisholm testified that there were 223 long-term listening devices and 357 short-term devices (Vol. 69, p. 11094). However, as has been stated earlier, entry is not always necessary for electronic eavesdropping to take place. For that reason, and because there has been no specific requirement to report entries made during the installation of a listening device, the exact number of entries made during that period could not be determined. However, he testified that a review of the files in which the 223 long-term devices were installed indicated that there had been 55 instances of entry. There is no breakdown of those cases into those preceding and those following the implementation of the Protection of Privacy Act. Nor is there any indication as to whether some of those entries were not trespassing, in the sense that consent of an owner, or of an occupant entitled to give consent, had been obtained.

31. Since July 1, 1974, the policy of the Security Service has been that no microphone installations are to be made unless a warrant for interception of "oral communications" has been granted by the Solicitor General under section 16 of the Official Secrets Act. In the year 1978 (for example) 128 warrants for the interception of oral communications were issued. (This figure includes all those in effect during 1979, that were renewed in December 1978.) Many of these interceptions required trespassory entry to be made: none of the warrants expressly authorized entry. Consequently, the authority for lawful entry, if it existed, must have rested upon the operation of section 26 of the

Interpretation Act or section 25 of the Criminal Code. This issue is discussed at length in Chapter 3 of this part of our Report.

32. Finally, since July 1, 1974, there has been a tendency on the part of the Security Service to regard section 16 of the Official Secrets Act as affording a means of obtaining lawful authority for surreptitious entry for the purpose of search, examination and photography on the premises. Clearly it would be improper to apply to the Solicitor General for a warrant under section 16 where the real object of those who seek the warrant is not to intercept communications but to make a search of the premises.

(b) *C.I.B.*

33. From 1963 onward, the installation of listening devices required the approval of Headquarters. From that time records were kept at Headquarters relating to 82 major installations. Not all of these required entries: some required more than one. The records from 1963 to June 30, 1974, (when the Protection of Privacy Act came into effect) showed that there were the following major installations:

	Installations	Entries
"A" Division (Ottawa)	4	7
"C" Division (Quebec)	43	60
"D" Division (Manitoba)	3	5
"E" Division (British Columbia)	10	10
"F" Division (Saskatchewan)	1	5
"H" Division (Nova Scotia)	3	4
"K" Division (Alberta)	6	11
"O" Division (S.W. Ontario)	13	21
	<u>83</u>	<u>123</u>

During the same period there was a record of 3,336 minor installations involving 995 entries:

	<i>Installations</i>	<i>Entries</i>
"A" Division	179	15
"B" Division (Newfoundland)	104	7
"C" Division	396	61
"D" Division	194	63
"E" Division	469	132
"F" Division	364	93
"G" Division (Northwest Territories)	3	0
"H" Division	207	20
"J" Division (New Brunswick)	101	12
"K" Division	490	169
"L" Division (Prince Edward Island)	43	3
"O" Division	786	420
	<u>3,336</u>	<u>995</u>

The form for reporting minor installations did not distinguish between those made with and those made without the consent of the occupant or owner. Many installations were made in hotel and motel rooms before the suspect occupied the room and with the consent of the hotel manager, so that there was no trespass. Others were made in commercial premises, cells, police cars and interview rooms with the consent of the owner or occupant, so that again there was no trespass.

34. The Annual Reports of the Solicitor General of Canada made under section 178.22 of the Criminal Code have given statistics as to authorizations granted by judges upon applications made by an agent of the Solicitor General of Canada (but not those made by an agent of a provincial attorney general — who makes a separate annual report). These statistics represent the activity of the R.C.M.P. in criminal investigations. These Annual Reports show that the following interceptions by microphone installations were authorized:

1974 (half-year)	51
1975	176
1976	238
1977	226
1978	227
1979	142

35. It was more difficult to ascertain the extent and prevalence of intelligence probes, that is, entries made for the purpose of a search but without the authority of a search warrant or writ of assistance. In early 1978, Headquarters asked each division to provide such information so that the C.I.B. could prepare to present evidence to us. Because case records were non-existent or difficult to locate, Headquarters suggested that the divisions examine the work orders of divisional Security Engineering Sections. The message from R.C.M.P. Headquarters requested information as to the extent of "illegal" surreptitious entry. This request was imprecise because it failed to define "illegal". The result was confusion in the reports from the divisions as to the extent and prevalence of surreptitious entries for the purpose of intelligence probes. (Ex. E-1, Tab 4B.)

36. One Division ("E" Division — British Columbia) replied candidly that it thought the practice was lawful, although there had been some entries which it thought were "perhaps questionable". It then listed hundreds of 'questionable entries', which are referred to below. As far as "E" Division was concerned, intelligence probes were on a legal plane with entering to place listening devices: in each case the entry would not be accompanied by damage or the intent to commit any offence or the commission of any offence, and consequently (it was contended) would not be illegal. (Ex. E-1, Tab 4C.)

37. Apart from British Columbia, negative replies were received from all divisions — not surprisingly, in view of the lack of definition of "illegal" in the request. Consequently a further message was sent by Headquarters, specifically asking for information about any intelligence probes that had been carried out. This resulted in four more divisions responding with information about a

small number of intelligence probes. On April 18, 1978, Assistant Commissioner T.S. Venner testified as to the result (Vol. 36, p. 5811):

"D" Division (Manitoba)	6
"E" Division (British Columbia)	402
"F" Division (Saskatchewan)	1
"K" Division (Alberta)	9

Other divisions replied that there had been none.

38. "F" Division in Saskatchewan described an entry into an office in a hangar at an airport to examine records. "H" Division in Nova Scotia described an instance in August 1974 when, pursuant to an authorization under section 178 of the Criminal Code, an entry had been made to install a listening device and the opportunity was taken to photograph records and correspondence in an open briefcase on the premises. (As the entry itself was assumed to be authorized in law, Nova Scotia is not included in the list of provinces that reported such entries.) "K" Division in Alberta reported that it had identified two intelligence probes into private residences to search for evidence or intelligence to aid Criminal Code investigations, one into a parked trailer to ascertain whether it contained stolen property, six into business premises to determine whether stolen property was stored there, and one into business premises to photograph company records and documents. "K" Division noted that in all cases there was no damage, no theft and no criminal intent.

39. Clearly at least two results required further investigation: British Columbia, which reported so many, and Southwestern Ontario (including Toronto), which reported none. As for British Columbia, that province's Department of the Attorney General conducted an investigation which showed that the huge figure that had been provided to us was not an accurate response to our search for information but the result of a different interpretation. The report by the province's Deputy Attorney General, dated December 11, 1978, shows that the 402 cases were based on work orders of the Security Engineering Section of that Division, but, of these, 212 cases did *not* involve an entry at all and 149 were made pursuant to consent, warrant or authorizing order. That left 41 to be examined, where there had been entry not authorized or provided for by law:

1. Cases prior to Privacy Act	5
2. Cases where no evidence of articles or documents removed	32
3. Cases where evidence of articles or documents removed	4
	41

Of these 41 cases, 12 were in drug investigations, 27 were in criminal investigations and the nature of two was not known. Twelve involved entry into homes or residences, 29 into other types of premises.

40. The Commission's check of the negative reply of "O" Division, (South-western Ontario, including Toronto), indicated that, while the reply was based upon a canvass of all divisional units, it was apparent that no detailed records of the Security Engineering Section were available as a starting point. Assistant Commissioner Venner, in correspondence with the Commission, stated as follows:

In the early 1970s in "O" Division, unlike some other divisions, the use of wiretaps was permitted and controlled at the line officer level, as I have already testified. This investigative aid gave that division an added advantage in combatting organized crime particularly in the drug enforcement field to the extent that in reality it was not necessary to resort to the 'intelligence probe' type of activity.

By reporting no 'intelligence probes', the division is not denying categorically that any were ever undertaken. The fact that we are dependent on human memory, coupled with the knowledge that no ex-members were included in the survey would make such a denial inappropriate. I am satisfied though, that "O" Division conscientiously went about this search for information and took advantage of every method they could devise to pull together a complete picture.

I would only add that, as you know, I was stationed in "O" Division in three capacities during the years 1973 to 1976, i.e. Division Intelligence Officer, Officer Commanding Metro Toronto Subdivision, Officer i/c Drug Enforcement, all operational roles involving close contact with the Sections and personnel who would have been most active in these endeavours. I assure you I can recall no incident which would render the "O" Division response inaccurate.

41. All divisions were faced with the fact that no records had been kept of such entries; any information provided has been volunteered from the memory of members. In the case of divisions such as Ontario and Quebec, are we to infer that, within the memories of members stationed there in early 1978, there had been no instances of the use of search of premises except upon consent or during an arrest or by virtue of a search warrant or a writ of assistance (under the Narcotics and Excise Acts)? We find it hard to imagine that there were no such instances in recent years, in Ontario and Quebec, of the type which were, for example, disclosed by the divisions in British Columbia and Alberta. However, while we may entertain such doubt, we can only speculate as to whether the technique was frequently used in all the divisions across Canada. Nevertheless, the probability that intelligence probes were more excessive before our inquiry began than the figures disclosed to us would indicate, is demonstrated by the following passage in a brief submitted to us by the R.C.M.P.:

Two R.C.M.P. criminal investigative sections, Commercial Crime and National Crime Intelligence, have resorted to intelligence probes. Their targets were usually people involved in the stock exchange and organized crime fields. Members employed on these duties, particularly supervisory personnel, did not think that intelligence probes were unlawful. This is evident in the knowledge that no document can be found to show that the Force, up to July 1977, ever asked the Department of Justice to provide a legal opinion on this issue.

(Ex. E-1, Tab 4.)

42. That the technique was probably tolerated at all levels of the R.C.M.P., or at least that a blind eye was turned to it, is suggested by the language chosen by the R.C.M.P. in its statement (Ex. E-1, Tab 4) read as testimony by Assistant Commissioner Venner in April 1978:

The intelligence investigator and his supervisors have been aware that their responsibility to pursue a course of action in the public interest was paramount. . . This must and has included uncovering intelligence to determine if serious criminal offences were/are being committed or were/are about to be committed. The investigator faced a dilemma. Should he overlook his responsibility and pursue the matter no further? Or should he, in the "public interest" and without *mens rea*, surreptitiously enter the premises controlled by the suspected criminal to determine for certain if he is involved in crime?

He then observed that:

No court, to our knowledge, has ever examined the legality of a surreptitious entry by a policeman merely to determine if a person was engaged in crime. No clear legislation exists to prohibit or authorize this action.

(Vol. 36, pp. 5774, 5786-89.)

This understanding of the law, from such an experienced officer, is undoubtedly representative of the opinion commonly held in the Force. His view of the state of the criminal law may well be correct, as far as the practical result of a prosecution of the policeman for breaking and entry is concerned. However, his appreciation of the law was, as he himself recognized, limited to the effect of the criminal law. The R.C.M.P.'s prepared statement, by its silence on the effect of the law of trespass, must be considered as treating it as of no account. It is also noteworthy that the prepared statement considered that, without clear prohibitory legislation or Force policy, and because Force policy approved of the use of surreptitious entry in order to install listening devices, an investigator could feel confident that "within limits" surreptitious entry was lawful and that his actions were in the public interest if he acted "with reasonable grounds in the performance of his duties". Finally, we note that the R.C.M.P.'s prepared statement referred to the "paramount" responsibility "to pursue a course of action in the public interest". To us this signifies clearly that the C.I.B. considered that, even though the law might in some uncertain manner constitute an impediment, it was not to stand in the way of a conscientious investigation in the public interest. All these points add up, in our mind, to substantial evidence of wide use of surreptitious entries with the tacit approval of the management of the Force.

D. LEGAL AND POLICY ISSUES — SECURITY SERVICE AND C.I.B.

General

43. Lord Denning said in a book written when he was a trial judge in 1949:

Let us consider, then, the power to enter a man's house against his will: for this is a power which has been greatly extended of late. It is a power which

we must watch with care, because, next to our personal freedom; we value most the freedom of our homes. 'An Englishman's house is his castle' we say: and our feelings about it were well summed up by the great Earl of Chatham when he said "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement". These proud words take their legal origin from Magna Carta, when King John promised that no free man should be disseised of his free tenement except by the law of the land. The freedom of an Englishman's house was there put on an equal footing with his personal freedom. Just as the executive could not deprive a man of his personal freedom except when the law permitted, so also the executive could not enter his house except in accordance with the law.³

In a case in 1970 he said:

The common law does not permit peace officers, or anyone else, to ransack another's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other. If police officers should do so, they would be guilty of a trespass.⁴

44. In his book, *Freedom, the Individual and the Law*, Professor Harry Street writes:⁵

The law has long imposed serious restrictions on the claims of the police to search private premises. A series of cases in the 1760s followed the issuing by the Government of the day of general warrants to search premises, i.e. warrants in which either the person or the property is not specified. In the great case of *Entick v. Carrington*, the Secretary of State issued a general warrant to officers who broke into the house of Entick, who was suspected of editing a seditious publication, "The British Freeholder", and seized his books and papers. The Lord Chief Justice of the day castigated the Government's conduct severely and awarded Entick £300 damages for trespass.

45. The actual decision in *Entick v. Carrington* dealt with the validity of general warrants (warrants not specifically identifying the things to be seized) and the need for lawful authority for a warrant if the seizure was not to constitute a trespass. More important than the decision itself were these ringing passages from the judgment of Lord Camden, the Chief Justice:⁶

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he

³ Sir Alfred Denning, *Freedom Under the Law*, London, Stevens and Sons Limited, 1949, p. 103.

⁴ *Ghani v. Jones* [1970] 1 Q.B. 693 at 706; [1969] 3 All E.R. 720 (English Court of Appeal).

⁵ Harry Street, *Freedom, the Individual and the Law*, 3rd edition, Harmondsworth, Middlesex, Penguin Books, 1972, p. 23.

⁶ (1765), 19 Howell's State Trials 1001, at p. 1066.

admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

Ever since, it has been accepted that persons invading property commit a trespass unless they can found their actions upon some rule of positive law. Of those arguments for the defence that were advanced and discarded in *Entick v. Carrington* one is of particular interest to us — state necessity. This was held not to afford a justification. Lord Camden, C.J. said:

With respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take note of any such distinctions. . .

46. The only situation in which, until then, the common law had recognized a power to search and seize under search warrant was in the case of stolen goods. This concession had been allowed grudgingly by the judges. However, Parliament obviously considered that, while the root principle established in *Entick v. Carrington* was not open to question, the need to search in order to obtain evidence should be provided for in additional particular cases.⁷ Consequently, in the century or more that followed in England, a number of statutes were enacted that provided for search upon warrant, usually issued by a magistrate, in respect to a number of offences. In England this catalogue of such powers has never been brought together in a single statutory provision. However, in Canada, since 1886, the Criminal Code has contained just such a comprehensive statutory provision in what is now section 443.⁸ It allows a justice to issue a warrant for search and seizure if he is satisfied that

there is reasonable ground to believe that there is in a building, receptacle or place,

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

⁷ *Ibid.*, p. 1073.

⁸ Section 443 is comprehensive in regard to offences under the Criminal Code. There are additional provisions for search found in other statutes, such as the provisions for writs of assistance found in the Narcotics Control Act.

- (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
- (c) anything that there is reasonable cause to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant.

47. It is important to remember that there is not always a trespass if there is entry upon the premises of a person without his consent and without a warrant or writ of assistance. At common law a constable, and even a private citizen, may forcibly enter a dwelling house to terminate an affray,⁹ or to prevent an occupant from doing serious bodily injury to another person in the house. The need to prevent personal injury is the justification for the trespass in such cases.¹⁰ In addition the policeman has a power of forcible entry commensurate with his powers of arrest, by virtue of the common law, which was explained in *Eccles v. Bourque* by Mr. Justice Dickson of the Supreme Court of Canada as follows:¹¹

... there are occasions when the interest of a private individual in the security of his house must yield to the public interest, when the public at large has an interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of one of his friends. So it is that in *Semayne's Case* a limitation was put on the "castle" concept and the Court resolved that:

In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...

...Thus it will be seen that the broad basic principle of sanctity of the home is subject to the exception that upon proper demand the officials of the King may break down doors to arrest.

48. The common law has also recognized, to a limited degree, that powers to search under a search warrant may be exceeded by a policeman without his becoming exposed to civil liability for trespass. The most recent English case, *Ghani v. Jones*,¹² according to L.H. Leigh,

... suggests that a constable can seize from premises which he has entered lawfully, property of evidential value in connection with the crime which he is investigating. This power enables him to seize material of evidential value against the person whom he is investigating or anyone associated with him in the offence.¹³

⁹ *R. v. Walker* (1854) Dears, C.C. 358. *Timothy v. Simpson* (1835) 1 Cr. M.R. 758; *Robson v. Hallett* [1967] 2 Q.B. 939, [1967] 2 All E.R. 407; *R. v. Marsden* (1925) 88 J.P. Jo. 369, *Handcock v. Baker* (1800) 2 Bos. P. 260; *Bailey v. Wilson* [1968] Crim. L.R. 617.

¹⁰ L.H. Leigh, *Police Powers in England and Wales*, London, Butterworths, 1975, p. 172.

¹¹ [1975] 2 S.C.R. 739 at 742-3.

¹² [1970] 1 Q.B. 693; [1969] 3 All E.R. 720.

¹³ Leigh, *Police Powers in England and Wales*, London, Butterworths, 1975, p. 184.

Moreover, in *Ghani v. Jones* earlier cases¹⁴ were explained as deciding that

... a constable lawfully on premises is entitled to take any goods which he finds in the occupier's possession or in his house and which he reasonably believes to be material evidence in relation to the crime for which the occupier is arrested or in respect of which the constable enters. If, while searching, the constable comes upon other property which shows the occupier to be implicated in some other crime, he may, if he acts reasonably, detain such property for a limited period.¹⁵

As Leigh says,

The propositions are apparently very wide. They go well beyond the early limitation that only goods described in a warrant or goods which were apt to provide evidence of goods so described could be taken. Instead, they assert a general right to take goods which the police reasonably suspect may implicate the occupier in the crime charged, whether the search is pursuant to a search warrant or incidental to an arrest. This amounts to a considerable extension of the right to search. These rules coupled with the chance discovery rule, are substantial infringements of the rights of the individual. But the rule as stated by the Court of Appeal may be wider still. For if the occupier has on his premises the property of another, and is arrested and the property found pursuant to a search shows that that other is implicated in the occupier's crime, that other's property may also be seized.¹⁶

The precise extent to which these recent English cases will be applied in Canada, and what their significance is, remains to be seen.¹⁷ We have referred to them here for two reasons: first, to avoid leaving any impression that upon an entry being made pursuant to search warrant the courts have in all circumstances frowned upon the seizure of goods other than those referred to in the warrant; second, to lay a foundation for a discussion later as to whether, when members of the R.C.M.P. — either investigating a crime or on Security Service duty — enter premises to install a listening device under section 178 of the Criminal Code or section 16 of the Official Secrets Act, they are entitled to search the premises.

49. Throughout this chapter the problem is basically to strike a balance between two conflicting social goals. The dilemma was identified by Lord Denning as being how to permit the power to search as one of "the safeguards of freedom" without permitting abuse of such a power to lead "to the search of any man's house and belongings on the slightest pretext — or on none".¹⁸

50. However, while we accept that there is a need to strike such a balance, we assert emphatically that it is wrong and unacceptable that any Canadian police force should act on the assumption that its members need be concerned only to

¹⁴ *Chic Fashions (West Wales), Ltd., v. Jones* [1968] 2 Q.B. 299; [1968] 1 All E.R. 229 and *Pringle v. Bremner and Stirling* [1969] 3 All E.R. 1700.

¹⁵ Leigh, *Police Powers in England and Wales*, London, Butterworths, 1975, p. 187.

¹⁶ *Ibid.*, p. 188.

¹⁷ The cases are analyzed thoroughly in Leigh, *ibid.*

¹⁸ Sir Alfred Denning, *Freedom Under the Law*, London, Stevens and Sons Limited, 1949, p. 6.

avoid criminal offences; there are other illegalities. The policy of the R.C.M.P. has reflected an attitude that entries without consent or warrant or some other positive legal support are permissible because no criminal offence is thereby committed, as if that disposed of the matter. Leaving aside the few provinces that have Petty Trespass Acts, the police are faced with the "illegality" of the law of trespass for which damages may be awarded (at least in the common law provinces — i.e. all provinces except Quebec). The law of trespass is not to be brushed aside as of no account in deciding Force policy. A trespass is a "wrong". It is *wrongful* to adopt policies that countenance and encourage trespass. If the law of trespass is an obstacle to the effective detection of crime, the law should be changed by the appropriate legislative body. Pending change, the law must be respected.

Possible charges arising out of surreptitious entry

51. We shall now examine eleven different grounds on which it might be argued that a surreptitious entry for one purpose or another constitutes an offence under the Criminal Code or is for some other reason an act "not authorized or provided for by law". All of the following issues except (c), (i) and (j) are issues arising in the criminal law. As will be seen, there are no easy answers as to whether, in conducting a surreptitious entry and search, a policeman commits a crime. We examine those questions in considerable detail, because we consider that it is important that the arguments for and against criminal liability be examined seriously by us. However, we have no hesitation in saying that surreptitious entry will frequently constitute civil trespass, and as we have said, that — at least in the common law provinces — is conduct "not authorized or provided for by law" and therefore not to be permitted, as a matter of policy, unless the law expressly permits it in the circumstances.

(a) Breaking and entering with intent to commit an indictable offence

52. The relevant provisions of the Criminal Code are as follows:

306. (1) Every one who

- (a) breaks and enters a place with intent to commit an indictable offence therein,
- (b) breaks and enters a place and commits an indictable offence therein, or
- (c) breaks out of a place after
 - (i) committing an indictable offence therein, or
 - (ii) entering the place with intent to commit an indictable offence therein,

is guilty of an indictable offence and is liable

- (d) to imprisonment for life, if the offence is committed in relation to a dwelling house, or
- (e) to imprisonment for fourteen years, if the offence is committed in relation to a place other than a dwelling house.

(2) For the purposes of proceedings under this section, evidence that an accused

- (a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or
- (b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after
 - (i) committing an indictable offence therein, or
 - (ii) entering with intent to commit an indictable offence therein.
- (4) For the purposes of this section, "place" means
 - (a) a dwelling-house;
 - (b) a building or structure or any part thereof, other than a dwelling-house;
 - (c) a railway vehicle, vessel, aircraft, or trailer...

307. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

308. For the purposes of sections 306 and 307,

- (a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and
- (b) a person shall be deemed to have broken and entered if
 - (i) he obtained entrance by a threat or artifice or by collusion with a person within, or
 - (ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a permanent or temporary opening.

53. There can be little doubt that almost all surreptitious entries involve physical "breaking" within the meaning attributed to the sections. Merely opening a closed door and going inside has been held to constitute breaking. Even entrance through an open doorway of a partly constructed unoccupied dwelling-house has been held to constitute constructive breaking under section 308(b)(ii).¹⁹

54. Section 2 of the Criminal Code defines "dwelling-house" as including any part of a building "kept or occupied as a temporary residence". That would or might include hotel rooms, depending on the circumstances: a long-term hotel guest might be said to have his temporary residence there, but there is more uncertainty about a short-term guest. Assuming the room to be a "temporary residence", is there a "breaking and entry" of a "dwelling-house" if the hotel owner or his employee consents to the entry and provides a key? There appears to be no authority in Canada dealing with the provision of a pass-key by those

¹⁹ See the cases discussed in Mewett and Manning, *Criminal Law*, Toronto, Butterworths, 1978, p. 510.

in charge of hotels or apartment buildings. Courts in the United States have distinguished the status of a tenant who acquires a property interest from that of a hotel guest. The hotel guest in those cases has been considered to be a mere licensee, while the owner remains the occupier as he must look after the hotel room and has access for that purpose. Yet entry by pass-key has been held to be 'breaking' in both situations.²⁰ Whether or not the courts in Canada will find constructive breaking by pass-key under 308(b)(i) or in general law is speculative. The foregoing discussion applies to an occupied hotel room. What about a hotel room that is not yet occupied by the suspect? When the entry is made, with the consent of the owner or his employee, for example to install a device before the suspect arrives, there would not appear to be any possible application of the section.

55. The most substantial doubt as to the presence of all ingredients of the offence arises from the requirement that there be an "intent to commit an indictable offence" in section 306(1) and the provision "without lawful excuse" in section 307. Sections 306(2)(a) and 307(2) raise a presumption of intent "in the absence of evidence to the contrary" once there is evidence of breaking and entry or that the accused is in a dwelling-house "without lawful excuse". Three preliminary points should be noted with respect to this presumption:

- (a) Cases prior to 1969 are of little assistance since the sections then made evidence of break and enter "*prima facie* evidence" of intent, instead of providing that a presumption of intent exists.
- (b) The presumption is rebutted if, in all the circumstances of the case, the explanation of the accused could reasonably be true even if the trier of fact is not convinced that it is.
- (c) Once the presumption is rebutted by evidence to the contrary, the normal burden of proof beyond a reasonable doubt is imposed upon the prosecution.²¹

Thus if the intent of a surreptitious entry is to obtain information there would appear to be no offence under sections 306 and 307 unless an indictable offence is actually committed following a breaking-in, or preceding a breaking-out. The same conclusion would appear to apply to what occurred prior to July 1, 1974, if the intent was to wilfully intercept a private communication by means of placing a listening device in premises. In one case where a private detective took three assistants for an entry to take photographs, the court found an intention to commit an indictable assault²² but, in the absence of some such special circumstance, it would appear that the trespass would not result in a conviction under sections 306 or 307.

56. Since the commencement of our work there has been a number of statements in the media that members of the R.C.M.P. who have entered

²⁰ *Smith v. Director, Patuxent Institution* (1973) 395 F. Supp. 813 (U.S. D.C. Maryland); *Jack v. United States* (1967) 387 F. 2d 471 (U.S. Ct. of App., 9th Circ.); *Buck v. Del City Apartments* (1967) 431 P. 2d 360.

²¹ *R. v. Marshall* (1971) 1 C.C.C. (2d) 505; (B.C.C.A.); *R. v. Rivera* [1975] 2 W.W.R. 56 (B.C.C.A.).

²² *R. v. Massue* [1966] 3 C.C.C. 9 (Que. C.A.).

premises without consent or a warrant to conduct an 'intelligence probe' have been guilty of breaking and entry ("B & E"). Such assertions are not necessarily correct. If a member entered premises in order to search for drugs or a counterfeit printing press when he did not have the grounds of belief to enable him to swear the information necessary to obtain a search warrant and he did not have a warrant, or if he entered premises to look for espionage paraphernalia or to look at documents, or if, before July 1, 1974, he entered for the purpose of installing a listening device, he would be convicted only if he failed to testify as to his reason for entering. If he did not testify, so that the only evidence before the court was that he broke and entered, the presumption would normally lead to his conviction. However, if he testified, and if he were believed (as would likely be the case), he would not be convicted, because he did not enter with the intent to commit an indictable offence in the place. In saying this we assume that he did not cause any damage; usually he would not do so as he would wish the suspect to be unaware of the search. The small likelihood that a member of the R.C.M.P. would be convicted of breaking and entry with intent to commit an indictable offence in the place entered is illustrated by what was said by Mr. Justice J.K. Holmes in a recent address to the jury in the Court of Queen's Bench of Alberta. In a trial in 1980, at Calgary, the accused, Claude Wagner, was convicted of break, enter and theft, and, on a separate count, of mischief. Those facts that are relevant for our purpose are set forth in the judge's summing up. The accused, a private citizen, had entered a dwelling-house occupied by two persons by pushing open an unlocked but closed window, and removed some documents. A witness for the prosecution testified that he and the accused planned to deceive a Calgary city police detective. The accused denied this. The detective testified that the entry, in the planning of which he had participated, was for the purpose of Wagner searching for illegal drugs. The detective testified that he was surprised when the accused later produced the documents which he took from inside the house. Mr. Justice Holmes told the jury:

At this point I would like to comment on a matter which arises from Crown counsel's opening address to you, before any evidence was called. He made a comment to the effect that it was not a criminal offence for the police to make an unauthorized entry of premises only for the purpose of searching a place to assist the police to obtain information. *Such a procedure would certainly not constitute an offence under the Criminal Code of Canada* although it may not find approval by all members of our society. However, it is not your function to determine whether you agree as a jury on this case with the police tactics which were used and which were revealed in the evidence. (our emphasis added)

Therefore in these cases, even if, through more detailed investigation of the individual cases than we have conducted, evidence admissible in court were available to establish the breaking and entry, the attorney general of the province would have to decide whether the likelihood of conviction justified a prosecution in the light of what we have just pointed out. (In a subsequent Report we shall discuss the factors that should be taken into account in deciding whether to prosecute.)

57. There is another point to be made about this offence. The fact that the law makes conviction of a policeman engaged in such duties most unlikely has been misconstrued by some members of the R.C.M.P. They tend to construe the reason for likely acquittal as being that the policeman lacks "criminal intent". In a sense that is true; he lacks the intent *to commit an indictable offence* in the place. But what they really mean is that they think the criminal law would excuse him because he does not "intend" to commit any crime. From this proposition they infer that if he does any other act which, if done by an actual criminal to serve his own ends would be a crime, the policeman is not guilty of the same crime because he does not intend to commit a crime. This is a fallacy. It rests upon a distortion of the doctrine of *mens rea*, to which they have been first introduced in their training in Regina. They confuse *mens rea* (the general intent to do the act, which is an element of criminal liability) with the intent to commit a crime (i.e. to do the act for ignoble ends). The law is that if an accused does an act with noble purposes — whether he is a policeman or an ordinary person — that is no defence, provided that he did intend to do the act.

58. This erroneous reasoning appears to be firmly rooted in the R.C.M.P. and to have broad currency. It generates an attitude of mind that tolerates acts committed for such noble purposes as "the public interest" or "the protection of the security of the state", that if committed for other purposes the policemen themselves would regard as offences. It is therefore a dangerous heresy that must be overcome in the education and training of members of the Force and not allowed to persist in their thinking or in that of the members of a security intelligence agency.

(b) *Wilful disobedience of a statute*

59. As a result of the entry onto the premises of the Agence de Presse Libre du Québec on October 6 and 7, 1972, a member of the R.C.M.P. (Inspector Donald Cobb), a senior member of the Sûreté du Québec and a senior member of the Montreal Urban Police Force entered a guilty plea in May 1976, to a charge which was laid against them under section 115 of the Criminal Code. That section reads as follows:

115. (1) Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

60. The section requires three elements to constitute an offence:

- (a) a contravention of an Act of the Parliament of Canada which forbids some act or requires an act to be done;
- (b) no penalty or punishment provided for the contravention of the statute concerned; and
- (c) the accused's act or failure to act must have been wilful and without lawful excuse.

61. The offence with which these officers were charged was that they had contravened section 115 of the Code "by wilfully omitting to do something which section 443 required to be done: obtaining a warrant under section 443 of the Criminal Code". It is difficult to understand that charge. Section 443 does not *prohibit* the act of search and seizure without a warrant, or *require* an application to be made for a warrant. It merely provides a comprehensive procedure for applications for, and the issuing of, warrants for search and seizure in the three situations referred to in the section. There is no prohibition of an act or of an omission to do an act. In our opinion the provisions of section 115 do not constitute a basis for criminal liability for search and seizure without warrant. It may seem strange to the reader that we are saying that Inspector Cobb and the others pleaded guilty to an offence which, in the circumstances, did not exist, but that is indeed our opinion.

(c) *Petty Trespass Acts*

62. The legislatures of all provinces except Saskatchewan, Nova Scotia and Prince Edward Island have enacted legislation making a trespass in certain circumstances a summary conviction offence. Being summary conviction offences, prosecutions must be launched within six months (section 721, Criminal Code). The Petty Trespass Acts of British Columbia²³ and New Brunswick²⁴ apply to such narrow factual situations as to be irrelevant to criminal investigations and security intelligence work. Likewise, Quebec has a statute²⁵ that may appear to be broadly applicable to all "land" (*terrains*) but its scope is probably restricted to the kind of land referred to in the title of the statute: the Agricultural Abuses Act. The Petty Trespass Acts of Alberta,²⁶ and Newfoundland²⁷ apply only where a form of notice not to trespass has been posted; they therefore are irrelevant to the usual intelligence probe of a house or apartment. We are left with Ontario and Manitoba. Until 1980, the Ontario Petty Trespass legislation applied to any "enclosed" land and therefore did not apply to an open parking lot or to "open" parking garages under buildings. However, it applied to houses, apartments and offices, and therefore was of importance to the ability of a police force or to the Security Service to perform its tasks in cities such as Ottawa and Toronto. The new Trespass to Property Act, 1980,²⁸ likewise prohibits unauthorized entry onto premises "enclosed in a manner that indicates the occupier's intention to keep persons off the premises...". Similarly, the Petty Trespass Act of Manitoba²⁹ creates an offence when any person "unlawfully enters into. . . any land or premises. . . being the property of another and being wholly enclosed...". A legal problem therefore still faces the R.C.M.P. and other police forces, and any security intelligence agency, when its members enter the kind of premises referred to above.

²³ R.S.B.C. 1960 ch.387.

²⁴ R.S.N.B. 1973 ch.T-2.

²⁵ R.S.Q. 1964 ch.130 ss. 2,3.

²⁶ R.S.A. 1970 ch.273 ss. 2,3.

²⁷ S. Nfld. 1975-76 No. 59, s.2.

²⁸ S.O. 1980 ch.12. Replaces R.S.O. 1970 ch.347.

²⁹ R.S.M. 1954 ch.197 s.2.

63. There are many cases dealing with the phrases "enclosed" land, "unlawfully enters" and "acting under a fair and reasonable supposition that he had a right to do the act complained of" which appear in the legislation in some of the provinces.³⁰ Cases interpreting this latter phrase recognize a mistake of law defence where the belief in the right advanced was a "fair and reasonable" belief.³¹ The six-month limitation period of section 721 of the Criminal Code would be applicable, as these are summary conviction offences.

(d) *Theft*

64. In those instances in which surreptitious entry and search by a policeman have been followed by removal of objects or documents from the premises the policeman may be guilty of theft, even if he intends to return what was removed so that the owner or occupant of the premises will not know that anything has happened.

65. The relevant parts of section 283 are as follows:

283. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,

(a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,

... or ...

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(4) For the purposes of this Act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

Other policemen who accompany an officer and help him to remove objects or documents, or encourage him to do so may also be guilty. This occurs by virtue of sections 21 and 22 of the Code, which make them parties to the offence.

66. The phrase "fraudulently and without colour of right" in section 283 raises at once the question of the mental state of the accused, which is a necessary element of the offence. "Fraudulently" has been held to mean that the taking must be intentional and deliberate, without mistake and without

³⁰ Alberta s.8, Manitoba s.2, Newfoundland s.6, Ontario s.4 (old Act).

³¹ *R. v. Davy* (1900) 27 O.A.R. 508; *R. v. Malcolm* (1883) 2 O.R. 511; *R. v. Burko* [1969] 1 O.R. 598; *R. v. Labelle* [1965] 1 O.R. 321 (Ont. C.A.).

knowledge that the property taken is not the accused's.³² But two decisions in the Ontario Court of Appeal suggest that conduct is not fraudulent merely because it is unauthorized, unless it is dishonest and morally wrong. Thus an honest belief in a moral claim might negate the requirement that a taking be done fraudulently.³³ May a defence of "colour of right" be allowed, even though founded upon an honest belief in the right to act which turns out to be based upon a mistake whether of law or fact? Mr. Justice Rand and Mr. Justice Taschereau held in a Supreme Court of Canada case³⁴ that in the circumstances of the case (whether logs had been abandoned by a company) since the alleged mistake was a mistake as to the general law, the accused's belief in his "right" (to take the logs) was not admissible as a defence. (They were only two members out of seven. The other members of the court did not discuss the point.)

67. However, a series of cases in the Ontario and British Columbia Courts of Appeal have held that a "colour of right" defence can be supported by an honestly held belief even if founded upon mistake of fact or mistake of law.³⁵

68. It might be argued that the phrase "takes... anything whether animate or inanimate" does not include information taken, for example, by photographing documents, and that there is no property right to the information. However, the expanded definition of an "animate and inanimate" thing in section 283(1)(a), which extends the meaning so that it is an offence to deprive a person of his "special property or interest" in the thing, must raise doubt as to the validity of such an argument. Therefore it may be possible to contend that even the photographing of documents on the premises constitutes "taking" a "thing".³⁶

69. Some years ago Parliament considered it to be inappropriate that young people should be convicted of an offence as serious as theft when they took a vehicle for a "joyride" but with no intent to keep the vehicle, so that a lesser offence, punishable on summary conviction, was enacted. It is now section 295, which makes it an offence to take a vehicle, without the owner's consent, with the intent to drive it. Does this suggest that in other circumstances, such as taking a document with the intent of copying it and then returning it, there is not a theft but only something less than theft? It cannot be stated categorically that it is theft to remove a document or a thing temporarily from the place where it is kept by the owner, so that it may be examined or copied off the premises and returned before the owner misses it. In a series of Canadian cases,

³² *R. v. Brais* (1972) C.C.C. (2d) 301 (B.C.C.A.)—followed in *R. v. Renz* (1974) 14 C.C.C. (2d) 492 (B.C.C.A.) and by Mr. Justice Martland in *Lafrance v. The Queen* (1973) 13 C.C.C. (2d) 289 (S.C.C.).

³³ *R. v. DeMarco* (1973) 13 C.C.C. (2d) 369 (Ont. C.A.); *R. v. Hemmerly* (1976) 30 C.C.C. (2d) 141.

³⁴ *R. v. Shymkovich* (1954) 110 C.C.C. 97.

³⁵ *R. v. Howson* (1966) 3 C.C.C. (2d) 348 (Ont. C.A.); *R. v. DeMarco* (1973) 13 C.C.C. (2d) 369 (Ont. C.A.); *R. v. Scallen* (1974) 15 C.C.C. (2d) 441 (B.C.C.A.).

³⁶ *Oxford v. Moss* [1979] Crim. Law Rev. 119 (Div. Ct.); *R. v. Scallen* (1974) 15 C.C.C. (2d) 441 at 473 (B.C.C.A.).

the accused have been acquitted when the evidence did not establish that the accused had the "...intent to deprive the owner of his property either temporarily or permanently".³⁷ Another line of cases in which theft was held not to have occurred, are the so called 'prank' cases.³⁸ One Canadian textbook on criminal law states: "If it is intended to take the object temporarily and restore it before the owner misses it or has any use for it, then he has not been deprived of it and theft is not, at that stage, committed".³⁹ We do not think that the cases support the flat statement contained in that textbook. The most that can be said is that intention is a key factor in the offence and that the courts have held that there are certain types of cases where the necessary intention is not present. In our view none of the types of lack of necessary intention which have been recognized by the courts, to this date, are applicable to the activities of the R.C.M.P. when the latter remove documents or things, copy them and return them, all without the knowledge of the owner.

(e) *Mischief*

70. There may be instances when surreptitious entry is effected by means which involve damage to property, although that seems unlikely since the intention of the investigator would normally be to leave no trace of the entry. However, damage may occur if for some operational reason it is intended to let the suspect know that there has been a search. The problem also arises in the case of the installation of electronic listening devices, which almost inevitably involves some damage to property even if the damage is subsequently concealed. If there is damage to property, the following provisions of the Criminal Code may be applicable:

- 387. (1) Every one commits mischief who wilfully
 - (a) destroys or damages property,
 - (b) renders property dangerous, useless, inoperative or ineffective,
 - (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or
 - (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

³⁷ *Cooper v. The King* (1949) 93 C.C.C. 286 (N.S. Sup. Ct. en banc). In that case another reason given for acquittal was that the aircraft in question was never moved away from the owner's property.

³⁸ *R. v. Kerr* (1965) 4 C.C.C.37 (Man. C.A.) held that the evidence created at least a reasonable doubt as to whether the accused intended to steal an ashtray. Again, in *R. v. Wilkins* (1965) 2 C.C.C. 189 where the accused was held not to have intended to steal the parking meter enforcing officer's vehicle but only to perpetrate a joke and not "to convert the property in it to his own use." The intention only to play a trick and not to steal was also the basis of acquittal where an election poster was taken and placed on the property of the opponent of the candidate whose poster it was: *Handfield v. The Queen* (1953) 17 C.R. 343. On the other hand, the view that the fact that it was intended only to carry out a prank is not a ground for acquittal was adopted by the majority of the Quebec Court of Appeal in *Bogner v. The Queen* (1976) 33 C.R.N.S. 348.

³⁹ Mewett and Manning, *Criminal Law*, p. 498.

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

388. (1) Every one who wilfully destroys or damages property is, where actual danger to life is not involved, guilty of an offence punishable on summary conviction if the alleged amount of destruction or damage does not exceed fifty dollars.

Section 386 provides a definition of "wilfully" for the purposes of Part IX of the Criminal Code as follows:

386. (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

(2) No person shall be convicted of an offence under sections 387 to 402 where he proves that he acted with legal justification or excuse and with colour of right.

Since surreptitious entries are normally planned to avoid detection it would appear doubtful that subsections (b), (c) or (d) of section 387(1) would become operative. However, physical damage, no matter how nominal, is usually caused by the installation of hidden microphones, and thus sections 387(1)(a) and 388(1) are *prima facie* applicable to those circumstances. Only nominal physical damage is required for the offence to be complete, and the two sections create separate offences.⁴⁰

71. In addition, it can be argued that merely handling chattel property found in the premises amounts to a trespass upon the chattels and is thus an interference with the lawful use or enjoyment of the property contrary to section 387(1)(c). If this is so, then the indictable offence of mischief has been committed. This in turn would mean that if entry had been gained by a "breaking", then an offence under section 306(1)(b) ("breaks and enters a place and commits an indictable offence therein") is also committed, even though it be established that the original break-in was not made "with intent to commit an indictable offence".

72. Subsection (7) of section 387 follows a subsection that exempts stoppage of work situations from "mischief" and therefore subsection (7) might be thought to have been intended to relate to labour-management disputes. The broad language of the subsection might sustain an ingenious defence, for the usual reason for surreptitious entry of a dwelling-house is clearly for the purpose only of obtaining information.

73. If the recent "colour of right" cases, referred to above in our discussion of theft, are followed in defining the ambit of mistake of law or fact as affecting a "colour of right" defence, reliance upon legal opinion (even mistaken ones) or the existence of warrants or authorizing orders under section 178 could also provide the beginnings of a defence. It should be noted, however, that section

⁴⁰ *R. v. Ninos and Walker* [1964] 1 C.C.C. 326 (N.S.S.C. In Banco).

386(2) requires that an accused prove both legal justification or excuse *and* colour of right. With respect to the requirement of "legal justification or excuse", see below where the cases with respect to "without lawful excuse" are considered in detail. In addition, the criminal law, in certain contexts (e.g. homicide) recognizes a difference between justification and excuse. Whether or not it was intended by the draftsman, either justification or excuse will meet the test of section 386(2). It may well be that the tests applicable to "without lawful justification" will not be the same as those for "without lawful excuse".

74. In respect of entries made since July 1, 1974, to install lawfully authorized listening devices the issue of legal justification or excuse requires consideration of the effect of section 25 of the Code and section 26(2) of the Interpretation Act, which have been relied upon by the R.C.M.P. and its advisers. In Chapter 3 of this Part, while discussing "Electronic Surveillance", we shall examine the effect of those sections and suggest that they are at least doubtful sources of justification or excuse for such entries.

(f) *Trespassing at night*

75. In some circumstances surreptitious presence at night on the grounds of a house, or in the hallways of an apartment building, preparatory to effecting a surreptitious entry into the house or into an apartment, might give rise to an offence under section 173 of the Criminal Code. It provides as follows:

173. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

"Dwelling-house" is defined as follows in section 2:

"dwelling-house" means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes

- (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and
- (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.

"Loitering" means hanging around, and "prowling" means looking for trouble or hunting for an opportunity to carry out an unlawful purpose. There are two offences.⁴¹ If the element of loitering or prowling is present, the defence of lawful excuse cannot be supported on the basis of a right to investigate if carried out by trespass which is itself unlawful.⁴² In order to obtain a conviction, the Crown need not prove that the accused had a specific intent. Therefore an accused will be guilty even though he believed he was acting lawfully or even if he was incapable of forming any specific intent.⁴³ Being a

⁴¹ *R. v. Andsten* (1960) 128 C.C.C. 311, 32 W.W.R. 329 (B.C.C.A.); *R. v. McLean* (1970) 1 C.C.C. (2d) 277, 75 W.W.R. 157 (Alta. Mag. Ct.); *R. v. Edgar & Rea* (1962) 132 C.C.C. 396 (B.C.C.A.).

⁴² *R. v. Andsten* (1960) 128 C.C.C. 311 (B.C.C.A.).

⁴³ *R. v. Andsten*, *supra*, at 318; *R. v. Clark* (1971) 17 C.R.N.S. 56 at 64 (Man. Mag. Ct.).

summary conviction offence, the six-month limitation period, provided for in section 721 of the Criminal Code, would be applicable to "trespassing at night".

(g) *Possession of house-breaking instruments*

76. If a policeman, intending to enter a place of residence or an office surreptitiously and without a search warrant, is in possession of a lock-pick, he may be committing the offence of being in possession of "an instrument suitable for house-breaking". If he is not himself in possession of such an instrument but he brings with him a civilian lock expert who is, the policeman may be a party to the offence. Section 309(1) provides as follows:

309. (1) Every one who, without lawful excuse, the proof of which lies upon him, has in his possession any instrument suitable for house-breaking, vault-breaking or safe-breaking, under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for house-breaking, vault-breaking or safe-breaking, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The word "suitable" and the phrase "under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for... safe-breaking" were added in 1972.⁴⁴ The elements of the offence require proof of suitability, and of circumstances giving rise to one of the reasonable inferences described — namely actual use or present or past intention to use. Once these three elements have been proved, the burden shifts to the accused to establish a "lawful excuse" on a balance of probabilities.⁴⁵

77. Subsection (2) of section 309, which makes it an offence to have a face "masked or coloured or otherwise disguised", expressly provides that, for the offence to exist, the accused must have had the "intent to commit an indictable offence". However, it is not clear whether such an intent is a necessary element for the "reasonable inference" described in subsection (1). It was held in one case that the jury must be asked whether the circumstances gave rise to a reasonable inference that the instrument had been used or was intended to be used for house-breaking, but the court did not define "house-breaking".⁴⁶ If house-breaking is the same as "break and enter" as that phrase is used in section 306, there is a further element of intent to commit an indictable offence. The word "house-breaking" has been in the Code for many years without definition, but formerly the context was "instruments for house-breaking". The Code of 1927, however, distinguished between two offences in section 464. Under clause (a), possession, without lawful excuse, of an instrument for house-breaking by night was an offence. Under clause (b), possession of an instrument for house-breaking by day with intent to commit an indictable offence was a separate offence. It is at least arguable that in the 1927 Code house-breaking referred only to break and enter with no element of

⁴⁴ S.C. 1972, ch.13, s.25.

⁴⁵ *R. v. Kozak and Moore* (1975) 30 C.R.N.S. 7 (Ont. C.A.).

⁴⁶ *R. v. Kozak and Moore*, *supra*, per Martin J.A.

intent, since, in the case of (b), it would be unreasonable to have regarded the word "house-breaking" as meaning the commission of "breaking and entry with intent to commit an indictable offence", for such a definition would have rendered unnecessary the words contained in the express statement of the offence (i.e. "with intent to commit an indictable offence"). If this reasoning is correct, then in the present Code, it is probable that the word "house-breaking" is to have the same meaning — i.e. the fact of breaking and entry without any superimposed intent to commit an offence. Thus possession of such instruments with a mere intent to trespass and no more may be an offence under section 309(1) even when there is no offence of "break and enter" under section 306.

(h) "*Without lawful excuse*"

78. The phrase "without lawful excuse" appears as an element of three offences we have discussed: trespassing at night, being unlawfully in a dwelling-house, and possession of house-breaking instruments. There is no definition for "without lawful excuse" or "lawful excuse" in the Criminal Code despite the importance of the term in construing the scope and application of sections 173, 307 and 309. We now consider some of the cases which may be of assistance in understanding how the phrase, as used in various statutes, has been interpreted by the courts.⁴⁷

79. *Canada*: In *Regina v. Andsten*⁴⁸ lawful excuse for loitering (section 173 of the Criminal Code) was held to mean an excuse which was lawful under the "law of the land", (i.e. either by common law or statute law). The fact that the private investigators who were the accused in that case were investigating a wife's conduct was held not to be a lawful excuse as it would not be an excuse or justification in a trespass action. In *Regina v. Gibson*⁴⁹ this same "excuse which is lawful under 'the law of the land' test" was applied in a charge of entering a dwelling-house (section 307 of the Criminal Code). The fact that the accused, a private investigator, had committed the tort of trespass and possibly the tort of invasion of privacy meant that he had no lawful excuse for his entry. In *La Reine v. Marché de Québec Inc. and Begin*⁵⁰ ignorance of the law prohibiting the importation of American margarine or of the law prohibiting making American margarine appear to have the character of Canadian margarine constituted a lawful excuse for possession of the margarine on a

⁴⁷ In addition to the Canadian and English cases that are discussed in the following paragraphs, reference may be made to the considerable jurisprudence in Australia and New Zealand, which includes *Regina v. Phillips* (1973) 1 N.S.W.L.R. 275, *Holmes v. Hatton* (1978) 18 S.A.S.R. 412, *Killen v. Police* [1965] N.Z.L.R. 481, and *Carpenter v. Police* [1969] N.Z.L.R. 1052. See also the review of the cases by Anthony Dickey, "Being on Premises 'Without Lawful Excuse' — A Study in Judicial Interpretation", (1973) 47 *Australian L.J.* 382.

⁴⁸ (1960) 129 C.C.C. 311 (B.C.C.A.).

⁴⁹ [1976] 6 W.W.R. 484 (Sask. District Court). The same view, that private investigators do not, by virtue of their duty to their client to investigate, have a lawful purpose, has been adopted by the Australian cases involving private investigators.

⁵⁰ [1969] 1 Ex. C.R. 3 (Exchequer Court).

charge under the *Customs Act*. This case is generally considered to be an anomaly, for ignorance of the law is not usually considered to be an excuse. In the recent case of *Regina v. Parrot*⁵¹, the Ontario Court of Appeal held that a "mistaken belief as to one's legal obligation does not constitute a lawful excuse". These cases cannot be said to have resulted in a clear Canadian doctrine as to the extent of "lawful excuse".

80. England: In England the Court of Appeal has held that a mistaken belief that the law justifies the accused's act does not constitute "lawful excuse".⁵² But there may be a lawful excuse if there is a common law duty to do an act which in normal circumstances would be an offence. An example is carrying a firearm with the intention of surrendering it to the authorities who had invited terrorists to surrender their arms.⁵³ Another is possession of forged bank notes solely for the purpose of surrendering them to the police — such possession being wholly consistent with the common law duty of a citizen to assist the police in the capture and prosecution of a felon.⁵⁴ There may also be a lawful excuse if the accused had an honest and reasonable belief in a state of facts which, if true, would have made his conduct lawful.⁵⁵

81. With the exception of *La Reine v. Marché de Québec Inc. and Begin* it appears that Canadian courts and those of other Commonwealth countries have held that ignorance or mistake of law does not constitute a lawful excuse for an accused's actions. Leaving aside mistake of law, whether a member of the R.C.M.P., if charged, as a result of a surreptitious entry, with trespassing at night, being unlawfully in a dwelling-house, or having possession of house-breaking instruments, would be found to be acting "without lawful excuse" would depend on future interpretation of that phrase by the courts. If the strict interpretation of the British Columbia Court of Appeal in *Regina v. Andsten* is adopted (that any violation of the law of the land, whether civil or criminal, would prevent the accused from having a lawful excuse) it would be unlikely that a member of the R.C.M.P. could establish lawful excuse on a charge under section 173 (trespassing at night) or section 307 (being unlawfully in a dwelling-house). Applying this interpretation to section 309(1) (possession of house-breaking instruments) would be difficult as the mere act of possessing such instruments would not normally involve a violation of the criminal or civil law, apart from the very provisions of section 309(1). If the narrower interpretation placed on the phrase in a number of Australian cases is adopted, a member of the R.C.M.P. could argue successfully that he had a "lawful excuse" if his conduct gave rise to a mere matter of civil compensation, and he could be convicted only if his conduct were held to be such as to deserve the application of the criminal law — a somewhat subjective question.

⁵¹ *Regina v. Parrot* (1979) 51 C.C.C. (2d) 539, leave to appeal to the Supreme Court of Canada refused on January 29, 1980.

⁵² *Cambridgeshire and Isle of Ely County Council v. Rust* [1972] 2 Q.B. 426 (English C.A.); *Dickens v. Gill* [1896] 2 Q.B. 310.

⁵³ *Wong Pooh Yin v. Public Prosecutor* [1955] A.C. 93 (P.C.).

⁵⁴ *Regina v. Wuyts* [1969] 2 Q.B. 474 (C.A.).

⁵⁵ *Cambridgeshire etc. v. Rust*, *supra*; *Regina v. Harvey* (1872), L.R. 1 C.C.R. 284.

(i) *Trespass at common law*

82. Unless a police officer can show affirmative justification either under a statutory authority, or at common law, entry upon private property will amount to a trespass at common law.⁵⁶ In *Eccles v. Bourque*⁵⁷ the Supreme Court of Canada recognized this principle while holding that there is a common law right permitting a police officer to enter premises by force if he has reasonable and probable grounds to believe that a person is on the premises whom he has authority to arrest.

83. Since Canadian Courts have not, as yet, gone very far in recognizing a tort protecting the individual's right of privacy as such, it is generally considered that, if no real damage is established, only nominal damages will be recoverable.⁵⁸ Yet it may not require much of an extension of the principles enunciated by the courts in awarding exemplary or punitive damages, to conceive that more than nominal damages could be awarded. The limitations placed upon awards of exemplary or punitive damages in a leading English case are that exemplary damages may be awarded only "where there has been oppressive, arbitrary or unconstitutional action by servants of the government".⁵⁹ The applicability in Canada of the limitations contained in the English case has been doubted by Mr. Justice Spence in the Supreme Court of Canada⁶⁰ and the case has specifically not been followed in at least four provinces.⁶¹ Therefore it is possible that in Canada there will be a broader scope for exemplary damages.

84. Indeed, some Canadian cases have awarded exemplary damages in circumstances where no action of a "servant of the government" has been involved. In those cases the award has been made even when the defendant had no motive of personal benefit but was found to have committed "a deliberate trespass" or to have been "high handed" or to have shown "a contempt of the plaintiff's rights" or a "cynical disregard of the plaintiff's rights".⁶² If these tests of awarding exemplary damages are the law in Canada, such awards might well be made against members of the R.C.M.P. who have made a surreptitious entry without lawful authority, particularly bearing in mind that senior members of the Force have known over the years that such entries

⁵⁶ *Ghani v. Jones* [1970] 1 Q.B. 693, per Lord Denning, M.R. at 706; Leigh, *Police Powers in England and Wales*, London, Butterworths, 1975, at pp. 167, 171 and 173.

⁵⁷ [1975] 2 S.C.R. 739.

⁵⁸ See, e.g., Burns, "The Law and Privacy: The Canadian Experience", (1976) 54 *Can. Bar Rev.* 15.

⁵⁹ *Rookes v. Barnard* [1964] A.C. 1129 at 1226, per Lord Devlin.

⁶⁰ In his dissenting judgment in *McElroy v. Cowper-Smith and Woodman* [1967] S.C.R. 425 at 432.

⁶¹ *Eagle Motors (1958) Ltd. v. Makaoff* (1970) 17 D.L.R. (2d) 222 (B.C.C.A.); *Fraser v. Wilson* (1969) 6 D.L.R. (3d) 531 (Man. Q.B.); *U.N.B. v. Strax* (1969) 1 N.B.R. (2d) 112 (N.B.S.C.); *Gouzenko v. Lefolii* [1967] 2 O.R. 262 (Ont. C.A.).

⁶² *McKinnon v. F.W. Woolworth Co.* (1968) 70 D.L.R. (2d) 280 (Alta. App. Div.); *Turnbull v. Calgary Power Ltd.* [1975] 3 W.W.R. 354 (Alta. App. Div.); *Cash & Carry Cleaners v. Delmas* (1973) 7 N.B.R. (2d) 101; *Parkes v. Howard Johnson Restaurants* (1970) 74 W.W.R. 255 (B.C.S.C.).

amounted to trespass. On the other hand, as far as activities since July 1, 1974, are concerned, the possibility of such awards would exist only in the case of intelligence probes and not where an authorization has been given by a judge under section 178.13 of the Code or a warrant by the Solicitor General under section 16(2) of the Official Secrets Act, for in those cases the policeman entering the premises to install a listening device would have a genuine belief in his right to enter because the Department of Justice has given its opinion that he has such a right; and, even if (as we suggest in Chapter 3 of this Part) that is a mistaken view, such a genuine belief, even though mistaken, will preclude an award of exemplary damages.⁶³

85. The ancient doctrine of trespass *ab initio*, which provides that a person who enters under authority but subsequently exceeds that authority may be treated as a trespasser from the time of initial entry, may be of some interest, particularly when initial entry is made pursuant to a judicial authorization under section 178 of the Criminal Code or a warrant under section 16 of the Official Secrets Act. It was clear from the evidence before us that members of the R.C.M.P. entering pursuant to such authorizations and warrants sometimes take the opportunity to search, and on occasion to copy or photograph material found — i.e. conduct an intelligence probe.

86. While the doctrine of trespass *ab initio* developed as a method of penalizing abuses of authority, its applicability has been doubted by commentators and courts in recent years, usually on the basis that it amounts to a penalty against honest police efforts or technical errors.

87. In addition the courts earlier developed the limitation that the doctrine is not applicable unless the abuse directly relates to the original ground and reason of entry. If this view is the law, then a partial abuse of authority does not render unlawful everything done under the authority.⁶⁴ Nevertheless some commentators, and *obiter dicta* in some Canadian cases, point out that since the rule was originally designed to provide a remedy against abuses of authority which might lead to oppression, it might still be useful for this purpose.⁶⁵

(j) *Trespass under the Quebec Civil Code*

88. The relevant articles of the Quebec Civil Code are:

406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulation.

⁶³ *Cullerton v. Miller* (1894) 26 O.R. 36 (Ont. Q.B.D.).

⁶⁴ *Fleming, The Law of Torts* (5th ed., 1977) p. 101; *Salmond on Torts* (16th ed.) 1973, p. 48; *Elias v. Pasmore* [1934] 2 K.B. 164; *Canadian Pacific Wine Co. v. Tuley* [1921] 2 A.C. 417 (P.C.); *Chic Fashions v. Jones* [1968] 2 Q.B. 299.

⁶⁵ Denning, *Freedom under the Law*, p. 109; *Winfield & Jolowicz on Tort* (10th) 1975, p. 310; *Klar, Studies in Canadian Tort Law*, 1977, "Intentional Interference with Land", pp. 303-4; *Delta Holdings Ltd. v. Magrum* (1976) 59 D.L.R. (3d) 126; *Townesview Properties Ltd. v. Sun Construction* (1974) 56 D.L.R. (3d) 330 (Ont.).

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

89. Article 406 of the Civil Code describes in the most general terms the rights inherent in the ownership of property in the Province of Quebec. Trespass which may have been committed on such property, as a result of surreptitious entry performed by the R.C.M.P., may be considered a violation of the rights described in this article. Yet the Quebec courts have recognized trespass only in those circumstances where material damages have occurred as a result of such trespass. In those instances, damages have been awarded by the courts under article 1053 C.C. in order to compensate the owner of the property. The courts have refused to award exemplary damage for trespass and, as a result, where no material damage occurs, there can be no successful action for trespass.⁶⁶ It should be noted that any damage action for trespass under article 1053 C.C. is governed by a two-year limitation period pursuant to article 2261(2) C.C.

90. Some mention should also be made of the provisions of the Quebec Charter of Human Rights and Freedoms.⁶⁷ This legislation was enacted on June 28, 1976, and appears to cover some of the areas left unaffected by the Civil Code, including the right to sue for exemplary damages. Violations of this charter are brought before the "Commission des Droits de la Personne" which recommends the appropriate course of action before the courts. The manner in which the courts will acknowledge and protect the rights and freedoms protected by the Charter remains to be seen.

(k) *Conspiracy to commit trespass*

91. Section 423(2) of the Criminal Code provides as follows:

423. (2) Every one who conspires with any one

(a) to effect an unlawful purpose, or

(b) to effect a lawful purpose by unlawful means,

is guilty of an indictable offence and is liable to imprisonment for two years.

If two or more members of the R.C.M.P. conspire with each other to do an act which is trespass at common law, or which is an offence under a provincial Petty Trespass Act, does that constitute conspiracy "to effect an unlawful purpose"? If the act planned is an offence under a provincial statute, the offence of conspiracy is clearly established for the provincial offence is an "unlawful purpose".⁶⁸ Yet, even in that case, it may be possible to argue that

⁶⁶ *Cadorette et Autres v. Mlle Paris* [1951], B.R. 125; Nadeau, *Traité Pratiques de la Responsabilité Civile Délictuelle*, p. 188.

⁶⁷ L.Q. 1977, ch.C-12.

⁶⁸ *Wright, McDermott, Feeley v. The Queen* [1963] S.C.R. 539, [1964] 2 C.C.C. 201, 43 D.L.R. (2d) 597 (S.C.C.).

when the provincial offence is "trivial", section 423(2) should not apply.⁶⁹ In the case of an act which is simply trespass at common law, it is doubtful whether that is an "unlawful purpose" as that phrase is used in section 423(2). In *Grawelicz v. R.*⁷⁰ it was held that "in section 423(2)(a) unlawful purpose means contrary to law, that is prohibited by federal or provincial legislation". Consequently in Canada it becomes unnecessary to consider whether conspiracy to commit common law trespass will be an offence only in limited circumstances, as had been held to be the case in England: *Kamara v. D.P.P.*⁷¹ Presumably it is possible that those limitations might be applied in Canada to restrict liability for conspiracy to violate a provincial Petty Trespass Act. The limitations enunciated in *Kamara v. D.P.P.* were that conspiracy to trespass will amount to criminal conspiracy only when (a) something more than nominal damage is involved, or (b) where the public interest warrants criminal sanctions. It was held that the latter condition existed only when (i) premises were occupied to the exclusion of the rightful owner, and (ii) the action involved invasion of the public domain, for example by the occupation of a public building or (as in that case) the occupation of the embassy of a friendly power.

Legal and policy issues in C.I.B. work only

(a) Surreptitious entries in drug investigation

92. Surreptitious entries to search a place other than a dwelling-house may be made lawfully without a warrant only when the provisions of section 10(1) of the Narcotic Control Act are satisfied — i.e. when the peace officer

reasonably believes there is a narcotic [in the place] by means or in respect of which an offence under this Act has been committed.

An identical provision in respect of controlled drugs is found in section 37(1) of the Food and Drug Act. These provisions do not enable unlimited warrantless search of a dwelling-house. Even with regard to a place other than a dwelling-house the policeman must "reasonably believe" there is a narcotic or controlled drug there; that is, he must have the belief, and it must be a reasonable one. This condition will not exist when the police have at most a suspicion that there is a narcotic or drug on the premises. Therefore a surreptitious entry and search where there is only such a suspicion would be a trespass, and might be an offence under the Criminal Code. (See the analysis of possible offences contained above, in section D, devoted to legal issues in respect of both the Security Service and the C.I.B..)

⁶⁹ *R. v. Layton, ex p. Thodas* [1970] 5 C.C.C. 260, 10 C.R.N.S. 290 (B.C.C.A.) per Nemetz, J.A. dissenting; M.R. Goode, *Criminal Conspiracy in Canada*, Toronto, Carswell, 1975, pp. 87-95; *R. v. Bendall* (1977) 36 C.C.C. (2d) 113, *R. v. Jean Talon Fashion Center Inc.* (1975) 56 D.L.R. (3d) 296 (Que. Q.B.) The latter case concerned an offence under a municipal bylaw. Whether a conspiracy to commit such an offence is now itself an offence is doubtful: see *Grawelicz v. R.*, discussed below at n. 65.

⁷⁰ (1981) 54 C.C.C. (2d) 289 (S.C.C.).

⁷¹ [1973] 3 W.L.R. 198; [1973] 2 All E.R. 1242 (H.L.).

93. In addition, under both sections a peace officer, if he has the same reasonable belief, may enter and search a dwelling-house, but only if he has a writ of assistance. This is a general writ, issued pursuant to the Narcotic Control Act and the Food and Drug Act to a particular peace officer by a Federal Court judge, who must issue it when it is applied for by the Attorney General of Canada. (There has been much criticism of these writs, but as they are provided for by law we do not consider it to be within our terms of reference to comment on whether Canadian law should continue to permit them. Nor have we received any complaint that they have been used unlawfully by the R.C.M.P.) A covert search is lawful if it is made upon the authority of a peace officer who is in possession of such a writ and has a reasonable belief that there is in the place a narcotic or controlled drug by means or in respect of which an offence under the statute has been committed. Once again it must be emphasized that even if he has a writ of assistance, he cannot lawfully enter and search a dwelling-house unless he reasonably believes that a narcotic or a controlled drug is present there.

94. Finally, both sections provide that a justice may issue a warrant authorizing a peace officer to enter and search a dwelling-house, but the justice must be satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic or controlled drug present there.

95. The limitations on the powers of search found in these sections limit the ability of the R.C.M.P. in many circumstances to determine whether drugs are present. Consequently, as will be seen in section E of this Chapter, the R.C.M.P. want to have increased powers of search.

(b) Surreptitious entries in investigations of "moonshining"

96. The Excise Act, section 76(1), permits an officer, if he has a writ of assistance, to enter any building or other place to "search for, seize and secure any goods or other things liable to forfeiture under this Act". The word "officer" is defined as including a member of the R.C.M.P. The subsection reads in full as follows:

76. (1) Under authority of a writ of assistance, any officer, or any person employed for that purpose with the concurrence of the Governor in Council, expressed either by special order or appointment, or by general regulations, may enter in the night time, if accompanied by a peace officer, and in the day time without being so accompanied, any building or other place, and may search for, seize and secure any goods or things liable to forfeiture under this Act, and in case of necessity, may break open any entrance or other doors, walls, floors, windows or gates and any chests or other packages for that purpose.

On the face of the statute, no suspicion or belief in the existence of any particular set of facts need exist: there is no reference whatsoever to any such need. Yet in its brief to us the R.C.M.P. say that there may be surreptitious entry pursuant to section 76(1) only "when reasonable and probable grounds are sufficient to indicate that an offence is being committed". For this proposition an opinion by the Legal Branch is cited (Ex. E-1, Tab 4A), but that opinion does not relate to section 76(1). It discusses the search sections of the

Narcotic Control Act and the Food and Drugs Act, which do certainly require reasonable belief that a drug is present. Therefore the opinion does not support the view expressed in the brief. In our opinion section 76(1) does not contain any limitation, express or implied, as to a search being permissible only when there is a certain level of suspicion or belief in the existence of a state of facts. Consequently it is difficult to understand that any obstacle stands in the way of covert entry by an officer who possesses a writ of assistance.

(c) Surreptitious entries in white-collar crime investigations

97. The R.C.M.P. assert that in some cases surreptitious entry can be a valuable investigative technique in detecting "white-collar" crime. The example given was a case in which a covert search of a hotel room was made in the hope of gaining intelligence as to the intentions of a group of known "white-collar criminals" who were using the room but had left it temporarily. By chance, the search uncovered valuable stolen securities in the room. As a result, the R.C.M.P. called in the local police who later checked the suspects when they were leaving the hotel, and found the stolen securities. Convictions resulted. A search warrant could not have been obtained on mere suspicion. However, as far as the ability of the police to enter the hotel room is concerned, it is not clear that this case illustrates any limitation imposed upon the police by the law in the circumstances, for the policemen did not intend to commit an indictable offence and did not do so (hence there was no break and enter). Civil trespass did not occur because the law does not regard an ordinary short-term hotel guest as an "occupier" of his hotel room in the sense that he has a property interest sufficient to found an action for trespass. If the hotel manager gave permission for the entry, there was likely no trespass. In saying this we are speaking only of the entry into the room; any rummaging among personal effects may have constituted trespass to chattels (see Chapter 8 of this part).

E. NEED AND RECOMMENDATIONS — BRIEF SUMMARY

Security Service

98. We have already quoted extensively the explanation given publicly of the ways in which the Security Service finds that surreptitious entry for the purpose of intelligence probes is valuable in the investigation and detection of espionage, subversion and terrorism. Almost all the 47 cases that have been disclosed to us, mostly in summaries, and that were referred to in section C of this Chapter, involved targetted individuals who were suspected of espionage or foreign interference, or of links with terrorist groups. (Abridgments of many of these summaries are given as an Appendix to this Chapter.) Almost all these cases, and the one additional case which we mentioned, had an international element. There is no evidence that the Security Service has relied significantly upon surreptitious entry as a technique of investigation in cases where the suspected activity is believed to be purely domestic and where there is no suspicion of serious acts in terms that would justify application of the label "terrorist".

99. For reasons which we shall give in detail in Part V, Chapter 4, we consider that the need exists for the availability to the security intelligence agency, subject to external controls, of a limited lawful power of covert search where the investigation relates to suspected espionage, sabotage, foreign interference, or acts of political violence and terrorism which if carried out would cause grave injury to a person or serious damage to property. We do not come to this conclusion lightly, for we believe that any power to enter a man's house without his consent should be extended only with care.

C.I.B.

100. The R.C.M.P. has asserted, in a brief to us, that

There is a definite, and often an essential, requirement to resort to this 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 of high security risk, are faced with the problem of having to know for sure

- if 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;
- 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 particularly difficult, without the power to search in circumstances when a search warrant could not be obtained, to detect the existence of clandestine drug laboratories. The difficulties lie in locating the hidden laboratory and identifying the persons involved. These persons are said to be frequently well financed, intelligent and particularly skillful in creating security measures to guard against discovery by police. It is contended that such persons are often acquainted with the law so that they know that they are relatively safe from prosecution until the last stage of manufacture, for until then they have not created a substance the manufacture or possession of which is prohibited under the schedules to the Narcotic Control Act and Food and Drugs Act that identify prohibited substances. In other words, they know that arrest and seizure are possible only at and after the moment the process results in the production of a prohibited substance. Frequently, we were told, they will move the clandestine laboratory to a new location for the final stage of production. At the least sign of interest by the police, the conspirators will close down the laboratory. Consequently the R.C.M.P. feel that only surreptitious entry, and the taking of samples and photographs during such entry, can enable investigators to determine whether and when the moment has arrived when arrest and seizure would produce evidence that would lead to a conviction and, with luck, will enable investigators to catch the major participants at the scene. The R.C.M.P. state: "In almost every case, seizure of a clandestine laboratory and arrests of persons involved are possible only by a program of surreptitious entry and examination." The R.C.M.P. assert also that surreptitious entry is essential in some investigations of trafficking in such narcotics as heroin and cocaine. They say that it enables the discovery of caches, the photography and marking of drugs for later identification, and determining

whether portions are being removed for distribution. Moreover, they say, this investigative technique permits the police to detect the identity of persons, often previously unknown, who are participants in the scheme.

101. The R.C.M.P. assert also that surreptitious entry is a valuable tool generally in the fight against "white-collar" crime. This has not been substantiated before us. True, in regard to "white collar" crime as in regard to many other kinds of crime, particularly crimes against property interests, the police forces would find it useful to be able to search undetected in offices and homes to try to find some evidence of the commission of a crime. However, we consider that any broad power to search private premises, even upon warrant duly issued, upon mere suspicion that there might be evidence there of the commission of an offence or the intended commission of an offence, would be contrary to the established traditions of criminal law enforcement procedure in Canada. 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. is a power to search covertly. Such a power, we think, 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. We therefore decline to make any recommendation in regard to this proposal.

APPENDIX

SECURITY SERVICE: SOME CASES OF SURREPTITIOUS ENTRY FOR THE PURPOSE OF INTELLIGENCE PROBES

Counter-espionage

(a) Search of premises for paraphernalia and documents

(i) Paraphernalia or documents found

1. A dwelling of a suspected illegal agent of a foreign intelligence service was searched for evidence of illegal activities. Some equipment suitable for intelligence purposes was found, and the investigation was continued by other means. Ultimately the suspect left Canada.
2. The Security Service searched the dwelling of a suspected intelligence officer of a foreign country to look for evidence of specific operations. Some equipment suitable for intelligence purposes was found. The individual was later identified as an agent of the foreign intelligence service.
3. Several entries were conducted into the residence of a Canadian suspected of being an intelligence agent for a foreign country. Important evidence of espionage was discovered.
4. More than one entry was made into the residence of a Canadian considered by the Security Service to be a foreign intelligence officer. Certain documents, considered to be of significance, were discovered and photographed.

(ii) Paraphernalia or documents not found

5. The Security Service searched the residence of a suspected illegal agent of a foreign intelligence service. The search failed to reveal any espionage paraphernalia. This contributed to an ultimate conclusion that the individual was not and had never been an agent of any intelligence service.
6. The Security Service searched the residence of a foreign mission employee who, the Service believed, was running Canadian agents. While no espionage paraphernalia was found, other useful information was obtained.
7. A search of the residence of a known foreign intelligence officer revealed no technical paraphernalia but did produce other useful information.

8. A Canadian was suspected by the Security Service of engaging in intelligence activities on behalf of a foreign power. His residence was searched, but no information of value was obtained. Other means of investigation led to refusal of re-entry to Canada of the employee of a foreign mission.

9. A search of a Canadian's residence produced partial substantiation of other evidence that dispelled suspicions that he had been recruited by a foreign intelligence agency.

10. On the basis of information received, business premises were searched in order to determine whether certain items were there being held for a person suspected of being a foreign agent. The search revealed no such information, but, during the search, photographs were taken of documents pertaining to the organization whose premises were searched.

(iii) To observe the lifestyle of an intelligence officer

11. A search of a residence produced what the Security Service considered to be information that increased their insight into certain aspects of a foreign country's intelligence service community.

(iv) To conduct a survey preparatory to installing listening device

12. Residential premises of a foreign mission employee, who was a suspected foreign intelligence officer, were entered to determine whether it would be possible to install a listening device and to locate certain things which would be of use in further investigation. After further investigation the mission employee was declared *persona non grata* and left Canada.

13. The residence of a Canadian, suspected of having been recruited by a foreign intelligence service, was searched in order to conduct a physical survey preparatory to introducing a listening device. While on the premises then and on a later occasion, Security Service personnel found no evidence to connect him with any intelligence operation. Further investigation satisfied the Security Service that he had no such connection.

Foreign interference

(i) Search of premises

14. A search of a residence produced no evidence that the occupant was, as suspected, a foreign intelligence agent. However, some information was found that was considered to be of use to Security Service work generally.

15. A search of a residence enabled letters to be photographed between the occupant, who was suspected of having been recruited by a foreign intelligence agency, and other persons.

(ii) Search of baggage

16. A suspected foreign intelligence agent's luggage was searched and a document of interest was photographed.

Possible terrorist group

(i) Search of premises

17. Office premises of a Canadian group, with objectives similar to those of a foreign violence-prone group, were searched, but the quality of information obtained was not significant.

18. Security Service personnel entered the office of a violence-prone group in which there was reason to suspect the presence of weapons. The purpose of the search was to look for weapons and for other information of interest. As a result of what was found, local police obtained a search warrant and some weapons were seized.

19. The Security Service searched the office of a group thought to pose a threat to security, in order to obtain details of the operation of the group and of its membership. Such information was obtained.

20. A search of an office enabled the Security Service to assess the capability of an organization in relation to international terrorism.

21. A Canadian resident's premises were searched to determine the extent of his ties with a foreign terrorist organization. No information of intelligence value was obtained.

22. Searches of a Canadian's residence produced useful information as to his relationship with terrorist groups in Canada and abroad, and plans for steps to follow assumption of power by the Canadian group.

23. A search of the office of an organization failed to produce the information which was sought, as to its finances.

24. A search of a residence produced no information of intelligence significance as to a person suspected of being linked to a foreign terrorist group.

(ii) Search of baggage

25. Security Service personnel searched luggage in transit, of a person suspected of carrying handguns, and found weapons.

26. A foreigner was believed to be shipping arms from Canada to his country. A search of luggage being sent by him out of Canada produced nothing of intelligence interest.

27. A foreign agency believed that one of its nationals in Canada had documents of interest, and asked that his luggage be searched. When carried out by the Security Service, some items of interest were found. It will be observed that in this case the activities of the Security Service were not directly related to any security interests of Canada.