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Canada

APPENDIX "A"

CHAPTER I-13

An Act respecting public and departmental inquiries

SHORT TITLE

1. This Act may be cited as the Inquiries Act, R.S., c.154, s.1.

PART I

PUBLIC INQUIRIES

2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof. R.S., c.154, s.2.

3. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted. R.S., c.154, s.3.

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine. R.S., c.154, s.4.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. R.S., c.154, s.5.

PART II

DEPARTMENTAL INVESTIGATIONS

6. The minister presiding over any department of the Public Service may appoint at any time, under the authority of the Governor in Council, a commissioner or commissioners to investigate and report upon the state and management of the business, or any part of the business, of such department,

either in the inside or outside service thereof, and the conduct of any person in such service, so far as the same relates to his official duties. R.S., c.154, s.6.

7. The commissioner or commissioners may, for the purposes of the investigation, enter into and remain within any public office or institution, and shall have access to every part thereof, and may examine all papers, documents, vouchers, records and books of every kind belonging thereto, and may summon before him or them any person and require him to give evidence on oath, orally or in writing, or on solemn affirmation if he is entitled to affirm in civil matters, and any such commissioner may administer such oath or affirmation. R.S., c.154, s.7.

8. (1) The commissioner or commissioners may, under his or their hand or hands, issue a subpoena or other request or summons, requiring and commanding any person therein named to appear at the time and place mentioned therein, and then and there to testify to all matters within his knowledge relative to the subject-matter of such investigation, and to bring with him and produce any document, book, or paper that he has in his possession or under his control relative to any such matter as aforesaid; and any such person may be summoned from any part of Canada by virtue of the subpoena, request or summons.

(2) Reasonable travelling expenses shall be paid to any person so summoned at the time of service of the subpoena, request or summons. R.S., c.154, s.8.

9. (1) If, by reason of the distance at which any person, whose evidence is desired, resides from the place where his attendance is required, or for any other cause, the commissioner or commissioners deem it advisable, he or they may issue a commission or other authority to any officer or person therein named, empowering him to take such evidence and report it to him or them.

(2) Such officer or person shall, before entering on any investigation, be sworn before a justice of the peace faithfully to execute the duty entrusted to him by such commission, and, with regard to such evidence, has the same powers as the commissioner or commissioners would have had if such evidence had been taken before him or them, and may, in like manner, under his hand issue a subpoena or other request or summons for the purpose of compelling the attendance of any person, or the production of any document, book or paper. R.S., c.154, s.9.

10. (1) Every person who

(a) being required to attend in the manner provided in this Part, fails, without valid excuse, to attend accordingly,

(b) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same,

(c) refuses to be sworn or to affirm, as the case may be, or

(d) refuses to answer any proper question put to him by a commissioner, or other person as aforesaid,

is liable, on summary conviction before any police or stipendiary magistrate, or judge of a superior or county court, having jurisdiction in the county or district

in which such person resides, or in which the place is situated at which he was so required to attend, to a penalty not exceeding four hundred dollars.

(2) The judge of the superior or county court aforesaid shall, for the purposes of this Part, be a justice of the peace. R.S., c.154, s.10.

PART III

GENERAL

11. (1) The commissioners, whether appointed under Part I or under Part II, if thereunto authorized by the commission issued in the case, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry.

(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

(3) The persons so deputed, when authorized by order in council, have the same powers that the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(4) The persons so deputed shall report the evidence and their findings, if any, thereon to the commissioners. R.S., c.154, s.11.

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel. R.S., c.154, s.12.

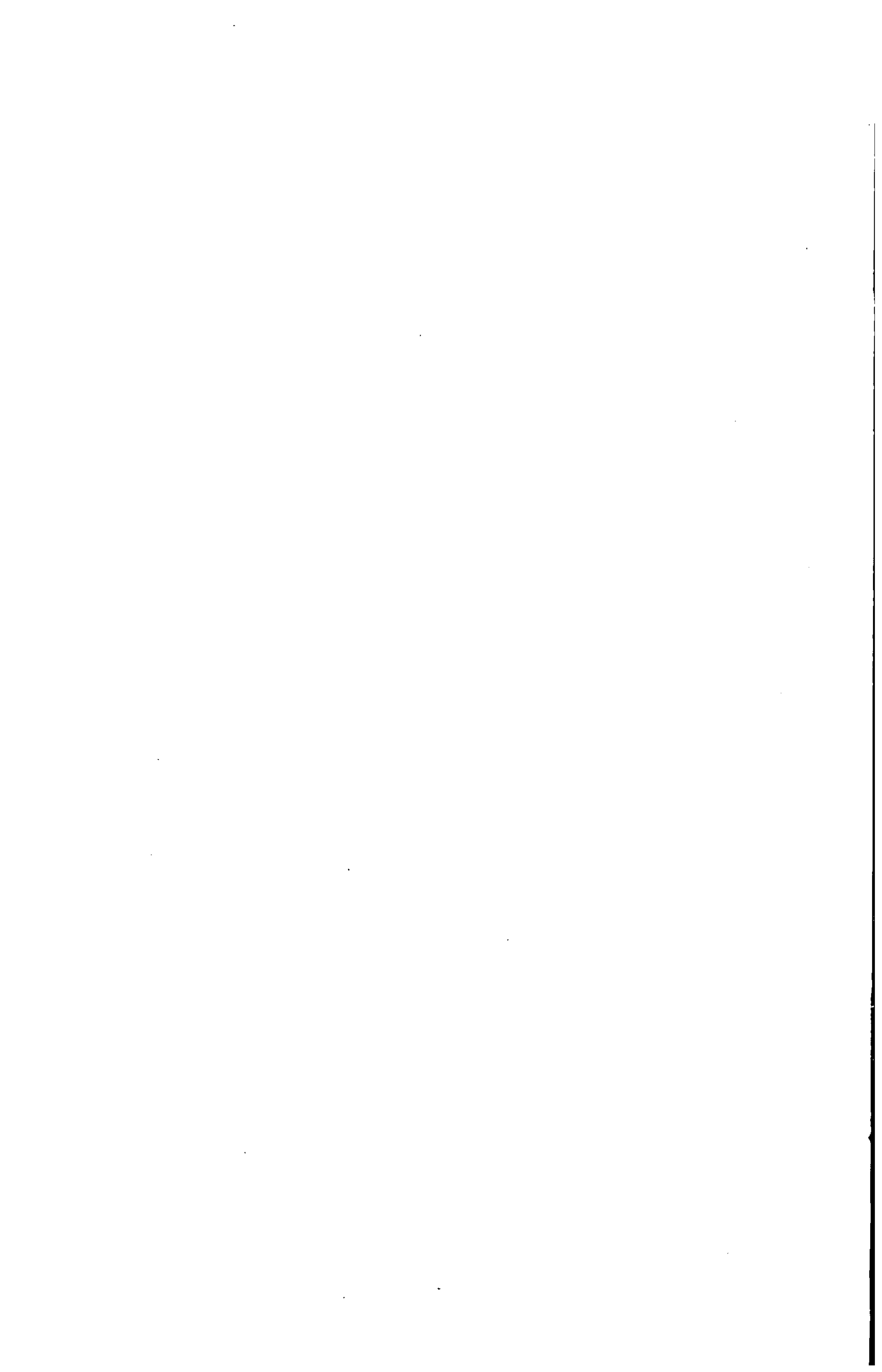
13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel. R.S., c.154, s.13.

PART IV

INTERNATIONAL COMMISSIONS AND TRIBUNALS

14. (1) The Governor in Council may, whenever he deems it expedient, confer upon an international commission or tribunal all or any of the powers conferred upon commissioners under Part I.

(2) The powers so conferred may be exercised by such commission or tribunal in Canada, subject to such limitations and restrictions as the Governor in Council may impose, in respect to all matters that are within the jurisdiction of such commission or tribunal. R.S., c.154, s.14.



APPENDIX "B"

P.C. 1977-1911

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 6 July, 1977

WHEREAS it has been established that certain persons who were members of the R.C.M.P. at the time did, on or about October 7, 1972, take part jointly with persons who were then members of la Sûreté du Québec and la Police de Montréal in the entry of premises located at 3459 St. Hubert Street, Montreal, in the search of those premises for property contained therein, and in the removal of documents from those premises, without lawful authority to do so;

WHEREAS allegations have recently been made that certain persons who were members of the R.C.M.P. at the time may have been involved on other occasions in investigative actions or other activities that were not authorized or provided for by law;

WHEREAS, after having made inquiries into these allegations at the instance of the Government, the Commissioner of the R.C.M.P. now advises that there are indications that certain persons who were members of the R.C.M.P. may indeed have been involved in investigative actions or other activities that were not authorized or provided for by law, and that as a consequence, the Commissioner believes that in the circumstances it would be in the best interests of the R.C.M.P. that a Commission of Inquiry be set up to look into the operations and policies of the Security Service on a national basis;

WHEREAS public support of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada is dependent on trust in the policies and procedures governing its activities;

AND WHEREAS the maintenance of that trust requires that full inquiry be made into the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, advise that, pursuant to the Inquiries Act, a Commission do issue under the Great Seal of Canada, appointing

Mr. Justice David C. McDonald of Edmonton, Alberta
Mr. Donald S. Rickerd of Toronto, Ontario
Mr. Guy Gilbert of Montreal, Quebec

to be Commissioners under Part I of the Inquiries Act:

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalance of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

The Committee further advise that the Commissioners:

1. be authorized to adopt such procedures and methods as the Commissioners may from time to time deem expedient for the proper conduct of the inquiry;
2. be directed that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined;
3. be directed, in making their report, to consider and take all steps necessary to preserve
   (a) the secrecy of sources of security information within Canada; and
   (b) the security of information provided to Canada in confidence by other nations;
4. be authorized to sit at such time and at such places as they may decide from time to time, to have complete access to personnel and information available in the Royal Canadian Mounted Police and to be provided with adequate working accommodation and clerical assistance;
5. be authorized to engage the services of such staff and technical advisers as they deem necessary or advisable and also the services of counsel to aid them and assist in their inquiry at such rates of remuneration and reimbursement as may be approved by the Treasury Board;
6. be directed to follow established security procedures with regard to their staff and technical advisers and the handling of classified information at all stages of the inquiry;
7. be authorized to exercise all the powers conferred upon them by section 11 of the Inquiries Act; and

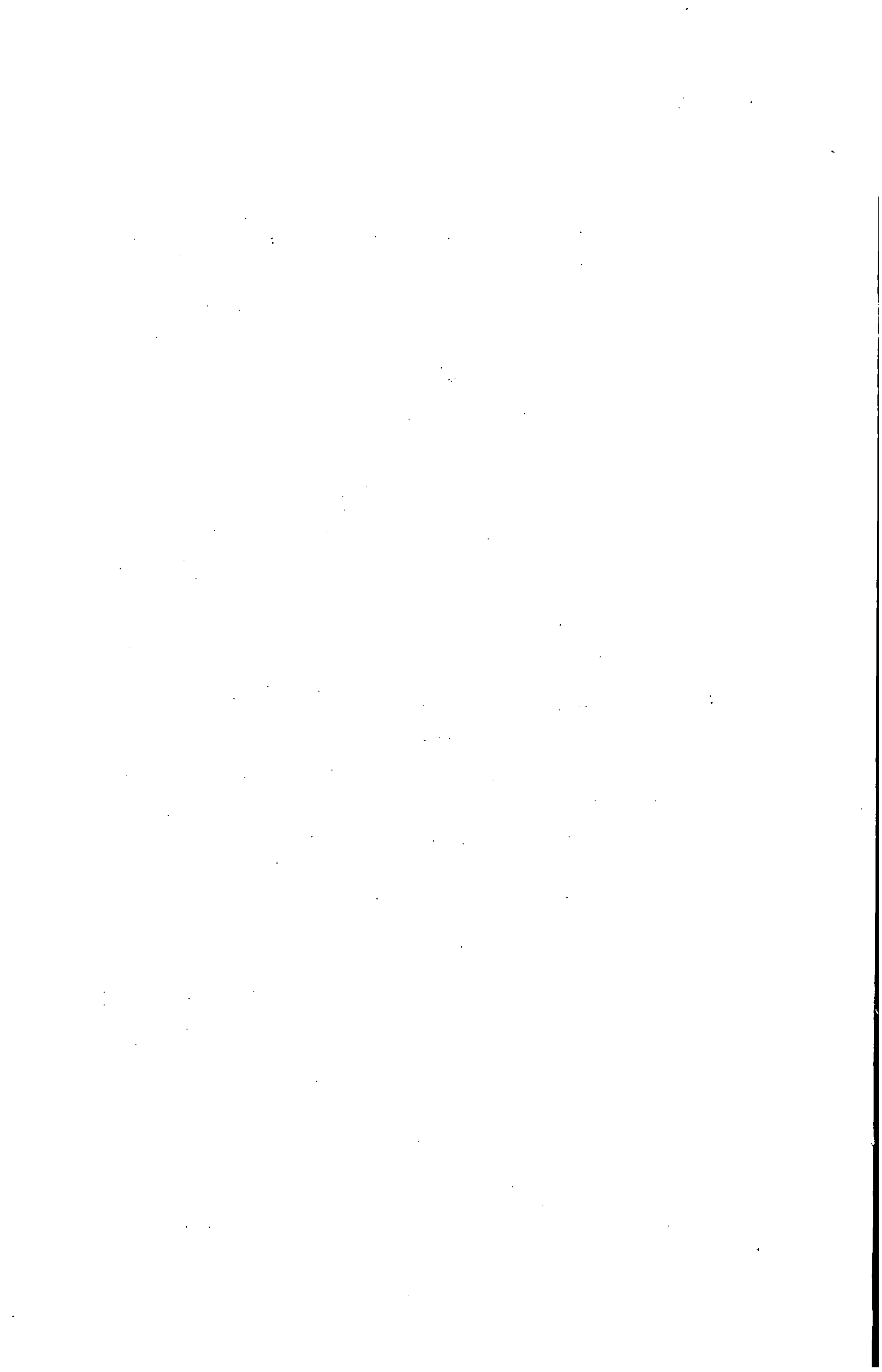
8. be directed to report to the Governor in Council with all reasonable dispatch and file with the Privy Council Office their papers and records as soon as reasonably may be after the conclusion of the inquiry.

The Committee further advise that, pursuant to section 37 of the Judges Act, His Honour Mr. Justice McDonald be authorized to act as Commissioner for the purposes of the said Commission and that Mr. Justice McDonald be the Chairman of the Commission.

Certified to be a true copy
Copie certifiée conforme

H. Chassé

Assistant Clerk of the Privy Council
Le Greffier Adjoint du Conseil privé



APPENDIX "C"

COMMISSION

appointing

the Honourable Mr. Justice David C. McDonald,
Donald S. Rickerd, Esquire,
and
Guy Gilbert, Esquire

to be Commissioners under Part I of the Inquiries Act, to inquire into the relevant policies and procedures that govern the activities of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada, and the Honourable Mr. Justice McDonald to be the Chairman of the Commission.

DATED .... 5th August, 1977
RECORDED .... 10th August, 1977

Film 420 Document 60

L. McCann (signature)

DEPUTY REGISTRAR GENERAL OF CANADA

Brian Dickson (signature)

DEPUTY OF THE GOVERNOR GENERAL

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

Roger Tassé (signature)

DEPUTY ATTORNEY GENERAL

TO ALL TO WHOM these Presents shall come or whom the same may in anyway concern,

GREETING:

WHEREAS it has been established that certain persons who were members of the Royal Canadian Mounted Police at the time did, on or about October 7, 1972, take part jointly with persons who were then members of la Sûreté du Québec and la Police de Montréal in the entry of premises located at 3459 St. Hubert Street, Montreal, in the search of those premises for property contained therein, and in the removal of documents from those premises, without lawful authority to do so;

AND WHEREAS allegations have recently been made that certain persons who were members of the Royal Canadian Mounted Police at the time may have been involved on other occasions in investigative actions or other activities that were not authorized or provided for by law;

AND WHEREAS, after having made inquiries into these allegations at the instance of the Government, the Commissioner of the Royal Canadian Mounted Police now advises that there are indications that certain persons who were members of the Royal Canadian Mounted Police may indeed have been involved in investigative actions or other activities that were not authorized or provided for by law, and that as a consequence, the Commissioner believes that in the circumstances it would be in the best interests of the Royal Canadian Mounted Police that a Commission of Inquiry be set up to look into the operations and policies of the Security Service on a national basis;

AND WHEREAS public support of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada is dependent on trust in the policies and procedures governing its activities;

AND WHEREAS the maintenance of that trust requires that full inquiry be made into the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law;

AND WHEREAS pursuant to the provisions of Part I of the Inquiries Act, chapter I-13 of the Revised Statutes of Canada, His Excellency the Governor General in Council, by Order in Council P.C. 1977-1911 of the sixth day of July in the year of Our Lord one thousand nine hundred and seventy-seven, has authorized the appointment of Our Commissioners therein and hereinafter named

(a) to conduct such investigations as in their opinion are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the Royal Canadian Mounted Police that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further

action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the Royal Canadian Mounted Police in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

NOW KNOW YOU that, by and with the advice of Our Privy Council for Canada, We do by these Presents nominate, constitute and appoint the Honourable Mr. Justice David C. McDonald, of the City of Edmonton, in the Province of Alberta, Donald S. Rickerd, Esquire, of the City of Toronto, in the Province of Ontario and Guy Gilbert, Esquire, of the City of Montreal, in the Province of Quebec to be Our Commissioners to conduct such inquiry.

TO HAVE, hold, exercise and enjoy the said office, place and trust unto the said David C. McDonald, Donald S. Rickerd and Guy Gilbert, together with the rights, powers, privileges and emoluments unto the said office, place and trust of right and by law appertaining during Our Pleasure.

AND WE DO hereby authorize Our said Commissioners to adopt such procedures and methods as they may from time to time deem expedient for the proper conduct of the inquiry.

AND WE DO hereby direct Our said Commissioners to hold the proceedings of the inquiry in camera in all matters relating to national security and in all other matters where they deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

AND WE DO further direct Our said Commissioners, in making their report, to consider and take all steps necessary to preserve

(a) the secrecy of sources of security information within Canada; and

(b) the security of information provided to Canada in confidence by other nations.

AND WE DO hereby authorize Our said Commissioners to sit at such time and at such places as they may decide from time to time, to have complete access to personnel and information available in the Royal Canadian Mounted Police and to be provided with adequate working accommodation and clerical assistance.

AND WE DO further authorize Our said Commissioners to engage the services of such staff and technical advisers as they deem necessary or advisable and also the services of counsel to aid them and assist in their inquiry at such rates of remuneration and reimbursement as may be approved by the Treasury Board.

AND WE DO hereby direct Our said Commissioners to follow established security procedures with regard to their staff and technical advisers and the handling of classified information at all stages of the inquiry.

AND WE DO further direct Our said Commissioners to report to the Governor in Council with all reasonable dispatch and file with the Privy Council Office their papers and records as soon as reasonably may be after the conclusion of the inquiry.

AND WE DO hereby appoint the Honourable Mr. Justice McDonald to be the Chairman of the Commission.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed.

WITNESS:

THE HONOURABLE BRIAN DICKSON, a Puisne Judge of the Supreme Court of Canada and Deputy of Our Right Trusty and Well-beloved Jules Léger, Chancellor and Principal Companion of Our Order of Canada, Chancellor and Commander of Our Order of Military Merit upon whom We have conferred Our Canadian Forces' Decoration, Governor General and Commander-in-Chief of Canada.

AT OTTAWA, this fifth day of August in the year of Our Lord one thousand nine hundred and seventy-seven and in the twenty-sixth year of Our Reign.

BY COMMAND,
John Howard (signature)

DEPUTY REGISTRAR GENERAL OF CANADA

APPENDIX "D"

OPENING STATEMENT OF THE COMMISSION DECEMBER 6, 1977

This Commission has been given a complex and demanding task. Some of the legal issues it must consider are not as clear as some people think. Some of the factual issues require a marshalling of evidence which is far from simple in the circumstances, because one or more police forces are involved, and because in respect of some issues there are a large number of particular instances and people involved. The investigative and legal staff which this Commission has undertaken to organize which is of a high quality, is not readily available to the Attorney General of Canada or to his counterpart in the provinces, for after all, it is members of the national police force itself and the policies, past and present, of that force which are under investigation. Whether there is evidence which would justify prosecution in some particular case is not a question which could easily be answered by Crown attorneys, without there first having been undertaken the kind of cross-jurisdictional investigation which this Commission intends to carry out, and without the ability which this Commission has, anywhere in Canada, to require the fullest co-operation of the R.C.M.P. — a co-operation which is required by the terms of the Order-in-Council.

In its fact-finding function, in its consideration of the societal values which are invoked by the issues raised by the facts, and in considering the nature of the needs to protect the security of Canada and the laws and structures and policies which should be adopted to satisfy those needs, this Commission undertakes to the Canadian people that it will be unremitting and conscientious in its work. The Commission invites the co-operation and the assistance of the Canadian public.

Today the Commission continues its hearings into one allegation of an investigative practice or procedure alleged to be "not authorized or provided for by law". Next week we shall move to Ottawa to begin our hearings into another allegation. In January and the ensuing months we shall continue our hearings into these matters, and begin our hearings into other allegations. We shall begin our hearings into any particular matter, and we shall complete them only when our counsel are satisfied that they are prepared to begin and to complete the hearings. The Commission expects them to do a thorough job of investigation and preparation. Nothing else in the long run will justify public confidence in our inquiry. Nothing else will be fair either to the individuals whose conduct is investigated or against who a charge is made in evidence. We appreciate that there should be no dilatoriness in starting our inquiry into a particular factual allegation and pushing it to a conclusion. Everyone should bear in mind that starting an inquiry involves more than just starting a public

hearing. It involves investigation and preparation. It is urgent that the truth should be revealed to the public as speedily as possible. Nevertheless, taking more time in preparing the material for arriving at the truth is a small price to pay in order to avoid injustice. Further time in preparing for the public hearing will also give the Commission's counsel a better opportunity of discarding irrelevant evidence. It is of the greatest importance that irrelevant evidence should not be made public, particularly if it contains clearly groundless charges against anyone.

The importance of having sufficient time for preparation of the evidence before a public hearing is even greater in the case of this Commission than it is in the case of many Commissions of Inquiry, because of the number of factual allegations before it and, in some cases, the complexity of the facts. This Commission's terms of reference require it to inquire into — and I am referring to paragraph (a) — into the extent and prevalence of investigative activities "not authorized or provided for by law". "Extent" and "prevalence" may, in some cases, require protracted investigation by the Commission's staff before the Commission can decide what time should be spent in public hearings — for example — if there were a large number of openings of letters by the R.C.M.P., counsel will have to consider all those cases in order to decide what evidence will best be called at public hearings to enable the Commission to determine "extent" and "prevalence", and to assess the need for such a procedure. Only such preparation will enable the Commission to reach its decision in an informed manner yet without spending months at public hearings on the one subject.

Now, a few comments on procedure. First of all, a comment on the fact that this Commission does not examine witnesses first in camera and then publicly. It should be realized by those interested in the proceedings of the Commission, that as a general rule, the witnesses who testify in public will not previously have been seen or heard by the three Commissioners. Certainly, they may have been interviewed by counsel for the Commission, but they will not testify before the Commission first in private and then in public. The position this Commission adopts is that set forth in the Report of the Royal Commission on Tribunals of Inquiry, in England in 1966, which was chaired by Lord Justice Salmon, a report which has justly earned the respect of students of Royal Commissions in Commonwealth countries and, in particular, has been substantially followed by a report last year of a Committee of the Quebec Bar. This is what the Salmon Report stated on this subject:

THE CASE FOR AND AGAINST A PRELIMINARY HEARING OF EVIDENCE IN PRIVATE

A further suggestion has been made by some witnesses — that is, some persons who appeared before that Inquiry — although many have disagreed with it, that the Tribunal should hold a preliminary investigation in private. At this investigation evidence should be called and submissions made to enable the Tribunal to decide whether or not there was a prima facie case to

support any allegation against any of the persons concerned. The advantage of this course, so it is said, is that the Tribunal could thus protect innocent persons from having groundless allegations or rumours against them pursued in the fierce light of publicity. Whilst we fully recognize the importance of protecting innocent persons against any possible injury to their reputations which may be involved in a public hearing, we do not consider that a preliminary hearing in private is the best means of affording them this protection. Assuming that there are widespread rumours and allegations about the conduct of some innocent individual, it seems to us that if the evidence is heard in private at a preliminary hearing and the Tribunal thereafter announces that the rumours and allegations are groundless, there is a real risk that the public will not be convinced and may consider that something is being hushed up. Indeed a number of witnesses involved in recent Tribunals of Inquiry and those appearing on their behalf have stressed in evidence before us the importance they attach to being able to destroy the rumours and allegations by evidence given in public.

If on the other hand the Tribunal comes to the conclusion that there is enough in the rumours and allegations to warrant a public investigation, the impression that this would make upon the public might well be unfortunate from the point of view of the individual concerned. Moreover, there is something unreal about evidence being taken in private and then being rehashed before the same Tribunal in public. Besides, the untruthful witness who has done badly under cross-examination at the first attempt would be forewarned. This procedure would also entail considerable unnecessary delay for the publication of the Report would be postponed by the time taken by the preliminary hearing without any corresponding advantage being secured.

Now, some remarks about the holding of all hearings in public. There is a great interest in the extent to which this Commission will hold its hearings in camera, ou à huis-clos. The subject is one which concerns the Commission deeply. The subject arises for at least one good reason, namely: the following direction which is given to the Commission by the Order-in-Council which created it. It bears the number two. The Commission is directed:

> ... that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

From a hasty reading of this direction, some observers have inferred that there will be little evidence that the Commission will be able to hear in public. In the view of the Commission, that is a false conclusion which the Commission wishes to dispel in principle and in its practice. We cannot do better than publicly adopt as a cardinal principle guiding our deliberations what Lord Justice Salmon's Committee called the principle of publicity and these are the words of that Commission:

> It is... of the greatest importance that hearings before a Tribunal of Inquiry — which is what they call them in England — should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth....

> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigations carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
>
> It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however that although secret hearings may increase the quantity of evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view, be a small price to pay for the great advantages of a public hearing....

The same point was made as follows in June, 1976, by the study committee of the Quebec Bar on Commissions of Inquiry, the members of which were Me Harvey M. Yarosky (Chairman), Me Philippe Casgrain, Me Joseph N. Nuss and Monsieur le Bâtonnier Michel Robert, and this is what that report said under the title:

Public hearings v. In Camera hearings

> We feel that as a general rule, it is important for commissions of inquiry to be held in public. Only when the public is present, as has been the case with our tribunals for some time, can we be sure that the rights of witnesses and others will not be violated. Thus we can be confident that such commissions will enjoy the credibility essential to what they are seeking to achieve. Public presentation of arguments is the best guarantee of adherence to the basic principles of justice...
>
> ...We realize that in some cases the desirability of public hearings can be outweighted by other considerations. This may be so where matters involving public security or intimate personal, financial or other details are being disclosed. In such cases the embarrassment and harm resulting from such disclosures would outweigh the desirability of a public hearing.
>
> When faced with such situations, the commissioners should have the power to exclude the public from the hearings and to hold them in camera. We recommend the adoption of a legislative text similar to section 4 of Ontario's Public Inquiries Act, 1971, which reads as follows: [our translation]

and it was quoted by the Quebec Bar Reports as follows:

> All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that:
>
> (a) matters involving public security may be disclosed at the hearing; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the

> circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the commission may hold the hearing concerning any such matter in camera.

That is the end of the quotation from the Quebec Bar Report.

Now, having stated that publicity is the general principle by which the Commission will be guided, it is nevertheless the case that, even if the Order-in-Council creating this Commisson had said nothing whatsoever about hearing evidence in camera, the Commission would nevertheless be required by the general law to do so if, for example, the evidence to be given would, if given in public, prejudice the safety of the nation or its diplomatic relations in some other country. The Commission would be bound by the general law — not by any statutes or any Order-in-Council — to prevent the disclosure of such evidence, whether or not any Minister of the Crown, or any lawyer for any government, asked that that be done. The law is clear to that effect.

In addition, if any party contended that it would not be in the public interest that certain evidence be heard in public, then if the Commission agreed with that contention, the Commission could hear the evidence in camera — even if our Order-in-Council has said nothing whatsoever to that effect. There is ample judicial authority which makes it clear that the duty to decide these matters and exclude such evidence altogether, if the circumstances justify it, applies to the ordinary courts of law. That being so, it is not surprising that commissions of inquiry should generally be affected by the same considerations, although the procedural result may be different in that, instead of a commission of inquiry having to exclude the evidence altogether, as would be the case in a court of law, the commission may receive the evidence in camera.

In England, where the Inquiries Act gives the power to exclude the public when the tribunal is of the opinion that:

> ... it is in the public interest expedient so to do by reasons connected with the subject matter of the inquiry or the nature of the evidence to be given,

the Salmon Report, 11 years ago, recognized that those words up until that time had only been construed in England as applying to cases in which hearing the evidence in public would constitute a security risk. The Report observed, however, that this was because no question had yet arisen as to whether a discretion might be exercised in other cases. The Report thought that there might be other cases in which such a discretion might be exercised, that is, when a public hearing would defeat the ends of justice.

I shall refer again in a moment to what the Salmon Report said in this regard.

I turn now to a specific consideration of the discretion contained in paragraph 2 of the terms of reference, having discussed what the law would be in any event. In respect of this direction, it is for the Commission, and not for

any other authority, to decide whether any of the criteria referred to in the paragraph applies in a particular situation.

The meaning of the words "matters relating to national security" cannot be defined exhaustively in advance of the need to apply the phrase to the facts of particular situations. No attempt made by the Commission to define the phrase can bind the Commission when it is faced with a particular situation. Nevertheless, it is possible for the Commission to make some observations.

In our view, the words "national security" must be taken to refer to the security or safety of the nation. The safety of the nation may be threatened by persons outside Canada or inside Canada. This double sense in which "national security" may be used properly was noted earlier this year by Lord Simon of Glaisdale, when he delivered one of the judgments in the highest court of England, the House of Lords, in *D. v. National Society for the Prevention of Cruelty to Children*, as follows:

> Then, to take a further step still from the public interest in the administration of justice, the law recognizes other relevant public interests which may not always even be immediately complementary. For example, national security. If a society is disrupted or overturned by internal or external enemies, the administration of justice will itself be among the casualties. *Silent enim leges inter arma.* So the law says that, important as it is to the administration of justice that all relevant evidence should be adduced to the court, such evidence must be withheld if, on the balance of public interest, the peril of its adduction to national security outweighs its benefit to the forensic process.. . .

On the other hand, in the Commission's present view of the matter, not every terrorist act or act of violence, actual or threatened, raises a question of national security. A threatened or actual kidnapping or hijacking of an aircraft or murder becomes a question of national security only if its object is the overthrow of the state or of an elected government. In other words, the threatened or apprehended or actual use of force, whether against one person or a group of persons, becomes a question of national security only if its object or one of its objects is the overthrow of the state or a government other than by democratic means.

However, having said that, it does not follow that, simply because the Commission may decide that a matter of police action does not relate to national security, evidence in respect of it will necessarily be heard in public, for it is still open to the Commission to hold, as it could have held without any direction in the Order-in-Council, that it would not be in the "public interest" to hear such evidence in public. In some cases, such as the examples just mentioned, it might be considered not to be in the public interest to hear evidence in public, the disclosure of which publicly would destroy the efficacy of present legal methods by which the police hope and attempt to prevent successful kidnappings or hijackings or murders for profit, unrelated to any attempt the safety of the state or its government. Likewise, just as in a court of law when evidence of the identity of an informer cannot be given — except in a crminal case where it is necessary to allow the name of the informer to be given in order to ensure that an accused person can present a legitimate defence

successfully — so a Commission of Inquiry, even if there were no direction such as is found in paragraph 2 of our terms of reference, would be bound to prevent the disclosure of the identity of an informer except, perhaps, in camera. As Lord Diplock said in the same case I mentioned a moment ago:

> The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers has to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by time of *Marks* v. *Beyfus* — which was decided about 1883 — had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer would help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure.

The matter is discussed by the Salmon Report as follows:

> We consider that the Tribunal should have a wider discretion, certainly as wide as the discretion of a judge sitting in the High Court of Justice. This discretion enables the public to be excluded in circumstances in which a public hearing would defeat the ends of justice, for example, where particulars of secret processes have to be disclosed — that is a reference, not to the secret processes of the police, but to patents and trade marks — and in infancy cases. We do not think however the discretion should necessarily be confined to infancy cases or to trade secrets. It is impossible to foresee the multifarious contingencies which may arise before a Tribunal of Inquiry. We can imagine cases in which for instance a name might be required of a witness and it would be just that he should be allowed to write it down rather than state it publicly. The Tribunal might consider it desirable to exclude the public from the inquiry for the purpose of making an explanation to a witness or admonishing him. The Tribunal might consider that the interests of justice and humanity required certain parts of evidence to be given in private. This would be only in the most exceptional circumstances which indeed may never occur. The discretion should however be wide enough to meet such cases in the unlikely event of their occurring. Clearly that discretion should be exercised with the greatest reluctance and care and then only most rarely....

Finally, the Commission is directed by the Order-in-Council to hold its proceedings in camera when the Commission deems it desirable "in the interest of the privacy of individuals involved in specific cases which may be examined". The scope of this phrase may overlap with "the public interest" in hearing evidence in camera. Thus, it may be said not to be in the public interest, or it may be said to be in the interest of the privacy of a witness, to permit him to give some part of his evidence in camera if that part of the evidence, although relevant to the Inquiry, nevertheless discloses some personal matter not criminal in nature, which standing alone would be of no pertinence to the issue of the fact being investigated.

The Commission hopes that this discussion of the circumstances in which it may decide to hear evidence in camera will demonstrate to all that it has devoted considerable attention to the problem. We wish to repeat that the general principle guiding the Commission will be the desirability of hearing evidence in public.

When a question arises as to whether a particular item of evidence or line of inquiry should be received in camera, in some circumstances it may be possible to hear argument by counsel in public. In other instances the argument will be meaningful only if it itself, that is, the argument, is heard in camera, where counsel can refer specifically to the documents or to the oral evidence it is proposed to offer. In such an instance, the Commission reserves the right to decide what counsel may be present while arguments are being heard, and for that matter, what counsel may be present when evidence is being heard in camera. The Commission has an obligation in law to ensure that no persons, whether counsel or otherwise, will be placed in a position which might endanger national security.

In the process of deciding whether on any of these grounds certain evidence will be received in camera, the Commission will insist that its counsel formally present to it the arguments for and against the proposition.

If argument as to whether evidence should be heard in camera is heard in camera, and if the Commission then decides that the evidence will be heard in camera, the Commission will attempt to deliver in public some reasons for its decision which will convey some idea of the Commission's reasoning, although it may not be possible to give very detailed reasons for doing so without disclosing the very nature of the matter which it has been decided ought not to be disclosed in public.

Now, some comments on certain aspects of the terms of reference, or mandate of the Commission.

In making these remarks, we express our agreement with the Salmon Report that a Commission of Inquiry "... should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued".

First of all, some comments on the words "not authorized or provided for by law", which are found in paragraphs (a) and (b) of our terms of reference.

The Commission will, of course, inquire into the facts of any allegations made that persons who were at that time, at the time of the incidents in question — they may still be members of the R.C.M.P. — were involved in "investigative actions or other activities that were not authorized or provided for by law". While thus inquiring, we shall have to consider whether the facts of a particular case, once established, were such that members of the R.C.M.P. were involved in actions or activities "not authorized or provided for by law". What do those words mean, the words "by law"? Clearly, they include acts which the Criminal Code defines as offences. Clearly, they include also acts which other federal or provincial statutes define as offences. In addition, we consider that those words require us to decide whether particular acts, even if

they are not crimes or offences against statute, were nevertheless wrongs in the eyes of the law of tort in the provinces other than Quebec, or of the law of delict in Quebec.

Moreover, those broad words "not authorized or provided for by law", require us even to consider whether, in the facts of a particular case, there was a positive duty imposed upon the police by law to do the act — whether some specific duty, or their general duty to enforce the law.

We shall examine the very legislative and constitutional basis for the existence of the R.C.M.P. generally, and for the existence of the security service of the R.C.M.P. in particular.

It should be borne in mind that, in inquiring into actions or activities "not authorized or provided for by law", we are not limited to activities of the security service. Our terms of reference in paragraph (a) require us to inquire into "the extent and prevalence" of such activities generally, and to, in paragraph (b), "report the facts" relating to any such activities generally. These obligations, in our view, are not limited to the activities of the security service. In this manner our task may become very complex and large, and its effect on other functions of the Commission's task will be the subject of a watchful eye. Meanwhile, however, the Commission's investigative staff is at work investigating complaints received, which are unrelated to the work of the security service.

In addition to the legal questions I have just mentioned, which are raised by the use of the words "not authorized or provided for by law", it is not the Commission's intention to ignore the moral and ethical implications of police investigative practices.

As to all matters of interpretation of the law, we earnestly invite counsel to be of assistance to the Commission. During recent months, despite a great deal of public discussion of the facts, or presumed facts of a number of situations, some public analyses of whether particular acts were or were not crimes or otherwise contrary to law, have been superficial. Lawyers who appear before this Commission will be carrying out their duties to their clients and to the Commission if they give serious consideration to those questions and are able to provide argument in principle and on authority. Needless to say, counsel for the Commission and ultimately the Commissioners themselves, will be addressing their minds to these questions of law.

When the Commission makes its Report as to a particular allegation, it will give its view as to whether the conduct proved constituted an action or activity "not authorized or provided for by law". Not only is the Governor in Council, to which we are required to report, entitled to hear the answer to that question, but the present and future members of R.C.M.P. are entitled to have the benefit of the Commission's view as to the law.

Now, comments about the question of control of the R.C.M.P. by ministers of the Crown.

The Commission considers that, while inquiring into specific allegations, and generally, it is empowered and obliged to determine what, in the past and

present, have been and are the controls exercised by federal or provincial ministers over the R.C.M.P.'s security service, and what methods and channels have been used by the R.C.M.P.'s security service to report and account to federal and provincial ministers.

Any witness who has information which will shed light on these questions will be invited to testify before the Commission.

The Commission considers that these issues are raised by the obligations expressly imposed upon the Commission by the terms of reference, "to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada" — that paragraph (a) — and by the entirety of paragraph (c), which I take the liberty of reading in full:

> to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

The point is that, if any federal cabinet minister, or any provincial cabinet minister, has in law or in practice in the past or at the present time, some power of control over the security function of the R.C.M.P., that is a relevant policy or procedure that "governs" — or governed — "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada", and therefore it is relevant to both paragraph (a) and paragraph (c) of our terms of reference.

The issues involved in this respect are serious. They will not be approached by the Commission, any more than any other issues will be, until its counsel are thoroughly prepared, so that the examination of such witnesses will be diligent and meticulous.

In order to enable the Commission to reach an informed decision as to what were, are and should be the extent of control by federal or provincial ministers over the R.C.M.P.'s security service, when investigating particular factual situations which illustrate these issues, the Commission will be grateful to any counsel who can make learned and informed representations as to the law and constitutional conventions and/or practices which are relevant to these matters.

Now, some comments about the policies, procedures and laws governing the national security function of the R.C.M.P.

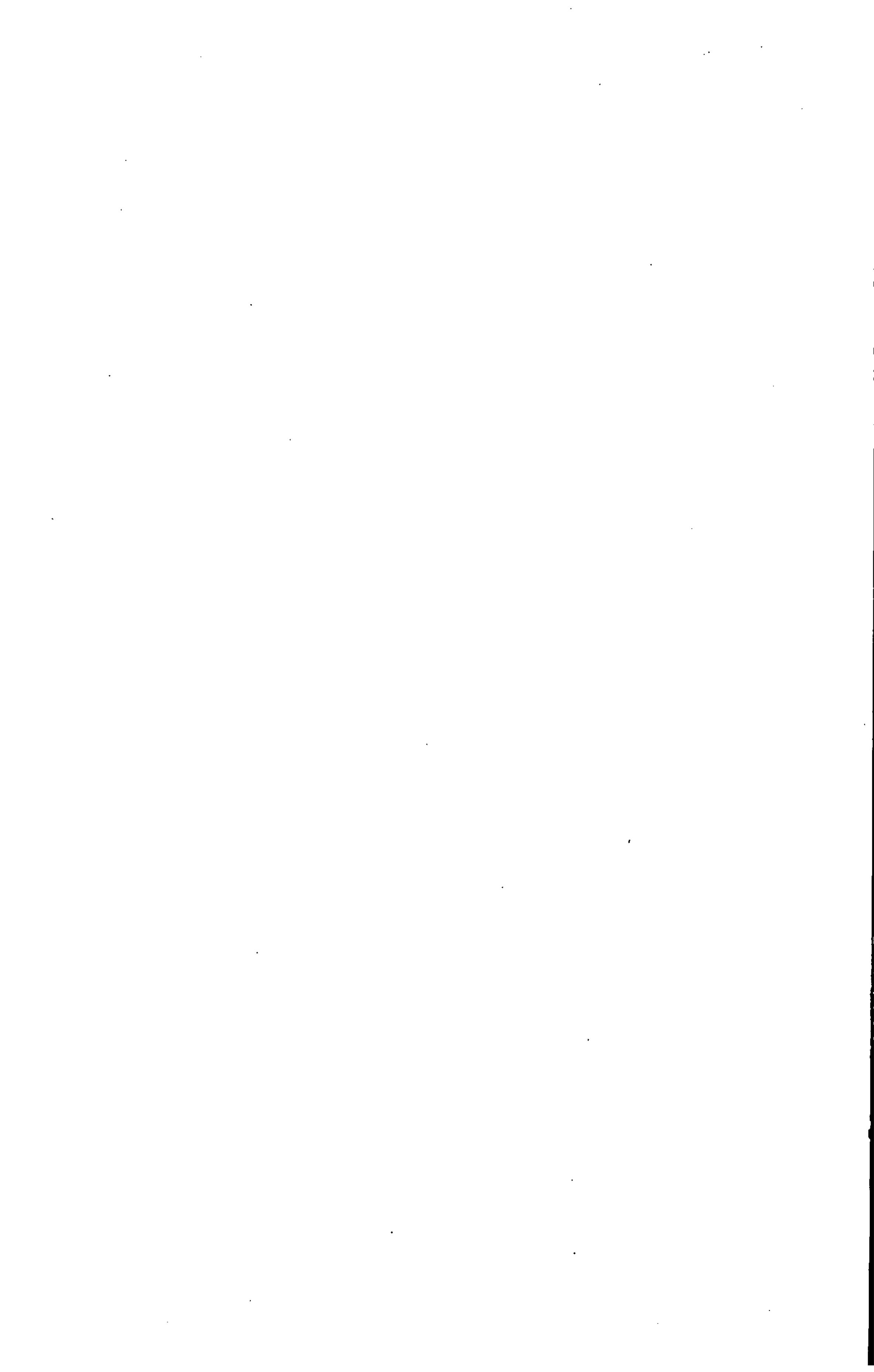
I have already read paragraph (c) of the terms of reference. That paragraph requires the Commission to make recommendations about the policies and procedures and the laws governing the national security function of the R.C.M.P.

The Commission will be obliged to decide what, in its view, the policies, procedures and laws should be. This will require the Commission to consider

what the needs of the security of Canada are, how those needs should be protected effectively in terms of police work, and how that protection can be achieved in a democracy which cherishes liberty. The assessment of these needs, means and values will constitute a major challenge to the Commission.

Apart from empirical and other research which the Commission's staff will undertake, the Commission will welcome the receipt of considered opinions about these issues from members of the public, including groups and associations. Written submissions will be welcome at any time. However, so as to guard against the possibility that silence will greet the Commission's requests for the opinions of the public, the Commission from time to time will hold public hearings for the purpose of encouraging written or oral submissions by persons, groups and associations in each of the provinces of Canada. These hearings will not be into particular factual situations. However, the opinions expressed may relate to issues which have been evoked by particular factual allegations already under investigation by the Commission, or which are otherwise in the public eye.

The first hearings for this purpose will be held in Montreal on January 16th — and I might say that the Commission expects that Me Sebastien will appear as counsel for the Commission on that occasion, and the hearings will be in this room — in Toronto on January 18th and Vancouver on January 20th. In due course, further such hearings will be held in other provinces. No doubt we will hold such hearings again in Ontario, Quebec or British Columbia, being the largest provinces of the country, before we write our final Report.



APPENDIX "E"

REASONS FOR DECISION OF THE COMMISSION DECEMBER 8, 1977

The starting point for the consideration of the matter of the representation by counsel before the Commission is the Inquiries Act of Canada, sections 12 and 13. They read as follows:

> The Commissioners may allow any person whose conduct is being investigated under this Act and shall allow any person against whom any charge is made in the course of such investigation to be represented by counsel.

Section 13:

> No report shall be made against any person unless reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel.

The Commission has given careful consideration to the submissions made on behalf of all interested parties on the issue of representation by counsel, in particular those made on behalf of the Canadian Civil Liberties Association, the Federation of Canadian Civil Liberties and Human Rights Associations and the Progressive Conservative Party of Canada. We appreciate the care that has been taken in preparing those submissions.

It is clear that representation is to be granted to counsel for the Commission and to the following who are expressly referred to in sections 12 and 13 of the Inquiries Act of Canada: (1) counsel for any person against whom any charge is made during the course of the investigation by this Commission; (2) counsel for any person whose conduct is being investigated by the Commission.

The second category, that is to say counsel for any person whose conduct is being investigated by the Commission, includes counsel for any witness, counsel for the Commissioner of the R.C.M.P. and counsel for the Solicitor General of Canada. The Commissioner and the Solicitor General are responsible by statute for the R.C.M.P., and in that sense the conduct of their offices is being investigated by the Commission.

Beyond those categories, it has been contended that the Commission ought not to grant standing because sections 12 and 13 of the Inquiries Act do not expressly provide for standing for any other persons.

We have examined the judicial decisions which have been referred to. Those arising under provincial legislation are based on statutory provisions very different from those of the Federal Inquiries Act. For example, the present Ontario Inquiries Act expressly requires a commission to give full standing to

> any person who satisfies it that he has a substantial and direct interest in the subject matter of the inquiry.

The previous Ontario Act was silent on the subject but in the case of Re *Ontario Crime Commission, Ex parte Feeley and McDermott* [1962] O.R. 872, the majority of the Ontario Court of Appeal held that persons against whom imputations of serious crimes were made should be allowed to have counsel with the power to cross-examine witnesses. Such persons are entitled under section 12 of the federal Inquiries Act to be represented by counsel. Thus, the Ontario Crime Commission case is of no assistance to us in deciding whether we should accord a privilege of counsel to persons who are not specifically referred to in sections 12 and 13 of the Inquiries Act.

One decision which arises under the Federal Act is *Advance Glass and Mirror Company Limited* v. *The Attorney General of Canada and McGregor* [1950] 1 D.L.R. 488. All it decided is that a person who does have the right to be "heard" under section 13 does not have the right to examine all witnesses. There is nothing in the decision to prevent a federal Commission of Inquiry granting a privilege or leave to a person's counsel to examine witnesses, even if that person is not expressly referred to in sections 12 and 13.

Having thus discussed some of the authorities, we prefer to approach the question on the basis that sections 12 and 13 do not limit the categories of persons who may be granted standing. The Commission is the master of its procedure. Subject to sections 12 and 13, it is within the discretion of the Commission to decide who shall be granted standing. The issue in particular is whether the two civil liberties groups and the Progressive Conservative Party of Canada should in the discretion of the Commission be granted standing. Each federal Commission of Inquiry must reach its decision as to how it exercises this discretion, based on the circumstances of the case and especially the origins of the Commission and the language of its empowering instrument.

A decision taken by one commission born of different circumstances cannot be taken as a precedent binding or even of serious persuasive value by a later commission. As far as the Berger Commission of Inquiry is concerned, counsel for the Federation of Civil Liberties and Human Rights Associations did not present us with a copy of the report of that Inquiry or whatever ruling Mr. Justice Berger may have made on the question of standing. This Commission must, therefore, today consider the Berger Inquiry without the benefit of such assistance.

It is not surprising that the Commission chaired by Mr. Justice Berger, inquiring into the proposal for a Mackenzie Valley Pipeline, granted standing to native persons groups and to the environmentalist groups. As far as the fact-finding function of that Commission is concerned, in effect, counsel for those groups were counsel for witnesses — for example, the many native persons who testified.

In the instance of the Dorion Inquiry into an alleged attempt to bribe counsel who was acting for the Government of the United States, applying on behalf of that government for the extradition of one Lucien Rivard, it is clear from Chief Justice Dorion's report that he regarded the matter as one arising from allegations made against appointees of the governing political party. The matter thus had a clear basis in allegations by the opposition political parties against the governing political party, as a political party. It is not surprising that Chief Justice Dorion, in the circumstances, granted standing to all the political parties, indeed invited their participation.

Since the manner in which the discretion is to be exercised must be decided in the circumstances facing a particular commission, we propose to turn to an examination of this Commission's mandate and proceed to decide the issue.

Paragraph (a) of the terms of reference requires the Commission to investigate certain facts. The facts in question are:

> The *extent* and *prevalence* of investigative *practices* or other *activities* involving members of the R.C.M.P. that are not authorized or provided for by law.

I have orally stressed the nouns which represent the facts that paragraph (a) requires us to examine. Paragraph (a) goes on:

> the relevant *policies* and *procedures* that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada.

Paragraph (b) requires the Commission:

> to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest.

These two paragraphs require the Commission to investigate facts and report what they were and then recommend what further action ought to follow. This aspect of the Commission's work is a factual inquiry. Whether members of the R.C.M.P. committed offences is a grave matter from the point of view of those against whom any charges are made in evidence.

If this were a trial of a criminal charge, there would be a Crown prosecutor and a defence counsel. No one else would be entitled to appear. No political party or public interest group would be entitled to come to court and claim either as a right or privilege that it should be allowed to examine and cross-examine witnesses. The Crown prosecutor would have the duty to produce all evidence that he has of the accused's guilt.

Similarly, before this Commission, Commission counsel must equally produce all evidence he has of the guilt of someone who is alleged to have done wrong and must not conceal evidence of that person's innocence. But, unlike a Crown prosecutor, he must also positively present to the Tribunal the existence of evidence of innocence and, in that sense, Commission counsel has no adversarial role.

Paragraph (a) and (b) of the terms of reference do not require this Commission to pass any political judgments on members of the R.C.M.P., but rather require it to undertake a task which is not dissimilar to the task that faces a criminal court.

The task that would be fulfilled in a criminal court by Crown counsel is fulfilled and gone beyond by Commission counsel. If he is as independent, well-qualified, diligent and able as we believe the several counsel for this Commission to be, the public is entitled to have confidence in the work of this Commission.

Moreover, to allow other counsel to appear with the right to cross-examine persons whose conduct is under investigation and suspicion, would be as unfair

to such a person as it would be to allow counsel other than the Crown prosecutor to cross-examine an accused and his Defence witness at a trial. At a criminal trial, the victims, after all, are not allowed to have their counsel cross-examine the accused. That function is left to the Crown prosecutor. No battery of counsel appears against an accused to wear him down one after another.

A commission of inquiry already has the power to require a person "charged" to testify to disclose his wrongdoing under oath, a power which no criminal court has over an accused person.

To compound the inquisitorial nature of a commission of inquiry by multiplying the number of cross-examiners a witness must face, would be to move the proceedings of the commission that much closer to the atmosphere of a Court of Star Chamber, a mechanism mercifully laid to rest in 1640.

In the Ontario Crime Commission case, Mr. Justice Schroeder said:

> It is no improper reflection upon counsel for the two political parties to observe that they may well be more concerned with doing what they deem best calculated to serve their own clients' ends and in so doing with promoting interests perhaps violently opposed to those of the applicants.

In that case, the applicants were the persons accused of crimes.

I turn now to the application by counsel for the Attorney General of Quebec. Counsel for the Attorney General of Quebec has asserted a right to appear, or in the alternative, has asked that in our discretion we grant leave to him to appear. With the greatest deference to the Attorney General, in the Commission's view he does not have a right to appear before this Commission. If there is an argument on the constitutional plane in support of the existence of such a right, and I mean not only constitutional in the sense of the British North America Act, but also in the sense of any constitutional convention or any unwritten constitutional law which is just as much a part of our Constitution as the British North America Act is — if there is an argument on the constitutional plane, then no such argument was placed before the Commission.

If the Attorney General wishes at some stage to place such a representation before the Commission, we shall be happy to consider it. Otherwise, today, we approach the question of the Attorney General's status in light of his counsel's statement to the effect that the Attorney General does not ask for full status. He said that the Attorney General does not wish to appear by counsel daily, but may have an interest in intervening actively, if the members of the Sûreté de Québec or of Municipal Police Forces in Quebec are referred to in evidence. It is not clear in such a case what role counsel for the Attorney General would wish to play.

As to counsel representing the interests of any members of the Sûreté du Québec who testify or against whom allegations may be made by witnesses, there is no difficulty in recognizing his standing. If counsel for the Attorney General should then wish to represent their interests, it may be that there would be duplication of representation. Perhaps the problem may be resolved if and when it arises.

As for the interests of members of municipal police forces — and no one has appeared before us asking for the right to appear on their behalf as yet — again, the problem can be answered if and when it arises — at which time we will know whether any other counsel comes forward, claiming to represent the interests of a member of a municipal force.

For the moment, therefore, the Commission will welcome the attendance at its hearings of counsel for the Attorney General without his being accorded any formal standing at this time.

We turn now to paragraph (c) of the terms of reference. This paragraph requires us to make recommendations as to laws and policies and procedures in the future. Obviously the Commission will welcome the suggestions of all persons, and even more so if those suggestions have been developed carefully and articulately with the assistance of counsel. There is no dobut about the Commission welcoming this form of participation by counsel.

To enable the Commission to formulate recommendations, the Commission must know what the present policies and procedures are and what they have been. One way to do that is to determine, in particular situations, what policy was applicable and what procedure was followed. For this purpose it may be necessary, in particular situations, to ask senior officers of the R.C.M.P. and Ministers of the Crown what communications were made to the Ministers, what the Ministers asked for, what they directed, and what they did not ask for or direct. In pursuing such matters, the Commission is satisfied that its counsel will ask the necessary questions and that before they ask the questions they will be properly prepared by meticulous investigation. If any other persons or counsel wish to suggest to Commission counsel some particular line of inquiry or some particular questions, Mr. Howard has already said that such suggestions will be welcomed. If the suggestions thus made are not acted upon, and no satisfactory explanation is given to the persons making the suggestions for Mr. Howard and other counsel not adopting them, the persons making those suggestions are at liberty to make such comments as they wish to this Commission and in other forums. The Commission is prepared to assume that its counsel will act upon constructive suggestions and, in this, if our counsel do not do so, the Commission's staff's decision can be the subject of proper comment to this Commission and in other forums. The Commission invites counsel for such entities as the Progressive Conservative Party of Canada, the Canadian Civil Liberties Association and the Federation of Canadian Civil Liberties and Human Rights Associations to cooperate fully with the Commission in a positive manner and not to retire from the scene because the position it has urged upon the Commission has not been accepted.

It is to be borne in mind that, even as to paragraph (c), the power to ask questions is directed only to the fact-finding process. At least as regards hearings in public, the associations and party which have applied for standing will be able to contribute, in the manner described, to that process. If they want questions asked, they have only to suggest. The facts will be explored exhaustively. No multiplication of counsel is likely to enhance the result.

The determination of what the proper policies and procedures should have been in the past, or should be today, or should be in the future, lies not in the domain of question and answer, but in that of representations and submissions

made to the Commission by all interested persons and organizations, by written and oral submissions made either at special hearings to receive such submissions, such as the one in Montreal on January 16th, which are being organized by the Commission and will continue to be organized by it. At such hearings, the opinions of political parties, civil liberties associations, and other groups, as well as individuals, will be welcomed.

If particular past or present policy or procedure is stated by a Minister as a fact in his evidence before us, the validity or propriety of such a policy or procedure may be the subject of comment by members of opposition political parties not only in briefs to this Commission, but of course, in Parliament or in the media. In Parliament, comment may be made fully and questions may be put to Ministers of the Government.

For the foregoing reasons, the Commission makes the following ruling:

1. The following counsel will be recognized as having the right to examine witnesses heard at public hearings of the Commission into any allegation of an "investigative action or other activity involving persons who are members of the R.C.M.P. that was not authorized or provided for by law" or into any fact relating to "policies or procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada":

   Counsel for any person against whom any charge is made in the course of the investigation by this Commission;

   Counsel for the Commission;

   Counsel for any person whose conduct is being investigated by the Commission.

(In the investigation of facts at public hearings, counsel for persons, groups or associations may draw to the attention of counsel for the Commission what areas of inquiry should be entered into or what evidence should be presented, and what specific questions should be asked.)

2. On matters of law, in public hearings or when argument is heard at the conclusion of the Commission's public hearings into any such allegations or facts, any other persons, groups or associations will have the right at that time to make submissions to the Commission in writing.

3. At hearings of the Commission held *in camera*, the Commission shall decide in the circumstances of the particular case who shall be permitted to attend, which counsel shall be permitted to attend and what conditions may be imposed upon any persons or counsel permitted to attend, all in the light of the law governing the inquiry.

In case anyone is in doubt, the effect of this ruling is that the following counsel may appear before the Commission to represent their clients and examine witnesses:

Counsel for the Commission;
Me Fortier;
Me Nuss;
Me Proulx;
Me Lamontagne;
Me Barakett.

APPENDIX "F"

REASONS FOR DECISION OF THE COMMISSION OCTOBER 13, 1978

1. *Introduction*

From an early stage in the work of the Commission, the Commission has had full access to the files of the Royal Canadian Mounted Police. In order to do its work effectively, including preparation for hearings, it was desirable that the Commission obtain documents or photocopies of the documents from the R.C.M.P. This need was expedited by the terms of the following letter dated November 6, 1977, from Mr. J.F. Howard, Q.C., Chief Counsel to the Commission, to Mr. Joseph Nuss, Q.C., Counsel for the Solicitor General of Canada:

> This will confirm arrangements made between us with respect to the delivery to the Commission of the documentary material relating to matters outlined in our letter of October 17th, in Commissioner Simmonds' letter to me of October 26th, and in telephone conversations of October 31 between the Secretary of the Commission and Assistant Deputy Commissioner Quintal. It is understood that the arrangements will apply to future delivery of documentary material to the Commission unless different arrangements are made at the time.
>
> The material being delivered to the Commission at its request is subject to the following understanding:
>
> 1. The material is being delivered to the Commission to avoid the inconvenience of reviewing all of the documentary material at the R.C.M.P. Headquarters at this time as contemplated by the paragraph numbered 4 in the Order-in-Council establishing the Commission;
>
> 2. By delivery of the material, the Solicitor General of Canada (the Minister) will not have been taken to waive the position that some of the documents delivered, or parts thereof, fall under the directive in the paragraph No. 2 of the Order-in-Council establishing the Commission, as being material to be dealt with by the Commission in camera and expressly reserve the right to make such contention;
>
> 3. Should there be a difference in the view of the Commission, and in the view of the Minister as to whether the direction in paragraph 2 referred to above applies to a particular document or part thereof and this difference of view cannot be resolved, it is understood that notwithstanding that the document has been delivered to the Commission, the delivery of such document shall not be invoked as a waiver of the right to the Minister to raise any objection, as to its introduction in evidence before the Commission and/or if so introduced that it be done at an in camera session, and the Minister shall be entitled to invoke any remedy

or any provision of law which may be applicable to the final disposition of such view.

It is also understood that only those members of the Commission's staff who have the requisite security clearance and who require a particular document for the purposes of their work with the Commission shall have access to such particular document amongst those delivered to the Commission.

Pursuant to the terms of that letter, all documents requested by the Commission, or photocopies of them, have been transmitted by the R.C.M.P. to the Commission. Among these documents are many that fall within the class of what Mr. Nuss calls "Government Documents". That class according to Mr. Nuss, is as follows:

Documents relating to the proceedings of Cabinet and its Committees, documents relating to any other process of consultation among Ministers and/or officials, and documents emanating from Ministers and/or officials relating to the decision-making or policy formulation process including, but without limiting the generality of the foregoing:

1. Cabinet Papers
   (a) Cabinet agendas, memoranda, minutes and decisions;
   (b) Cabinet committee agendas, minutes and reports;
   (c) Treasury Board submissions, minutes and certain decision letters.
2. Ancillary Papers

   Ministerial briefing notes for use in Cabinet or in discussions or consultations among Ministers.
3. Other Records and Papers

   Letters, memoranda, notes, records or other documents exchanged by Ministers and/or officials or describing discussions or consultations among Ministers and/or officials.
4. Opinion, Advice or Recommendations

   Documents emanating from officials containing matter in the nature of opinion, advice or recommendation or notes or other matter that relates to the decision-making or policy formulation processes.
5. Documents containing quotations from any of the above documents.

Some of the documents in the R.C.M.P.'s possession originated in the R.C.M.P. Others are copies of documents theoretically originating from outside the R.C.M.P. but in part drafted by the R.C.M.P. — such as memoranda to Cabinet ultimately signed by a Solicitor General. Others are copies of documents originating outside the R.C.M.P., of which a copy had been sent to the R.C.M.P.

Outside the terms of Mr. Howard's letter, some documents falling within the categories enumerated by Mr. Nuss may be obtained by the Commission from sources other than the R.C.M.P., for example by subpoena, or from other Government Departments.

The examination of witnesses to date has not been hampered by the failure to resolvde whether documents within the categories enumerated by Mr. Nuss

may be received in evidence by the Commission in public. This is because the Commission has so far examined mostly witnesses who have been involved at the operationbal level in various investigative practices or actions, or other activities which, it may be argued, were "not authorized or provided for by law" (to use the words of paragraphs (a) and (b) of the Commission's terms of reference, which are set forth in Order-in-Council P.C. 1977-1911), and for everybody's convenience, a copy of the Order-in-Council is attached. Such witnesses, by reason of their status, are unlikely to have been authors or recipients of, or to have had knowledge of, documents in the classes enumerated by Mr. Nuss.

However, the Commission is about to commence the examination of present and past senior officials of the R.C.M.P. and of Ministers to the extent that their evidence may be relevant to any of the issues of fact so far inquired into. It is clear that the examination of these witnesses will in part require the production of a number of documents in the categories enumerated by Mr. Nuss, or at the very least the testimony of the witnesses about the contents of the documents or about the conversations or discussions recorded by the documents.

Some time ago the Commission indicated to counsel that it wished to hear representations as to whether such evidence should be received by the Commission in public or in camera. For that reason the Commission scheduled a day during which counsel might make their submissions. Those submissions were made on October 5. These reasons for decision have been prepared as promptly as possible, in order that counsel may have the benefit of the Commission's opinion during the preparation for the evidence of senior officials and Ministers.

The question has been considered on the basis of the contention by Mr. Nuss and Mr. Michel Robert, his co-counsel, that these documents as a *class* ought not to be produced in public. The counsel who were heard on the matter were Mr. Nuss and Mr. Robert, who represent the Solicitor General and "interests of the Departments..." and which in the original manner in which it was placed before the Commission was in the French ("ministères" in the French original) of the Government of Canada, including the Office of the "Prime Minister" (statement by Mr. Nuss to the Commission, September 11, 1978, vol. 72, p. 11407), and Mr. Howard, Chief Counsel for the Commission.

2. *The nature of a Commission of Inquiry*

In approaching this problem, it is desirable to keep in mind the purpose and function of a Commission of Inquiry.

The Commissioners were appointed under Part I of the Inquiries Act, R.S.C. 1970 ch. I-13 pursuant to section 2 of the Act which empowers the Governor in Council to

> cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

Clearly the matters which this Commission is directed to deal with are connected "with the good government of Canada" and with "the conduct of

any part of the public business" of the Government of Canada, and I will not bother reading quotation marks from now on.

When the Governor in Council deemed it "expedient" to cause such an inquiry to be made, it created an organism of the executive branch of government to "investigate", "inquire", "report the facts" and "to advise" with respect thereto. The Commission is not a court. It is not a branch of the judiciary. It fulfills executive or administrative functions. As Cattanach, J. observed in *Copeland* v. *McDonald, Rickerd and Gilbert* (Federal Court of Canada, August 4, 1978) the gulf is wide between "the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative notwithstanding that both hold hearings".

The Governor in Council, in creating such a Commission as this, asks this newly and specially created unit of the executive branch of government to examine some particular aspect of the government, (that is, the executive). The executive branch, through its chosen executive instrument, is examining itself. This must not be forgotten by those who expect the Commission to do as they wish and as it wishes (assuming they are one and the same). The Commission is created by the executive (the Governor in Council) and its terms of reference can be altered — indeed its very existence can be abrogated — by another Order-in-Council at any time.

On the other hand, a Commission of Inquiry is not a unit of the executive branch of government like other government departments and agencies. Short of direction by Order-in-Council, it cannot be directed by a Minister or even by the Cabinet to interpret its terms of reference in a particular manner, or to follow this procedural course or that. It is for the Commissioners to interpret the instrument that gave birth to the Commission.

Moreover, the Commissioners, unlike other arms of the executive branch, are by statute given powers which members of the executive branch — even "Royal Commissions" appointed under the Great Seal but not pursuant to statute — do not enjoy: the power to summon witnesses, and to require them to give evidence on oath or affirmation, and to produce documents and things (all under section 4 of the Inquiries Act), and "the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in a court of record in civil cases" (section 5). These are extraordinary powers, ordinarily available neither to the common citizen nor to members of the government service. These powers set commissions appointed pursuant to Part I of the Inquiries Act apart from the remainder of the executive.

In addition, commissioners are usually persons who have not been members of the executive branch. They are, in effect, brought temporarily within the ranks of the executive to carry out the task of diagnosis and prescription. Very often a judge is the sole commissioner or chairman of a group of commissioners. One reason a judge is chosen is that his livelihood is secure in that he can be removed from office only by joint address of the Houses of Parliament. This fact, which lies at the root of the cherished independence of the judiciary, increases the likelihood that the inquiry will not be influenced by considerations to which ordinary segments of the executive are susceptible. Putting it another way, it ensures that the inquiry will be conducted at arm's length from the executive. It further ensures that all decisions taken by the

Commission, whether procedural or substantive, will be commensurate with a judge's duty to honour the principle that the reciprocal of judicial independence is judicial, non-partisan impartiality. Commissioners are appointed because of some real or imagined distinction or ability which the Governor in Council hopes they will bring to a dispassionate inquiry into the issues. Also, it is hoped that these qualities will enhance the possibility that their recommendations will enjoy public as well as governmental respect, so as to restore confidence and trust in that part of the business of government which is under review. (Sometimes, commissioners may have no claim to merit other than stamina and a thick skin, which is all we claim for ourselves.)

Observers who expect that a commission of inquiry will be a mere instrument of the government that created it are wrong. It is true that a commission is part of the executive branch and does not exercise judicial functions. On the other hand, it is an instrument of self-criticism which, unlike the executive branch which has created it, nevertheless by tradition exercises a spirit of detachment from the wishes of its creator as it pursues its assigned tasks, except in so far as those wishes have been expressed in the creating instrument and the general procedural law.

3. *Who has the power to decide whether evidence shall be received in camera?*

(a) *Introductory*

The Commission's interpretation of its terms of reference in this regard has not changed since it made its opening statement in Montreal on December 6, 1977. At that time, we said:

> I turn now to a specific consideration of the discretion contained in paragraph 2 of the terms of reference. In respect of this direction, *it is for the Commission, and not for any other authority, to decide* whether any of the criteria referred to in the paragraph applies in a particular situation...

(Emphasis is added by us as is emphasis in other quotations.)

We then discussed briefly some perceptions of the words "matters relating to national security" and continued:

> However, it does not follow that, simply because *the Commission decides* that a matter of police action does not relate to national security, evidence in respect of it will necessarily be heard in public. For *it is still open to the Commission to hold* that it would not be in the "public interest" to hear such evidence in public.

The Commission then quoted a passage from the Salmon Committee's Report on Tribunals of Inquiry, published in England in 1966, which stressed that what the English called a Tribunal of Inquiry should have a wide discretion to meet cases where the public interest would require a hearing to be in camera. We then referred to the remaining criterion found in paragraph 2, which directs the Commission to hold its proceedings in camera when the Commissioners deem it desirable "in the interest of the privacy of individuals involved in specific cases which may be examined". We then concluded:

> The Commission hopes that this discussion of the circumstances in which *it may decide to hear evidence in camera* will demonstrate to all that it has devoted considerable attention to the problem. We wish to repeat that the

general principle guiding the Commission will be the desirability of hearing evidence in public.

Until the argument heard October 5, there had been no indication from any counsel that his client did not accept the statements just quoted. However, the matter now having been raised, the Commission will state in detail its reasons for its interpretation of paragraph 2, while emphasizing that the conclusion is the same as was stated last December 6.

(b) *Who has the power to decide whether evidence must be received in camera because it relates to national security?*

During the course of argument, Mr. Nuss asserted that where evidence "relates to national security", the Commission must accept the decision of the Solicitor General that the evidence relates to national security — and that should read where a question rises as to national security. The Commission does not accept that view. The Order-in-Council says that the Commissioners

> 2. *be directed that the proceedings of the inquiry be held in camera in all matters relating to national security* and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

The Commission's interpretation of the direction is that, if the Solicitor General makes a submission to the Commission that some particular evidence relates to national security, it is for the Commission to reach its own decision. While the Commission will give careful consideration and substantial weight to any reasonable submission made on behalf of the Solicitor General, or for that matter, on behalf of any other Minister of the Crown, that evidence relates to national security, the decision of the Minister is not conclusive.

While the Commission arrives by its own reasoning at this interpretation, it finds some comfort in knowing that at the time of the creation of the Commission the then Solicitor General shared it. On July 6, 1977, the Honourable Francis Fox said (Hansard p. 7378):

> The terms of reference are quite clear that if, *in the opinion of the Commission*, there is a matter of national security which is at stake, it has the power and is indeed directed to sit in camera.

(c) *Who has the power to decide whether it is desirable in the public interest that evidence be received in camera?*

During the course of argument the Commission came to realize that the submission made by Mr. Nuss was not only that, on principle and on the authorities, all the documents on his list ought not "*in the public interest*" to be disclosed in public, but that the decision as to that matter does not rest with the Commission at all but rather with (he said) the Privy Council. Assuming that he and Mr. Robert appeared before this Commission on behalf of "the Privy Council", which is far from clear to us, we understand his submission to mean that, once the Privy Council has decided that such documents are not to be produced in public, that decision is binding upon the Commission.

The practical result of that proposition would be the same as the result of the proposition which we first understood Messrs. Nuss and Robert to be making; namely, that in deciding whether the Commissioners "deem it desir-

able in the public interest" that the proceedings be held in camera, the authorities led to only one possible conclusion that such documents must be received in evidence in camera. If the Commission were to accept that view of the authorities, then, as we have just said, the result would be the same. However, there is an important difference between the decision being that of the Commissioners, on the merits of the case, and, on the other hand, the decision being that of "the Privy Council".

The question of the effect of such a decision of "the Privy Council" does not in fact arise for decision at this point, because Mr. Nuss did not advise the Commission that the Privy Council has decided that the Commission is not to receive any such documents in public. Such a decision could be made only by another Order-in-Council. If the Privy Council, by another Order-in-Council should so decide, the Commission would then have to re-examine its position in the light of the terms of the new Order-in-Council.

However, at the present time, the Commission must interpret and apply the terms of Order-in-Council P.C. 1977-1911, which created the Commission. The Order-in-Council states, in part, as follows:

> The Committee (of the Privy Council) further advise that the Commissioners:
>
> 2. be directed that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters *where the Commissioners deem it desirable in the public interest* or in the interest of the privacy of individuals in specific cases which may be examined.

Counsel for the Commission submits that the words of paragraph 2 of the Order-in-Council delegate to the Commission whatever power the Executive might otherwise have, to decide that certain evidence not be produced at all or not be produced in public. Mr. Nuss contends, however, that there can be no delegation of the power which, he says, must always rest with a Minister or the Privy Council to decide what it is in the public interest not to produce at all, or not to produce in public.

The Commission considers that by using the words found in para. 2 the Governor in Council has clearly directed the Commission to arrive at its own judgment as to whether, either in regard to a particular class of evidence or in regard to a particular item of evidence, it is "desirable in the public interest" that the proceedings be held in camera. It is well established by the authorities that the word "deemed" imports that a judgment is to be exercised: see *De Beauvoir* v. *Welch* (1827), 7 B. & C. 265, 108 English Reports 722 at 727.

For these reasons, the Commission's interpretation of Order-in-Council P.C. 1977-1911 leads it to reject the contention that the decision as to what proceedings should be held in camera on the ground of "public interest" rests outside the Commission.

4. *Considerations which the Commission may take into account in future specific cases*

It is true that in a number of court decisions, although comments on the question have frequently not been essential to the decision, judges in England, Australia and Canada have asserted an absolute privilege for government

documents originating at a high level. See, for example, *Smith* v. *East India Co.* (1841) 1 Ph. 50, and *Beatson* v. *Skeen* (1860) 5 H. & N. 838.

In *Conway* v. *Rimmer* [1968] A.C. 910, several members of the House of Lords spoke without limitation of the privilege from production which applies to such documents. For example, Lord Reid said:

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or capricious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan's* case, whether the withholding of a document because it belongs to a particular class is really necessary for the proper functioning of the public service.

Lord Hodson said the privilege applied to, for example, "Cabinet minutes, dispatches from ambassadors abroad and minutes of discussions between heads of departments" and heads of departments are the English equivalent of Deputy Ministers in the Canadian system. Lord Pearce added "Cabinet correspondence, letters or reports on appointments to office of importance and the like". Lord Upjohn added "high level interdepartmental minutes and correspondence pertaining to the general administration of the naval, the military and air force services" and "high level interdepartmental communications". Incidentally, Lord Upjohn expressly rejected, as a rationale for the privilege, that it would encourage candour and freedom of expression. Instead he said simply that the "reason for the privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high level communications, however innocent of prejudice to the state the actual contents of any particular document might be: that is obvious".

Australian cases in which the same view has been taken are *Lanyon* v. *Commonwealth* (1974) 3 A.L.R. 58, and *Australian National Airlines Commission* v. *Commonwealth* (1975) 132 C.L.R. 582.

On the other hand, in *Manitoba Development Corporation* v. *Columbia Forest Products Ltd.* (1973) 3 W.W.R. 593, Nitikman, J. refused to recognize a class claim for privilege for "documents pertaining to the policy-making and decision-making conduct of the Executive Council of the Government of

Manitoba". The privilege had been claimed on the ground that the production of the documents "would create or fan ill-informed or capricious public or political criticism", language which of course had been taken by the Minister there claiming privilege directly from the judgment of Lord Reid.

These cases are of great interest. However, the Commission is not a court of law. Principles of admissibility of evidence applicable to a court of law do not necessarily apply to the proceedings of a commission of inquiry. That is well established by court decisions. Moreover, some commissions of inquiry have as their subject matter questions of the conduct of high officers of state. Unlike the role of a court trying a case between private litigants or between a private litigant and the state, in a commission of inquiry such as this the very objects of the inquiry may include facts the disclosure of which — whether through government documents or not — may create or fan ill-informed or capricious public or political criticism.

Because of these differences between the role of a court and the role of a commission of inquiry, it is incorrect to suggest that procedural rules applicable to litigation are applicable automatically to commissions of inquiry.

Even in the courts, the recent judgment of Lord Widgery, C.J., in *Attorney General* v. *Jonathan Cape Ltd.* [1975] 1 Q.B. 752, is of great interest. There, the issue to be decided was whether, upon the application of the Attorney General, the court should grant an injunction to restrain the defendant from publishing the memoirs of the late R.H.S. Crossman, a Cabinet Minister in the 1960s, which included his record of discussions in Cabinet. At p. 764, Lord Widgery C.J. said:

> It has always been assumed by lawyers and, I suspect, by politicians, and the Civil Service, that Cabinet proceedings and Cabinet papers are secret, and cannot be publicly disclosed until they have passed into history. It is quite clear that no court will compel the production of Cabinet papers in the course of discovery in an action, and the Attorney General contends that not only will the court refuse to compel the production of such matters, but it will go further and positively forbid the disclosure of such papers and proceedings if publication will be contrary to the public interest.

The latter is a reference to the trial of the action as compared with production before trial on discovery. He continued:

> The basis of this contention is the confidential character of these papers and proceedings, derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel compelled to resign. It is contended that Cabinet decisions and papers are confidential for a period to the extent at least that they must not be referred to outside the Cabinet in such a way as to disclose the attitude of individual Ministers in the argument which preceded the decision. Thus, there may be no objection to a Minister disclosing (or leaking, as it was called) the fact that a Cabinet meeting has taken place, or, indeed, the decision taken, so long as the individual views of Ministers are not identified.

At p. 765, Lord Widgery, C.J. said:

> ... it must be for the court in every case to be satisfied that the public interest is involved, and that, after balancing all the factors which tell for or against publication, to decide whether suppression is necessary.

At p. 769, he said:

> ... The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility.
>
> It is evident that there cannot be a single rule governing the publication of such a variety of matters. In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.
>
> Applying those principles to the present case, what do we find? In my judgment, the Attorney General has made out his claim that the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussions are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.
>
> The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.
>
> There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.

He then held that, ten or eleven years having elapsed since the Cabinet discussions described in the memoirs, there ought not to be an injunction to restrain publication as he was not satisfied that "publication would in any way inhibit free and open discussion in Cabinet hereafter". He held likewise as to the disclosure of advice given by senior civil servants.

The Commission is not prepared to apply to its own proceedings a rule more absolute than that applied by Lord Widgery. The Commission will balance all the factors which tell for or against any document being made public.

The Commission does not intend to close its eyes to the importance which under certain circumstances the protection of state secrets could call for, whether this be done by keeping documents or oral evidence from public knowledge. But when this concern arises the Commission must invoke a number of factors which in each case will be weighed on their merits.

Without limiting the number of factors which may be pertinent in a particular case, the Commission readily recognizes that, faced by an objection to the giving of certain evidence in public on the grounds that it is of a secret nature the Commission could take into consideration:

1. The role of a Commission of Inquiry. The Governor in Council did not direct this Commission to receive all its evidence in camera. Thus the Governor in Council may reasonably be taken to have accepted the principle of publicity articulated in the Salmon Report, which I referred to earlier and was quoted in this Commission's opening statement on December 6th, 1977, as follows:

> It is. . . of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth...
>
> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
>
> It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view be a small price to pay for the great advantages of a public hearing. . .

2. Conflicting with the principle of publicity is the rationale of any privilege relating to state documents and discussions among officers of state. The Commission believes that the rationale must be found in more than an assertion that, as was said in one case, it would be wrong for such evidence to be disclosed, and it seems to us that the judgment of Lord Widgery C.J. in the *Jonathan Cape* case rested not on any such sphinx-like rationale but on that of the extent to which the suppression of such evidence is necessary to encourage candid exchanges of opinions about policy among persons at high levels of government, whether or not they actually had an expectation that the opinions were being exchanged in confidence. In most such situations there will have been an expectation of confidentiality, so that the effect is the same whether the rationale is the one or the other. It will be noted that this rationale is designed to protect exchanges of *opinions* about policy. The rationale is deserving of great weight where it is properly applicable. It is not applicable to statements of *fact*. The distinction was observed in *Halperin* v. *Kissinger*, 1975, 401 Federal Supplement 272, where the court said:

> ...Executive privilege

— as the Americans call it —

> exists to protect the decision-making process. The guarantee of confidentiality assures freedom "to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately..." The realm of advice, opinion, and policy formulation should be protected from public scrutiny in order to encourage candid discussion and independence by policy-makers in the executive branch.

It does not necessarily follow that statements of fact contained in records or in memories of discussions, or in letters, require the same protection in order to encourage candid discussion and independence by policy-makers. Disclosure of such statements of fact will not always impede the executive decision-making process, or deter future frank discussions by government officers.

3. "The public has an interest in preventing government malfeasance. Exposure of past wrongdoing might inhibit future abuses by government employees" (Wallace, (1976) 76 Columbia Law Review 142). Disclosure of crimes, frauds and misdeeds is permissible if the disclosure is justified in the public interest, in which case that public interest may override any private interest in confidence, as is established by, amongst others, two cases: *Garside* v. *Outram* (1856) 26 L.J.Ch. 113; *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396 (English Court of Appeal). The same view of the public interest in the administration of criminal justice resulted in rejection of a claim of "executive privilege" in *Nixon* v. *United States* (1974) 418 U.S. 683.

4. The status of the possessor or of the originator of the information may be significant. The older cases seemed to treat all documents of the central government as "state secrets" and accordingly, as a class, privileged from production. That view does not prevail today. Conversely, it cannot be assumed that documents of some other level of government are to be treated differently *as a class*: *D.* v. *National Society for the Prevention of Cruelty to Children* (1978) A.C. 171 (House of Lords).

5. As has already been observed, witnesses already heard by the Commission, whose conduct may lead the Commission to make a "charge" against them (to use the word found in sections 12 and 13 of the Inquiries Act), may have a proper interest in knowing of the testimony of senior officials of the Security Service and of persons in high levels of government from whom they may have received express or implied authority to carry out the acts under investigation.

This is not intended as an exhaustive list of the considerations which may be pertinent when the Commission must decide whether in regard to a particular document or oral evidence, the proceedings should, in the public interest, be held *in camera*.

In quantitative terms it may turn out to be rare that the Commission will have to reach a decision as to what is in the public interest. Frequently it should be possible for counsel to establish in public the existence of relevant facts without making specific reference to such documents and without eliciting oral testimony about discussions recorded by such documents. Again, in many cases a document in the class of "government documents" will be one which will, in any event, in the Commission's view, "relate to national security", and thus be receivable *in camera* on that ground.

The Commission is optimistic that in the future, as in the past, a spirit of reasonableness will enable counsel and the Commission to arrive at a result in a particular case which achieves the Commission's desire to hear as much evidence as possible in public while at the same time ensuring both that the national security is not endangered and that the public interest is served.

The Commission also wishes to point out that if the ingenuity and diligence of counsel fail to find a way of solving a problem involving a document, the Commission will not decide that the document should be received in public, without first giving all counsel the opportunity to make representations. Then, if the Commission does not accept the representations made against public disclosure it will not cause the document to be produced in public without giving counsel reasonable time to seek such remedies or take such action as they may wish.

5. *The Official Secrets Act, section 4(1)*

As was pointed out during argument, if the Commission, contrary to the submission of counsel for the government departments, including the Prime Minister's Office, should decide that a particular document should be received in evidence in public, it may be that the disclosure of the document would be a violation of section 4(1) of the Official Secrets Act, the relevant parts of which read as follows:

> 4.(1) Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or password, or any sketch, plan, model, article, note, document or information that... has been entrusted in confidence to him by any person holding office under Her Majesty, or tht he has obtained or to which he has had access... owing to his position as a person who holds or had held office under Her Majesty
>
> (a) communicates the... document or information to any person, other than a person to whom he is, authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it...

It might be said that a violation would occur in either of two situations:

> First: One interpretation of the sub-section requires the adjectives "secret official" to be read as applicable only to the nouns "code word, or pass word". If so, it might be contended that any disclosure of a document or information entrusted to the Commission in confidence, would be a violation of section 4(1) even if the document or information were not "secret official". There may be a violation when the Commission communicates *any* document or information which it had received in confidence from the government (including the Privy Council Office or the R.C.M.P.), or has obtained it from the RCMP by virtue of the duty imposed upon the RCMP to provide access to the Commission to all its documents, or has obtained it from a government department by subpoena.
>
> Second: If on the contrary, the adjectives "secret official" apply to "any... document or information", then it is only documents and information which are "secret" and "official" that are covered by section 4(1). Thus, the section would apply only to a document or information which is "Secret" or "Top Secret".

In each of these two situations, a violation would occur only if the Commission does not have the "authority" to disclose it in public. There is an unresolved issue here, as to whether such authority must be given expressly or may be given by implication.

Moreover, in each of these situations, a violation would occur only if it were not "in the interest of the State" to communicate the document or information to the public by receiving it in evidence in public. It would be a nice legal question whether, in a particular case, receiving a certain document or information in evidence in public would be in the interest of the State, for it might be contended that the receipt of the evidence in public is in the interest of the State in that the State has an interest in the public having confidence in the proceedings of a commission of inquiry before which there are questions of the conduct of persons holding high public office.

These are difficult questions as to which the Commission need not now reach a conclusion, and as to which the Commission has received no indication what the position of the Attorney General of Canada is. In *Attorney General* v. *Jonathan Cape Ltd.*, the Attorney General of England and Wales, conceded that the defendants were not in breach of the Official Secrets Act. During the course of argument, Mr. Nuss was unable to advise the Commission whether he and Mr. Robert appeared on behalf of the Attorney General, at most he could say that he appeared on behalf of government "Departments" (in French, "ministères") which would include the Department of Justice, but he was unable to assert that he had instructions to speak on behalf of the Attorney General of Canada. Moreover, he admitted that he did not have any instructions in respect of the applicability of section 4(1) of the Official Secrets Act.

So this aspect of the matter must be left, to be faced if and when a situation should arise which requires it to be considered by the Commission. In the absence of an opinion by the Attorney General of Canada that the disclosure in public of any particular document or information, or of any particular class of documents or information, would be a violation of the Official Secrets Act, this decision of the Commission has been reached on the assumption that no such question arises.

6. *Do the Terms of Reference preclude the Commission from hearing evidence of ministerial knowledge of activities by members of the R.C.M.P. unrelated to national security?*

During the course of argument, Mr. Nuss submitted that when the Commission is inquiring into "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada" (paragraph (c) of the terms of reference), it has jurisdiction to inquire into and report on "the policies and procedures governing" those activities. From his remarks we infer that, in his submission, the power to inquire into the "policies and procedures governing" those activities permits the Commission to hear the testimony of persons who are not and have not been members of the R.C.M.P. but have had a role in shaping or applying the "policies and procedures" governing "those activities", or to receive in evidence documents relating to the role of such persons — that is, when the question is one of the discharge of the responsibility of the R.C.M.P. to protect the security of Canada.

However, as we understand Mr. Nuss, his submission is that when the Commission is inquiring into the matters referred to in paragraphs (a) and (b) and which do not relate to "policies and procedures" that govern "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada", the Commission does *not* have the power to hear the testimony of persons who are not and have not been members of the R.C.M.P. but have had a role in shaping or applying the "policies and procedures" governing those activities, or the power to receive in evidence documents relating to the role of such persons. It would follow logically that objection would be taken also to evidence by any member of the R.C.M.P. or any other witness as to the statements or conduct of persons who, although never members of the R.C.M.P., nevertheless had a role in shaping the "policies and procedures" governing those activities.

This is a novel proposition as far as the Commissioners are concerned. It has not previously been advanced by counsel for the Solicitor General, who now are counsel for the Departments of the Government of Canada.

On May 25, 1978, during the hearings into the relationship between the R.C.M.P. Criminal Investigation Branch and the Department of National Revenue, when objection was taken to the production in public of correspondence between two Ministers it was on the ground that in the public interest such correspondence ought not to be disclosed in public. It was not asserted either formally or informally to the Commission that the correspondence was immaterial as relating to a matter beyond the Commission's terms of reference.

While it is for the Commission to interpret for itself the provisions of Order-in-Council 1977-1911, it is of interest to note the following statements made in the House of Commons on November 8, 1977, by the then Solicitor General The Hon. Francis Fox, M.P. in Hansard at p. 709.

> I believe that any fair observer would say the terms of reference that have been given to the Royal Commission are extremely wide.
>
> Why did we set up a Royal Commission of Inquiry? A Royal Commission of Inquiry was set up last July in response to a number of allegations that were made known to the government at that time. Prior to that the Leader of the Opposition was pressing for a royal commission. He then asks the following question during this debate: by whom were these acts committed and at whose direction? I would venture to suggest that the basic purpose of the Royal Commission of Inquiry is to get at the bottom of exactly who committed the acts and at whose direction. I think if you look at the terms of reference —
>
> Mr. Speaker, an hon. member on the other side says change the terms of reference. If you look at the terms of reference —

Mr. Clark:

> We have.

Mr. Fox:

> If you have, I suggest you re-read them. They are extremely wide. I should like to make one point very clear once again, a point that has been made time and time again in the course of debate in the House, that is, that the chairman and members of that commission have all the powers required

> under the terms of reference to look at an illegal act, if there is one, and to follow the nexus all the way up to wherever leads.

The Solicitor General did not limit the applicability of his statement to illegal acts committed by members of the Security Service or relating to national security.

The Commissioners, who must themselves interpret P.C. 1977-1911 without relying on a statement by another person, such as that of Mr. Fox, do not accept the proposition now advanced by counsel for the Departments.

This Commission was appointed pursuant to Part I of the Inquiries Act, R.S.C. 1970 ch. I-13, entitled "Public Inquiries". The first section of that Part of the Inquiries Act is section 2, which reads as follows:

> 2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

The terms of reference of this Commission of Inquiry are clearly concerned with both "the good government of Canada" and "the conduct of (a) part of the public business" of the government of Canada. The preamble of Order-in-Council P.C. 1977-1911, dated July 6, 1977 which appointed the Commissioners and stated the terms of reference, makes it clear that the Governor in Council was concerned that there be "full inquiry" into "the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law", so as to "maintain" public "trust in the policies and procedures governing its activities" without which there cannot be "public" support of the R.C.M.P. "in the discharge of its responsibility to protect the security of Canada".

In other words, with respect to "investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law", the preamble indicates that the Commission is to inquire into "policies and procedures governing" the activities of the R.C.M.P. without limitation to the policies and procedures governing the Security Service of the R.C.M.P., for there can be public support for the work of the Security Service only if there is public trust in the policies and procedures governing all the investigative practices and other activities of the R.C.M.P. of which the Security Service is a part.

Paragraph (a), in so far as that paragraph relates to investigative practices and activities not relating to matters of the security of Canada, must be read together with paragraph (b). If the Commission finds that an "investigative practice" or "action" or "other activity" has involved members of the R.C.M.P. and "are" or "was" not authorized or provided for by law, then the Commission has a duty to "report the facts" relating to any such investigative action or other activity involving persons who were members of the R.C.M.P.

The effect of the contention by Mr. Nuss is that in the absence of any duty being specified in (b) to report on "policies and procedures" governing such investigative action or other activity, the scope of the inquiry must stop short of inquiring into whether, for example, a Solicitor General knew of an investigative practice that violated the provisions of a federal statute or that constituted a violation of the rights of citizens enforceable in the civil law and

yet authorized the investigative practice to continue or at least condoned it by not directing that the practice cease.

To accept that view of the meaning of the Order-in-Council, in the Commission's view, would mean that the Commission would be precluded from rendering a full and proper "report" on the facts "relating to" any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law. For it would require the Commission to attempt the difficult and artificial task of differentiating between the activities of the Criminal Investigation Branch of the R.C.M.P. and the Security Service of the R.C.M.P. in terms of considering the role and function of the Solicitor General and of other Ministers of the Crown. Such a distinction would not be founded upon any satisfactory rationale.

Moreover, if the Commission were to accept the contention of Mr. Nuss, it would find itself in an invidious position when deciding as required by paragraph (b) what advice to give to the Governor in Council "as to any further action that the Commissioners may deem necessary and desirable in the public interest". For example, the Commission will wish to consider what advice it will give to the Governor in Council as to whether the facts which the Commission reports, and the evidence of those facts, should be referred to the appropriate Attorney General for his consideration.

Among the facts which the Commission will wish to report in some cases will be whether members of the R.C.M.P. who, in the opinion of the Commission have, or might be held in a court to have, committed a wrongful act, were doing so upon the direction or with the consent or at least without the disapproval of a Minister of the Crown, for that might be a fact which any Attorney General might consider relevant to the process of his deciding whether or not to prosecute the members of the R.C.M.P.

Conversely, the Attorney General, while satisfied that he should launch a prosecution against a member or members of the R.C.M.P., if he were so satisfied, might wish to prosecute all those against whom there is evidence upon which a prosecution might be successful as parties to the offence under section 21 of the Criminal Code or to a conspiracy to commit an unlawful act.

Finally, to interpret the terms of reference in such a way as to permit the Commission to report on wrongful acts by members of the R.C.M.P. without also reporting on the extent to which they had from Ministers express or tacit authority to perform those acts would not only compel the Commission to deliver an incomplete report on the relevant facts but would also be unfair to the members of the R.C.M.P. who while "charged" by the Commission (to use the word found in sections 12 and 13 of the Inquiries Act) would have reason to feel that facts tending to exonerate them perhaps from guilt and perhaps from punishment had not been inquired into, or had not been reported upon, and would never come to the attention of the appropriate Attorney General.

APPENDIX "G"

REASONS FOR DECISION OF THE COMMISSION JULY 11, 1979

The Commission will now adjourn until September its public hearings into the numerous factual matters before it. This does not mean that the Commission is stopping work. Quite the contrary.

Counsel for the Commission will be preparing to complete the testimony of certain witnesses, and preparing for forthcoming witnesses. The evidence yet to be heard, on those issues which have already been before the Commission, relates to the questions of accountability by the R.C.M.P. and by Ministers. The evidence yet to be heard is not of interest only to historians: unless the story is told fully in terms of these issues, the Commission considers that any attempts to enhance accountability and control in the future are more likely to founder.

Only by going into the story fully will it be possible to judge fairly the extent to which investigative practices and activities not authorized or provided for by law were limited to one period of time or to one geographical area or to one part of the R.C.M.P. Likewise, only by detailed evidence will it be possible to judge, and to judge fairly, the extent to which there was a pattern at the senior levels of the R.C.M.P. of failing to report to the responsible Minister investigative practices not authorized or provided for by law, and a pattern of resistance by the R.C.M.P. to decided policies of government regarding the R.C.M.P. Similarly, only by detailed evidence will it be possible to judge fairly the extent to which Ministers and senior officials outside the R.C.M.P. were parties to, or knew of, investigative practices and activities not authorized or provided for by law.

It is not possible to reach fair and just conclusions on these issues without taking this further evidence. If we do not do so, the Commission will be open to criticism that we have failed to get to the bottom of issues of complicity, knowledge, accountability and control.

Part (c) requires the Commission to make recommendations on the policies and procedures governing the R.C.M.P. in the discharge of its responsibilities to protect the security of Canada. It also calls upon the Commission to render advice on the adequacy of the laws of Canada as they apply to such policies and procedures. In preparing its recommendations on these policy matters, the Commission is studying in depth the purpose and mandate of a security service, its structure, personnel policies, its methods of internal management and discipline, its methods of collecting, analyzing and disseminating information and its role in security screening for the public service, immigration and citizenship. The Commission must review the Security Service's relationship with provincial governments and police forces and with foreign

agencies. In considering all of these matters the Commission is concerned with both the consonance of Security Service activities with democratic values, and the effectiveness of the Security Service. In addition to examining the Security Service, the Commission must also be prepared to make recommendations on other branches of the R.C.M.P. which have responsibilities for protecting the security of Canada, for example in the areas protecting V.I.P.s and federal property.

The Commission has been giving careful consideration to the most effective means of government control of a security service, including the role of Parliament in this process. This part of the Commission's work includes an assessment of the way in which responsibility for the Security Service and security policy is divided between the Solicitor General's Department and an interdepartmental committee system based on the Privy Council Office.

Finally, the Commission is carrying out intensive research and review of those laws which have a direct bearing on the national security responsibilities of the R.C.M.P. This work includes consideration of possible reforms of the *Official Secrets Act*, alternatives to the *War Measures Act*, and the impact of the *Human Rights Act* and proposed Freedom of Information legislation on the work of a security service.

In respect to certain topics on the policy side of the Commission's programme, the work of the Commission is sufficiently advanced that it is now commencing preparation of its report on those topics. To move in this direction means that there must be time to write drafts of such reports. It is not possible to do so while hearings and other forms of Commission business are taking place.

The Commission repeats what it has made clear on other occasions: that it is determined to find answers to complex questions of policy and law. Some such questions have been known in one part or another of the R.C.M.P. for years. Others have been identified as legal issues only recently in the sense that they have been the subject of precise identification, discussion and disclosure, either to this Commission or to government. To many of them the final answers are not so clear and simple that they can be produced overnight by any one person, or group of persons. As for matters of law, the Commission repeats that it can countenance only police and security service activities which are lawful and proper: the rule of law must prevail. In saying that, as the Commission indicated in its opening statement on December 6, 1977, it is not just the criminal law that is to be taken into account. Applying the precept that the rule of law must prevail is not easy when it comes to deciding what may be permitted as *lawful* investigative or other practices.

Many of the legal problems, if they are to be solved by recognizing that the police or the security agency is to have the power to do certain things in certain circumstances, may require the attention of both Parliament and the provincial legislatures. The Commission's task is to make recommendations as to what powers are needed, what controls are needed, and what level of legislative authority will have to act in order to provide the solution.

APPENDIX "H"

REASONS FOR DECISION OF THE COMMISSION MAY 22, 1980

On January 24, 1980, Mr. J.F. Howard, Q.C., Chief Counsel to the Commission, wrote to counsel for the Commissioner and many members and past members of the R.C.M.P., as follows:

> . . . We are currently preparing detailed written Submissions of Counsel on the topics dealt with at the hearings of the Commission. These submissions will contain Statements of the Legal Issues which we consider to be raised by the Statements of Facts.
>
> The intention is to assist the Commission in determining whether or not conduct disclosed in the Statement of Facts is or may be lawful or on the other hand unlawful and thus conduct "not authorized or provided for by law". While it is not our general intention to argue for any particular conclusion as to the determination which should be made by the Commission, we do intend to attempt to identify aspects of the conduct reviewed which could constitute activities prohibited by law whether under the Criminal Code, other Statutes, or at Common Law. You will appreciate, however, that in some cases the absence of any dispute as to the facts or as to the applicable law may lead Commission Counsel to state their conclusion that it would appear that the conduct described in the Statement of Facts is clearly unlawful.
>
> We intend, upon the direction of the Commission, to forward copies of the written submissions to counsel who have been involved in the hearings with an invitation to make submissions as to the accuracy and completeness of the Submissions. Where individuals are named as participating in actions which the submissions indicate may amount to misconduct, copies will also be forwarded either to counsel for such persons or to the persons themselves. At that time an indication will be given as to the time of the formal presentation of the Submissions to the Commission and the time within which the persons concerned should indicate to the Commission whether or not they wish an opportunity to be heard in person or by counsel. It is our view that this procedure will constitute at least initial compliance with the requirements of s.13 of the Inquiries Act. . .

As a result of receiving this letter, counsel for the R.C.M.P. indicated that they wished to have an opportunity to make submissions about the extent to which the Commission should make reports against a person that he had committed an unlawful act, and about whether and to what extent notices should be given to members under section 13 of the Inquiries Act. The submissions of counsel for the R.C.M.P. and of counsel for the Commission were made orally on March 6, 1980. On April 9, 1980, counsel made an oral submission on behalf of the Attorney General of Canada (not, it should be

noted, on behalf of the Solicitor General). These reasons will consider the arguments that were presented on both dates.

It is necessary first to set forth the Commission's terms of reference and the provisions of the Inquiries Act that were referred to in argument.

The Commission's terms of reference (P.C. 1977-1911) are as follows:

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

The relevant portions of the Inquiries Act are as follows:

Part III — General

11.(1) The commissioners, whether appointed under Part I or under Part II, if thereunto authorized by the commission issued in the case, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry.

(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

(3) The persons so deputed, when authorized by order in council, have the same powers that the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(4) The persons so deputed shall report the evidence and their findings, if any, thereon to the commissioners.

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel.

13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he

has been allowed full opportunity to be heard in person or by counsel.

The Commission has now virtually completed its formal hearings concerning a number of investigative practices and activities which involved members of the R.C.M.P. It is therefore preparing to report the facts referred to in paragraph (b) of the terms of reference.

The position of Mr. Thomson, one of the several counsel who have appeared for the Commissioner and most of the members of the R.C.M.P. who have been witnesses, was supported by Mr. Yarosky, who appeared for several members. Mr. Nuss, on behalf of the Attorney General of Canada, made a submission as well. The issues they raised may be described as follows:

> I. Should the Commission report on the legal qualities of the acts of individuals in particular cases?
>
> (a) Is the Commission limited to making findings as to whether "practices" and "activities" were unlawful?
>
> (b) If the Commission finds legal fault in the conduct of a particular individual, does it impinge upon the functions of the courts or of the disciplinary process?
>
> II. Do the provisions of section 13 of the Inquiries Act apply to the Commission?

We shall now discuss these issues in detail:

I. *Should the Commission report on the legal qualities of the acts of individuals in particular cases?*

(a) *The Submissions of Mr. Thomson and Mr. Yarosky*: Is the Commission limited to making findings as to whether "practices" and "activities" were unlawful?

Mr. Thomson's principal submission is that this Commission does not have the power to conclude that the action or investigative activity of any particular member of the R.C.M.P. has been a criminal act or other form of misconduct. He contends that if appropriate, such matters should be dealt with in the courts or in disciplinary proceedings. Both he and Mr. Yarosky say that the Commission can make findings as to whether practices and activities were unlawful but not findings as to the blame to be assigned to any particular individual for any particular act. In other words, the Commission can make findings only as to what might be called systematic activities — not as to legal responsibility to be assigned to any particular individual in the case of any one of those systematic activities, or in any isolated case unrelated to a systematic practice.

If this view were accepted, it would be unnecessary for the Commissioners and their counsel to address their minds to the question of the manner in which section 13 of the Inquiries Act should be complied with. If the submissions by Mr. Thomson and Mr. Yarosky are accepted, the report would not make any "report... against any person" and consequently counsel for the Commission would not assert any charge of misconduct against any person. Consequently no notice need be given under section 13.

In support of his submissions, Mr. Thomson contends that some limiting significance ought to be attached to the failure of the Governor in Council, in

adopting Order-in-Council 1977-1911, to require the Commission to report as to "unlawful" or "illegal" acts. He argues that, if the Governor in Council had wished us to report on "unlawful" or "illegal" acts, those words would have been used in the Order-in-Council, and that the failure to use those words means that the Governor in Council expects us to report on something other than unlawful or illegal acts by particular persons. However, we attach no limiting significance to the failure to use such language. On the contrary, we consider that the phrase "not authorized or provided for by law" was chosen so as to extend the frontiers of the matters concerning which the Commission would investigate and report beyond offences against the Criminal Code or other federal or provincial statutes or regulations or municipal bylaws, and beyond civil wrongs. We pointed out in our statement on December 6, 1977:

> Moreover, those broad words... require us even to consider whether, in the facts of a particular case, there was a positive duty imposed upon the police to do the act — whether some specific duty, or their general duty to enforce the law.

We might now elaborate that point as follows: In addition to wrongdoing, the words "not... provided for by law" require us to report on any investigative action or other activity that, even though not an offence or a civil wrong, was nevertheless not authorized by the R.C.M.P. Act or by regulations made under that Act or by the standing orders of the Commissioners of the R.C.M.P. or by the orders of a superior.

(b) *The submission of Mr. Nuss on behalf of the Attorney General*: If the Commission finds legal fault in the conduct of a particular individual, does it impinge upon the functions of the courts or of the disciplinary process?

On this issue, Mr. Nuss pointed out quite accurately that a Commission of Inquiry is not a court of law and can render no judgment of acquittal or conviction. He warned that the proceedings and the report of the Commission ought not to appear to impinge (i.e. have an impact upon) or usurp the domain of the courts of law. Referring to Mr. Howard's letter, Mr. Nuss expressed the Attorney General's concern that:

> This manner of proceeding might lead to the Commission embarking on the type of consideration or examination of facts and law which is normally the exclusive preserve of our Courts of Justice, even though the Commission's purpose is not and cannot be the determination of guilt or innocence.

Mr. Nuss then observed that:

> If the Commission examines the incident on which it is going to report, by entertaining a detailed consideration of all the elements which constitute an offence, and then states whether the proof is such as to make out these elements; and if the Commission then is invited to consider possible defences and either rejects them or accepts them, then, for all practical purposes, a process so close to that of a trial has taken place as to be indistinguishable from it, except that instead of a formal verdict of guilt or innocence, one has a report.
>
> The Attorney General is apprehensive of the unfairness to the individual, real or perceived, which might result: a type of conviction without the safeguards of a trial by a body other than a Court of law.

Mr. Nuss did not express any concern about the fact that in most of the situations before the Commission in which there has been evidence concerning a specific incident the evidence has been heard in public. Indeed, in his representations he accepted that "at a Commission of Inquiry... the evidence is public right from the start". Yet he implied that hearing the evidence in public is "unfair" or "appears" to be unfair, for he said that:

> If as a result of the report, charges are brought before a Court, against a person whose conduct has been so scrutinized by this Commission of Inquiry, which appears to be using the same test as a Court, then the unfairness or appearance of unfairness is compounded.

By speaking of "compounding", he appears to say that if the Commission hears argument and then reports as to whether on the facts of a situation the elements of an offence are to be found and as to whether any defences apply, and this is followed by charges in a court of law, that process itself would be unfair or would appear to be unfair to the accused. This unfairness or appearance of unfairness resulting from the evidence having been heard in public is "compounded" by the laying of charges. The Attorney General has not previously expressed concern that the hearing of the evidence before this Commission in public is itself unfair or would appear to be unfair. Perhaps his concern might be directed at the fundamental issue whether public commissions of inquiry, which have become so common in Canada, should be used as an instrument of the investigation of facts where the government reserves the right to proceed in the courts against the individuals whose conduct is investigated by the commission. In England, the Royal Commission on Tribunals of Inquiry (chaired by Lord Salmon), reporting in 1966, said:

> The publicity... which such hearings usually attract is so wide and so overwhelming that it would be virtually impossible for any person against whom an adverse finding was made to obtain a fair trial afterwards. So far no such person has ever been prosecuted. This again may be justified in the public interest because Parliament having decided to set up an inquiry under the Act has already considered whether or not civil or criminal proceedings would resolve the matter and has decided that they would not.

Such consideration does not appear so clearly to be given by the Governments of Canada or of the provinces when they appoint commissions of inquiry. In England a commission of inquiry, at least if it is to sit in public, is a mechanism of investigation that should be used only if the decision has been made not to prosecute the individuals whose conduct the Commission is bound to investigate if it is to carry out its mandate.

It appears that the present real concern of the Attorney General relates to (a) the content of the submissions which counsel for the Commission will make publicly to the Commission as to specific incidents in which the evidence names individuals who participated, and (b) the content of the report by the Commissioners.

With respect, the representations made on behalf of the Attorney General do not assist the Commission in resolving a fundamental dilemma. That dilemma arises as follows: On the one hand, as Mr. Nuss quite correctly observes, there is the possibility of unfairness or the appearance of unfairness if

the Commission makes a report against a person, and he is then charged with an offence. Mr. Nuss appears to be suggesting that therefore the Commission ought not to make a report against a person and that counsel for the Commission ought not to scrutinize the evidence to see whether the elements of an offence are present or whether any defence is available.

What is the alternative? Mr. Nuss does not say what the alternative is, other than to say that the Attorney General "trusts" that we "will proceed in such a manner as to lay" his concerns "to rest". So we are left to guess what manner would lay his concerns to rest. Would his view be that our report should narrate the facts of a particular incident, as we find them on the basis of the evidence placed before us, but that we refrain from any analysis of those facts as to whether they constitute an "activity not authorized or provided for by law"? We must carry out the duties imposed upon us by the Governor in Council pursuant to Part I of the Inquiries Act. We are required to "report the facts relating to any... activity that was not authorized or provided for by law". How can we decide to report a certain set of facts unless we have determined that the activity they disclose "was not authorized or provided for by law"? How can we determine that the activity they disclose "was not authorized or provided for by law" unless we analyze whether the facts, *as disclosed by the evidence before us*, constitute an offence or a civil wrong or in some other way conduct "not authorized or provided for by law"? The answer is that we must, if we are to undertake our duty according to law, undertake such an analysis. And, if we are required to undertake such an analysis, we prefer to have the fullest possible assistance of counsel for the Commission and such assistance as other counsel are prepared to provide to us. Thus there is a dilemma created on the one hand by our duty in law to carry out our directions, and on the other hand by our desire so far as possible to meet the legitimate concerns expressed by the Attorney General.

It should be borne in mind that the dilemma arises only in those situations in which:

(a) the Commission has detailed evidence of the specific acts in a specific case and the names of all or some of the participants, and when the activity may constitute a transgression of the Criminal Code or other statute law (other than the R.C.M.P. Act) or the law of tort or delict;

(b) the Commission has detailed evidence of specific acts in a specific case, the names of all or some of the participants, and perhaps, but not necessarily, evidence as to exactly what all the participants did, and where the activities are not likely to be a transgression of those laws referred to in (a) but where they may constitute a major service offence under sec. 25 of the RCMP Act. An example might be by the member conducting himself "in a scandalous... (or) ... disgraceful... manner".

The dilemma does not arise where, for one reason or another, the conduct concerning which the Commission may report cannot, as described by the Commission, give rise to any criminal or disciplinary proceedings against an individual. This may be because:

(i) the Commission's evidence is as to the general nature and purpose of the activities but the Commission does not have any evidence of the

names of participants or the particulars of any specific instances. There are a number of investigative techniques, the use of which by members of the RCMP may not have been authorized or provided for by law, which have been investigated by the Commission as to the "extent and prevalence" of the use of the technique without the Commission having obtained evidence of the particular cases in which over the years or decades the technique was used, or, consequently, of the identity of the individuals involved, whether members of the RCMP or not. To have collected such evidence in regard to the use of these techniques would frequently have been impossible, since no records were kept, or, if kept, records would no longer be available. Moreover, to try to reconstruct the individual situations would have required a much larger investigative and legal staff and would inevitably prove to be an exercise in futility; or

(ii) the Commission's evidence is as to a general practice or system and the names of some participants but not all of them, and as to which even if the Commission has the names of some participants it does not have the particulars of any specific case so that the Commission is in no sense considering any specific "offence"; or

(iii) the Commission's evidence is as to specific acts in a specific case but not the names of the participants, or at least not all of them, and as to which none of the participants has given evidence; or

(iv) the Commission has detailed evidence of the specific acts in a specific case, the names of all or some of the participants, and perhaps, but not necessarily, evidence as to exactly what all the participants did and the activities cannot be said to be a transgression of the Criminal Code or other statute law or of the law of tort or delict, or a major service offence under section 25 of the RCMP Act. Nevertheless, if they occurred, they may be, in the opinion of the Commission, conduct which is "not authorized by law" in the sense that it is beyond the duties of a member so to conduct himself: i.e., if such conduct is not within the phrase "such security and intelligence services as may be required by the Minister" (quoting sec. 44(e) of the Regulations).

It should also be borne in mind that, after reviewing the facts of a particular situation as disclosed by the evidence before the Commission, we may choose not to say that in our opinion the evidence discloses that a particular individual committed a particular offence. Instead, if the evidence justifies our doing so, we may choose to say that the evidence before us justifies the appropriate Attorney General considering laying a charge, or that it discloses no evidence of any offence by that individual. In so doing, we may identify the evidence which points to inculpation and that which points to exculpation. One cannot do that without reference to the legal principles that define what the facts in issue are with regard to a particular offence. However, it is possible that we may recommend to the Governor in Council that our analysis of the legal position in the particular case and our recommendation as to what should be done should not be published until the matter is finally disposed of by a decision either not to prosecute or launch disciplinary proceedings, or, if there is a decision to prosecute or launch disciplinary proceedings, the final disposition of such criminal or disciplinary proceedings.

Moreover, even if we do not make that recommendation, it is open to the Governor in Council to decide to follow that procedure.

We shall welcome the submissions of counsel as to whether any of these possibilities is appropriate to our report as to a particular matter, when counsel make their submissions about the various activities within a few weeks. There can be no more precise or detailed statement by us as to what would be appropriate in the particular circumstances of a particular case until we have heard the submissions of counsel for the Commission and of other counsel. All we can now say is that we do not accept the proposition that, in reporting on the participation of a particular individual, we are precluded from analysing the legal qualities that are attached to his conduct *as established by the evidence before the Commission.*

It is important that we lay stress upon the fact, whatever our report may say about the legal significance of the facts of a particular case, it does not follow that, if the same case were presented in a court of law, the court would necessarily reach the same conclusion. Counsel for the Commission have done their utmost to elicit all relevant evidence, whether favourable or unfavourable to an individual, but there may be evidence that has not been made known to our counsel and that would be placed before a court of law, either favourable or unfavourable to the accused, that would result in the facts having a different complexion. Moreover, some evidence which has been before the Commission might not be before a court, such as the evidence of an accused person whose evidence before this Commission, given under the protection of section 5 of the Canada Evidence Act, would not be admissible for the prosecution.

II. *Do the provisions of section 13 of the Inquiries Act apply to the Commission?*

(a) Mr. Thomson also argued that the Governor in Council by having, in Order-in-Council 1977-1911, expressly authorized the Commissioners to exercise all the powers conferred upon them by section 11 of the Inquiries Act, must be taken not to have intended that sections 12 and 13 of the Inquiries Act would apply. Sections 11, 12 and 13 together make up Part III of the Inquiries Act. We do not accept Mr. Thomson's contention. The powers set forth in section 11 are not available to a Commission of Inquiry unless the instrument creating the Commission of Inquiry expressly says so: that is the meaning of section 11(1) when it says:

> The Commissioners..., *if thereunto authorized by the Commission issued in the case...*

Only, therefore, if the Order-in-Council expressly incorporates, by reference (as it does) the powers contained in section 11 do we have, for example, the power to employ clerical staff, reporters, counsel and investigators. On the other hand, sections 12 and 13 apply to all Commissions of Inquiry without the creating instrument having to say so. Section 12 deals with when a Commission may allow a person to be represented by counsel, and when it must do so. Section 13 imposes a requirement of notice if a report is to be made against a person. These latter two sections, then, permit or require safeguards for the protection of the individual who is faced with extraordinary powers given to the

Commission of Inquiry. They apply whether the creating instrument says so or not. The fact that Order-in-Council 1977-1911 does not refer to them is of no significance.

(b) Mr. Thomson submitted that it is in the public interest that the work of this Commission be concluded as soon as possible. We agree. We also agree with him that a number of members of the RCMP have had to wait a long time without knowing what the final result of the revelations will be in terms of their position in law or their careers, and that no doubt their morale has been affected. We would add that if their morale has been affected adversely, probably their working effectiveness has been adversely affected as well. However, we wish to observe that the responsibility for that situation cannot be laid at the feet of this Commission. In almost all the cases of conduct involving possible offences which have come before the Commission, the evidence of wrongdoing — or possible wrongdoing — has been heard in public, or, if first heard in camera, it has been released to the public. The evidence has thus been available to the appropriate Attorneys General if they had wished to investigate further so as to enable them to reach decisions as to whether or not prosecute. In the case of one province, in which many of the acts occurred, that province was represented throughout many of our public hearings by counsel with a watching brief. In the case of matters not investigated on the basis of individual cases by this Commission, such as surreptitious entries in criminal investigations, one province — British Columbia — conducted its own investigation and reached a decision, announced publicly about seventeen months ago, that there would be no prosecutions. Therefore, in many cases it has been open to the appropriate authorities with prosecutorial discretion to execute that discretion one way or another. The absence of our report to the Governor in Council should not, in many cases, have hindered such action.

It is true that, as far as disciplinary proceedings within the R.C.M.P. are concerned, the Commissioner of the R.C.M.P. is awaiting this Commission's report before reaching a decision as to whether such proceedings are to be undertaken. However, we believe that it would have been inappropriate and unwise to attempt to report on some situations without reporting on them all at the same time. Only by adopting this procedure can we and others regard the conduct of various members of the R.C.M.P. as a whole.

We would have been pleased to be able to give our report on these factual matters sooner. However, from the beginning, we interpreted our terms of reference as requiring us to report not only as to the conduct of members of the R.C.M.P. — but also as to that of other persons, such as responsible Ministers of the Crown, who may have authorized or condoned conduct not authorized or provided for by law. Paragraphs (a) and (b) of our terms of reference use the words involving members of the R.C.M.P. but do not say that, in investigating extent and prevalence, and reporting the facts, we are to be limited to referring to members of the R.C.M.P. This interpretation of the terms of reference was adopted from the outset by the Government of Canada in public statements, and was in our own announced interpretations as well. We considered that, if the evidence did establish such ministerial implication, that would be a factor of great bearing upon our report on the facts and our advice as to what further

action we would deem necessary and desirable in the public interest. Put more simply, it might help the case of the member of the R.C.M.P. who acted if he knew of such purported authorization or actual condonation. As we have said often, to fail to explore this potential thoroughly, would have resulted in a Commission process that would be out of balance and unfair.

It is largely the exploration of this potential that has delayed our ability to report. We do not regret it, and in any event, apart from its importance to paragraphs (a) and (b), the evidence of these former Ministers and senior officials has had much significance in terms of paragraph (c) — that is in regard to the recommendations we shall make as to the laws, policies and procedures that ought to govern the R.C.M.P. in protecting the security of Canada.

(c) Some other points were made by Mr. Thomson or Mr. Yarosky, but they need not be commented on at this time. Some of them no doubt will be made again when argument is heard on the merits of the various situations, and we can take them into account in preparing our report.

Conclusion

Therefore, we are instructing counsel for the Commission to prepare their submissions, in which, in addition to summarizing the evidence, they will identify the legal issues and, where individuals are named, they may discuss the conduct of those persons in the light of the law. Then, before oral submissions are made to us, our counsel will, pursuant to section 13 of the Inquiries Act, give notice to any persons whose conduct is described in our counsel's submission as constituting actual or possible misconduct, of the charge of misconduct.

APPENDIX "I"

PRACTICE DIRECTION OF THE COMMISSION JUNE 20, 1980

Pursuant to the Commissioner's power to direct the practice and procedure before the Commission, we hereby give the following direction to counsel for the Commission and to other counsel appearing before the Commission.

In our reasons for decision dated May 22, 1980, we referred to a number of different categories of situation which are before us. Among them were the following:

(a) The Commission has detailed evidence of the specific acts in a specific case and names of all or some of the participants, and when the activity may constitute a transgression of the Criminal Code or other statute law (other than the R.C.M.P. Act) or the law of tort or delict;

(b) The Commission has detailed evidence of specific acts in a specific case, the names of all or some of the participants, and perhaps, but not necessarily evidence as to exactly what all the participants did, and where the activities are not likely to be a transgression of those laws referred to in (a) but where they may constitute a major service offence under sec. 25 of the R.C.M.P. Act. An example might be by the member conducting himself "in a scandalous...(or)... disgraceful-... manner".

In our reasons we indicated that in our report on such situations we were not precluded from analyzing the legal qualities that attach to the conduct of a participant as established by evidence before the Commission. In those reasons were were not asked to, and did not, deal in any way with the form or manner of presentation by counsel for the Commission in regard to the above two situations. We now do so.

In our reasons for decision we concluded as follows:

> Therefore, we are instructing counsel for the Commission to prepare their submissions, in which, in addition to summarizing the evidence, they will identify the legal issues and, where individuals are named, they may discuss the conduct of those persons in the light of the law. Then, before oral submissions are made to us, our counsel will, pursuant to sec. 13 of the Inquiries Act, give notice to any persons whose conduct is described in our counsel's submission as constituting actual or possible misconduct, of the charge of misconduct.

We observed in our reasons as follows:

> However, it is possible that we may recommend to the Governor in Council that our analysis of the legal position in the particular case and our recommendation as to what should be done should not be published until the matter is finally disposed of by a decision either not to prosecute or

launch disciplinary proceedings, or, if there is a decision to prosecute or launch disciplinary proceedings, the final disposition of such criminal or disciplinary proceedings. Moreover, even if we do not make that recommendation, it is open to the Governor in Council to decide to follow that procedure.

We shall welcome the submissions of counsel as to whether any of these possibilities is appropriate to our report as to a particular matter when counsel make their submissions about the various activities within a few weeks.

As we indicated, whatever our recommendations may bein that regard, the Governor in Council in the interest of fairness and the protection of the due process of the administration of justice, might decide not to publish our report as to those situations until the matter is finally disposed of in the courts or the disciplinary process. The intention of such a decision would be to ensure fairness for a person accused in the courts or subjected to disciplinary proceedings. Such an intention would be frustrated in advance if we were to have our counsel make public their notices of "charges of misconduct" given under section 13 of the Inquiries Act, or if there were to be public presentations by counsel for the Commission asserting that this person or that person had committed a particular offence.

If these steps were taken in public, the public identification of a person as, allegedly, a person who has committed an offence would make it that much more difficult for the person, if subsequently charged, to receive a fair trial, perhaps anywhere in Canada. If those steps were taken in public, we would thereby have contributed to the possibility of serious prejudice to those individuals. We do not intend to adopt procedures which would possibly have that result.

The policy of Parliament as to the publicity to be attached to pre-trial proceedings is demonstrated by the provisions of section 467 of the Criminal Code, which requires a justice holding a preliminary inquiry, prior to the taking of evidence, if an accused makes application for such an order, to make an order

directing that the evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as

(a) the accused who made the application is discharged, or

(b) if the accused who made the application is committed for trial or ordered to stand trial, the trial is ended.

Application of that policy in the extreme to the circumstances of a commission of inquiry into whether there was activity "not authorized or provided for by law" would have required all the evidence of an individual's conduct to be heard in camera. From the beginning, however, we decided against that course.

In our opening statement, delivered on December 6, 1977, we said that we could not do better than publicly adopt as a cardinal principle guiding our deliberations what the English Royal Commission on Tribunals of Inquiry, chaired by Lord Justice Salmon, called the principle of publicity:

It is... of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that

the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth...

When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.

It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view be a small price to pay for the great advantages of a public hearing. . .

It will be observed that what Lord Justice Salmon's Report was speaking of was the *evidence* before an Inquiry and the desirability of the *investigation* of the facts being carried out in public. If the evidence is heard in public, then members of the public can form their own judgment as to the state of the public institution under investigation and the conduct of its members. It is another thing to extend the principle of publicity necessarily to the consideration by the Commission of the legal significance of the evidence. At this stage, no new evidence is presented. *No fact* will be hidden from the public's scrutiny if submissions are made in private by counsel for the Commission and counsel for the witnesses.

Therefore our conclusion is that, to be fair to the individuals concerned, and so as not to risk prejudice to the administration of justice, these steps should be taken by private communication. In reaching this conclusion, we have attempted to strike a balance between, on the one hand, the proper place of the principle of publicity and, on the other hand, the protection of the privacy of individuals in the sense that the due process of the administration of justice is not adversely affected by the procedure we follow.

Nevertheless, we wish to emphasize that, in regard to most of the situations that will be found in categories (a) and (b), the applicable legal issues will be the subject of public presentation, not in regard to specific cases but as to the situations generally, both by written submissions of counsel which are made public and by public oral submissions. Thus, for example, the various possible offences that arise from surreptitious entries as a general class of conduct will be analyzed publicly, both from the inculpatory and the exculpatory viewpoints.

For these reasons, the following procedure will be adopted:

1. Written submissions by Commission counsel and other counsel in so far as they relate to those two categories of situation referred to at the beginning of

this Practice Direction, will be communicated privately to the Commission and will not be released by the Commission to the public at this time.

2. Notices given to individuals under section 13 of the Inquiries Act will be given privately and will not be publicized by the Commission.

3. Any submissions which may follow the giving of such notices will be made in private.

This direction is, of course, subject to variation in the event that any person who wishes the Commission to follow some other procedure in his case should apply to the Commissioners to have any of the steps handled otherwise, and in that case the Commissioners will decide what the procedure will be.

APPENDIX "J"

P.C. 1979-887

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 22 March, 1979.

WHEREAS a commission of inquiry (hereinafter referred to as the "Commission") was established under Part I of the Inquiries Act by Order in Council P.C. 1977-1911 of July 6, 1977 to inquire into certain activities of the Royal Canadian Mounted Police;

WHEREAS the Honourable Mr. Justice David C. McDonald, Mr. Donald S. Rickerd and Mr. Guy Gilbert were appointed by such Order in Council as Commissioners to conduct such inquiry (hereinafter referred to as the "Commissioners");

WHEREAS the said Commissioners have requested access to and copies of Cabinet and Cabinet Committee minutes which are relevant to the matters within the Commission's terms of reference as set out in the said Order in Council;

WHEREAS it is a matter of convention and practice in Canada that access to records of Cabinet meetings and of Cabinet Committee meetings has been restricted to the Prime Minister and the Ministers who were members of the Cabinet at the time the meetings took place, the Secretary to the Cabinet, and such persons on the Secretary's staff as the Secretary authorizes to see them, on a confidential basis, where necessary for the proper discharge of their duties;

WHEREAS this convention and practice is, in the opinion of the Committee, essential for the proper functioning of the Cabinet system of government;

WHEREAS the Prime Minister, on behalf of his Ministry, has recommended to the Committee that, having regard to the particular nature of the inquiry being conducted by the Commission, an exception be made to the convention and practice in order to enable the Commissioners to ascertain whether any such documents relating to the terms of reference of the Commission contain evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, or evidence implicating a Minister in such act; and

WHEREAS the Secretary to the Cabinet, as the custodian of the records of all Cabinet and Cabinet Committee meetings of previous ministries, has recommended the adoption of such an exception in respect of such records.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, and with the concurrence of the Secretary to the Cabinet, advise that:

(1) subject to paragraph (5) the Commissioners shall be granted access to read the minutes of any Cabinet or Cabinet Committee meeting held prior to the establishment of the Commission which relate to the terms of reference of the Commission as set out in Order in Council P.C. 1977-1911 and which on reasonable and probable grounds they believe provide evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, or evidence implicating a Minister in such act;

(2) where the Commissioners are of the view that any minute or portion of a minute to which they have been granted access as provided for in paragraph (1) above contains evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, they may request the Secretary to the Cabinet to deliver a copy of any such minute, or portion thereof, to the Commission, and the copy of any such minute or portion thereof so requested shall be delivered to the Commissioners;

(3) if the Commission after a hearing on the issue, wishes to make public the contents of any such Minute or portion thereof referred to in paragraph (2), or to refer publicly to the existence of such Minute or portion thereof, it shall first request the Secretary to the Cabinet to secure from the appropriate authority declassification of such Minute or portion thereof;

(4) the Secretary to the Cabinet shall provide the Commissioners access to such indexes or other information as may reasonably be necessary to enable them to determine the minutes of the Cabinet or Cabinet Committee meetings to which they wish to be granted access for the purposes of paragraph (1) above;

(5) the Commissioners shall be granted access to the minutes of any Cabinet or Cabinet Committee meeting emanating from the Ministry of the Right Honourable John G. Diefenbaker only with the concurrence of the said the Right Honourable John G. Diefenbaker, it having first been communicated by him in writing to the Secretary to the Cabinet;

(6) this order being at variance with the normal conventions and practices of the Cabinet system of government, is:

   (a) subject to paragraph (3) above, for the sole purpose of enabling the Commissioners personally to have access to minutes of Cabinet or Cabinet Committee meetings as provided in paragraph (1) above; and,

   (b) to have effect only until such time as the Commission acting under the authority of Order in Council P.C. 1977-1911 shall have made its final report to the Governor in Council.

Certified to be a true copy - Copie certifiée conforme

P.M. Pitfield (signature)

Clerk of the Privy Council - Le Greffier du Conseil privé

APPENDIX "K"

P.C. 1979-1616

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 2 June, 1979.

WHEREAS a commission of inquiry (hereinafter referred to as the "Commission") was established under Part I of the Inquiries Act by Order in Council P.C. 1977-1911 of July 6, 1977 to inquire into certain activities of the Royal Canadian Mounted Police;

WHEREAS the Honourable Mr. Justice David C. McDonald, Mr. Donald S. Rickerd and Mr. Guy Gilbert were appointed by such Order in Council as Commissioners to conduct such inquiry (hereinafter referred to as the "Commissioners");

WHEREAS, for the purposes of the said Inquiry, by Order in Council P.C. 1979-887 of March 22, 1979, an exception was made to convention and practice in Canada governing access to records of Cabinet and Cabinet Committee meetings;

AND WHEREAS it is desirable to amend paragraph 5 of the said Order in Council P.C. 1979-887 by extending to the Right Honourable Pierre E. Trudeau the same rights and privileges in respect of his Ministry as are by that paragraph extended to the Right Honourable John G. Diefenbaker in respect of his Ministry.

THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister advise that paragraph (5) of the said Order in Council P.C. 1979-887 be revoked and the following substituted therefor:

"(5) the Commissioners shall be granted access to the minutes of any Cabinet or Cabinet Committee meeting emanating from the Ministry of the Right Honourable John G. Diefenbaker only with the concurrence of the said the Right Honourable John G. Diefenbaker, it having first been communicated by him in writing to the Secretary to the Cabinet;

(5.1) the Commissioners shall be granted access to the minutes of any Cabinet or Cabinet Committee meeting emanating from the Ministry of the Right Honourable Pierre E. Trudeau only with the concurrence of the said the Right Honourable Pierre E. Trudeau, it having first been communicated by him in writing to the Secretary to the Cabinet for Federal-Provincial Relations or such other person as may from time to time be designated by the Right Honourable Pierre E. Trudeau for such purposes."

The Committee, recognizing that there is a distinction between the authority to declassify a document and the authority to release a confidence of

the Queen's Privy Council for Canada, further advise that paragraph (3) of the said Order be amended to read

> "(3) If the Commission after a hearing on the issue, wishes to make public the contents of any such Minute or portion thereof referred to herein or to refer publicly to the existence of such Minute or portion thereof, it shall first request the Secretary to the Cabinet or in the case of a Minute or portion thereof to which paragraph 5.1 applies, the Secretary to the Cabinet for Federal-Provincial Relations or such other person as may from time to time be designated by the Right Honourable Pierre E. Trudeau for such purposes to secure from the appropriate authorities release of the confidences of the Queen's Privy Council for Canada contained in any such Minute or portion thereof and declassification of the same."

Certified to be a true copy - Copie certifiée conforme

P.M. Pitfield (signature)

Clerk of the Privy Council - Le Greffier du Conseil privé

APPENDIX "L"

COMMISSION PERSONNEL
(Full- and Part-time, 1977-1981)

Administrative Staff

Linda Anderson
Paula Barry
Ann Bowering
William Brennan
Yvette Collins
Rita Cook-Lauzier
Jane Davey
Madeleine De Carufel
Irene Duy
Maureen Fermoyle
Peter Glarvin
Barbara Glover
Keith Gorman
Anne Hooper
Alix Houston
Joan Huston
Vicky Hallé
Kristina Jensen
Harry Johnson
Laurie Klee
Marcel Lacourcière
Valerie Madden
Henriot Mayer
Gisèle McIntyre
Ronald McKinnon
Paulette Monette
Linda Newman
Larry O'Brien
Paul O'Brien
Marcelle Pilet
Louise Plummer
Paulette Proulx
Jo-Anne Rankin
Guy Robitaille
Mary Rous
Peter Schofield
Mary Shae
Lise Sicotte
Moyra Tooke
Dorothy Villeneuve

Investigative Staff

Guy Bélanger
Clifford Christian
Wilbert Craig
Henry Kostuck
Alistair Macleod
Ernest Martin
John McKendry

Legal Counsel

David Abbey
Pierre Barsalou
Hon. Angelo Branca, Q.C.
*A.J. Campbell, Q.C.
Brian Crane, Q.C.
*Eleanore Cronk
Winston Fogarty
Dale Gibson
Colin McNairn
John Nelligan, Q.C.
Simon Noël
*Eugene Oscapella
*Mark Paci
*Bruno Pateras, Q.C.
*Timothy Ray
*J.J. Robinette, Q.C.

*Ross Goodwin
Margaret Hodgson
*John Howard, Q.C.
*W.A. Kelly, Q.C.
*Louis LeClerc
*Sydney Lederman
*Eva Marszewski
*Allan Rock
*Pierre Sébastien, Q.C.
*Richard Scott, Q.C.
*John Sopinka, Q.C.
*Yvon Tarte
Keith Turner, Q.C.
Bryan Williams

Those persons indicated by an asterisk (*) have appeared before the Commission as Commission Counsel, or in Court on behalf of the Commissioners.

Research Staff

Yolanda Banks
Patricia Close
Judy Doyle
John Ll.J. Edwards
Richard Elson
M.L. Friedland
Greg Goldhawk
John Graham
Alasdair MacLaren
Kenneth McFarlane
Leonard Preyra
Marke Raines
Claudine Roy
Peter Russell
Elizabeth Saunderson
Denise Vezina

APPENDIX "M"

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

Notice as to submissions by members of the public

Order-in-Council P.C. 1977-1911 dated July 6, 1977, appointed the undersigned as Commissioners under Part I of the inquiries Act

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

Pursuant to its mandate, the Commission proposes to investigate and in due course to hold hearings concerning matters brought to its attention which fall within the terms of the foregoing.

The Commission invites individuals and organizations having knowledge of any facts relating to such matters, or wishing to express any opinions in respect of such matters, to communicate with the Commission, if possible in writing. Such individuals and organizations are not asked to communicate in detail to the Commission now if they would prefer not to give such details until the Commission's staff is able to interview them.

Any written communications should be sent by mail to:

Commission of inquiry concerning
certain activities of the R.C.M.P.
P.O. Box 1982
Station "B"
Ottawa, Canada
K1P 5R5

Tel. (613) 593-7821

Such communications should contain the signature, printed name, address and telephone number of the person or organization making the communication.

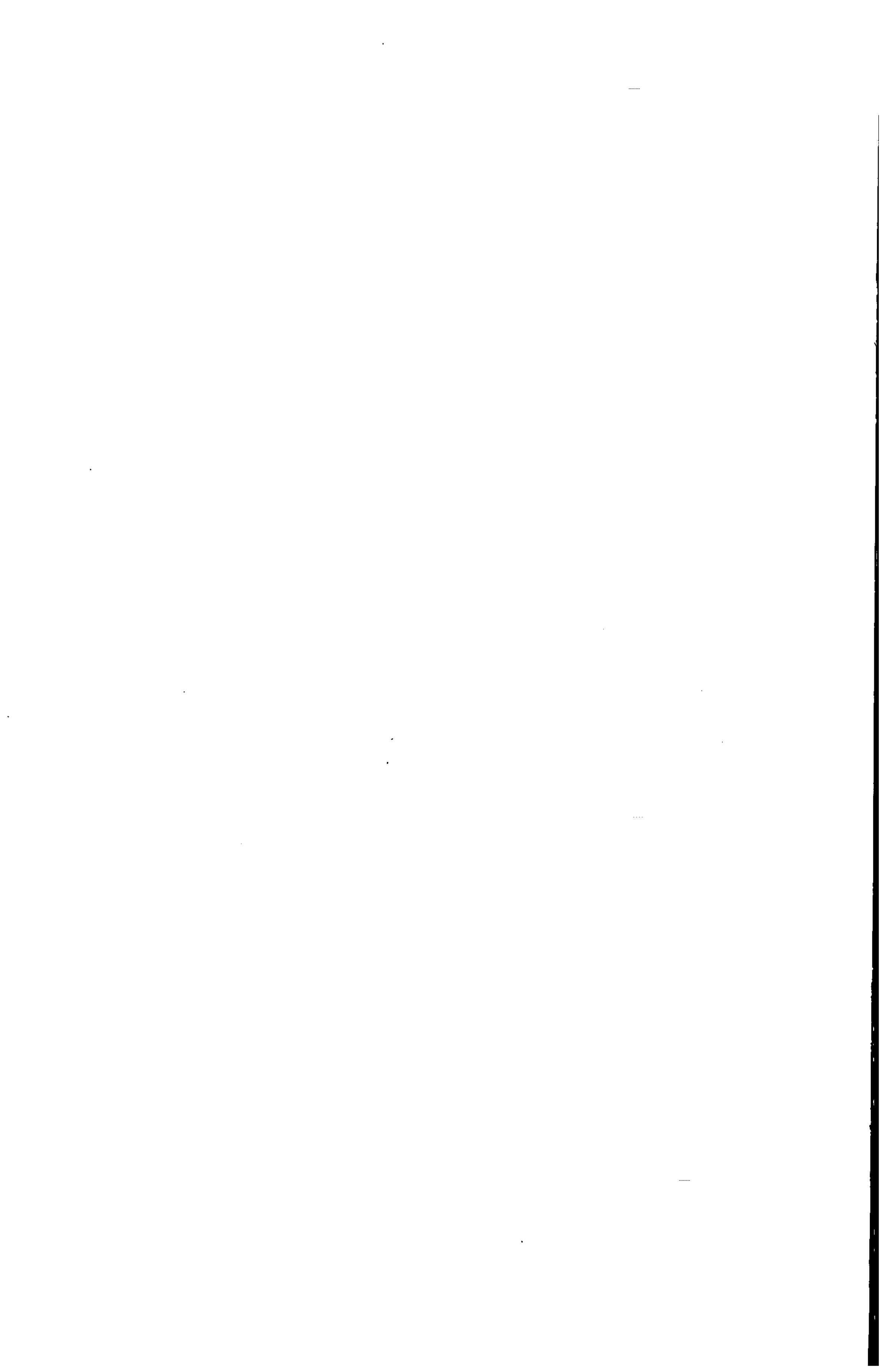
Any other persons who wish to be placed on the Commission's general mailing list should write the Commission at the address given above, asking that that be done. Please be sure to give your address.

In due course a further notice will be published as to such public hearings as the Commission may deem expedient for the proper conduct of the inquiry.

Mr. Justice D. C. McDonald, Chairman
of the Commission
D. S. Rickerd, Commissioner
Guy Gilbert, Q.C., Commissioner

Chief Counsel to the Commission:
J. F. Howard, Q.C.

Secretary of the Commission:
H. R. Johnson



APPENDIX "N"

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

NOTICE

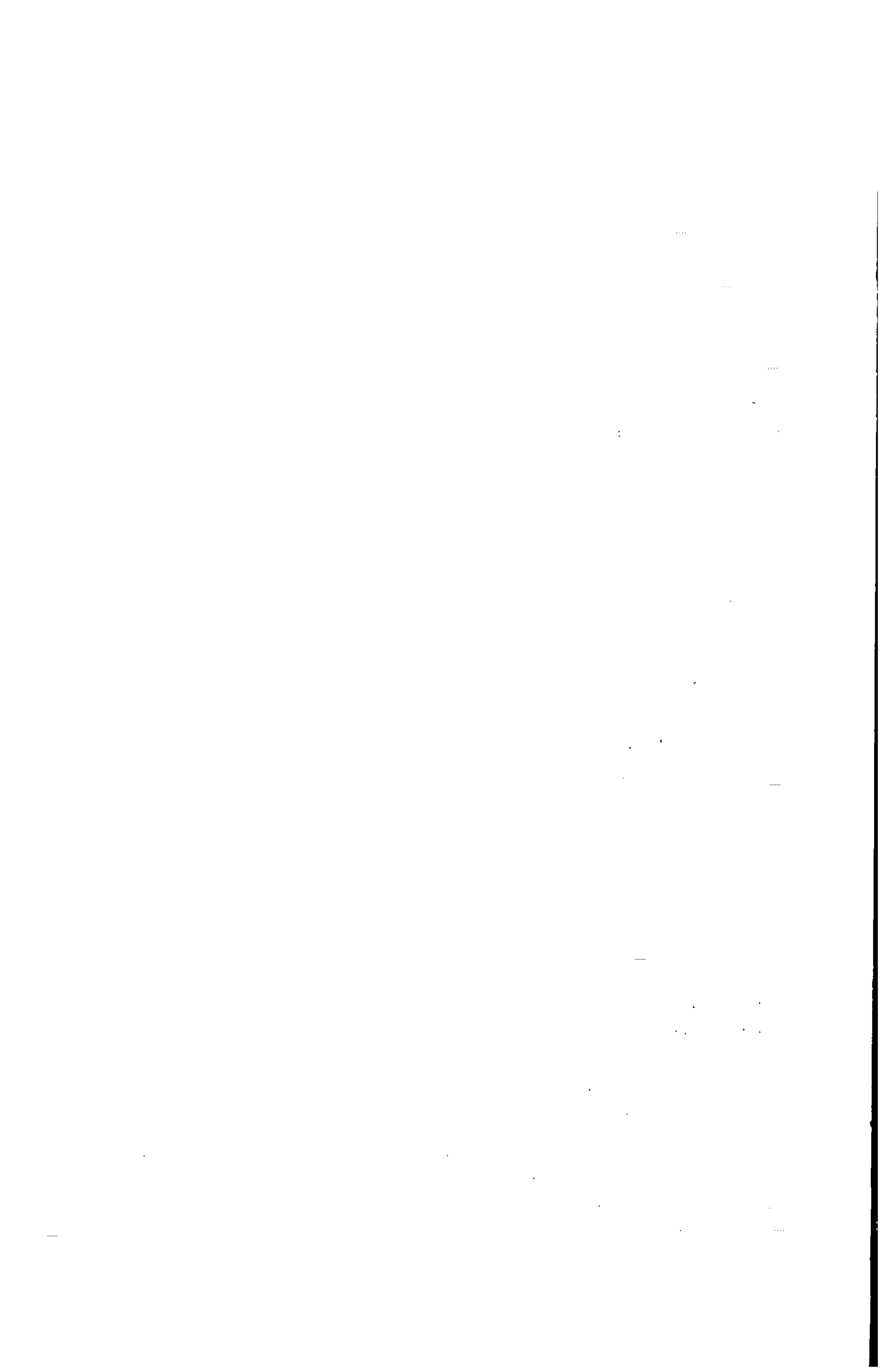
The Commission will not be in a position to investigate any allegations by members of the public of investigative practices or other activities involving members of the RCMP that were not authorized or provided for by law, if such allegations are received by the Commission after November 19, 1979.

This termination date is necessary to allow the Commission to complete its work in this area. Any allegation received after that date will be referred back to the sender with the Commission's advice as to where it might most appropriately be sent in the alternative.

Any allegations should be made in writing to the Commission of Inquiry, PO Box 1982, Station B, Ottawa, Ontario, K1P 5R5.

Mr. Justice D. C. McDonald, Chairman
of the Commission
D. S. Rickerd, Q.C., Commissioner
Guy Gilbert, Q.C., Commissioner

Chief Counsel of the Commission
J. F. Howard, Q.C.
Secretary of the Commission
H. R. Johnson
P.O. Box 1982 Station "B"
Ottawa, K1P 5R5
Tel. (613) 593-7821



APPENDIX "O"

WITNESSES WHO TESTIFIED BEFORE THE COMMISSION

Ex-Staff Sergeant Gilbert Albert — R.C.M.P.

The Honourable Warren Allmand

Staff Sergeant Leonard F. Andrichuk — R.C.M.P.

Rita Baker — R.C.M.P.

Robert Joseph Bambrick — Canadian Employment and Immigration Commission

Superintendent Patrick Banning — R.C.M.P.

Superintendent Archibald Barr — R.C.M.P.

Robert Lawlor Beatty — Canadian Employment and Immigration Commission

Donald Beavis — Retired employee of Privy Council Office

Sergeant Pierre Bédard — R.C.M.P.

Chief Superintendent Gustav Begalki — R.C.M.P.

Inspector Bernard Blier — R.C.M.P.

Sergeant Dale Boire — R.C.M.P.

Paul Boisvert — Canada Post Office

Sergeant Serge Boisvert — R.C.M.P.

Inspector Luc Boivin — R.C.M.P.

Corporal Guy Bonsant — R.C.M.P.

Staff Sergeant Gérard Boucher — R.C.M.P.

Robin Bourne — Assistant Deputy Minister — Department of the Solicitor General

Maurice Bradshaw — Department of National Revenue

Superintendent Pierre Jacques Brière — R.C.M.P.

Sergeant Claude Brodeur — R.C.M.P.

Ex-Sergeant Ian Douglas Brown — R.C.M.P.

Ex-Staff Sergeant Gilles Brunet — R.C.M.P.

Inspector Alan Donald Spencer Burchill — R.C.M.P.

Kenneth Burnett — Former civilian member — R.C.M.P.

Arthur Butroid — retired employee of Canadian Employment and Immigration Commission

Corporal Robert Cadieux — R.C.M.P.

Sergeant Barry Charles Cale — R.C.M.P.

John Ralph Cameron — Former employee of the Department of the Solicitor General

Deputy Commissioner (Retired) Raoul Carrière — R.C.M.P.

Jean Castonguay

André Chamard

Corporal Normand Chamberland — R.C.M.P.

Pierre Champagne — Québec Police Force

Yvon Charlebois — Executive Secretary — Unemployment Insurance Commission

Assistant Commissioner Stanley Vincent Maurice Chisholm — R.C.M.P.

Donald Henry Christie, Q.C. — Department of Justice

Jérôme Choquette, Q.C.

Inspector Randil Bruce Claxton — R.C.M.P.

Sylvain Cloutier — Deputy Minister of Transport

Darryl Allan Clute — Senior Projects Officer — Department of National Revenue

Chief Superintendent Donald Cobb — R.C.M.P.

Lieutenant Roger Cormier — Montreal Urban Community Police Force

Ernest Côté — Former Deputy Solicitor General

Detective Inspector Jean Coutellier — Québec Police Force

Inspector Richard Doublas Crerar — R.C.M.P.

Superintendent Marcellin Coutu — R.C.M.P.

The Honourable Bud Cullen

Constable Richard Daigle — R.C.M.P.

Director General Michael Reginald Joseph Dare — R.C.M.P.

Inspector James Nathaniel Dawe — R.C.M.P.

Ex-Staff Sergeant François D'Entremont — R.C.M.P.

Bernard Dertinger — Canadian Employment and Immigration Commission

Assistant Commissioner (Retired) Howard Crossfield Draper — R.C.M.P.

Sergeant Bernard Dubuc — R.C.M.P.

Superintendent Robert Layton Duff — R.C.M.P.

Sergeant Louis Duhamel — R.C.M.P.

Corporal James Michael Dupuis — R.C.M.P.

Superintendent Joseph Ferraris — R.C.M.P.

Constable Gilles Forgues — Montreal Urban Community Police

Force Staff Sergeant Hughes Fortin — R.C.M.P.

The Honourable Francis Fox

Inspector Jean Gagnon — R.C.M.P.

Corporal Michel Gareau — R.C.M.P.

Superintendent Robert Bruce Gavin — R.C.M.P.

Assistant Commissioner Bertrand Giroux — R.C.M.P.

Sergeant Maurice Goguen — R.C.M.P.

The Honourable Jean-Pierre Goyer

Corporal Jean Michel Hanssens — R.C.M.P.

Warren Hart

Sergeant John Douglas Hearfield — R.C.M.P.

Commissioner (Retired) William Leonard Higgitt — R.C.M.P.

Sergeant Richard George Hirst — R.C.M.P.

Staff Sergeant Kenneth Hollas — R.C.M.P.

Superintendent Foster Archibald Howe — R.C.M.P.

Inspector Laurent Hugo — R.C.M.P.

Chief Superintendent Bruce James — R.C.M.P.

Assistant Commissioner Henry Jensen — R.C.M.P.

Robert Howell Jones — R.C.M.P.

Staff Sergeant Arnold Kay — R.C.M.P.

Deputy Commissioner (Retired) William Henry Kelly — R.C.M.P.

Sergeant Tony Kozij — R.C.M.P.

André Laforest

Ex-Constable Robert James Laird — R.C.M.P.

The Honourable Marc Lalonde

Sergeant Paul Langlois — R.C.M.P.

Superintendent Raymond Hugh Lees — R.C.M.P.

Jean-Marc Legros — Canadian Employment and Immigration Commission

Michel Lemay

Staff Sergeant Joseph Albert Bernard Limoges — R.C.M.P.

"M" — a retired employee of Canadian Employment and Immigration Commission

Kenneth John MacDonald — Department of the Solicitor General

Inspector Robert Ian MacEwan — R.C.M.P.

Inspector Stanley Maduk — R.C.M.P.

John Lawrence Manion — Secretary of the Treasury Board

Sergeant Detective Claude Marcotte — Montreal Urban Community Police Force

Superintendent Ernest Allan Marshall — R.C.M.P.

Corporal Peter Marwitz — R.C.M.P.

Donald Spencer Maxwell — former Deputy Minister of Justice

Ex-Staff Sergeant Donald McCleery — R.C.M.P.

The Honourable George McIlraith
Sergeant Wayne Arthur McMorran — R.C.M.P.
Raynald Michaud
Jean Pierre Mongeau
Commissioner Maurice Nadon (Retired) — R.C.M.P.
Inspector Georges Noël — R.C.M.P.
Superintendent Joseph Albert Nowlan — R.C.M.P.
Katharine O'Malley
John Gordon Palmer — Canadian Employment and Immigration Commission
Sergeant Henri Pelletier — R.C.M.P.
Staff Sergeant Ervin Pethick — R.C.M.P.
Peter Michael Pitfield - Secretary to the Cabinet
Ex-Staff Sergeant John Robert Plummer — R.C.M.P.
Staff Sergeant James Pollock — R.C.M.P.
Inspector Paul Pothier — R.C.M.P.
Ex-Staff Sergeant Robert Potvin — R.C.M.P.
Corporal Richard Presseau — Québec Police Force
Sergeant Victor Probram — R.C.M.P.
Inspector Thomas Marvin Quilley — R.C.M.P.
Sergeant George Rehman — R.C.M.P.
Maurice Richer
Chief Superintendent James Andrew Baron Riddell — R.C.M.P.
Robert Gordon Robertson — former Secretary to the Cabinet
Chief Superintendent Henry Francis Robichaud — R.C.M.P.
Sergeant Edmund Philip Rockburne — R.C.M.P.
Ex-Constable Robert Samson — R.C.M.P.
Assistant Commissioner Murray Stanley Sexsmith — R.C.M.P.
Chief Superintendent Roger Shorey — R.C.M.P.
Commissioner Robert Henry Simmonds — R.C.M.P.
Staff Sergeant Charles Victor Smith — R.C.M.P.
John Starnes — Former Director General — R.C.M.P.
Maurice St-Pierre — former Director General, Québec Police Force
Fernand Tanguay
Roger Tassé — Deputy Minister of Justice
Staff Sergeant James Thompson — R.C.M.P.
Jean-Guy Tremblay
Rt. Honourable Pierre Elliott Trudeau — Prime Minister of Canada
Leonard Lawrence Trudel — Former employee of Privy Council Office
The Honourable John N. Turner

Marie-Claire Dubé-Vani — former Civilian Member — R.C.M.P.

Assistant Commissioner Thomas Stanley Venner — R.C.M.P.

Inspector Claude Vermette — R.C.M.P.

Inspector James Warren — R.C.M.P.

Hugh Williams — Canadian Employment and Immigration Commission

Inspector James Sutar Worrell — R.C.M.P.

Superintendent William John Wylie — R.C.M.P.

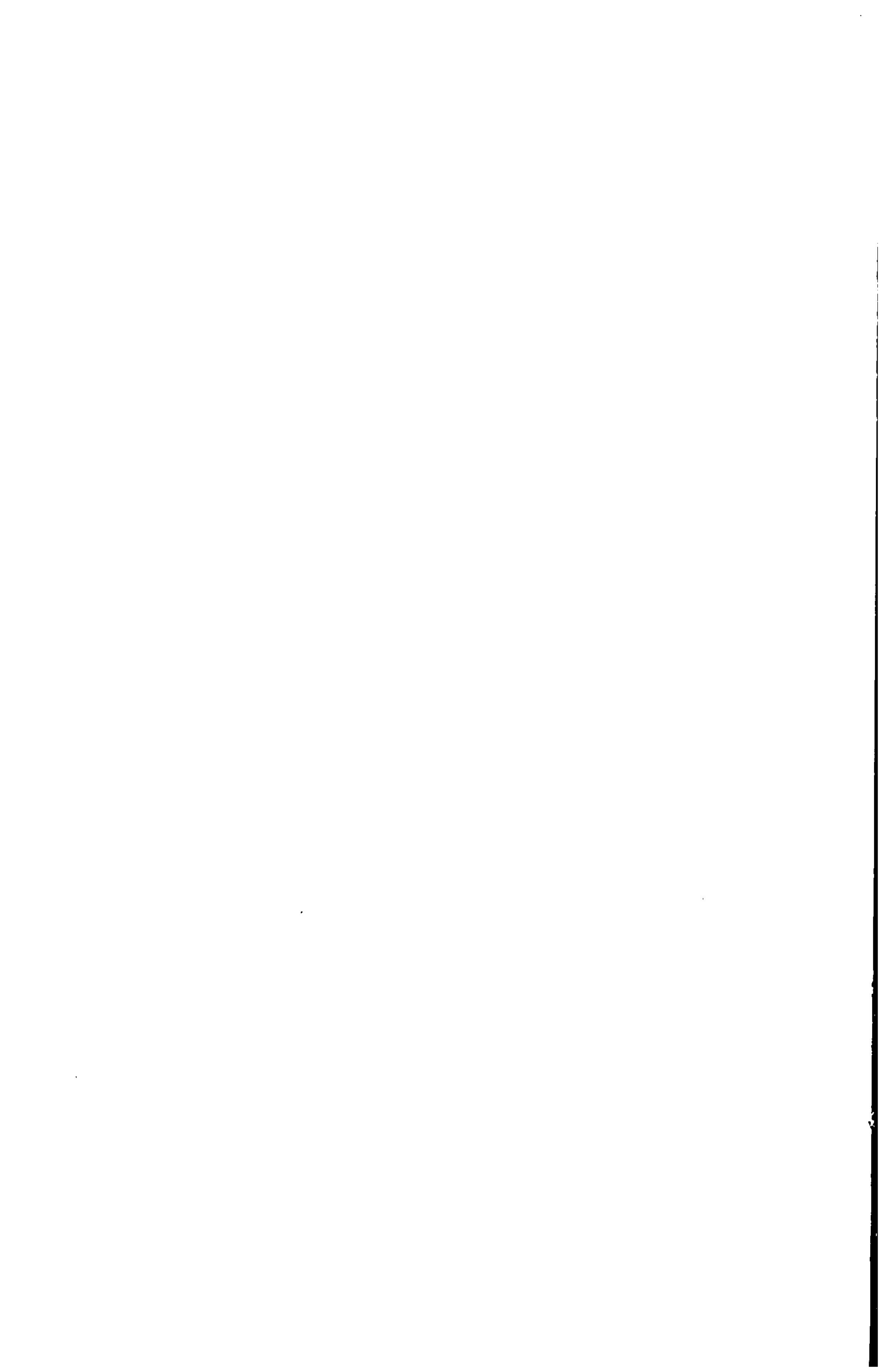
Mr. "X"

"X"

Superintendent Ronald Yaworski — R.C.M.P.

Inspector Alcide Yelle — R.C.M.P.

Chief Superintendent Charles Yule — R.C.M.P.



APPENDIX "P"

COUNSEL WHO HAVE APPEARED BEFORE THE COMMISSION OTHER THAN COUNSEL FOR THE COMMISSION

Name	Representing
G. Lapointe, Q.C. Raphael Schachter	— The Commissioner and members of the R.C.M.P. (until November 10, 1977) — Certain employees of the Post Office Department.
Pierre Lamontagne, Q.C. Richard Mongeau Michèlle Gouin Hélène Leroux Victoria Percival Philippe Roy	— The Commissioner and certain past and present members and employees of the R.C.M.P.
Jacques Tetrault, Q.C.	— The Commissioner of the R.C.M.P. (relative to the hearing on February 6, 1979, with respect to liaison with the Department of National Revenue.)
Claude Thomson, Q.C. Mark P. Frawley Jeffrey S. Leon	— The Commissioner and members of the R.C.M.P. for hearings relative to Warren Hart and J.S. Warren and for various other matters.
Joseph R. Nuss, Q.C. Le bâtonnier Michel Robert H. Lorne Murphy, Q.C. Allan Lutfy (except between June 30, 1978 and March 4, 1980)	— The Government of Canada, including present and former ministers and officials not otherwise represented.
Allan Lutfy* Stephen Foster* (from June 5, 1979 to March 4, 1980)	— the Right Honourable Pierre Elliott Trudeau
Harvey Yarosky Natalie Isaacs	— Bernard Blier — Michael Gareau — Robert Potvin — Stanley Maduk

Mark Jewett — The Department of National Revenue

Claude Lanctot — Robert Samson

G.A. Allison, Q.C. — Jérome Choquette, Q.C.

Jean C. Sarazin — Certain employees of the Unemployment Insurance Commission

Warren Black — Canada Employment and Immigration

Pierre Cloutier — André Chamard

J.C. Major, Q.C. — Certain employees of the Department of National Revenue

Guy Lafrance — Montreal Urban Community Police

Michael A. Meighen — The Progressive Conservative Party of Canada

Gerald Tremblay — Le Procureur Général du Québec
Jean Bellevue
Mario Bilodeau
Claude Gagnon
B.F. Flynn

Michel Proulx — La Sûreté du Québec et ses membres

David Gibbons — Canadian Federation of Civil Liberties and Human Rights Association of Canada

Normand Caron — La ligue des droits de l'homme

Walter Tarnopolsky — Canadian Civil Liberties Association
Alan Borovoy
Irwin Cotler
Edward Greenspan, Q.C.
Allan Strader

Paul Lamoureux — Patricia Metivier

L. Yves Fortier, Q.C. — The Hon. Jean-Pierre Goyer and Lt. Col. J.R. Cameron
Simon V. Potter

Robert J. Carter, Q.C. — L.D. Brown, J.R. Plummer and W. McMorran

Raymond Barakett — The Hon. Warren Allmand and J. MacDonald

A.H. Campeau — Donald R. McCleery, Gilles Brunet and Gilbert Albert

John E. Rouatt — The Hon. Bud Cullen

David W. Scott, Q.C. — Senator the Hon. George J. McIlraith
George D. Hunter

Richard E. Shadley — Paul Potvin

— Michel Hanssens

Pierre A. Michaud, Q.C. — The Hon. Francis Fox

André Wery — Jean-Pierre Mongeau

Barry S. Wortzman — Warren Hart

Hubert Mantha — Hugh Williams

APPENDIX "Q"

PLACES AND DATES OF HEARINGS TO RECEIVE BRIEFS AND PERSONS AND ORGANIZATIONS THAT PRESENTED BRIEFS AT THOSE HEARINGS

MONTREAL — October 19, 1977.
La ligue des droits de l'homme du Québec Canadian Civil Liberties Association

MONTREAL — January 16, 1978
La ligue des droits de l'homme du Québec
Syndicate des Postiers du Canada — Canadian Union of Postal Workers
L'association des vétérans de la Gendarmerie Royale du Canada — R.C.M.P. Veteran's Association

TORONTO — January 18, 1978
Canadian Labour Congress
Quaker Committee on Jails and Justice
Mr. D. Campbell
Mr. X
Church of Scientology
Communist Party of Canada
Peoples' Republic of Poetry
North American Labour Party
Revolutionary Workers League
Mr. O. Batchelor
The Law Union of Ontario
Professor J. Arvay
Mr. Samuel Ross

VANCOUVER — January 20, 1978
Law Union of British Columbia
Francis Wingate
British Columbia Civil Liberties Association
Canadian Bar Association, Criminal Justice Sub-section of the British Columbia Branch
Ricardo Tettimanti
Kenneth McAllister

REGINA — January 30, 1979
Regina Chamber of Commerce
Buckland Consultants Ltd.
Mr. C.F. Platt

FREDERICTON — January 8, 1979
Hon. R. Logan, Q.C. — Attorney General of New Brunswick
Nova Scotia Civil Liberties Association

OTTAWA — January 23, 1979
Canadian Association of University Teachers
Foundation for Human Development
Mr. Lawrence A. Greenspon
Mr. Arthur A. Wardrop

OTTAWA — January 24, 1979
National Capital Region Civil Liberties Association
Professor Richard D. French
Mr. J. Ross Colvin

VANCOUVER — January 31, 1979
Rev. James Manly
British Columbia Civil Liberties Association

VANCOUVER — February 1, 1979
Law Union of British Columbia

OTTAWA — October 2, 1979
Canadian Bar Association

OTTAWA — October 3, 1979
Canadian Civil Liberties Association

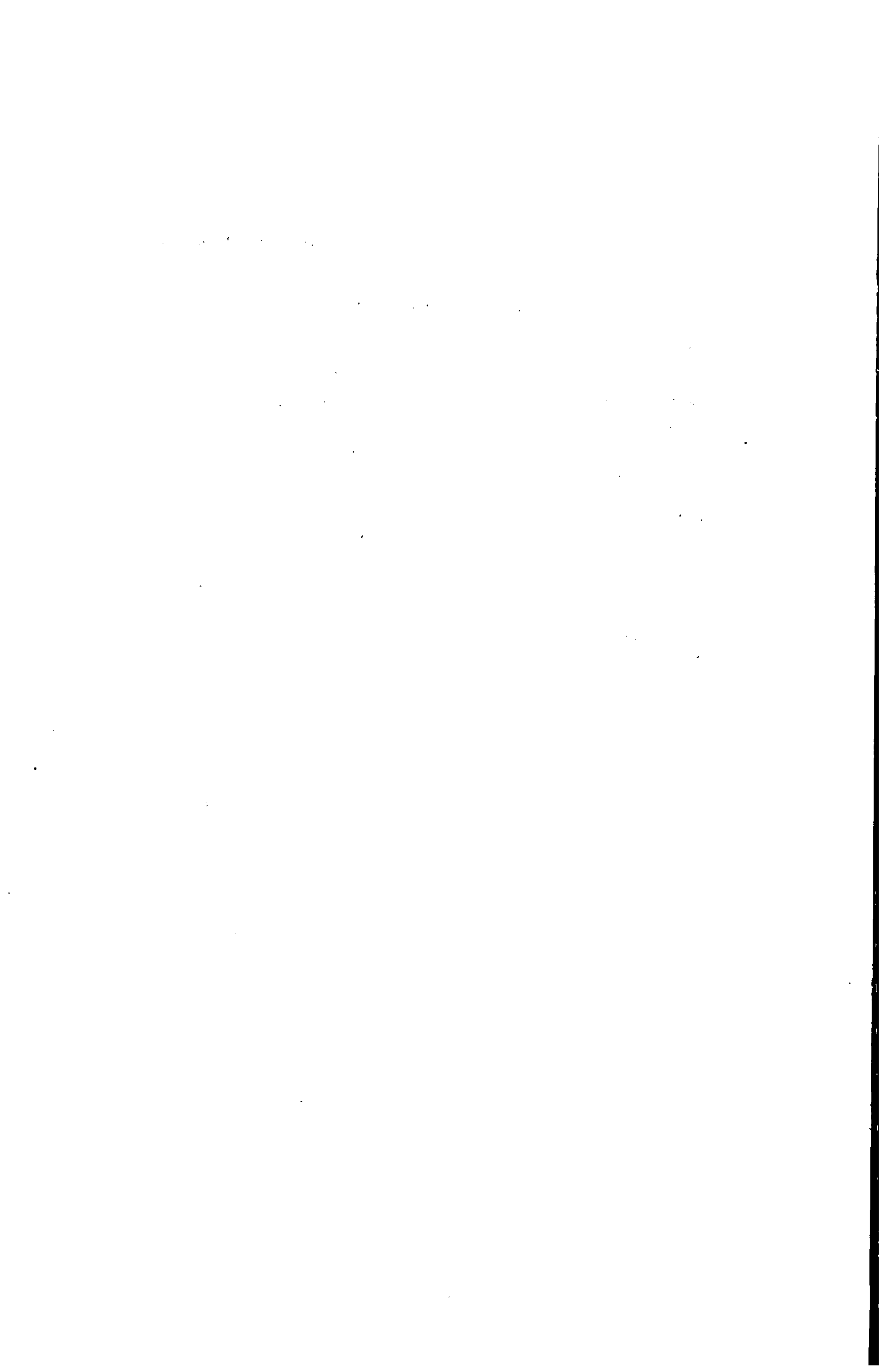
OTTAWA — April 17, 1980
Canadian Civil Liberties Association

OTTAWA — July 23, 1980
Canadian Bar Association

APPENDIX "R"

FORMAL BRIEFINGS

1. Surveillance of Members of Parliament and Candidates
2. Surveillance of Separatist Movements in the Parti Québecois
3. R.C.M.P. Security Service — Human Sources
4. R.C.M.P. Security Service — Records Management
5. R.C.M.P. Security Service Automated Information Services
6. R.C.M.P. Security Service — Surveillance
7. Surveillance of Labour
8. Internal Control Mechanisms
9. R.C.M.P. Security Service — Technical Services
10. R.C.M.P. Security Service Relations with the Provinces
11. The Mandate of the Security Service
12. R.C.M.P. Security Service — Security Screening
13. Surveillance of Native Organizations
14. R.C.M.P. Personnel and Management Policies
15. Criminal Intelligence
16. Commission of Offences by Sources
16. 17. R.C.M.P. Legal Branch
18. R.C.M.P. Security Service — Counter-Espionage
19. R.C.M.P. Security Service — Counter-Subversion
20. Public Service Security Clearance
21. Immigration Security Clearances
22. Citizenship Security Clearances
23. R.C.M.P. Security Service Key Sectors Targetting
24. R.C.M.P. Security Service and the Media
25. R.C.M.P. "P" Directorate (Protective Policing)
26. Security Service Activities Outside Canada



APPENDIX "S"

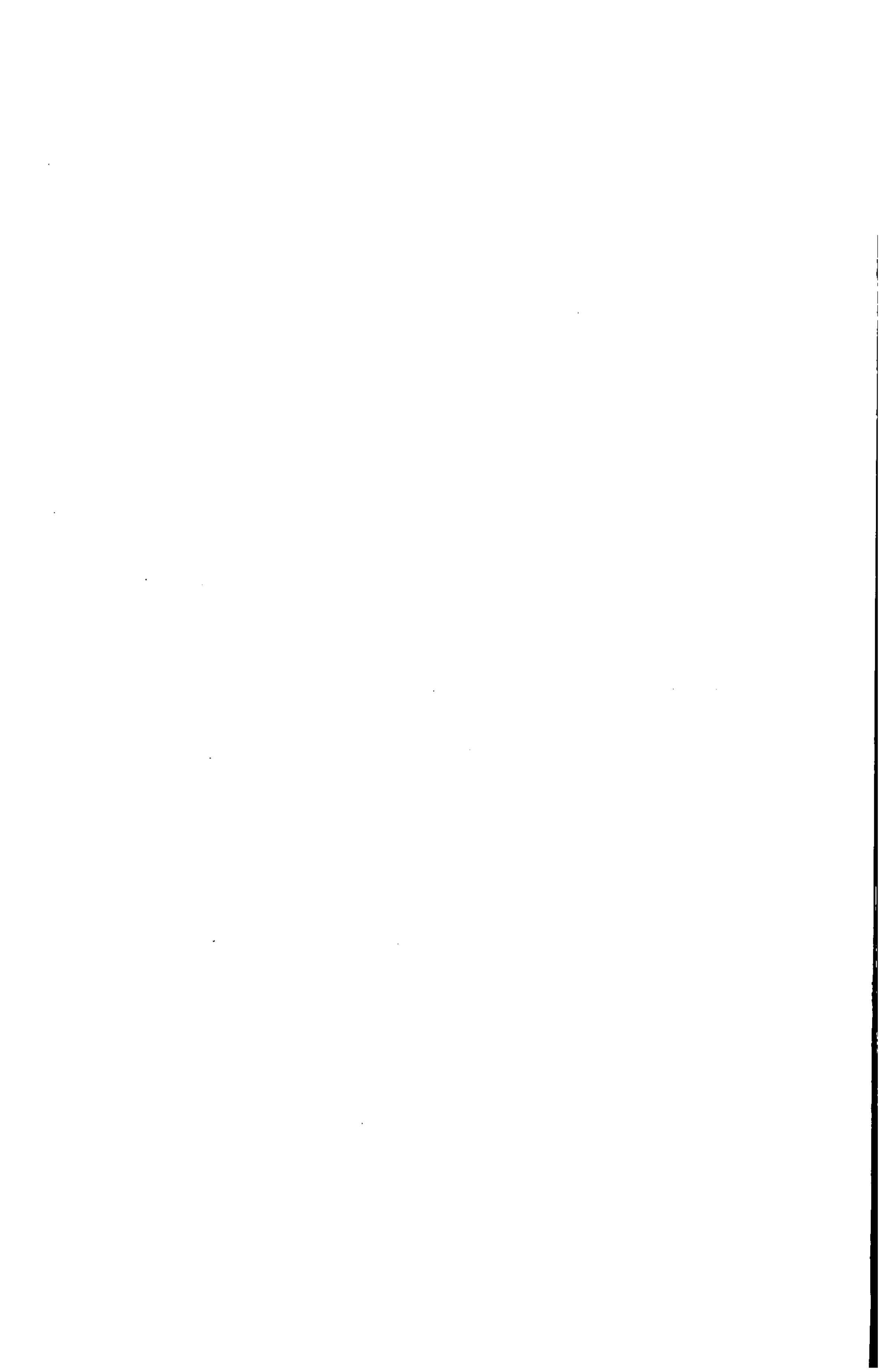
MEETINGS WITH ACADEMICS

In Toronto

W.F. Bowker, Q.C.
B.A. Grosman, Q.C.
J. Hogarth
C.D. Shearing
R.S. Mackay, Q.C.
T. Elton
A. Morel
P. Garant
G. Marshall
L. Taman
J.Ll.J. Edwards
J.D. McCamus
P.H. Russell

In Montreal

J.M. Piotte
G. Côté-Harper
A. Normandeau
H. Brun
C. Hector
A. Jodouin
A. Morel
P. Garant
A. de Mestral



APPENDIX "T"

CONTRACTED STUDIES AND CONSULTANTS

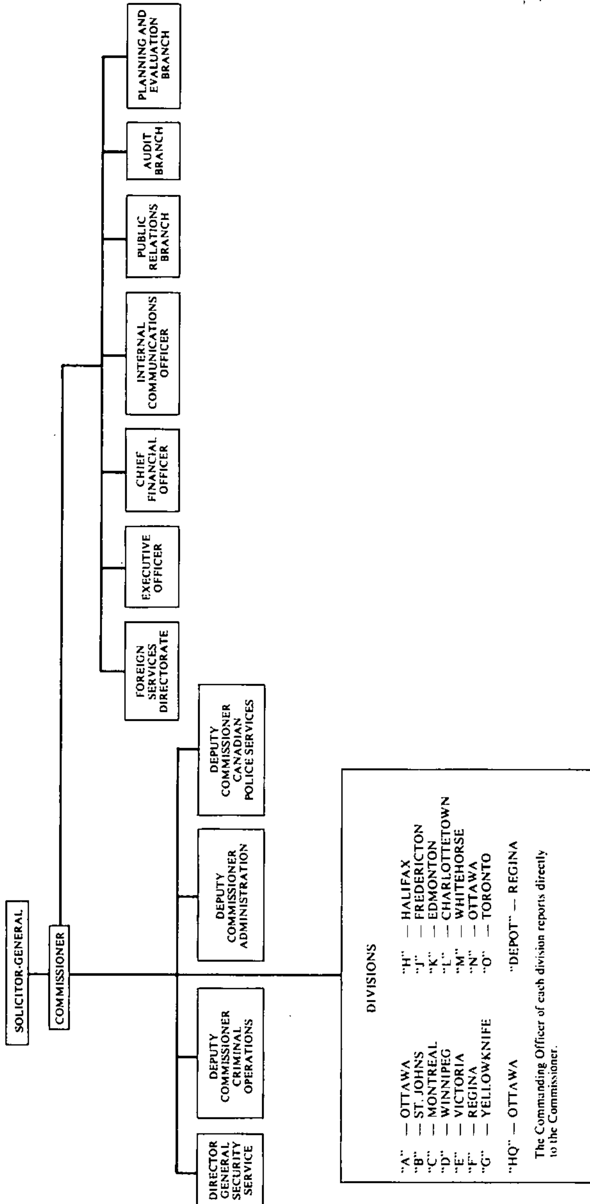
1. *Brun, Henri:* The Division of Constitutional Jurisdiction Between the Federal Government and the Provincial Governments with respect to National Security
2. *Brooks, Neil*: Admissibility of Illegally Obtained Evidence
3. *Chapman, Brian*: Consultant on the Structure and Organization of Police and Security Forces in Foreign Countries
4. *Edwards, J.Ll.J.*: Ministerial Responsibility as it relates to the offices of Prime Minister, Attorney General and the Solicitor General of Canada
5. *Fox, Richard* and *Waller, P. Louis*: Police and Security in Australia
6. *Franks, C.E.S.*: The Role of Parliament in Security Matters
7. *Friedland, Martin L.*:
   (1) National Security: The Legal Dimensions
   (2) Review of the Law relating to Entrapment
8. *Grant, Alan*: R.C.M.P. Interrogation Techniques
9. *Green, L.C.*: Section 63 of the Criminal Code
10. *Hogg, Peter*: The Constitutional boundaries between Federal and Provincial authority with respect to the investigations and prosecutions of criminal offences
11. *Larouche, Angers*: Legal Opinion on the Legal Position in Quebec Civil Law with respect to Surreptitious Entries as that problem has been developed in evidence before the Commission
12. *Leigh, L.H.*: Consultant on the recent experiences of the United Kingdom Administration in dealing with activities of the Security Service
13. *Magnet, Joseph*:
    (1) Privacy and Commissions of Inquiry
    (2) Public Intervention Before Commissions of Inquiry
    (3) Definition of National Security
    (4) Definition of Public Interest
14. *Marshall, Geoffrey*: Consultant on Police and Government in Britain
15. *Meredith, Harry A.*: Consultant on Personnel Management
16. *Nolan, John E. Jr.*: United States Law Governing Mail Surveillance
17. *Robson, J.L.*: New Zealand Experience with National Security Issues
18. *Ryan, Stuart*: Judicial Authorization of Electronic Surveillance

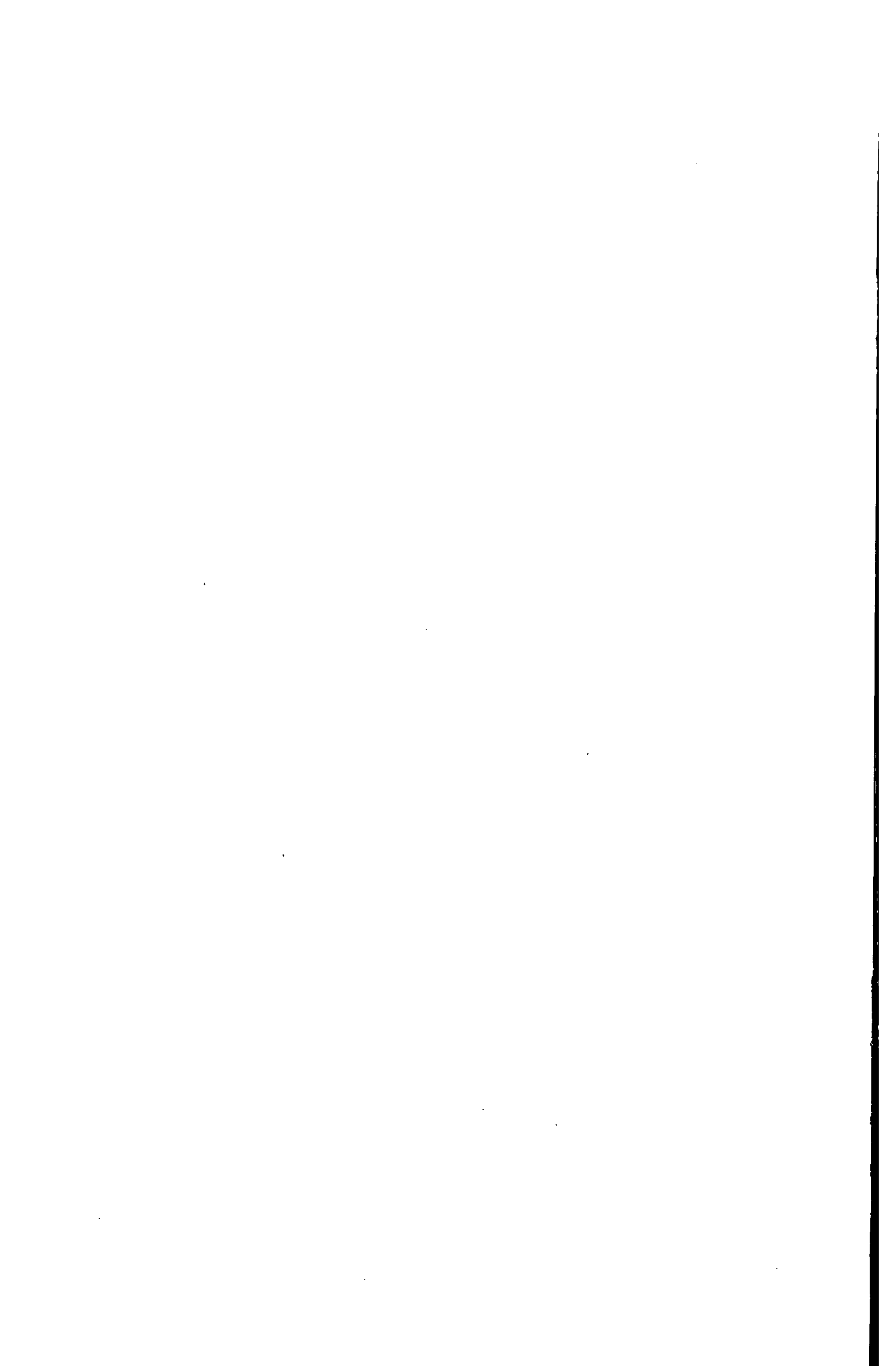
19. *Scalia, Antonin*: United States Intelligence Law
20. *Stenning, Philip C.*: Police Commissions, their development, composition, duties and powers
21. *Williams, D.G.T.*: The British Experience with respect to matters under the mandate of the Commission of Inquiry

We are also indebted to the Honourable Mr. Justice Campbell Grant, the Honourable Mr. Justice G.-R. Fournier and the Honourable Angelo Branca, Q.C., for their assistance in reviewing the practice of applications for judicial authorization of electronic surveillance.

APPENDIX "U"

ORGANIZATION of the R.C.M.P.

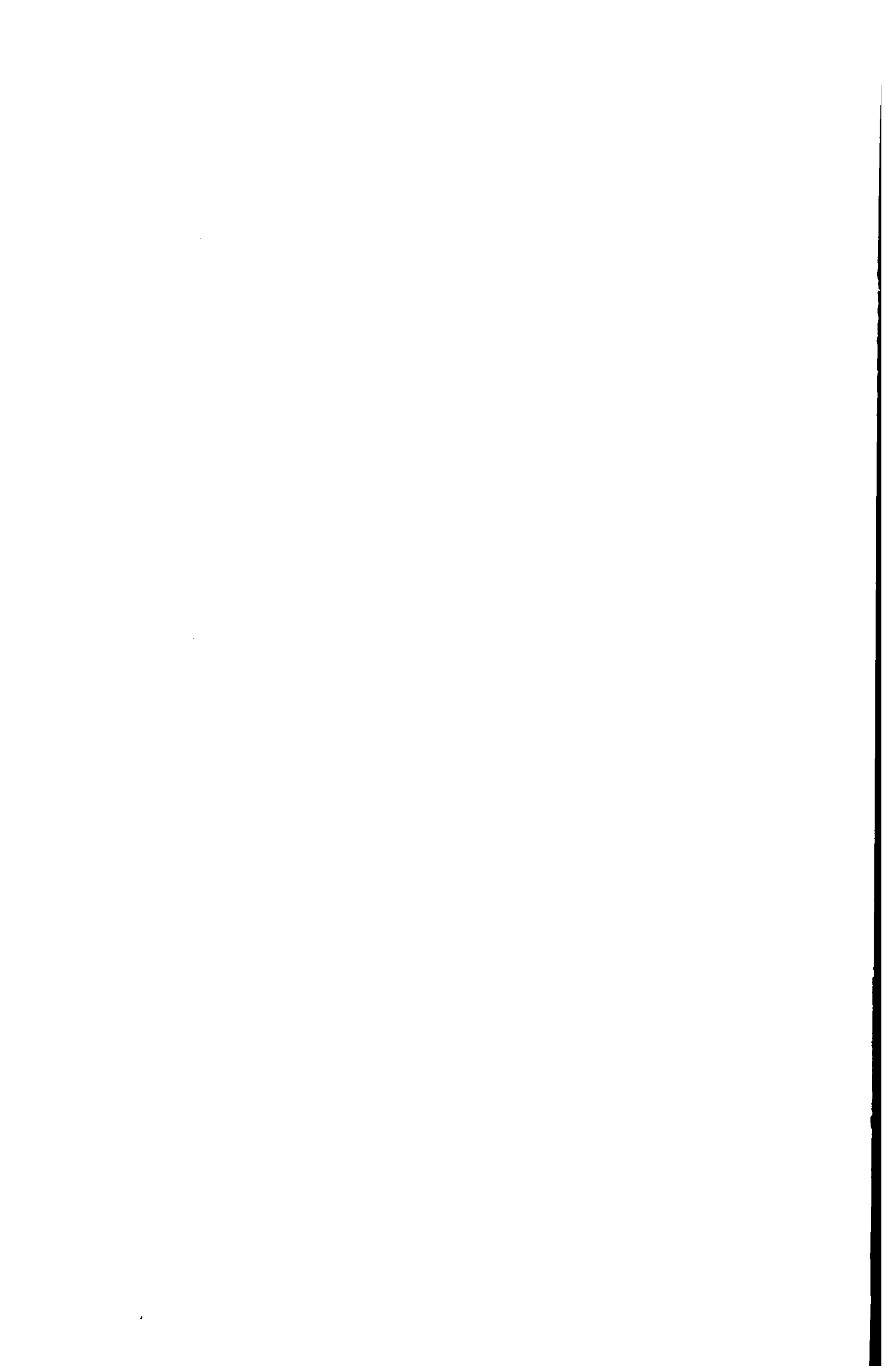




APPENDIX "V"

ORGANIZATION of the SECURITY SERVICE

- COMMISSIONER
  - DIRECTOR GENERAL SECURITY SERVICE
    - SECRETARIAT TO DIRECTOR GENERAL
    - AUDIT
    - DEPUTY DIRECTOR GENERAL SERVICES
      - AUTOMATED INFORMATION SERVICES
      - "F" OPERATIONS
      - "J" OPERATIONS
      - "E" OPERATIONS
      - "I" OPERATIONS
    - DEPUTY DIRECTOR GENERAL OPERATIONS
      - "A" OPERATIONS
      - "B" OPERATIONS
      - "D" OPERATIONS
      - "H" OPERATIONS
      - "L" OPERATIONS
      - INTELLIGENCE COORDINATION UNIT
      - BRITISH COLUMBIA
      - ALBERTA YUKON N.W.T.
      - SASKATCHEWAN
      - MANITOBA
      - SOUTHWESTERN ONTARIO
      - ONTARIO
      - QUEBEC
      - ATLANTIC AREA
    - DEPUTY DIRECTOR GENERAL ADMINISTRATION & PERSONNEL
      - ORGANIZATIONAL DEVELOPMENT
      - INTERNAL SECURITY
      - ADMINISTRATION
      - FINANCIAL SERVICES & SUPPLY
      - STAFFING & PERSONNEL
      - TRAINING & DEVELOPMENT



APPENDIX "W"

INFORMAL MEETINGS

1. R.H. Vogel, Q.C., Deputy Attorney General, British Columbia
2. A. Leal, Q.C., Deputy Attorney General, Ontario
3. R. Gosse, Q.C., Deputy Attorney General, Saskatchewan
4. A. Bissonnette, Deputy Solicitor General
5. E.P. Black, Deputy Under Secretary of State for External Affairs
6. R.P. Bourne, Assistant Deputy Solicitor General
7. M.R. Dare, Director General of the Security Service
8. T.D. Finn, Assistant Secretary to the Cabinet
9. A.E. Gotlieb, Under Secretary of State for External Affairs
10. M.W. Mackenzie, Chairman, Royal Commission on Security (1969)
11. M. Massé, Secretary to the Cabinet
12. D. Maxwell, Q.C., Former Deputy Minister of Justice
13. C.R. Nixon, Deputy Minister of National Defence
14. K. O'Neill, Chief, Communications Security Establishment, Department of National Defence
15. P.M. Pitfield, Q.C., Secretary to the Cabinet
16. R.G. Robertson, Former Secretary to the Cabinet
17. Commodore J. Rodocanachi, Director General of Intelligence and Security, Department of National Defence
18. R.H. Simmonds, Commissioner of the R.C.M.P.
19. J. Starnes, Former Director General of the Security Service
20. R. Tassé, Q.C., Deputy Minister of Justice and Former Deputy Solicitor General
21. R. Watson, Q.C., Department of Justice, R.C.M.P. Counsel

APPENDIX "X"

In the Federal Court of Canada

Trial Division

OTTAWA, Friday, the 4th day of August, 1978

PRESENT: THE HONOURABLE MR. JUSTICE CATTANACH

IN THE MATTER of the Inquiries Act, R.S.C. 1970 c. I-13

— and —

IN THE MATTER of a Commission under the Great Seal of Canada issued pursuant to Order in Council P.C. 1977-1911 to MR. JUSTICE DAVID C. McDONALD, MR. DONALD S. RICKERD and MR. GUY GILBERT to be Commissioners under Part I of the Inquiries Act to inquire into certain activities of the Royal Canadian Mounted Police;

— and —

IN THE MATTER of an Application for a Writ of Prohibition under section 18(a) of the Federal Court Act, R.S.C. 1970 c. 10 (2nd Supp.):

BETWEEN:

PAUL D. COPELAND on his own behalf and on behalf of all members of the Law Union of Ontario,

Applicant,

— and —

MR. JUSTICE DAVID C. McDONALD, DONALD S. RICKERD and GUY GILBERT, members of the Commission of Inquiry into certain activities of the Royal Canadian Mounted Police,

Respondents.

JUDGMENT

THIS application having come on for hearing before this Court at Toronto on the 26th and 29th days of June, 1978, in the presence of counsel for the respondents as well as for the applicant, and the Court after hearing what was alleged by counsel having reserved its decision,

IT IS THIS DAY ORDERED AND ADJUDGED that the said application be and it is dismissed with costs.

In The Federal Court of Canada

Trial Division

IN THE MATTER of the Inquiries Act, R.S.C. 1970 c. I-13.

— and —

IN THE MATTER of a Commission under the Great Seal of Canada issued pursuant to Order In Council P.C. 1977-1911 to MR. JUSTICE DAVID C. McDONALD, MR. DONALD S. RICKERD and MR. GUY GILBERT to be Commissioners under Part I of the Inquiries Act to inquire into certain activities of the Royal Canadian Mounted Police;

— and —

IN THE MATTER of an Application for a Writ of Prohibition under section 18(a) of the Federal Court Act, R.S.C. 1970 c.10 (2nd Supp.):

BETWEEN:

PAUL D. COPELAND on his own behalf and on behalf of all members of the Law Union of Ontario,

Applicant,

— and —

MR. JUSTICE DAVID C. McDONALD, DONALD S. RICKERD and GUY GILBERT, members of the Commission of Inquiry into certain activities of the Royal Canadian Mounted Police,

Respondents.

REASONS FOR JUDGMENT

CATTANACH, J.

As indicated in the style of cause this is an application by way of an originating notice of motion pursuant to section 18(a) of the Federal Court Act for a writ of prohibition prohibiting the respondents, as members of a Commission of Inquiry for the purpose of inquiring into

certain activities of the Royal Canadian Mounted Police, from continuing their inquiry on the ground of the bias, in the legal sense, of each commissioner.

Immediately antecedent to the hearing of this motion the applicant moved for leave to call the respondents and two newspaper reporters to testify orally in open court in relation to issues of fact raised by the present application pursuant to Rule 319(4).

I declined to grant the leave requested because, in my opinion, no special reason was established for so doing.

By virtue of Rule 319, the rule is that the allegations of fact on which a motion is based shall be proved by affidavit. That a witness may be called to testify in open court in relation to an issue of fact raised in the application, is

the exception. The exception is granted only by leave when special reason is shown.

The adverse party to a motion may file an affidavit in reply and that affidavit too is to be directed to the facts. That is all an adverse party is required to do and he need not file an affidavit in reply unless he considers it expedient to do which the respondents in this matter did not.

As I appreciated the purpose of calling the three respondents to testify orally as well as the two newspaper reporters, it was to exact an admission or denial from the commissioners of the allegations of fact in the supporting affidavit to the principal motion, from which an inference of bias might be made, and the source of the information of the newspaper reporters for their published stories.

I failed to see the necessity for so doing. I expressed the view that there were adequate allegations of fact in the supporting affidavit to the principal motion from which bias, in its legal sense, may be inferred, but in so stating I did not make a finding of bias and I made it clear that I did not intend to so imply.

An application by way of motion is in no way akin to the trial of a cause of action which is based on antecedent pleadings.

I did not fault the applicant in adopting the procedure which he did and as he is entitled to do but I could not refrain from expressing the view that if the applicant wished to examine the respondents (and he could not cross-examine them on their affidavits because the respondents did not consider it necessary to file such affidavits and were under no obligation to do so) then if the applicant had adopted the alternative course open to him of filing a statement of claim an examination for discovery of the respondents would have been available to him.

While I verbally rejected the application I have considered it expedient to reduce to writing at this stage the reasons I gave orally for doing so.

There is a further matter also preliminary in its nature which may be considered also at this stage.

The applicant brings this motion on his own behalf and on behalf of all members of the Law Union of Ontario.

Thus it is a class motion. For a matter to be appropriate for the institution of a class or representative action (and for the purposes of this particular subject matter only I shall consider a class motion as synonymous with a class cause of action) the persons in the class must have the same interest. There must be a common interest and a common grievance and the relief sought in its nature must be beneficial to all.

In *Naken et al.* v. *General Motors of Canada Ltd.* (17 O.R. (2d) 193) Griffiths J. speaking for the Divisional Court said at page 195:

> "The first important principle to be extracted from these cases is that a plaintiff is only permitted to sue in a representative capacity on behalf of a class when the cause of action being asserted is common to all members of the class, not similar, but identical."

In the affidavit of Paul D. Copeland in support of the motion it is alleged that the members of the Law Union of Ontario is an unincorporated association of one hundred and eighty progressive and socialist lawyers, law students

and legal workers. Thus the Law Union of Ontario is but a collection of individuals.

In paragraph 10 of Mr. Copeland's affidavit he alleges that he verily believes that he has been the victim of criminal and other illegal activity by members of the Royal Canadian Mounted Police on the grounds that his clients have been the victims of such activities, that confidential telephone communications with a potential witness had been illegally intercepted, that his office has been the subject of surveillance, that he was regarded as a threat to the security of the Canadian Penitentiary Service and because his legal partner was the victim of illegal acts by the R.C.M.P. and that because of that association he was also a victim.

These allegations are personal to Mr. Copeloand. They are not common to him and the members of the Law Union of Ontario nor are there such allegations with respect to all or any members of the Law Union of Ontario.

Therefore this motion is not properly brought by Mr. Copeland in a representative capacity on behalf of all members of the Law Union of Ontario and I have entertained the motion as being brought on his own behalf exclusively.

With respect to the members of the Law Union of Ontario the motion is therefore dismissed.

Counsel for Mr. Copeland, because of the allegations in his affidavit above mentioned, contended that he was a victim of R.C.M.P. illegal activity which may well be the subject of investigation by the Commission and in fact Mr. Copeland has so requested and there has been a tentative indication given that these particular matters will be investigated if deemed appropriate and at the appropriate time.

Accordingly it is contended that Mr. Copeland is entitled to have his allegations of illegal activities by the R.C.M.P. with respect to himself investigated by a completely unbiased panel.

It was then contended Mr. Copeland could reasonably apprehend that the Commission might not act in an entirely impartial manner and that is a ground for disqualification.

The supporting affidavit to the motion has many allegations and has annexed thereto numerous exhibits running through the alphabet and starting through the alphabet a second time, the gist of which may be summarized.

The allegations are that Mr. Justice McDonald, prior to his appointment, had been an active, energetic and political partisan in the Province of Alberta for the political party which now forms the Government of Canada and which was responsible for the appointment of all three commissioners. Similar allegations are made of political partisanship by Mr. Rickerd and Mr. Gilbert. It is further alleged that Mr. Justice McDonald, after his appointment accompanied the present Prime Minister in a private DOT aircraft on an official visit to the Orient in the capacity of a news correspondent. It is also alleged that Mr. Rickerd and Mr. Gilbert had close personal and business relationships with members of the Cabinet particularly the then Solicitor General responsible for the R.C.M.P. It is alleged that the Commission has expressed the view that certain alleged illegal activities by the R.C.M.P. may have been justified by the interests of national security. It is a function of the

Commission to determine the extent to which the members of the Government, the Cabinet and the Liberal party were aware of, authorized or were in any way complicit in illegal activities of the R.C.M.P.

These allegations were the subject matter of many newspaper reports, given wide distribution and prominence in the newspapers because the stories were newsworthy. The press clippings are among the exhibits to the affidavits.

Still further summarized the gist of the allegations is that these circumstances lead to the suspicion, to be reasonably entertained that the Commission will serve as a whitewash of the R.C.M.P. and members of the Government and that Mr. Copeland, as a victim of these activities, cannot expect a fair shake from a Commission so appointed and so comprised.

The most recent test of bias to be applied and a discussion thereof is in the reasons for judgment delivered by Laskin C.J.C. for the majority of the Supreme Court of Canada in *Committee for Justice and Liberty et al.* v. *National Energy Board* ([1976] 68 D.L.R. (3d) 716) where he said at pages 732-3:

> (The past activity of the Chairman of the Board), in my opinion, cannot but give rise to a reasonable apprehension, (of bias) which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined on a s. 44 application.
>
> This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi* v. *Minister of Highways (B.C.) (1966)*, [1966] S.C.R. 367 and again in *Blanchette* v. *C.I.S. Ltd.* [1973] S.C.R. 833 (where Pigeon J. said that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand J., said in *Szilard* v. *Szasz*, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it may be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

The majority held that Mr. Crowe, the Chairman of the National Energy Board, because of his previous association with a party before the Board, was the object of a reasonable apprehension of bias. Similar circumstances applied in *Szilard* v. *Szasz*.

In the plethora of decided cases expressions such as "reasonable apprehension of bias", "reasonable suspicion of bias" and "real likelihood of bias" have been used interchangeably without distinction.

In his dissenting judgment in the National Energy Board case, de Grandpré J. with whom Martland and Judson J.J. concurred, applied the same test as did Laskin C.J.C. but arrived at a different result.

> de Grandpré J. said at pp. 735-6:
>
> ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.

He could:

> ...see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

I can perceive no difference in principle to the approaches between the judgment of Laskin C.J.C. and de Grandpré J. but it is significant that de Grandpré J. does refer to "real likelihood of bias" whereas the majority excluded that formula.

It may be that a "real likelihood of bias" imposes a higher standard on an applicant for prerogative relief than does a "reasonable apprehension of bias" but in view of the majority's silence as to the test of a "real likelihood" such expressions of the test as to whether "a reasonable man would consider there was a likelihood of bias", which has been frequently propounded, may not be an accurate statement of the law.

Accordingly the question immediately arises as to what issues are to be determined by the Commission.

For there to be an issue to be determined there must be a *lis inter partes*, that is to say a dispute between parties to be decided by the Commission.

Lord Simmonds in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* ([1948] 4 D.L.R. 673) said at page 680:

> It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties,...

Thus if there is a *lis inter partes* the function is judicial in the case of courts of law and equally so in the case of a tribunal where issues between parties are decided where the function is more properly described as quasi-judicial.

Conversely if there is no issue or *lis* to be determined then the function of the tribunal is described as administrative and the principles of natural justice, particularly the common law concept of bias, do not apply with the same full force and effect to such a tribunal as they apply to a quasi-judicial tribunal which is required to determine a quasi-*lis*.

Incidentally in *Committee for Justice and Liberty* v. *National Energy Board* (supra) there was such a quasi-*lis*. There the Board had before it the question for decision whether to issue a certificate in respect to the proposed Mackenzie Valley pipeline to an applicant therefor to which other interested parties upon whom the Board had conferred status were opposed.

In *Guay* v. *Lafleur* ([1965] 47 D.L.R. (2d)226) Cartwright J. (as he then was) said that the maxim, *audi alteram partem* (one of the cardinal principles of natural justice) does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power to impose a liability or to give a decision affecting the rights of parties.

In re Pergamon Press Ltd. ([1970] 3 W.L.R. 792) the English Court of Appeal held that inspectors appointed to investigate the affairs of a company under Companies legislation were masters of their own procedure but were required to act fairly and, therefore, were required to give anyone whom they

proposed to condemn or criticize in their report a fair opportunity to answer what was alleged against him.

In the *Federal Companies Act* as I once knew it, that right was the subject of precise statutory enactment.

But Lord Denning M.R. in his characteristically precise and incisive language said:

> They are not even quasi-judicial, for they decide nothing, they determine nothing.

Accordingly a tribunal is to be categorized as either quasi-judicial or administrative by the function it performs and its powers. The category into which a tribunal falls is of paramount importance in determining what common law principles of natural justice are applicable and consideration must also be given to the legislation to which the tribunal owes its existence.

The present Commission of Inquiry, of which the respondents are members, owes its existence to the *Inquiries Act*, as stated in the style. Under Order in Council, P.C. 1977-1911 a Commission issued appointing the respondents to be commissioners under Part I of the *Inquiries Act*.

Their functions are therein outlined to be:

> (a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;
>
> (b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and
>
> (c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

I have omitted the introductory portion and the procedure provisions.

Paragraph (a) requires the Commission to "investigate" and to "determine" the extent and prevalence "of certain investigative practices" of and to "inquire into" certain policies of the R.C.M.P.

By paragraph (b) the Commission is required to "report the facts", and to "advise as to any further action that the commissioners deem necessary and desirable in the public interest".

By paragraph (c) the Commission is required "to advise and make such report as the commissioners deem necessary and desirable".

In the procedural portion of the Order in Council which I have not reproduced, the commissioners are "directed to report to the Governor in Council".

The key words in the functions of the Commission are to "investigate", "inquire", "report the facts" and "to advise" with respect thereto.

Thus at its very highest the Commission is but a fact-finding, reporting and advisory body.

Paraphrasing and applying the words of Lord Denning, M.R. to the commissioners herein, they are not even quasi-judicial, for they decide nothing, they determine nothing.

The Commission reports to the Governor in Council and it is for him to decide what shall be done. He may implement the advice given in the report in whole or in part or he may consign the report to oblivion. The Action to be taken thereon is exclusively his decision.

In contrasting the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative, notwithstanding that both hold hearings, the gulf is so wide between them that the common law standards of bias are not applicable to the latter.

In my view bias in the Commission, even if it should be found to exist and I make no such finding, is irrelevant.

In so stating I have not overlooked the comment *In re Pergamon Press* (supra) that the inspectors appointed under Companies legislation to give to anyone whom they propose to condemn or criticize, "a fair opportunity to answer what was alleged against him".

In *Maxwell* v. *Department of Trade and Commerce* (Times Newspaper L.R. June 25, 1974) the Court of Appeal dealt with the same inquiry as that dealt with in the *Pergamon Press* case and refused to apply any requirement other than the inspectors must be "fair to the best of their ability".

If a person is aggrieved by a decision that should have been made on a quasi-judicial basis then that person, in my view, may resort to proceedings in the nature of *certiorari* or may invoke a review of that decision under section 78 of the *Federal Court Act*.

But if a person is aggrieved by a decision that is required to be made on the basis of it being fair to the best ability of those who decide, then the remedy is political not judicial.

That being so it applies with much greater force to a tribunal which makes no decision.

Counsel for Mr. Copeland relied strongly on the judgment of the Supreme Court in *Saulnier* v. *Quebec Police Commission and Montreal Urban Community* ([1976] 1 S.C.R. 572) in support of his position that, even though the respondent commissioners would not have any decision to make, their recommendations would or might form the basis for action to be taken by the Governor in Council which might prejudicially affect Mr. Copeland's interests. In that case, Pigeon J. speaking for the Court, distinguished the case of *Guay* v. *Lafleur* in the following passage at page 578:

> With respect, I must say that the function of the Commission is definitely not that of the investigator concerned in *Guay* v. *Lafleur*. That investigator was charged only with collecting information and evidence. The Minister of National Revenue could then unquestionably make use of the documentary evidence collected, but not of the investigator's conclusions. It is for this reason that it was held the investigator could refuse to allow the

taxpayer concerned to be present or be represented by counsel at the kind of investigation provided for by the *Income Tax Act*. The situation is quite different under the *Police Act*, s.24 of which reads as follows:

> 24. The Commission shall not, in its reports, censure the conduct of a person or recommend that punitive action be taken against him unless it has heard him on the facts giving rise to such censure or recommendation. Such obligation shall cease, however, if such person has been invited to appear before the Commission within a reasonable delay and has refused or neglected to do so. Such invitation shall be served in the same manner as a summons under the Code of Civil Procedure.
>
> This provision indicates that in this essential particular the *Police Act* differs fundamentally from the *Income Tax Act*. If this Court held that the latter Act did not require application of the audi allenam partem rule, this was because it had first concluded that the kind of investigation provided for by the Act involved no conclusion or finding as to the rights of the taxpayer concerned. The *Police Act*, on the other hand, besides expressly recognizing the application of the *audi alteram partem* rule, clearly indicates that the investigation report may have important effects on the rights of the persons dealt with in it. It does not appear necessary for me to labour this point, as I cannot see how it can be argued that the decision is not one which impairs the rights of appellant, when it requires that he be degraded from his position as Director of the City of Montreal Police Department, and the sole purpose of subsequent proceedings is to determine the lower rank to which he should be assigned, that is the extent of the degradation.
>
> In my opinion Casey J.A., dissenting, properly wrote, with the concurrence of Rinfret J.A.:
>
> I believe that the *Lafleur* case is clearly distinguishable from the one now being discussed. In *Lafleur* the Supreme Court was concerned with the *Income Tax Act* — here we have a Quebec statute. In that case it had to decide whether the doctrine *audi alteram partem* applied: here it is written right into the Act by sec. 24. Finally there it was said that "... the appellant has no power to determine any of the former's (Respondent's) rights or obligations". In my opinion Appellant (i.e. the Commission) has done just that.
>
> Appellant has rendered a decision that may well impair if not destroy Respondent's reputation and future. When I read the first and fourth considerants and the conclusions of the sixth recommendation and when I recall that the whole purpose of these reports is to present facts and recommendations on which normally the Minister will act the argument that no rights have been determined and that nothing has been decided is pure sophistry.

In the *Saulnier* case the inquiry was into the conduct of Saulnier as a police officer under the applicable statutory provision. The report, from which there was no appeal, was held to have impaired his rights while in the *Lafleur* case the rights of the person investigated under the *Income Tax Act* remnained intact, since he had access to the courts by way of appeal from any assessment that might arise from information collected by the investigator.

Here the situation is that it is not even the conduct of Mr. Copeland, but that of the R.C.M.P., that is to be investigated, and while there is no appeal neither is there any report to be made on Mr. Copeland's conduct. No

prejudice to any personal right or interest of his is foreseeable as a result of the inquiry or of any action that may be taken by the Governor in Council on the report of the Commission when eventually submitted. At most Mr. Copeland may, and perhaps will be a witness at some stage of the inquiry, in which event he will undoubtedly be entitled to the same rights and protections as any witness.

In the event that any adverse report is to be made against him as a witness, he will also be entitled to the protection afforded by section 13 of the *Inquiries Act*, that is to say the right to be told what is alleged against him as misconduct on his part and the right to a full opportunity to be heard in person or by counsel on his behalf. But this will be the full extent of his rights in respect of the making of such an adverse report. Though prescribed here by the statute, these rights are, in my opinion, precisely the same as those upheld by the Court of Appeal in the absence of a like statutory provision in the *Pergamon Press* case.

The application therefore fails and it will be dismissed with costs.

A. Alex. Cattanach
J.F.C.C.

Ottawa, Ontario
August 4, 1978

APPENDIX "Y"

In the Federal Court of Canada

Court No. T-2550-78

BETWEEN

PAUL D. COPELAND et al.,

Applicant,

— and —

MR. JUSTICE DAVID C. McDONALD et al.,

Respondents.

DATES OF HEARING: June 26 & June 29, 1978

PLACES OF HEARING: Toronto, Ontario

COUNSEL:

Michael Mandel, Esq.
J. House, Esq. for the Applicant

J.J. Robinette, Q.C. for the Respondent

SOLICITORS OF RECORD:

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Downsview, Ontario for the Applicant

Messrs. McCarthy & McCarthy
Barristers and Solicitors
Toronto, Ontario for the Respondent

REASONS FOR JUDGMENT

Federal Court of Canada
Trial Division

TORONTO, MONDAY THE 2nd DAY OF JUNE, 1980

PRESENT: THE HONOURABLE MR. JUSTICE GIBSON

IN THE MATTER of the Inquiries Act, R.S.C. 1970 c. I-13

IN THE MATTER of a Commission under the Great Seal of Canada issued pursuant to Order in Council P.C. 1977-1911 to MR. JUSTICE DAVID C. McDONALD, MR. DONALD S. RICKERD and MR. GUY GILBERT to be commissioners under Part I of the Inquiries Act to inquire into certain activities of the Royal Canadian Mounted Police;

- and -

IN THE MATTER of an Application for a Writ of Certiorari with mandamus in aid under section 18(a) of the Federal Court Act, R.S.C. 1970 c. 10 (2nd Suppl):

BETWEEN:

ROSS DOWSON AND JOHN RIDDELL, on their own behalf and on behalf of all former members of the League for Socialist Action

Applicants

- and -

The Commission of Inquiry into certain activities of the Royal Canadian Mounted Police

Respondent

Upon motion dated the 20th day of May, 1980 on behalf of the Applicants for a Writ of Ceretiorari with Mandamus in aid quashing the decision of the Respondent, dated the 9th day of April, 1980, refusing the Applicants the right to examine witnesses before the Commission of Inquiry into certain activities of the Royal Canadian Mounted Police, and requiring the Commission to reconsider and to grant the Applicants such right.

ORDER:

Order-in-Council P.C. 1977/1911 authorised the Commissioners referred to in such Order to investigate certain conduct of the R.C.M.P. only and not the Applicants.

Such Commissioners are "a fact finding, reporting and advisory body" (C.F. Copeland case (1978) 2 F.C. 815 Cattanach, J.)

The submission that the Commissioners have breached Section 12 of The Inquiries Act or acted unfairly within the meaning of the cases is without merit. Not only is the applicants' conduct not under investigation but also no charge has been made against the applicants within such statutory provision or within the meaning of the cases where the concept of fairness is discussed and relevant.

For these and other reasons this application accordingly is dismissed with costs.

For these and other reasons this application accordingly is dismissed with costs.

"H.F. Gibson"

APPENDIX "Z"

REASONS FOR DECISION OF THE COMMISSION DELIVERED ON FEBRUARY 23, 1979

(Note by the Commissioners:

On February 23, 1979, the Commissioners delivered to counsel for the principal interested parties reasons for decision as to certain documents which had been made exhibits at hearings *in camera*. These reasons led to the release of a number of documents where a considerable amount of testimony that had been received *in camera* was released to the public on March 28, 1979. It is not proposed here to publish reasons that were given in regard to certain specific documents. However, the following portions are of more general interest and the Commissioners believe that they should be declassified and published.)

1. KNOWLEDGE BY CABINET MINISTERS AND SENIOR OFFICIALS OF TRANSGRESSIONS OF THE LAW BY R.C.M.P.

Introductory Comments

The Commission has approached consideration of those of the following documents which might be described as 'Government documents' in the light of the statement made by the Commission on October 13, 1978. As it then said:

> The Commission will balance all the factors which rest for or against any document being made public.

It will be recalled, too, that the Commission itemised some considerations that would be appropriately taken into account when considering whether it would decide that a particular document or particular evidence of a meeting or of the contents of a document would or would not be released in public.

At the risk of repetition, it will be recalled that the Commission itemised these factors:

(a) The role of a Commission of Inquiry in investigating allegations of misconduct, and the importance of a public hearing in that the public will derive from it complete confidence that everything possible has been done for the purpose of arriving at the truth.

(b) The importance of encouraging candid exchanges of opinion about policy among persons at high levels of government, by not disclosing records of expressions of opinion. Statements of fact are to be distinguished from expressions of opinion.

(c) The desirability of disclosing government misconduct or wrongdoing.

In addition to the authorities referred to by the Commission in its reasons delivered October 13, 1978, reference may be made now to the decision of the

High Court of Australia delivered November 9, 1978 in *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505. In that case, as Gibbs A.C.J. said at p. 26:

> If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by ministers in the execution of their office.

Stephen J. said, at p. 34:

> ... the need to safeguard the proper functioning of the executive arm of government and of the public service (seems) curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it... if (the charges) are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest in non-disclosure should be shown before this privilege should be accorded.

(d) The status of the possessor or originator of the information.

(e) The interest of persons who have already been witnesses before the Commission, in knowing of documents containing evidence of the conduct of senior officials of the R.C.M.P. and of persons in high levels of government, which may have a bearing on whether the conduct of those witnesses was authorized expressly or by implication, or at least tolerated or condoned.

The Commission also pointed out that the foregoing was not intended to be an exhaustive list of pertinent considerations.

Thus, for example, the evidence given in public by Mr. Higgitt included statements reflecting on the conduct of senior officials and Cabinet Ministers, and an indication that certain specified documents supported adverse inferences against such persons. A pertinent consideration in respect to some of the documents under consideration is that those persons would have no way to meet that evidence in public without their counsel being able to refer to the actual content of such documents in public. Not to allow them to do so would expose the Commission to the risk of being an instrument of injustice and unfairness, a consideration far more important in the generally accepted scale of values than such possibility as there may be that disclosure in these instances would adversely affect the efficiency of the governmental process.

Of considerable importance is the evidence of Mr. Starnes generally as to the extent to which senior officials and cabinet ministers knew that members or agents of the R.C.M.P. had committed offences. It is true that all of Mr. Starnes' evidence in this regard has been given in camera. Not to disclose publicly the documents to which Mr. Starnes refers in his in camera evidence would have the result that in effect none of his testimony on this vital issue could be made public — whether his testimony upon being examined by counsel for the Commission or that upon being cross-examined. In other words, his testimony on this issue would remain behind closed doors. Yet it is obvious to all that, as Director General of the Security Service, he had access in writing and in person to senior officials and to Cabinet Ministers. To keep his

testimony, and the documentary passages which form such an important part of his testimony, from the public eye would not engender "confidence that everything possible has been done for the purpose of arriving at the truth".

Another pertinent consideration is that the documents to be considered are now at least eight years old. In *Sankey* v. *Whitlam*, at p. 69, Mason J. said:

> I would also agree with (Lord Reid) that the efficiency of government would be seriously compromised if Cabinet decisions and papers were disclosed whilst they or the topics to which they relate are still current or controversial. But I base this view, not so much on the probability of ill-informed criticism with its inconvenient consequences, as upon the inherent difficulty of decision-making if the decision-making processes of Cabinet and the materials on which they are based are at risk of *premature* publication... I should have thought that, if the proceedings or the topics to which those proceedings relate, are no longer current, the risk of injury to the efficient working of government is slight and that the requirements of the administration of justice should prevail... (The documents) are Cabinet papers, Executive Council papers or high level documents relating to important policy issues (... but...) they are not recent documents; they are three and a half to five years old. They relate to issues that are no longer current, for the most part policy proposals of Mr. Whitlam's Government which were then current and controversial but have long since ceased to be so, except for the interest which arises out of the continuation of these proceedings.

The third of the considerations in the list given in the Commission's reasons of October 13, 1978, did not include, but could have included, the observation that it is desirable and in the public interest not only to produce in public such documents as disclose government malfeasance, but also, when government malfeasance is alleged or suspected, to produce such documents as exonerate those suspected from any such suspicions. In the courts, what is commonly described as Crown privilege does not apply in criminal cases, as Viscount Simon said in *Duncan* v. *Cammell Laird* [1942] A.C. 624. We have already observed that it does not apply to protect an accused, nor ought it to apply so as to prevent an accused from raising a defence. As Kellock J. said in the Supreme Court of Canada in *Reg.* v. *Snider* [1954] 4 D.L.R. 483 at p. 490-1:

> ... there is... a public interest which says that 'an innocent man is not to be condemned when his innocence can be proved': per Lord Esher M.R. in *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 at p. 498.

Thus evidence of sources of police information "must be forthcoming when required to establish innocence at a criminal trial": per Lord Simon of Glaisdale in *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 2 W.L.R. 201 at p. 221. It is true that the proceedings before this Commission are not criminal proceedings and this is not a court of law. Nevertheless, questions have arisen before this Commission as to whether members of the R.C.M.P. have committed criminal acts, and the Commission may conceivably in its report make a 'charge' of misconduct against them. Those members have a legitimate interest in being able to make representations to the Commission, if the facts permit them to do so, that their conduct

was in accordance with policy accepted, condoned, or even encouraged by senior officials of government and cabinet ministers. Yet they are in no position to do so unless the evidence in this regard is made public. (This is the fifth of the considerations listed in the Commission's reasons of October 13, 1978). Moreover, the conduct of such senior officials and Cabinet Ministers may be the subject of a 'charge', and they cannot effectively make representations to the Commission unless the documents disclosing policy vis à vis the R.C.M.P. in relation to these matters are made public.

2. SPARG

It was alleged by Mr. Eldon Woolliams, M.P., on September 7, 1971 that "secretly and without notice to the public and without the consent of this Parliament, the government has organized a civilian security force, so-called, operating solely... under and accountable only to the Solicitor General". (House of Commons, *Debates*, September 7, 1971, p. 7546.)

It was alleged by Mr. Robert McCleave, M.P., on September 9, 1971 that "some in the Mounted Police, I think, feel (the security planning and research group) constitutes an infringement upon themselves" and that "the group has no statutory basis and no accountability". He also asked whether the group would be "a Canadian version of the Central Intelligence Agency". (House of Commons, *Debates*, September 9, 1971, pp. 7698-9.)

On September 21, 1971, the Solicitor General, the Hon. Jean-Pierre Goyer, made a statement on the establishment of the Security Planning and Research Group. (House of Commons, *Debates*, September 21, 1971, pp. 8026-27.)

Immediately thereafter Mr. Woolliams expressed "suspicion" about the statement, and questioned whether the Minister's "word" was "sufficient to satisfy Parliament in this regard". (House of Commons, *Debates*, September 21, 1971, p. 8027.)

These are just some examples of doubts and suspicions that were cast upon the original role and function of the group.

The implication was that an agency had been established that would parallel or even replace, the Security Service.

The net impression which it was possible to draw from the suspicions was that in some irregular and sinister fashion, however ill-defined such might be, the Security Service was being supplanted and the R.C.M.P.'s legitimate role was being suppressed.

If such had been the case, it might accurately have been characterized as an improper circumscription of the duty imposed by the R.C.M.P. Act upon all members of the force who are peace officers "to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada" and "to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner".

The evidence of Mr. John Starnes, if accepted, makes it clear that, far from his opposing the establishment of SPARG, he supported the development.

Thus this is a case in which it is desirable, not only that the report of the Commission clarify the origins and functions of the body, but that any loss of confidence in the Security Service that may have come about in consequence of

these suspicions and allegations should be allayed (if the evidence so justifies) by the investigation being conducted so far as possible in the open.

There may be portions of the evidence in relation to SPARG, the publication of which would not advance the interests of clarifying the origins and functions of SPARG and would at the same time adversely affect national security or in some other way damage the public interest.

It will therefore be necessary to strike the balance line by line, or document by document, of the evidence. If counsel are not able to agree, the Commission will render the necessary decisions as to specific areas of disagreement.