PART VIII

A PLAN FOR THE FUTURE: DIRECTION AND REVIEW OF THE SECURITY INTELLIGENCE SYSTEM

INTRODUCTION

INTRODUCTION

1. Maintaining an acceptable system of government control and review of security and intelligence activities poses a serious challenge to a democracy. Among these activities, those related to security must, in particular, often be conducted with great secrecy. Therefore, it may be difficult to provide direction and control in a manner which is consistent with the principles of democratic government. We perceive the difficulties, but we do not concede that the principles must be compromised. Where a choice must be made between efficiency in collecting intelligence and the fundamental principles of our system of government, the latter must prevail. It would be a serious mistake — indeed a tragic misjudgment — to compromise our system of democratic and constitutional government in order to gather information about threats to that system: this would be to opt for a cure worse than the disease.

2. Earlier in the Report we proposed one important step towards a more democratic system of direction of the security intelligence organization: an Act of Parliament establishing the organization and defining in general terms its functions and powers. We have also emphasized how important it is to ensure that responsible Ministers give direction on the policy issues which will inevitably arise in carrying out a general statutory mandate. In Chapter 1 of this part of our Report we shall consider in more detail the mechanisms and relationships needed within government to provide this policy direction. In an adequate system of government direction and control not only must there be ministerial knowledge and direction of the security agency's operation involving significant policy decisions, but there must also be collegiality and countervailing powers. Security matters, as we emphasize throughout this Report, raise issues requiring thoughtful and balanced political judgment. No single Minister should be left with sole responsibility for security matters.

3. However, a thorough-going and well balanced system of government control and direction of a security agency is not enough, in our view, to satisfy the requirements of democracy. We believe there is also a need to bring to bear on the government some checks and balances from external sources. The modern history of western democracies has revealed that there is a danger of secret intelligence agencies being used by the government of the day for narrowly partisan purposes or to serve the personal interests of political leaders rather than the security of the nation. To avoid this danger and to strengthen public confidence in the integrity of security intelligence operations and their direction by government, provision must be made for independent review of security activities. One element of independent review is the Security Appeals Tribunal we proposed in Part VII to hear appeals in security clearance cases. Also, in Part V, we proposed that judicial approval be required for the use of certain intrusive techniques of investigation. In Chapter 2 of this part of the Report we shall propose some additional elements of external review.

4. Before presenting our detailed proposals as to various institutions and offices involved in the direction and review of security intelligence activities, we think it worthwhile to provide a short outline of all the elements in the system we propose. The outline will show clearly how the various components of the system interact.

5. The main elements in the system we propose for government direction and independent review of the security intelligence agency are as follows:

(a) Parliament should express its will in statutory form as to the functions and powers of a security intelligence agency and the means of directing and reviewing its activities.

(b) Within the statutory framework established by Parliament, general policy as to the agency's methods and intelligence collection priorities should be established and reviewed by the Cabinet.

(c) The Cabinet, the Privy Council Office and interdepartmental committees should be responsible for the co-ordination of security and intelligence activities, including the development and implementation of personnel and physical security policies and the provision of assessments of intelligence reports to government consumers.

(d) The Prime Minister's responsibility for national security has some special dimensions. He should continue to chair the Cabinet Committee on Security and Intelligence and be consulted on security issues of major importance.

(e) The Secretary to the Cabinet and the staff in the Privy Council Office should assist the Prime Minister in discharging his responsibilities with regard to security and intelligence. They should also assist the Cabinet in co-ordinating the activities of the intelligence agencies and in developing and implementing policy on an interdepartmental basis with respect to personnel and physical security.

(f) The Solicitor General of Canada should continue to be the Minister responsible for the security intelligence agency. He should be responsible for ensuring that government policy with respect to the security intelligence agency is carried out and should take the lead in initiating changes in government policy and legislation governing the security intelligence agency.

(g) The Deputy Solicitor General should be the Minister's deputy with respect to all aspects of direction and control of the agency. With the assistance of the Departmental staff and the Director General of the agency, he should be in a position to give the Minister informed advice on all aspects of the security intelligence agency's activities.

(h) The accountability of the agency, both to the Cabinet and to Parliament, must be ensured by an effective system of communication. It should operate within the agency and also between the Director General of the agency and the Deputy Solicitor General and the Solicitor General to ensure that the Minister is informed of all those activities which raise questions of legality or propriety.

(i) An effective system of control on security intelligence expenditure and efficiency must be maintained by the Treasury Board through its Secretariat and the Comptroller General and the Auditor General.

(j) Parliament's function of scrutinizing the activities of the security intelligence agency must be facilitated by a joint parliamentary committee on security and intelligence which can examine the activities of the agency *in camera*.

(k) An Advisory Council on Security and Intelligence should be established to assist the Minister, the Cabinet, and Parliament in assessing the legality, propriety, and effectiveness of the security intelligence agency. It should be made up of capable people who will command the respect of Parliament and the public. It should have no executive powers, but should have an investigating capacity. It should report any findings of illegality or impropriety to the responsible Minister. It should also report at least annually to the joint parliamentary committee on security and intelligence.

(l) A Security Appeals Tribunal should be established to review situations in which individuals wish to challenge security clearance decisions in the areas of public service employment, immigration and citizenship. The conclusions of this review process should be reported as recommendations to the Cabinet.

(m) Where Parliament has empowered the security intelligence agency to collect information by methods not available under law to the ordinary citizen, a judge of the Federal Court of Canada should determine, on an application approved by the Solicitor General of Canada, whether the conditions established by Parliament for the use of such techniques are satisfied in each case.

(n) Members of the security intelligence agency must not be above the law. Evidence of illegal activity by members or their agents must be submitted to the appropriate Attorney General who is responsible for deciding what further steps should be taken with regard to prosecution.

(o) The internal security of Canada must not be treated as a water-tight compartment under exclusive federal jurisdiction. Arrangements should be established for ensuring that the federal Minister and officials responsible for security intelligence activities meet with other levels of government on a regular basis to ensure mutual understanding and co-operation.

(p) Ministers and Parliamentarians with responsibilities relating to security and intelligence should endeavour to provide the public with all information possible about the security of Canada, the threats to it and steps taken to counter those threats so that a more informed public opinion can address with some understanding the major issues relating to the work of a security intelligence agency.

CHAPTER 1

INTERNAL GOVERNMENTAL CONTROLS

A. ROLE OF THE CABINET AND INTERDEPARTMENTAL COMMITTEES

6. The Parliament of Canada must establish the basic 'charter' of the security intelligence agency, but this charter will inevitably require important policy decisions in its implementation. Such decisions require answers to the following:

> What should be the priorities of the agency in collecting intelligence?
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> How can its capacity to serve the needs of the government be improved?
>
> How can its performance better meet the intention of Parliament and the concerns of the public?

In our system of government the Cabinet must be responsible for determining these policy questions, subject always to its accountability to Parliament.

7. We recognize that the amount of time the Cabinet can devote to any subject, even national security, is quite limited. But we would emphasize that because security issues so often involve the balancing of conflicting policy interests and social values, it is highly desirable that important policy matters in this field be subject to a collegial decision-making process. In the past, the participation of the Cabinet and Cabinet Committees has occurred mostly during periods of crisis. We think it important that the Cabinet should be involved in the policy-making process in normal times.

8. The assignment of much of the detailed policy work of Cabinet to specialized Cabinet committees has become a permanent feature of Cabinet government in Canada. Such committees have the advantage of making it possible for the Ministers whose departments are most involved in a particular policy to devote more attention to its development than could the full Cabinet. Also, meetings of Cabinet committees permit interaction between senior government officials and Cabinet Ministers which is not possible at meetings of the full Cabinet. The advantages of using specialized Cabinet committees can be realized in the field of security and intelligence through the Cabinet Committee on Security and Intelligence which has existed since 1963.

9. This Committee has not met on a regular basis to consider policy matters in relation to security and intelligence. Instead it has dealt with particular issues which are referred to it, usually by the Interdepartmental Committee on Security and Intelligence. As we shall see shortly, that Interdepartmental

Committee has not been able in recent years to develop policy proposals in most of the areas under review to the point of submitting them for consideration by the Cabinet Committee. This is one reason why meetings of the Cabinet Committee on Security and Intelligence have been relatively infrequent. Between 1972 and mid-1980 it has met 20 times.

10. We think that one matter which the Cabinet Committee should deal with on a regular basis is the establishment of the government's intelligence priorities. When the Committee meets for this purpose, its membership should be expanded to include Ministers whose departments are the principal consumers of foreign and domestic intelligence as well as those whose departments are involved in intelligence collection. The Committee should review the performance of the security intelligence agency along with other components of the intelligence community to ensure that government departments and agencies are receiving useful intelligence products. The Committee's assessment of intelligence priorities should be reflected in the budget allocations for the various intelligence and security functions of government. For some years now the Treasury Board has been trying to establish a satisfactory method of identifying expenditures on security and intelligence. As soon as such a scheme is arrived at, the Cabinet Committee should be asked to make budget recommendations to those government departments with responsibilities in security and intelligence. An improvement in the Cabinet Committee's capacity for deciding intelligence priorities depends very much on the assistance which it can receive from the Interdepartmental Committee on Security and Intelligence in identifying the government's intelligence needs. We shall make a number of specific suggestions in this chapter designed to improve this aspect of the interdepartmental committee system.

11. The 1975 Cabinet Directive on "The Role, Tasks and Methods of the R.C.M.P. Security Service" stated that

> (b) the R.C.M.P. Security Service be required to report on its activities on an annual basis to the Cabinet Committee on Security and Intelligence;

There have been two reports so far: the first covered the 1976 calendar year and the second covered the period from January 1977 to April 1979. We were told the second report was delayed because the R.C.M.P. Security Service decided to change the time basis for its annual report from calendar year to fiscal year, and because a special task force was examining the interpretation of terms in the 1975 Cabinet Directive. We think this delay is regrettable. A report once a year is the minimum required to keep the Cabinet Committee on Security and Intelligence adequately informed about the security intelligence agency's activities. Preferably, there should be reports twice a year. The quality of the second report is a distinct improvement over the first. It contains a good deal of information about the nature of security threats and targetting decisions, but has much less to say about methods of investigation and countering. A dramatic reduction in security screening activity is reported but not explained. The report could be improved by focussing more directly on policy issues which should be of concern to the Cabinet. Shifts in the allocation of resources to target areas should be indicated as these should reflect changes in

intelligence priorities. Legal implications of operational practices which indicate a need for legislative change should be identified. The report should also refer to serious difficulties encountered in relationships with foreign agencies, provincial or municipal authorities, or with other federal departments or agencies.

12. Since its inception, the Cabinet Committee on Security and Intelligence has been chaired by the Prime Minister. The Prime Minister's responsibility for national security has some special dimensions which set it aside from his other basic responsibilities and create the need for him to chair the Cabinet Committee during discussions of major issues in this area. Weaknesses in the internal security system can have drastic consequences for the well-being of the nation. The secret, intrusive nature of security work makes it dangerous to permit any Minister to become overly dominant in this field. The consideration of intelligence needs should be a balanced process free from domination by any single government department. It is doubtful that any other area of government activity has as much potential for damaging civil liberties. For all of these reasons we think it essential that the Prime Minister continue to be chairman of the Cabinet Committee on Security and Intelligence, and should chair the Committee when it deals with matters of great urgency or major policy questions, or when the Committee determines the government's intelligence requirements. But there should be a vice-chairman who could chair the Committee when such matters as administrative changes in security screening or protective security are being considered. The Solicitor General might be the appropriate Minister to serve as vice-chairman.

WE RECOMMEND THAT the Cabinet annually determine the government's intelligence requirements.

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WE RECOMMEND THAT the security intelligence agency prepare at least annually a report on its activities for submission to the Cabinet Committee on Security and Intelligence and that this report include an analysis of changes in security threats, changes in targetting policies, serious problems associated with liaison arrangements and legal difficulties arising from operational practices.

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WE RECOMMEND THAT the Prime Minister be the chairman of the Cabinet Committee on Security and Intelligence and have the assistance of a vice-chairman.

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B. ROLE OF THE PRIVY COUNCIL OFFICE AND INTERDEPARTMENTAL COMMITTEES

13. Because of the central role which the Prime Minister must play in policy relating to Canada's internal security and the need for balanced direction and central co-ordination, the Privy Council Office must continue to play an important role in security and intelligence matters. The Privy Council Office is, in effect, the Prime Minister's department. One of its principal functions is to act as a central coordinator for government activities. It serves as the

secretariat for the Cabinet and Cabinet committees and provides advice to the Prime Minister on the various matters with which he must deal. The Secretary to the Cabinet (who is also the Clerk of the Privy Council) is the deputy minister of the Prime Minister and as such is considered to be the senior public servant in the Government of Canada. The Secretary to the Cabinet chairs the Interdepartmental Committee on Security and Intelligence. This is the Committee of senior officials at the Deputy Minister level which is responsible for developing most of the policy proposals considered by the Cabinet Committee on Security and Intelligence. An Assistant Secretary to the Cabinet for Security and Intelligence reports to the Secretary to the Cabinet and heads the Privy Council Security and Intelligence Secretariat.

14. The recommendation of the Royal Commission on Security that a considerably enlarged Privy Council Office Secretariat develop and implement security policy has not been implemented. The group of officials in the Privy Council Office devoted to security and intelligence matters continues to be quite small. In addition to the Assistant Secretary to the Cabinet for Security and Intelligence, there are, on the security side, a security policy adviser and two officers who are responsible for personnel and physical security within the Privy Council Office. On the intelligence side of the Secretariat, there are currently four officers seconded from the Departments of External Affairs, National Defence and the R.C.M.P. These officers, under the direction of the Intelligence Advisory Committee, perform the staff work involved in collating intelligence reports and preparing material which is distributed to several departments and agencies of government. In addition, the seconded staff participates in working groups that prepare long-term intelligence assessments.

15. We see no reason to change the basic responsibilities or the size of the Privy Council Office's Security and Intelligence Secretariat. The Privy Council Office should play a co-ordinating, not an operational role, in this as in other fields. The Bureau of Intelligence Assessments which we recommend below should not be part of the Cabinet secretariat, although reporting — through the Secretary to the Cabinet — to the Prime Minister. That Bureau would relieve the seconded intelligence officers in the Privy Council Office of any responsibilities they now have for the preparation of long-term intelligence estimates, but not of their work as it relates to current intelligence. The central co-ordinating role of the Privy Council Office requires that the Secretary to the Cabinet devote a significant portion of his time to security and intelligence matters. His responsibilities in this field are already considerable. Our recommendations for strengthening the interdepartmental committee system and establishing a Bureau of Intelligence Assessments will increase the responsibilities of the Secretary to the Cabinet in this area. So will his work in co-ordinating the implementation of this Report. On the basis of our discussions here and in other countries which have a parliamentary and cabinet system of government, we estimate that as much as 10 per cent of the Secretary's time might be spent, particularly in the next few years, in dealing with security and intelligence policy.

WE RECOMMEND THAT the Privy Council Office Secretariat for Security and Intelligence continue its existing functions with the exception

of any responsibilities its seconded staff now has for the preparation of long-term intelligence estimates and that the Secretary to the Cabinet devote a considerable amount of time to security and intelligence matters.

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The Interdepartmental Committee System

16. In Part II of our Report we traced the development of the system of interdepartmental committees which deal with security and intelligence matters. It will be recalled that this committee system was reorganized in 1972. The principal components of this system are:

— *The Interdepartmental Committee on Security and Intelligence* (I.C.S.I.) chaired by the Secretary to the Cabinet and composed of the Deputy Ministers of the principal departments involved in security and intelligence activities and the Commissioner of the R.C.M.P. Its secretary is the Assistant Secretary to the Cabinet for Security and Intelligence.

— A subcommittee of I.C.S.I., known as the *Security Advisory Committee* (S.A.C.), chaired by the Assistant Deputy Solicitor General who is the head of the Police and Security Branch in the Solicitor General's Secretariat. The Committee is composed of senior departmental officials responsible for security matters including the Director General of the R.C.M.P. Security Service.

— Another subcommittee of I.C.S.I., known as the *Intelligence Advisory Committee* (I.A.C.), is chaired by the Deputy Under Secretary of State for External Affairs (Security and Intelligence) and composed of senior officials including the Director General of the R.C.M.P. Security Service.

17. The principal activity of the Security Advisory Committee has been to develop policy with respect to the security of information, government property and personnel. In recent years it has also taken on a responsibility in relation to security intelligence: the preparation and distribution of the weekly report on threats to internal security. The reports are based primarily on information received from the R.C.M.P. Security Service, with occasional contributions from the Department of National Defence. The group which drafts reports is chaired by a member of the Police and Security Branch in the Solicitor General's Department, and the final product is approved by key members of the Security Advisory Committee. The Intelligence Advisory Committee supervises the collation of reports received from various departments and agencies and the production of papers. Most of the staff work in this collation and analysis process is done by the officials seconded to the Privy Council Office.

18. Virtually everyone who discussed the interdepartmental committee system with us, including those who participate in it, said that though the basic structure of the system is sound it is not working as well as it should. Our own study of this system has identified two major shortcomings. First, in the area of security policy, while a great deal of time and effort has been devoted by the Security Advisory Committee and its network of subcommittees to such matters as security clearance policy, the system of classifying government documents and emergency planning arrangements, few of these matters have

been finally resolved. Second, the process of providing government departments with useful assessments of intelligence received from collecting agencies needs to be strengthened. We shall deal with each of these issues in turn.

Security policy and co-ordination

19. Turning first to security policy, our review of the performance of the Security Advisory Committee (S.A.C.) over the last eight years revealed a high degree of frustration. In 1972, the Chairman of the S.A.C. presented to the Interdepartmental Committee on Security and Intelligence (I.C.S.I.) a list of priority items in the area of security policy which required resolution. The I.C.S.I. approved the list and the S.A.C. went to work. Eight years later some of the most important items on the list remain unresolved. For instance the redrafting of Cabinet Directive 35 governing security screening in the Public Service has been under way since 1973, but despite numerous drafts and re-drafts, a new directive has still not been adopted. In Part VII we noted how the failure of the Committee system to develop a new method for classifying government information has impeded the reform of the security screening mechanisms. In Part IX we shall describe the failure of the Committee system to develop policy on emergency security matters. Both these failures have had a direct impact on the R.C.M.P. Security Service as they have left that organization without comprehensive, up-to-date policy directions in several areas.

20. We think that one of the factors which accounts for the ineffectiveness of the Committee system with regard to Security policy is the poor linkage between Deputy Ministers on the senior committee (I.C.S.I.) and the members of the junior committee (S.A.C.) from some departments or agencies. Some of the security officials who represent their departments on the Security Advisory Committee do not have a direct reporting relationship with their Deputy Ministers. The discussion and proposals at the S.A.C. level too often focus on the intricacies of administration rather than on fundamental policy. As a result the proposals of this Committee do not have a receptive audience in the senior Committee.

21. We recommend that in the future the *initiative* in policy issues such as personnel security, physical security and emergency planning not be delegated to a junior committee. Leadership in determining which security policy issues need resolution, in assigning policy problems to the S.A.C. and in monitoring the impact of security procedures, must be exercised by Ministers and Deputy Ministers. The Cabinet and Interdepartmental Committees on Security and Intelligence should establish clear mandates with firm completion dates for working groups at the S.A.C. level. Leadership at the Cabinet level requires the designation of a lead Minister for policy in this area. The Solicitor General would seem to us to be the logical Minister to be designated for most security policy matters. In section C of this chapter we shall discuss his role as the Minister responsible for the security intelligence agency. There we shall argue that the Solicitor General must continue to have within his Department, and outside the security intelligence agency itself, a nucleus of personnel to advise him on security matters. The Assistant Deputy Solicitor General who heads the Police and Security Branch in the Solicitor General's Department should be

one of the most knowledgeable senior officials in the federal government on security matters. It makes good sense for the person who holds this position to continue to chair the Security Advisory Committee. There may be some areas of security policy in which a department other than the Solicitor General's Department has a more direct operational responsibility (for instance, security screening for the Public Service) in which case the Minister responsible for that department should be designated as the Minister responsible for bringing forward policy proposals to Cabinet. The important point to bear in mind is that adequate Cabinet attention to the various elements of security policy will be ensured by assigning responsibility for each element to one or more Ministers.

22. The Secretary to the Cabinet and the Assistant Secretary for Security and Intelligence must continue to play the primary role in overseeing and co-ordinating the committees or working groups of security experts. It is through the work of these interdepartmental groups co-ordinated by the Privy Council Office that the perspectives — philosophical and technical — of the different departments and agencies must be brought to bear on the resolution of security problems. More effort should be made through this central co-ordinating mechanism to learn how security policies are working. In particular it is important for the Privy Council Office to be able to keep the Minister responsible for the security intelligence agency well informed about the impact that the agency's work is having on the security clearance process. How often are persons being denied a security clearance? For what reasons? Are the departments following the recommendations of the security intelligence agency? If not, why not? What major breaches of security have occurred in government? What is their cause? It is on questions of this kind that the central machinery of security policy co-ordination should focus. No time should be spent on routine meetings which are not channelled towards solving policy problems recognized as reasonably urgent and in need of resolution by Deputy Ministers and Ministers.

WE RECOMMEND THAT the Cabinet and Interdepartmental Committees on Security and Intelligence assume active responsibility for determining those security policy issues which require resolution and, where necessary, instruct the Security Advisory Committee or working groups of officials to prepare draft proposals for submission by stipulated deadlines.

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WE RECOMMEND THAT one or more Ministers be clearly designated as responsible for bringing forward policy proposals to Cabinet on all aspects of security policy, and that the Solicitor General be the Minister responsible for the development of policies governing the work of the security intelligence agency.

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WE RECOMMEND THAT the Secretary to the Cabinet and the Assistant Secretary to the Cabinet for Security and Intelligence continue to be responsible for overseeing the interdepartmental co-ordination of security policies and that more emphasis be given to analyzing the impact of security practices and policies on the departments and agencies of government.

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Intelligence policy and co-ordination

23. Turning now to the committee system's role in formulating policy with regard to intelligence priorities and in co-ordinating intelligence activities, we think improvement is needed in two areas. First, there is a need for a more effective process of identifying intelligence requirements for the Cabinet and ensuring that these requirements have a direct and significant impact on the work of the collecting agencies. The identification of the requirements entails closer collaboration with the consumers, or users, of intelligence. A second area of improvement concerns the analysis of the intelligence received and its use by the intelligence consuming departments and agencies of government. The structural changes which we shall recommend are directed towards realizing improvements in these closely connected areas.

24. We think that the logic which led to the amalgamation of security and intelligence at the Deputy Minister level in 1972 (i.e. in I.C.S.I.) should now also be applied to the central collation and assessment of intelligence. Under the present system, domestic security intelligence and foreign intelligence are dealt with separately: the Security Advisory Committee collates and prepares assessments of current security intelligence, the Intelligence Advisory Committee does the same for foreign intelligence. As we have pointed out many times in this Report, many of the threats to Canada's internal security have international dimensions. The collation and distribution of reports about such threats should not be split up into foreign and domestic compartments. Thus, we think that the intelligence assessment and dissemination functions of the Security Advisory Committee should be transferred to the Intelligence Advisory Committee.

25. Some changes should be made in the structure of the Intelligence Advisory Committee to enable it to function more effectively as a central co-ordinating body for intelligence activities. This central co-ordinating work must not be dominated or be perceived to be dominated by one or two departments of government. It is essential that the perspectives of the various collecting departments be reflected in the intelligence products the government receives. We think what might be referred to as the "confederal" character of this process will be enhanced if the Intelligence Advisory Committee is chaired by the Assistant Secretary to the Cabinet (Security and Intelligence) rather than by the Deputy Under Secretary of State for External Affairs (Security and Intelligence). In the past, the Department of External Affairs and the R.C.M.P. have had their differences in assessing the significance of security threats. These differences are inevitable and, indeed, their expression in the intelligence process provides a desirable element of countervailance. These differences, however, should not be resolved by one department having more influence than the other on the intelligence assessment process. That is why we think the official who presides over this process should be someone who reports to the Secretary to the Cabinet and the Prime Minister.

26. The membership of the I.A.C. should represent the community of intelligence producers and its major customers. If our recommendation to establish a security intelligence agency separate from the R.C.M.P. is adopted, the

Director General of the new organization should certainly be a member of the Committee just as the Director General of the present Security Service is a member of the I.A.C. The R.C.M.P. should continue to be represented on the Committee as a major consumer of security intelligence and because of its liaison with the security intelligence agency. We think, too, that there should be better representation of the economic departments of government on this Committee. Certainly the Department of Finance should be represented, as well, perhaps, as the Departments of Industry, Trade and Commerce, and Energy, Mines and Resources. The central assessment of intelligence needs and intelligence products has tended to focus on political and military intelligence. We think this emphasis is too narrow and that as a result the Government of Canada does not make the best use of the information at its disposal. The integration of economic intelligence into the overall intelligence requirements and priorities may contribute to a less narrow intelligence community, and one perhaps more aware of the benefits to be gained from the intelligence machinery. In addition, the Treasury Board should be represented on the Committee in order to assist it in monitoring the costs of the different components of the intelligence system.

27. With these additions to the membership and with the integration of security intelligence analysis, we think that the Intelligence Advisory Committee should continue with its present functions. One of these functions is the production of current intelligence — analyzed information on events to assist short-term decision-making. At present, the support staff of the Committee who do most of the work in drafting papers is constituted by a small group of officers seconded to the Privy Council Office, usually from the Departments of External Affairs and National Defence, and from the R.C.M.P. Under our suggested reforms this group would remain in the Security and Intelligence Secretariat of the Privy Council Office under the supervision of the Chairman of the Intelligence Advisory Committee. Its work in current intelligence would follow the requirements and priorities as defined by the Committee and as approved by the Interdepartmental Committee on Security Intelligence. With the suggestions we have made for greater integration between producers and consumers of intelligence, and for a broader definition of intelligence requirements, the current intelligence function would expand to include security intelligence and economic intelligence in addition to political and military intelligence.

28. While these changes in the functions and structure of the Intelligence Advisory Committee will improve the collation and distribution of *current* intelligence, this in itself is not enough. The aim of intelligence is to provide information needed for informed decision-making by government. In addition to current intelligence, there is a need for longer term, strategic estimates assessing the likelihood that certain situations will exist or that certain events will occur. The aim of such assessments or estimates is to attempt to reduce the inevitable degree of uncertainty in making calculations about future situations. A former Deputy Director of the C.I.A. has written that of "all the different duties devolving on the C.I.A." as a result of the National Security Act "... the preparation and dissemination of national estimates is the most

difficult, the most sophisticated, the most important."[1] Maintaining a current intelligence function and providing intelligence estimates provide the policy-maker with information of use both in the short-term and in the longer term. The existing interdepartmental committee system produces the occasional long-term assessment, but we think the government's intelligence capacity in this area needs strengthening. As for the domestic scene, our examination of the intelligence situation with respect to separatist terrorism in Quebec during 1970 and afterwards leads us to draw the following inference. There are indications that there was a deficiency in the machinery available to do strategic long-term assessments within government of intelligence received from various sources, including the Security Service.

29. The lack of an interdepartmental security and intelligence assessments programme singles Canada out from its close allies. A recent Australian Royal Commission on Security and Intelligence recommended the establishment of an assessments agency.[2] Mr. Justice Hope, who headed the Australian Royal Commission, found that in that country the assessment process suffered from too great control by the Defence Department and the Department of Foreign Affairs.[3] He also concluded that other departments of government did not take any real part in setting intelligence targets and priorities.[4] He found, too, that there was a lack of definition of roles and co-ordination which affected the collectors of intelligence.[5] As was the case in Canada for much of the post-war period, Mr. Justice Hope thought that too little emphasis had been placed on non-military intelligence,[6] and the Royal Commission proposed a centralised assessment function.[7] Our review of the co-ordination of intelligence policy in Canada has drawn us to some similar conclusions, including the need for a centralized assessments body. The Australian body, which emerged as a result of the Royal Commission's recommendations is called the Office of National Assessment (O.N.A.). Its functions and personnel arrangements are laid out in the Office of National Assessments Act, 1977, that governs its operations.

30. With these examples, and bearing in mind our criticisms of the intelligence analysis function as presently constituted, we propose the creation of a Bureau of Intelligence Assessments. The Bureau should be centrally located in the Privy Council Office, but separate from the Security and Intelligence Secretariat. The functions of the Bureau would be to produce intelligence assessments under the direction of the Interdepartmental Committee on Security and Intelligence and in line with the requirements and priorities set by the Intelligence Advisory Committee and approved by the Interdepartmental and the Cabinet Committees on Security and Intelligence. Following the Australian

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[1] Ray S. Cline, *Secrets, Spies and Scholars: Blueprint of the Essential C.I.A.*, Washington, Acropolis Books, 1976, p. 135.

[2] Australia, *Third Report of the Royal Commission on Intelligence and Security* (The Hope Report), *Abridged Findings and Recommendations*, Canberra 1978, para. 67.

[3] *Ibid.*, para. 67.

[4] *Ibid.*, para. 48.

[5] *Ibid.*, para. 51.

[6] *Ibid.*, para. 53.

[7] *Ibid.*, para. 59.

model, we think the Bureau should have a nucleus of its own intelligence analysts augmented by officers seconded from the departments and agencies of government with responsibilities for security and intelligence matters. It should be headed by a Director General, an individual with experience in the assessment of intelligence. We think he should report to the Prime Minister through the Secretary to the Cabinet and should be a member of the I.A.C.

31. It is our belief that the confederal character of the intelligence community should be retained in the work of the Bureau. Much of its work should be carried out by working groups devoting their time and energies to specific topics. In the preparation of papers on a subject which is likely to be perceived differently by different departments of government, it would be wise to ensure that representatives of these departments are included, or are consulted by the working group. Departments with intelligence collecting functions must have the opportunity to present their views to government if they dissent from the assessment presented in a paper prepared by the Bureau. To provide for this opportunity, consideration should be given to providing a clause in the legislation establishing the Bureau, similar to section 8(3) of Australia's Office of National Assessments Act 1977. That section requires that, where consultation with departments has not produced a consensus, the Director General

> shall forward to each person to whom the assessment is furnished a statement setting out the matter or matters in respect of which the difference of opinion has arisen.

32. It must be emphasized that the Bureau of Assessments would not be an intelligence collecting agency. Its function would be confined to using the intelligence collected by other departments and agencies of the Canadian government and that obtained from other sources, and combining this with the best available public sources of information to produce long-term assessments of threats to Canada's security and vital interests. Nor would the Bureau be a substitute for developing a strong analytic capacity within the security intelligence agency. As we have explained earlier, analysis is an essential ingredient of the operational work of an effective security intelligence agency. The agency's products must include short-term and long-term assessments of security threats. These reports would often be used by the Bureau in its work. In addition intelligence officers from the agency would frequently be members of groups working under the Bureau's auspices on long-term estimates.

33. The Bureau should also make an important contribution to the process of developing intelligence priorities. From its preparation of assessments it will be in a position to identify shortcomings in the information or intelligence held by government and, therefore, to help define the requirements and priorities of the intelligence community.

34. But the primary responsibility for developing annual intelligence priorities should continue to rest with the Requirements and Priorities Group which functions under the supervision of the Intelligence Advisory Committee. The Assistant Secretary to the Cabinet (Security and Intelligence) should forward that group's recommendations to the Chairman of the I.C.S.I. The intelligence requirements for security and foreign intelligence, including economic intelli-

gence identified by the Bureau, should be integrated with the I.A.C.'s list of intelligence requirements and be subject to discussion in an interdepartmental environment, as well as to review by the I.C.S.I. and the Cabinet Committee on Security and Intelligence. The links that exist between assessments and the definition of priorities and requirements, together with the close links that exist between current intelligence and intelligence assessments will, we think, require a close working relationship between the Assistant Secretary to the Cabinet and the Director General of the Bureau of Assessments. Also the participation of the Solicitor General, the Deputy Solicitor General, and the Director General of the security intelligence agency at each stage of the process should ensure that the intelligence requirements established by the government are reflected in the operational priorities of the security intelligence agency.

WE RECOMMEND THAT the collation and distribution of security intelligence now carried out by the Security Advisory Committee be transferred to the Intelligence Advisory Committee and that the work of the Intelligence Advisory Committee in collating current intelligence and advising on intelligence priorities be broadened to include security intelligence and economic intelligence.

(163)

WE RECOMMEND THAT the Intelligence Advisory Committee be chaired by the Assistant Secretary to the Cabinet (Security and Intelligence).

(164)

WE RECOMMEND THAT the membership of the Intelligence Advisory Committee include, among others, the Director General of the security intelligence agency, the Commissioner of the R.C.M.P. and representatives of the Department of Finance and the Treasury Board.

(165)

WE RECOMMEND THAT a Bureau of Intelligence Assessments be established to prepare estimates of threats to Canada's security and vital interests based on intelligence received from the intelligence collecting departments and agencies of the government and from allied countries and that it be under the direction of a Director General who reports to the Prime Minister through the Secretary of the Cabinet.

(166)

C. MINISTERIAL DIRECTION

35. A discussion of the ways in which the security intelligence agency should be directed by its Minister and the Prime Minister entails a study of how the agency should itself relate to the responsible Minister and to the Prime Minister. It also requires a determination of who ought to be the responsible Minister and how those reporting to him on security matters ought to be structured. Confusion and controversy in the past as to precisely what role ought to be played by the Prime Minister, the Solicitor General, the Deputy Solicitor General, the Commissioner of the R.C.M.P. and the Director General of the Security Service not only have been responsible for wasted time and

energy but also have contributed to the creation of an environment in which many of the activities which have been investigated by us have been allowed to take place. Direct and clear lines of responsibility and reporting relationships can go a long way to preventing future abuses.

36. Before embarking on an examination of what the extent of ministerial direction ought to be and how it ought to be effected, a brief look at developments in the past and the current status will make clear what changes ought to be made and what pitfalls ought to be avoided in the future.

Legal background

37. As a starting point it is useful to recall the legal basis for the existence of the Security Service. Section 18 of the R.C.M.P. Act[8] sets out the duties of members of the Force who are peace officers:

> 18. It is the duty of members of the Force who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

Thus it will be seen that the Governor in Council is authorized to specify "other duties and functions" but only with respect to those members "who are peace officers".

38. Section 21 of the Act gives the Governor in Council further authority to make regulations and also gives the Commissioner authority to make rules in precisely the same areas, exclusive of the power to make regulations generally. It reads:

> 21. (1) The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Force and generally for carrying the purposes and provisions of this Act into effect.
>
> (2) Subject to this Act and the regulations made under subsection (1), the Commissioner may make rules, to be known as standing orders, for the organization, training, discipline, efficiency, administration and good government of the Force.

[8] R.S.C. 1970, ch.R-9.

39. Pursuant to its regulation making powers, the Governor in Council passed the R.C.M.P. Regulations,[9] regulation 24 of which provides the only specific authority for the maintenance and operation of a Security Service, in the following terms:

> 24. In addition to the duties prescribed by the Act, it is the duty of the Force:
>
> (e) to maintain and operate such security and intelligence services as may be required by the Minister.

One other mention of the Force's security role used to be found in regulation 110 of the same Regulations where provision was made for the position of the Director General. It stated:

> 110. No person shall be appointed a civilian member unless he is of good character and physically fit to perform the duties of the position to which he is appointed and to perform one of the following duties:
>
> ...
>
> r. Director General - Security and Intelligence.[10]

That provision was dropped in the consolidation of the Regulations in 1978.

40. On this legal base is built the edifice of the R.C.M.P. Security Service. In our opinion this legal foundation is not firm. It is at least doubtful whether, the Act having delegated authority to the Governor in Council to make regulations (sections 18 and 21), the Governor in Council can then sub-delegate that authority by Order-in-Council to the Minister [regulation 24(e)].[11] Had the duties been assigned directly by the Commissioner of the R.C.M.P. under the powers of prescription granted to him under section 18(d) of the Act this difficulty might have been avoided. However, even in that case the Commissioner's powers are limited to prescribing the duties and functions of members "who are peace officers", and therefore would not extend to the civilian members of the Security Service, one of whom is the Director General. In addition, the Commissioner's assignment of responsibilities to the Security Service might have excluded the direct involvement of the Minister.

41. Even assuming that the R.C.M.P. can in fact legally be assigned duties and functions in the security field, there are further legal problems with respect to the way in which those duties and functions have been assigned. In Part II, Chapter 2, we defined the present role assigned to the Security Service. Much of that role has been assigned by Cabinet Directive or by Record of Decision of Cabinet. Neither of these methods is provided for in the R.C.M.P. Act or Regulations, and therefore neither would appear to possess any *statutory* legal authority. It might be argued that the Cabinet was acting under prerogative authority of the Crown but it is at least debatable whether any such prerogative remains, Parliament in the R.C.M.P. Act having provided the means by which the Crown may direct the R.C.M.P. — by regulations or by the Solicitor

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[9] C.R.C., ch.1391.

[10] P.C. 1969-14/2318.

[11] *A/G Can.* v. *Brent* (1956) 2 D.L.R. (2d) 503 (Supreme Court of Canada).

General's direction.[12] Since the Solicitor General is a member of the Cabinet, it also could be argued that the Cabinet directions (for example, the Cabinet Directive of March 27, 1975) are in fact his directions under regulation 24(e) as he is a member of the Cabinet, but this seems to be a rather imprecise way of dealing with the matter.

42. Setting aside the problems mentioned above relating to the legal assignment of security duties and functions to the R.C.M.P., we turn to an examination of the legislation as it affects the responsibilities of the key participants. Our purpose here is simply to point out the problems in the current legislation as they affect ministerial direction in the security field. It must be borne in mind that when we speak here of the Commissioner of the R.C.M.P. we are considering him in his capacity as the person responsible for the Security Service, the Director General of the Security Service being simply the Commissioner's deputy for that purpose. We shall be analyzing these latter problems, as they relate to the policing role of the R.C.M.P. in Part X, Chapter 4.

43. Our present examination requires an analysis of the legal relationships between the Commissioner, the Solicitor General and the Deputy Solicitor General. This has been a vexing problem, at least since the creation of the Department of the Solicitor General, and has been a major contributing factor to the present difficulties of the Security Service. Prior to January 1, 1966, the R.C.M.P. reported to the Minister of Justice. In 1965 the government of the day decided that a new department should be created under an already existing Minister of the Crown, the Solicitor General. There were at least two reasons for this decision. First, it was felt that the Minister of Justice was overburdened with responsibilities, departmental and otherwise, and consequently was unable to give proper consideration to all of them: in addition to his normal departmental duties, the Minister of Justice was also the Minister responsible for the Canadian Penitentiary Service, the National Parole Board and the R.C.M.P. It is clear that by 1965 the R.C.M.P. was receiving little direction or guidance at the ministerial level. Nor did it appear to be seeking any. Although the R.C.M.P. was not dissatisfied with a relationship which enabled them to operate in a semi-autonomous fashion, the lack of supervision and civilian control was considered by the government to be undesirable. It was believed that one consequence of transferring responsibility for the R.C.M.P. to a Minister with fewer responsibilities would be more direction given by the Minister in security matters. The second reason for the creation of the Department of the Solicitor General was a growing awareness on the part of the government that there was a theory of "social defence" in the system of criminal justice which had a logic to it and required more attention. This theory looked at the path of a criminal from detection and apprehension, through conviction and detention, to parole. There is, according to the adher-

[12] In *Attorney General* v. *De Keyser's Royal Hotel* [1920] A.C. 508 the principle was established that the conferment of statutory powers upon the Crown may prevent the Crown from using prerogative powers which otherwise would have been available to it: Wade and Phillips, *Constitutional and Administrative Law*, London, Longman, 9 ed., 1977, p. 239.

ents to the theory, a need to tie the components together to ensure that full consideration is given to the impact in one area of any change made in another area. It was determined, however, that in order to protect the rights of the individual prior to conviction there was one aspect that ought not to be too closely tied in with the others. That was the prosecutorial role. Thus it was decided that the police, penitentiaries and parole should be placed under one Minister who would have enough time to integrate them and develop them as a system. At the same time, by removing them from the Minister of Justice, the direct connection with the prosecutorial function would be severed.

44. As is usually the case with government reorganizations, the necessary steps to accomplish the reorganization were taken in advance, with the forthcoming legislation in mind. On December 22, 1965 an Order-in-Council was passed,[13] to be effective January 1, 1966, which transferred to the Solicitor General responsibility for supervision of the R.C.M.P. and for control or supervision of the Canadian Penitentiary Service as well as the powers, duties and functions of the Minister under the relevant Acts, including the National Parole Act. The Order further provided that, pursuant to section 2(1) of the Civil Service Act, the Commissioner of the R.C.M.P., the Commissioner of Penitentiaries and the Chairman of the National Parole Board were each designated as deputy heads for the purposes of that Act. This latter designation was necessary because, although there was a new Minister responsible for the agencies, he had no department or deputy minister, both of which required legislation to bring them into existence. This was the embryo Department of the Solicitor General, which came into being when the Government Organization Bill was passed in 1966. That Bill included the Department of the Solicitor General Act,[14] which became law on October 1, 1966. (In Part II, Chapter 2, section E, we described the creation of the Department, which was based on "The Swedish Ministry" concept.)

45. There appears to have been no effort to make the provisions of the new Department of the Solicitor General Act compatible with those of the existing R.C.M.P. Act. Nor was any effort made in the legislation to define clearly the responsibilities of the different positions involved. Section 4 of the Department of the Solicitor General Act sets out the "normal" ministerial powers of the Solicitor General vis-à-vis the R.C.M.P.:

> The duties, powers and functions of the Solicitor General of Canada extend to and include all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to . . .
>
> (c) the Royal Canadian Mounted Police.

This section does not say what the Solicitor General's duties, powers and functions are in relation to the R.C.M.P. It simply states that he has those duties, powers and functions falling within federal jurisdiction "not assigned by law" to any other federal "department, branch or agency". One consequence of this section is that if any other statute assigns duties, powers or functions to the

[13] P.C. 1965-2286.

[14] R.S.C. 1970, ch.S-12.

Minister responsible for the R.C.M.P. then the "Minister" referred to is the Solicitor General. An example of this would be section 54 of the Canadian Human Rights Act[15] which empowers a Minister to exempt databanks. In relation to the R.C.M.P. databanks the "Minister" is therefore the Solicitor General.

46. Difficulties arise when section 4 of the Department of the Solicitor General Act is examined in conjunction with the R.C.M.P. Act. To the extent that any power, duty or function can be said to be assigned by the R.C.M.P. Act to another department, branch or agency, that power, duty or function will be excluded from those of the Solicitor General. There are certain sections of the R.C.M.P. Act which appear to fall clearly within that category — for example, the authority given to the Treasury Board in sections 6(2) and 7(2) of the Act to prescribe the maximum number of officers and members in the Force. But what of the powers assigned to the Commissioner of the R.C.M.P.? Section 5 of the Act[16] provides:

> The Governor in Council may appoint an officer to be known as the Commissioner of the Royal Canadian Mounted Police who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.

Do the words "control and management" cover all the activities of the R.C.M.P. or are they limited to administrative matters? If the words are so limited, what respective roles do the Minister and the Commissioner play in activities not covered by the limitation? And do the words "all matters connected therewith" refer to "the Force" or do they refer to "the control and management of the Force"? And what is the meaning of the French version of section 5 which does not appear to say the same thing as the English version? We shall discuss this question of the meaning of section 5 in greater detail in Part X, Chapter 4, when considering the powers of the Minister and the Commissioner on the policing side. Certain other areas of authority are dealt with specifically in the R.C.M.P. Act. For example, the Governor in Council and the Commissioner are given specific authority in section 21, previously cited. Further, by virtue of section 7 of the Act the Commissioner is given authority to appoint members other than officers. Presumably under either of those sections, and others similar to them in the Act, the Commissioner does not fit the category of a "department, branch or agency of the Government of Canada" as contained in section 4 of the the Department of the Solicitor General Act. If that assumption is correct, is the Commissioner subject to the authority given to the Minister in section 4? If the Commissioner does not fall within the exclusions found in section 4 then what legal reason was there for not amending section 5 of the R.C.M.P. Act which gives the Minister a specific power of "direction" in relation to "control and management"? The only other section of the R.C.M.P. Act which purports to give the Minister authority to perform an act is section 20(1). That section empowers the Minister, with the approval of the Governor in Council, to contract with a province to provide

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

[16] R.S.C. 1970, ch.R-9.

policing by the R.C.M.P. or, with the approval of the Lieutenant Governor in Council of a province, to contract with a municipality for the same purpose. It will be noted that this section simply adds to the powers of the Minister and does not purport to affect his relationship with the Commissioner.

47. Short of statutory amendment, we do not think there can be any reasonable answer given to the various questions we have posed. We think that all the necessary amendments should be made to make it clear, beyond any doubt, that the Minister has full power over all activities of the security intelligence agency. We shall set out in Part X, Chapter 4, our views as to what the Minister's powers ought to be with respect to the R.C.M.P.'s policing role. We do not consider that any restrictions which should be placed on ministerial direction of peace officers should in any way be intended to derogate from the powers of the Minister in connection with the duties of the security intelligence agency. We shall expand on this shortly, but first we shall look briefly at the legal status of the Deputy Solicitor General in relation to the R.C.M.P., a relationship which, as we have already mentioned, applies to the Security Service.

48. Section 23(2) of the Interpretation Act[17] reads as follows:

> (2) Words directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a Minister acting for him, or, if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council, and also his successors in the office, and his or their deputy, but nothing in this subsection shall be construed to authorize a deputy to exercise any authority conferred upon a Minister to make a regulation as defined in the Regulations Act.

In the absence of anything to the contrary that section would appear to make it clear that whatever statutory authority the Solicitor General has with respect to his office is also granted to the Deputy Solicitor General, exclusive of the power to make regulations. The authority thus acquired by the Deputy Solicitor General would normally extend to the R.C.M.P. However, since at least 1965 the Commissioners of the R.C.M.P. have consistently taken an opposite view. In their opinion the Deputy Solicitor General does not stand between them and the Solicitor General for any purpose whatsoever. It has been, and continues to be, contended by them that the Commissioner is the deputy head (in the sense of being the Deputy Minister) of the R.C.M.P. for all purposes. They have argued that, with respect to section 23(2) of the Interpretation Act, it is the Commissioner who is the "deputy" in relation to the R.C.M.P. Some legal support for this position can be found in both the legislation and two Orders-in-Council.

49. The statutory support arises out of the changes in relevant legislation. The North-West Mounted Police Act, 1873, provided that:

> The Department of Justice shall have the control and management of the police and all matters connected therewith: but the Governor-in-Council

[17] R.S.C. 1970, ch.I-23.

> may, at any time, order that the same shall be transferred to any other Department of the Civil Service of Canada...[18]

That Act also made the Commissioner of the Force "subject to the control, orders and authority of such person or persons as may, from time to time, be named by the Governor-in-Council for that purpose".[19] These sections clearly envisaged that the Force was not merely under the Minister but that the "control and management" belonged to the "Department". Just over twenty years later this formula had changed. It then provided that "such member of the King's Privy Council for Canada as the Governor-in-Council from time to time directs, shall have the control and management of the Force and of all matters connected therewith".[20] By 1959, the relevant sections of the R.C.M.P. Act had adopted the present wording of section 5 which speaks of the Commissioner having "control and management" under the direction of the "Minister". The Minister at that time was the Minister of Justice. There is no mention of any departmental involvement. It is argued that this removal of explicit statutory departmental jurisdiction, when coupled with the other statutory powers bestowed on the Commissioner in the R.C.M.P. Act, gives the Commissioner deputy head status.

50. Further support for the proposition is found in two Orders-in-Council. The first of these was the one mentioned earlier which was passed on December 22, 1965.[21] It designates the Commissioner as the "deputy head" of the R.C.M.P. for the purposes of the Civil Service Act. The second was passed on October 5, 1967[22] and designates the Commissioner as "deputy head" for the purposes of the Public Service Employment Act. That latter Act had replaced the Civil Service Act which had been repealed.

51. But neither the R.C.M.P. Act nor the two Orders-in-Council, nor any other statute or statutory instrument, makes the Commissioner the deputy of the Minister for the purposes of section 23(2) of the Interpretation Act, thereby giving the Commissioner the full powers of a deputy with respect to the R.C.M.P. None of the other principal Acts which organize the legal status and powers of the constituent parts of the Public Service and their chief executive officers designates the R.C.M.P. as a "department". The Public Service Staff Relations Act,[23] by virtue of the definition of "Public Service" in section 2 and the listing of the R.C.M.P. in Schedule I to the Act, does make the R.C.M.P. a separate "portion" of the Public Service. That same definition has been incorporated, by reference, into the Public Service Employment Act.[24] But there is no designation of the R.C.M.P. as a "department" as distinct from a "portion" of the Public Service.

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[18] 36 Vict., ch.35, s.33.
[19] 36 Vict., ch.35, s.11.
[20] 57-58 Vict., ch.27, s.3.
[21] P.C. 1965-2286.
[22] P.C. 1967-1898.
[23] R.S.C. 1970 ch.P-35.
[24] R.S.C. 1970, ch.P-32, section 2(1).

Attempts at resolution of the problem

52. It is not our intention to try to come to a conclusion as to the current legal status, within government, of the R.C.M.P. and its Commissioner. Our purpose in cataloguing the legal problems set out above is simply to show that a very real problem does exist. The lines of disagreement were drawn very shortly after the creation of the Department of the Solicitor General. Ministers who held the Solicitor General portfolio in the early days of the Department took different views as to what role should be played by the Deputy Solicitor General and the Commissioner. Mr. Ernest Côté, who was the second Deputy Solicitor General, serving from December 15, 1968 to July 31, 1972, spent a great deal of time and effort trying to resolve the problem. It was his position that the Deputy Solicitor General was the "alter ego" of the Solicitor General for all purposes (Vol. 307, pp. 300, 752). According to Mr. Côté, his position was strenuously resisted by the Commissioner of the day (Vol. 307, pp. 300, 745).

53. On January 27, 1971, shortly after Mr. Goyer was appointed Solicitor General, the Prime Minister wrote to him with his views as to what the relationship ought to be between the Deputy Solicitor General and the heads of the R.C.M.P., the Canadian Penitentiary Service and the National Parole Board. The Prime Minister suggested that the problems be reviewed with the purpose of finding some solutions. He said:

> To begin with, you must endeavour to foster within these three components of your Department a spirit of understanding and solidarity which has hardly been encouraged by their long-established hierarchical structure and independence. The senior officials, in particular, seem suspicious of and distant with both one another and the Deputy Minister. This behaviour has prevented them from developing bonds of trust and a spirit of understanding and solidarity — elements which are essential to the smooth operation of the Department.
>
> This problem could no doubt have been resolved at the outset by unifying the three agencies under a single firm authority, instead of allowing them to develop their own structure and autonomy. The decision made at the time was a sound one which complied with the desire to work out an arrangement that, while guaranteeing the exercise of central authority, permitted the existence of a decentralized administration. This decentralized structure was to remain under the overall authority of the central body which was responsible for allocating resources. It had been anticipated that, under the supervision of the Deputy Minister, the authority exercised by the departmental team would be firm enough to foster confidence and co-operation within these three agencies without diminishing unduly the autonomy they needed.
>
> Therefore, in my opinion, the solution lies not in carrying out a total merger of the Department's components but rather in ensuring mutual co-operation and co-ordination. Contrary to current practice, in order to manage the affairs or allocate the resources of your Department, your Deputy Minister must have at his disposal all the information needed to advise you or, as required by his duties, to act for you in any matter. He must also be able to rely on the full co-operation of the officials responsible for each of the agencies.

Therefore, I ask you to take into account the measures advocated many times by your predecessors — specifically, the idea that the three departmental agency heads should refer all departmental matters to you through your Deputy Minister. In this regard, it would no doubt be advisable to review Orders-in-Council 1965-2286 and 1967-1898, the terms of which inevitably complicate relations between your Deputy Minister and the departmental agency heads. I feel that it is important to seek the most acceptable solutions with respect to relations between your officials as well as to management, personnel and the budget. Your Deputy Minister could submit these problems to the Committee of Senior Officials which could study them and suggest a way of resolving them.

In my opinion, measures of this kind would help to improve the operation of your Department. I do not think there is any need to pursue matters further and apply the Government Organization Act, 1966, in accordance with the original intent. Your task is rather to establish clearly that you are counting on and require everyone's co-operation, that your Deputy Minister will frequently act on your behalf, that it is through him that you are seeking to obtain the necessary co-operation, and that you are expecting him, in his turn, to act in a manner which will not undermine the leadership, authority and responsibility of the departmental agency heads. Ideally, the Deputy Minister and the agency heads should work together as a team in a spirit of openness, understanding and good will. The climate which must be established within your Department would be undermined by the imposition of strict hierarchical relations on either side. In my view, a good way of fostering a climate of this kind — one which I hope you will often resort to — is to invite study groups and task forces set up within your Department to participate in the formulation of new policies. Their combined efforts could not help but increase the effectiveness of their activities.

54. In the Spring of 1971 the problem was referred to a Committee of senior officials, chaired by the Secretary to the Cabinet, but no resolution was forthcoming from that Committee by the time Mr. Côté left office. The Treasury Board and the Public Service Commission were both treating the Commissioner as a deputy head and the R.C.M.P. was acting as a department of government completely independent of the Department of the Solicitor General, although reporting to the same Minister.

55. The result of this autonomy of the R.C.M.P. was that the Solicitor General was not able to obtain any independent advice or guidance from his Deputy Minister on police or security matters. When Mr. Goyer became Solicitor General he initiated the practice of having the Deputy Solicitor General present at all his meetings with the Commissioner and the Director General except when warrants for electronic surveillance were being considered. But simply having the Deputy Solicitor General present at meetings did not solve the problem of how the Solicitor General was to examine and analyze all the information which was being passed to him by the R.C.M.P., particularly on the security side. It was in part to alleviate this problem that a group was set up in the Secretariat of the Department of the Solicitor General to analyze and assess information received from the Security Service and to advise the Solicitor General with respect to it, and when appropriate, to report the information within government. That group was created on May 14, 1971

and was called the Security Planning and Research Group (SPARG). It was not its role to monitor the activities of the Security Service, nor did it have any authority to get information from the Security Service if the latter refused to provide it. Indeed, from the outset SPARG was denied access to operational files by the Security Service and only has such access now in connection with its review of applications by the Security Service for warrants for electronic surveillance. SPARG was set up with the approval of the Director General of the Security Service, although he would have preferred to see it located in the Privy Council Office. With respect to the work of the Security Service, SPARG performed a service essentially confined to handling the liaison between the Security Service and the Minister. That SPARG worked successfully in this limited role was manifested by the extension of its mandate, at the request of the R.C.M.P., to include police matters. When that occurred its name was changed to the Police and Security Planning Branch (PSPB), which was subsequently modified to the Police and Security Branch (PSB).

56. We have described the development and current role of SPARG in Part II, Chapter 2, section E, in discussing the place of the Department of the Solicitor General in the security system of the government. We therefore simply wish to repeat here that PSB, the successor to SPARG, is the centre within the Department of the Solicitor General in which the security policy advice to the Minister originates and it has all the limitations which we previously discussed.

57. Over the past few years a *modus vivendi* has been worked out between the Solicitors General, Deputy Solicitors General and Commissioners of the R.C.M.P. based on the "ministry" concept which we have described in Part II, Chapter 2. It is now understood that the Deputy Solicitor General is the principal adviser of the Solicitor General. He is responsible for coordinating the development of policies and legislation. He is also responsible in large part for federal-provincial relations and for the organization of meetings with the provinces at the level of Ministers and senior officials. He is also, of course, the deputy head of the Secretariat of the Department. The Commissioner is the deputy head for purposes of the R.C.M.P. and is responsible for its operations. He therefore reports directly to the Solicitor General on operational matters. We are advised that, because the Deputy Solicitor General is the principal adviser, he is present, except on rare occasions, at all meetings between the Solicitor General and the Commissioner and he sees all correspondence and documents between them. A very recent change is that the Deputy Solicitor General is now present when the Director General is seeking warrants for electronic surveillance. Working together, the Commissioner concentrates on operations and the Deputy Solicitor General's emphasis is on overall policies and directives, legislation and research. That this current system was for some time an uneasy truce can be seen by the attempts of the R.C.M.P. to revert to previous practices when the Solicitor General's portfolio changed hands from Mr. Goyer to Mr. Allmand on November 27, 1972. Mr. Goyer had insisted that the Deputy Solicitor General be involved in all dealings with the R.C.M.P. (Vol. 120, pp. 18831-32). After Mr. Allmand assumed office, the Force was reluctant to include the Deputy in some matters and Mr. Allmand had to insist that they do so (Vol. C71, p. 9924 et seq.).

Proposed role of the Minister

58. Having examined the present situation we turn now to our proposals as to how ministerial direction ought to be exercised with respect to the new security intelligence agency which we advocate be created. The main question is whether the Minister should be limited in any way as to the matters over which he should have the power of direction. The argument in favour of limitation is based on the very real concern that the Minister might give a direction based on improper considerations. For example, the Minister might direct that surveillance take place in order to harass a political opponent or direct that surveillance not take place in order to protect a personal friend. Direction based on partisan or political considerations is clearly wrong, but in our view the protection against such improper direction can be achieved otherwise than by making the Director General independent of ministerial direction. In Chapter 2 of this part of the Report we shall be recommending the creation of an independent review body, one of whose prime responsibilities will be to provide protection against improper direction by investigating and reporting to a Parliamentary Committee any instances that it finds of such improper direction. Were there no such protective mechanism we could see some merit for restricting the Minister as has been done in Australia.[25] However, even then we would be very concerned about placing independent authority in the hands of the Director General, a non-elected official responsible to no one for the exercise of that authority. We have discussed this question in greater detail in Part VI, Chapter 2.

59. It has been suggested, both in evidence before us and in statements elsewhere, that there should be limitations on the power of direction of the Minister based on a perceived dichotomy between policy and operations. For example, consider the following evidence given to the Commission by the present Commissioner of the R.C.M.P.

> A. . . . The Minister's role, I suppose, the most basic — really as I understand it, is really a policy role. Not an operational director in any sense; although when you are in the security areas, he gets very close to operations, because he does control your warrants, and you produce the intelligence product, if you want, which is the papers that are produced

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[25] Australian Security Intelligence Organization Act, 1979, section 8(2) reads as follows:

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

as a result of your work, which is for the purpose of government, and so on. Thus, they are in a position where they can see what you are doing, and ask questions and one thing or another, which is, I think, their proper role.

Q. But if you are a deputy head for certain matters, if the policy of the Force is issued under your signature, be it the criminal investigation side or the Security Service side, now, you say the Minister has control over policy. What is there left for him?

A. Well, you know, perhaps a definition of *policy* is needed. I think, you know, to me, policy — I suppose the law itself is the ultimate expression of policy. And under the law, there are various directives and orders and Cabinet directives, and something or another, all of which are reflections of government policy. And then, you get down to what we in the Force sometimes call *policy*, which is really not government policy in the broad sense. It is operational directives and policies to guide our operations and so on. And even that comes in a variety of levels, if you like.

Now, the Minister has great responsibility for the first area that I spoke of: proper laws, proper guidance in the broad sense, and one thing and another. But much less when it comes to the directing of the Force. There are also many other policies in the Force, particularly in the administrative side, that flow out of directives that are not in the control of the Minister at all: Treasury Board Directives with respect to many operations all across government, and so on, from which we develop directives in the Force, and so on. So, the problem in using simple words like *policy*, is to know exactly what we are talking about.

(Vol. 164, pp. 25214-6.)

Prime Minister Trudeau has made the same distinction in explaining his government's approach to security matters. He said,

> We in this government and I believe it was the case with previous governments, have removed ourselves from the day to day operations of the Security Services. . . . We just make sure that the general directives are those which issue from the government and the example of that kind of directive was given in the guidelines of March 1975.[26]

60. In our view such a distinction between policy and operations leads to insurmountable difficulties in application, and even worse, it results in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of 'operations' and are thus outside the Minister's purview. This neglect has been apparent in what might be called the policy of operations - those policies which ought to be applied by the Security Service in its methods of investigation, its analysis of the results of investigations and its reporting on those results to government. All policies of operations must receive direction from the ministerial level. For instance, whether or not a particular new foreign target ought to be the subject of surveillance and, if so, what methods of surveillance ought to be employed are questions which Ministers should decide as a matter of policy even though such a decision could clearly be described as involvement in operations. Policy and operations in the

[26] House of Commons, *Debates*, November 2, 1977, p. 568.

security field are not severable and any attempt to make them so is doomed to failure. Two further examples should suffice. In the work of a security intelligence agency important policy questions concerning the distinction between legitimate dissent and subversive threats to the security of Canada will arise in the context of deciding whether or not to initiate surveillance of a particular individual or group. Similarly, questions will arise about the legality and propriety of a particular method of collecting intelligence in the context of a particular case. Obviously, the Minister cannot direct the day-to-day operations of the agency any more than can the Minister of any other department do so with respect to his or her department. However, there must be no fetters on the Minister's legal right to give such direction provided that such direction is consistent with the authority granted to the security intelligence agency under the Statute. In the instances we have mentioned above, and others where day-to-day operations raise significant policy questions, the Deputy Minister and the Director General must keep the Minister informed and seek his advice and direction.

61. In directing the security intelligence agency the Minister must not be simply reactive to proposals brought to him by the agency. He must also take the initiative in developing policies and guidelines, and in reviewing activities of the agency. Without attempting to be exhaustive we think the Minister should be responsible for the following:

(i) developing policy proposals for administrative or legislative changes with regard to the activities of the security intelligence agency and presenting such proposals to the Cabinet or Parliament;

(ii) developing guidelines with respect to investigative techniques (e.g. on use of informants) and reporting arrangements;

(iii) continuous review of the agency's progress in establishing personnel and management policies required by government;

(iv) reviewing difficult operational decisions involving any questions concerning legality of methods or whether a target is within the statutory mandate;

(v) reviewing targetting priorities set by the government and ensuring that the agency's priorities and deployment of resources coincide with the government's priorities;

(vi) approving proposals by the Director General to conduct full investigations and to apply for judicial authorization of investigative techniques (e.g. electronic surveillance and mail checks);

(vii) approving liaison arrangements with foreign countries after consultation with the Secretary of State for External Affairs;

(viii) approving liaison arrangements with provincial and municipal police forces and government; and

(ix) authorizing reporting of security intelligence to the media.

62. The Minister cannot, of course, carry out his powers of direction without adequate advice and assistance. Normally in government a Minister looks to the agency or department for which he is responsible for such advice and assistance. This system is usually satisfactory because of the myriad of other

ways in which inadequacies or improprieties of the agency or department can be brought to his attention. For example, most departments of government have a constituency within the country which will be quick to express its concerns to the Minister, such as farmers, labour, business, consumer groups, universities, and other levels of government. In addition, within government, certain central agencies are charged with the specific responsibility of ensuring that the operating departments and agencies "toe the line". Also, to the extent that one department's activities border on those of another department there is a certain amount of monitoring of the other department's activities. Parliament itself has a large role to play in this scrutiny through its examination of estimates, question period, debates on legislation, and so on. Moreover, the media are always searching for stories. Through all of these processes and others, a Minister is normally made aware of problems and difficulties of both a policy and operational nature. He is then able to seek answers from his department and give direction on the basis of the information and advice received. Such is not the case with an agency whose activities are essentially secret. Very few people either inside or outside government have much of an idea what the agency is doing. Moreover, if the agency is to function as it must, not much can be done to change that situation. Certainly not a great deal can be made public so as to put into play the forces of the media and interest groups. Implementation of our recommendations with respect to a statutory base for security activities would offset the problem to some extent, as would our suggestions for more adequate reporting to Parliament on the extent of electronic surveillance and other intrusive techniques requiring warrants.

63. Within government, our proposals as to the role to be played by the Committee system and the Cabinet secretariat, and as to the increased activities to be undertaken by the Department of Justice should each help to make available to the Minister a larger pool of knowledge and advice. As a further source we place great store in the reports to the Minister by the Advisory Council on Security and Intelligence, the creation of which we shall recommend in the next chapter.

64. At the parliamentary level, the special Committee which we envision should also be of some assistance to the Minister, not as a source of information, but rather as a guide on general policies. In discussing matters with that Committee the Minister will no doubt wish to use its members as a sounding board for some of the more difficult policy areas.

Role of the Deputy Minister

65. However, none of these sources of information and advice can serve as a substitute for the information that the Minister must get from the agency and the advice that he must get from his senior officials. In Part VI, Chapter 2, we recommended that the Director General report to the Deputy Minister rather than directly to the Minister. The purpose of this recommendation is to avoid the concentration of too much power in the hands of the Director General, who will have a statutory term of office and whose appointment will have been made after consultation with the leaders of the opposition parties in the House of Commons. The Deputy Minister should be considered for all purposes as the

'alter ego' of the Minister. Section 23(2) of the Interpretation Act should apply to the Deputy Minister in his relations with the security intelligence agency. Also, the Deputy Minister should be the 'deputy head' for the agency for the purposes of all applicable legislation.

66. The paramountcy of the Deputy Minister having been thus established, we hasten to repeat our recommendation in Part VI, Chapter 2, that the legislation provide for the security intelligence agency to be under the control of the Director General, subject to that paramountcy. The Deputy Minister must be ever mindful that although he has full legal authority over the agency he ought not to exercise that authority in such a way as to weaken the role of the Director General. We do not envision that the Deputy Minister become, in effect, the Director General of the agency and that the Director General become simply a Deputy Director General. We have recommended that the Deputy Minister have plenary power to ensure that he is able to carry out his functions. He should exercise that power to its full extent only in exceptional circumstances.

67. The Deputy Minister is the principal adviser of the Minister for all purposes, including the areas of responsibility covered by the agency. But the Director General must also be seen as an adviser to the Minister in those same areas and, as a matter of good management, should meet regularly, together with the Deputy Minister, with the Minister. The Director General will, in the normal course of things, run the operations of the agency. He will also be responsible to the Deputy Minister for developing policy proposals with respect to the agency's field of activities.

68. However, it is the Director General who should be reporting to the Minister on operational problems, and he should also be presenting to the Minister the policy proposals developed by the agency. In both cases this reporting should be done with the knowledge and consent of the Deputy Minister, other than in exceptional circumstances which we will mention shortly. The Deputy Minister should engage such staff outside of the agency as he considers necessary to assess the policy proposals brought forward by the Director General and to fill any gaps in security policy that are identified. The Deputy Minister must also have sufficient staff to appraise for the Minister the quality of the reports produced by the agency so that the Minister can assess the agency's work. For that purpose the Deputy Minister and no more than one or two of his staff having the appropriate security classification, should have such access to the operational files of the agency as the Deputy Minister considers necessary. We make the recommendation while fully realizing the difficulties faced by a security intelligence agency in protecting the identity of its human sources and its communications with foreign intelligence agencies. The Deputy Minister's departmental staff will also be serving the Minister in carrying out all his other responsibilities in the security field, some of which we mentioned earlier. In many of the areas the staff work will be a cooperative venture between the agency and the secretariat of the department.

Direct access by the Director General to the Minister and the Prime Minister

69. Because we have tried to recommend a system of countervailance between the Deputy Minister and the Director General, subject to the overriding authority of the Deputy Minister if it is necessary for him to assert it, we think there are certain circumstances in which the Director General must have direct access to the Minister without the consent, or even necessarily the knowledge of the Deputy Minister. Those circumstances would arise only when the Director General is of the opinion that the conduct of the Deputy Minister is such as seriously to threaten the security of the country. For example, the Director General might obtain information that leads him to believe that the Deputy Minister is a security risk, or the Director General might consider that the Deputy Minister is wrongly refusing to submit to the Minister proposed policy changes of great importance. We do not think that such a right of access needs to be provided for formally, either legislatively or administratively, since it will be exercised only in extreme cases, when the dictates of common sense would govern.

70. There are also circumstances when the Director General must be able to "go over the heads" of both the Deputy Minister and the Minister to the Prime Minister. It is part of our constitutional convention that a Deputy Minister may, *in extremis*, go directly to the Prime Minister, either with or without the knowledge of his Minister. It is not possible or desirable to describe definitively the circumstances in which this might be necessary in the security field. We would expect that in most cases where the Minister is to be by-passed it would be done by the Deputy Minister, in consultation with the Director General. This would be the case, for example, if it were necessary to bring to the attention of the Prime Minister security concerns relating to any of his Ministers. In our opinion such concerns should not be brought to the attention of the Minister responsible for the agency unless the Prime Minister so directs. The Director General should only go directly to the Prime Minister in those situations where he considers there is a serious security threat and he is being blocked at either or both of the deputy or ministerial level. Once again, we do not think there is any necessity to spell this out in a formal sense. Indeed, even if this custom did not already exist or nothing had been said about it we would find it alarming if the Director General did not take this step in appropriate circumstances when the security of the state is threatened.

Role of the Prime Minister

71. We think it is appropriate to deal briefly with the directing role of the Prime Minister in the security field. As the leader of the government he has the ultimate responsibility for the security of the nation. This means that he must be kept informed of issues arising from the work of the security intelligence agency that have serious implications for Canada's internal security, for the civil liberties of Canadians, or for Canada's international relations. It is the responsibility of the Deputy Minister, with the assistance of the Director General, to bring such matters to the attention of the Minister, who must then decide whether and how to brief the Prime Minister. In the circumstances previously described the Prime Minister may also be informed by either the

Deputy Minister or the Director General. The Prime Minister, after ensuring that he is being adequately briefed, must be prepared to give advice and direction to the responsible Minister on the major security policy positions of the government.

72. In addition, as we have indicated earlier in this chapter, given the ultimate responsibility of the Prime Minister for the security of Canada and the need to prevent policy on security or intelligence from being unduly influenced by any one department or agency, the Prime Minister should chair the Cabinet Committee on Security and Intelligence. Also he should be expected to answer questions in the House of Commons relating to the security of Canada or the activities of the security intelligence agency whenever he believes an issue is important enough.

Choice of responsible Minister

73. Throughout this chapter we have referred to "the responsible Minister". We turn now to a consideration of which Minister that ought to be. We have examined three options:

(i) the Solicitor General (who is now the minister responsible for the R.C.M.P. Security Service);

(ii) the Minister of Justice (who until 1966 was responsible for the R.C.M.P., including its security intelligence directorate);

(iii) a Minister of State or Minister Without Portfolio especially appointed for the purpose of directing the security intelligence agency and implementing the Commission's Report.

There are advantages and disadvantages to each of these options. On balance we favour the first of the three. We also feel that there might be some advantage in combining the first and the third options and we shall discuss that as well.

74. In rejecting the option of the Minister of Justice we considered two matters. First, the principal reason for the removal of the R.C.M.P. from the responsibility of the Minister of Justice in 1965 — the too-heavy workload — still holds, and is no doubt even more applicable today. From many of our recommendations it will be clear that we consider that only if the security intelligence agency receives considerable attention from the Minister and the Deputy Minister will the countervailing forces be effective and accountability be achieved. Our second reason is that we think there would be some danger of a conflict of interest developing if the Minister who is responsible for reviewing the legality of the agency's operations is also responsible for directing the agency. That same reasoning of course might apply to the assignment of responsibility for any other agency to the Minister of Justice, who is the government's legal adviser, but in any event it is certainly applicable to a security intelligence agency. We have not discounted the one great advantage in having the agency report to the Minister of Justice: the benefit which would accrue to the agency by virtue of the prestige of the Minister and the Department of Justice both within and outside government.

75. This element of prestige is the main reason why we rejected the option of having the agency report directly to a Minister of State or a Minister without Portfolio. For a variety of reasons, whether valid in all cases or not, these Cabinet positions are seen by many to be less important or significant than the 'regular' Portfolios. If it were decided that there should be a separate Minister responsible only for the security intelligence agency, which we do not recommend, that Minister could function effectively only if he were attached directly to the Prime Minister, thus acquiring the prestige and authority of that office. Along with that acquisition would be the concomitant danger of the activities of the agency being in too close association with the Prime Minister. Such close association might result in knowledge of particular matters being imputed by Members of Parliament to the Prime Minister when in fact he has no knowledge of them.

76. There is no Minister of the Crown, except the Solicitor General, whose responsibilities have any logical association with the agency. (Perhaps a marginal case could be made with respect to the Minister of National Defence or the Secretary of State for External Affairs but the case is so tenuous as not to require further elaboration.) The office of the Solicitor General has, of course, 15 years of experience with the Security Service. Along with the machinery and structure which have been built up in his department, the various relationships and understanding which have developed are also indefinable but significant benefits which should not be cast aside without valid justification.

77. If the security intelligence agency is separated from the R.C.M.P., it might be argued that it would be unwise to leave it under a Minister who continues to be responsible for the R.C.M.P. No matter how well separation is implemented it is bound to arouse some hostile feelings and a Minister responsible for both the R.C.M.P. and the new agency might find himself with divided loyalties. On the other hand, a strong Minister should be in a position to arbitrate the differences and ensure that hostilities are not allowed to degenerate into costly organizational rivalries. He should also play a key role in ensuring that effective liaison — which will be essential — is established between the R.C.M.P. and the new agency.

78. We do not accept the view that the responsibilities of the Minister responsible for a police force and those of a Minister responsible for a security intelligence agency are so incompatible that they should be assigned to different Ministers. A security intelligence agency does need more direction from a federal Minister than does a law enforcement agency whose targets are primarily defined by the law creating federal and provincial offences and which performs functions for eight provincial governments and many municipalities. But, we submit, this is more a difference of degree than of kind. While in police matters there may be certain "quasi-judicial" functions, such as the laying of a charge, in relation to which ministerial direction is improper, there are a great many policy questions concerning the deployment of resources and the legality and propriety of investigative techniques which are similar to the policy issues on which a Minister should give direction to a security intelligence agency.

79. It is beyond our terms of reference to comment on the structure of the reporting relationships of the other operational components of the Solicitor General's "Ministry", and the suitability of those relationships for ministerial direction.[27] We have rejected this "Ministry" concept as it applies to the security intelligence agency for the reasons stated in our discussion of the relationship between the Deputy Minister and the Director General. One thing is clear: no matter how the "Ministry" is structured, its components are such that any one of them can, over a considerable period of time, occupy almost the whole of the time of the Minister to the unfortunate exclusion of the others. There are two reasons for this: the disconnected nature of the components, although there is a thread of commonality, and the 'high profile' areas of their responsibilities (police, parole, penitentiaries and security) when problems of public concern arise. For example, when Mr. Fox assumed the portfolio in September 1976, there were major disturbances in certain penitentiaries on which he had to concentrate most of his efforts (Vol. 159, p. 24338). And no doubt there have been periods just prior to and during the life of this Commission when the Solicitor General has had to pay less attention to parole and Correction Service matters than is desirable.

80. One further point about the responsible Minister requires consideration. Since the bringing together of the various components under the Solicitor General on January 1, 1966, and the subsequent creation of the Department of the Solicitor General on October 1, 1966, there have been nine Solicitors General. Three of the changes came about by resignations and two by a change of the Party in power. It would be impossible for any government department to escape unscathed by such a turnover, but it is especially damaging to a security agency. It must be remembered that until the last year or two public knowledge about the Security Service was practically non-existent. A new Minister assumed his responsibilities absolutely "cold". With all his other duties as a Minister and a Member of Parliament it would take him months, if not years, to begin to understand the workings of this arcane Service. We hope that the recommendations we have made as to the structure of the agency will help to alleviate this problem through the Deputy Minister's being able to brief the Minister more quickly and adequately. Nevertheless, we think that such a rapid turnover in Ministers as has occurred in the past must, if at all possible, be avoided in the future.

Ministerial assistance for the Solicitor General

81. The other major changes which we have proposed, including the creation of a new security intelligence agency, will place severe time demands on the Solicitor General. There will be the creation of the new agency, the preparation and processing of legislation, the preparation and implementation of adminis-

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[27] For a discussion of the "Ministry" concept see: H.L. Laframboise, "Portfolio Structure and a Ministry System: A Model for the Canadian Federal Service", *Optimum*, vol. 1 (Winter, 1970); D.R. Yeomans, "Decentralization of Authority", *Canadian Public Administration*, (Spring, 1969); John W. Langford, *Transport in Transition: The Reorganization of the Federal Transport Portfolio*, Montreal, McGill-Queen's University Press, 1976.

trative orders and guidelines and extensive negotiations with the provinces. We are concerned that the Solicitor General will not have the time to direct the details of all those matters. This would be true if an emergency arose on the police or security side, but particularly if one arose on the corrections side. For that reason we think serious consideration should be given to the appointment of a Minister of State, pursuant to section 23(a) of the Government Organization Act, 1970,[28] to assist the Solicitor General in implementing the changes. We do not envisage this Minister of State assuming the responsibilities of the Solicitor General nor do we suggest that he operate independently of the Solicitor General in any way. He would be there simply to assist the Solicitor General in providing direction on all the details which will require ministerial attention. We visualize such assistance being necessary only during the implementation stages and see no role for such a Minister beyond that. We are reluctant to make this suggestion as one of our recommendations because we are not familiar with the various considerations which a Prime Minister must bear in mind when recommending that a Minister be appointed. As outsiders to that process we would have thought that a Senator might be ideal for this role. He would have the necessary experience and maturity, and would be knowledgeable about governmental processes, would not seek to use the position for personal advancement or to compete with the Solicitor General, and would not be reluctant to give up the duties when the implementation had been completed. We raise this matter of a Minister of State for consideration only, and not as a recommendation.

82. Having thus examined the way in which we feel ministerial direction of the agency ought to take place, whether at the level of Cabinet, Prime Minister or responsible Minister, we turn now to look briefly at other levels of government direction.

WE RECOMMEND THAT the Minister responsible for the security intelligence agency be the Solicitor General.

(167)

WE RECOMMEND THAT the Minister responsible for the security intelligence agency should have full power of direction over the agency.

(168)

WE RECOMMEND THAT the Minister's direction of the security intelligence agency include, inter alia, the following areas:

(i) developing policy proposals for administrative or legislative changes with regard to the activities of the security intelligence agency and presenting such proposals to the Cabinet or Parliament;

(ii) developing any guidelines which are required by statute with respect to investigative techniques and reporting arrangements;

(iii) continuous review of the agency's progress in establishing personnel and management policies required by government;

[28] S.C. 1970-71, ch.42.

(iv) reviewing difficult operational decisions involving any questions concerning legality of methods or whether a target is within the statutory mandate;

(v) reviewing targetting priorities set by the government and ensuring that the agency's priorities and deployment of resources coincide with the government's priorities;

(vi) approving proposals by the Director General to conduct full investigations and to apply for judicial authorization of investigative techniques (e.g. electronic surveillance and mail opening);

(vii) approving liaison arrangements with foreign countries after consultation with the Secretary of State for External Affairs;

(viii) approving liaison arrangements with provincial and municipal police forces and governments; and

(ix) authorizing dissemination of security intelligence to the media.

(169)

WE RECOMMEND THAT the Director General be responsible, in the normal course, for running the operations of the agency.

(170)

WE RECOMMEND THAT the Director General be responsible to the Deputy Minister for developing policy proposals with respect to the agency's field of activities.

(171)

WE RECOMMEND THAT the Minister meet regularly with the Director General and the Deputy Minister together, to discuss matters relating to the agency and to receive reports from the Director General on operational problems in the agency and policy proposals developed by the agency.

(172)

WE RECOMMEND THAT the Deputy Minister have such staff as he considers necessary to:

(i) assess the policy proposals brought forward by the Director General and to fill any gaps in security policy that are identified;

(ii) to appraise for the Minister the quality of the reports produced by the agency; and

(iii) assist the Minister in carrying out all his other responsibilities in the security field.

(173)

WE RECOMMEND THAT the Director General have direct access to the Minister, without the knowledge or consent of the Deputy Minister, when the Director General is of the opinion that the conduct of the Deputy Minister is such as to threaten the security of the country.

(174)

WE RECOMMEND THAT the Deputy Minister and the Director General each have direct access to the Prime Minister, and not consult with their Minister, in the following circumstances:

(i) if there are security concerns relating to any Minister;

(ii) if, in the opinion of the Deputy Minister or the Director General, the conduct of the Minister is such as to threaten the security of the country.

(175)

WE RECOMMEND THAT recognition be given to the special need for continuity in the office of the Minister responsible for the security intelligence agency.

(176)

D. OTHER FORMS OF GOVERNMENT DIRECTION AND REVIEW

83. There are three other government entities which have a role to play in this area. They are:

— Minister and Department of Justice

— Treasury Board, which has two components, the Treasury Board Secretariat and the Comptroller General

— Auditor General

Minister of Justice

84. We do not propose to examine here the responsibilities and duties of the Minister and Department of Justice. They have been dealt with in Part V, Chapter 8, and Part VI, Chapter 2 and will also be covered in detail in Part X, Chapter 3. We simply wish to emphasize at this point that their role is crucial in ensuring that the security intelligence agency conducts its activities within the law.

Treasury Board

85. The Treasury Board, which is made up of certain designated Ministers, has two distinct parts of the Public Service, each reporting directly to it. They are the Treasury Board Secretariat and the Comptroller General's office.

86. The Treasury Board Secretariat performs a number of functions but we are concerned only with the direction and control it exercises over the Security Service through the Program and Budget Analysis Process. Each department and agency of government must submit to the Treasury Board each year a Program Forecast which relates to the following fiscal year and the four subsequent fiscal years. This forecast is an estimate of the fixed costs of providing services in the designated year plus any new or expanded initiatives. A department's programme allocation for the next ensuing fiscal year becomes the budgetary target level for the Main Estimates for that same year. Each year a department must submit its Main Estimates for the following year and twice during a year there is the opportunity to submit Supplementary Estimates. The Program Forecasts and the Estimates are reviewed by program analysts in the Treasury Board Secretariat and then submitted by the Secretariat to the Treasury Board with recommendations.

87. The Program Forecast of the R.C.M.P. falls under the Solicitor General's Program Review. Normally, a budget such as that of the Security Service,

being in the category of a sub-activity, would not receive special treatment by the Treasury Board. But it does receive special treatment. For purposes of analysis only it is broken out as a sub-activity and the Program Forecasts and the Estimates are examined as though the Security Service were a separate agency or department. The recommendations of the Secretariat are then submitted for approval to the President of the Treasury Board only, and not to the full Board, as would be normal. Thus it will be seen that the Security Service budget is subject to an extraordinarily detailed examination. This process appears to be satisfactory and we see no need for change in it. It could be readily adapted to the new security intelligence agency which we have recommended.

88. The other component of the Treasury Board which is of interest to our concerns is the Office of the Comptroller General. This office was created approximately two years ago to improve financial management in the Public Service. The Comptroller General decided that he should first conduct a study of 20 of the largest departments. Included was the R.C.M.P. (The study of the R.C.M.P. did not include the Security Service nor the Security Service internal audit mechanism.) This study is called "Improvement of Management Practices and Controls" (IMPAC). After doing a "systems walk through" (which means there is no verification of documents or of representations made by the department or agency) the Comptroller General discusses his conclusions with each department or agency and obtains its agreement to the conclusions. Each department and agency must submit an action plan of how it intends to remedy the faults which have been found. A copy of that action plan is given to the Auditor General and both the Comptroller General and the Auditor General monitor the implementation of the plan. The role that the Comptroller General will play after the action plans are implemented has not yet been determined. We see nothing in this process which requires any particular comment by us. Should any problems develop between the Comptroller General and the security agency with respect to access to files they should be capable of resolution at the ministerial level.

Auditor General

89. Currently there is only one examination of any aspect of the affairs of the Security Service which is performed by an agency independent of the government. That is the Auditor General's review process. The Auditor General has been given three responsibilities by Parliament and he must report on them to Parliament. They are:

- a financial audit of government accounts;
- a legislative audit to determine the degree of compliance by government departments and agencies with the legislation governing the management and operation of the public service, e.g. the Financial Administration Act
- a value-for-money audit — this audit examines programmes as to three facets:
  - (i) the way in which goods and services are acquired
  - (ii) the efficiency of use of the goods and services

(iii) the manner in which the departments and agencies measure their effectiveness. But the Auditor General is not authorized to comment on the effectiveness itself.

90. Each year the Auditor General does an attest audit of each department and agency, which involves a minimum amount of audit of the accounts. There is a comprehensive audit of each department and agency once every five years. This is an audit of the application by the department or agency of government regulations, procedures, directives, guidelines and practices. This audit is done not only on a departmental and agency basis but also on a horizontal basis across departments and agencies with respect to particular factors, as for example, buildings.

91. It is our understanding that in the past the Auditor General has done very little in relation to the Security Service as such. Because the Security Service financial figures are included in the R.C.M.P. figures they have been subject to the annual attest audit and that is the extent of the examination to date. A comprehensive audit of the R.C.M.P. is scheduled to be completed in 1981. This audit will include a thorough look at the affairs of the Security Service under the three rubrics mentioned above ie. financial, legislative and value-for-money.

92. As a result of the undertaking of this comprehensive audit we can envision problems arising in two areas: access to confidential Security Service files and disclosure of confidential information in the report to Parliament. There are certain files, such as those dealing with human sources, which the Security Service justifiably considers should be seen by only those persons having an absolute 'need to know'. Access to those files is not normally given to anyone outside the Security Service. We do not know to what extent the Auditor General will wish to see such files but if any difficulties arise that cannot be resolved between the Auditor General and the Solicitor General we suggest that they be referred for resolution to the Joint Parliamentary Committee which we shall recommend, and pending the creation of such a Committee that the resolution of any impasses be held in abeyance. Because criticisms in the Auditor General's Report are usually system based it is unlikely that there will be any need for the disclosure of any confidential information. If such a problem does arise, however, and cannot be resolved between the Auditor General and the Solicitor General that, too, should be referred to the Joint Parliamentary Committee for resolution.

WE RECOMMEND THAT any disagreements between the Solicitor General and the Auditor General with respect to:

(i) access by the Auditor General to information in the possession of the security intelligence agency; and

(ii) disclosure in the Auditor General's Report of classified information obtained by him from the agency

be referred to the Joint Parliamentary Committee on Security and Intelligence for resolution, and pending the creation of that Committee the resolution all such disagreements be held in abeyance.

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CHAPTER 2

EXTERNAL CONTROLS

INTRODUCTION

1. In this chapter we consider one of the most neglected aspects of Canada's security and intelligence system: control of security intelligence activities by bodies external to the executive branch of the federal government. In our system of cabinet and parliamentary government under the rule of law, 'control' of government activity by individuals or institutions not accountable to Ministers primarily takes two forms: (1) the supremacy of laws enacted by a representative legislature and (2) review of governmental activity to ensure that it is effective and that it meets the requirements of the law and acceptable standards of propriety. The function of bodies which are independent of the executive, such as Parliament, the judiciary and oversight bodies, is not to carry out, nor to direct the carrying out, of national security functions, but rather to provide some assurance that national security responsibilities are performed properly and effectively within an established legislative framework.

2. Our inquiry has shown how limited has been the control and direction of the Security Service by responsible Ministers and their deputies. Our recommendations in the previous chapter were aimed at remedying that situation. But if adequate ministerial control and direction of security intelligence activities were lacking in the past, independent review of these activities was almost non-existent. The judiciary has played a limited role on the relatively rare occasions when security investigations have resulted in the laying of charges. Parliament has been very active in raising questions and provoking debates on security matters, but members of Parliament (aside from Ministers) have had little or no opportunity to scrutinize security intelligence practices systematically. The proposal of the Royal Commission on Security for the establishment of a Security Review Board was implemented only to a very limited extent in the field of security screening. On the whole, security intelligence operations have remained in a secret realm. Little has been known about them, even by the Ministers who were theoretically responsible for them, and even less by anyone outside government. The work of our own Commission of Inquiry and the report of the earlier Royal Commission on Security have, perhaps, been the principal departures from this pattern of excluding external review of security activities.

3. The recommendations put forward in this chapter would permit a number of 'outsiders' to have considerable knowledge of security practices. Although the number would not be large, still there is a risk, though a slight one, of

compromising operations whose effectiveness often depends on their absolute secrecy. We acknowledge that risk, but we think it is justified by the greater risk to our democracy that lies in the absence of any effective independent check on the government's conduct of security operations.

A. THE FEDERAL COURT OF CANADA AND THE SECURITY APPEALS TRIBUNAL

4. In our First Report, *Security and Information*, we recommended that the Federal Court of Canada have two responsibilities with regard to security matters. First, we recommended an appeal to the Federal Court from an administrative tribunal reviewing government decisions refusing disclosure of government documents on security and intelligence grounds. The appeal would be available to the government or, in cases where the existence of a document is admitted, to the person applying for access. We further recommended that section 41(2) of the Federal Court Act no longer apply to security and intelligence documents. When, in the course of judicial proceedings, a litigant seeks to introduce evidence consisting of government documents, we recommended that instead of the court being bound by a Minister's affidavit that production of the document would be injurious to national security, the matter be referred to a judge of the Federal Court of Canada who would determine whether the need to disclose the evidence for the purpose of doing justice outweighed the public interest in non-disclosure.

5. Earlier in this Report, our recommendations for controlling methods of intelligence collection by the security intelligence agency called upon the Federal Court of Canada to play a role in authorizing the use of electronic and photographic surveillance, mail interception, surreptitious entry and access to confidential governmental information of a personal nature. It will be recalled that, under the scheme we proposed, the Solicitor General would be responsible for deciding whether, as a matter of policy, the use of any of these techniques to gather intelligence about a particular 'target' is advisable. If he decides that it is and also is satisfied that the evidentiary standards established by the statute for use of the technique have been satisfied, he could authorize an application by the security intelligence agency to a judge of the Trial Division of the Federal Court of Canada for a warrant to use the technique. A refusal might be appealed to the Federal Court of Appeal. The judicial function in this scheme would be to ensure that the evidentiary standards established by the Statute, governing the use of the techniques, are satisfied. Because of the secret nature of these techniques and the absence of any provision requiring notification of persons subject to them, we felt that judicial authorization is the best way to ensure that the requirements of the law are met in each case.

6. These two sets of recommendations clearly envisage a significant role for the Federal Court of Canada in decisions relating to national security. As we recommended earlier in Part V, this role would best be carried out by a nucleus of judges from the Appeal and Trial Divisions who would be specially designated for the purpose by the Chief Justice of the Court.

7. The judiciary may be involved in the review of security intelligence operations in one other way. Our proposed statutory charter for the security intelligence agency may create opportunities to launch a legal challenge against the security agency if it is suspected of gathering information, by any technique, about a subject which lies outside its statutory mandate. Such a charter, it might be argued, will lead to harassment of the agency by persons or groups who will launch suits mainly to expose or inconvenience the agency. We do not believe that such harassment is a significant danger. Australia (since 1956) and New Zealand (since 1969) have had statutes governing their security intelligence agencies and have not experienced this difficulty. We are confident that the Federal Court, which hears cases involving challenges alleging that Federal departments or agencies have exceeded their jurisdiction, can deal expeditiously and properly with litigants.

8. Besides the judiciary, our earlier recommendations include one other element of independent review: the Security Appeals Tribunal for security screening cases. The purpose and nature of this body are fully set out in Part VII of the Report. Here we wish only to include the Tribunal in our consideration of external controls and distinguish it clearly from the independent review body — the Advisory Council on Security and Intelligence (A.C.S.I.) which we will recommend below. The Security Appeals Tribunal is a quasi-judicial body whose function would be to hear cases in which persons wish to challenge security clearance decisions. Given the adversarial nature of proceedings before the tribunal and the need for the tribunal to function as much as possible like a Court, we think it should be quite separate from the Advisory Council on Security and Intelligence which will have a broad mandate to review and advise the government on all aspects of security and intelligence policy and operations.

B. THE ADVISORY COUNCIL ON SECURITY AND INTELLIGENCE (A.C.S.I.)

9. In 1977, the R.C.M.P. took some steps to establish better internal controls of Security Service activities. Earlier, we commented on these developments and in Parts V and VI recommended a number of ways in which the internal control of security intelligence activities could be improved. In Chapter 1 of this part of the Report, we have made recommendations designed to strengthen the capacity of the Solicitor General and the Cabinet to supervise security intelligence activities. We shall also be recommending a special parliamentary committee to increase parliamentary review of security intelligence activities. While all of these changes will provide much greater assurance that the security intelligence agency's conduct is lawful and proper, still we believe that they are not sufficient. In addition a review mechanism is needed, both to ensure that ministerial neglect or ignorance of security intelligence activities does not recur and at the same time to guard against the possibility of the security intelligence agency's being subject to direction by Ministers based on partisan or personal considerations.

10. Two features of security intelligence operations point to the need for an independent review body: the extreme secrecy of many operations and their

potential impact on the civil liberties of Canadians. With normal operations of government the citizen knows what the government has done to him, and can decide whether he wishes to question the propriety or legality of government action. However, with regard to security intelligence investigations which a citizen may fear are encroaching on his privacy or his political liberty, he has no way of knowing whether he has been investigated as a threat to security and, if he has, whether the investigation has been carried out in a legal and proper manner. For reasons that are fully set out in our First Report, we think providing a right of access to information about the operations of a security intelligence agency would defeat its very purpose. However, in that Report we argued that rigorous mechanisms of scrutiny subject to democratic control would be even more effective than freedom of information legislation as a means of ensuring that security intelligence operations are acceptable. "The function of scrutinizing the operations of a security or intelligence agency", we wrote,

> "should be systematic and continual. It is a sensitive and important task which must be performed assiduously by highly competent people who are also responsible to democratically elected representatives."[1]

This is so even if Parliament adopts Freedom of Information legislation which affords a mechanism for some degree of non-systematic, intermittent scrutiny of the activities of the security intelligence agency. It is with the object of providing a *systematic* and democratically accountable review mechanism that we now recommend the establishment of the Advisory Council on Security and Intelligence.

11. This Advisory Council, as its title suggests, should have no executive powers. Its basic functions should be to carry out a continuous review of security intelligence activities to ensure that they are lawful, morally acceptable and within the statutory mandate established by Parliament. Although it should not be responsible for assessing the effectiveness of the security organization, it should be fully cognizant and supportive of the functions of the security intelligence organization as set out in its statutory mandate. The Council should report on a continuing basis to the Solicitor General so that he has an opportunity to take remedial action in response to any finding by the Council that an operation or practice is questionable. Also, it should report from time to time and at least annually to the parliamentary Committee on Security and Intelligence so that Members of Parliament representative of all political parties will know of any situations in which the Solicitor General has rejected the views of the Advisory Council.

12. The independence of the Council will be best ensured if its review of the agency's operation is strictly *ex post facto*. If the Council becomes involved in advising on or, worse, approving operations before they occur, it will be implicated in the agency's operations and in effect will be reporting on itself. Therefore it should avoid giving advisory opinions before the fact. Its *ex post*

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[1] *Security and Information*, Ottawa, Department of Supply and Services, 1979, paragraph 97.

facto review of operations should, nevertheless, produce a body of "case law" which should be of considerable assistance to the agency and those in government who are responsible for supervising the agency in making the difficult policy decisions which, as we have emphasized throughout the Report, are inherent in security intelligence operations.

13. The scope of the Advisory Council's review of intelligence activities should extend to all organizations employed by the federal government to collect intelligence through clandestine means, other than the R.C.M.P. and other federal police forces. Unless the independent review body's jurisdiction extends this far, it will be all too easy for a government to evade its scrutiny by *de facto* transfers of responsibilities from the security intelligence agency to some other organization which is not subject to its review. In Part X, Chapter 2, we recommend the establishment of the Office of Inspector of Police Practices as a review and audit body to perform functions in respect to the R.C.M.P. which are similar in this regard to those which we recommend the Advisory Council on Security and Intelligence should perform with respect to the security intelligence agency.

14. To be effective the Advisory Council must be both independent and knowledgeable. These two characteristics are not easily combined. The Advisory Council's advice will be of little value to the government or to Parliament if it does not acquire a solid understanding of security intelligence work. Its members must appreciate the purposes of this work, its problems and its temptations. It must learn what questions to ask and where to look for the answers. But the more knowledge the Advisory Council acquires about the agency the more its members are apt to become so enmeshed in the world of security and intelligence that they lose perspective and objectivity. There is no fool-proof defence against this tendency. Our recommendations as to the Council's composition, powers and organization will be designed to minimize the danger while ensuring that the Council is knowledgeable enough to perform a useful function.

15. The Council must be small. The risk of disseminating highly sensitive information about intelligence activities to 'outsiders' should be kept to a minimum. We think that an appropriate size would be three members. In the United States, the President's Intelligence Oversight Board is that size and it appears to function effectively.[2] One member of the Council should be designated by the government as the chairman. We think that members of the Council should be at arm's length from the Government of Canada — for example, they should not be employees of the government. It would be a distinct advantage if one of the members had some previous experience in the field of security and intelligence. At least one member should be a lawyer of not less than 10 years standing. On the basis of our own experience, we know how much is involved in obtaining a reasonable understanding of security intelligence activity. It is a field in which reliable knowledge is simply unavailable to outsiders. Therefore we would urge that members new to the

[2] See *Executive Order 12036*, January 24, 1978, section 3-101. Note that all three members of this Board "shall be from outside the government".

field should, on being appointed, undergo a month-long programme of intensive study on security and intelligence activities. After this, the members should be expected to devote several days a month to the work of the Council. We do not think that any of the members of the Council should be full-time, although they should have the assistance of a small full-time secretariat. There is a danger of their becoming too closely identified with the agency whose activities they are to review. This danger is reduced if members of the Council do not spend all of their time on security and intelligence business. For the same reason, they should serve for no more than six years. Continuity in the membership of the Council, so that its accumulated experience is passed on to new members, would be ensured if all appointments did not terminate at the same time.

16. The method of appointing and removing members of the Council must be designed to ensure, so far as possible, that both the government and the Opposition in Parliament respect the judgment and integrity of the Council. We think this condition is most likely to be realized if members are appointed by the Governor in Council after approval of the appointment by resolution of the Senate and House of Commons. An appointment system of this kind would be similar to that used for appointing the Commissioner of Official Languages and that proposed for the Ombudsman in the bill introduced by the government in April 1978. The method of removal should be the same as that which applies to three offices or bodies which now report to Parliament (the Auditor General, Members of the Human Rights Commission and the Commissioner of Official Languages) as well as the proposed Ombudsman namely that members should hold office during good behaviour for six years but may be removed by the Governor in Council on address of the Senate and House of Commons. We emphasize that our reason for making this recommendation is our belief that this degree of parliamentary involvement in the appointment and removal of Council members will increase the likelihood of Parliament's having confidence in the Council. Public confidence in the security agency — confidence that its activities are not serving narrow partisan interest and are not biased against one side of the democratic political spectrum — will be best assured if the body responsible for the independent, continuous audit of security intelligence activities, demonstrably has the confidence of Parliament.

17. The Council's full-time secretariat need not be large. It will certainly need a full-time executive secretary and a small administrative staff. It should also have authority to retain its own legal counsel and one full-time investigator. In addition, the Council should be able to recruit personnel on a temporary basis for major investigations or studies. To reduce the danger of the Council's staff being co-opted or of their coming to dominate the work of the Council, full-time members of the Council's secretariat should hold their positions for limited periods of time. The secretariat and Council should be housed separately from the security intelligence agency and the staff should be instructed to avoid frequent social contact with members of the security intelligence agency.

18. Members of the Council must have complete access to all documents and files of the security intelligence agency and of other agencies which it scrutinizes. There may be information, for instance, pertaining to the identity of

sources or to foreign agencies, which is considered so sensitive that the Council staff should not have access to it. But for purposes of examining files and documents in the possession of the agency, the three members of the Council must be treated as if they were members of the security intelligence agency who are entitled to see all material. The arrangement would be similar to that which has applied to the work of this Commission. Nothing less would be acceptable for an effective and credible independent review body. The Council should have the power to require members of intelligence agencies to testify before it under oath and to produce documents — that is, the powers of a Commission of Inquiry appointed under Part I of the Inquiries Act. Although it is to be expected that the ordinary relationship of the Council to the agencies would not require such formality, we are convinced that there may be circumstances in which the use of the power will be necessary.

19. The basic function of the Advisory Council on Security and Intelligence should be to conduct a continuing review of legality and propriety of the activities of the security intelligence agency and of any other federal government agencies (other than police forces) which collect intelligence by clandestine means. Amongst the matters which the Council should keep under review are the following:

(a) The interpretation of the statutory mandate. The Council should review how the general terms of the statutory mandate are interpreted. It will be particularly important in the first few years under a statutory mandate for the Solicitor General, the Cabinet and Parliament to obtain an informed, independent appraisal of the judgment exercised in translating the general terms of the statute into an active programme of intelligence collection.

(b) The implementation of administrative directives and guidelines. The Council should periodically conduct audits to ensure that the security intelligence agency is observing the directives or guidelines issued by the Cabinet, the Solicitor General or the senior management of the agency with regard to such matters as the use of human sources, reporting information about individuals to government departments and the role of the agency in the security screening process.

(c) The operation of the system of controlling intrusive intelligence collection techniques. The system we have proposed, especially for controlling electronic surveillance, mail opening, surreptitious entries and access to confidential information is complex and novel. The Council should review the functioning of the system as a whole: Is the system too cumbersome? Are the powers, especially the new powers of mail checks, surreptitious entry and access to confidential information, being used to good effect or are they being used excessively? The Council's answers to these questions should be expected to provide a far deeper insight into the use of these extraordinary powers than has been the case with the bare statistical reports which have been published in the past under section 16 of the Official Secrets Act.

(d) Relationships with other agencies. The Council should monitor the security intelligence agency's liaison arrangements with foreign agencies and with other police or security agencies in Canada. It is

especially important that it review intelligence sharing activities with foreign agencies to ensure that they satisfy the standards set out in guidelines established by the government.

(e) Director General's report of improper ministerial direction. At several points earlier in this Report we stated that the Director General of the security intelligence agency should have a "safety valve" in the event that he received what he considered to be an improper direction from the Solicitor General and was unable to resolve the matter to his satisfaction through the Deputy Solicitor General or the Prime Minister. Although it is unlikely that such a situation would ever arise, still we think there should be some provision for it other than the resignation of the Director General. The Director General should at least be able to discuss with an independent body his opinion that his "political masters" are asking him to use the security intelligence agency for a purpose he believes is outside its mandate.

20. Although the Advisory Council's main task should be to carry out on its own initiative a continuing audit of security intelligence activities, it should also play two other roles. The first is described in Part V, Chapter 8, and concerns the review of decisions by the Attorney General of Canada not to refer allegations of illegal conduct by members or agents of the security intelligence agency to provincial attorneys general. The second role is responding to public complaints of improper or illegal conduct by members of the agency. The primary responsibility for investigating such complaints should rest with the agency itself, as it now rests with the R.C.M.P. In Part VI, Chapter 2, we recommended the establishment of a small investigative unit within the security intelligence agency for this purpose. But we think it essential that the Advisory Council review the adequacy of the agency's response to complaints. A number of incidents afford ample evidence of the need for outside scrutiny of the response to public complaints of wrongdoing by members of the security agency.

21. The Advisory Council should be able to receive complaints and should be kept informed of all complaints received by the agency, including those that the Solicitor General refers to the agency, and the actions taken by the agency in response to such complaints. The Council's main function with regard to complaints should be to review the effectiveness and fairness of the security intelligence agency's response to complaints; it should advise the Solicitor General when it finds that a complaint has not been dealt with satisfactorily; it should report, at least on an annual basis, to the joint parliamentary committee on the frequency of complaints and the adequacy of the agency's response to them. Although the Advisory Council should not normally investigate complaints itself, it should have a reserve power to carry out its own investigation in exceptional circumstances. The Advisory Council on Security and Intelligence must be empowered to conduct its own investigation when the Council considers that it is in the public interest to do so. The general audit function of this independent review body will not be adequately fulfilled if it is denied the power to carry out independent investigations. The discretionary power to investigate complaints should be used sparingly and for stated reasons. These reasons, particularly if the Council's power to investigate complaints is used

complaints is used frequently, should alert the Minister and the parliamentary committee either to inadequacies in the internal investigative capacity of the security intelligence agency or to excessive use of the Council's investigative powers.

22. As we indicated in Part VI, the Council should also serve as a safety valve in those exceptional situations when a member of the security intelligence agency believes that an operation or practice of the agency is illegal or improper and there appears to be no satisfactory way of having his concern investigated by his superiors or by the Deputy Solicitor General or the Solicitor General. While we think that it is essential to have such a safety valve, we would stress that the Council should investigate such a complaint by a member of the agency only when it has assured itself either that the member has tried unsuccessfully to have his concern looked into by his superiors, the Director General, the Deputy Solicitor General and the Solicitor General, or that the member had good reason to believe that bringing the matter to the attention of these people would not elicit a satisfactory response.

WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of an Advisory Council on Security and Intelligence to review the legality and propriety of the policies and practices (which includes operations) of the security and intelligence agency and of covert intelligence gathering by any other non-police agency of the federal government.

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WE RECOMMEND THAT the Advisory Council on Security and Intelligence be constituted as follows:

(a) The Council should be comprised of three members, who should be at arm's length with the Government of Canada, and at least one of whom should be a lawyer of at least ten years' standing.

(b) Members of the Council should be appointed by the Governor in Council after approval of their appointments by resolution of the House of Commons and Senate. One member should be designated by the Governor in Council as the Chairman of the Council.

(c) Members of the Council should serve for not more than six years, and the termination dates of their appointments should vary so as to maintain continuity.

(d) Subject to (c) above, members of the Council should hold office during good behaviour subject to being removed by the Governor in Council on address of the Senate and House of Commons.

(e) Members of the Council need not serve on a full-time basis but must be able to devote up to five days a month to the work of the Council.

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WE RECOMMEND THAT the Advisory Council on Security and Intelligence have the following powers and responsibilities:

(a) For purposes of having access to information, members of the Council should be treated as if they were members of the security intelligence agency and have access to all information and files of the security intelligence agency.

(b) The Council should be authorized to staff and maintain a small secretariat including a full-time executive secretary and a full-time investigator, to employ its own legal counsel and to engage other personnel on a temporary basis for the purpose of carrying out major investigations or studies.

(c) The Council should be informed of all public complaints received by the security intelligence agency or by the Minister, or by any other department or agency of the federal government, alleging improper or illegal activity by members of the security intelligence agency or any other covert intelligence gathering agency (except police) of the federal government, and when it has reason to believe that a complaint cannot be or has not been satisfactorily investigated it must be able to conduct its own investigation of the complaint.

(d) The Council should have the power to require persons, including members of the security intelligence agency or of any other federal non-police agency collecting intelligence by covert means, to testify before it under oath and to produce documents.

(e) The Council should report to the Solicitor General any activity or practice of the security intelligence agency or any other federal non-police agency collecting intelligence by covert means, which it considers to be improper or illegal and from time to time it should offer the Solicitor General its views on at least the following:

(i) whether an activity or practice of the security intelligence agency falls outside the statutory mandate of the security intelligence agency;

(ii) the implementation of administrative directives and guidelines relating to such matters as the use of human sources, the reporting of information about individuals to government departments and the role of the security intelligence agency in the security screening process;

(iii) the working of the system of controls on the use of intrusive intelligence collection techniques;

(iv) the security intelligence agency's liaison relationship with foreign agencies and with other police or security agencies in Canada;

(v) the adequacy of the security intelligence agency's response to public complaints;

(vi) any other matter which in the Council's opinion concerns the propriety and legality of the security intelligence agency's activities.

(f) The Council should report, to the Minister responsible for any federal non-police organization collecting intelligence by covert means, any activity or practice of a member of such organization which in the Council's view is improper or illegal.

(g) The Council should report to the Joint Parliamentary Committee on Security and Intelligence at least annually on the following:

(i) the extent and prevalence of improper and illegal activities by members of the security and intelligence agency or any other

federal organization collecting intelligence by covert means, and the adequacy of the government's response to its advice on such matters;

(ii) any direction given by the Government of Canada, to the security intelligence agency or any other federal organization collecting intelligence by covert means, which the Council regards as improper;

(iii) any serious problems in interpreting or administering the statute governing the security intelligence agency.

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C. THE ROLE OF PARLIAMENT

23. In the past Parliament's effectiveness in security matters has been limited. This is not surprising. Indeed there appears to be a basic inconsistency between the requirements of the field of security and the role of Parliament. Security operations directed against significant threats to the country's security must be associated with a high degree of secrecy, but Parliament is an open arena of partisan debate. Consideration of security matters in the parliamentary forum, it may be argued, can result only in jeopardizing the efficacy of our security arrangements. Adherence to this philosophy since the days of Sir John A. Macdonald has had much to do with the fact that the function and structure of Canada's security intelligence organization have not been debated and approved by Parliament.

24. Yet security has not been completely absent from the parliamentary agenda. On the contrary, particularly in recent years, national security issues have been frequently debated in the House of Commons. As has been shown in the study of *Parliament and Security Matters* prepared for us, between 1966 and 1978 the House of Commons spent a great deal of time questioning and debating the government's handling of security issues — 230 hours of debate, the equivalent of more than half the government's time for an annual session.[3] During these years Parliament has often been effective in performing its 'watch dog' role and many questions have been asked about alleged breaches of security or improprieties. Often these questions have been inspired by information 'leaked' to the media.

25. There has not been a full debate on the basic purpose, the permissible methods and the structure of the Security Service, nor an opportunity for even a small group of parliamentarians (other than Cabinet Ministers) to scrutinize its activities. When the Report of the Royal Commission on Security was tabled in the House of Commons in June 1969, there was a one-hour exchange of statements by the Party Leaders. In concluding his remarks, Prime Minister Trudeau stated that the government intended

> . . . to consult with the leaders of the opposition parties to determine how the report might best be made the subject of parliamentary debate during the next session.[4]

[3] C.E.S. Franks, *Parliament and Security Matters*, Ottawa, Department of Supply and Services, 1979, p. 22.

[4] House of Commons, *Debates*, June 26, 1969, p. 10638.

This debate did not take place. In 1971, the government indicated that the debate on a resolution to appoint a Special Joint Committee of the House of Commons and the Senate to study the nature and kind of legislation required to deal with emergencies might be an opportunity to consider the Royal Commission's report. But the debate which occurred focussed on whether the opposition would have an opportunity to examine the circumstances leading to the invocation of the War Measures Act in 1970 and resulted in the government's dropping the motion to establish the Special Committee. In 1977 the Solicitor General, the Honourable Francis Fox, in disclosing Operation Ham in the House of Commons, paraphrased the 1975 Cabinet Directive on the Role, Tasks and Methods of the R.C.M.P. Security Service and thus disclosed its existence and essence for the first time, but no opportunity was afforded for a parliamentary debate on these guidelines. At the Committee level, the House of Commons Standing Committee on Justice and Legal Affairs has annually been briefed *in camera* on security matters. We were permitted by the Chairman of this Committee to examine the proceedings of two *in camera* sessions held in November 1977. Our impression of these sessions is that, while they offer a general survey of the security system, they are not occasions for probing in any depth the operational policies or practices of the security organization. From time to time opposition leaders have been privately informed of, or consulted on, security matters, but these briefings have been *ad hoc* and rare in recent years.[5]

26. We think Parliament should play a larger role with respect to the federal government's security intelligence organization than it has in the past. Parliament should debate and determine the mandate of the security intelligence agency. The Minister should have full knowledge of the agency's operational policies and practices so that he can answer parliamentary questions. Members of the opposition must have a means of acquiring more accurate knowledge of the security agency's policies and practices. In making recommendations to achieve these ends, our aim is to tilt the balance between secrecy and openness slightly away from a near monopoly of knowledge on the executive side of government, so that the work of the security intelligence agency is based on a parliamentary endorsement of its mandate and subject to a reasonably well-informed and knowledgeable process of parliamentary review. In our view the requirements of security and democracy require no less than this.

A parliamentary mandate

27. We think that a point in Canadian history has been reached when both the requirements of security and the requirements of democracy would be best served by embodying the mandate of Canada's security intelligence agency in an Act of Parliament. The security intelligence agency has an important service to perform for the people of Canada. The organization which performs this service will cost many millions of dollars annually and will often intrude on the privacy of individuals and groups. If it is ineffective in its work, foreign powers will, with relative ease, operate secretly within Canada and elected

[5] See C.E.S. Franks, *Parliament and Security Matters*, pp. 70-6.

governments in Canada will not be forewarned of programmes of political violence directed against them. Also, friendly foreign governments will not trust Canada and hence will refuse to share information. A service of this importance must not be left to be regulated, as it is now, almost solely by administrative guidelines. Parliamentary democracy requires that a government service of this importance be explicitly approved by the Parliament of Canada.

28. The process of enacting a statutory mandate for the security intelligence agency may be a harrowing experience for those responsible for the effective operation of such an agency. Parliamentary debate, and the public debate it will stimulate, will expose the agency to unaccustomed and uncongenial publicity. Given the necessarily limited knowledge which those outside the security and intelligence community possess of security operations, there is a risk that Parliament will impose a statutory mandate on the security intelligence agency which will dangerously emasculate it. We acknowledge these risks, but we think that they are outweighed by the risk to parliamentary democracy of continuing to operate such an important government service without explicit statutory authorization, and the risk to the effectiveness of the security intelligence agency which results from the lack of clear public endorsement of its purpose. The short-run unsettling effects which may be associated with a full-scale parliamentary debate will, we think, be justified by the long-run benefits for both democracy and security.

29. On the basis of discussions we had with members of the three parliamentary parties we have formed the impression that there is the basis for a parliamentary consensus on the need for an effective security intelligence agency, providing it is under an adequate system of controls. We hope that information provided in this Report will be useful background knowledge to Parliament in considering the various aspects of a statutory mandate. We know from our own experience that there are a number of Canadian and international experts in the field who might be of assistance when draft legislation is considered at the Committee stage. In the previously mentioned study, *Parliament and Security Matters*, it was suggested that for the consideration of some matters, it might be advisable for the House of Commons Standing Committee on Justice and Legal Affairs to meet *in camera*. As an alternative, Parliament might set up a smaller joint committee of both Houses of Parliament along the lines of the permanent joint committee we shall suggest below. However, we would hope that resort to *in camera* proceedings is minimized so that there is as wide as possible a public understanding of the security intelligence agency's rationale and of the precepts embedded in its statutory mandate.

30. At a number of points in this Report, we have indicated matters which should be included in the Act of Parliament governing the security intelligence agency. Here we bring together these various suggestions and, for ease of reference, list below the subjects which should be dealt

(a) *Definition of national security threats.* The Act should identify the categories of activity which are deemed to constitute threats to Canada's security such that advance intelligence about them should be provided by the security intelligence agency. In Part V, Chapter 3, we

advanced our recommendations as to how these threats should be defined. In addition to this definition of security threats, the statute might also set out in an introductory section, as for example is done in the Broadcasting Act, a statement of the fundamental purpose of the security intelligence agency and the framework of values within which it is expected to operate.

(b) *Structure of the security intelligence agency.* The department or agency of government to which the security intelligence agency belongs should be indicated, along with the responsibilities, manner of appointment and term of office of its Director General and the status, within the Public Service, of its personnel. Provision should also be made for ministerial responsibility for the agency and for the Deputy Minister's power with respect to the agency.

(c) *Functions of the security intelligence agency.* The Act should positively identify the agency's basic function of collecting, analyzing and reporting intelligence about threats to national security and negatively establish the limits of the agency's operations by stipulating that it must not perform intelligence functions unrelated to threats to national security (as defined in the Act) nor perform executive functions to enforce security measures. Besides providing for its general function, there are a number of specific functions the permissible extent of which should be provided for in the statute. These are activities outside Canada, liaison with foreign agencies and with provincial and municipal authorities, and the provision of security intelligence reports in programmes of security screening for public service employment, immigration, and citizenship.

(d) *Extraordinary powers.* Any investigatory power to be exercised by the security intelligence agency which is not available under law to persons generally, in Canada, must be provided for in the Act. This would mean that the statutory authorization to intercept or seize communications for security purposes which is now in section 16 of the Official Secrets Act should be transferred to the Act governing the security intelligence agency. Additional powers which we have recommended above and which should be similarly provided for are the power to intercept and open mail, the power of surreptitious entry and the power to gain access to certain kinds of confidential information. Certain additional techniques which are not otherwise unlawful, such as the use of dial digit recorders and hidden cameras or optical devices, should also be covered by the Act. The Act should stipulate all of the conditions and controls which apply to the exercise of all such powers. The Act should also specify the evidentiary standard which the security intelligence agency must meet before it can initiate a full investigation.

(e) *External controls of security and intelligence operations.* Mechanisms for providing an independent check and review of security intelligence operations and of any intelligence activities, other than police activities, conducted by the Government of Canada involving covert techniques of intelligence collection should be provided for in the statute. In this Report we suggest four such mechanisms:

— the designation of judges of the Federal Court of Canada to decide whether certain statutory tests relating to national security have been met;

— a Security Appeals Tribunal to review security screening cases;

— an Advisory Council on Security and Intelligence to review the legality and propriety of security intelligence activities and the covert intelligence activities of any other federal agency other than a police force;

— a joint standing committee of the Senate and House of Commons on security and intelligence activities.

31. Legislation covering the points outlined in the preceding paragraphs should be enacted whether or not our structural recommendation on the separation of the security intelligence agency from the R.C.M.P. is adopted. Security intelligence work is so important for Canada's security, has such a potential impact on civil liberties and is sufficiently distinct from normal police work, that it requires a clear and explicit authorization by Parliament, whether or not it continues to be carried out by a division of our national police force.

WE RECOMMEND THAT Parliament enact legislation vesting authority in an organization to carry out security intelligence activities and that such legislation include provision for

(a) the definition of threats to the security of Canada about which security intelligence is required;

(b) certain organizational aspects of the security intelligence agency including: its location in government; the responsibilities, manner of appointment and term of office of its Director General; the powers of direction of the responsible Minister and Deputy Minister; and, the employment status of its personnel;

(c) the general functions of the organization to collect, analyze and report security intelligence and to be confined to these activities, plus specific authorization of certain activities outside Canada, liaison with foreign agencies and provincial and municipal authorities and of the organization's role in security screening programmes;

(d) authorization of certain investigative powers and the conditions and controls applying to the use of such powers;

(e) mechanisms of external control to ensure an independent review of the legality and propriety of security intelligence activities and any other covert intelligence activities by agencies of the Government of Canada except those performed by a police force.

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The ability of Ministers to answer questions in Parliament

32. A second way in which the role of Parliament in security matters needs strengthening is that Ministers must be better able to answer parliamentary questions about security intelligence activities. In the past ministerial ability in this area was deficient in two respects: first, Ministers did not have sufficient knowledge of the operational policies and practices of the R.C.M.P. Security Service, and second, Ministers lacked means of ensuring that answers to parliamentary questions about the Security Service supplied by the R.C.M.P. were accurate, complete, and understandable by the audience to which they were addressed.

33. The proposals we have made earlier for strengthening internal governmental control of the security intelligence agency are designed to ensure adequate ministerial direction and control of security intelligence activities. In particular we refer to our recommendations concerning the role of the Solicitor General, as the Minister responsible for the security agency, and his Deputy, aimed at ensuring full ministerial knowledge of the agency's operational policies. We also emphasized the extent to which ministerial direction and control should be carried out in a collegial manner when important policy issues are at stake and for that purpose we called for a strengthening of the role played by Cabinet and the interdepartmental committee system in directing and reviewing security intelligence activities. Further, an independent review body, along the lines proposed in our recommendation for an Advisory Council on Security and Intelligence, with its own powers of investigation, should give Ministers more assurance than they have had in the past that significant information about security investigations is not being withheld from them.

34. We believe that, if these changes in the system of government control are made, Ministers will at least possess the knowledge to answer questions about security intelligence activities asked in the House of Commons. Of course, because of the need for secrecy with respect to many aspects of security operations, they may choose not to divulge in public some of the information which they have: but such non-disclosure will be of their own choosing and not because the information is kept from them by the security organization. To insist that this condition be realized is to demand nothing more than that a fundamental principle of responsible government be applied to security intelligence activities undertaken on behalf of the Government of Canada. Furthermore, the proposal we make below for a special parliamentary committee will make it more feasible than it has been in the past for the Minister responsible for the security intelligence agency to give those parliamentarians who are members of the committee important information about policy matters relating to security activities which it would be unwise to disclose publicly.

A Parliamentary Committee on Security and Intelligence

35. Effective scrutiny of security intelligence activities by representatives of all parties in Parliament is more likely to be maintained if a new committee is formed which can examine policies and practices in more depth than is now done by the Standing Committee on Justice and Legal Affairs of the House of Commons. That Committee is too large, its membership too fluctuating and its procedures too restrictive of the time which each of its members has to raise questions and pursue a line of inquiry. Our examination of the record of that Committee's *in camera* meetings in 1977, when public disclosures had focussed attention on the R.C.M.P., indicated the inherent difficulties faced by such a committee when it comes to inquiring about policy issues arising from security intelligence activities. Most of the time at these meetings was spent receiving the views of security officials and members of the R.C.M.P. While what they said was educational, most of it could have been, and indeed has been, stated in public.

36. We think effective parliamentary scrutiny of security intelligence activities is more likely to be achieved by establishing a small joint committee of both Houses of Parliament. This committee should be constituted of parliamentarians whose commitment to Canada's democratic system of government is unquestionable and who have the confidence of all parliamentary parties. The members of this Committee, either through their previous experience in government or by continuing to serve on this Committee from session to session, must possess or acquire a reasonable base of knowledge about Canada's security and intelligence system. The need for experience and knowledge is one reason why we think the participation of Senators in such a committee would be valuable.

37. Our proposals concerning ministerial direction of the security organization acknowledged that a risk inherent in closer ministerial direction and control was the possibility of the organization being used for narrow partisan or personal purposes. A key protection against this possibility is the Advisory Council on Security and Intelligence with its independent powers of investigation and its availability to the Director General in the event that he receives what he regards as improper direction from government. But this independent review body will be more credible as a check on partisan or personal misuse of the security intelligence agency (or any other federal intelligence agency) if it in turn has access to a parliamentary committee containing members of opposition parties.

38. To ensure that the Committee has the confidence of the recognized parties in Parliament, the leaders of opposition parties should personally select members of their party and, if possible, serve themselves on the Committee. The Committee should not have more than ten members. All recognized parliamentary parties should be represented on the Committee with the exception of a party dedicated to the ultimate overthrow of the democratic system of government in Canada, if in the future any such party should have members of Parliament. If the parties are represented on the Committee roughly in proportion to their strength in the House of Commons, as is traditional with parliamentary committees, the Committee should be chaired by a member of an opposition party. We understand that the combination of a government majority and an opposition chairman has worked well with the Public Accounts Committees. We think a similar balance would contribute to the effectiveness and credibility of a Joint Parliamentary Committee on Security and Intelligence.

39. This Committee should have much more continuity in its membership than is the case with Standing Committees of the House of Commons. During the first three sessions of the 30th Parliament (1974-79) substitutions in the membership of committees totalled 4,310, 1,749, and 1,409 respectively.[6] Rapid turnover of membership during a session, or from session to session, would prevent the Committee from developing the background understanding which is a prerequisite for knowledgeable questioning and judgment of security

[6] Robert J. Jackson and Michael M. Atkinson, *The Canadian Legislative System*, 2nd Edition, Toronto, Macmillan of Canada, 1980, p. 142.

and intelligence matters. The necessary continuity would be best provided by establishing the Committee for the life of a Parliament. We considered the possibility of a Committee of parliamentarians (rather than a Committee of Parliament) which, rather like the British Committees of Privy Councillors, would not die with each dissolution of Parliament. But such an arrangement would, in our view, go too far towards detaching this Committee from Parliament. Also there is the danger of building too much continuity into the structure of this Committee with the result that its members would become, or would be perceived to have become, too closely associated with the security and intelligence system.

40. The prime function of the Joint Parliamentary Committee we are recommending should be to scrutinize the activities of the security intelligence organization with a view to ensuring that it fulfills the intentions of Parliament as set out in the organization's legislative charter. The Committee's regular opportunity for examining the conduct of the security organization's affairs should be its examination in an *in camera* session of the organization's annual financial estimates. This should be an occasion on which members of the Committee can question the Solicitor General, and officials who accompany him, on security intelligence activities. As a background paper for this activity of the Committee, the Solicitor General should provide an annual report of the security intelligence agency's activities similar to, but not necessarily containing the same information as, that which we have recommended be prepared for the Cabinet. It is interesting to note that in making this recommendation for an examination of security intelligence expenditures on a confidential basis by a joint committee of Parliament, we are in part, reviving a recommendation made more than a century ago by the House of Commons' Select Standing Committee on Public Accounts. That Committee, which was appointed to look into Sir John A. Macdonald's handling of secret service funds, resolved

> that inasmuch as such large sums as $75,000 have been voted for 'Secret Service Money' of which there is no audit, as in the case of other expenditure, this Committee is of opinion, that an account of all sums hereafter spent for 'Secret Service' should be kept, as in England, in a book specially prepared for the purpose, and that this book should annually be inspected by a confidential Committee, of whom two shall be Members of the Opposition of the day.[7]

The detailed examination of estimates must be *in camera*, although it should be remembered that the Parliamentary committee would be composed of members from both sides of the House. We would point out further that in Australia, the total figure for expenditure by their security intelligence agency is a matter of public record and we would urge that after some experience with the new Parliamentary Committee careful consideration be given to the adoption of that practice in Canada. We are not recommending such publication at this time.

41. Our earlier recommendations referred to two specific matters which should be considered by the Committee. First, the Committee should receive

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[7] *Journals of the House of Commons*, May 29, 1872, p.173.

detailed annual reports on the use of the extraordinary powers of intelligence collection authorized in the Act governing the security intelligence agency. The bare statistical report on the use of the power to intercept and seize communications for security purposes, which Parliament now receives pursuant to section 16 of the Official Secrets Act is, as was explained earlier, an inadequate means of accounting to Parliament. We realize that a much more detailed and in-depth public account of the use which is made of such powers would require the disclosure of information which could seriously damage security. Therefore, we have recommended that the more detailed examination of the use of these powers be carried out *in camera* by the Joint Parliamentary Committee on Security and Intelligence. Second, we have recommended that the Advisory Council on Security and Intelligence report at least annually to the Joint Parliamentary Committee on the extent and prevalance of improper or illegal activities, on improper direction by government and on any serious problems which have arisen in applying the security intelligence agency's statutory mandate. In addition to these matters, Parliament would be able by resolution to ask the Committee to inquire into and report on any matter relating to security and intelligence. The availability of such a Committee might make it unnecessary to establish Commissions of Inquiry in the future.

42. We have referred to this special parliamentary Committee as the Joint Parliamentary Committee on Security and Intelligence. As this title implies, the jurisdiction of such a Committee should extend to the covert intelligence collection activities of all agencies of the federal government. The rationale for this recommendation is the same as the rationale for a similar recommendation with respect to the Advisory Council on Security and Intelligence. The maintenance of effective parliamentary scrutiny of secret intelligence activities conducted on behalf of the Canadian government could be jeopardized if other agencies could be assigned covert intelligence-gathering tasks and not be subject to the same powers of parliamentary scrutiny as the security intelligence agency. We would exempt the collection of criminal intelligence (i.e. advance information about criminal activity unrelated to security threats) from the purview of this Committee but not the activities of federal police agencies if any of them are authorized to carry out non-criminal, covert intelligence-gathering tasks unrelated to the investigation of offences.

43. Unlike the Advisory Council on Security and Intelligence, the Parliamentary Committee should be as much concerned with the effectiveness of the security intelligence organization as with the legality or propriety of its operations. Gaps in the security or intelligence system should be of as much concern to this Committee as alleged excesses of security surveillance. In this respect it might be asked to look into breaches of security which in Britain are referred to the Security Commission[8] (an appointed body of individuals, with experience in security matters).

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[8] The British Prime Minister, Sir Alec Douglas-Home, announced the establishment of the Security Commission in January 1964: United Kingdom, Parliament, *Debates*, January 23, 1964, pp. 1271-5.

44. The Committee we have recommended should also play a role in the legislative process. It should be in a strong position to see how the terms of the security intelligence agency's new statutory charter are working out in practice and to identify areas where legislative change may be required. In particular, under the clause we have proposed for providing some flexibility in the scope of security surveillance, this Committee would be notified of any order-in-council temporarily extending security intelligence collection to a category of activity not provided for in the Act. The Committee's knowledge of these situations would enable it to assess the need for permanent changes in the agency's mandate. The House of Commons might prefer to continue to have the committee stage of bills relating to national security handled by the larger and more representative Standing Committee of the House of Commons on Justice and Legal Affairs. If this were so, then it would be important to include Members of Parliament from the Joint Committee on Security and Intelligence on the Justice and Legal Affairs Committee. If, on the other hand, the Joint Committee were to have bills sent to it for clause-by-clause consideration, it would be essential to arrange for the appearance of expert witnesses and the representation of views by public interest groups as is done when legislative proposals are before the Justice and Legal Affairs Committee.

45. The Joint Committee on Security and Intelligence should have some staff assistance. In addition to the access it would have to the Research Branch of the Library of Parliament and to the services of a committee clerk, it should be able to call upon the assistance of one or more specialists in security and intelligence matters to assist it in obtaining background information on security and intelligence matters and in preparing itself for other questioning of security officials who may appear before it.

46. The Committee we are proposing, to be effective, must carry out many of its inquiries *in camera*. There is simply no other way in which it can examine the structure and management of the security organization, the deployment of its resources and the policy issues which arise in, or can only be satisfactorily illustrated by, references to concrete cases. Participation in *in camera* sessions by members of opposition parties raises the prospect of reducing their freedom to criticize the government's handling of security and intelligence matters. Reluctance to compromise their right to criticize the government was a factor, on occasions in the past, which inhibited Leaders of the Opposition from accepting invitations from Prime Ministers to be briefed on some security matter. We can see no tidy solution to this problem. Knowledge brings with it the burden of responsibility to respect the conditions under which the knowledge has been provided. The alternative is to provide no authorized means of informing opposition members about significant security and intelligence matters, and to continue to leave them dependent on unauthorized leaks of information. We think that almost total dependence on unauthorized leaks is undesirable: leaks of information are likely to be organized by disgruntled members of the security intelligence organization or by hostile intelligence agencies. The quality of parliamentary and public discussion of security and intelligence will, we think, be enhanced if a few opposition members have the opportunity to acquire a firmer, more balanced understanding of practices and

policies in the field than is available through public information and the unauthorized disclosure of confidential information.

47. The dilemma we have referred to can be lessened, although not entirely removed. Not all of the Committee's proceedings need be *in camera*. It is particularly important, as we have stressed, that when the Committee considers legislative matters it have public sessions and discussions with expert witnesses from outside the government and representatives of public interest groups. Further, the Committee could adopt the practice of British Parliamentary Committees and publish edited records of its *in camera* proceedings. Our own experience suggests that such a procedure can produce a record that retains an account of the important policy issues while editing out references to specific sources, targets or organizational features, which might damage security. More fundamentally, if members of the Committee discover what they regard as bad practices or policies pointing to serious inadequacies or improprieties in Canada's security and intelligence arrangements and are not satisfied that the government is taking appropriate remedial action, then they might well have to speak out publicly. They should do so in a manner which does not disclose the particular information given to them in confidence, but informs Parliament and the public of their perception of the government's failure to deal adequately with a serious security or intelligence problem. Informed public criticism of government is essential to democracy. In the final analysis, as we have contended throughout this Report, security must not be regarded as more important than democracy, for the fundamental purpose of security is the preservation of our democratic system.

48. The view expressed at the end of the last paragraph may give rise to the fear that access to confidential security information, rather than muzzling opposition members, will have the opposite result of leaking important confidential information. It has been suggested that, as a protection against this possibility, members of the kind of parliamentary committee we are proposing should all need formal security clearance. That indeed was the view of the Royal Commission on Security. However, that Commission took the position that it was "inappropriate to subject private Members of Parliament to these (security clearance) procedures". Because of this view and the general contention that security was a matter for the executive, not the legislature,[9] the Commission discarded the idea of recommending a parliamentary committee as a means of providing independent, responsible scrutiny of the Security Service. In Part VII of this Report we put forward our own position on the security screening of Senators or Members who are being considered for positions with access to confidential information relating to national security, including those who are considered for appointment to the proposed Joint Committee on Security and Intelligence. Our position is that, while parliamentarians should not be subjected to the formal security screening process, the security intelligence agency should be asked to report in advance to a party leader as to whether it has information about a Member the leader is proposing to name to the Committee which indicates a significant association of that

[9] Canada, *Royal Commission on Security*, 1969, paragraph 65.

member with an activity threatening the security of Canada. This would mean that while parliamentarians would not be subjected to all the procedures of a regular security clearance process (e.g., they would not fill out personal history forms nor be screened for "character weaknesses" by government officials), party leaders would have an opportunity to be apprised in advance if an appointment is likely to raise serious security problems. In addition to this security check, Members might be asked to take an oath similar to that taken by Privy Councillors, and they should receive a security briefing from the Director General of the security intelligence agency.

49. Security checks and oaths will not likely satisfy those whose fear focusses, not so much on the possibility of a person who is associated with a genuinely subversive activity serving on the Committee, but on the possibility of members of the Committee leaking information for partisan purposes to embarrass the government or to obtain publicity for themselves or their party. A minimum amount of realism about the role of partisanship in democratic politics makes it necessary to acknowledge this risk. We are not in a position, and we doubt that anyone else is, to be categorical about the extent of this risk in the context of Canadian politics. However, we are not aware of evidence which would indicate that members of the Canadian Parliament are so much more partisan and so much less trustworthy than are members of the United States Congress or the Bundestag of the Federal Republic of Germany who serve on security intelligence oversight committees, that it is too dangerous to attempt such an experiment in Canada. Only time will tell the likelihood of this danger. If it appears to the government that opposition members, for partisan political purposes, disclose information damaging to Canadian security, the government will cease to permit the disclosure of important information to the Committee, and the Committee will become ineffectual.

50. In embarking on the experiment in parliamentary oversight which we have proposed, Canada would not be breaking entirely new ground. Nearly all of the western democracies in one way or another have been moving away from the position taken by the Canadian Royal Commission on Security (the Mackenzie Commission) 13 years ago that the legislature should not be directly involved in security matters. The trend has been towards a greater role for Members including those who do not belong to the governing party or coalition, to review secret security and intelligence activities. The two countries which have made the most use of committees of the legislature are the United States and the German Federal Republic. In the United States, Congressional Committees, especially since the Watergate episode, have played a prominent role in reviewing the operations of all of that country's intelligence agencies. Recently there has been a movement to cut back on the number of committees involved in such oversight and a rejection of the proposal that covert foreign operations should require advance notification. These changes, however, will not alter the comprehensive scrutiny of intelligence activities carried out by the House and Senate Select Committees on Intelligence. The Senate Committee, for instance, consisting of 19 Senators (10 Democrats and 9 Republicans while the Democrats controlled the Senate), assisted by a staff of approximately 50, two-thirds of whom are experts in various disciplines, continuously monitors all

aspects of covert and overt intelligence collection, including the F.B.I.'s counter-intelligence activities. About 95 per cent of its sessions are *in camera*, but all Senators may examine records of its proceedings and documents in its possession. In Germany, a Parliamentary Panel of Party Representatives to examine the activities of that country's intelligence services has been in existence since 1956. Recent legislation in Germany has given the Parliamentary Committee a more formal status.[10] It consists of eight members drawn from the three major party groups in the Bundestag. The chairman of each party group is a member of the Committee, and the chairmanship of the Committee rotates every three months amongst the party groups. The scale of this committee's activities (it has one staff member, who is an expert on security and intelligence matters) is closer to what we envisage for a similar parliamentary committee in Canada, although we would hope that a Canadian Committee might have more access to information about operational policy matters than has the German Committee. There is also a Parliamentary Committee on Security and Intelligence in the Netherlands, although it would appear to have been less active than the German Committee.

51. In Australia a parliamentary committee has not been adopted as a means of providing scrutiny of intelligence activities. One reason for this is the practice of electing members of parliamentary committees. However, the Australians have emphasized consultation with the Leader of the Opposition as a means of providing "a bi-partisan approach to security matters."[11] Section 94(2) of the Australian Security Intelligence Organization Act 1979, requires that a copy of the annual report, which the Director General of the Australian Security Intelligence Organization is required to furnish his Minister, be given to the Leader of the Opposition, but with the proviso that "it is the duty of the Leader of the Opposition to treat it as secret". Also section 7(2) requires consultation with the Leader of the Opposition before appointing the Director General of A.S.I.O. We do not see a Parliamentary Committee, along the lines we have proposed, as replacing consultation with the Leader of the Opposition or leaders of other parliamentary parties on security matters. Situations may well arise, as was the case in 1970 and frequently in World War II, when the government deems it advisable to offer to brief the Leader of the Opposition and other party leaders on security situations. But this kind of consultation is too fragmentary and too dependent on the personal relationships between party leaders to provide the systematic parliamentary scrutiny which is required. Nor do we think it is wise to concentrate the burden of knowledge and judgment concerning security matters on a single opposition member. Finally, in the context of the Canadian Parliament, which for more than half a century has been a multi-party, not a two-party, forum, it is essential to involve opposition parties other than the official Opposition. Being more likely to be associated with what, in the context of the times, are considered to be more radical views,

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[10] An exchange of articles examining the strength and weaknesses of this Committee can be found in the October 22, 1977 issue of *Aus Politik und Zeit Geschichte*.

[11] Australia, *Fourth Report of the Royal Commission on Security and Intelligence* (The Hope Report), Canberra 1978, paragraph 461.

leaders of these parties are likely to be especially sensitive to the need for careful judgment in distinguishing threats to security from legitimate dissent.

52. The British Parliament has not developed a special parliamentary committee on security and intelligence matters. Instead, it has relied extensively on Committees of Privy Councillors, who have served in Conservative and Labour governments, to inquire into security issues. This is scarcely a feasible option in Canada until such time as the balance of power in federal politics shifts much more frequently from one party to another. Indeed, one important function which the existence of a parliamentary committee on security and intelligence would perform is to provide much more opportunity for at least a few leading opposition Members of Parliament to become reasonably well-informed about security and intelligence matters than has been possible in recent years.

53. We realize that institutions and procedures developed by other democracies, even those with parliamentary systems, may not be workable within the context of Canadian parliamentary institutions. We have cited these foreign experiences not because any of them will provide an ideal model for Canada, but because all of them indicate a democratic desire to subject secret state intelligence activities to review by persons associated with the democratic critics of the party in power. We think most Canadians share that desire. The way it is fulfilled will depend on the conventions and attitudes which govern the workings of parliamentary government in Canada. These conventions and attitudes are not static. We sense an interest by all political parties in strengthening parliamentary committees to examine the operations of government effectively. Our proposed Joint Parliamentary Committee would be consonant with parliamentary reform in this direction.

WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of a Joint Committee of the Senate and House of Commons to review the activities of the security intelligence agency and of any other agency collecting intelligence (other than criminal intelligence) by covert means.

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WE RECOMMEND THAT the Joint Committee on Security and Intelligence have not more than ten members, that all recognized parliamentary parties be represented on it, that the leaders of parliamentary parties personally select members of their parties for the Committee and, if possible, serve themselves, that the Committee be chaired by a member of an opposition party, that members serve for the duration of a Parliament and that it retain the help of such specialists as it considers necessary.

(183)

WE RECOMMEND THAT the Committee be concerned with both the effectiveness and the propriety of Canada's security and intelligence arrangements and that its functions include the following:

(a) consideration of the annual estimates for the security intelligence agency and for any other agency collecting intelligence (other than criminal intelligence) by covert means;

(b) examination of annual reports of the use made of "extraordinary" powers of intelligence collection (other than criminal intelligence) authorized by Parliament;

(c) consideration of reports directed to it by the Advisory Council on Security and Intelligence;

(d) the investigation of any matter relating to security and intelligence referred to it by the Senate or House of Commons.

(184)

WE RECOMMEND THAT the Joint Committee on Security and Intelligence whenever necessary conduct its proceedings *in camera*, but that it publish an expurgated report of all *in camera* proceedings.

(185)

D. PUBLIC KNOWLEDGE AND DISCUSSION OF SECURITY MATTERS

54. Our experience in carrying out the mandate of our Commission has made us acutely aware of the low level of public knowledge about security issues. This is, of course, what one should expect, given the veil of secrecy which, traditionally, has been drawn over this sphere of government. The main sources of 'information' for most Canadians are newspaper disclosures of 'spy scandals' and popular works of fiction. Public discussion of Canada's internal security arrangements tends to be dominated by two groups who advance positions at two extreme poles: those who contend that the threats to security are so serious that the wisest course is to disclose as little information as possible about the measures taken to counter these threats and those who contend just the opposite — that Canada is so fortunately immune from threats to its security that there are no secrets worth keeping. We think that both of these groups are wrong. There are serious threats to the security of Canada but they are not so serious as to prevent a reasonable amount of informed discussion about the nature of these threats and the measures necessary to protect Canada against them. As we have said in more expanded form elsewhere in this Report, security measures can be so corrosive, that to preserve democracy we should minimize the secrecy aspect wherever this can reasonably be done.

55. The recommendations we have made to strengthen the role of Parliament would, we think, contribute to raising the level of public discussion about security matters. Also, the Solicitor General, as the Minister responsible for the security intelligence agency, should take a leading role in informing the public about security issues and encouraging the study of these issues by private research institutes and the universities. The Solicitor General might turn to the Advisory Council on Security and Intelligence for assistance in these areas. As laymen temporarily involved in the world of security and intelligence, members of this Council should be in a good position to identify subjects which would benefit from public discussion and independent research.

56. The Bureau of Intelligence Assessments which we have recommended would provide another opportunity for wider public participation in security

and intelligence matters. The Office of National Assessments in Australia from time to time arranges seminars attended by experts from outside government to discuss subjects on which it is preparing an intelligence assessment. If such a Bureau were established in Canada, we think it too should draw upon the perceptions and knowledge of Canadians outside of the security and intelligence community in collating intelligence on various topics. Indeed, we think that one of the distinct advantages of such a Bureau is to ensure that the intelligence estimates prepared for government combine information and viewpoints obtained from covert sources with insights from a broad range of public sources.

57. Another means of creating wider public knowledge of the security intelligence agency's functions is to make more of the historical record of the agency available to the general public. The Security Service has not transferred to the public archives any file material covering any period after 1925. We find this practice both overly conservative and shortsighted. It is overly conservative in that there is much Security Service file material of interest to the public which is less than 50 years old and which, if made public, would not damage Canada's security nor be harmful to the privacy of individuals. The public record of this Commission in examining events which occurred as recently as three years ago amply demonstrates this point. The practice is shortsighted because it is in the security intelligence agency's best interests to have its history published and widely examined. Such a process will serve as a check on the abuse of the agency's power, will help the agency learn from its past mistakes, and will help mobilize support for its activities. We believe, therefore, that the security intelligence agency should adopt a more liberal approach than in the past in making historical material relating to its policies and practices available to the general public.

58. It is also our hope that the public record of this Commission's proceedings, this Report and its accompanying bibliography, as well as the books and articles stimulated by the work of the Commission, will provide Canadians who are interested in this subject with a much better basis for study and research than has ever been available before. The requirements of both security and democracy are better served when the ideas which influence and shape Canada's security and intelligence arrangements come not only from those who work within government agencies but also from a broad cross-section of informed Canadians.

WE RECOMMEND THAT the security intelligence agency be directed to draft a policy for approval by the Minister to ensure the release of historical material, unless such release can be shown to endanger the security of Canada.

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PART IX

ADDITIONAL LEGAL AND POLICY PROBLEMS RELATING TO THE SECURITY OF CANADA

INTRODUCTION

INTRODUCTION

1. Paragraph (c) of our terms of reference requires us to advise and report on "... the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada... as well as the adequacy of the laws of Canada as they apply to such policies and procedures...". In Parts V, VI, VII and VIII, which together form what could be called a manual for Canada's security intelligence agency, we discussed what we considered to be the major policy problems facing this security intelligence agency. Many of our recommendations called for important changes in both federal and provincial laws — changes which included the establishment of a statute to govern the agency's scope of intelligence collection and its use of intrusive investigative methods.

2. In this Part, we present further proposals with respect to changing inadequate laws relating to the security intelligence agency's mandate. Four chapters make up this Part. In Chapter 1, we examine the special powers available to the federal government in time of war or national emergency. We also discuss the role that the security intelligence agency should play in such emergencies. In Chapter 2, we focus on the Official Secrets Act. We recapitulate earlier recommendations we made in our First Report, *Security and Information*, of relevance to this Act, and then discuss other sections of the Act about which we have not yet made recommendations. In Chapter 3, we consider legislative proposals to prohibit or restrict active measures of foreign interference. Finally, in Chapter 4, we examine the law of sedition in Canada and make a recommendation concerning that law.

CHAPTER 1

NATIONAL EMERGENCIES*

INTRODUCTION

3. In this chapter we examine the special powers available to the federal government in time of war or other national emergency. We also discuss the role of the R.C.M.P. in relation to emergency planning since World War II, with particular reference to the October Crisis of 1970, and the role of the security intelligence agency in the future. We have considered only emergencies arising from threats to the internal security system of Canada, not natural disasters or other catastrophes unlikely to involve the security intelligence agency.

4. Our terms of reference require us to advise on "the adequacy of the laws of Canada" as they apply to the "policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada". A security intelligence agency should play a significant role in national emergencies, being prepared to advise government on the possibility of political violence and on various operations to ensure the security of the state. After an emergency has been declared, the agency should keep government and police forces informed on security matters. Before we discuss the specific role of the security intelligence agency, however, we examine the laws which give the federal government the authority to exercise emergency powers.

A. THE LEGAL FRAMEWORK

5. When the state is threatened by attack from a hostile power or by civil insurrection, special powers are available to the federal and provincial governments. At common law and by virtue of the prerogatives of the Crown, the state had the power to take all measures which were absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency.[1] Many of these inherent emergency powers are now set down in the War Measures Act,[2] the National Defence Act[3] and the Criminal Code. In the event of a complete breakdown of civil authority, there remains the ultimate power to

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[1] *Halsbury's Laws of England*, 4th edition (1974), Vol. 8, pp. 624-28.

[2] R.S.C. 1970, ch.W-2.

[3] R.S.C. 1970, ch.N-4.

*Commissioner Gilbert has filed a minority report with respect to some aspects of this question.

impose military government or martial law (last declared in Canada following the rebellion of 1837). In this section we set out the emergency powers which are now available.

Criminal Code

6. The Criminal Code contains a number of provisions which may have particular application in emergency situations, including treason (section 46), sabotage (section 52), inciting to mutiny (section 53), sedition (section 62), riot (section 65), and hijacking (section 76.1). No special powers beyond the ordinary police powers of search and seizure and arrest are provided for.

Use of the armed forces

7. In cases involving riot or civil disturbances, where local police forces are insufficient, a provincial government can call upon military aid. The consent of the federal government is not required. Section 233 of the National Defence Act provides that the Canadian forces

> ... are liable to be called out for service in aid of the civil power, in any case in which a riot or disturbance of the peace requiring such service occurs, or is, in the opinion of an attorney general, considered as likely to occur, and that is beyond the powers of the civil authorities to suppress, prevent or deal with.

A provincial attorney general may act on his own or after receiving notification from a judge of a superior, county or district court that the services of the armed forces are needed. It should be noted that the Chief of the Defence Staff, although required to respond to a provincial requisition, may determine what resources to call upon to deal with particular situations. The province is legally liable to pay for the costs of such military assistance.

8. Troops have been used on a number of occasions, including the labour disturbances in Quebec City in 1878 and in Cape Breton in 1923, and the Winnipeg General Strike in 1919. More recently, during the 1970 October Crisis, the military was called in by the government of Quebec, prior to the invocation of the War Measures Act by the federal government.

9. It is not entirely clear how far the federal government can use its own initiative to employ troops in connection with domestic disturbances. In the anti-conscription riots of 1918 in Quebec City, the local commanding officer moved in troops to restore order without waiting for any requisition for aid from the provincial or local authorities. A week later, such interventions were authorized by a federal Order-in-Council under the War Measures Act. Of course, in the event of a national emergency the Government of Canada has undoubtedly the constitutional power, pursuant to its authority to legislate in relation to "peace, order and good government", to enact legislation to authorize the deployment of troops within Canada.

10. A member of the armed forces does not ordinarily have the powers of a peace officer (except when enforcing military law), but may exercise them when called in to help civil authorities. Section 239 of the National Defence Act provides:

> 239. Officers and men when called out for service in aid of the civil power shall, without further authority or appointment and without taking oath of office, be held to have and may exercise, in addition to their powers and duties as officers and men, all of the powers and duties of constables, so long as they remain so called out, but they shall act only as a military body, and are individually liable to obey the orders of their superior officers.

11. The ability to invoke military aid to civil authorities would appear to be less necessary today than in the early days of Confederation. Most local disturbances can be adequately controlled by local police. Since the end of World War II the provinces have used the requisition power on only two occasions, once for the Police and Firemen's Strike in Montreal in 1969, and again for the October Crisis in 1970.

The War Measures Act

12. The War Measures Act was enacted by Parliament on August 21, 1914, at the outbreak of World War I. The Act was passed without dissent after just over half an hour of debate, and became law, following Royal Assent, on August 22. The Canadian government had already detained enemy vessels and taken other actions that were validated retroactively by the legislation.

13. The Canadian War Measures Act followed much the same pattern as the Defence of the Realm Act[4] passed in the United Kingdom on August 8, 1914. The emergency powers granted to the government were not spelled out in the legislation. Rather, the Governor in Council was given broad powers to declare a state of emergency and then to pass regulations under the Act. The Canadian Act, which was more all-embracing than the United Kingdom legislation, allows the government to make orders and regulations deemed "necessary or advisable for the security, defence, peace, order and welfare of Canada". Under the Act a state of emergency may be declared by proclamation and, until revocation, the proclamation is conclusive evidence that a state of war, insurrection or invasion, real or apprehended, exists. Section 2 of the War Measures Act states:

> 2. The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.

14. The Canadian Act provides that the regulations may impose penalties of up to five years for breaches of the regulations, compared with three months under the United Kingdom legislation.

15. The U.K. legislation expired shortly after the end of World War I, whereas the Canadian Act has never been repealed. New emergency powers legislation was enacted in the U.K. just before World War II which remained

[4] (Imp.) 4 and 5 Geo. 5, ch.29.

in force for the duration of hostilities.[5] It is not clear whether the original intent was to make the Canadian Act a permanent one. The statute makes specific reference to the existing hostilities, yet refers to "war, invasion, or insurrection, real or apprehended". Since if it were meant only to be applied during the war there would have been no need to refer to "insurrection", it seems likely that the government intended the statute to be permanent. Moreover, it may be that the scope of the Act was altered during its passage. The resolution introducing it referred to the issue of a proclamation only as "conclusive evidence that war exists", whereas the legislation passed a few days later made the proclamation "conclusive evidence that war, invasion, or insurrection, real or apprehended, exists...".

16. It is not certain how the crucial words "insurrection, real or apprehended", which were not in the U.K. legislation, came into the Canadian statute. However, it is very likely that the language was borrowed from the Militia Act of 1904[6] which had defined the word "emergency" to mean "war, invasion, riot or insurrection, real or apprehended." Another Canadian Act, the Finance Act, passed on the same day as the War Measures Act, used the precise words of the Militia Act to allow the government to issue certain proclamations (authorizing, for example, a debt moratorium and other measures to prevent a run on financial institutions) in case of "war, invasion, riot or insurrection, real or apprehended...". In the War Measures Act, the word "riot" was dropped.

17. During World War I the government enacted extensive regulations under the authority of the War Measures Act. Towards the end of the war a number of organizations, such as the Industrial Workers of the World and the Russian Workers Union, were declared to be unlawful for the duration of the war by Order-in-Council under the Act. Membership in such associations or even attendance at their meetings was an offence. Investigating the activities of such unlawful organizations was the responsibility of the Royal North-West Mounted Police.

18. The War Measures Act was invoked for World War II on September 1, 1939, nine days before the formal declaration of war. The regulations had been prepared by a Standing Interdepartmental Committee on Emergency Legislation set up in 1938. During the war a number of front organizations were declared unlawful by Orders-in-Council. Also, a Treachery Act was passed to allow for prosecutions for major espionage and other serious cases.[7] After 1945 special transitional Acts were passed from year to year until 1951. Following the outbreak of the Korean War, a special Emergency Powers Act was passed which expired in 1954.[8]

19. In 1960, at the time of the enactment of the Canadian Bill of Rights, the War Measures Act was amended so that section 6 provided that a proclamation invoking the Act "shall be laid before Parliament forthwith after its issue,

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[5] Emergency Powers (Defence) Act, 1939, 2 and 3 Geo. 6, ch.62.
[6] S.C. 1904, ch.23.
[7] S.C. 1940, ch.43.
[8] S.C. 1951, ch.5.

or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting". Section 6 also provides for Parliamentary debate of a motion signed by ten members, "praying that the proclamation be revoked". Finally, section 6(5) provides that anything done under the authority of the Act "shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights".

20. Mr. Pearson, then Leader of the Opposition, maintained that an effective Bill of Rights should restrict the executive even in an emergency. He submitted that the Governor in Council should be expressly forbidden to deprive any Canadian citizen of citizenship or to banish or exile any citizen in any circumstances. He further proposed a "limitation by law on the absolute and arbitrary power of the government to detain persons, even in wartime", but stopped short of recommending that detention without an early trial on properly laid charges should be expressly forbidden. These proposals were not accepted. Prime Minister Diefenbaker pointed out that the government's amendments "assured parliamentary control which has not previously existed under the War Measures Act". Moreover, he suggested that a parliamentary committee should later be established to examine the operation of the War Measures Act.[9] Such a committee was never set up.

21. The War Measures Act was invoked for the third time, on the occasion of the October Crisis of 1970. This crisis was precipitated by the kidnapping of the British Trade Commissioner, James Cross, and the subsequent kidnapping and murder of Pierre Laporte, a cabinet minister in the Quebec government. It provides an opportunity to evaluate the strengths and weaknesses of the statute. Much was learned from the crisis about the adequacies of the legal framework and the state of emergency preparedness of the country.

22. On October 16, 1970, at four a.m., the War Measures Act was invoked by proclamation and the Order-in-Council incorporating the regulations was signed by the Governor General. Later that morning, the Prime Minister tabled in Parliament the Orders-in-Council under the War Measures Act "authorizing the issuing of a proclamation" that a state of "apprehended insurrection exists" in Quebec and "authorizing certain regulations to provide emergency powers". The regulations were published in the Canada Gazette at 11:00 a.m., and debated in the House of Commons for two days. On October 19, the House voted 190 to 16 to approve the action of the government in invoking the War Measures Act. The resolution read:

> That the House approves the action of the government in invoking the powers of the War Measures Act to meet the state of apprehended insurrection in the Province of Quebec as communicated to the Prime Minister by the Government of Quebec and the civic authorities of Montreal and further approves the orders and regulations tabled today by the Prime Minister on the clear understanding that the proclamation invoking the powers as contained in the regulations will be revoked on or before

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[9] House of Commons, *Debates*, July 7, 1960, p. 5948.

April 30, 1971, unless a resolution authorizing their extension beyond the date specified has been approved by the House.[10]

23. The regulations declared as unlawful the Front de Libération du Québec (F.L.Q.) and any other association that advocated the use of force or criminal means to effect governmental change within Canada.[11] Membership in the F.L.Q. was declared an indictable offence, as were advocating or promoting its aims and policies, communicating its statements, contributing to it financially, soliciting subscriptions for it, or rendering assistance to its members. According to the regulations, peace officers (including members of the armed forces) were given extended powers of search, seizure, and arrest. A peace officer could arrest without warrant a person suspected of committing, or of being likely to commit, any of the activities declared illegal. Those arrested could be detained for seven days without charges being laid.

24. The proclamation under the War Measures Act was revoked on December 3, 1970 when Parliament enacted the Public Order (Temporary Provisions) Act.[12] This Act incorporated the same regulations in slightly different form restricting the definition of illegal organizations to the F.L.Q. and groups that advocated the same or similar methods to accomplish governmental change "with respect to the Province of Quebec or its relationship to Canada as that advocated by..." the F.L.Q. The time of detention was made shorter and certain protections drawn from the Canadian Bill of Rights were included in the Act. By its own terms, the statute expired on April 30, 1971.

25. It is clearly not within our terms of reference to judge whether or not there were sufficient grounds for invoking the War Measures Act. The matters relevant to our mandate are the adequacy of that Act, the extent to which the federal government looked to the Security Service for intelligence before deciding to invoke the Act and the extent to which the R.C.M.P. was later involved in dealing with this national crisis.

26. There is some uncertainty as to the role played by the R.C.M.P. in the decision to invoke the War Measures Act. Was the decision based upon intelligence supplied by the R.C.M.P. or were the relevant facts in the public domain? On October 16, 1970, the Minister of Justice, the Honourable John Turner, told the House that some of the information in the government's hands could not be made public.[13] The Prime Minister, however, on October 23, 1970, stated that the decision was based on information that was then known to the public:

> The first fact was that there had been kidnappings of two very important people in Canada and that they were being held for ransom under the threat of death. The second was that the Government of the Province of Quebec and the authorities of the City of Montreal asked the Federal Government to permit the use of exceptional measures because, in their

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[10] *Ibid.*, October 19, 1970, p. 335.
[11] S.O.R./70-444; P.C. 1970-1808, October 16, 1970.
[12] S.C. 1970-71-72, ch.2.
[13] House of Commons, *Debates*, October 16, 1970, p. 212.

> own words, a state of apprehended insurrection existed. The third reason was our own assessment of all the surrounding facts, which are known to the country by now — the state of confusion that existed in the Province of Quebec in regard to these matters.[14]

27. During the months preceding October 1970, the Security Service provided the Solicitor General, the Department of External Affairs and the Privy Council Office with assessments on subversive organizations within Quebec, including the F.L.Q. In addition, the Security Service had itself collected information on the activities of the F.L.Q. and its supporters. On the operational level, the Security Service had established a close relationship with the Quebec Police Force and the Montreal City Police.

28. After the October crisis, criticism was expressed by Ministers that the intelligence provided by the R.C.M.P. on the F.L.Q. had been less than adequate. Yet it was well known to the Security Service that the F.L.Q. was a tightly knit terrorist organization capable of political violence. An abortive attempt to kidnap the Israeli Consul and Trade Commissioner in Montreal had been discovered as the result of an arrest by the Montreal City Police in February 1970. A similar plot to kidnap the U.S. Consul in Montreal was discovered in June after a raid by the Combined Anti-Terrorist Squad. Information on this aborted kidnapping was transmitted by the Security Service to the Department of External Affairs and the Privy Council Office. Mr. E.A. Côté, who as Deputy Solicitor General was directed by the Prime Minister during the crisis to prepare an independent report on the F.L.Q., expressed the view to us that the R.C.M.P.'s basic intelligence on the F.L.Q. had been very good, better indeed than the intelligence of the Quebec Police Force and the Montreal City Police. A general report on subversion in Quebec had been prepared by the Security Service for the Interdepartmental Committee on Law and Order in July and was considered by Mr. Côté to be a good summary of the situation (Vol. C76, pp. 10486-95; Vol. C77, p. 10532; Vol. C79, p. 10846). After the crisis broke on October 5 with the kidnapping of James Cross, the R.C.M.P. was in daily contact with the Solicitor General and other Ministers to report on events as they unfolded (Vol. C39, pp. 5221-32). Not surprisingly, there were no written assessments of the situation in those hectic days.

29. Commissioner Higgitt testified that the R.C.M.P. was not asked at the time for an opinion as to whether the Act should be proclaimed or, in other words, whether there existed a state of "apprehended insurrection" in the Province of Quebec. According to his evidence, the R.C.M.P. did not take the initiative to recommend to government that the Act should be proclaimed, nor was the opinion of the R.C.M.P. sought. Furthermore, the R.C.M.P. did not volunteer any comment on the government's proposal to invoke the War Measures Act (Vol. C39, pp. 5297-5305; Vol. C40, pp. 5354-55, 5375-79; Vol. C39, pp. 5336-64, 5367-68, 5376). In early November, Commissioner Higgitt was asked for his views as to whether the War Measures Act needed to be

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[14] *Ibid.*, October 23, 1970, p. 510.

continued. Mr. Higgitt told us that he then advised Ministers that as far as the R.C.M.P. was concerned the special emergency powers did not need to be continued (Vol. C39, p. 5288).

30. According to the Security Service records, during the several days preceding October 15, the Security Service in Montreal had been working with the Quebec Police Force putting together lists of suspects. According to the testimony of Superintendent (then Sub-Inspector) Ferraris, some of the information on which the lists were based had been sent from R.C.M.P. Headquarters in Ottawa. Late in the afternoon of October 15 the lists arrived in Ottawa. According to the testimony of Superintendent Ferraris, during the course of the evening a shorter list that had been prepared independently by the Montreal City Police, arrived in Ottawa. (An R.C.M.P. memorandum prepared late in 1970 stated that the number of names on the Montreal City Police List was 56.) The lists prepared by the R.C.M.P. in co-operation with the Quebec Police Force were of persons who, according to records, had participated in violent demonstrations, or advocated the use of violence, or were suspected of terrorist activities (Vol. C51, p. 6979-80; Vol. C39, pp. 5309-14). Late in the evening of October 15 Sub-Inspector Ferraris, accompanied by a more senior officer, took the lists that the R.C.M.P. had prepared, which totalled 158 names, to Parliament Hill in order to show them to the Honourable Jean Marchand and the Honourable Gérard Pelletier, both members of the federal Cabinet from Quebec. Those lists were shown to Messrs. Marchand and Pelletier. (It is unclear whether the Montreal City Police list was shown to them.) (Vol. C39, p. 5325; Vol. C51, pp. 6982-3.) According to the testimony of Superintendent Ferraris, Messrs. Marchand and Pelletier did not ask that the lists be altered in any respect (Vol. C51, pp. 6985-87). According to Commissioner Higgitt, there were two reasons for showing the list to the Cabinet Ministers: first, this had been decided upon at a meeting of Ministers and second, in a highly charged situation with political overtones, the greatest care had to be taken in the preparation of the lists (Vol. C39, pp. 5319-27).

31. There has been little public discussion about the part played by the R.C.M.P. after the proclamation of the War Measures Act. The major responsibility for police operations remained with the police authorities in the Province of Quebec (Vol. C39, p. 5256; Vol. C51, p. 6939). The R.C.M.P. co-operated with the Quebec, Montreal, and various other municipal police forces in supplying intelligence to help identify and locate the kidnappers. Members of the Security Service also acted in a liaison capacity with the crisis centres and special task forces within the Privy Council Office, the Department of External Affairs, and the Department of the Solicitor General.

32. The arrests when they took place were not confined to those on the original lists. The majority of the arrests were made by the Quebec Police Force or the Montreal City Police. According to the R.C.M.P., members of the R.C.M.P. assisted in many of the arrests but never acted alone. There were cases of local municipal police forces acting unilaterally to arrest people without consulting the Quebec Police Force or the R.C.M.P. In the first few hours after the regulations under the War Measures Act came into force, the

Quebec Police Force, acting on its own, (according to R.C.M.P. records) arrested 140 persons, 115 of whom were the subject of files maintained by the Security Service. Of the 68 noted to represent the greatest threat to security, 54 had been arrested by mid-December. Warrants had been issued for 5 of the remaining 14, namely, the two Rose brothers, Francis Simard, Marc Carbonneau, and Jacques Lanctot.

33. Mr. James Cross was found by the police and released by his captors on December 4, 1970. On December 27 the Rose brothers and Francis Simard were arrested for the murder of Pierre Laporte. The tension then subsided. In the perception of the Security Service, however, the crisis did not end. Even after the Public Order (Temporary Provisions) Act expired in April 1971, methods of investigation appropriate to a crisis situation were continued. Here is the testimony of two members of the Security Service, both of whom were involved in R.C.M.P. activities in Quebec during this period:

> And so, in our minds, while the Act had been revoked, the situation had not changed, and that to some extent many of the same measures that had been used at that time seemed to us to be still necessary. And so there was a kind of attitude, if you will, that prevailed among those of us that were doing the work.
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> (Vol. 71, p. 11393.)

> . . . we were told that Mr. Turner would be bringing in the permanent Public Order Measures Act, which would allow us to operate at a more reasonable level, with more authority and more legality behind our operations. . . So when the Public Order Measures Act [sic] was repealed in April. . . we continued our operations as if the new one was going to come in any time.
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> (Vol. 92, p. 14982.)

In the opinion of Commissioner Higgitt, the situation during the October Crisis and for one or two years thereafter was far from normal. It was in effect "a war between the Security Service and those forces who were disrupting and causing mayhem and unease in the country" (Vol. 87, p. 14346; Vol. 85, p. 13933-34). In his testimony he implied that those times demanded "fairly desperate counter-measures" (Vol. 85, p. 13934).

34. The Security Service, which had been severely criticized for failing to provide government with adequate intelligence on the F.L.Q., expanded its operations after the October Crisis. The situation was described by the Solicitor General, the Honourable Francis Fox, in 1977 in the House of Commons:

> Nonetheless, when the October crisis of 1970 struck, there was an immediate realization that information on groups responsible for the crisis had been wholly inadequate. It was not clear which specific groups involved in the separatist movement were advocating or resorting to the use of violence or the commission of criminal acts, including murder, to accomplish the changes they sought. It was difficult to determine at that time precisely which groups were conducting themselves in accordance with the law and the principles of democratic action. In response to the gaps that were recognized as existing in October 1970, the security service realigned its

operational activity to obtain intelligence on groups and organizations that had been identified as supporting the separatist cause.[15]

Some of the operations that resulted from the realignment of operational activity after October 1970 were among the events ultimately leading to the establishment of this Commission.

B. LEGISLATIVE REFORM

35. The October Crisis made one thing quite clear: the government had no means of bringing emergency powers into play in a national domestic crisis other than by invoking the War Measures Act or by enacting special legislation in Parliament. Whether or not the use of emergency powers was justified in 1970 is not for us to decide. However, the question that arises is whether a statute that would authorize less severe measures, with more protection for fundamental rights and freedoms, should be available for use in similar circumstances. In the spring of 1971, legislation was drafted dealing with civil emergencies and the government proposed the appointment of a special joint committee of the Senate and the House of Commons to consider the enactment of this legislation. However, the committee was not appointed and the legislation was never introduced.

36. At first blush the concept of a statute to fill this gap and to give the executive certain powers in the case of emergencies which fall short of war or insurrection has attractions. However, many citizens are opposed in principle to such laws which would give government more power to introduce emergency measures without the prior approval of Parliament.[16]

37. Some countries, such as the United Kingdom, have no permanent legislation on the statute books applicable to civil political emergencies. In the United Kingdom the only comparable statute is the Emergency Powers Act of 1920 which authorizes the executive to exercise emergency powers if essential services, such as the supply of food, water, fuel or light, are threatened.[17] The legislation has been used only in connection with emergencies arising out of industrial disputes. Regulations under the Act must be laid before Parliament forthwith and they expire after seven days unless continued by a resolution of both Houses. There are three limitations: there can be no conscription; to strike cannot be made an offence; and existing criminal procedures cannot be altered.

38. In 1974, with the outbreak of I.R.A. violence in Britain the British Parliament enacted The Prevention of Terrorism (Temporary Provisions) Act. In many respects this legislation was similar to the Canadian statute enacted in December 1970, the Public Order (Temporary Provisions) Act. The British legislation was of limited duration. It required renewal by Parliament every six

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[15] *Ibid.*, October 28, 1977, p. 394.

[16] See the Brief submitted by the Canadian Civil Liberties Association, *Emergency Powers and the War Measures Act*, October 3, 1979.

[17] (Imp.) 10 and 11 Geo. 5, ch.31.

months. In 1976, the statute was amended to provide for renewal on an annual basis.[18]

39. The War Measures Act applies to a variety of emergency conditions: "war, invasion, or insurrection, real or apprehended". The decision of the government to invoke the act by proclamation is conclusive evidence that an emergency condition under the Act is in existence. These are wide powers, but grave national emergencies, such as war or insurrection, may well require immediate action by the executive and we do not believe that there are convincing arguments for the repeal of the War Measures Act. We do, however, think that the Act can be improved, and we comment on this below. On the other hand, we are not convinced that a case has been made, from the point of view of national security, for the enactment of additional emergency powers legislation that would give the government special powers in situations falling short of "war, invasion or insurrection, real or apprehended". When less grave emergencies occur or are apprehended, and the government wishes special powers, it should seek the approval of Parliament to special legislation.

Amending the War Measures Act

40. We now make a number of specific suggestions for the improvement of the War Measures Act.

(a) *The role of Parliament*

41. Section 6(2) of the War Measures Act provides that a proclamation of an emergency shall be laid before Parliament forthwith if Parliament is sitting and, if Parliament is not sitting, within the first 15 days of the new session. Parliament, after debate, may then decide whether or not to revoke the proclamation. In our opinion, section 6 should be amended to reduce the time during which a state of emergency can continue without the approval of Parliament. As now drafted, the Act does not provide for any time limit within which Parliament must be assembled if not then in session. If a proclamation invoking the Act is ordered by government, Parliament should be summoned immediately. We therefore recommend that, if Parliament is not in session it should be summoned to meet within seven days of the proclamation, so that the merits of the proclamation and regulations may be debated and approval or disapproval be given. We also consider that any proclamation should be limited to a specific time not to exceed twelve months. Parliament would be required to approve continuation for each subsequent twelve-month period.

42. In order to hold a genuinely useful debate on the proclamation and the regulations, Members of Parliament should be given the information on which the government based its decision. In some cases this can be accomplished openly in Parliament, but there may be situations in which it would be unwise to disclose some of the information publicly. Other arrangements must be made to inform the House of the real situation. One solution is to have Parliament sit *in camera* for part of its deliberations, as happened during the

[18] 1974, ch.56.

Second World War in both Canada and the United Kingdom in regard to certain other matters. Another is to inform the Leader of the Opposition, or the leaders of all recognized parliamentary parties. A further possibility is to inform a committee of the House, which could report its conclusions to the House. In this context, the Parliamentary Committee on Security and Intelligence, which has been referred to earlier in our Report, could play a useful role.

(b) *Emergency regulations*

43. Under the War Measures Act, the government has plenary authority, once a proclamation is issued, to make such orders and regulations as are deemed necessary "for the security, defence, peace, order and welfare of Canada". Section 3 of the Act goes on to state "without restricting the generality of the foregoing", that such orders and regulations of the Executive may extend to

> (a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
>
> (b) arrest, detention, exclusion and deportation;
>
> (c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
>
> (d) transportation by land, air, or water and the control of the transport of persons and things;
>
> (e) trading, exportation, importation, production and manufacture;
>
> (f) appropriation, control, forfeiture and disposition of property and of the use thereof.

44. In the past, regulations under the War Measures Act were not made public until an emergency was declared. Draft regulations, called the Internal Security Regulations, based on the old Defence of Canada Regulations, were prepared in 1962 at the interdepartmental level although we understand that they were not submitted to Cabinet for approval. The draft Internal Security Regulations cover such matters as the authority of the Minister of Justice to make detention orders, the establishment of a review committee to hear objections to detention orders, security of vital points, censorship, offences related to sabotage, interference with communications, possession of firearms and special powers of search and seizure. The draft regulations also provide for the registration of aliens, authorize the Governor in Council to declare an association or group to be an illegal organization and authorize the Minister of Justice to establish and regulate places for the detention of persons.

45. It is highly desirable that the emergency powers set out in the draft regulations be debated in public *before* a crisis develops, to ensure that proper attention will be paid to civil liberties. In our view, it would be an appropriate and useful step to have such draft regulations tabled and discussed in Parliament. This would ensure the greatest degree of public confidence if and when the regulations, in whole or in part, are brought into force at the time of an emergency. If the government decides at the time the War Measures Act is

invoked that further regulations which have not received Parliamentary approval, are required, such regulations should be submitted to Parliament for approval at the earliest possible date and in any event within 30 days, otherwise they would lapse.

(c) *Fundamental rights*

46. In 1960, the Opposition, led by the Honourable L.B. Pearson, demanded that certain fundamental rights, such as the right of citizenship, be spelled out in the statute. This view was not accepted by the government. Instead, there is a blanket proviso in section 6(5) that the War Measures Act applies, notwithstanding the Canadian Bill of Rights. Prime Minister Diefenbaker did suggest that the question be debated by a special all-party committee. As we have noted, no such committee was set up. Twenty years have gone by, and we think it is time for Parliament to reconsider the question.

47. We are not convinced that the fundamental freedoms expressed in the Canadian Bill of Rights should be completely excluded after a proclamation under the War Measures Act. The Public Order (Temporary Provisions) Act 1970, which revoked the October 1970 proclamation, retained the application of certain provisions of the Canadian Bill of Rights — the right to a fair hearing, the right to instruct counsel without delay, the presumption of innocence, and the right to the assistance of an interpreter. These are fundamental to our system of justice and public administration in peace and in war, and we believe that the total exemption of the War Measures Act from the Canadian Bill of Rights is not required. The powers that are to be permitted, notwithstanding the Canadian Bill of Rights, should be specifically identified in the legislation. For example, if the executive is to have the power to hold without bail, the statute should specifically identify this power as one permitted, notwithstanding the Canadian Bill of Rights.

48. Also, in considering the rights and freedoms which should be preserved even in emergency situations, Parliament should have regard to the fact that Canada is a signatory to the International Covenant on Civil and Political Rights. Hence Canada can be the subject of an international complaint for violation of its provisions. Article 4 of the Covenant provides that although some rights can be overriden in time of "public emergency threatening the life of the nation", certain rights cannot be overridden under any circumstances. These are: the right to life; the protection against cruel, inhuman, or degrading treatment or punishment; the protections against slavery, against imprisonment for debt, and against punishment for acts made crimes retroactively; the right of every individual to be recognized as a person before the law; and the right to freedom of thought, conscience and religion. We believe that these rights should not be capable of being overridden by regulations adopted under the War Measures Act.

49. Certain additional rights, not specifically covered in the Canadian Bill of Rights, should also apply even in a state of emergency. The Canadian Civil Liberties Association, echoing Mr. Pearson's sentiments, has expressed the view that the Act should not authorize government to denaturalize, deport or

exile a Canadian citizen.[19] We agree. It should be recalled that on December 15, 1945, a series of Orders-in-Council were passed under the authority of the War Measures Act which allowed under certain conditions for the deportation from Canada of nationals of Japan resident in Canada and British subjects, natural born and naturalized, "of the Japanese race". Those Japanese who were British subjects by naturalization or birth were to lose their citizenship on deportation. Revocation of citizenship is not one of the powers explicitly mentioned in section 3 of the War Measures Act, and, in our opinion, there should be no such power. The power to exile or deport a Canadian citizen should not be part of the War Measures Act. Although the deportation and denaturalization of the Japanese Canadians was not carried out, as Prime Minister Trudeau has said, "the fact that it could have been contemplated is a frightening thing".[20] If fundamental rights and freedoms are to be introduced in the Constitution, extremely careful consideration should be given as to which rights and freedoms ought not to be abrogated even in time of national emergency.

50. As in the Second World War, there should be a Board of Detention Review to consider the circumstances of persons whose liberty has been restrained by actions taken or purported to have been taken under the War Measures Act. Further, an independent tribunal should have the power to award compensation to persons whose rights have been infringed, without due cause, through the application of emergency legislation. Compensation should be awarded not only for loss of property but also for loss of liberty. These procedural safeguards should be provided in the War Measures Act itself rather than in the regulations.

(d) *The power to search, seize and arrest*

51. Under the Criminal Code a search warrant may be issued when a Justice of the Peace has "reasonable grounds to believe" that evidence with respect to the commission of an offence will be found in a specific place (section 443). A peace officer may arrest without warrant a person who he believes "on reasonable and probable grounds" has committed or is about to commit an offence (section 450). Under the regulations enacted at the time of the October Crisis, a police officer was given the power to "enter and search without warrant any premises... in which he has reason to suspect" that a member of the F.L.Q. or anything that might be evidence of an offence under the regulations was present. The draft Internal Security Regulations, on the other hand, use the more familiar "reasonable grounds to believe" criterion. We are not convinced that there is likely to be much substantive difference between "reasonable suspicion" and "reasonable belief" in the context of a political emergency. In any event, it is worth pointing out that neither of these phrases would appear to authorize anything in the nature of wholesale house-to-house searches.

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[19] *Emergency Powers and the War Measures Act*, p. 10.

[20] Prime Minister Trudeau, *Globe and Mail*, October 28, 1968, p. 12.

52. It is a fundamental precept of our law that an arrested person be charged as soon as possible. Thus, the Criminal Code provides that a person who is arrested and detained in custody shall, with very limited exceptions, be brought before a justice of the peace within 24 hours. The British anti-I.R.A. legislation requires a charge within 48 hours, although this can be extended by the Minister for a further period of five days. The regulations enacted at the time of the October Crisis provided that a person arrested had to be charged within seven days although the period could be extended up to another 14 days by a provincial attorney general. The Public Order (Temporary Provisions) Act 1970 provided that a charge had to be laid within three days of arrest, a period which could be extended up to another four days by a provincial attorney general. While we recognize that the time limits provided in the Criminal Code may be too short in the case of an emergency, we believe that lengthy detention before charge should not be permitted. We are of the view that the War Measures Act should be amended to provide that the period of detention before charge should be as short as possible and in any event should not exceed seven days after arrest.

53. Section 3(2) of the War Measures Act provides that breaches of orders and regulations made under the Act may be enforced by "... such courts, officers and authorities as the Governor in Council may prescribe,...". This may be interpreted as providing authority to create new courts. Such courts might appear to be simply extensions of the executive arm of government. In our opinion there should be no such authority and the Act should be amended to make this clear. If, by reason of the volume of charges arising out of a given situation, the ordinary courts of criminal jurisdiction cannot handle the case-load, they should be enlarged, or the jurisdiction of other existing courts should be extended to deal with the overload.

(e) *Unlawful organizations and associations*

54. During the October Crisis the regulations declared the F.L.Q. to be an illegal organization and membership was made an offence. There was precedent for this in Canada. During the two World Wars a number of organizations had been banned and membership in them prohibited. Such organizations have not always been of a violent nature. During World War II, under the provisions of the Defence of Canada Regulations,[21] the Jehovah's Witnesses, not a violent group, were declared an illegal organization.

55. The draft Internal Security Regulations confer authority on the Governor in Council to declare an organization illegal. There is a similar provision which authorizes the Minister of Justice to issue a detention order. It is important, however, to distinguish persons who are simply members of a banned organization from those who are also dangerous and should be detained in the national interest for the duration of the emergency. Membership in a banned organization may be made an offence, but as a rule membership should not be the sole basis for arrest in an emergency.

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[21] Defence of Canada Regulations (1942), Reg. 39c.

56. During the second World War the Government gave notice of the organizations that were to be proscribed, thus affording persons an opportunity to relinquish membership or cease active participation in such organizations. The legislation in the United Kingdom proscribing the I.R.A. provides, to the same effect, that

> A person belonging to a proscribed organization shall not be guilty of an offence under this section by reason of belonging to the organization if he shows that he became a member when it was not a proscribed organization and that he has not since then taken part in any of its activities at any time while it was a proscribed organization.[22]

57. The regulations adopted on October 16, 1970, came into force at four o'clock in the morning. People were arrested and charged with being members of the F.L.Q. before they had an opportunity to renounce their membership. The Associate Deputy Minister of Justice for Quebec, Gerald Boisvert, issued instructions to some prosecutors that the regulations did not have retroactive effect and therefore that for guilt to be established there should be evidence of membership in, or support for, the F.L.Q. on or after October 16. This reflected the common law rule of statutory construction that penal statutes not be construed retrospectively unless the statute so provides. The instruction no doubt contributed to the fact that of 467 persons arrested under the War Measures Act only five were eventually prosecuted. If simple membership in an illegal organization is declared to be an offence (as compared with active support of an illegal organization) the regulations should allow for a certain period of grace during which membership may be renounced with respect to any membership held prior to the making of the regulations. Indeed, the same period of grace should apply to any other section of the regulations proscribing conduct which was not previously an offence if such conduct began prior to the making of the regulations. An example would be the possession of literature. The principle of non-retroactivity of penal legislation is enshrined in our law and should be applicable even in the case of national emergencies.

> **WE RECOMMEND THAT a proclamation invoking the War Measures Act be debated in Parliament forthwith if Parliament is in session or, if Parliament is not in session, within seven days of the proclamation. Parliament should be informed of the reasons for the invocation of the Act, either publicly in the House, in an *in camera* session or by means of consultation with the leaders of the opposition parties, or through a report to the Joint Parliamentary Committee on Security and Intelligence.**
>
> (187)
>
> **WE RECOMMEND THAT the War Measures Act limit the duration of a proclamation issued by the Governor in Council to a specific period not to exceed twelve months. Extensions for periods not to exceed twelve months should require further approval by Parliament.**
>
> (188)
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> **WE RECOMMEND THAT orders and regulations to be brought into force when the War Measures Act is invoked be drafted in advance.**
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> (189)

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[22] 1974, ch.56, s.1(b).

WE RECOMMEND THAT the War Measures Act be amended to provide that such draft orders and regulations be tabled and approved by Parliament prior to their being brought into force. Any orders and regulations under the War Measures Act which have not been so approved in advance of the emergency should have to be tabled forthwith and should expire 30 days after coming into force unless approved by Parliament in the meantime.

(190)

WE RECOMMEND THAT section 6(5) of the War Measures Act be amended to provide that powers that are to be permitted, notwithstanding the Canadian Bill of Rights, should be specifically identified in the legislation and approved by Parliament.

(191)

WE RECOMMEND THAT section 3(1)(b) of the War Measures Act be amended. There should be no executive power in emergencies to exile or deport a Canadian citizen, nor should the Governor in Council have the power to revoke Canadian citizenship.

(192)

WE RECOMMEND THAT there be provision in the War Measures Act for:

(a) a Board of Detention Review to consider the circumstances of persons whose liberty has been restrained by actions taken or purported to have been taken under the War Measures Act; and

(b) a Compensation Tribunal to award compensation to persons whose rights have been infringed, without just cause, through the application of emergency legislation.

(193)

WE RECOMMEND THAT the War Measures Act be amended

(a) to prohibit prolonged detention after arrest without the laying of a charge; a charge should be laid as soon as possible and in any event not more than seven days after arrest;

(b) to prohibit the creation by the Governor in Council of new courts to handle charges laid under the Act and Regulations; and

(c) to provide that if, because of the volume of cases arising out of charges laid under the Act and regulations, the ordinary courts of criminal jurisdiction cannot handle the caseload, such courts should be enlarged or the jurisdiction of other existing courts should be extended to deal with the overload.

(194)

WE RECOMMEND THAT the War Measures Act be amended Act should not be based solely upon the fact of simple membership in an illegal organization.

(195)

WE RECOMMEND THAT:

(a) no regulations passed pursuant to the War Measures Act have a retroactive effect; and

(b) if the regulations proscribe a course of conduct which was not previously an offence, and the conduct began prior to the making of the

regulations, a reasonable period of grace be granted during which any person may comply with the regulations.

(196)

WE RECOMMEND THAT certain fundamental rights and freedoms, such as those specified in the Public Order (Temporary Provisions) Act, those specified in Article 4 of the International Covenant on Civil and Political Rights, and the right of citizens not to be deprived of citizenship or exiled, not be abrogated or abridged by the War Measures Act or any other emergency legislation under any circumstances.

(197)

C. INTERNMENT

58. To complete our discussion of the War Measures Act, we turn to the question of internment. A major security responsibility of the R.C.M.P. in the past has been the preparation of contingency plans for interning persons who are considered to be security risks, in time of emergency of the kinds contemplated by the War Measures Act, because of their allegiance to hostile powers, or their known tendency towards political violence. During World War I, World War II, and the October Crisis, the R.C.M.P. advised government with respect to internment. The War Measures Act confers upon the Governor in Council the authority to enact regulations that provide for the "arrest, detention, exclusion and deportation" of persons. In World War II internment of aliens was dealt with under the Defence of Canada Regulations enacted pursuant to the War Measures Act. As we have noted, these regulations have been replaced by the draft Internal Security Regulations, which, if adopted when an emergency is proclaimed, would authorize the Governor in Council to declare an association, society, group or organization illegal. The regulations also would give the Minister of Justice authority to order the indefinite detention of an individual or a group of individuals.

59. In 1948, a programme was established by the Commissioner of the R.C.M.P. to identify persons who, it was expected, might have to be rounded up promptly in the event of hostilities with the Soviet Union. An Advisory Committee was established in 1950 to review the list of people to be interned. The R.C.M.P. was directed to identify and to group such persons in order "of importance and danger to the country in the event of a further deterioration in international affairs". Emphasis was placed not only on those who might hold allegiance to a foreign power but also on those who might play key roles in espionage or sabotage in the event of war.

60. From 1950 until 1965, the programme was accorded a very high priority within the Security Service. Some organizations were subjected to close scrutiny and surveillance and a large number of potential internees were screened through the programme. With the relaxation of international tensions the programme was given less and less attention until, by the 1970s, it had been placed virtually in abeyance.

61. For the past decade Canada has lacked an effective contingency plan for dealing with dangerous or hostile persons in the event of emergency of the

kinds provided for in the War Measures Act. The Security Service maintained that a similar system, but including terrorists and other dangerous 'subversives', was needed. In fact, within the R.C.M.P. (and without approval of the Advisory Committee) the criteria were revised in 1970 to include terrorists and other violence-prone individuals generally. The Security Service developed proposals for a general reform of the system and referred these in 1973 to the Security Advisory Committee for approval. There was a good deal of consensus since it was apparent that the programme was outdated and that the Advisory Committee on Internments had not functioned well. Interdepartmental consultation on this aspect of emergency planning, however, was extraordinarily slow. Eventually, on November 3, 1976, a memorandum on the proposal was submitted to members of the Interdepartmental Committee on Security and Intelligence (I.C.S.I.) with the following recommendations:

(a) the Advisory Committee and the existing internment programme be abandoned;

(b) the Security Service be authorized and instructed to set up and maintain a system of identification of individuals, and data retrieval, such system to be incorporated in the R.C.M.P. War Book; and

(c) the selection of such individuals be on the basis of "subversive activity" as defined in s.16(3) of the Official Secrets Act.

62. Members of I.C.S.I. replied in writing and expressed general agreement with the recommendations, although the Deputy Minister of Communications and the Deputy Minister of Justice felt that the selection of individuals should be approved by an independent body such as the Advisory Committee. The views of the Security Service were again solicited and on March 25, 1977, the Director General's comments on the proposed system, were circulated to members of I.C.S.I. The Director General indicated at this time that the selection of individuals and organizations would be subject to the supervision of an internal review committee that would include representatives of the Departments of Justice and Solicitor General. Although there is apparent consensus, the new programme has not been approved.

63. At the time of writing, the Security Service is engaged in the preparation of basic lists employing new criteria. These criteria are extremely broad. The preparation of lists based on the new criteria has not, as far as we know, been authorized by the Government of Canada. Although the action now being taken by the Security Service has been reported to the Department of the Solicitor General, the government has not given approval to the new criteria or to the programme as a whole. In our opinion, the government should give this matter urgent attention, both in terms of being prepared to act effectively in the event of emergency and in terms of ensuring that the Security Service does not develop "lists" except on the basis of approved criteria and proper monitoring of the application of the criteria.

64. The history of the internment programme affords a striking example of the inadequate functioning of the interdepartmental system of decision-making on emergency security matters. We are disturbed by the incapacity, not only of the Security Service, but also of the whole machinery of government, to come

to grips with this aspect of emergency planning during the past 15 years. While the Security Service has maintained its interest and developed proposals for a new programme, it does not seem to have been able to obtain any decisions from the Security Advisory Committee or the Interdepartmental Committee on Security and Intelligence. Even conceding that emergency planning is a low priority in times of peace, the failure of the interdepartmental system to act effectively over the past eight years is regrettable. In the meantime, Canada has no responsible emergency plan for the detention of hostile or dangerous persons in the event of emergency of the kinds contemplated in the War Measures Act. No doubt the R.C.M.P. on short notice can provide government with the names of likely candidates for internment — as was done in October 1970 — but this is surely not good enough. Even the most senior official dealing with security matters during the period 1964 to 1977 was given little, if any, information about the programme. He testified that, until questioned about the matter at a hearing before us in late 1980, he had not been made aware of the "essentials" of the programme or that the Security Service regarded it as one of the major sources of authority for some of the Service's most sensitive investigations (Vol. C116, pp. 15138-40).

65. The extent to which a security intelligence agency, or indeed any agency of government, should make preparations for dealing with dangerous or hostile persons is doubtless a contentious subject. The broad brush approach of the post World War II years, is not justifiable today. We are not prepared to accept the proposition that the Canadian government and its security intelligence agency should collect intelligence on the assumption that in the event of hostilities with the Soviet Union key members of all designated organizations will be interned. Even if all such persons could be considered to be hostile to Canada in the event of war, only a few might be considered to be of such a character as to require their immediate arrest. The wholesale round-up of people does not sit well with many Canadians who have lived through the arrests of Japanese Canadians in World War II and the crisis of October 1970. Having said this, however, the fact remains that in an emergency of the kinds contemplated by the War Measures Act some potentially dangerous persons will have to be put under restraint. However, this should occur only when the criteria for arrest, charge and imprisonment (detention) under law are defined as clearly and narrowly as possible and the civil rights of the persons affected are protected as much as possible. Because this is our view, we think that it is undesirable that the regulations, in addition to providing offences for which there may be arrest and trial in accordance with traditional judicial procedures, should provide a system of detention upon order by a Minister or the Governor in Council. Our view is that any order of extended detention should be made only by judicial procedures in the ordinary courts of law. We realize that this proposal has procedural ramifications which should be closely examined; we are thinking of the kinds of procedural questions which we examined in our First Report in connection with trials under the Official Secrets Act. The preparation of arrest lists in times of calm, subject to a system of careful external review, is one means of minimizing the abrogation of civil liberties at the time of crisis. Such lists must of course be kept to a minimum and be

consistent with the threat of hostilities or emergencies as perceived by government.

The Advisory Committee on Internments

66. When the programme was established, it was recognized that the evidence required to place a person on the list should be sufficient to satisfy any independent committee that might subsequently be established to review the internment programme. With this in mind, the Minister of Justice in 1950 appointed a committee external to the R.C.M.P., the Advisory Committee on Internments. While the origin of the Committee is not fully documented, it appears that the idea was first suggested by the Commissioner of the R.C.M.P. He insisted that members of the Force should not serve on the Committee.

67. The main function of the Committee was to decide, on the basis of evidence supplied by the R.C.M.P., whether an individual should be placed on the list. The Advisory Committee was also asked to approve a list of 'subversive' organizations, membership in which was one of the criteria for internment. In the event of emergency of the kinds contemplated by the War Measures Act, such organizations might be banned as unlawful if the government of the day agreed.

68. The Advisory Committee on Internments was composed of the Deputy Minister of Justice, three other senior officials from the Department of Justice, and a legal adviser, who was a lawyer from outside the federal government service. During the 1950s the Committee did not function to any extent; its work, including the approval of organizations, was carried on by the external legal adviser. By 1960 the Committee had been reconstituted, and became more active. Thus, in 1961 and 1962, the Committee met on several occasions, considered R.C.M.P. briefs on organizations, reviewed the criteria for internment and considered the nature of the evidence required. After this spurt of activity, the Advisory Committee ceased to function. The Committee was reconstituted in 1967, and thereafter held one meeting, but never met again.

69. The Advisory Committee on Internments cannot be called an effective piece of interdepartmental machinery. In spite of the fact that the Committee was appointed by and, it would appear, responsible to the Minister of Justice, it was of no real interest to the Department. Mr. D.S. Maxwell, Q.C., who in 1968 became Deputy Minister of Justice and *ex officio* chairman of the Committee, told us that the Committee was not accorded much priority at that time (Vol. C66, pp. 9127, 9132). Before that, the Committee had become active only by virtue of prodding by the Commissioner of the R.C.M.P. and, in 1961-62, by an interested Deputy Minister and legal adviser. After 1969-70, as the programme itself wound down, it appears that both the R.C.M.P. and the Department of Justice gave up and allowed the Committee to die. During its entire career, the Advisory Committee on Internments was in practice accountable to no one and never made a report of any kind.

70. In 1948, the Commissioner of the R.C.M.P., in the aftermath of the Second World War, felt that an independent view of evidence was essential if the internment process were to function properly in a future emergency. We

feel, in the light of the subsequent 30 years, that his perception was sound. Indeed, an independent review body is necessary to supervise all aspects of contingency planning for arresting people in times of emergency, not merely to provide an external legal opinion as to the sufficiency of evidence in individual cases. Important policy matters that should be reviewed by such a body include the criteria for arrest, the selection of potential unlawful organizations, the resources employed in the agency to keep the programme up-to-date, and last, but by no means least, the techniques used to gather evidence on individuals.

71. Experience has shown that a committee of lawyers from the Department of Justice, responsible to no one, is not the answer. It would seem appropriate to locate the proposed Committee, which we propose be called the Committee on Arrests in Emergencies, squarely within the interdepartmental committee structure under the Interdepartmental Committee on Security and Intelligence or, if preferred, the Interdepartmental Committee on Emergency Preparedness. The proposed Committee need not be large, but should have representation from the Department of the Solicitor General and the Department of Justice. We have also considered the participation of the security intelligence agency and have concluded that for continuity and communication, a senior member of the agency should serve as an adviser to the Committee, but should not participate in the actual review of case files.

72. The implementation of arrest procedures and contingency planning are potentially so oppressive that the programme should be carefully reviewed by the interdepartmental committee responsible for the special identification programme. That interdepartmental committee should submit an annual report as to the state of planning of these matters to the Cabinet Committee on Security and Intelligence.

73. The Committee will have to review individual cases proposed for arrest. It is probably inevitable, if only because of the routine nature of the work, that the actual examination of individual files will be delegated by the Committee to one or two of its legal members who would report to the full Committee from time to time. In the past, although the Advisory Committee was inactive for most of the time, a large number of individual cases were reviewed by the Committee's external legal adviser. In effect, it was the legal adviser who gave approval to names being placed on the list. His job was to ascertain if there was adequate documentation to support a conclusion that an individual occupied a key position in a designated organization.

74. When the system began it was probably felt that the Advisory Committee would approve all possible cases. However, it soon became evident that many important "probable" cases existed that could be proved conclusively only when an emergency was declared and the police were granted special powers of search and seizure. The "not-approved" and "special case" categories were created to hold these "probables". The power to search the premises of a "probable" subversive is almost as much an invasion of liberty as the power to detain or intern, as the experience of the October crisis showed. Therefore, we believe that the Committee should review not only the list of potential persons to be arrested but also those as to whom further evidence is required and who,

in the heat of an emergency, will be subject to emergency police powers of search and seizure pursuant to regulations made under the War Measures Act. We also believe that a record of the decisions of the Committee and of the reasons for making them should be maintained. The lack of such documentation in the past is regrettable and appears to be contrary to the original purpose of establishing the Committee.

Criteria for arrest

75. The criteria applied to cases in the past were clear-cut. An individual was included on the list if he was a permanent member of certain organizations dedicated to the overthrow of our system of government. The evidence to support each case was required to be either (1) an authentic document, such as a membership list or a newspaper report of the election to office of an individual, or (2) evidence from two independent and reliable human sources whose reports were to be corroborative of each other, or (3) evidence from three human sources which did not need to be corroborative, but which was, of course, required to be relevant to the criteria.

76. The review of case files by the legal adviser was largely mechanical. Thus, if an individual was an important member then *ipso facto* he was included on the list. The criteria did not admit of fine distinctions as to whether or not an individual was a significant threat to security (except perhaps in the category of persons "suspected of espionage"). The evidence in most cases would simply be proof that an individual held an office or a position, a fact easily enough established from the reports of human sources, membership lists and newspaper reports. Reports derived from technical sources were not used by the Security Service to support applications to the Advisory Committee because such sources were considered extremely sensitive. On occasion, evidence obtained by means of "Contact 300" (a code name for surreptitious entries) was put forward. For the most part, however, the evidence was obtained from the reports of human sources and from publications.

77. In future, the criteria for the arrests programme must be more closely related to security threats, and the selection process should be far less mechanical. During more normal times, arrest lists should be prepared only of persons who are predicted to be serious threats to the community in the event of war or national emergency, as, for example, those who on reasonable grounds are believed to be, or would in the event of an emergency of the kinds contemplated by the War Measures Act likely become, espionage agents, terrorists or saboteurs. If this approach is adopted the criteria for arrests should be based on the statutory definitions of threats to security which we have recommended in Part V. This approach will also require the submission of more elaborate evidence, including a threat assessment, to the Committee. To help members of the Committee evaluate this evidence, the security intelligence agency should brief them fully as to the methods used to collect security intelligence. A report on such methods should be included in the Committee's annual report. In the event of an imminent emergency, it might become necessary to seek authority from government to expand the criteria so as to

include, for example, key figures in organizations who are considered sympathetic to likely hostile powers.

WE RECOMMEND THAT the government give immediate attention to the establishment of a Special Identification Programme.

(198)

WE RECOMMEND THAT the legislation dealing with national emergencies should prohibit the making of regulations which would provide for a system of detention upon order by a Minister or the Governor in Council. Any detention should be consequent upon arrest, trial and imprisonment in accordance with traditional judicial procedures.

(199)

WE RECOMMEND THAT the identification of dangerous individuals who should be arrested in situations of emergency of the kinds contemplated by the War Measures Act be carefully reviewed prior to the outbreak of any crisis by a Committee on Arrests in Emergencies external to the security intelligence agency. This Committee should be responsible to the Interdepartmental Committee on Security and Intelligence or the Interdepartmental Committee on Emergency Preparedness and should include representatives from the Department of the Solicitor General and the Department of Justice, with a member from the security intelligence agency serving in an advisory capacity. The responsible interdepartmental committee should annually submit a report on the arrests programme to the Cabinet Committee on Security and Intelligence.

(200)

WE RECOMMEND THAT members of the Committee review and record decisions on individual cases proposed for arrest or for extraordinary powers of search and seizure in case of an emergency.

(201)

WE RECOMMEND THAT the members of the Committee who review individual cases be fully briefed as to the methods used by the security intelligence agency to obtain the supporting evidence. This evidence should be discussed in the annual report to the Cabinet Committee on Security and Intelligence.

(202)

WE RECOMMEND THAT arrest lists be prepared only in respect of persons who are believed on reasonable grounds to be serious security threats in the event of emergency of the kinds contemplated by the War Measures Act such as those who, on reasonable grounds, are believed to be espionage agents, terrorists or saboteurs, or likely to become such.

(203)

D. THE ROLE OF A SECURITY INTELLIGENCE AGENCY IN NATIONAL EMERGENCIES

78. A security intelligence agency should play a role only in those emergencies — for example, war, insurrection, serious political violence, political terrorism, or sabotage — that affect the security of the nation. Public order

emergencies, such as rioting, looting, street fighting and other such forms of violent civil disorder, require action by law enforcement agencies. Emergencies that arise from natural disasters or major accidents do not call for action by the security intelligence agency.

79. After the October Crisis in 1970 there was a substantial feeling in the federal government that there was considerable room for improvement in its capability for handling peacetime emergencies relating to security. Consequently a group was assembled in the Privy Council Office under Lieutenant-General Michael Dare of the Department of National Defence to consider ways of improving the federal government's ability to respond quickly, intelligently and efficiently to a broad range of emergency situations. Its report was completed in 1972 and tabled in the House of Commons in March 1974. One of the report's key recommendations called for "a comprehensive system within the federal structure which would confirm and formalize the primary responsibilities of departments in crisis handling matters and which would provide the Cabinet with an enhanced capacity for crisis management."[23]

80. In October 1973 the Cabinet decided to establish a co-ordinated system for federal emergency preparedness and management. Each department was directed to be responsible for the preparations necessary to deal with emergencies within its area of responsibility. Particular Cabinet Ministers were appointed as "lead Ministers" to assume automatic responsibility for co-ordination of the federal government's response should an emergency arise. The Solicitor General was designated the lead Minister for emergencies affecting the internal security of Canada. A security intelligence agency can be vitally important to the Solicitor General in helping him with his responsibilities during a national emergency. In the remainder of this section, we examine the various roles an agency should play before and during an emergency.

Providing intelligence and advice

81. Intelligence is the first line of defence, both in preventing emergencies and managing them once they occur. During an emergency it is of vital importance that the government receive accurate, timely and relevant information about the identity, capacity, intentions and techniques of those who are the source of the serious political violence. The government's capability to deal with an emergency depends to a very great extent on the availability of such intelligence. The primary role of a security intelligence agency is to supply this intelligence to the various sections of government responsible for managing the situation and to the authorities with the primary law enforcement jurisdiction. The agency should possess the most extensive data bank in the country on subversive and terrorist organizations and have developed a high level of expertise on terrorist tactics and the effectiveness of various means of countering terrorist tactics in Canada and in other jurisdictions. Besides intelligence obtained from its own sources, there will likely be intelligence reports from

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[23] Report of the Crisis Management Study Group, *The Enhancement of Crisis Handling Capability within the Canadian Federal Structure*, October 15, 1972, p. 45.

police forces and other government agencies. The security intelligence agency should be in a position to monitor all the intelligence that is received and to provide assessments of such intelligence to the Emergency Operations Centre established to co-ordinate the government's response to the crisis.

82. The security intelligence agency should also be responsible for alerting government to potential emergencies affecting the security of Canada. When a security intelligence agency fails in this task, a serious lack of confidence in the agency can result. There is some evidence before us to suggest that such a lack of confidence occurred with respect to the R.C.M.P. during the October Crisis. In the midst of the crisis, rather than continuing to rely solely on the Security Service, Cabinet established several special task forces to assess the political intelligence available on the F.L.Q. (Vol. C76, p. 10441).

83. An agency report which assesses the likelihood of an emergency occurring should be reviewed both by the Solicitor General and by the Intelligence Advisory Committee we described in Part VIII. Such reports could be used by the Bureau of Intelligence Assessments (proposed in Part VIII) to prepare long-term, strategic assessments of security threats. Further refinement and analysis of reports might be required before they are considered by the Cabinet Committee on Security and Intelligence. The timing of the Cabinet review of the reports should depend upon the imminence of the threat.

84. When a national emergency threatens the internal security of the country, the government should be able to rely for policy advice on the head of the organization with the most expertise and resources in security intelligence matters, namely the Director General of the security intelligence agency. As has been noted, the Commissioner of the R.C.M.P. attended meetings of government at the beginning of the October Crisis, yet neither gave, nor was asked for, advice as to whether or not the R.C.M.P. saw the situation as one of an apprehended insurrection. We find Commissioner Higgitt's silence in such situations somewhat puzzling, if for no other reason than the fact that silence may well have been interpreted as approval. Although the Department of the Solicitor General may play the lead role in orchestrating the procedures necessary to handle any future crisis, there must be no reticence or hesitation on the part of the Director General in offering the agency's assessment of the situation or on the part of the government in asking for it.

Advice on vital points

85. Vital points are facilities, such as power stations, communications centres, government buildings and transportation networks, that are of sufficient importance to warrant extra security precautions to protect them from interference or destruction in time of emergency. A systematic attempt to protect such vital points began in Canada in 1948 when an Interdepartmental Committee was established to maintain an up-to-date list of vital civilian installations. The Department of National Defence was responsible for assessing the vulnerability of these vital points to military attack; the R.C.M.P. assessed their vulnerability to sabotage. All vital points were assessed in terms of their vulnerability as targets in case of war. In the crisis of October 1970, it became evident that the

criteria for identifying vital points in wartime were not entirely appropriate for a peacetime terrorist crisis. A second list of vital points was drawn up by the federal Emergency Measures Organization with the aid of the provincial governments to identify those facilities that might be the peacetime target of insurrectionists. Several thousand peacetime vital points were listed. This figure compared with 800 wartime vital points. The two lists have not been amalgamated and are currently under review by the Interdepartmental Advisory Committee on Vital Points. The Security Service has no direct responsibility for the vital points programme; the responsibility resides with the Protective Security Directorate of the R.C.M.P. Directorate whose representatives sit on the Interdepartmental Advisory Committee. Nor is the Force responsible for the actual protection of the vital points, except to ensure that the most important federally owned wartime vital points can be, and are, guarded.

86. The role of a security intelligence agency, as described in Part V, does not include protective security functions such as surveying the security requirements of vital points. This function properly belongs in a protective security unit of the federal police force. The security intelligence agency has, however, an advisory role to play in that it should be responsible for reporting to the protective security unit any intelligence on methods of sabotage or terrorist tactics that might influence the security requirements for vital points. The security intelligence agency should also be responsible for reporting intelligence on new targets of terrorists or saboteurs to the Advisory Committee on Vital Points.

Advice concerning the media

87. The October crisis revealed the necessity for cooperation between the security and police forces and the media. Communiqués by the F.L.Q. were announced by the media before the police had a chance to see them, and the media were antagonistic because of the lack of daily operational information from the police.

88. Because of the very nature of terrorism itself some form of media control may be necessary when a terrorist incident occurs. One of the main aims of the terrorist is to gain maximum publicity for his cause. A total news blackout of a terrorist incident, however, would be unacceptable and untenable in a democratic society. Furthermore, the media need information; to deny it could lead to serious inaccuracies and flagrant rumours. We concur with the approach suggested by Mr. Justice Hope in Australia. In the *Protective Security Review*, he proposes the development of effective liaison between those directing the police response to the crisis and the press.[24] Briefings with the media should be instituted to establish guidelines and appropriate channels of communication that would operate during a crisis. During these briefings the security implications of irresponsible reporting should be explained to members of the media. It would not be the function of the security intelligence agency to conduct or

[24] Australia, *Protective Security Review*, Canberra, Australian Government Publishing Service, 1979.

attend such meetings, but it should be able to advise the government and the police on the ways in which media reports might adversely affect the investigation of and response to the terrorist incident.

WE RECOMMEND THAT the security intelligence agency have the responsibility to alert government to situations that might develop into emergencies that would threaten the internal security of the nation. Reports on such threats should be reviewed by the Solicitor General and the Intelligence Advisory Committee and used by the Bureau of Intelligence Assessments in preparing long-term, strategic assessments of security threats. Reports assessing the imminence and significance of threats should be submitted to the Cabinet at an appropriate time.

(204)

WE RECOMMEND THAT in times of national emergency, the security intelligence agency monitor all intelligence received from its own sources and from sources of other agencies, and provide assessments of such intelligence to the crisis centre established to co-ordinate the government's response to the crisis.

(205)

WE RECOMMEND THAT in national emergencies the government seek the advice of the Director General of the security intelligence agency as to matters to which security intelligence collected by the agency would be relevant.

(206)

WE RECOMMEND THAT the responsibility for assessing the security requirements for vital points remain a protective security function of the federal police agency. The proper role of a security intelligence agency is to report intelligence that may be valuable towards ensuring that vital points are adequately protected.

(207)

WE RECOMMEND THAT during a national emergency involving terrorism or political violence the security intelligence agency be responsible for advising these officials on the security implications of media coverage of the crisis.

(208)

CHAPTER 2

THE OFFICIAL SECRETS ACT

1. One of the most important pieces of legislation relating to the work of the Security Service is the Official Secrets Act.[1] In our First Report, *Security and Information*,[2] we discussed most of the offences in the Official Secrets Act and in Part V, Chapter 4 of this Report we made recommendations with regard to the special powers of investigation provided for in the Act. In this chapter we recapitulate these earlier recommendations and discuss other sections of the Official Secrets Act on which we have not yet made recommendations. Our recommendations as a whole, as we indicated in the First Report, call for the repeal of the Official Secrets Act and the replacement of some of its provisions by new legislation. Thus, the aim of this chapter is to provide a comprehensive statement of the way in which our Security Plan for The Future will affect the various provisions of the Official Secrets Act.

A. SUMMARY OF FIRST REPORT

Espionage, leakage and related offences

2. By any standard, the Official Secrets Act is an anachronism and should be substantially revised. This is particularly so in the light of recent legislative initiatives in the field of Freedom of Information. The Official Secrets Act is so broad that it covers in section 4 any official document, whether classified or not, entrusted to a civil servant or government contractor. Release of any government information to the public or the media without authority constitutes an offence. In this respect, the Act runs contrary to the Freedom of Information proposals which assume that information may be released to the public unless there is good reason shown for not doing so.

3. In our First Report we argued that, having regard to the steps being taken to achieve greater openness in government, it is inappropriate to include in a single statute, both a serious national security offence such as espionage, (section 3) and a general catch-all offence covering the unauthorized disclosure of government information, (section 4). Accordingly, we felt that the Official Secrets Act should be repealed and replaced with new legislation. We suggested that the espionage offences be placed in the Criminal Code or in a separate statute. Finally, we noted the overlap between the treason provisions in section

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[1] R.S.C. 1970, ch.O-3, amended S.C. 1973-74, ch.50.

[2] Department of Supply and Services, 1979.

42(2)(b) of the Criminal Code and the espionage provisions in section 3 of the Official Secrets Act. We made the following recommendations in the First Report:

> that the Official Secrets Act be repealed and replaced with new legislation with respect to espionage, which should be incorporated in a new statute or placed in one part of the Criminal Code with all other national security offences.
>
> (First Report, Recommendation 27)

> that new espionage legislation incorporate in a single enactment the offences relating to espionage now set out in section 3(1) of the Official Secrets Act and section 42(2)(b) of the Criminal Code.
>
> (First Report, Recommendation 1)

4. We gave close attention to espionage which is one of the most serious offences in any country. It was our view that the offence should apply to a person who communicates to a foreign power information prejudicial to national security, whether he acts knowingly or with reckless disregard of the consequences. Furthermore, a person would be convicted even if the information he communicated was not classified, provided that the release of the information might be prejudicial to national security. We gave as an example of this the provision to a foreign state of photographs and data on key facilities, such as dams, harbours and pipelines. We made the following recommendations with respect to espionage:

> that espionage offences apply only to conduct which relates to the communication of information to a foreign power.
>
> (First Report, Recommendation 2)

> that new espionage legislation define the term 'foreign power' to include a foreign group that has not achieved recognition as an independent state.
>
> (First Report, Recommendation 3)

> that new espionage legislation cover the disclosure of, or an overt act with the intention to disclose, information whether accessible to the public or not, either from government sources or private sources, if disclosure is, or is capable of being, prejudicial to the security of Canada.
>
> (First Report, Recommendation 4)

> that the maximum penalty for espionage be life imprisonment, except in the case of the communication to a foreign power of information accessible to the public in which case the maximum penalty should be six years.
>
> (First Report, Recommendation 22)

We recommended that the offence of espionage be worded as follows:

> No person shall:
>
> (a) obtain, collect, record or publish any information with the intent of communicating such information to a foreign power, or
>
> (b) communicate information to a foreign power
>
> if such person knows that the foreign power will or might use such information for a purpose prejudicial to the security of Canada or acts with reckless disregard of the consequences of his actions to the security of Canada.
>
> (First Report, Recommendation 5)

5. We also made recommendations with regard to offences in the Official Secrets Act which are closely related to espionage. We recommended that the provisions with respect to harbouring spies be retained, although in a somewhat narrower form; that a new offence be introduced to cover the possession of instruments of espionage; and that the "prohibited place" subsection of section 3 be repealed because, in our view, it was archaic and constituted an unnecessary duplication of the sabotage section of the Criminal Code. We recommended

> that the provisions of section 3(1)(a) of the Official Secrets Act relating to a prohibited place be repealed and not be included in new legislation.
>
> (First Report, Recommendation 6)

> that the provisions of section 8 of the Official Secrets Act, the harbouring section, be retained but that the new legislation should make it clear that the provisions would only apply in cases in which the accused has knowledge that the person on his premises has committed or is about to commit an espionage offence.
>
> (First Report, Recommendation 7)

> that the new legislation include the offence of possession of instruments of espionage. Under this provision it would be an offence to be found in possession without lawful excuse of instruments of espionage, which would include false documents of identity.
>
> (First Report, Recommendation 8)

6. Section 4 of the Official Secrets Act makes the unauthorized use of virtually all official documents or information an offence: its catch-all quality has been subject to almost universal criticism. In our First Report we urged that criminal liability for unauthorized disclosure of government information apply only to well defined categories of information. We confined our recommendations to the two categories which fell within our terms of reference: security and intelligence, and the administration of criminal justice. However, we treated those two categories differently in view of the greater risks to the state that accompany any disclosure of information relating to security and intelligence.

7. Thus, we felt that it should be an offence if a person entrusted with security and intelligence information disclosed that information regardless of what his motives might be. We also felt that a court should not be bound to accept the security classification that has been placed by the government on a document but should be able to determine the appropriateness of that classification. We therefore recommended

> that new legislation with respect to the disclosure of government information should make it an offence to disclose without authorization government information relating to security and intelligence.
>
> (First Report, Recommendation 9)

> that new legislation should empower the court trying an offence of unauthorized disclosure of government information relating to security and intelligence to review the appropriateness of the security classification assigned to such government information.
>
> (First Report, Recommendation 10)

8. However, with regard to the disclosure of information which would adversely affect the administration of criminal justice, we felt that a person should not be convicted if he believed that the disclosure of such information was for the public benefit. We recommended

> that new legislation with respect to the unauthorized disclosure of government information should make it an offence to disclose government information relating to the administration of criminal justice the disclosure of which would adversely affect:
>
> (a) the investigation of criminal offences;
> (b) the gathering of criminal intelligence on criminal organizations or individuals;
> (c) the security of prisons or reform institutions;
>
> or might otherwise be helpful in the commission of criminal offences.
>
> (First Report, Recommendation 11)

> that it should be a defence to such a charge if the accused establishes that he believed, and had reasonable grounds for believing the disclosure of such information was for the public benefit.
>
> (First Report, Recommendation 12)

9. Finally, we recommended that in both categories — disclosure of information relating to security and intelligence and information relating to the administration of criminal justice — a person should not be convicted if he was authorized, or had reasonable grounds for believing he was authorized to disclose the information. We recommended

> that the offence of unauthorized disclosure of government information relating to security and intelligence and the administration of criminal justice provide that a person shall not be convicted
>
> (a) if he had reasonable grounds to believe and did believe that he was authorized to disclose such information, or,
> (b) if he had such authorization, which authorization may be expressed or implied.
>
> (First Report, Recommendation 13)

10. We also considered the position of the person such as a newspaper editor who receives government information, albeit unsolicited, and who then wishes to publish the information or who simply retains it without doing anything. Information relating to security and intelligence or to the administration of criminal justice as defined should not find its way, even innocently, into the public domain. Positive harm to our country would result in most cases if such information were published. We reached the conclusion that all citizens, including members of the press, are under a public duty to return documents relating to security and intelligence and to the administration of criminal justice as defined should such documents come into their hands. We recommended

> that the communication of government information relating to security and intelligence or the administration of criminal justice by a person who receives such information, even though such information is unsolicited, be an offence.
>
> (First Report, Recommendation 14)

that it be an offence to retain government documents relating to security and intelligence or to the administration of criminal justice notwithstanding that such documents have come into the possession of a person unsolicited and that there has been no request for the return of such documents.

(First Report, Recommendation 15)

11. However, we did not feel that criminal liability should attach to the negligence of a public servant who fails to take reasonable care of secret government information unless his conduct shows wanton or reckless disregard for the lives or safety of other persons or their property. We recommended

that the failure to take reasonable care of government information relating to security and intelligence or to the administration of criminal justice not be an offence unless such conduct shows wanton or reckless disregard for the lives or property of other persons.

(First Report, Recommendation 16)

12. The 'leakage' offences are quite different from the espionage offences. To be convicted of 'leakage', the intent to assist a foreign power is not required; furthermore, the 'leakage' is a less serious offence than espionage. Therefore, we recommended

that the maximum penalty in a case of unauthorized disclosure of government information relating to security and intelligence or the administration of criminal justice, be six years imprisonment.

(First Report, Recommendation 23)

that the legislative provisions with respect to the unauthorized disclosure of information relating to security and intelligence and the administration of criminal justice be clearly separated from the legislative provisions with respect to espionage.

(First Report, Recommendation 28)

Procedural matters

13. Much of the recent criticism of the Official Secrets Act as a result of the *Toronto Sun* and *Treu* prosecutions was directed at the special advantages alleged to be enjoyed by the Crown, particularly the right to an *in camera* or "secret" trial. In our opinion, much more could be done in the way of conducting the trial of espionage offences and offences of unlawful disclosure of government information in public, even in cases where the accused consents to or, as in the Treu case, at least does not oppose having the entire proceedings *in camera*. We felt that the onus should be clearly placed on the trial judge to hold *in camera* only those parts of the trial that must be kept confidential for reasons of national security. We suggested that a pre-trial proceeding *in camera* might be a useful procedure in order to reduce the need for an *in camera* trial. Thus, we recommended

that with respect to section 14(2) of the Official Secrets Act which permits *in camera* proceedings that:

(a) the provisions of section 14(2) be retained and made applicable to all offences, either offences in new legislation or in the Criminal Code, in which the Crown may be required to adduce evidence the disclosure of which would be prejudicial to the security of Canada or to the proper administration of criminal justice.

(b) the phrase 'prejudicial to the interest of the state' read 'prejudicial to the security of Canada or to the proper administration of criminal justice'.

(c) the last clause of the section read 'but except for the foregoing, the trial proceedings, including the passing of sentence, shall take place in public'.

(d) the legislation make provision for the holding of an *in camera* pre-trial conference for the purpose of dealing with procedural questions relating to the handling of evidence which might have to be received *in camera*

(First Report, Recommendation 18)

that new legislation provide that jurors who participate in proceedings *in camera* be subject to the offences relating to the unauthorized disclosure of government information.

(First Report, Recommendation 21)

14. In some cases, we were convinced that certain special provisions were necessary for the prosecution of national security offences. Thus, we agreed that the provisions in the Official Secrets Act which require that the Attorney General of Canada give his consent to prosecution (section 12) and which make the Act applicable to offences committed by Canadians overseas (section 13) were necessary. We further agreed that section 9, which makes it an offence to attempt to commit an offence or to incite an offence or to aid and abet an offence, should remain in the legislation. However, we felt that that part of section 9 which makes it an offence to do "any act preparatory to the commission of an offence" should be dropped for it goes well beyond the normal scope of the criminal law. Thus, we recommended

that the consent of the Attorney General of Canada be required for the prosecution of espionage offences, conspiracy to commit espionage offences, or offences relating to the unauthorized disclosure of that federal government information discussed in this report. Similarly, the conduct of such prosecutions should be the responsibility of the Attorney General of Canada.

(First Report, Recommendation 17)

that the offence of doing an act preparatory to the commission of an offence under the Official Secrets Act be removed but that the other offences found in section 9 be retained in the new legislation and made applicable to the offences of espionage and the unauthorized disclosure of government information relating to security and intelligence and the administration of criminal justice.

(First Report, Recommendation 25)

that the provisions of sections 13(a) and 13(b) of the Official Secrets Act which make the Act applicable to offences committed abroad be retained in the new legislation.

(First Report, Recommendation 26)

15. Our general approach to procedural matters, however, was that the Crown should not be given any advantage, over and above any advantages it may have in a normal criminal case, unless clearly necessary. We did not

believe that the Crown required a special right to 'vet' the members of a jury in a security case, nor did we believe that the various presumptions in the Official Secrets Act in favour of the Crown should be retained. In previous espionage trials, it does not appear that the Crown required the assistance of the presumptions in the Act. We also recommended that the accused be tried on indictment and not by summary conviction, thus preserving the right of the accused to have a jury trial. Thus, we recommended

> that offences dealing with espionage and the unauthorized disclosure of information relating to security and intelligence and the administration of criminal justice should be required to be tried by indictment and not by summary conviction.
>
> (First Report, Recommendation 19)

> that the Crown have no special right to 'vet' a jury in security cases over and above the rights now provided in the Criminal Code and under provincial law.
>
> (First Report, Recommendation 20)

> that the presumptions in favour of the Crown in section 3 of the Official Secrets Act not be incorporated in the new legislation.
>
> (First Report, Recommendation 24)

B. SPECIAL POWERS OF INVESTIGATION

16. The Official Secrets Act contains the following special powers for security investigations.

Section 7 — warrants to seize telegrams

Section 10 — power to arrest without warrant on reasonable suspicion

Section 11 — warrant to search and seize

Section 16 — warrant to intercept communications

In Part V, Chapter 4, of this Report we gave extensive consideration to the use of warrants for the interception of electronic communications and the seizure of telegrams and other communications. We also considered the power to enter secretly and search for documents in the course of a security investigation (surreptitious entries). If our recommendations are accepted all these special powers will be brought together in a provision in the National Security Act and may be authorized only by warrant of a judge after approval by the Minister. As recommended in Part V, Chapter 4, this will result in the repeal of the present sections 7, 11 and 16 of the Official Secrets Act.

17. Section 10 provides for a special power of arrest by a police officer of a person who is "reasonably suspected" of having committed, or being about to commit, an offence. It reads

> Every person who is found committing an offence under this Act, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be arrested without a warrant and detained by any constable or police officer.

So far as we have been able to determine, it has never been necessary for the police to resort to this special power of arrest in connection with offences under the Official Secrets Act. The Criminal Code (section 450) gives a police officer the right to arrest in these circumstances if he has "reasonable and probable grounds" to believe that an offence has been, or is about to be, committed. In our view the power of arrest in the Criminal Code should be sufficient to deal with security offences and section 10 should also be repealed.

WE RECOMMEND THAT section 10 of the Official Secrets Act be repealed.

(209)

C. OTHER MATTERS

18. In our First Report, we did not refer to sections 5 and 6 of the Official Secrets Act. Section 5 makes the following conduct an offence if done "for the purpose of gaining admission, or assisting any other persons to gain admission, to a prohibited place, or for any other purpose prejudicial to the safety or interests of the State":

1. Use of a military or police uniform.
2. Making a false written or oral statement.
3. Forging a passport, permit or licence.
4. Impersonating a person entitled to use or have possession of a password or official document.
5. Use without authority of an official die, seal or stamp or the counterfeiting or sale of such die, seal or stamp.

Section 6 makes it an offence to obstruct or interfere with a police officer or military officer on guard near a prohibited place. In our First Report we recommended repeal of the provision in section 3(1)(a) of the Act relating to "prohibited place". Similarly, the provisions of sections 5 and 6 need not be retained. They would be covered by the general espionage section or by the provisions of the Criminal Code against impersonation, forgery or the obstruction of justice. Indeed, the espionage offence which we have recommended in our First Report is broad enough to comprehend the types of conduct that are referred to in such unnecessary detail in sections 3, 4, 5 and 6 of the Official Secrets Act. Apart from the specific offences mentioned in the First Report, none of these sections need be retained in the new legislation.

WE RECOMMEND THAT sections 5 and 6 of the Official Secrets Act not be retained in the new espionage legislation; if a general espionage offence is enacted, as recommended in the First Report (Recommendation 5), it will not be necessary to preserve the other particular espionage related offences in sections 3, 4, 5 and 6 of the Official Secrets Act.

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CHAPTER 3

FOREIGN INTERFERENCE

1. In our First Report, entitled Security and Information, we pointed out that there were activities of secret foreign agents which, although detrimental to the security of Canada, could not be prosecuted under the espionage laws. These activities can be described generally as active measures of foreign interference. In Part V, Chapter 3, of this Report, we discussed these activities and recommended that, because they involve attempts by foreign powers to interfere with or manipulate our democratic process of government by secret means, they should be included as one of the kinds of activity about which the security intelligence agency has a statutory mandate to collect and report intelligence. In this chapter, we consider legislative proposals designed to restrict or prohibit such active measures of foreign interference.

2. The proposal which has received most consideration in Canada is legislation requiring the formal registration of persons acting in Canada as agents of foreign powers. The existence of such legislation in the United States, in the form of the Foreign Agents Registration Act[1] and the Voorhis Act,[2] is widely known in Canada and it might be argued that similar registration requirements in Canada would facilitate the work of the security intelligence agency by compelling public identification of foreign agents.

3. Legislation prior to the current Foreign Agents Registration Act was passed in the United States as early as 1917, as a response to the view that a host government had a right to know the identity of persons acting within its boundaries as agents of foreign powers. The current Act came into effect in 1938 in response to the rapid growth in Nazi and Communist propaganda in the United States. Despite numerous alterations in the Act since 1938, its basic purpose has continued to be as stated in its 1942 revision:

> To protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

Some knowledgeable American observers have attributed a wider purpose to this legislation. For instance, Senator Fulbright, long time Chairman of the

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[1] October 17, 1940, ch.645, All 62 Stat. 808.

[2] October 17, 1940, ch.897, 54 Stat. 1201 (see Title 18, *2386).

Senate Foreign Relations Committee, has stated that the registration and disclosure were initially intended to serve the broader purpose of making public the identities of all foreign sponsors of public relations campaigns and of political lobbyists, regardless of whether their activities were subversive or not.[3] In any event, American effort in this field has been marked by a shift in emphasis from control of classic subversion and propaganda activities to disclosure of attempts by foreign interests to manipulate American policies and public opinion. It has proven extremely difficult, however, to administer the legislation on a day-to-day basis, and the result has been a series of attempts to refine the legislation so as to reflect changing concerns.

4. In broad outline, the Foreign Agents Registration Act defines those required to register with the Department of Justice as foreign agents and specifies how they must register and report on their activities, provides exemptions from registration for certain types of agents, establishes specific filing and labelling requirements for political propaganda disseminated by registered agents, requires all registered agents to preserve books of account and other records of all their activities, requires all of these books to be made available for inspection by officials responsible for enforcement of the Act, provides for public inspection of all registration statements and imposes penalties for wilful violations of the Act. Over time, it has been necessary to introduce a series of exemptions to the Act so as to overcome such special problems as those associated with lawyers and others acting in a normal professional capacity. The resulting "patchwork nature" of the Act has given rise to great uncertainty as to which persons are required to register under it.

5. The Voorhis Act, passed in 1940, requires the registration and detailed disclosure of the activities of organizations subject to foreign control engaging in political activity in the U.S. or whose civilian members engage in military-type activity in the U.S., and all organizations whose purposes include the establishment, control, conduct, seizure, or overthrow of a government or subdivision thereof by the use of force, violence, military measures, or threats of any of the foregoing. Thus an attempt is made to expose the activities of organizations, subject to foreign control or not, which seek to overthrow a government by force or otherwise.

6. Our examination of American experience with these registration schemes leads us to the conclusion that it would be unwise for the Canadian government to introduce similar legislation in Canada. Even if legislation were adapted to our own distinctive needs, we doubt that its benefits would justify the cost involved in developing and administering such a scheme in Canada. It is possible that a few agents of influence would register and disclose their affiliation publicly. Also, such a scheme, by delineating acceptable forms of foreign involvement in Canadian affairs, would provide a clearer basis for identifying unacceptable activities which are a threat to security. But we doubt that such a scheme would be of much assistance at all in detecting the professional, clandestine activities of agents of foreign interference. American

[3] (1964-65) 78 *Harvard Law Review*, 619 at 621.

experience indicates that, while a wide range of persons and organizations involved in legitimate and mainly commercial activities would register, the truly secret agent or organization would continue unaffected by the requirements of the legislation and might even be driven further underground and forced to use more subtle techniques which are harder to detect. In the meantime, the government would be obliged to establish, at considerable cost, administrative machinery which, if it is to be effective, would likely involve setting up an inspectorate to examine the books and records of representatives of foreign organizations in Canada. We think the results of such a scheme are too dubious to justify taking on these enforcement difficulties.

7. In our First Report, we suggested as an alternative to a registration scheme that consideration be given to the enactment of a provision which would make it an offence to be a secret agent of a foreign power. We have considered this possibility, but conclude that such a provision in the Criminal Code would be extremely difficult to enforce without basing it on a registration scheme providing a means for publicly disclosing a person's or organization's affiliation with a foreign power. Since we have rejected such a scheme as being impracticable we do not recommend this alternative.

WE RECOMMEND THAT there be no legislation requiring the registration of foreign agents or making it an offence to be a secret agent of a foreign power.

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CHAPTER 4

THE LAW OF SEDITION

1. Paragraph (c) of our terms of reference requires us to report on the adequacy of the laws of Canada as they apply to the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada. The several Criminal Code offences commonly called "sedition" are among those laws. In this section we shall examine the law of sedition in Canada and make recommendations concerning that law.

2. Before the Cabinet attempted to define the "Role, Tasks and Methods" of the R.C.M.P. Security Service by its Cabinet Directive of March 27, 1975, one of the cornerstones upon which the Security Service rested its authority was the law of sedition. For example, participants in the "Security and Intelligence Induction Course" held in November 1970, were told in written material given to them that their duties were based "directly" on the R.C.M.P. Act, sections 17(3) and 18(a) and (d), particularly section 18(a), which provides as follows:

> 18. It is the duty of members of the force who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform the duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada...

The words "the laws of Canada" were of course taken as including the Criminal Code and the Official Secrets Act. The provisions of the Criminal Code relating to sedition were analyzed (Ex. MC-17, Tab 30).

3. The training material defined 'sedition' as follows:

> Practices by word, deed or writing, which are carried out to disturb the tranquility of the State, and lead persons to endeavour to subvert the government and laws of the country. There must be an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority.

The last sentence is taken verbatim from the judgment of Mr. Justice Kellock in the leading Canadian judgment on the subject, *Boucher* v. *The King*.[1] The first sentence is taken verbatim from an English case from which the following passage was also quoted in the materials handed out:

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[1] [1951] S.C.R. 265 at 301. Mr. Justice Estey said, to the same effect: "Seditious intention must be founded upon evidence of incitement to violence, public disorder or unlawful conduct directed against His Majesty or the institution of the government."

> The objects of sedition generally are to induce discontent and insurrection, and to stir up opposition to the government, and bring the administration of justice into contempt and the very tendency of sedition is to invite the people to insurrection and rebellion. . . . [t]he law considers as sedition all those practices which have for their object, to excite discontent or dissatisfaction, to create public disturbance or to lead to civil war.[2]

The materials describe the evolution of the law quite accurately. We quote at length because we wish to give credit to the R.C.M.P. for sensitively conveying the law to its members on such an important issue:[3]

> Some earlier decisions suggest that an intention to promote feelings of ill-will and hostility between different classes of subject in itself would establish a seditious intention. This proposition seems to have been clearly rejected by the Supreme Court in the *Boucher* case. In this respect Rand, J. stated:
>
> There is no modern authority which holds that the mere fact of tending to create discontent or defamatory feelings among His Majesty's subjects or ill-will or hostility between groups of them not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons.
>
> This decision clearly establishes that to be guilty of sedition a person must have an intention to incite others to violence or disorder against the government. The creation of violence or disturbance of some nature, must be evident to show a seditious intention. Whether in fact a disturbance takes place is immaterial. The crux of the matter is whether or not the words themselves suggest the intention to incite violence. A person could therefore be convicted of sedition on the evidence of the words alone and no other overt act may be required.
>
> A difficulty may arise in the case of particularly critical remarks directed against the government. The right of an individual to criticize government is a recognized democratic right in this country. This right is emphasized and protected by section 61 of the Criminal Code. This section provides in effect that a person should not be deemed to have a seditious intention by reason only that he intends in good faith to point out certain fallacies in government policy or government action.
>
> The problem is to determine the line of demarcation between *bona fide* criticism of the government and an actual seditious intent. The judge or jury must determine what in fact was the real purpose of the statement. Do the words seditious intention, themselves suggest incitement to violence? If they do, the necessary element in sedition, is evident. If the real purpose was honest criticism directed towards government policy or action with no seditious intention then no offence has been committed. This distinction was expounded in the judgment of Lord Chief Justice Coleridge in *Rex* v. *Aldred*[4] where he stated:

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[2] *Regina* v. *Sullivan* (1868) 11 Cox C.C. 44, per Mr. Justice Fitzgerald.

[3] The history of sedition is traced in a research study prepared for this Commission, *National Security: The Legal Dimensions*, by M.L. Friedland, Ottawa, Department of Supply and Services, 1979, at pp. 17-25.

[4] (1904) 22 Cox C.C. 1.

> A man may lawfully express his opinions on any public matter however distasteful, however repugnant to others, if, of course, he avoids anything that can be characterized either as blasphemous or as an obscene libel. Matters of State, matters of policy, matters even of morals — all these are open to him. He may state his opinion freely, he may buttress it by argument, he may try to persuade others to share his views. Courts and juries are not the judges in such matters. For instance, if he thinks that either a despotism, or an oligarchy or a republic or even no government at all is the best way of conducting human affairs, he is at perfect liberty to say so. He may assail politicians, he may attack governments, he may warn the executive of the day against taking a particular course, or he may remonstrate with the executive of the day for not taking a particular course; he may seek to show that rebellions, insurrections, outrages, assassinations, and such-like, are the natural, the deplorable, the inevitable outcome of the policy which he is combatting. All that is allowed, because all that is innocuous; but on the other hand, if he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then, whatever his motives, whatever his intention, there would be evidence on which a jury might, on which I should think a jury ought, and on which a jury would decide that he was guilty of a seditious publication.

4. We have no quarrel with the foregoing instructional material. We have quoted it partly to lay the foundation for the following points:

(a) If Canada retains the offences of the speaking of seditious words, publishing a seditious libel and being a party to a seditious conspiracy,[5] then the definition of "seditious intention", which is an essential ingredient of each of those offences[6] should be defined in the Criminal Code and not left to judicial decisions. When the Criminal Code was first introduced in Canada in 1892, the Minister of Justice abandoned an attempt to include a definition of seditious intention, "leaving the definition of sedition to common law".[7] We think that the positions taken by the judges of the Supreme Court of Canada in the *Boucher* case represent what the law should be, and that the important limitation there stated, which requires "an intention to violence", should become part of the statutory definition of the seditious offences. Unless there is a narrow statutory definition of the offence, there is a risk that, despite the excellent instruction which appears to have been given to members of the R.C.M.P. Security Service, the police and others will give the offence a wider meaning than is now the law, when deciding upon the scope of investigation and search. The language that we propose be employed, if

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[5] The three indictable offences provided for in section 62 of the Criminal Code.

[6] Criminal Code, section 60.

[7] Sir John Thompson, House of Commons, *Debates*, 1892, Vol. 2, col. 2837, quoted in Friedland, *National Security: The Legal Dimensions*, p. 17.

the seditious offences are retained, is "an intention to incite others to violence or disorder against government".[8]

(b) However, we propose an even more radical step — the deletion of the seditious offences from the Criminal Code. For it seems to us that the scope of possible application of the present seditious offences, including a judicially imported requirement of proof of an intention to incite violence, is already covered by other offences under the Code. We refer to counselling or incitement or conspiracy to commit either offences against the person, or offences against property, or to riot or to assemble unlawfully. Advocacy of revolution is covered by incitement to commit treason, for the commission of treason includes the use of "force or violence for the purpose of overthrowing the government of Canada or a province".[9] Therefore there is no need for the seditious offences that are now found in the Criminal Code.[10]

WE RECOMMEND THAT the seditious offences now found in the Criminal Code be abrogated.

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[8] We delete the additional words found in *Boucher*: "or resistance or defiance for the purpose of disturbing constituted authority". Retention of those words in the statutory definition might mean that incitement to call a major illegal strike would be regarded as seditious.

[9] Criminal Code, section 46(2)(a).

[10] Professor Friedland argues that a new, comprehensive offence of "armed insurrection" ought to be considered; see his study at pp. 15-16. However, it is difficult to see the advantages of creating a new offence if existing offences are sufficient to enable effective protection of the State.

PART X

THE R.C.M.P. POLICING FUNCTION: PROPOSALS FOR IMPROVING ITS LEGALITY, PROPRIETY AND CONTROL

INTRODUCTION

INTRODUCTION

1. Our intent in this Part is to examine and make recommendations on certain policies and procedures affecting the R.C.M.P.'s policing function. The basis for our choice of which policies and procedures to examine is found in that part of our terms of reference which requires us first to report the facts established before us concerning incidents in which members of the R.C.M.P. were involved in actions or activities "not authorized or provided for by law", and second, "... to advise as to any further action that [we] may deem necessary and desirable in the public interest...". We have interpreted this second clause as requiring us to advise not only on what ought to be done with respect to the individuals involved in the specific incidents (this is the subject of a separate Report) but also on what general measures should be taken in order to avoid such incidents in the future. These general measures are the subject of this Part. Our focus here is solely on measures designed to ensure legality and propriety. Thus, our mandate with regard to the R.C.M.P. policing function does not extend to advising generally on policies and procedures and the means to implement them, as it does for the security side of the R.C.M.P.

2. This part of our Report contains five chapters. In the first, we examine the changes necessary within the R.C.M.P. to enhance legality and propriety. Our emphasis here is on the rule of law, and the role of the peace officer in relation to this principle. In Chapter 2, we develop recommendations concerning the R.C.M.P.'s procedures for handling complaints. Several of the activities we have inquired into have revealed major flaws in how the Force responds to allegations of misconduct on the part of its members. In Chapter 3, we focus on the system by which the R.C.M.P. receives legal advice. Again, it has been our experience that this legal advice system has had major deficiencies in the past. In Chapter 4, we turn to the relationship of the Force to the Solicitor General and the Deputy Solicitor General. We believe that many of the Force's problems which we have been examining stem, in part, from both a lack of clarity with regard to the roles of the Minister, his Deputy, and the Commissioner of the R.C.M.P., and inappropriate lines of control and direction. Our aim in this Chapter is to clarify these roles and to establish appropriate legal relationships in order that the Solicitor General can properly direct and control the R.C.M.P. Finally, in Chapter 5, we develop recommendations on the legal issues relevant to the R.C.M.P.'s policing function — issues which we have already highlighted in Part III and which include such topics as surreptitious entries, electronic surveillance, mail opening, access to confidential information and interrogation. This chapter corresponds to Part V, Chapter 4, in which we examined similar subjects with regard to the security intelligence agency.

CHAPTER 1

CHANGE WITHIN THE R.C.M.P.

A. BASIC PRINCIPLES

3. One of the commonly accepted implications of the rule of law, fundamental to the health of our democratic society, is that all persons are equal before the law.[1] That is, "officials like private citizens [are] under a duty to obey the same law".[2] All persons must obey the law: there is no special dispensation for policemen. Members of the R.C.M.P. who are peace officers and have the duty to preserve the Queen's peace[3] and to protect citizens from offenders are expected to conduct themselves so as not to break the law.

4. Although Parliament has seen fit to confer special powers on them, for instance powers of arrest, peace officers should not labour under the misconception that any act which would be an offence if committed by another citizen is not an offence if committed by a policeman during the investigation of a crime, or in the furtherance of national security. Yet we have found that in the R.C.M.P. just such a misconception exists, and tends to be justified by claims that there is no intent to commit a crime. The first part of this chapter will examine the principles of the law as they apply to the role of the police, and assess the validity of possible defences open to peace officers accused of committing a crime in the execution of their duty.

5. As already noted, it is true that the law does give certain powers to a peace officer which an ordinary person does not have. Thus, section 450(1)(c) of the Criminal Code provides that he may arrest without warrant "a person who has committed an indictable offence, or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence", or "whom he finds committing a criminal [even a non-indictable] offence", or where he "has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found". Generally

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[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10 ed.), London, Macmillan, 1959, p. 202.

[2] E.C.S. Wade and G. Godfrey Phillips, *Constitutional and Administrative Law* (9 ed.), London, Longman, 1977, p. 87.

[3] "The general duty of all Constables, both high and petty, as well as of the other officers, is to keep the King and peace in their several districts...": Blackstone's *Commentaries on the Laws of England* (1809), Bk I, 15th ed., Ch. 9, quoted by Judge Zalev in *R.* v. *Walker* (1979) 48 C.C.C. (2d) 126 at 138. See also *Reg.* v. *Dytham* [1979] 3 Weekly L.R. 467 (Eng. C.A.).

speaking, an ordinary person may not arrest a person in those circumstances. This provision is intended to protect a peace officer from civil liability for false arrest when he acts, as very often society expects him to, on the basis of information provided by others.

6. The defence of 'lack of intent' to commit a crime often put forward by the R.C.M.P., has been disclosed both in files we have examined and in testimony before us. While lack of intent may be a defence to a charge of "breaking and entering with intent to commit an indictable offence" upon the premises, it will most likely not be a defence to other criminal charges in which the question is not whether the accused had the "intent" to commit a crime but whether he had a "guilty mind" in a more general sense. (We have already discussed this question in detail in Part IV, Chapter 1.) The current impression which permeates the R.C.M.P. is mainly the result of inadequate basic training in the criminal law.

7. Another defence put forward is that of 'necessity', which is probably based on section 7(3) of the Criminal Code:

> 7. (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada. . .

While this provides a policeman and an ordinary citizen with a defence to criminal liability or liability for an offence under any other federal statute, it is probably limited to emergencies. In *Morgentaler* v. *The Queen*[4] Mr. Justice Dickson, speaking for the majority of the Supreme Court of Canada, said that, if the defence of necessity does exist,

> it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible.

He said that not only must the situation be one of great urgency but the harm averted must be "out of all proportion to that actually caused by the defendant's conduct". Let us take an example that has been raised with us in evidence by the R.C.M.P. A peace officer *prima facie* violates a federal law or regulation by not donning a life jacket when he goes in a motor boat to the aid of a drowning person. Probably the defence of necessity would prevent a conviction, unless of course the life jacket was on hand and the peace officer simply chose not to wear it. Therefore that example, which was put before us as an instance of the need for policemen to violate the law to protect the public interest, does not make the case at all.

8. There is also specific provision in section 25(1) of the Code that "everyone", including a peace officer,

> who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,

[4] (1975) 70 C.C.C. (2d) 449.

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Since the law — as rendered by statute in the oath he takes — requires him to enforce the law, he is protected from criminal and civil liability for any use of force in the course of enforcing the law, if the force he uses is no more than is reasonably necessary in the circumstances.

9. Section 27 of the Code, applicable to peace officers and non-peace officers alike, provides that a person is "justified in using as much force as is reasonably necessary" to prevent "the commission of an offence", or the doing of anything "that, on reasonable and probable grounds, he believes would, if it were to be done, be an offence", if the person committing it "might be arrested without warrant" and the offence "would be likely to cause immediate and serious injury to the person or property of anyone".

10. The provisions of sections 25 and 27 together permit a policeman, provided he acts reasonably, to perform those acts which society expects a policeman to do. They afford protection from criminal and civil liability if, for instance, he breaks into premises, breaking down the door in the process, in order to prevent the commission of an impending crime of serious violence.

11. This brief statement of the law relating to the powers of a peace officer should be sufficient to make it clear that, while the law expects a policeman to do more than it expects of an ordinary person, it correspondingly affords him certain specific protections which will be sufficient to enable him in many cases to do his duty without fear of prosecution or civil suit, provided he behaves reasonably.

12. There will, nevertheless, be situations in which he will not be able to enforce a law effectively without breaking some other law. In those situations he must not break the law. No assertion that his action is in the public interest or for the public good in the war against crime can be allowed to justify his committing an offence. His conduct must be above reproach, and set an example of obedience to the law. No equivocation is permissible either in the policy established for the police force or in its application in the field.

13. If a specific law, whether found in a federal, provincial or municipal statute or regulation or bylaw, stands as an obstacle to effective law enforcement then the police force should press for a change in the law. It must not subvert the law by permitting or even encouraging its members to break the law on grounds that the violation will only be "technical". Nor must it permit its members to encourage other persons to do some act of co-operation as a "good citizen" if that act is an offence.

14. We have heard a good deal about 'technical' violations of the law. There are no such things. A breach of a statutory prohibition is an offence, no matter

how noble the motive of the policeman committing it. While the selflessness of the motive may be taken into account by a judge in mitigation of what otherwise might be a severe penalty, the possibility of such leniency must not be the basis of a policy permitting conduct which constitutes an offence.

15. No doubt members of a police force such as the R.C.M.P. feel frustrated if they find it difficult to persuade governments and legislators to change the law, as they feel it needs to be changed to enable them to enforce it effectively. We have found that the R.C.M.P. is unskilled at presenting a case for legislative change. This may be a reflection of an inadequate capacity for analytical thought and presentation, or it may flow from a failure to understand the process of government or the necessity to present the need and the proposed solution with clarity and absolute candour. Government cannot be expected to press the R.C.M.P. for clear evidence of need, or for more effective presentation of argument. On the other hand, we recognize that a number of legal problems which are analyzed in this Report, if they are to be resolved, will require the active and concerted effort of the federal and provincial governments, each of which bears constitutional responsibilities that affect law enforcement in general and the work of the R.C.M.P. in particular. The federal system does not render the solution to these problems easier.

16. Our preceding observations have referred to offences. But a police officer must equally not be guilty of conduct which, although not an offence, will constitute a civil wrong. For example, even if entry upon premises and surreptitious search without warrant may not be a crime and in most provinces does not contravene a provincial statute, in the common law provinces it will be trespass and in Quebec may be a delict. It was the law of trespass which in England 200 years ago established the unacceptability of searches by general warrant issued by an officer of state. The observations found in the great judgments of those times (see Part III, Chapter 2) apply equally to render "illegal" or "unlawful", in the civil sense, any such conduct by a peace officer. That is enough to require a police force to prohibit such an investigative practice.

17. The currency of the doctrine that tortious conduct by policemen is unacceptable, even if it is not a criminal offence or an offence under any statute, was vividly illustrated by a recent judgment in the highest court of England, the House of Lords. In *Morris* v. *Beardmore*[5], a charge by police was dismissed because the evidence was obtained while the police were trespassing. Lord Diplock stated:

> In my opinion, in order to constitute a valid requirement the constable who makes it must be acting lawfully towards the person whom he requires to undergo a breath test at the moment that he makes the requirement. He is not acting lawfully if he is then committing the tort of trespass on that person's property, for [the statute] gives him no authority to do so.[6]

[5] [1980] 3 Weekly L.R. 283.
[6] *Ibid.*, at p. 289.

Lord Edmund-Davies said:

> ... although policemen have been vested by statute with powers beyond those of other people, they are exercisable only by virtue of the authority thereby conferred upon them and in the execution of their duty. A policeman as such — in or out of uniform — has no powers or authority beyond those of the ordinary citizen on occasions or in matters which are unconnected with his duties.
>
> My Lords, I have respectfully to say that I regard it as unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this regardless of whether his contravention is of the criminal law or simply of the civil law. And so, when Parliament decreed that in the circumstances indicated in section 8 "a constable in uniform" was empowered to take certain steps in relation to motorists, the whole framework of the legislative provision was that the powers were being conferred on a constable who at the material time would not merely be in uniform but would also be acting in the execution of his duty.[7]

And later he warned that

> ... if the police (above all people) are seen to flout the law and are yet to be regarded as lawfully exercising powers granted to them by Act of Parliament, diminished respect for the law and for the officers of law enforcement must inevitably follow.[8]

18. The policy of the R.C.M.P., and its application in the field, must unequivocally expect compliance with the law. Any deficiency in the law which is perceived as a serious obstacle to the effective performance of the tasks entrusted to the R.C.M.P. by the government and Parliament should be drawn candidly to the attention of government. It should not be regarded as a difficulty to be overcome either by turning a blind eye to violation of the law, or by being equivocal in its approach to government on the subject.

19. Our investigations reveal that some of the legal problems that have arisen in the R.C.M.P. should have been identified sooner, and, when identified, should have been brought to the attention of the government for legal advice and if necessary for remedial legislation. Too often we have found that a legal problem, even if identified as such by senior management of the Force, has been hidden from government because of fear that the legal advice that the government would obtain would result in a prohibition of the use of an investigative technique.

20. In addition to recognizing unreservedly the significance of the rule of law in its application to the R.C.M.P., it is imperative that in word and deed all police forces accept the primacy of the civil government. Yet we have detected, in subtle references, that there is an impression in some quarters in the R.C.M.P. that the Commissioner of the R.C.M.P. is answerable to the law and not to the government. Such is the impression one has when members of the

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[7] *Ibid.*, at p. 291.

[8] *Ibid.*, at p. 294.

Force refer to *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn*[9] (cited and discussed in Chapter 4 of this Part) as an apparent authority for that proposition. The limits of what was said in that judgment were analyzed by the Honourable Madam Justice Roma Mitchell, of the Supreme Court of the State of South Australia, in the Report of the Royal Commission on the Dismissal of Harold Hubert Salisbury from the office of Commissioner of Police, 1978.[10] She found that former Commissioner Salisbury had misled the Government of the State by his communications to it as to the nature and extent of the activities of the Police Special Branch, and that the decision to dismiss him was justifiable in the circumstances. Shortly before his dismissal, as Madam Justice Mitchell said in her Report:

> In his interview with the Premier on the 13th January 1978 Mr. Salisbury said that special branches of Police Forces had duties which he considered to be to the Crown, to the law and not to any political party or elected Government. In giving evidence he again affirmed that that was his belief and he said "As I see it the duty of the police is solely to the law. It is to the Crown and not to any politically elected Government or to any politician or to anyone else for that matter." That statement, in so far as it seems to divorce a duty to the Crown from a duty to the politically elected Government, suggests an absence of understanding of the constitutional system of South Australia or, for that matter, of the United Kingdom. As I understand his evidence he believed that he had no general duty to give to the Government information which it asked but he regarded it as politic to give such information as, in his view, was appropriate to be general knowledge.[11]

Madam Justice Mitchell then continued:

> Of course the paramount duty of the Commissioner of Police is, as is that of every citizen, to the law. The fact that a Commissioner of Police "is answerable to the law and to the law alone" was adverted to by Lord Denning M.R. in *R.* v. *The Commissioner of Police of the Metropolis: ex parte Blackburn.* This was in the context of the discretion to prosecute. No Government can properly direct any policeman to prosecute or not to prosecute any particular person or class of persons although it is not unknown for discussions between the executive and the police to lead to an increase in or abatement of prosecutions for certain types of offences. That is not to say that the Commissioner of Police is in any way bound to follow government direction in relation to prosecutions. Nor should it be so. There are many other police functions in respect of which it would be unthinkable for the Government to interfere. It is easier to cite examples than to formulate a definition of the circumstances in which the Commissioner of Police alone should have responsibility for the operations of the Police Force.
>
> It is one matter to entrust to the Commissioner of Police the right to make decisions as to the conduct of the Police Force. It is quite another to

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[9] [1968] 2 Q.B. 118; [1968] 1 All E.R. 763.

[10] *Royal Commission Report on the Dismissal of Harold Hubert Salisbury*, South Australia, 1978.

[11] *Ibid.*, at p. 19.

deny the elected Government the right to know what is happening within the Police Force.[12]

We shall express our views on this subject in Chapter 4 of this Part. Suffice it to say here that requests by government for information as to what is happening within the R.C.M.P. must be answered in a forthright manner using unequivocal language that sets out clearly any qualifications to the information being provided. But candour and completeness are not the only essentials. The police, because they are aware of the difficulty government may have in identifying issues requiring its attention, must bring forward all such issues, even matters which the police themselves might consider to be "internal management".

B. MANAGEMENT AND PERSONNEL PRACTICES

21. A study of the management and personnel practices of the R.C.M.P. policing function, parallel to the one we conducted and reported on in Part VI in relation to the Security Service, is outside our terms of reference. We have not been asked to examine the role that the Force ought to play as Canada's national police force, and without such an examination we believe that a study of management and personnel issues would be on an unsound footing. Even if we were to assume a continuation of the R.C.M.P.'s existing role, we could review the Force's procedures in the area of policing in a comprehensive manner only by focussing on effectiveness as well as on legality and propriety. We consider that lasting improvements will not be effected simply by suggestions for improved legal training or by calling upon R.C.M.P. members to refuse to obey illegal orders. Questions of legality and propriety relate directly to long established, deeply rooted characteristics of the Force: its managerial style, with its emphasis on obedience; its disciplinary procedures; the extensive and well-defined set of rules that governs behaviour on and off the job; the stress on loyalty; the initial training which attempts to mould the individual to fit the image of the Force; the insularity of the R.C.M.P. These topics, in our view, should be looked at only in the context of effectiveness.

22. However, although a study of management and personnel issues for the R.C.M.P. policing function lies outside our terms of reference, we would be remiss in dropping the subject entirely. We believe that there is a strong connection between legality and propriety on the one hand and management and personnel procedures on the other. Moreover, we strongly suspect that some of the weaknesses we have identified in the Security Service — a poor capacity for legal and policy analysis, a serious deficiency in management skills, lack of continuity and expertise in key areas because of the generalist career path — are also weaknesses in the criminal investigations side of the Force. Indeed, some have argued that the type of managerial and personnel policies which we are recommending for the security intelligence agency would be appropriate for at least certain parts of the Force, such as those branches

[12] *Ibid.*, at p. 20.

dealing with commercial crime, criminal intelligence, and drug offences. For these reasons, we suggest that the government consider initiating a study of the R.C.M.P. policing function, centering on at least the following topics:

- the role for Canada's national police force,
- the desired qualities for the R.C.M.P. Commissioner and his senior managers,
- the major personnel policies including recruitment, training and development, career paths and classification,
- the organizational structure of the Force,
- the approach to management and decision-making.

The objectives of such a study should be to enhance the effectiveness of the Force and to ensure legal and proper conduct on the part of its members.

CHAPTER 2

COMPLAINTS OF POLICE MISCONDUCT

1. "Who should police the police?" is one of the most difficult questions facing those concerned with law enforcement in a liberal democracy. Allegations of police misconduct must be resolved promptly and fairly to protect the rights of citizens and police alike, and to maintain the confidence and respect of citizens in the police. Moreover, an effective means of handling complaints can be an important management tool for a police force in identifying problem areas such as poor recruiting and training practices or improper investigatory procedures. As we have noted in Part VI, Chapter 2, the problem of police misconduct — certainly as it relates to the R.C.M.P. — is not simply a question of 'evil' people doing 'evil' deeds. We were not investigating acts of police corruption, that is policemen acting illegally or improperly for their own aggrandizement. Rather the evidence before us suggests that the causes of police misconduct are complex and have at least as much to do with failures in our systems of law, management, and governmental relationships as they do with human failings. The proper handling of complaints is an excellent way of identifying and correcting these systems failures.

2. As in the case of 'policing' a security intelligence agency, an effective system for 'policing' the police requires a judicious blending of several approaches. In some instances, especially those in which the complaint is a relatively mild one — for example, a complaint that a police officer was rude — the best approach may be for the complainant and the officer to meet face to face in order to ascertain whether an amicable resolution is possible. In other cases, the R.C.M.P. itself should conduct an investigation. In situations where there is an alleged illegality on the part of the police, the matter must be handled by the appropriate Attorney General. Finally, we believe that an external review body is necessary to monitor how the R.C.M.P. handle complaints, and in certain circumstances, to undertake an investigation of its own. Indeed, the major recommendation in this chapter will call for the establishment of the Office of Inspector of Police Practices whose functions and roles, with some important exceptions, will be similar to those of the Advisory Committee on Security and Intelligence, which we discussed in Part VIII, Chapter 2.

3. In addition to the establishment of an external review body, we shall make recommendations in three other areas to improve the R.C.M.P.'s handling of complaints. First, we shall recommend ways of improving the flow of complaints about police misconduct from the general public, the judiciary and from members of the R.C.M.P. Then we shall make proposals for improving the way in which complaints are dealt with, once they have been received by the

R.C.M.P. or some other government body. Finally, we shall examine the role which the provinces should play in the complaints system relating to the R.C.M.P.

4. Before turning to each of these areas, we should note that a Royal Commission has recently studied R.C.M.P. complaint procedures. The Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedures Within the Royal Canadian Mounted Police[1] (chaired by His Honour Judge René Marin and referred to hereafter as the "Marin Commission") was published early in 1976 and called for a series of changes in the manner in which public complaints against the R.C.M.P. are handled. The R.C.M.P. has since implemented many of these proposals. Having that Report makes our task much easier in that we agree with a number of the Marin Commission's recommendations. Nonetheless, there are certain areas where we differ with the recommendations made by that Commission and for this reason we have developed our own proposals on certain key points.

A. EXISTING PROCEDURES FOR HANDLING PUBLIC COMPLAINTS AGAINST THE R.C.M.P.

5. The existing procedures provide for the reception, investigation and resolution of a complaint by the Force itself. With the exception of certain provincial police boards, whose constitutional authority in so far as their jurisdiction over the R.C.M.P. is concerned is now in doubt (which we shall discuss later in this chapter), no authority external to the Force oversees, on a regular and systematic basis, the handling of public complaints against it. The administration of public complaints and internal discipline procedures is the responsibility of the divisional commanding officers. Appeals concerning internal discipline can be made to the Commissioner, whose rulings are final.

6. When a complaint is received by the R.C.M.P., a preliminary investigation is carried out at the local level. The majority of complaints appear to be satisfactorily resolved on an informal basis by way of an explanation or an apology. R.C.M.P. Headquarters does not keep records of complaints which are resolved informally. However, Force policy requires divisions to compile reports on the nature and frequency of all complaints as a measure of divisional effectiveness. At the discretion of Headquarters and the Commanding Officer of each division, the R.C.M.P. also examines and investigates adverse comments reported in the press or contained in judicial decisions in court cases. The R.C.M.P. told us that an investigation is undertaken in a case where there is an expectation that questions will be addressed to the responsible federal or provincial Minister.

7. Where any matter is considered by the R.C.M.P. to be serious, or if the complainant is not satisfied at the informal level, a formal investigation is undertaken by a senior NCO or an officer at the local level, or by a special

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[1] Information Canada, Ottawa, 1976.

R.C.M.P. internal investigation unit called the Complaints and Internal Investigation Section (C.I.I.S.). There are internal investigation sections in most divisions across Canada and they can be sent to smaller detachments as required. C.I.I.S. Sections investigate most serious cases including those cases where R.C.M.P. members normally responsible for service investigations (or criminal investigations in areas where the R.C.M.P. has general law enforcement responsibilities) have personal involvement or interest in the matter to be investigated; where there is any question of corruption; or, where public interest appears to be high.

8. If a complainant alleges illegal conduct on the part of an R.C.M.P. member in an area where the R.C.M.P. has general law enforcement responsibilities, the Force undertakes a criminal investigation. The R.C.M.P. then refers the matter to the provincial prosecutorial authorities who determine whether criminal charges should be laid. In other areas, the R.C.M.P. refers the matter to the police force which has general law enforcement responsibilities for investigation and referral to the prosecutorial authorities. One of the Marin Commission's recommendations concerning public complaints proposed that such criminal investigations be carried out by experienced R.C.M.P. investigators seconded to a provincial attorney general and working under his direction. This recommendation has not been implemented. The R.C.M.P. and the interdepartmental review committee that studied the report believed that these investigations should be carried out by experienced R.C.M.P. members under the direction of the Commissioner. The provincial attorneys general have never requested seconded officers, and there does not appear to be administrative machinery available to implement the recommendation. We return to this matter later in this chapter.

9. In cases of alleged illegal conduct the R.C.M.P. may also undertake an internal investigation. If it does, it may rely heavily on the criminal investigation material to determine the appropriate disciplinary action. This procedure is contrary to two recommendations of the Marin Commission. These recommendations would not permit the use of the criminal investigation reports or the employment of the criminal investigators in subsequent disciplinary proceedings.

10. The focus of R.C.M.P. internal investigations regarding complaints is not solely on determining the validity of the complaint and proposing remedial steps. In addition Force management sometimes review training programmes, standing orders of the Commissioner, and Force directives. When an incident suggests that training or operational procedures were part of the cause of a problem, modifications to those procedures are considered.

11. According to the R.C.M.P., whenever it receives a complaint through a provincial attorney general, and in cases where the matter is sufficiently serious that inquiries by the press or public are likely to be made to the attorney general, the R.C.M.P. keeps the attorney general's office informed of the progress and the final result of the investigation. (We have examined cases in which this procedure has not been followed and these are documented in a subsequent Report.) The complainant, for his part, is told whether his com-

plaint has been found to be substantiated and, in some cases where property damage is involved, he receives compensation from an *ex gratia* fund. The fact that an R.C.M.P. member was or was not disciplined is always disclosed. However, the nature of the discipline is not disclosed.

12. In December 1978, the R.C.M.P. established a unit called the Complaints Section within its Internal Affairs Branch at Headquarters to receive complaints and forward them to the appropriate region. The Complaints Section does not receive particulars of all complaints, but has recently begun to receive statistical data of complaints, and their resolution, from each division. In the six months ending September 30, 1979, the Complaints Section recorded that 1,042 complaints were lodged against the R.C.M.P., of which 576 were disposed of informally. A total of 281 complaints were found to be substantiated. If R.C.M.P. personnel at the divisional level rule that a complaint is unsubstantiated, Headquarters has at present no means to review the case. To date, the only authorities external to the R.C.M.P. which have reviewed internal investigation of complaints are the provincial attorneys general in the contracting provinces or their police boards and commissions. They are provided with access to investigation files to ensure that complaints have been fairly dealt with. In isolated instances, specially appointed provincial commissions of inquiry have investigated specific allegations of misconduct. Until recently, complainants in some provinces were advised that if they were dissatisfied with the disposition of their complaint, they could appeal the matter to the provincial police board or commission. However, as we shall explain later in this chapter, serious doubt has now been cast on the constitutional power of provincial police boards and commissions to review complaints against R.C.M.P. members.

13. We have concluded that the present R.C.M.P. public complaints procedures go some distance in providing for the just disposition of a complaint, and for the use of complaints as a remedial management tool to improve policies and procedures governing R.C.M.P. operations. However, based on our experience at the formal hearings and on our research of how other jurisdictions handle this matter, we believe that improvements can be made. We shall describe the major shortcomings of the present system and develop proposals which we think will solve them.

B. LODGING OF COMPLAINTS

14. It is clear to us that only a small minority of cases involving police misconduct are reported by the 'victim' of alleged wrongdoing. This is a matter of serious concern to us. In this section we shall recommend the adoption of measures to facilitate the lodging of complaints by aggrieved citizens. We shall also examine two other sources of information about police misconduct — the judiciary and members of the R.C.M.P. — and make recommendations to facilitate the lodging of complaints from these sources as well.

Complaints from the public

15. We have found that R.C.M.P. misconduct does not necessarily lead to a public complaint. Of nine sample cases of alleged R.C.M.P. misconduct reviewed by our counsel, in only one did the alleged victim complain to the Force directly. In each of two cases, the lawyer for the potential complainant wrote to the R.C.M.P. years after the event, following the disposition of criminal appeals. In the remaining cases the R.C.M.P. initiated an inquiry following adverse publicity.

16. There are a variety of reasons why a 'victim' of alleged police misconduct may fail to complain to the police. First, the 'victim' himself is often engaged in questionable activity, and may be subject to continuing police investigation. Evidence relating to the complaint may also be relevant to the charges against him. Second, some individuals may fear, especially if there was a physical altercation, that complaints against police officers will result in later police harrassment. Third, minority groups may lack confidence in police impartiality. Fourth, even where the incident comes to the knowledge of lawyers, it may serve as a tool in plea bargaining and never be publicly disclosed. Further, lawyers often hesitate to raise the issue of police impropriety outside the criminal proceedings brought against their clients until the cases have been finally resolved by the courts. Fifth, the fear, whether justified or not, of incurring heavy legal costs may deter many people from lodging complaints. Finally, the 'victim' may not be aware of the police misconduct. For example, a policeman might break into his home without his knowledge. Alternatively, the victim might be aware of a questionable act, but have no idea that the police were responsible.

17. In those cases where the 'victim' is aware of possible police misconduct, it is important, we believe, that there be public bodies other than the R.C.M.P. to which a complaint may be submitted. Consequently, we propose that provincial police boards and commissions continue to receive complaints against the R.C.M.P. These boards and commissions should transmit the allegations to the R.C.M.P. If so requested, they should not reveal the name of the complainant to the R.C.M.P. The second alternative to lodging complaints directly with the R.C.M.P. should be the registering of allegations with a new federal review agency, the Office of Inspector of Police Practices. We do not see a need for this agency to establish offices in every region for the purpose of receiving complaints. Rather, the local offices of the federal Department of Justice should receive complaints on behalf of this body. Copies of complaints received by or on behalf of the federal review body should be forwarded to the R.C.M.P. Again, if so requested, the Inspector should not reveal the name of the complainant to the R.C.M.P.

18. These alternatives to filing a complaint directly with the R.C.M.P. should be widely publicized by the Solicitor General, the Force, the Inspector of Police Practices and the provincial police boards and commissions. In particular those agencies and organizations dealing with minority groups should be aware of the right to complain about R.C.M.P. conduct to the Inspector of Police Practices and the provincial police boards and commissions, as well as the right

to anonymity. As the Marin Commission recommended, the public should be advised of the need to file complaints as soon as possible after the event because

> . . . with the passage of time evidence is lost, memories dim, members of the Force are transferred and the reconstruction of events becomes difficult.[2]

Complaints from the judiciary

19. Members of the judiciary are in a position to provide a continuous, albeit unsystematic, review of police conduct in the course of the criminal trial process. We are referring here to situations where judges, in the course of criminal trials, learn of possible police misconduct. What action should they take? In Part X, Chapter 5, we deal with the efficacy of judicial discretion to reject illegally obtained evidence in controlling improper police investigative measures. We conclude there that the possibility of penalizing the prosecution is not an adequate response when police misconduct is discovered by a judge. There is a need to ensure that the matter comes to the attention of the proper authorities in order that corrective action can be taken.

20. For want of established procedure, the response from the judiciary on police misconduct has been variable and sometimes inequitable. At present, when the issue of police misconduct is raised in the criminal courts, members of the bench occasionally castigate the police officers involved for the apparent impropriety. While the desire of judges to voice their concern over an apparent case of police misconduct is understandable, sometimes all the facts are not before the court and the police officer involved is not given an opportunity to state his case.

21. We believe that the courts should establish procedures whereby judges may send a formal report to the Commissioner of the R.C.M.P. of cases of suspected police misconduct. The culpability of police officers should be determined in the proper forum where, after a full investigation, a fair hearing is accorded the police officer. Informing judges of the avenues available for lodging complaints or allegations, and encouraging them to make use of these channels, would seem to us to be the best approach. In Chapter 5 of this Part of our Report, in a section concerning the interrogation of suspects, we shall make a related recommendation calling for the establishment of procedures to ensure that the R.C.M.P. is notified of the reasons given by judges for excluding confessions because of questionable police practices being brought to the attention of the management of the R.C.M.P.

Misconduct reported by members of the R.C.M.P.

22. Even if the present obstacles to filing a complaint against the R.C.M.P. are partially or wholly removed, public complaints and criticism will continue to be irregular sources of information on police misconduct. There might still be serious cases of illegal or improper conduct on the part of R.C.M.P. members which either do not come to the attention of anyone outside the

[2] *Ibid.*, p. 75.

Force, or, if they do, for one reason or another are not brought to the attention of the proper authorities. In such cases, the only way in which the incidents may come to light is through other members of the R.C.M.P. who know of the illegalities or improprieties and report them. "Whistle-blowing" is a term often used to describe such reports. We make two proposals aimed at encouraging R.C.M.P. members to report misconduct. The first is to have a clearly designated organization outside the R.C.M.P. to which members can report questionable acts in a way that ensures anonymity and protects the whistle-blowers from future reprisals. The second proposal calls for the explicit recognition, in the statute governing the R.C.M.P., of an R.C.M.P. member's duty to report misconduct within the Force. We enlarge below on each of these proposals.

23. R.C.M.P. members should normally bring questionable acts to the attention of their immediate superiors or the designated units within the Force responsible for investigating misconduct. There may be situations, however, where an R.C.M.P. member, having knowledge of a case of illegal or improper conduct, is not confident that the matter will be properly handled by the Force. A case of improper conduct, for example, may have its roots in policies and procedures which have received the approval of senior officers of the R.C.M.P. (We have found evidence of several such situations in the past.) Or the member may suspect that his superiors have either participated or acquiesced in the misconduct. Or the member may have received an order that he believes is either illegal or improper. Finally, the member may have made an allegation internally and not been satisfied with the Force's response. In all of those cases, the member may be concerned that pursuing his allegation within the Force will bring him into disfavour. Such cases should arise only infrequently, but if they do there must be a means for R.C.M.P. members to report their allegations to an authority external to the Force. We recommend that the Inspector of Police Practices be the external authority to receive such allegations. In addition to investigating these allegations, he should ensure that the members making the allegations should remain anonymous, if they so wish, and that they not be punished or their careers harmed for making these allegations. This recommendation is similar to one we have made for the security intelligence agency in Part VI, Chapter 2, and provides a channel for members' allegations which is an alternative to the public forums of the press and Parliament.

24. Our second recommendation calls for a more explicit requirement by Parliament that members of the R.C.M.P. disclose incidents of wrongdoing by other members of the Force. We believe that members of the R.C.M.P. should be under a statutory duty to report evidence or knowledge of illegal or improper conduct on the part of other R.C.M.P. members. R.C.M.P. Regulation 25 provides that:

> It is the duty and responsibility of every officer and of every person in charge of a post to ensure that there is at all times strict observance of the law, compliance with the rules of discipline and the proper discharge of duties by all members of the Force.[3]

[3] P.C. 1960-379.

This regulation does not place a duty on R.C.M.P. members to report incidents of wrongdoing. Rather, it places a duty on superiors to ensure that their subordinates obey the law. One other enactment which should be mentioned is paragraph 25(o) of the present R.C.M.P. Act,[4] which provides that every member of the Force who "conducts himself in a scandalous, infamous, disgraceful, profane or immoral manner" is guilty of a major service offence. While this provision might be broadly construed so as to apply to the withholding by an R.C.M.P. member of knowledge of illegal or improper acts committed by other members, so far as we know it has not been so applied in the past. Bill C-50, An Act to Amend the Royal Canadian Mounted Police Act, which was introduced in April 1978, and which subsequently died on the order paper, had the following section which is appropriate to what we are recommending:

> 37. It is incumbent on every member
>
> (e) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue.

By adopting such a provision, Parliament will make it clear to the members of the Force that the rule of law must be paramount in all that the R.C.M.P. does. Loyalty to the Force or even to members within the Force must be secondary.

25. In making these two recommendations designed to encourage and, indeed, compel members of the Force to report misconduct on the part of other members, we recognize that their adoption by government may not, by itself, be adequate. Our own experience supports this conclusion. In December 1977, Commissioner Simmonds told members of the Force that they had a "right" to appear before this Commission in order to give evidence which would help the Commission in its deliberations. He further promised that the fact that a member did so would not "give rise to disciplinary action". A year later, in the "Pony Express", the R.C.M.P. newsletter, we invited members of the Force to volunteer knowledge relevant to the Commission's mandate without their being officially called upon to do so. Despite these messages, not one serving member of the Force has come *directly* to us to volunteer information about incidents or practices that may have been unlawful. We realize that it is expecting a good deal of a member to come to us voluntarily when his own conduct is in issue. However, knowledge of some questionable practices was widespread, and it is noteworthy that no one has come forward in regard to such practices even when his own conduct would not be in issue.

26. In one of our formal hearings, a senior R.C.M.P. officer, who has served in both the Security Service and the criminal investigation side of the Force, gave us some inkling of the norms operating within a police force which would discourage members from reporting questionable activities which occur within their organization. In attempting to explain the reason for his not knowing

[4] R.S.C. 1970, ch.R-9.

about a certain questionable activity conducted by several of his own subordinates, he said:

> ...I had every reason to believe at that time, that I had installed in the organization and procedures and communications facilities of that Section — and I'm speaking now of the formal ways people communicate — so many safeguards there was no way that this kind of thing could happen. In looking for an explanation afterwards, I have gone back into the literature and I have brought for whatever interest it might have for the Commission... an extract from the work of — I believe he is a sociologist — on police cultures, that explains that where you have rogue individuals in groups of this kind, it is part of the police tradition, of *esprit de corps* and professional secrecy, that as long as people do not break these codes, as long as they do not rat on each other, that police groups are tolerant of the existence among them, of individuals of this kind... A number of people in the Section knew it, but they knew intuitively that the last thing they could do was let that knowledge get to the level of a person who would have to act on it...
>
> (Vol. C106, pp. 13703-04.)

The senior officer then went on to quote passages from the extract[5] he had brought with him. Relevant to what we are dealing with in this chapter is the following excerpt:

> Teams of partners do not talk about each other in the presence of non-team members, line personnel do not talk about their peers in the presence of ranking officers... and, of course, no members of the department talk about anything remotely connected with police work with any outsiders. Obviously the rule of silence is not uniform throughout these levels. Thus, matters that could never be mentioned to outsiders can be topics of shoptalk among peers. But this reflects only gradations of secretiveness. In a larger sense police departments accommodate a colossally complicated network of secret sharing, combined with systematic information denial.
>
> (Vol. C106, pp. 13705-06.)

In reply to a question asking him whether the passages he had quoted reflected his experience in the R.C.M.P., the witness said

> Yes, sir. As a matter of fact, when I came across that book, I was astounded at the perceptions that this person could communicate, not having been a police officer. Then I discovered that he had, in fact, like many of his practitioners, ... gone to work directly in police forces to acquire his knowledge.
>
> (Vol. C106, p. 13708.)

27. It is not important for us at this point to comment on the merits of the thesis put forward by this senior officer. But what his evidence does suggest to us is that the reporting by R.C.M.P. members of questionable acts within the Force is a complex matter which is very much tied to the management style and personnel policies now employed by the R.C.M.P. Reflecting on this relationship has reinforced for us the suggestion we made in an earlier chapter

[5] Egon Bittner, *The Functions of the Police in Modern Society*, Chevy Chase, Maryland, National Institute of Mental Health, 1970.

— a suggestion that the Solicitor General undertake a review of the R.C.M.P.'s organizational structure and its management and personnel policies with the twin objectives of increasing the Force's effectiveness and reducing the risks of members committing illegalities and improprieties in the performance of their duties.

WE RECOMMEND THAT the federal government establish the Office of Inspector of Police Practices, a review body to monitor how the R.C.M.P. handles complaints and, in certain circumstances, to undertake investigations of complaints on its own.

(213)

WE RECOMMEND THAT as alternatives to filing complaints directly with the R.C.M.P.,

(a) provincial police boards and commissions continue to receive complaints against the R.C.M.P., and to forward copies of them to the R.C.M.P. without revealing the name of the complainant if so requested by the complainant;

(b) the Inspector of Police Practices and local offices of the federal Department of Justice, receive complaints against the R.C.M.P. and forward copies of them to the R.C.M.P. without revealing the name of the complainant if so requested by the complainant.

These alternatives to sending a complaint directly to the R.C.M.P. should be widely publicized by the Solicitor General, by the Force, by the Office of Inspector of Police Practices and by provincial police boards and commissions.

(214)

WE RECOMMEND THAT the Federal Government request the courts to establish procedures whereby judges may send a formal report to the Commissioner of the R.C.M.P. of cases of suspected police misconduct.

(215)

WE RECOMMEND THAT the Inspector of Police Practices be authorized to receive allegations from members of the R.C.M.P. concerning improper or illegal activity on the part of other members of the Force.

(216)

WE RECOMMEND THAT the Inspector of Police Practices endeavour to keep secret the identities of R.C.M.P. members who report incidents of illegal or improper R.C.M.P. activity.

(217)

WE RECOMMEND THAT R.C.M.P. officers be proscribed from taking recriminatory personnel action against any member under their command by reason only that the member filed, or is suspected of having filed, an allegation of illegal or improper R.C.M.P. conduct with the Office of the Inspector of Police Practices.

(218)

WE RECOMMEND THAT members of the R.C.M.P. be under a specific statutory duty to report evidence of illegal or improper conduct on the part of members of the Force to their superiors. Where there is reason to believe that it would be inadvisable to report such evidence to their superiors they should be under a statutory duty to report it to the Inspector of Police Practices.

(219)

C. INVESTIGATING ALLEGATIONS OF MISCONDUCT

28. Who should investigate allegations of R.C.M.P. misconduct? This is a sensitive issue requiring consideration of the nature of the allegation (is the alleged misconduct illegal or merely improper?), the effectiveness of the investigation, the morale of the Force, public confidence in the R.C.M.P. and in the administration of justice, and the constitutional division of powers between the federal and provincial governments. We believe that different circumstances call for different approaches to the form of investigation. We see an initial distinction between complaints which allege or disclose the commission of a federal or provincial offence on the one hand, and those which complain of impropriety but make no allegation of illegality on the other. We shall deal with the latter class of allegations first.

Complaints of R.C.M.P. impropriety

29. As we discussed earlier, the R.C.M.P. now employs special units for the investigation of complaints against members of the Force. Is this sufficient, or should provision be made for investigation by non-R.C.M.P. investigators? We are persuaded that in most cases R.C.M.P. investigations into allegations against their own members are fair and thorough. Moreover, there are other compelling reasons for having the R.C.M.P. investigate its own members in the majority of cases. First, as we explained earlier in this chapter, many complaints can be handled informally by the complainant and the R.C.M.P. member involved, thus avoiding the need for a costly investigation. Second, having 'outsiders' completely in charge of investigating misconduct would undermine the sense of responsibility within the R.C.M.P. for uncovering and preventing questionable behaviour in its own ranks. Third, we believe that the level of co-operation given to R.C.M.P. investigators will generally be higher than that given by members of the Force to 'outsiders'. For all of these reasons, the following remarks of one American writer commenting on the F.B.I., apply to the R.C.M.P.:

> For more than thirty years the F.B.I. has gathered evidence for federal prosecutions of local law enforcement officers for corruption, police brutality, and other crimes. Now it is learning that it must sometimes investigate its own personnel. Every law enforcement agency has to face this problem; and there is no simple answer. But to act as if the F.B.I. is incapable of investigating itself would be as unrealistic as to rely on the traditional assumption that the F.B.I. does not need investigating.[6]

30. We have two concerns, however, which lead us to suggest that, in special circumstances, it may be advisable to have the Office of the Inspector of Police Practices investigate allegations of misconduct. Our first concern is the need for public confidence in the resolution of allegations of police misconduct. Sometimes, in controversial or very serious cases, the notion of the police investigating themselves may not provide the public with the assurance it needs that a completely thorough and impartial investigation has been conducted.

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[6] John T. Elliff, *The Reform of F.B.I. Intelligence Operations*, Princeton, New Jersey, Princeton University Press, 1979, p. 174.

Our second concern is that, in some situations where there is tension or distrust between the R.C.M.P. and the community they serve, complainants or witnesses may not lend their complete co-operation to the investigators. Without such co-operation, the quality of the investigation will be poor and consequently the complaint will not be satisfactorily resolved.

31. For these reasons we adopt the general approach suggested by the Australian Law Reform Commission in its 1978 Supplementary Report entitled "Complaints Against the Police".[7] The Australian Law Reform Commission thinks that the Australian Ombudsman should have a reserve power to undertake, at his discretion, an independent investigation into public complaints against the police. This power would be exercised in any of four circumstances:

(1) The complaint involves a member of the police force senior to all members of the internal investigation unit;

(2) the complaint involves a member of the internal investigation unit;

(3) the complaint is related to a matter which the Ombudsman has already investigated; or

(4) the Ombudsman is of the opinion that it is in the public interest that the complaint should be investigated by him.

32. We believe it is especially important that the Inspector of Police Practices have the residual discretion which is incorporated in the fourth condition. He must be able to exercise his judgment as to whether and when to conduct an independent investigation. Thus when a citizen is dissatisfied with the disposition by the R.C.M.P. of his complaint and brings his allegation to the attention of the Inspector, the latter would decide whether further inquiry is necessary. Review would not be automatic. In addition, we think that the Solicitor General should have the power to require the Inspector to investigate a specific allegation.

33. In addition to its investigatory role, the Office of the Inspector of Police Practices should have a second function — that of monitoring the R.C.M.P.'s investigations of complaints and evaluating the R.C.M.P.'s complaints handling procedures. To perform this role effectively, the Inspector should receive copies of all written complaints of R.C.M.P. misconduct and reports from the R.C.M.P. of the results of its investigations of these complaints. As one American writer has noted:

> Acquisition of the input and output information [relating to a complaint] is one of the most powerful monitoring devices available over an organization. Whoever has that information has the potentiality to assess where the problems of the organization lie. The power of aggregate information is considerable. The patterns exhibited in matters surrounding the complaint and its processing provide useful information for changing the organization.[8]

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[7] The Australian Government Publishing Service, Canberra, 1978.

[8] Albert Reiss, *The Police and the Public*, 1971, pp. 193-7 as quoted by John Elliff in *The Reform of F.B.I. Intelligence Operations*, p. 177.

As part of this reviewing and evaluating role, the Inspector of Police Practices should be empowered to inquire into and review at his own discretion or at the request of the Solicitor General any aspect of R.C.M.P. operations and administration which may relate to questionable behaviour on the part of R.C.M.P. members. This proposal is in line with our belief that complaints can be an important managerial tool for identifying 'systems' problems which can lead to improper or even illegal behaviour.

Allegations of illegal conduct on the part of R.C.M.P. members

34. Allegations of illegal conduct on the part of R.C.M.P. members will normally result in at least two investigations. The first and primary investigation will be a police inquiry into the alleged violation of a federal or provincial law. This police investigation is conducted under the ultimate direction of either the federal or provincial attorney general (usually the latter) in order that the appropriate authorities can determine whether there is sufficient evidence to warrant a prosecution. The second investigation is the internal one conducted by the R.C.M.P. It is conducted under the authority of the Commissioner of the Force, and its purpose is to determine whether the member violated the R.C.M.P.'s own standards of conduct. It may result in disciplinary or other remedial action by the Force.

35. Important questions arise as to the timing of these investigations, and who should conduct them. These issues are further complicated by the division of constitutional responsibility in the field of law enforcement. We shall turn first to the matter of police investigations into alleged violations of federal and provincial statutes by R.C.M.P. members. Then we shall discuss the R.C.M.P. internal inquiry, and its relation to the police investigation for purposes of prosecution.

36. We consider it most important, as did the Marin Commission, that the investigation of suspected unlawful conduct by R.C.M.P. members parallel as closely as possible regular police investigations into allegations concerning private citizens. That is, there should be no special treatment accorded a member of the R.C.M.P. The general rule should be that the details of all allegations of R.C.M.P. illegal conduct received by the Force, by the provincial police boards, or by the Inspector of Police Practices, should be forwarded to the appropriate law enforcement body for investigation, and concurrently to the appropriate prosecutorial authorities. We endorse the Marin Commission's admonition against refraining from prosecuting in the expectation that R.C.M.P. internal disciplinary proceedings will suffice. Internal discipline proceedings should not be viewed as a substitute for prosecution under a federal or provincial statute.

37. Many, although not all, allegations of R.C.M.P. violations of federal and provincial statutes occur in jurisdictions where the R.C.M.P. is the police force which would normally investigate the matter. In most cases the R.C.M.P. investigators will be capable of undertaking a thorough and impartial investigation, and will have the complete confidence of the public. Still, the problems which may, on occasion, arise when a police force investigates allegations of

improper conduct on the part of its own members may be equally present when criminal conduct is alleged, especially if the incident has been a violent one. That is, R.C.M.P. investigators may encounter problems obtaining evidence from complainants and witnesses who are reluctant to co-operate with investigators belonging to the same police force uniform as the potential 'accused'. Also the appearance of justice may be compromised at times if the R.C.M.P. is seen to be carrying out the investigation into the alleged offence.

38. Just as we recommended above that occasionally complaints of improper conduct lodged against the R.C.M.P. should be investigated by members of an outside body, we feel also, for the same reasons, that certain police investigations of alleged criminal or other statutory offences might be better conducted by members of a police force other than the R.C.M.P. The appropriate attorneys general might therefore, in certain cases, direct members of another municipal or provincial police force to investigate an allegation of criminal misconduct lodged against an R.C.M.P. member. It may be necessary to establish special administrative machinery if outside investigators are to be employed frequently. One other alternative is to appoint a provincial commission of inquiry for special investigative problems. The importance of a thorough and impartial investigation into allegations of criminal misconduct on the part of R.C.M.P. members cannot be overstated. The prosecutorial authorities need a complete and accurate investigative record for the purpose of deciding whether or not to prosecute, and generally how best to proceed. Consequently, we believe that allowing for the use of 'outside' investigators in certain circumstances is superior to the recommendation made by the Marin Commission whereby R.C.M.P. investigators would be seconded to an attorney general. We note that the procedure we are proposing is similar to one now commonly used in England.

39. Almost all police investigations into suspected offences should be supplemented by internal R.C.M.P. investigations for purposes of disciplinary or other remedial action. We propose that whenever the R.C.M.P. is the police force undertaking the criminal investigation, a separate, special R.C.M.P. unit be directed to investigate the matter for internal (non-prosecutorial) purposes. These parallel inquiries would be for different ends, and the two investigative teams, even though both composed of R.C.M.P. members, would be responsible to different authorities for the purpose of the investigation. While R.C.M.P. members investigating the alleged statutory offence would be subject to the final authority and direction of the appropriate attorney general, the members of the special internal unit would be under the direction of the Commissioner of the Force.

40. With respect to the timing of the internal investigation, it is clear that the criminal investigation, by whichever police force it is undertaken, must take precedence. This means that the internal investigation would normally not be undertaken until the criminal investigation is substantially completed, unless exceptional circumstances warranted an immediate internal inquiry. As well, the Inspector of Police Practices, as we noted earlier, should be empowered, in certain circumstances,to conduct an independent investigation into alleged misconduct, including criminal allegations. If the Inspector decides to conduct

an investigation, any criminal investigation should take precedence, but the R.C.M.P. should halt its internal investigation for disciplinary purposes. Any new relevant information which the Inspector obtains should also be transmitted to the R.C.M.P. and the appropriate prosecutorial authorities.

41. One final matter we would like to raise in this regard is the Marin Commission recommendation that criminal investigative files not be used by the R.C.M.P. for disciplinary purposes. Their view was that the rights of members might be compromised if investigative reports which are prepared under the direction of the prosecutorial authority, and which do not contain sufficient evidence to warrant the laying of criminal charges, are used as the basis for internal disciplinary charges. We take the view that the use of these records by the R.C.M.P. does not threaten the rights of members. Indeed, investigatory reports which show a prosecution is not warranted may contain exculpatory evidence which might be missed by an internal investigation. We believe that it is imperative that the R.C.M.P. obtain as much information as possible in the course of their internal investigations, not only to ensure the just disposition of the allegation against the members involved, but also to assess better the effectiveness of R.C.M.P. policies and procedures.

WE RECOMMEND THAT the R.C.M.P. retain the primary responsibility for investigating allegations of improper, as opposed to illegal, conduct lodged against its members.

(220)

WE RECOMMEND THAT the Inspector of Police Practices be empowered to undertake an investigation of an allegation of R.C.M.P. misconduct when

(a) the complaint involves a member of the R.C.M.P. senior to all members of the internal investigation unit;

(b) the complaint involves a member of the internal investigation unit;

(c) the complaint is related to a matter which the Inspector is already investigating;

(d) the Inspector is of the opinion that it is in the public interest that the complaint be investigated by him; or

(e) the Solicitor General requests the Inspector to undertake such an investigation.

(221)

WE RECOMMEND THAT the Inspector of Police Practices be empowered to monitor the R.C.M.P.'s investigations of complaints and to evaluate the R.C.M.P.'s complaint handling procedures. The Inspector should receive copies of all formal complaints of R.C.M.P. misconduct and reports from the R.C.M.P. of the results of its investigations.

(222)

WE RECOMMEND THAT, as part of his monitoring and evaluating role, the Inspector of Police Practices inquire into and review at his own discretion or at the request of the Solicitor General any aspect of R.C.M.P. operations and administration insofar as such matters may have contributed to questionable behaviour on the part of R.C.M.P. members.

(223)

WE RECOMMEND THAT copies of all allegations of illegal conduct on the part of R.C.M.P. members, which are received by any of the bodies authorized to receive the allegations, be forwarded to the appropriate law enforcement body for investigation and concurrently to the appropriate prosecutorial authorities.

(224)

WE RECOMMEND THAT the Solicitor General adopt the necessary administrative machinery to allow provincial attorneys general to direct at their discretion members of municipal or provincial police forces to investigate an allegation of criminal misconduct lodged against an R.C.M.P. member.

(225)

WE RECOMMEND THAT whenever the R.C.M.P. is the police force undertaking the investigation into an alleged offence committed by one of its members, a separate, special R.C.M.P. investigative unit be directed to investigate the matter for internal (non-prosecutorial) matters.

(226)

WE RECOMMEND THAT an R.C.M.P. internal investigation into alleged illegal conduct not be undertaken until the regular police investigation has been substantially completed, unless there are exceptional circumstances which warrant an immediate internal inquiry.

(227)

WE RECOMMEND THAT

(a) **the Office of Inspector of Police Practices be empowered to conduct an investigation into allegations of illegal conduct;**

(b) **any criminal investigation take precedence over the Inspector's investigation;**

(c) **the R.C.M.P. halt any internal investigation that it is conducting for disciplinary purposes; and**

(d) **any relevant information discovered by the Inspector during the investigation be transmitted to the appropriate prosecutorial authorities.**

(228)

WE RECOMMEND THAT criminal investigatory files continue to be used by the R.C.M.P. for internal investigations.

(229)

D. RESOLVING ALLEGATIONS OF MISCONDUCT

42. In this section we shall be concerned with the resolution of alleged improprieties not involving illegalities. Determining whether or not an R.C.M.P. member committed a statutory offence is of course the responsibility of the prosecutorial authorities and the courts. The responsibility of the R.C.M.P. with regard to such offences, if it is the police force investigating the allegation, is to conduct a thorough and impartial investigation. Otherwise, its responsibility is to co-operate completely with the police force which is conducting the investigation.

43. We have two main concerns regarding the resolution of allegations of improper conduct lodged against the R.C.M.P. The first is that there be a just and effective resolution of the specific allegation. The second is that the report on the incident serve as a remedial management tool, i.e. that it be examined with a view to improving the quality of the management and operation of the R.C.M.P. We examine each of these matters in turn.

Resolving specific complaints

44. It has been controversial in many jurisdictions whether a body independent of the police should resolve allegations of police misconduct, or whether the determination of the validity of a complaint and any subsequent disciplinary action ought to be left in the hands of the police themselves. Some argue, for example, that the only way in which a fair result can be achieved, and seen by the public to be achieved, is for an individual or body independent of the police force to make the finding as to police misconduct. Others believe that the police themselves should be entirely responsible for deciding on the validity of the complaint and the subsequent action to be taken with regard to the complainant.

45. Our position on this difficult issue of who should determine the validity of the complaint parallels our view as to who should investigate the complaints. We believe that in the large majority of cases the responsibility for adjudicating complaints should rest with the R.C.M.P. Once it has completed the investigation of the complaint, the R.C.M.P. should advise the complainant as to whether the Force has determined the allegation to be founded, unfounded or unsubstantiated. The R.C.M.P. should also advise the complainant that if he is not satisfied with how the Force has handled his complaint, he can appeal to the Solicitor General who will be the final adjudicator. In this regard, we part company with the strongly held view within the R.C.M.P. and other police forces that the final judge in complaint matters should be the head of the Force. In Bill C-50, to which we have previously referred, which was introduced in 1978 but not passed, the traditional approach was maintained. But we feel there cannot be public confidence in the complaint procedure if the final arbiter belongs to the force whose conduct is under review. We emphasize that we have not taken the extreme position favoured by some who advocate the investigation and adjudication of complaints by a body external to the Force. In the case of an appeal from a complainant, the Solicitor General, in coming to his decision, may wish to seek the advice of the Inspector of Police Practices as to the quality and thoroughness of the R.C.M.P. investigation. The Solicitor General should also be able to ask the Inspector to re-investigate the matter if he believes this is necessary. In those cases in which the Office of the Inspector of Police Practices has done the original investigation, the R.C.M.P. should not decide on the validity of the complaint. Rather, the Inspector of Police Practices should report the results of his investigation directly to the Solicitor General who should make a decision on the matter and communicate it directly to the complainant.

46. In addition to the complainant appealing a decision by the R.C.M.P. to the Solicitor General, the Inspector of Police Practices, in his role as monitor of

the complaint handling procedures of the R.C.M.P., should also bring to the attention of the Solicitor General any specific case which, in his opinion, has not been handled or adjudicated properly by the R.C.M.P. We believe that this is an essential role for the Inspector to have. There may be cases, for example, where the complainant is anonymous or where the complainant is only an observer to the alleged misconduct and is not directly affected by it. In both of these situations, there is a need for a review body to ensure that the complaint is dealt with fairly and effectively.

Remedial action within the R.C.M.P.

47. Another important aspect of resolving a complaint of misconduct has to do with the R.C.M.P. itself and those members who were involved in the activity leading to the complaint. In Part VI, Chapter 2, we have already noted our agreement with the Marin Commission's assessment of R.C.M.P. disciplinary procedures. That Commission found the procedures too formal, the control too centralized, the members' rights ill-defined and the exercise of disciplinary authority too arbitrary. Following the Marin Commission, we also believe that the primary emphasis on correcting improper behaviour should be through remedial action, rather than by punishing individuals. Moreover, the remedial action should not be directed solely or primarily at individuals. Rather, improper behaviour may indicate faults in certain organizational practices such as inadequate supervisory patterns or poor training programmes. When remedial action is directed toward an individual, the key, in our view, is to avoid a highly formalized adversarial process. The stress should be on creatively working out joint solutions to problems rather than on punishing people.

48. Because we agree with the general principles of the Marin Commission's approach to disciplinary matters, we decided not to commit time and resources to further exploration of this subject. Consequently, we make no recommendations on R.C.M.P. disciplinary procedures with one exception concerning an issue on which the Marin Commission did not comment. We believe that the punishment given an R.C.M.P. member arising from a complaint should not necessarily be communicated to the complainant. Rather, the Force should tell the complainant that it recognizes the error, that it apologizes for the misconduct of its member, that it has taken steps to ensure that such activity will not be repeated, and that, in those cases where the complainant has suffered damage or loss, it will make an *ex gratia* payment. In addition, as part of its monitoring responsibilities of complaints handling procedures, the Office of Inspector of Police Practices should periodically review and report on the appropriateness of the disciplinary measures taken by the Force in regard to questionable conduct affecting persons outside of the R.C.M.P. We do not think that this general power of review will undermine the authority of the Commissioner of the R.C.M.P. We are not proposing that the Inspector of Police Practices have any authority to overturn the Commissioner's decisions in these matters.

WE RECOMMEND THAT the R.C.M.P. advise complainants whether it has found the allegation to be founded, unfounded, or unsubstantiated.

(230)

WE RECOMMEND THAT complainants have the right to appeal to the Solicitor General if they are not satisfied with how the R.C.M.P. has handled their complaint.

(231)

WE RECOMMEND THAT, upon request, the Inspector of Police Practices advise the Solicitor General as to the quality and thoroughness of any investigation of a complaint undertaken by the R.C.M.P. The Inspector of Police Practices should also re-investigate a complaint at the request of the Solicitor General.

(232)

WE RECOMMEND THAT the Inspector of Police Practices report directly to the Solicitor General the results of his office's investigations of complaints alleging misconduct.

(233)

WE RECOMMEND THAT the Inspector of Police Practices, as part of his role of monitoring the complaint handling procedures of the R.C.M.P., bring to the attention of the Solicitor General any specific complaints which, in the opinion of the Inspector, have not been properly handled by the R.C.M.P.

(234)

WE RECOMMEND THAT any punishment given an R.C.M.P. member arising from a complaint not necessarily be communicated to the complainant. Rather, the Force should tell the complainant that it recognizes the error, that it apologizes for the misconduct of its member, that it has taken steps to ensure that the activity will not be repeated, and that in those cases where the complainant has suffered damage or loss it will make an *ex gratia* payment.

(235)

WE RECOMMEND THAT the Inspector of Police Practices periodically review and report on the appropriateness of the disciplinary measures taken by the R.C.M.P. in regard to questionable conduct on the part of a member which affects the public.

(236)

E. THE OFFICE OF INSPECTOR OF POLICE PRACTICES

49. Our major recommendation in this chapter calls for the establishment of an external review body which we have named the Office of Inspector of Police Practices. We have discussed the need for such a body and its role at several points already. In sum, it should have two basic functions: first, it should have the power in exceptional circumstances to investigate complaints of R.C.M.P. wrongdoing and make recommendations to the Solicitor General; second, it should monitor the investigations of alleged misconduct undertaken by the R.C.M.P. itself and evaluate the R.C.M.P.'s complaints handling procedures. The functions, responsibilities and staffing arrangements which we are recommending for the Office of Inspector of Police Practices closely parallel those of the Office of Professional Responsibility recently established in the Attorney

General's Department in the United States.[9] The system we are proposing places primary responsibility for investigating and disposing of complaints with the R.C.M.P. We believe this is necessary if the Force is to take seriously the need to make changes on a continuing basis to reduce the likelihood of future misconduct and if it is to continue to be responsible for ensuring a proper standard of conduct on the part of its members. The Inspector of Police Practices would act as a kind of safety valve in this system. We know from the evidence received in our hearings that the R.C.M.P. does not always investigate itself adequately, and consequently, in our opinion, there is room for skepticism about any claims that the R.C.M.P. does not need the intervention of 'outsiders' in handling certain complaints against it. We also believe that an outside body can be an important repository for complaints of R.C.M.P. misconduct, especially in those instances where someone from either inside or outside the organization might fear retaliation if he made the complaint directly to the Force.

50. Our recommendation of an external review body is similar to one made by the Marin Commission, which, as one of its pivotal recommendations, called for the establishment of a "Federal Police Ombudsman". The Marin Commission preferred an ombudsman specializing in police matters because such a person would soon acquire a detailed and intimate knowledge of the Force and its members, and thereby dispel fears expressed by R.C.M.P. members that an 'outsider' would lack an understanding of the particular problems the R.C.M.P. have to face. This central proposal was not fully accepted by the government of the day. Instead, in 1978, Bill C-43 proposed the establishment of an Ombudsman who would oversee all federal government departments and agencies, and not simply the R.C.M.P. The Bill died on the order paper that year.

51. We believe the Marin Commission's proposal of a specialized police Ombudsman remains fundamentally valid. The police function is intrinsically different from other administrative functions in the federal Public Service, and the problems which arise between members of the public and the R.C.M.P. are of a special character. Unlike most federal civil servants, R.C.M.P. members exercise powers of arrest and search and seizure. They are occasionally obliged to use physical force on potential complainants in the course of their duties. R.C.M.P. members, by the nature of their tasks, are more apt than any other federal government employees (with the possible exception of members of the security intelligence agency) to infringe upon fundamental rights and freedoms, especially those relating to due process of law. Consequently, the problems R.C.M.P. members face in the course of their duties are quite distinct from those faced by most other federal civil servants. We therefore see

[9] The Office of Professional Responsibility was established on December 9, 1975, by Attorney General Edward H. Levi. The Office was designed to oversee and, if necessary, investigate "conduct by a Department employee that may be in violation of law, of Department regulations or orders, or of applicable standards of conduct." 28 C.F.R. Section O.39 *et seq.* (1976).

the need for a continuing review of police activity by an external body which can acquire an intimate understanding of the problems involved in police work.

52. While we support the Marin Commission's proposal for a specialized external review body for the R.C.M.P., and perhaps for other federal police forces, we believe the institution of the Ombudsman would not go far enough in meeting the needs we have identified. Our view is that the work of an external review body should go beyond the traditional role of the Ombudsman of responding to individual complaints and should involve a *continuing* review of the adequacy of the R.C.M.P.'s practices. Such matters, we feel, should be within the mandate of an external body charged not only with reviewing the R.C.M.P.'s disposition of complaints, but also with identifying problems within the R.C.M.P. which may have contributed to the incidents in question.

53. There is a second reason for our preferring the Office of Inspector for Police Practices to the Marin Commission's police Ombudsman. An Ombudsman is usually an officer of Parliament and is therefore independent of any government department. In contrast, we believe that there are real advantages to having the Office of Inspector of Police Practices as part of the Solicitor General's Department. First, the evidence we have heard concerning several allegations of R.C.M.P. misconduct — for example, the North Star Inn incident and the surreptitious entry into the A.P.L.Q. premises — suggests that it would have been highly advantageous for a Solicitor General to have a convenient means of launching an investigation of the R.C.M.P. using investigators attached to his office but not part of the Force. Second, having the Inspector of Police Practices within the Solicitor General's Department will give the Minister and his Deputy another source of information and advice about the R.C.M.P.'s handling of complaints. It is clear from the evidence we have heard that past Solicitors General knew far too little about the R.C.M.P., and did not have sufficient means for finding out enough to even ask the right questions. The Inspector of Police Practices should be one way of remedying this weakness.

54. In making this recommendation, we realize that we are departing from the organizational arrangements we recommended in Part VIII, Chapter 2 for the Advisory Council on Security Intelligence, an agency with similar functions to those of the Inspector of Police Practices. We do so because we see a fundamental difference in the manner in which a police force and a security intelligence agency should relate to government. There is far less danger than in the case of the security intelligence agency that the Solicitor General will himself be a party to R.C.M.P. misconduct because of the quasi-independence the police should enjoy in terms of conducting investigations and making arrests. (We shall return to this theme in Chapter 4 of this part of our Report.) In contrast, the Solicitor General, under the system we are proposing for directing the security intelligence agency, would be actively involved in the "targetting" decisions to be made by the agency and therefore, would be more likely to risk becoming a participant in wrongdoing.

55. Still, we can envision situations where the Solicitor General might use the Office of Inspector of Police Practices improperly. We believe that there are

several ways in which the position of Inspector of Police Practices should be structured to avoid such possible abuses. Specifically, we propose that the Inspector be an Order-in-Council appointment for a fixed five-year term, that no Inspector should serve for more than 10 years, and that the Inspector can be dismissed only for 'cause'. (We have defined 'cause' in Part VI, Chapter 2 to include mental or physical incapacity, misbehaviour, bankruptcy or insolvency, or failure to comply with the provisions of the Act establishing the position of the Director General.) Further, the statute establishing his agency should give the Inspector the authority to launch any investigation he deems necessary to fulfill his mandate. Thus, the Solicitor General should not be able to prevent the Inspector from investigating a matter in which the Solicitor General might be implicated. Finally, it should be understood that the Inspector would have access to the Prime Minister on matters where the integrity of the Solicitor General is at question. By structuring the Office of Inspector of Police Practices in this way, we believe that the Office can be placed within the Solicitor General's Department but still enjoy a quasi-independent relationship with the Minister and his officials.

56. The Office of Inspector of Police Practices should have a small staff with experience in the field of police administration or criminal justice. The Inspector should be a lawyer who has at least 10 years standing at the Bar. The permanent staff members should focus primarily on the monitoring and review role we have defined above. Their role in investigation should be limited to preliminary inquiries to determine the need for an investigation. When the Inspector decides to undertake a special investigation, he should obtain on secondment, experienced police investigators from different police forces and other experts as required. This arrangement will ensure that the Inspector does not undertake investigations merely in order to keep permanent staff occupied. More importantly, the Inspector and his assistants will not have a strong vested interest in the outcome of investigations conducted by the seconded staff of investigators, and, consequently, will be a more reliable source of advice to the Solicitor General.

57. A final aspect of the Office of Inspector of Police Practices concerns the submission of reports. The Inspector should report regularly to the Solicitor General on the results of investigations of serious concern, and he should report annually to the Solicitor General on significant activities of his office during the year, including recommendations calling for changes in R.C.M.P. policies and procedures and the Force's response to these. This annual report should also be tabled in Parliament.

WE RECOMMEND THAT the Office of Inspector of Police Practices be established within the Department of Solicitor General and that the Inspector report directly to the Solicitor General.

(237)

WE RECOMMEND THAT the Inspector of Police Practices be an Order-in-Council appointment and that the following conditions of employment be included in the statute establishing the office:

(a) the Inspector should be subject to dismissal only for 'cause';

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

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

(d) no Inspector should serve for more than 10 years.

(238)

WE RECOMMEND THAT the Inspector of Police Practices have access to the Prime Minister on matters concerning improper behaviour on the part of the Solicitor General in the performance of his duties vis-à-vis the R.C.M.P.

(239)

WE RECOMMEND THAT the Inspector of Police Practices be a lawyer who has at least 10 years standing at the Bar, and that he have a small staff with experience in the field of police administration or criminal justice.

(240)

WE RECOMMEND THAT the Inspector of Police Practices be empowered to obtain on secondment experienced police investigators and other experts to conduct investigations, when appropriate, of misconduct on the part of R.C.M.P. members.

(241)

WE RECOMMEND THAT the Inspector of Police Practices report regularly to the Solicitor General on the results of investigations and annually to the Solicitor General on significant activities of his Office during the year. The Solicitor General should table this report in Parliament.

(242)

F. THE PROVINCIAL ROLE

58. Before outlining a role for the provinces in resolving allegations against the R.C.M.P., we shall examine briefly the current developments in the courts and define what we believe to be the present limits on provincial power over the R.C.M.P. and its contract policing role. The relevant provincial power is section 92(14) of the B.N.A. Act, which grants to the provinces power over "... the Administration of Justice in the Province...". This has traditionally been thought to include not only the establishment and administration of provincial courts, but also the enforcement of law within the province. The scope of the power of the provincial attorney general in regard to law enforcement does not seem to be in doubt so far as the direction and control of provincially constituted police forces are concerned. But where a federal agency, the R.C.M.P., carries out the provincial policing functions under contract, there are significant constitutional limitations on the control the provinces may exercise over it. There are also constitutional limits on provincial power in relation to the R.C.M.P.'s federal policing role.

59. Two recent court decisions have dealt specifically with the limits to provincial authority over the R.C.M.P. The first case is the 1978 decision of

the Supreme Court of Canada in *Attorney General of the Province of Quebec and Keable* v. *Attorney General of Canada et al.*[10] Specifically, the constitutional question addressed was:

> If members of a federal institution, namely the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the Administration of Justice in the province have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to enquire into:
>
> (a) the federal institution, namely, the Royal Canadian Mounted Police;
>
> (b) the rules, policies and procedures governing the members of the institution who are involved;
>
> (c) the operations, policies and management of the institution;
>
> (d) the management, operations, policies and procedures of the security service of the Royal Canadian Mounted Police;
>
> and to make recommendations for the prevention of the commission of said acts in the future?

60. Mr. Justice Pigeon, speaking for the majority of the Court, answered this question in the negative. He stated:

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the Force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.

61. Thus, while the provincial authorities may investigate and prosecute offences committed by members of the R.C.M.P., they cannot expand their focus to include matters relating to the administration and management of the Force. This decision by itself would appear to suggest that provincial boards and commissions are not constitutionally competent to investigate the non-criminal aspects of public complaints against the R.C.M.P., even when the R.C.M.P. is performing a provincial-policing service in the contract provinces. Attempts by a provincial police commission to inquire into policies and procedures which may have given rise to a series of complaints, for example, may well be unconstitutional in light of the *Keable* decision. The same may be true of attempts by a provincial commission to order the R.C.M.P. to conduct an internal investigation into allegations which come to the attention of the provincial commission.

62. A recent Alberta case confirmed these limitations on provincial powers to inquire into public complaints against the R.C.M.P. The Alberta Court of Appeal, in *The Attorney General of Alberta and the Law Enforcement Appeal Board* v. *Constable K.W. Putnam and Constable M.G.C. Cramer and the*

[10] [1979] 1 S.C.R. 218.

Attorney General of Canada,[11] held that section 33 of the Alberta Police Act, which established a procedure for the investigation and review of complaints against all police forces in the province, was *ultra vires* the province in so far as it applied to members of the R.C.M.P. This section purported, among other things, to empower the Alberta Law Enforcement Appeal Board to hear an appeal by the complainant from the decision made by the R.C.M.P. as to the merits of the complaint. It also purported to permit the Board to conduct its own investigation into any complaint, and to conduct an investigation into any matter relating to the discipline or conduct of any member of a police force. These provisions were held to be invalid insofar as they would interfere with the internal management of the R.C.M.P., and insofar as they would conflict with valid and subsisting federal legislation and regulations. This decision is now being appealed to the Supreme Court of Canada.

63. The result of these decisions has been to cast serious doubt on the validity of provincial machinery for handling public complaints against the R.C.M.P., even when the Force is carrying out a provincial policing function under the direction of a provincial attorney general. One must now assume that some of the central features of these provincial schemes no longer apply to the R.C.M.P.

64. We believe that the provinces have a legitimate role to play in the handling of public complaints against the R.C.M.P. They would like to provide a uniform system of redress for aggrieved citizens regardless of whether the complaint concerns the R.C.M.P. or another provincially constituted police force. The police boards have proved to be valuable instruments of provincial oversight and control. The provincial attorneys general have a constitutional duty to oversee the effectiveness of provincial police operations, including those undertaken by the R.C.M.P. How are these concerns to be reconciled with the responsibility of the Solicitor General of Canada to direct the control and management of the federal agency under his supervision, the R.C.M.P.?

65. As we said earlier, the investigation and adjudication of allegations of criminal misconduct on the part of R.C.M.P. members should continue to be the responsibility of the provincial attorneys general, as a matter of the administration of justice in the provinces. This accords with the existing judicial interpretation of Canada's Constitution. With respect to the non-criminal aspects of complaints against the R.C.M.P. in their provincial policing role, we feel that effective communication and co-operation between the provincial attorneys general and police boards on the one hand, and the R.C.M.P., the Inspector of Police Practices, and the federal Solicitor General on the other, are essential. In the remainder of this section, we indicate where co-operation is required and how it might be obtained. Given the recent court decisions cited

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[11] [1980] 22 A.R. 510, [1980] 5 W.W.R. 83. [Commissioners' Note: Since delivery of this Report the Supreme Court of Canada, on May 28, 1981, delivered reasons for judgment in dismissing the appeal to it, and upholding the judgment of the Alberta Court of Appeal. The reasons are not yet reported in the law reports.]

above, it is incumbent on the federal government to take many of the required initiatives to ensure that provincial bodies play a significant role in the complaints system.

66. One area of potential co-operation is in the sharing of information about complaints of R.C.M.P. misconduct. The provincial attorneys general and the provincial police boards should be advised by the R.C.M.P. and the Inspector of Police Practices of all serious complaints in their respective provinces, which were not filed with the provincial police boards. They should be informed of the disposition of all allegations of R.C.M.P. misconduct within their provinces, and should receive the statistical analyses of complaints compiled by the R.C.M.P. subject to the restrictions which we are proposing in Part V, Chapter 8, when the R.C.M.P. are carrying out duties relating to the mandate of the security intelligence agency. Requests for any information by provincial attorneys general and police boards respecting allegations against R.C.M.P. members should be met fully by the Force, by the Inspector of Police Practices and by the Solicitor General.

67. Another area where co-operation is required concerns the actual investigations and inquiries of alleged misconduct. As we understand the present law, provincial police boards and special Commissions of Inquiry are not constitutionally barred from inquiring into instances of criminal misconduct, violations of the rights of citizens, or damage to property. The only limitation is that the scope of the inquiry may not include the internal administration and management of the R.C.M.P. Provincial inquiries, if conducted, should, to the extent of their constitutionally proper scope, receive the full co-operation of the R.C.M.P., the Inspector and the Solicitor General.

68. Alternatively, a provincial police board or commission should be able to request an investigation by the R.C.M.P. or refer a matter to the Inspector of Police Practices if the commission or board deems it to be unusually important or sensitive. The R.C.M.P. and the Inspector, while they should not be obliged to comply with such requests, ought to accommodate them wherever possible. It would also be highly desirable for the Inspector to obtain on secondment, staff from provincial or municipal bodies when his office conducts investigations of alleged misconduct. As well, the Inspector should normally consult provincial officials on recommendations he proposes to make arising out of a serious allegation made in that province. It is especially important that the provinces have an opportunity to comment on and influence recommendations which concern the management of the Force and which are relevant to complaints occurring in the provinces.

69. One way in which the Solicitor General might facilitate the necessary co-operation and communication amongst federal and provincial ministers and officials in this area is to establish a regular forum for discussing mutual problems and for sharing information on handling complaints. Such a forum, which might be held annually or perhaps semi-annually, might lead to more formalized structures and procedures for ensuring federal-provincial co-operation. Without such co-operation, the system for handling complaints of R.C.M.P. members, proposed in this chapter, will not be as effective as it could be.

WE RECOMMEND THAT, subject to the restrictions which we have proposed when the R.C.M.P. are carrying out duties relating to the mandate of the security intelligence agency, the R.C.M.P. and the Inspector of Police Practices provide each provincial attorney general and each provincial police board with the following:

(a) information about all serious complaints in their province;

(b) reports on the disposition of such complaints;

(c) statistical analyses of complaints regarding R.C.M.P. misconduct.

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WE RECOMMEND THAT the Inspector of Police Practices should

(a) obtain on secondment staff from provincial police forces, police boards, or appropriate provincial government departments when forming task forces to investigate allegations of R.C.M.P. misconduct;

(b) normally consult the appropriate provincial officials on recommendations he proposes to make arising out of a serious allegation in that province.

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WE RECOMMEND THAT the Solicitor General

(a) initiate the establishment of a regular forum for Provincial and Federal ministers and officials to discuss problems and share information concerning complaint handling procedures; and

(b) ensure that provincial inquiries into allegations of R.C.M.P. misconduct, to the extent of their constitutionally proper scope, receive the full co-operation of the R.C.M.P. and the Inspector of Police Practices.

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CHAPTER 3

OBTAINING LEGAL ADVICE AND DIRECTION

A. ROLE OF THE LEGAL BRANCH

1. Our mandate instructs us "to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law...", and further "to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest". We consider that advice with respect to legal services falls squarely within those instructions.

2. Prior to 1960 the R.C.M.P. apparently did not feel the need for 'in-house' legal advice. They found it satisfactory to obtain their legal advice from the Department of Justice or from the appropriate provincial attorney general, depending on the circumstances. Although some members of the Force, most notably former Commissioner Lindsay, had graduated from law school, they did not act officially in the role of legal advisers.

3. In the 1950s, as part of its university education programme, the Force paid for 10 of its members to acquire law degrees. Some of the graduates under this programme comprised the Legal Section of the R.C.M.P. which was set up in 1960. They did not article, were not admitted to the Bar of a Province, and hence were not, in the normal sense of the term, 'lawyers'.

4. The Royal Commission on Government Organization (1962) (Glassco Commission), chaired by Mr. Grant Glassco, reported that in 1961 there were three legally trained officers in the R.C.M.P. engaged in legal work and that they served much as did departmental solicitors in other government departments. The Commission pointed out that those officers were not recruited as solicitors, but sent by the Force to law school. Members of the Force graduating from law school were assigned to legal work at Headquarters, and after three to five years were promoted to non-legal positions. It was also pointed out that those officers did not article and were not admitted to the Bar of any province.

5. The Glassco Commission recommended that there be an integrated legal service for the government, with several exceptions, those being:

- Judge Advocate General;
- Legal Division of the Department of External Affairs;
- Legal Branch of Taxation, Department of National Revenue;
- Pensions Advocates in the Department of Veteran's Affairs;
- Legal Officers in the R.C.M.P.

6. In the Rivard affair, which gave rise to the Commission[1] of 1965, chaired by Chief Justice Frédéric Dorion, the fledgling Legal Section gave a legal opinion to the Commissioner of the R.C.M.P. as to the sufficiency of evidence to warrant a successful prosecution of Raymond Denis, one of the participants in the events that gave rise to the Inquiry. That advice was adopted by the Commissioner of the R.C.M.P. in his verbal report to the Minister of Justice. The Minister of Justice acted upon the recommendations in that verbal report without consulting his departmental lawyers. Chief Justice Dorion commented unfavourably on the advice given by the Commissioner to the Minister, and went on to say:

> I do not believe it to be the responsibility of the R.C.M.P. officers, no matter how great their experience, to advise the Minister of Justice in regard to the decision he should take in respect to a denunciation, nor in regard to the probable results of a charge laid before a Court. Their duty is rather to seek out all the facts and leave the decision to the Minister.[2]

7. The rebuke had no apparent effect on the development of the R.C.M.P.'s 'in-house' legal services. The then Commissioner, Mr. McClellan, considered that he had not been giving legal advice to the Minister, but only a police officer's advice on the stage reached in the police investigation.

8. In 1966, with the creation of the new Department of the Solicitor General, responsibility for the R.C.M.P. was transferred from the Minister of Justice to the Solicitor General. The government had accepted the basic recommendation of the Glassco Commission that most of the government's legal services be integrated in the Department of Justice, and, in keeping with that decision, lawyers were assigned by the Department of Justice to provide legal services to the Solicitor General's Department. This appears to have had no measurable impact on the course of development of the in-house legal services of the R.C.M.P. Indeed, in 1966 the Legal Section was upgraded to branch status. The Force continued its policy of sending selected members to university to obtain law degrees. It also continued its policy of not allowing those law graduates to article with a practising lawyer, thus denying them the opportunity to become members of a provincial Bar.

9. The Glassco Commission recommended that a Department of Justice lawyer be assigned to the R.C.M.P. to "head up the legal work" of the Legal Section, but this recommendation was virtually ignored by the R.C.M.P. The failure to implement it appears not to have been of concern to the Department of Justice, which assumed that the Legal Branch was providing advice to the Force only on internal matters, such as the contents of R.C.M.P. manuals, and that whenever the Force required an opinion, it obtained it from the Department of Justice or from the appropriate provincial attorney general. After the Rivard affair, nothing of significance relating to the Legal Branch would appear to have come to the attention of the Department of Justice.

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[1] The Dorion Commission was to investigate fully into allegations about any improper inducements having been offered to, or improper pressures having been brought to bear on, counsel acting upon application for the extradition of one Lucien Rivard and all relevant circumstances connected therewith.

[2] Report of the Commission, p. 118.

10. From 1960 to 1974 inclusive, the Legal Branch grew very little: the number of law graduates in the Force increased from 12 to 17; 22 members graduated in law and 17 law graduates left the Force. The net gain of five law graduates was not enough to staff the Legal Branch, which was being saddled with an increasing number of responsibilities. By 1975 the problem had become acute and the R.C.M.P. sought assistance from the Department of Justice. They requested that Department to second a civilian lawyer to assist the Legal Branch. No mention was made, however, of that lawyer 'heading up' the Legal Branch, and there is no record of a reply from the Department of Justice. Nor was a lawyer seconded.

11. In response to the disclosure of the events which gave rise to the creation of this Commission, it was determined by the Commissioner of the R.C.M.P. and the then Solicitor General, Mr. Fox, that certain steps would have to be taken to ensure that the Security Service of the R.C.M.P. would operate within the law. One of the steps envisaged was to request the assignment of a Department of Justice lawyer to the R.C.M.P. to assist the Security Service with some of its legal problems.

12. After some discussion between the Department of Justice and the Security Service, a formal request was made on November 20, 1977, from the Director General of the Security Service to the Deputy Minister of Justice and the Deputy Solicitor General for the assignment of a Department of Justice lawyer to the Security Service. On November 29, 1977 the Solicitor General advised the Justice and Legal Affairs Committee of the House of Commons as follows:

> There was, in March of 1977, set up by the Director General of Security Services the Operational and Priorities Review Committee which has as its mandate to ensure that the new operations are not only within the mandate given to the Security Service by the government but also within the law. It also has the mandate of reviewing operations that have gone on in the previous year to ensure once again that they come within the mandate and are within the framework of the law.[3]

The Minister said that three additional steps had been taken and explained the one relevant to our considerations as follows:

> . . . the Security Service Operational and Priorities Review Committee has been reinforced, so to speak, by the addition of two members, one of whom is a senior officer with current criminal operations responsibility for the Force, the other is a lawyer seconded from the Department of Justice. This is with a view to ensuring that all operations are within the mandate and are also within the scope of the law.[4]

A Department of Justice lawyer, R. Watson, Q.C., who was at that time the Director of Legal Services in the Solicitor General's department, was assigned to the R.C.M.P. on December 1, 1977. He was not given any guidelines or terms of reference except for what was contained in the Minister's statement.

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[3] Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, November 29, 1977, p. 87.

[4] *Ibid.*

Discussion took place between the R.C.M.P. and the Department of Justice over the next year and finally, on December 19, 1978, the terms of reference were settled. By these terms his duties were not confined to the Security Service, but were extended to the whole of the R.C.M.P.

13. From the date of the Glassco Commission until 1980, the Legal Branch had grown to nine members, all with law degrees. They continued to be assigned to the Legal Branch for three to five years, usually immediately after receiving their degrees, and then to non-legal duties. On occasion they were re-assigned to the Legal Branch in a more senior capacity later in their careers. Only three members had been admitted to the Bar of a province and thus were the only ones legally qualified to practise law. (Of these three, one member retired from the Force, became a member of a provincial Bar and subsequently re-enlisted.)

14. The most recent objective and goals of the Legal Branch were set out in the R.C.M.P. Policies, Objectives and Goals for 1979 as follows:

Objective:

> To provide legal advice and services to Commissioner, Deputy Commissioners, Directorates, Branches and Sections in Headquarters.

Goals:

- Conduct research and submit reasoned opinions on legal problems; interpret statutes, contracts, leases, and give legal opinions or direction on matters referred in writing or verbally by Senior Management, Directorates, Branches and Sections.
- Assist in redrafting the R.C.M.P. Act, Regulations and Orders, and in restructuring administrative procedures in accordance with the Marin Commission recommendations.
- Write selected articles for publication; serve on committees inside and outside Headquarters; attend conferences, meetings, seminars, etc.
- Respond to requests for lecturing to internal training courses as well as to outside organizations as required, covering the aspects of criminal and civil law, their application and interpretation and law enforcement in general.

No facet of legal services appears to be missing from this mandate.

15. The relevant paragraphs of the terms of reference for the Department of Justice lawyer assigned to the R.C.M.P. can be summarized as follows:

(a) The R.C.M.P. may look to the Department of Justice for legal advice, and when acting as a provincial police force to the appropriate provincial attorney general.

(b) A legal opinion obtained from other than the above provides no protection "within the framework of responsible government".

(c) In all matters, other than certain specified areas where it should seek legal advice from a provincial attorney general, the Force "should seek its legal advice from the Minister of Justice".

(d) The Legal Branch should channel all requests for a legal opinion through the Department of Justice counsel assigned to the R.C.M.P.

(e) The Legal Branch advises the Commissioner and the Force "in relation to internal operational matters which include a variety of considerations as well as matters of law".

(f) The Legal Branch may assist "in the identification of issues and problems which require (or do not require) a legal opinion from the Minister of Justice or a provincial attorney general".

16. It is clear from the terms of reference that the Department of Justice lawyer was not to fulfill the role recommended by the Glassco Commission, to "head up the legal work" of the Legal Branch. It is also clear that the Department of Justice lawyer was not given any supervisory role over the Legal Branch. Any such role does not appear to have been contemplated by either the Department of Justice or the R.C.M.P.

17. The terms of reference imply that a legal opinion obtained from an attorney general provides "protection" to a member of the Force "within the framework of responsible government". This implication arises from the provision which states that any other opinion does not afford such protection. We understand that the protection allegedly afforded arises out of constitutional convention and the consequence of such protection is that the Government of Canada will do whatever it can to ensure that a member of the Force does not suffer personally if he acts in conformity with the opinion. For example, the government will pay the legal fees of a member who has to defend himself as a result of an activity based on a legal opinion of an attorney general, even if that legal opinion is found to be wrong.

18. The paragraphs of the terms of reference which deal with the relationship between the Justice counsel and the Legal Branch are instructive in their lack of clarity. The extent to which the Legal Branch is to provide legal advice to the Commissioner and the Force is not spelled out, nor is there any indication as to when the Legal Branch should seek an opinion from the Justice counsel. The role of the Legal Branch set out in the 1979 Policies, Objectives and Goals, and the role of the Department of Justice spelled out in the terms of reference of the Department of Justice lawyer, are clearly not compatible. The former provides that the Legal Branch is to "give legal opinions or direction" to "Management, Directorates, Branches and Sections". The latter provides that the R.C.M.P. "should seek its legal advice from the Minister of Justice" or "the appropriate provincial attorney general" and "the Legal Branch should . . . channel all requests for a legal opinion through the Justice counsel...".

19. This, then, was the status of the Legal Branch in 1980. However, in late 1979 the Commissioner of the R.C.M.P. decided that it was not desirable to maintain a Legal Branch within the R.C.M.P. There was a concern on his part that the Legal Branch had been providing legal advice that should have been obtained from the Department of Justice. Since the members of the Legal Branch did not have the status of government legal advisers it was not proper, in his opinion, for the R.C.M.P. to rely on this advice. He initiated discussions with the Department of Justice with the aim of eliminating the Legal Branch

and having all legal services provided by Department of Justice lawyers assigned to the R.C.M.P. We understand that the plans include provision for the secondment of legally trained R.C.M.P. members to assist those Department of Justice lawyers. It is our view that this is precisely the direction which should be followed.

B. GLASSCO COMMISSION'S POSITION

20. We should now discuss briefly the current plans for the Legal Branch in the light of the recommendations of the Glassco Commission. In Part VI, Chapter 2, section F, dealing with legal advice for the security intelligence agency, we set out the Glassco Commission's general position with respect to the provision of legal advice. That Commission recommended that the R.C.M.P. Legal Branch be one of the exceptions to the general rule of integration of the government's legal services. They stated as their reason:

> ...The nature of the work may be such as to require a close identification of the legal staff with officials who are administering the law: to sever this organic connection would, as has been said, cause the whole function to "bleed". This is the relevant consideration in recommending the partial dissociation from the proposed integrated system of... the lawyers in the R.C.M.P.[5]

That Commission went further, however, to propose "that a representative of the integrated legal services be seconded to the Force to head up the legal work". The Commission added that "The existing pattern of legal training and rotation would not be disturbed, but more effective liaison with the Department of Justice would be maintained".[6]

21. An organization the size of the R.C.M.P., whose principal function is law enforcement, requires a full range of legal services. Not only must it have legal advice and assistance on all those matters common to any government department or agency, such as contracts for goods and services and real estate transactions; it also needs specialized legal advice with respect to its functional role as a law enforcement agency. As to legal advice essentially unrelated to the functional role of the Force, e.g. property law, commercial law, etc., we can see no reason why such advice should not be provided by the Department of Justice in precisely the same fashion as it is provided generally to other departments and agencies.

22. In our view, when the Glassco Commission spoke about the necessity for "a close identification of the legal staff with the officials who are administering the law" it had in mind the legal advice required in relation to the functional role of the Force. We agree with the Glassco Commission that the whole function must not be allowed to "bleed", if what this means is that the legal advice will be inadequate unless those providing it are totally familiar with the context within which the advice has to be applied. We would add that the same is true of all legal advice. What we think is unique about the R.C.M.P. is the

[5] Commission Report, Vol. 2, p. 413.

[6] Commission Report, Vol. 2, p. 419.

depth and range of the knowledge which the lawyer must have. In other words, a lawyer providing legal advice to the R.C.M.P. in matters relating to law enforcement must be knowledgeable about law enforcement generally as well as all aspects of the Force's activities in that field. This does not imply, however, that such lawyers need to be members of the R.C.M.P.

23. We pointed out earlier, in discussing legal advice for a security intelligence agency, the problems associated with the provision of legal advice by lawyers who are on the staff of the department or agency that they are advising. The essential problem is that independence, which is a prerequisite to the giving of sound legal advice, may be lost. Against this must be balanced the requirement, also mentioned above, that the lawyer must have extensive general knowledge about the field in which he or she is providing the legal advice. We believe that the plan presently being developed between the R.C.M.P. and the Department of Justice will provide the benefits of both independence and extensive knowledge and experience in the field. We also believe that it is consistent with the principles underlying the recommendations of the Glassco Commission.

24. Earlier in this Report, in discussing the legal services for the security intelligence agency we pointed out that it is the duty of a Department of Justice counsel to report immediately to the Deputy Attorney General of Canada any knowledge he obtains with respect to past or potential illegalities by members of the agency. In our opinion the same reasoning and result apply to the Department of Justice counsel who are legal advisers to the Force. Such a duty might be considered by some to be incompatible with the counsel's responsibility towards his client. We feel that, on the contrary, the two are entirely consistent in that it is the counsel's duty to promote, at all times, the interests of the Force as a whole, and adherence to the law is clearly in its best interests.

25. As indicated earlier, a senior Department of Justice lawyer with a great deal of experience and expertise in the area of criminal law enforcement was assigned to the R.C.M.P. in November 1977. It is obvious that a number of lawyers will have to be assigned by the Department of Justice to the R.C.M.P. and we believe it is imperative that among them there be several with those same qualities of experience and expertise.

26. Our approval of the current plan includes an endorsement of the proposal to second legally trained R.C.M.P. members with several years of regular police duties to assist the Department of Justice lawyers. We consider, as did the Glassco Commission, that such an element is essential to the provision of sound legal advice to the R.C.M.P. Those members will assist immeasurably in interpreting and explaining the problems of the Force to the Justice lawyers when legal advice is being sought. We prefer the concept of their being seconded rather than that the Legal Branch be retained. If the Legal Branch were to be retained, there would be a danger of its drifting towards its former role.

27. There is a further point with respect to the use of law graduates by the R.C.M.P. We understand that it is the intention of the R.C.M.P. to increase

the number of law graduates among its regular members and that this will be accomplished primarily through recruitment of law graduates after graduation. We applaud this recruiting of more highly educated persons, but we wish to inject a note of caution with respect to the use of such law graduates in any positions where they are expected to provide some sort of legal advice.

28. No law graduate can hope to become or remain competent as a lawyer unless he is active full-time in the practice of law, has the use of a good law library and has the opportunity to mix daily with other lawyers to discuss legal problems with them. The legally trained member of the Force who is assigned to a post without the benefit of all of those conditions and who has, in addition, other duties to perform, would be woefully inept in providing proper legal advice. That is not to say that the forensic skills acquired by that member will be lost to the Force. Clearly, he will be more capable of analyzing difficult problems than he would otherwise have been: this is the outstanding benefit derived from legal training. Even more important, he will be more aware of legal problems and will see those circumstances in which they are likely to arise. That, however, is not the same thing as providing the legal solution to the problems, which must be left to the full-time legal practitioners.

29. We also wish to enter a *caveat* with respect to the intention of the Force to assign members with law degrees to represent other members who have been charged with breaches of discipline. We see this as an entirely appropriate measure provided that the member law graduate is acting under the general supervision of a Department of Justice counsel. In our opinion, if the matter is sufficiently serious to require an advocate and there is legal advice to be given, it must be given under the supervision of a qualified and experienced lawyer.

C. RELATIONSHIP OF R.C.M.P. TO PROVINCIAL ATTORNEYS GENERAL

30. In carrying out certain of its responsibilities the R.C.M.P. ought to obtain its legal advice from a provincial attorney general. In our view, as a general rule the legal advice with respect to problems of a typically departmental nature should be sought from the federal and not the provincial level. This should be so regardless of whether it relates to services provided under provincial or municipal contracts or whether it relates to the federal policing role. However, in the law enforcement area the situation is different. Here, if the advice concerns a matter being performed under a municipal or provincial contract it must be sought from the attorney general of the province in which the matter occurs. If it does not so fall within a provincial or municipal contract then the legal advice must be sought at the federal level. If the R.C.M.P. is in doubt as to which governmental level is the appropriate one from which to seek its advice, it should, as a federal government agency, seek the opinion of the federal Attorney General and abide by that opinion.

WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice relating to matters arising out of its administrative activities as an agency of the Government of Canada from the federal Department of Justice.

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WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice with respect to its federal law enforcement role from the federal Department of Justice, and with respect to its law enforcement role pursuant to a provincial or municipal contract from the appropriate provincial attorney general.

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WE RECOMMEND THAT if the R.C.M.P. is in doubt as to which governmental level is the appropriate one from which to seek its legal advice in a particular matter it should get an opinion from the federal Department of Justice as to which is the appropriate level and abide by that opinion.

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WE RECOMMEND THAT the Department of Justice assign sufficient counsel to satisfy the requirements of the R.C.M.P.

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WE RECOMMEND THAT there be no Legal Branch of the R.C.M.P.

(250)

WE RECOMMEND THAT THE R.C.M.P. continue to have within the Force regular members with law degrees and to assign a sufficient number of such members to work with the Department of Justice counsel to ensure that the R.C.M.P.'s needs are explained and interpreted to those counsel.

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WE RECOMMEND THAT no member of the Force with a law degree be assigned to any duty requiring him to give a legal opinion to another member of the Force, with the exception of the normal assistance given by any superior to a subordinate in the course of the investigation of an alleged offence.

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WE RECOMMEND THAT members with law degrees who are assigned to represent other members in disciplinary proceedings be supervised by Department of Justice counsel.

(253)

WE RECOMMEND THAT the Department of Justice counsel assigned to the Force have a specific duty to report to the Deputy Attorney General of Canada any past or future acts which he believes may be unlawful, of any past or present member of the Force.

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CHAPTER 4

MINISTERIAL RESPONSIBILITY FOR THE R.C.M.P.

INTRODUCTION

1. Throughout the long and distinguished existence of the R.C.M.P., spanning over 100 years of Canadian history, there has never been a study in depth, by an independent body, of the interrelationships between the Force and the Government of Canada. The work of this Commission of Inquiry represents the first. In this chapter we are principally concerned with the proper dimensions of ministerial supervision and accountability for the criminal law aspects of policing by the R.C.M.P. We have earlier described the degree of supervision and direction that is appropriate in security matters.

2. The post of Commissioner of the R.C.M.P. has been elevated to a position of prominence in the senior ranks of the government. He has right of access to the Prime Minister of the day, claimed and exercised by successive Commissioners; he is a member of Committees of Deputy Ministers; and, when invited, he sits in on meetings of Cabinet Committees. This status, combined with the dependence of the government upon the R.C.M.P. to enforce federal laws effectively, has generated an unwarranted disinclination on the part of government to interfere in R.C.M.P. affairs, even when serious questions of ultimate government control of the Force arise. This reluctance has been increased by three other factors — an ill-defined principle of non-intervention by the government in the decision-making processes of peace officers, the long-standing legal ambiguity surrounding the legal status of the Deputy Solicitor General and the R.C.M.P. Commissioner vis-à-vis each other, and the monolithic character of the Force arising from its organizational structure and the common ethos imbued in each of its members by its internal systems. The first two factors will be examined in the context of the discussion which follows. The third factor has been dealt with in detail in Part VI, Chapters 1 and 2.

A. PRINCIPLES GOVERNING MINISTERIAL RESPONSIBILITY AND ACCOUNTABILITY FOR POLICE ACTIVITIES

3. We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative

bodies composed of elected representatives. This important doctrine in our system of democratic government has often been overshadowed by the parallel concept that the best interests of the state are served by keeping at bay any attempts to interfere with the making of police decisions relating to investigation and prosecution in individual cases.

4. The concept of independence for peace officers in executing their duties has been elevated to a position of paramountcy in defining the role and functions of the R.C.M.P., thus setting the norm for all relationships between the government and the Force. We believe, on the contrary, that the peace officer duties of the R.C.M.P. should qualify, but not dictate, the essential nature of those relationships. The government must fulfill its democratic mandate by ensuring that in the final analysis it is the government that is in control of the police, and accountable for it. There is no inconsistency in asserting simultaneously that every member of the government, and above all the Minister responsible for the R.C.M.P., has an essential obligation not normally to become involved in the decisions to be made by members of the Force, including the Commissioner himself, with respect to investigation, arrest and prosecution in individual cases.

5. We have studied carefully statements made by Prime Minister Trudeau, on his government's policy with respect to ministerial responsibility for the day-to-day operations of the police. Speaking in 1977 he said:

> I have attempted to make it quite clear that the policy of this Government, and I believe the previous governments in this country, has been that they... should be kept in ignorance of the day-to-day operations of the police force and even of the security force. I repeat that is not a view that is held by all democracies but it is our view and it is one we stand by. Therefore, in this particular case it is not a matter of pleading ignorance as an excuse. It is a matter of stating as a principle that the particular Minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it.
>
> I would be much concerned if knowledge of that particular investigative operation by the security police were extended to all their operations and, indeed, if the Ministers were to know and therefore be held responsible for a lot of things taking place under the name of security or criminal investigation. That is our position. It is not one of pleading ignorance to defend the government. It is one of keeping the government's nose out of the operations of the police force at whatever level of government.
>
> On the criminal law side, the protections we have against abuse are not with the government. They are with the courts. The police can go out and investigate crimes, they can investigate various actions which may be contrary to the criminal laws of the country without authorization from the Minister and indeed without his knowledge.
>
> What protection do we have then that there won't be abuse by the police in that respect? We have the protection of the courts.[1]

[1] Prime Minister's Press Conference, December 9, 1977.

6. We note that the Prime Minister, in his statement quoted above, assigned the source of protection against police misdeeds on the law enforcement side of the R.C.M.P. to the courts and not to the government. Such a policy implies two things. The first is that the courts will become aware of police misdeeds during the course of criminal trials on other matters and will make their views known from the Bench, and the second is that those views will have a salutary effect on the police. This procedure is considered by the R.C.M.P. to be a significant control over their activities, but we have come across situations in which the failure of a judge to express disapproval of an objectionable investigative procedure disclosed in evidence has been interpreted by the R.C.M.P. as judicial approval. We discuss this in the following chapter of this Part. In our view reliance on comments from the Bench is an entirely haphazard and unsatisfactory method of control, depending as it does on the almost accidental disclosure of a misdeed in the course of other proceedings, and the inclination of the judge to comment on it or not, usually without the benefit of any background evidence or argument. Moreover, judges are unlikely to comment on the lawfulness of an investigative procedure if, as at present, the law holds that evidence is admissible if relevant, even if illegally obtained. (We shall discuss this law and make recommendations about it, Chapter 5 of this Part.) The second implication of the policy is that it transfers to the private citizen the initial responsibility for correcting alleged abuses, either by laying an information or bringing a civil action against the Force. There does not appear to be a strong tradition in Canada of the civil courts being used by private citizens as a means to curb police transgressions. The cost alone of such civil action is likely to deter all but the exceptional person. Neither is it sufficient to invoke the right of private prosecutions without also pointing out the statutory powers of the Crown to take over such private prosecutions and to determine whether to press forward with the case or to enter a stay of proceedings. In short, the realities of the situation significantly diminish the controls exercised theoretically by the courts.

7. These realities help to explain why we have seen emerge in recent years a plethora of Ombudsmen, assistant Ombudsmen and quasi-Ombudsmen, in the form of civilian review boards, whose functions include the task of investigating citizen complaints against other police forces and, if possible, effecting remedial actions. There has, however, never been any suggestion that these Ombudsmen should be given the powers of control over the day-to-day operations of the police, with respect to which the government disclaims any responsibilities. In Chapter 2 of this part of the Report we developed our views on the desirability of extending the principle of an Ombudsman to handle public complaints against the R.C.M.P. Our recommendations there were in no way intended to diminish the accountability of the Minister responsible for the R.C.M.P.

8. In the areas of both security and law enforcement we strongly support the principle that considerations of a purely partisan or personal nature should play no part in the making of decisions at any level. In examining earlier in this Report the role of the responsible Minister in relation to the security intelligence agency, we set out our views on the extent to which the Minister ought to be involved in its operations. In our view, the methods, practices and proce-

dures used by the R.C.M.P. in executing its criminal law mandate — "the way in which they are doing it" to borrow the Prime Minister's words — *should* be of continuing concern to the appropriate Minister. We believe that the Solicitor General of Canada has not only the right to be kept sufficiently informed but a duty to see that he is kept sufficiently informed.

B. MINISTER'S AND DEPUTY MINISTER'S ROLES IN DIRECTING R.C.M.P.

9. As far as the Minister is concerned, the language of the pertinent Acts of Parliament does not brook much doubt as to where the ultimate authority of direction lies. We detailed in Part VIII, Chapter 1, the cumulative effect of the relevant sections in the Department of the Solicitor General Act and the R.C.M.P. Act which make it clear that the Solicitor General has the power of direction over the R.C.M.P., subject to any powers, duties or functions assigned by law to any other department, branch or agency of the government. Those sections do not, however, make clear which activities of the R.C.M.P. are subject to such direction.

10. As already recounted, the roots of the present constitutional arrangements are to be found in the North-West Mounted Police Act of 1873, section 11 of which made the Commissioner "subject to the control, orders and authority of such person or persons as may, from time to time, be named by the Governor in Council for that purpose". The same enactment designated the Department of Justice as being responsible for "the control and management" of the new police force. By the R.C.M.P. Act of 1959 the Commissioner of the R.C.M.P. was given "control and management" of the Force, subject to the direction of the Minister. Prior to 1966 the responsible Minister was, with one change of short duration, the Minister of Justice. The Government Organization Act of 1966, which included the Department of the Solicitor General Act, transferred responsibility for the R.C.M.P. to the Solicitor General. What, it may be asked, did Parliament intend in conferring upon the R.C.M.P. Commissioner "control and management" of the Force, subject to the direction of the Minister, when previously the Department of Justice was made responsible in the legislation for "the control and management" of the Force? And what did Parliament intend should be the relationship between the Commissioner and the Deputy Minister?

11. We have encountered within the R.C.M.P. a misunderstanding of certain judicial decisions concerning the extent to which the powers of police officers affect the Minister's power of direction of the Force. In our opinion, these misunderstandings have contributed greatly to the barrier that arises repeatedly when attempts are made to define the proper relationship between police and government. We refer specifically to the oft-repeated claim that, by the very nature of their office, police officers acquire the privilege of independence from the executive branch of government, at all levels. The present day police officer, it is asserted, is a direct descendant of the early constable or peace officer in England whose duties were to preserve the King's peace and to bring malefactors to justice without fear or favour. It is said that his duty is to "the

Crown" as a public officer of the state. However, the responsibilities of a member of the R.C.M.P. are defined by the common law or subsequent legislation. In the case of members of the R.C.M.P. reference is specifically directed to section 17(3) of the R.C.M.P. Act which states:

> Every officer, and every person appointed by the Commissioner under this Act to be a peace officer, is a peace officer in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law.

and to section 18 of the same enactment which declares:

> It is the duty of members of the Force who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;...
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

12. Little or no attention has been given to the potential conundrum posed by the fact that the exercise of the powers, which historically were exercisable by each peace officer in his own right, is by section 18 made "subject to the orders of the Commissioner". Any police force is a disciplined body of men acting in accordance with a hierarchical structure that, leaving aside questions of possible unlawfulness, requires the orders of a superior to be carried out. The pertinent clause above, by making the members' performance of their duties "subject to the orders of the Commissioner", presumably does no more than state explicitly what is implied in other Police Acts governing provincial and municipal police forces. This conclusion is advanced with some tentativeness, since the question has not been litigated. In any event, the alleged independent authority of each peace officer is, at least with respect to the R.C.M.P., limited by the exercise of such authority having been made "subject to the orders of the Commissioner".

13. In support of the claim by members of the R.C.M.P. to occupy a special status of independence in the discharge of their peace officer's duties, reference is frequently made to decisions of the English courts and to the Report of the British Royal Commission on the Police in 1962 which examined the relationship of police personnel in that country both with the central authority, in the person of the Home Secretary, and with the local police authorities. In its Report, that Royal Commission reaffirmed the special constitutional status of the police in Britain, on the grounds that in such "quasi-judicial" matters as inquiries with regard to suspected offences, the arrest of persons, and the decision to prosecute,

> ... it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardized

and public confidence in it shaken, if in this field he were to be made the servant of too local a body.[2]

The Royal Commission, however, experienced more difficulty in defining the status of the chief constable and his relations with the local or regional police authority. When dealing specifically with the "quasi-judicial" matters referred to above, the Royal Commission accepted the proposition that it is in the public interest that a chief constable "should be free from the conventional processes of democratic control and influence". The problem areas, the Commission deduced, were those which fell outside the enforcement of the law in particular cases and included such matters as the police chief's

> general policies in regard to law enforcement over the area covered by his force, the disposition of the force, the concentration of police resources on any particular type of crime or area, the manner in which he handles political demonstrations or processions and allocates and instructs his men when preventing breaches of the peace arising from industrial disputes, the methods he employs in dealing with an outbreak of violence or of passive resistance to authority, his policy in enforcing traffic laws and in dealing with parked vehicles and so on.[3]

It is important to note with respect to these questions, that the British Commissioners rejected the prevailing doctrine by which, as a consequence of his legal status, the chief constable is invested with an unfettered discretion, and accountable to no one and subject to no one's orders as to the manner in which he exercises that discretion.

14. This fundamental distinction between the "quasi-judicial" and other functions of a police force is, we believe, pertinent to the Canadian situation. But it is a serious mistake to assume that the conclusions of English judges and Royal Commissioners correctly describe the constitutional status of police officers in Canada, and particularly so with reference to the Royal Canadian Mounted Police whose powers, responsibilities and relationship to the appropriate Minister of the Crown are the subject of express statutory definition. The English decision most frequently cited is the judgment of the Court of Appeal in *R.* v. *Metropolitan Police Commissioner, ex parte Blackburn* in 1968.[4] In that case, Lord Denning M.R., referring to the constitutional position of the Metropolitan Police Commissioner stated:

> I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the

[2] Cmnd. 1728, 1962, paragraph 68.

[3] *Ibid.*, paragraph 89.

[4] [1968] 2 Q.B. 118; 1968 1 All E.R. 763.

servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher* v. *Oldham Corpn.* (1930), and the Privy Council case of *A.G. for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (1955).

15. The judgment in *A.G. of N.S.W.* v. *Perpetual Trustee Co. Ltd.*, cited by Lord Denning, has also often been cited with approval by Canadian provincial Courts of Appeal in their attempt to define, by analogy to the English constable, the true status of a police officer. According to the Privy Council:

> ... there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office; he is a ministerial officer exercising statutory rights independently of contract.[5]

It is important to recognize that the issues which have arisen in the Canadian courts, and which have prompted Canadian judges to invoke the analogy of the common law constable contained in the passage just quoted, have been issues of civil liability (e.g. the extent to which chiefs of police, police governing bodies or various levels of government are liable for the wrongful exercise of police powers by a subordinate police officer) and the power of the courts to review collective bargaining agreements. To date Canadian courts have not addressed the problem that arose indirectly before the English Court of Appeal in *Ex parte Blackburn*, namely, the powers of the executive (or the courts) to give directions to a chief constable in matters of law enforcement.

16. Unfortunately, the particular passage from the judgment of Lord Denning, M.R., in *Ex parte Blackburn*, quoted above, is constantly transposed to the Canadian scene with no regard to those essential features that distinguish Canadian police forces from their British counterparts. There is no English legislation defining the precise nature of the relationship between the Home Secretary and the Commissioner of the Metropolitan Police, nor does the English Police Act of 1964 (enacted in the wake of the recommendations of the 1962 report of the Royal Commission on the Police) contain either a general authority for the governing of police forces or specific powers to issue directions or orders to police forces or their individual members. In Canada, however, section 5 of the R.C.M.P. Act clearly empowers the Minister to give direction to the Commissioner in regard to "the control and management of the force and all matters connected therewith". To the extent that a matter is one of "control and management" or is "connected" with control and management, the Minister has a statutory power of direction. The statute has to that extent made the English doctrine expounded in *Ex parte Blackburn* inapplicable to the R.C.M.P. However, there is a further question in the interpretation of section 5, which has not been tested in the courts. Can decisions to investigate

[5] [1955] A.C. 457 at 489-90 (P.C.).

in a particular case, to lay an information in a particular case, or to arrest in a particular case, properly be described as powers "connected" with control and management of the R.C.M.P.?

17. On this point, section 5 of the R.C.M.P. Act is open to two interpretations. The English language version of the section empowers the Minister to give direction to the Commissioner in regard to "the control and management of the force and all matters connected therewith." Under one construction of the English version the Minister's power of direction would extend to "control and management" and "all matters connected" with "control and management". In other words, the reference to "matters connected therewith" might be to "control and management". On the other hand, a broader construction of the words would be that "matters connected therewith" refers to "the Force" and thus the Minister would have the power of direction over "all matters connected" with "the Force" including decisions to investigate, lay an information or arrest in individual cases. The French language version of the section is not an exact translation. It reads as follows:

> Le gouverneur en conseil peut nommer un officier, appelé commissaire de la Gendarmerie royale du Canada, qui, sous la direction du Ministre, est investi de l'autorité sur la Gendarmerie et de la gestion de toutes les matières s'y rattachant.

Our translation from the French is as follows:

> The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has authority over the Force and has the management of all matters connected therewith.

The versions are "equally authentic", according to the Official Languages Act.[6] The French version does not appear to be subject to the same ambiguity as the English version. It seems to state clearly that the Commissioner has full authority over the Force, that the exercise of that authority is subject to the direction of the Minister, and that the Commissioner's authority extends to the management of all matters connected with the Force. In other words, in the French version there is not the same problem with what is being referred to by the words "connected therewith". Thus, in interpreting section 5 we receive little assistance from the rules quoted from the Official Languages Act. Nor does another provision of the Official Languages Act assist in resolving the problem of interpretation, for there is no obvious way to determine which of the different interpretations to which the two linguistic versions of section 5 are open would best ensure the attainment of the objects of the R.C.M.P. Act.[7]

18. There has been no judicial interpretation of this section of the R.C.M.P. Act. For our purposes, we do not think it is necessary for us to attempt an

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[6] R.S.C. 1970, ch.0-2, section 8(1).

[7] *Ibid.*, section 8(2):

> "In applying subsection (1) to the construction of an enactment,
>
> (d) if the two versions of the enactment differ. . . preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects."

interpretation. We think that the statute should be amended to effectuate the recommendations which we will be proposing, and such amendments would, we believe, eliminate any existing ambiguity. We do not think that this problem can be solved otherwise.

19. We believe that those functions of the R.C.M.P. which we have described as 'quasi judicial' should not be subject to the direction of the Minister. To be more explicit, in any particular case, the Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P. Even though the Minister should have no power of direction in particular cases in relation to the exercise by the R.C.M.P. of these 'quasi judicial' functions, the Minister should have the right to be, and should insist on being, informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases he may give guidance to the Commissioner and express to the Commissioner the government's view of the matter, but he should have no power to give *direction* to the Commissioner.

20. As we reported in Part VIII, Chapter 1, throughout the short history of the Department of the Solicitor General, the Commissioner of the R.C.M.P. has not accepted that the Deputy Solicitor General has the full powers of a deputy minister with respect to the R.C.M.P. This state of affairs, moreover, did not begin in 1966, when the Solicitor General's Department was first established, but was carried over from the previous era when the Commissioner of the R.C.M.P. reported to the Minister of Justice.

21. Because of the difficulties we encountered in comprehending the exact nature of these working relationships, both past and present, we attempted to analyze in depth the legal status of the Commissioner of the R.C.M.P. In the opinion of the R.C.M.P. its Commissioner is the 'Deputy Head' in charge of the Force for all purposes and is not required to report to the Minister through the Deputy Solicitor General. We concluded that the legal position is not clear. In our earlier analysis we did not come to any conclusion as to the current legal status nor do we propose to do so here. We believe such legal speculation to be futile, in the circumstances. Until now the people who could have resolved this dispute have fought shy of grasping this nettle and, in consequence, the problems arising from ineffective accountability have been seriously compounded. In our opinion what is required is clear and decisive action on the part of the government to resolve the problem through the introduction of legislation which states categorically that the Deputy Solicitor General is the deputy of the Solicitor General for all purposes related to the R.C.M.P. The Commissioner of the R.C.M.P. should be legally accountable to the Deputy Solicitor General. Such a legal relationship is imperative to ensure that ministerial responsibility is effective. The Deputy Minister is the principal adviser of the Minister. The Deputy Minister must have unimpeded access to all matters being handled by the R.C.M.P., to be able to advise the Minister properly. Any doubts about the Deputy Minister's right to be kept informed and to look into all matters must be removed. The Deputy Minister is not a

member of the Force itself and thus should be able to give the Minister informed, independent advice on policy matters relating to the Force, something which has not been possible in the past.

22. One final point needs to be made in this regard. On no account should the Minister or his deputy give direction based on partisan or personal considerations. If the Deputy Solicitor General does so, the Commissioner should take the matter up with the Minister and if necessary the Prime Minister. If the Minister gives such an improper direction the Commissioner should speak to the Prime Minister directly.

WE RECOMMEND THAT the Deputy Solicitor General be considered as the deputy of the Solicitor General for all purposes related to the R.C.M.P. and that the Commissioner of the R.C.M.P. report directly to the Deputy Solicitor General rather than to the Solicitor General as at present.

(255)

WE RECOMMEND THAT the Solicitor General have full power of direction over the activities of the R.C.M.P., except over the 'quasi-judicial' police powers of investigation, arrest and prosecution in individual cases.

(256)

WE RECOMMEND THAT the Commissioner of the R.C.M.P. keep the Deputy Solicitor General, and through him the Solicitor General, fully informed of all policies, directions, guidelines and practices of the Force, including all operational matters in individual cases which raise important questions of public policy.

(257)

WE RECOMMEND THAT if the Commissioner considers that the Deputy Solicitor General is giving him direction based on partisan or political considerations, the Commissioner take the matter up directly with the Minister. We further recommend that if the Commissioner, after consultation with the Deputy Solicitor General, considers that the Solicitor General is giving him, the Commissioner, direction based on partisan or political considerations, he should take the matter up directly with the Prime Minister.

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C. RELATIONSHIP WITH PROVINCIAL ATTORNEYS GENERAL

23. Pursuant to contracts entered into between the Government of Canada and eight of the provinces (Ontario and Quebec having their own provincial police forces) the R.C.M.P. provides policing services to those eight provinces. In carrying out its duties under each of those contracts it is accountable to the provincial attorney general. In Alberta, where the responsibility for the administration of justice has been divided between two ministers, the Force is also accountable to both the provincial solicitor general and the provincial attorney general. The extent to which the Commanding Officer of the R.C.M.P. (in the contracts called the "Commanding Officer of the Provincial Police Services") in each province is responsible to the provincial minister or

ministers is governed by the terms of the contract. The relevant provisions are the same in all contracts (except the Alberta contract which we will cite later). They read:

> 3. The internal management of the Provincial Police Services, including the administration and application of professional police procedures, shall remain under the control of Canada.
>
> 4. (1) The Commanding Officer of the Provincial Police Services shall for the purposes of this agreement act under the direction of the Attorney General in the administration of justice in the province.
>
> (3) The Commanding Officer shall provide the Attorney General with information in possession of the Royal Canadian Mounted Police which affects the administration of justice in the Province. This will include information obtained by members employed in Federal duties and shall be provided in a manner and form to be mutually agreed upon between the Commanding Officer and the Attorney General.

Nowhere does the contract state what is meant by the words in clause 4(1) "under the direction of the Attorney General in the administration of justice in the Province". Nor is there any clarification of which activities are subject to such "direction" and which are governed by the words in clause 3 which provide that internal management "shall remain under the control of Canada".

24. The relevant provisions in the Alberta contract simply add to the confusion. They read:

> 3. The internal management of the Provincial Police Services, including the administration and application of professional police procedures, shall remain under the control of Canada.
>
> 4. (1) The Commanding Officer of the Provincial Police Services shall for the purposes of this agreement act under the direction of the Solicitor General of Alberta in matters dealing with the operations, broad policy and functions of the Provincial Police Services. The said Commanding Officer shall for the purposes of this Agreement act under the direction of the Attorney General of Alberta in matters dealing with administration of justice and the enforcement of those laws which the Government of Alberta is required to enforce.
>
> (2) Nothing in this agreement shall be interpreted as limiting in any way the powers of the Attorney General, relating to the administration of justice within the Province.
>
> (3) The Commanding Officer of the Provincial Police Services shall provide the Attorney General of Alberta with information in the possession of the Royal Canadian Mounted Police that relates to the administration of justice in the Province. The Commanding Officer shall provide the Solicitor General of Alberta with information in the possession of the Royal Canadian Mounted Police that relates to the operations, broad policy and functions of the Provincial Police Services. The phrase 'information' as it appears in this paragraph shall include information obtained by members employed in Federal duties and shall be provided in a manner and form to be mutually agreed upon by the Commanding Officer and the Attorney General of Alberta, and the Solicitor General of Alberta, as the case may be.

It will be noted that in the Alberta contract "direction" of the Commanding Officer is extended to more than "matters dealing with administration of justice". It also covers "those laws which the Government of Alberta is required to enforce" and "matters dealing with the operations, broad policy and functions...".

25. There is no common understanding on the part of the responsible provincial ministers and the eight Commanding Officers in the provinces as to what is included in the power of direction of the provincial ministers and what information must be provided by the Commanding Officers to those ministers. This cannot help but lead to misunderstandings and subsequent litigation such as the *Putnam* case,[8] which we discuss in Chapter 2 of this Part. We consider it doubtful that our terms of reference require us to recommend how the responsibilities for direction of the R.C.M.P. ought to be divided between the federal and provincial ministers. In view of that doubt, we did not carry out the extensive research and analysis which would have been required to formulate recommendations on this subject. We are concerned, however, that the matter be clarified. In our view, agreement should be reached between the two levels of government as to what is meant by "internal management" for purposes of exclusion from direction by the provincial ministers. With respect to all other matters, members of the R.C.M.P. who are acting within a province pursuant to a contract should be governed by the same principles which we outlined earlier in this chapter with respect to the responsible Minister and Deputy Minister at the federal level.

26. There have also been controversies between the federal government and provincial governments about the extent to which the R.C.M.P. is obliged to keep the provincial attorneys general informed of the activities of members of the R.C.M.P. involved in the enforcement of federal laws. This problem applies to all provinces: contract and non-contract. In Chapter 2 of this Part we discussed this problem as it relates to acts in which members of the R.C.M.P. may have been engaged and which may be violations of the Criminal Code or other federal or provincial statutes. We made recommendations for the procedure to be followed in these cases. In cases not involving such acts the solution appears to be close and continuous consultation among the federal and provincial ministers responsible for policing.

WE RECOMMEND THAT in the contracts with the provinces covering the provision of R.C.M.P. policing services, the respective roles of the responsible federal and provincial ministers be clarified, so that the R.C.M.P. members involved have an accurate understanding of the division of their obligations and duties vis-à-vis those ministers.

(259)

WE RECOMMEND THAT the contracts with the contracting provinces incorporate as far as possible the principles of ministerial direction recommended above for the federal level.

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[8] *The Attorney General of Alberta and the Law Enforcement Appeal Board v. Constable K.W. Putnam and Constable M.G.C. Cramer and the Attorney General of Canada*, [1980] 22 A.R. 510, [1950] 5 W.W.R. 83. Affirmed by the Supreme Court of Canada in a judgment pronounced May 28, 1981.