CHAPTER 10

INTERROGATION OF SUSPECTS — C.I.B. AND SECURITY SERVICE

A. CRIMINAL INVESTIGATIONS

1. Much of the work of the police consists of asking questions of innocent people as well as suspects. The Supreme Court of Canada has recognized the crucial role that is played by police questions in the investigation of crime. In *R.* v. *Fitton*[1] it was said that "it would be quite impossible to discover the facts of a crime without asking questions of persons from whom it was thought that useful information might be obtained". The law on police interrogation of suspects is almost entirely the result of judicial decisions as to the admissibility in evidence of statements made by suspects to police officers. Some principal features of this judge-made law will be referred to in this chapter.

2. The present R.C.M.P. Operational Manual begins with a foreword by Commissioner Simmonds dated September 1, 1977. It includes the following paragraph:

> Each member shall observe and comply with the policy and procedural directives in this manual, and is expected to interpret them reasonably and intelligently in the best interests of the Force.

The chapter entitled "Interrogations and Statements" has stated the following policy since September 12, 1979:

> A member must avoid unethical conduct of any type when he interrogates a person, e.g., causing mental or physical suffering, and must pay particular attention to the provisions of the Canadian Bill of Rights.

The policy has been the same, at least since December 1, 1978, except that there had been no reference to the Canadian Bill of Rights.

3. Assuming that the paragraph quoted from the Commissioner's foreword constitutes a "standing order", a breach of that policy might constitute a "minor service offence" under section 26 of the R.C.M.P. Act. If the conduct were so grave as to be "scandalous" or "disgraceful" or "immoral" it might constitute a "major service offence" under section 25 of the Act. Consequently we are within paragraph (a) of our terms of reference in considering whether any features of interrogation and taking statements from suspects would be "unethical", for such conduct would be conduct "not authorized or provided

[1] (1956) 116 C.C.C. 1 at 30.

for by law". We shall consider these features here, and in Part X, Chapter 5 we shall make recommendations arising from our findings. However, as our terms of reference, as far as criminal investigations are concerned, do not permit us to inquire into or make recommendations on a broad scale concerning the law or the practice governing the R.C.M.P. in criminal investigations, we shall limit our remarks and recommendations to those relating to and arising from conduct that may be "not authorized or provided for by law". It follows that we do not intend to discuss some of the proposals that have been made for radical revision of the present law.

4. Before we embark on an examination of interrogation techniques it is important to underline that the police do not have a general power to detain persons for questioning. As Lord Devlin has said:

> The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly. Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest and imprisonment is only a continuing arrest. If an arrest is unjustified, it is wrongful in law and is known as false imprisonment. The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him. They cannot even compel anyone whom they do not arrest to come to the police station. It is true that in the course of an inquiry they frequently ask people to come to the police station and make a statement there and that people almost invariably comply.[2]

Thus, the legal right to interrogate arises only after there has been an arrest, although, as pointed out by Lord Devlin, questioning often occurs in the absence of an arrest.

5. Of all criminal investigation techniques, this power of the police to question persons suspected of crime is the one most often suspected by the public of being open to abuse. On the other hand, the manner in which accused are questioned is frequently open to review by the courts, which have reserved a right to reject statements made by an accused person to the police. There have been no indications, whether by complaint to us or examination of the files of the R.C.M.P., that in the manner in which members of the R.C.M.P. question suspects and take statements there is a general pattern of conduct which is contrary to law or even subject to criticism on ethical grounds. Nevertheless, there are some disquieting facts which have come to light, and which indicate some degree of conduct which is not authorized or provided for by law and therefore requires comment by us.

The Roberts booklet

6. In 1975, questions in the House of Commons by Mr. David MacDonald, M.P., revealed that a document was in use by the Training and Development Branch of the R.C.M.P., entitled "Interrogation Techniques", written by Chief Inspector A.R. Roberts of the Calgary City Police. At the time the R.C.M.P.

---

[2] P. Devlin, "The Criminal Prosecution in England" (1960) at p. 68, quoted in Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process*, Toronto, Carswell, 1979, p. 143.

confirmed, in a press release, that it was used in a course offered to senior investigators with between 5 and 15 years of experience. Mr. MacDonald characterized the techniques that were described in the document as "intimidation, manipulation and brain washing".[3] The Solicitor General of the time, the Honourable Warren Allmand, wrote to Mr. MacDonald on April 11, 1975, stating:

> . . . the booklet in itself does not represent Force policy on the subject. I feel that the Royal Canadian Mounted Police policy on interrogation is clear and is based largely on the Judges' Rules dealing with the admissibility of evidence. I am sure that you will be interested in reviewing the Judges' Rules and am attaching a copy for your information.

In the House of Commons Standing Committee on Justice and Legal Affairs, Mr. Allmand stated that the booklet had been used to stimulate discussion as to "the good and bad way of doing things", and that the author was brought in as a guest lecturer, but not because the Force was recommending the use of all the techniques listed, any more than bringing in an outside lecturer on Nazism or Communism meant that the Force was recommending those doctrines. He emphasized that the Force policy on interrogation is in the Operations Manual. The Deputy Commissioner, R.J. Ross, assured the Committee that

> in future in any such course of this nature there will be a final wrap-up, stating exactly. . . that the policy is such, and that we will not allow any deviation from the policy of the Force in this aspect.[4]

We are concerned that notwithstanding what was said orally nothing in the Operations Manual tells the recruit or the experienced investigator which of the many techniques listed by Chief Inspector Roberts are ethical and which are unethical and not permissible.

7. The booklet was used as a handout by Chief Inspector Roberts in late 1973 and supplied to candidates in two R.C.M.P. centralized training courses — the Investigational Techniques Course and the Drug Investigational Techniques Course. On June 4, 1975, the officer in charge of Training and Development advised all Commanding Officers that Chief Inspector Roberts' booklet "is no longer distributed on centralized training courses, due to the recent controversy". Since March 1979 a much shorter manual entitled "Interrogation" has been distributed to members attending courses that deal with the subject of interrogation, for example, Junior Constables (1 1/2-3 years of experience) and Senior Investigators (7-12 years). This manual deletes most of the objectionable material previously included in the Roberts booklet, but we note with concern the following advice contained in it:

> Make it difficult for the suspect to deny the crime by asking questions where he has two answers — both incriminating.

Examples are then given, and the text continues: "This type of question is most effective at crucial moments." The R.C.M.P. have advised us that "the manual

---

[3] House of Commons, *Debates*, March 26, 1975, p. 4531.

[4] Minutes, House of Commons Standing Committee on Justice and Legal Affairs, May 15, 1975, p. 26:19.

was developed by our Force Polygraphists". We hope that this extract does not represent the standards of polygraphic tests as used by R.C.M.P. polygraphers.

8. During June 1975 and afterwards no instruction was issued within the R.C.M.P. that the Roberts handbook was not acceptable. In 1980 the R.C.M.P. advised us that in view of the fact that "most, if not all the techniques described in it can be found in books generally available on the shelves of most libraries", no instructions were issued to members regarding the methods recommended. It is therefore not surprising to us that in the summer of 1980 our researcher was told by one officer, who had been trained in interrogation when the Roberts booklet was in use, that he learned only some considerable time after 1975 that many of the techniques there advocated are now frowned upon. Moreover, he was never so advised formally, as there has never been a directive as to what parts of the Roberts booklet are acceptable and what parts are not. It cannot be said that a press release stating that the booklet did not represent Force policy, without further comment for the benefit of investigators across Canada, can be taken as a serious internal criticism of those techniques.

9. Our review of the cases which have come to our attention reveals that there are four areas of interrogation which give rise to concern: the right to counsel, oppressive conduct, brutality, and trickery. In this chapter we shall discuss each of these in turn, with reference to the problems they have caused in the past, reserving our recommendations for change for Part V, Chapter 6 as they relate to the Security Service and Part X, Chapter 5 as they apply to criminal investigations.

The right to counsel

10. There are two aspects of this concern which require comment: whether members of the R.C.M.P. advise persons in custody of their right to counsel and whether persons in custody are denied counsel. There is no express requirement in Canadian law that a person under arrest be advised of his right to retain counsel. In comparison, section 29(2) of the Criminal Code imposes a duty upon everyone who arrests a person "to give notice to that person, where it is feasible to do so, of... the reason for the arrest". It is true that section 2(c)(ii) of the Canadian Bill of Rights recognizes the right of "a person who has been arrested or detained" to "retain and instruct counsel without delay", but it says nothing as to whether he must be advised that he has that right. The R.C.M.P. Operations Manual states:

> Advise prisoners of their right to engage legal counsel or to get advice from a relative or friend.

This requirement probably goes beyond the requirements of the Canadian Bill of Rights, and for this the R.C.M.P. is to be commended. On the other hand, there is some uncertainty as to the scope of application of the instruction, for it is unclear who are to be regarded as "prisoners" for this purpose. The chapter in the Operational Manual on interrogation makes no reference to this directive. We infer from this that it is not intended to be applied to persons being interrogated. Indeed, the silence in both the chapter on interrogation and

the chapter on arrest, on the subject of advising of the right to engage counsel may indicate that the Force does not require its members to advise persons who are being questioned but not yet arrested, or persons arrested but not yet charged, to be advised of their right to counsel. Moreover, we have been advised by senior officers of the R.C.M.P. that there is no Force policy requiring persons who are not in custody to be advised of their right to counsel.

11. There may be circumstances in which the right to contact a lawyer, and to be advised of that right, should be tempered. The English Judges' Rules (which are not the law in England or in Canada, but are considered good practice in both countries and are published in the R.C.M.P. Operational Manual), have appended to them administrative directions (not published in the R.C.M.P. manual) which, in this regard, face up to interests which compete in certain circumstances. Under the heading of "Facilities for Defence" they say:

> a person in custody should be allowed to speak on the telephone to his solicitor or to his friends, provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so.

The proviso is intended to entitle the police to refuse a person in custody the right to contact his lawyer (or friends) when there is reason to think that his doing so may hinder the investigation underway by tipping off other suspects not yet in custody. We doubt that this proviso, however reasonable, is consistent with the provision in the Canadian Bill of Rights. An allegation made to us, with respect to which we shall be reporting in detail in another Report, illustrates the problem. R.C.M.P. officers from a certain detachment, together with other R.C.M.P. and municipal officers, arrested a number of people on drug-related charges. The arrested persons were first taken to the detachment cells. One of the accused was allowed, by a constable acting on his own initiative, to telephone his wife to ask her to come to the police station to pick up their three-year old child who had been with the father at the time of his arrest. Later, during that afternoon, the R.C.M.P. corporal in charge of the investigation, who had been made aware that the earlier call had been made, allowed the same accused to speak on the telephone to his lawyer. Apart from these two calls, the remainder of the investigation was typified by attempts by the police to prevent the arrested persons from making telephone calls and to prevent lawyers, who were attempting to contact clients, from being able to do so. After a defence lawyer involved in the case wrote to us about the experience, the R.C.M.P. conducted an internal investigation. It produced the following results:

(a) Members of the squads who had been involved in the events, and detachment personnel who were present at the station, when asked by lawyers, claimed either not to know where the prisoners were or that they did not know which other detachment the prisoners had been taken to.

(b) Lawyers were told that the officer in charge of the case would be informed of their request or that inquiries would be made to obtain the necessary information, but nothing was done in furtherance of these assurances.

(c) Official forms which ought to have identified who had arrested whom and where the persons detained were lodged were not completed properly. On four of the forms, notations expressly stated that no telephone calls were to be permitted to the prisoners concerned. The identity of the persons who wrote those notations could not be traced.

(d) One of the accused was moved from the original cells to R.C.M.P. cells at another detachment, then back to the original cells, then to still another detachment, then back to the original cells again, and finally to the provincial correctional facility, all in the course of three days and three hours.

(e) Officers involved in the case gave, as reasons for the various movements of prisoners, "lack of room" in the original detachment, "security", "separation of the accused", "investigational purposes".

(f) The original purpose of the "no telephone calls" order may well have been to prevent prisoners from hindering the continuing investigation by informing co-conspirators of what was happening. However, many of the officers involved evidently translated this purpose into a practice of not allowing the persons detained to have access to counsel, for reasons that were unrelated to the original purpose.

12. Judicial consideration of the admissibility of statements made by suspects is, as it relates to the right to counsel, an insufficient incentive to the attainment of proper standards. It has been held that even a specific denial by the police to allow an accused to contact his lawyer, despite the contravention of the Canadian Bill of Rights, will not render a statement thereafter obtained from him inadmissible on that account.[5] This judicial attitude has led the R.C.M.P. in at least one training course in 1972, to present the following examination question: "The accused, Mr. O'Connor, was refused permission to obtain counsel by the police at the police station. Is this illegal?" The desired answer was "No, it was not illegal". In another case, a retrial was ordered because of a denial of counsel, but the most that can be said is that this will be an important factor when a court decides whether or not a statement is voluntary.[6] No case stands for the proposition that a statement obtained after a denial of counsel must be held to be inadmissible. Although one judge has expressed the view that denial of counsel by police may give rise to a civil action in tort or possibly criminal action (for disobeying a federal statute, under section 115 of the Criminal Code), the Canadian Committee on Corrections has argued to the contrary:

> Section 2(c)(ii) of the Canadian Bill of Rights does not command a police officer to do anything. It is a direction to a court not to construe the law of

---

[5] *R.* v. *Steeves* [1964] 1 C.C.C. 266 (N.S.C.A.). See also, *O'Connor* v. *R.* [1966] 4 C.C.C. 342 (Sup. Ct. Can.) and *Hogan* v. *The Queen* (1974) 48 D.L.R. (3d) 427 (Sup. Ct. Can.).

[6] *R.* v. *Ballegeer* [1968] 66 W.W.R. 570 (Man. C.A.).

arrest in such a way as to infringe the right of a person who has been arrested to retain a lawyer.[7]

Oppressive conduct

13. As already stated, Canadian courts will not admit a statement made by an accused person unless the prosecution proves that the statement was made voluntarily. In one of the most recent judgments in the Supreme Court of Canada, *Horvath* v. *The Queen*, Mr. Justice Martland said:

> . . . to render a statement of the accused to a police officer inadmissible there must be the compulsion of apprehension of prejudice or the inducement of hope of advantage whether that apprehension or hope be instigated, induced or coerced.[8]

He reconfirmed that, as had been held in an earlier case in the Supreme Court of Canada, the primary question is whether the statement was made voluntarily in the sense that it has not been obtained from the accused either by fear of prejudice or hope of advantage exercised or held out by a person in authority. Mr. Justice Martland declined to consider whether, beyond those circumstances, facts which constitute "oppression" would result in a statement being ruled inadmissible. It is true that Mr. Justice Martland's judgment, with which two other members of the Court agreed, was one which dissented in the result of the case, and, as will be seen, his statement of the law represents the narrowest of the statements of the concept of voluntariness found in the *Horvath* case. In England, it has been held that "oppressive questioning" will result in the exclusion of a statement, oppressive questioning being defined as "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent".[9] In *Horvath* v. *The Queen*, Mr. Justice Beetz, who spoke for himself and one other member of the Court, said that the principle of voluntariness may extend

> to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear, and serious enough to bring the principle into play.[10]

The third judgment in that case was delivered by Mr. Justice Spence, with whom one other judge agreed. He also expressed the view

> that a statement may well be held not to be voluntary. . . if it has been induced by some other motive or for some other reason than hope or fear.[11]

---

[7] *Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections*, 1969, p. 143 note 23. The judge referred to was Mr. Justice Coffin in *R.* v. *Steeves*.

[8] [1979] 2 S.C.R. 376 at 388. See also *Ward* v. *The Queen* [1979] 2 S.C.R. 30.

[9] *The Queen* v. *Prager* [1972] 1 All E.R. 1114 (C.A.).

[10] [1979] 2 S.C.R. 376 at 424-5.

[11] *Ibid.*, at 401.

He found that in the circumstances of that case the accused's statements had been made at a time when he was suffering from "complete emotional disintegration", and that "no statement made by that accused under those circumstances can be imagined to be voluntary".

14. These recent judicial statements indicate that the precise bounds of "voluntariness" remain doubtful in Canadian law. That being so, it is impossible to say that review by the courts of the circumstances in which the accused made a statement will constitute discouragement of "oppressive" police conduct in the interrogation of suspects.

15. The paucity of complaints made to us about the manner in which members of the R.C.M.P. have questioned suspects, and our examination of R.C.M.P. files, lead us to the conclusion that oppressive questioning is not widespread in the R.C.M.P. Yet there have been examples of such conduct. The *Horvath* case involved members of the R.C.M.P. Some members of the Supreme Court of Canada considered the circumstances of the interrogation found in that case to be very objectionable. The accused, a 17-year-old, was suspected of murdering his mother. He was questioned from 12:20 a.m. until 3:10 a.m. and from 12 noon until 4:16 p.m. During the first interrogation, two R.C.M.P. constables, in the words of the trial judge "hammered him with [verbal] shots from both sides" for just under three hours, and accused him again and again of lying. The trial judge found that the manner of questioning was oppressive. The trial judge found that the "atmosphere of oppression" was so great as to give the accused "a sense of being threatened". During the second period, the accused was questioned by a sergeant "trained with great skill in interrogation techniques", and the trial judge found that in all the circumstances the "complete emotional distintegration" of the accused had been brought about.

16. Another case, which we will be dealing with in detail in another Report, also involved strong judicial criticism of conduct of R.C.M.P. members in interrogating a suspect. The case raised the question not only of oppressive conduct but also the matter of the right to counsel, discussed above, and "trickery", discussed below. This was a murder case in which the accused was suspected of having killed her common-law husband. Upon being taken to police headquarters she was questioned from 7 p.m. until 2:30 a.m., at which time she was admitted to hospital, suffering from an apparently self-administered overdose of sedatives. At 9:45 a.m. she was taken from the hospital back to a police office and questioned again until some time before 12 noon. She was then placed in city police cells and later that day charged with first degree murder. The statements she made to the R.C.M.P. officers were tendered in evidence by the prosecution at her preliminary inquiry. Because of the circumstances in which they were obtained, the provincial court judge held that the statements were inadmissible and criticized the conduct of the members of the R.C.M.P. No complaint was made to us by any person involved, but because of the press publicity the case received, we inquired into it. We found that, because of the judge's comments, there had been an internal investigation in the R.C.M.P., from which the following facts emerged:

(a) The interrogation of the accused prior to her admission to the hospital was continued over a period in excess of 7 hours, part of which occurred after the R.C.M.P. members knew that the suspect had taken a sedative and was lapsing into unconsciousness.

(b) The officers continued to interrogate her after they knew that any statement which might then be obtained would be inadmissible.

(c) The officers attempted to induce a confession by reminding the suspect that if she were convicted of murder she would go to prison for life and her child would be given up to welfare and brought up an orphan.

(d) After she had had only five hours of sleep in the hospital, the interrogation continued.

(e) On more than one occasion the suspect told the officers that she wished to call her lawyer. The officers used "delaying tactics" saying that the lawyer would be called, but that a few matters had to be discussed first. (Since the suspect had talked to her lawyer before going to the police office, the officers claimed that this was not a denial of counsel but a "delaying tactic" only.)

(f) Some of the officers claimed that nothing in their training or their experience before the court led them to conclude that delay in providing counsel, when an investigative interview was in progress, was improper.

(g) Several weeks after the charge was laid, when it was intended to administer a polygraph test to the accused, a sergeant promised her lawyer that he would be allowed to see the accused immediately after the test was completed. The sergeant then broke his word and there was a further delay of several hours before the lawyer was permitted to see his client, during which the R.C.M.P. members ignored the lawyer's knocks at the door of the very room where the accused was being interviewed.

(h) Attempts to interview the accused continued even after she had been remanded, and included showing her a picture of the deceased, without seeking the permission of her lawyer to do so.

(i) After the internal investigation had been completed at the Division, a senior officer in Ottawa, reviewing the file, recorded that in his opinion more ought to have been done by the investigators on the "right to counsel" issue and that continuing the interrogation after the suspect was lapsing into unconsciousness was an error. However, he expressed the opinion that the conduct of the interrogation otherwise was "not unlike [that of] other investigators and [that] the methods used were not harsh or unusual". On the issue of the "right to counsel", this senior officer, referring to the knowledge by defence counsel that his client was being interviewed on the later occasion, put the onus on defence counsel to protect the interests of his client. The officer, in his report to the director of personnel, stated:

> It would appear that once counsel knew his client's position, it was up to him to properly advise her and ensure her rights were protected.

17. Our concern with this case is not only that experienced investigating officers believed that their conduct was proper, but that a senior R.C.M.P.

officer should come to the conclusion that it was "not unusual". There is no indication in his report on the matter that he found the conduct surprising or aberrant. This gives us cause for grave concern. If the senior officer was correct in his conclusions, then we are concerned that conduct of that type appears not to be isolated, but despite every effort we have not been able to locate other instances. On the other hand, if it is isolated and aberrant, it nevertheless does not shock the conscience of a senior officer whose responsibility lies in internal inquiries into disciplinary matters. In either case, we wish to express our concern. Our comments with respect to the conduct of the various R.C.M.P. members involved will be made when we consider this case in more detail in a subsequent Report.

Brutality

18. We are pleased to report that there is very little evidence before us to indicate that in the R.C.M.P., violence, or the threat of violence, is used to obtain statements from suspects. Once again, we have only one case before us which raises the issue. It was not a case arising from a complaint received by us. The matter came to our attention only because the trial judge happened to speak of the matter to a group of judges who by chance included the Chairman of this Commission. Even the trial judge did not at the time have any intention of placing the matter formally before our Commission. The case involved the murder of a motorist who picked up a hitchhiker, the accused. When the accused was arrested he was found to be in possession of things that afforded strong circumstantial evidence that he was the murderer. He denied any knowledge of what had happened to the deceased. Threats were made to him during two interrogations lasting a total of six hours. He was then taken to a room by an R.C.M.P. corporal and constable in plain clothes. The room was stripped of all furniture except a chair. The corporal told him to stand up and remove his spectacles, kicked him in the testicles, and hit him across the face with the back of his hand. When the accused would not answer questions, he was told by the corporal that he would be "taken for a ride". The R.C.M.P. officers then took him off in a car. They told him that they were not like other police officers, but were from a special squad, and that what he told them would not be for court purposes. The corporal struck him hard blows on the head and body that caused swellings and lumps on his head. He was told that he was being taken to a gravel pit. Afraid of what would happen there, he made a statement as to where the deceased's body could be found. This statement proved to be only partly correct, and resulted in a fruitless search for the body. Following further threats, but no further physical violence, he finally gave the correct location of the body. All these facts were placed before the judge before whom he pleaded guilty to second degree murder. The facts were placed before the court during the hearing as to sentence, by a statement of facts agreed to by counsel. The corporal submitted a detailed report of his activities, including the facts that concern us, to his superior officer, who did nothing. A week after the sentence hearing, the trial judge mentioned the matter in the presence of the Chairman of this Commission. In due course, when we enquired as to what steps had been taken internally with regard to the conduct of the officers involved, we were informed that nothing had been done

to investigate these matters. It was then, and only then, that an internal investigation was commenced in the R.C.M.P. Following the R.C.M.P. investigation, two charges of assault occasioning actual bodily harm were preferred against the corporal. No action of a criminal nature was taken against the constable, whom the Crown intended to call as a witness against the corporal. The charges against the corporal were disposed of in the provincial court where he pleaded guilty to a lesser charge of common assault. The Provincial Court judge granted the corporal an absolute discharge, largely on the ground that the corporal, in the meantime, had been medically discharged from the R.C.M.P. as a result of heart trouble, and that he had suffered sufficiently from the internal investigation and criminal prosecution. Disciplinary action was taken against the constable (who had in the meantime been promoted to corporal) for his "passive participation" in the assault on the accused, and against the officer in charge at the detachment for "failure to initiate an investigation" when he became aware of the circumstances.

19. An interesting feature of this case is that although members of the provincial Department of the Attorney General and the Provincial Court judge who presided at the preliminary inquiry were aware of the circumstances in which the statements had been obtained, no steps whatsoever were taken within the R.C.M.P., or otherwise, in regard to the conduct of the R.C.M.P. members. After our Commission took an interest in the case, the officer in charge of the C.I.B. in the R.C.M.P. Division issued a memorandum to the four officers serving directly under him expressing his "wish to be briefed as soon as possible on all serious crime incidents or unusual issues which may arise from time to time". The officer in charge has also advised that he and the Commanding Officer of the Division had had a discussion "to the effect that the C.I.B. Officer or another Officer should see major and/or sensitive files in addition to any initialling of correspondence that might be done by other C.I.B. staff members". Although we would hope that similar conduct would not occur elsewhere, its doing so remains a possibility. We therefore asked the R.C.M.P. whether any system existed in other divisions in the country to ensure that oppressive or violent conduct towards persons in custody would receive official attention. The answer given to us was that there were no similar directives in other divisions and that "one case does not a universal problem make". We are unfavourably impressed by the attitude taken by the R.C.M.P. toward this issue. Even in the Division in which measures were taken we consider that the "discussion" and the "wish" are likely to be forgotten, at least as soon as there is a change in senior personnel. The impermanence and vagueness of the "system" there afford little ground for optimism that a recurrence of such conduct would be reported to senior officers at Divisional Headquarters. The Headquarters attitude toward our request leaves us even more pessimistic about the other divisions. We hope that this kind of possible deficiency in administration would be examined by the independent review agency for police matters (the Inspector of Police Practices) which we propose in Part X, Chapter 2.

Trickery

20. In determining whether a statement made by an accused to a policeman is admissible, the Canadian courts have regarded a "trick" as having a bearing on voluntariness. For example, if the trick is a lie, it may result in the statement being held to be inadmissible if it in some way implies or at least relates to a fear of prejudice or a hope of advantage resulting in an "inducement" or "extraction" or "obtaining" of the admission.[12] The R.C.M.P. Training and Development Branch booklet on interrogation which is handed out to recruits in Regina says:

> Never lie to or deceive a suspect for, if he discovers this, he will never again co-operate. Never bluff, at least not when you may easily be discovered. If he recalls [sic] your bluff and you cannot back it up, for all intents and purposes the interrogation is over as your position is greatly weakened.

It will be noted that the limits are defined, not in terms of principle, but in terms of effectiveness.

21. Examples of a "trick" being used by field personnel are the pretences in the last two cases summarized above that what would be said would not be used for court purposes. Beyond these examples, we are unable to comment on the extent or prevalence of the use of trickery in criminal investigations.

B. SECURITY SERVICE

22. Occasionally members of the Security Service may be required to interrogate people. The suspicion will ordinarily be that the person being questioned has become the agent of a foreign intelligence agency. We do not consider that our recommendations in regard to interrogations by the security intelligence agency hinge upon the extent to which there have been such interrogations. There is only one case that we know of that has given rise to any possibility of the use of methods "not authorized or provided for by law". We shall report on it in a subsequent Report.

C. NEED AND RECOMMENDATIONS — BRIEF SUMMARY

23. It is obvious to us that both the R.C.M.P., for criminal investigation purposes and, to a lesser extent, the security intelligence agency, need to interrogate suspects in order to perform their responsibilities effectively. In Part V, Chapter 6, we shall state some concerns we have about the manner in which interrogations should be conducted by members of the security intelligence agency. Then, in Part X, Chapter 5, we shall make recommendations on the policy, reporting and review procedures and training practices of the R.C.M.P. with regard to interrogations relating to criminal investigations, and we shall also make recommendations with respect to the admissibility of illegally or improperly obtained evidence.

---

[12] *R.* v. *Materi and Cherille* [1977] 2 W.W.R. 728 at 735 (B.C.C.A.).

CHAPTER 11

ACTS BEYOND THE MANDATE

INTRODUCTION

1. In this chapter we do not examine Security Service acts or practices which were unlawful. Rather, we examine certain acts and practices of the Security Service to determine whether they were "not authorized... by law" in the sense that there was no government authority to perform them. In Part V, Chapter 3, we shall consider these same acts and practices again from the point of view of their policy implications. These two examinations will form the foundation for our recommendations for the future in regard to the matters discussed.

A. GOVERNMENT DIRECTIVES ON SURVEILLANCE ON UNIVERSITY CAMPUSES

2. Although the government did not usually devote attention to the conduct of operations by the Security Service, a specific policy was developed in the 1960s with respect to R.C.M.P. operations on university campuses. Because the policy unquestionably constituted a governmental limitation on R.C.M.P. operations on university campuses, we examine in this chapter whether the R.C.M.P. violated the policy and thus may have acted beyond its authority.

3. According to R.C.M.P. files, in June 1961 the Minister of Justice, the Honourable E. Davie Fulton, gave verbal instructions to Commissioner C.M. Harvison to suspend the R.C.M.P.'s investigations of subversive activities in universities and colleges. At the time the only activities that the R.C.M.P. deemed subversive were those of Communist organizations. Apparently a short-term freeze on operations was intended until a detailed study of the problem could be completed. Divisions were advised by letter, dated June 21, 1961, that all investigations connected with Communist penetration of universities and colleges were to be suspended, but that long established and reliable agents and contacts should be permitted to continue to report upon developments. That letter stated:

> Owing to recent unfavourable publicity arising from enquiries conducted by S. & I. personnel in connection with Communist activity amongst students, the Commissioner has directed that all investigations connected with Communist penetration of universities and colleges or similar educational institutions, is to be suspended forthwith, pending an analysis of our requirements.

2. This should not be interpreted as meaning that we have waived our interest in Communist activities within educational institutions, but rather that we must undertake a careful review of our approach to problems which could result in critical and somewhat embarrassing reflections upon the intentions of the Force. It should be made clear that no action of any kind which could result in public discussion or complaints to the Minister is to be undertaken until the review.

4. One interpretation of this instruction is that not all R.C.M.P. investigations on campus were curtailed, only those concerned with Communist activity. However, it is important to point out that at that time the R.C.M.P.'s counter-subversion programme was directed against Communist activity. Throughout the 1960s the Fulton directive was regarded within the Security Service as applying to all R.C.M.P. university operations with the exception of reports from previously established sources and security clearance investigations.

5. In 1963 the government changed, and, as a result of representations by the Canadian Association of University Teachers (C.A.U.T.), further consideration was given by the government to R.C.M.P. activities on university campuses. Meetings between the Prime Minister and the C.A.U.T. were held in July and November 1963. At the conclusion of the November meeting a public statement was issued by the Prime Minister which read as follows:

> There is at present no general R.C.M.P. surveillance of university campuses. The R.C.M.P. does, in the discharge of its security responsibilities, go to the universities as required for information on people seeking employment in the public service or where there are definite indications that individuals may be involved in espionage or subversive activities.[1]

This policy statement does not appear to have been a Cabinet decision; rather, it was an expression of present policy by the Prime Minister worked out after discussion with officials and the representatives of the C.A.U.T. and the National Federation of Canadian University Students. While it was not seen as a formal government directive by the senior management of the R.C.M.P., divisions were advised in the course of a long report on the November meeting with the C.A.U.T. that "absolute assurance was given that there was not at the present time any general security surveillance of university campuses by the R.C.M.P. nor of any university organizations as such". In 1970 and 1971 the Pearson policy statement was formally reaffirmed by Cabinet as government policy and continues as such to this day. In one respect, the Pearson statement supplemented the Fulton policy by recognizing that the R.C.M.P. might seek information on campus "where there are definite indications that individuals may be involved in espionage or subversive activities".

6. Thus, at the end of 1963 the situation was that the government had specifically directed the R.C.M.P., by means of the Pearson statement, that there was to be no general surveillance of people or organizations on campus.

---

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

Furthermore, the Fulton moratorium on campus investigations — specifically that no new sources on campus should be developed — had never been rescinded and the policy, insofar as the R.C.M.P. was concerned, remained in effect.

7. In the mid-1960s the Security and Intelligence Directorate of the R.C.M.P. reached the conclusion that much subversive activity had its origin in universities and colleges and it was anxious to improve its coverage of such activity. While subversive activity was still considered by the R.C.M.P. as predominantly Communist, it was no longer seen by them as exclusively so. Thus, in Quebec there was evidence that terrorist sympathizers were active in universities and other educational institutions. The Security and Intelligence Directorate therefore decided to put special emphasis on the development of sources in the university milieu, but to do this within the constraints previously imposed by government. There is no evidence that sources were developed from among students, but it is clear that a good deal of effort was devoted to the recruitment of faculty members. In an important directive to divisions, dated November 29, 1967, a senior officer in the Security and Intelligence Directorate gave instructions to develop sources on campus:

> As noted above, it is contended, with rather overwhelming supporting evidence, that university campuses are the core [sic] to these newly recognized, potential threats to national security. It is not suggested that universities, per se, are involved in conspiratorial activities directed against our democratic system, however, it is an irrefutable fact that they do exert considerable influence on sociological issues of the day and are, therefore ripe targets for communist infiltration and manipulation. You will undoubtedly agree that a person who privately harbours Communist sympathies and who gains an influential position in a select faculty on a university, can contribute immeasurably to the Communist cause. The value of such a person to the movement is obvious as is our corresponding security responsibilities. In addition to this, universities are obviously being utilized as stepping stones for infiltration of other intellectual groups and, of particular concern to us, of "key sectors" of society. It seems apparent then, that university campuses are the focal point of the entire problem.
>
> In attempting to devise ways and means of attacking this problem, many and varied methods, short of conducting on campus enquiries, have been considered and implemented. As indicated above, however, the success achieved has been negligible and leads one to question the suitability of our current techniques. In analyzing these methods it is obvious they are ineffective and completely inadequate in light of current demands. This can, for the most part, undoubtedly be attributed to the present restrictions placed, by the Government, on subversive enquiries at educational institutions. It is evident, however, that no appreciable progress can reasonably be expected in this area without the cooperation of, or liaison with, select faculty members on the universities concerned. Our experience during the past six years has clearly shown that the desired information is simply unattainable off campus and, if we are to succeed in this important undertaking, our current methods will require a degree of revision. It is felt that with tact and diplomacy we could achieve our objectives, or a good portion of them, without transgressing the assurances we have provided to the government.

It will be recalled that in 1961 the Government was assured we would refrain from conducting enquiries on subversive activities on university campuses. Instructions in that respect are contained in our memorandum of 21-6-61. . . This restriction is still in effect and, under the circumstances, we are bound to abide by this directive until such times as it is revoked. It is significant, however, that the restriction pertains exclusively to subversive enquiries with no objection being made to the conducting of legitimate security enquiries. Throughout the dispute of 1961/62 relative to our on-campus investigations the necessity of legitimate security enquiries was conceded by even our most vocal protagonists. This position was never refuted during subsequent debates and apparently, has been accepted by all concerned.

While we are morally, and indeed, honour bound to respect the assurances we made to the Government in this area, paradoxically, we are still burdened with the responsibility of keeping that same Government abreast of Communist penetration of the educational process. However, since we are under this dual obligation it is clear that the probable solution lies within the realm of security enquiries through which it is possible to establish liaison with faculty members. Such enquiries are, in fact, the only legitimate grounds on which we may establish this liaison. Since our efforts are restricted to this one avenue, we should exploit the opportunity to the fullest possible extent in keeping with our heavy responsibilities in this area. As a point of interest, the limited success we have enjoyed to date was, in large measure, accomplished through this medium.

While limited progress has been made in various areas, the success realized at one particular institution may best illustrate the use to which legitimate, on-campus enquiries may be put. Two senior investigators, well versed in [counter subversion] Branch interests, were delegated to conduct all university investigations, including the all important security screenings. Our knowledge of Communist penetration of the institution was then reviewed and, on the basis of the review, specific faculties were singled out for further study. Security investigations relating to these faculties were given particular attention with a view of eventually interviewing all professors who were not adversely recorded in our indices. All such professors listed as references on the P.H.F.s [Personal History Forms completed by applicants for employment in the public service] were interviewed without fail. Additionally, faculty heads and assistants, even though they were not specifically mentioned on the P.H.F.s, were requested to provide character references on former students seeking sensitive government employment. As part of the character study the professor was routinely invited to comment on the person's loyalty and patriotism. Needless to say, the members concerned identified themselves as members of the Force and fully explained to the professor in question the exact nature of the enquiry. Under no circumstances was the overt and legitimate nature of the enquiry deviated from.

Following each interview the investigator committed the salient points thereof to paper in a book which was maintained for the express purpose of compiling data on faculty members of the university concerned. This was, of course, in addition to the usual report on the particular [security screening] file. Each professor or staff member interviewed was allotted one page which was headed with the faculty, the professor's name and his

position. Beneath this were listed all interviews with him. These were detailed as to the date of the interview, the reason therefore. . . and most importantly, the professor's personal reaction. Special attention was devoted to his willingness, or lack of same, to cooperate with the investigator, his general attitude towards the Force and what sentiments he displayed, verbally or otherwise, to our presence on the campus.

All contacts on the campus were duly recorded and analyzed. Those who were obviously well disposed towards us and who appeared willing to cooperate, were given additional attention. Efforts were made to arrange further interviews (based, as usual, on security enquiries) during which the subject's reactions were further examined. As at the outset, subsequent interviews were restricted to the security enquiries concerned. All reactions were, however, recorded in the manner noted in the preceding paragraph. In addition to fulfilling the requirements of the enquiry, the investigators endeavoured to establish a personal rapport with the professors. This was accomplished through general conversation on far ranging topics and, in some cases, limited social contacts in the form of coffeeing or lunching together. As in the past, no effort was made to directly solicit the individual's cooperation, nor was the matter of subversion broached. Essentially, a friendship was developed with an attempt made to relegate the professional status of both the investigator and the professor, and all that that entails to, at least outwardly, a position of secondary importance.

The discussions entered into arose very naturally when our "business transactions" were completed. Besides any number of topics of no particular concern to us, many persons, because of our declared interest in "security", raised, in general terms, the subject of Communism. Under the circumstances this was considered a natural course of events. Most had very definite views and the discussions which ensued were, to say the least, of more than passing interest to the investigators. In spite of a general opinion to the contrary, it was found that many professors were not only very much aware of the threat posed by Communism but also genuinely concerned about it. Those discussions were enlightening and posed no threat to our operations since the subjects raised were covered in depth in any number of books or other publications available to the general public. Other subjects such as the international situation, the Sino-Soviet dispute, local issues (political or otherwise) were often raised in these general conversations.

One topic which, not surprisingly, was frequently raised by faculty members was the dispute raging over our "on campus" investigations. Discussions in this vein quickly determined the person's views on the matter and removed any doubts, one way or the other, the investigator might have had. In most cases, however, the issue was raised in a sympathetic manner. Occasionally, when circumstances appeared favourable, a professor would be asked outright if he had any objection to our security enquiries. This frequently led to his revealing his views on the entire question of on-campus investigations, subversive or otherwise. It is significant that, in most cases, there was no objection to any of our enquiries so long as they were conducted prudently and with discretion. A detailed account of all such discussions would be impractical at this juncture, however, a brief insight of their scope is provided by the foregoing points. No doubt the most important point is that neither the letter, nor the spirit, of the trust placed in us by the Government was broken. All contacts were legitimate, honourable and useful. Under no circumstances was the professor's formal cooperation

sought nor was the subject of subversion raised by the investigators. In short, every precaution was taken to ensure that our long range interests were not compromised. The individuals concerned were provided no opportunity to voice any legitimate complaint of unethical practices on our part.

When the foregoing plan had been pursued over an extended period of time, some rather pleasant developments took place. The most significant of these was in the number of professors, etc., who eventually offered their full cooperation on all matters of interest to us. Many, without prompting on our part, volunteered, or at least chose to discuss, the activities and political views of a number of their colleagues. It was evident that they would have spoken to us sooner but did not know anyone connected with the Security Service and would not take it upon themselves, for obvious reasons, to call our offices "blind". Once an association had been developed some individuals actually called us to pass on pieces of information of potential interest to us. This willingness to cooperate was displayed in varying degrees and in a variety of ways, however, of immense importance to us was that a workable liaison had been established. By mere social evolution our interest in subversion was also accepted and information developed without the necessity of us first providing information on persons of interest to us. This was also accomplished without the necessity of directly soliciting their cooperation.

Of further value in an operation such as that described, is the fact that, besides creating liaison with faculty members, it also determines those persons who should not be contacted. This is of positive value since it alerts us to potential problem areas which would otherwise be unknown. Such information, gained through legitimate means, could prove useful in various ways on future, unrelated enquiries. This could be of particular value relative to extremely delicate (counter espionage) Branch enquiries which very often involve this profession.

The essential point in this type of operation is that no attempt of any kind is made to solicit an individual's cooperation. What we are doing, in effect, is making ourselves known and available to the profession should any of its members have occasion, and the desire, to speak to us. Once this desire is expressed we would be grossly negligent in our duties if we refused to listen to the person. In the operation described above a number of persons did, in fact, indicate they were glad to meet us since they wished to discuss certain matters. It is assumed that, had we not made our presence known, the persons concerned would not have made any special efforts to contact us. Although persons in this profession will not usually initiate contact, it has been proven that they will confer with us if they know one of our investigators through previous legitimate dealings. Once the desired liaison has been established and continued over an extended period of time, the individual concerned really becomes an established casual source with whom we can safely deal.

It is noteworthy that in the above described operation, which has been in effect for five years, no embarrassment to the Force resulted; our assurances to the Government were not broken; standing policy within the Directorate was not contravened, yet, a workable and valuable liaison was established at the institution concerned. It should also be noted that university students were not involved in any manner in the plan. All things considered, it was a worthwhile and secure exercise which proved that, in

spite of the restrictions under which we are obliged to operate, we can discharge our responsibilities in this delicate field of endeavour.

Despite the frequent disclaimers, there is no question that the actions outlined and commented on in the directive represent a comprehensive, long range programme of source development on campus. The security screening process was being used as a means of making contact with faculty heads and assistants, even though they were not mentioned as referees on personal history forms, and persons who were obviously well disposed were re-interviewed and cultivated in the hope that a continuing relationship would be established. The method employed was subtle and indirect but its object was clear: the development of a number of faculty sources who would contribute to the counter-subversion programme.

8. On July 8, 1968, the same senior officer who had signed the letter to divisions of November 29, 1967, admitted in a letter to the Secretary of the Royal Commission on Security that the Security Service was endeavouring to develop a few sources of high reliability with respect to campus subversive activities, but these approaches were not being made on campus.

9. It also appears that in 1968 and 1969 when student violence was a serious problem, the Security Service held a number of consultations with university presidents and senior administrators at several large universities. These consultations — which were welcomed and in fact encouraged by senior university personnel — were not regarded as source development although through them a certain amount of information on subversive activities on campus was undoubtedly accumulated.

10. We have reached the conclusion on the basis of this evidence that the R.C.M.P. in the late 1960s embarked, without government approval, on a significant programme to upgrade and improve their contacts with university faculty members. This programme was undertaken in response to increasing militancy in the universities and, in some universities, the development of terrorism. Nevertheless, it appears to us that this programme was in conflict with the instructions received by the R.C.M.P. in 1961 that no new operations were to be conducted and that only established sources were to be used. It was also in conflict with government policy enunciated by Mr. Pearson in 1963 that there was no general surveillance of university campuses. In our opinion, the procedure described in the directive to divisions, dated November 29, 1967, was designed to circumvent the policy of the government and it was inaccurate to claim that such procedures complied with government policy.

11. By the end of 1970, in the aftermath of the October Crisis, the question of surveillance on university campuses again came before Cabinet. After considerable discussion the Cabinet, by a decision dated September 30, 1971, reaffirmed the 1963 Pearson directive as a statement of general policy, rescinded any other directives and ordered further

> that no informers or listening devices will be used on university campuses except where the Solicitor General has cause to believe that something specific is happening beyond the general free flow of ideas on university campuses.

After this directive it was clearly a prerequisite that the use of all sources on university campuses have the authorization of the Solicitor General. However, in a letter dated December 13, 1971, the Solicitor General advised the R.C.M.P. that this Cabinet directive would not apply

> (a) in cases of emergency, provided a report was given to the Solicitor General within 48 hours;
>
> (b) in cases where informers volunteered information to the Security Service and were not paid for the information provided.

12. It would appear that these instructions were issued by the Solicitor General after consulting the Director General of the Security Service and that the Cabinet decision of September 30, 1971, was not amended. It also does not appear that the Solicitor General knew of the number of "volunteer informers" that had been developed by the Security Service. (We note that "volunteer informers" is an ambiguous phrase as it does not distinguish between informers who volunteer and unpaid informers.) We point out that the Cabinet directive of September 30, 1971, applies in quite explicit terms to "informers" and we can see no reason to interpret it as being limited to paid sources. Furthermore, the emphasis placed by the Security Service in 1967 on the recruitment of "volunteers" suggests that this could be a significant exception. In our opinion, if the Solicitor General and the Security Service intended to adopt a narrow interpretation of the word "informers", the Cabinet should have been advised and the Cabinet directive should have been amended to make it clear that the approval of the Solicitor General was to apply to the use of paid sources only and that there should be an exception in the case of emergencies.

B. SURVEILLANCE OF LEGITIMATE POLITICAL PARTIES

13. As we shall see in Part V, Chapter 3, Prime Minister Trudeau stated in the House of Commons on May 11, 1976, that his view and that of the government, which he said had been stated in Cabinet Committee, was that

> if the party is legal, it should not be under surveillance systematically by the Royal Canadian Mounted Police or any other police.[2]

Mr. R.G. Robertson, who was Secretary to the Cabinet in the 1960s and Chairman of the Security Panel, considers that this has represented the policy of the government since 1964. He testified that at that time the concern was about the Rassemblement pour l'Indépendance Nationale (R.I.N.), a predecessor of the P.Q. He said that

> the R.I.N., as a legitimate political party, was not supposed to be subject to the kind of surveillance that there would be of a terrorist organization or a subversive organization. So that the R.C.M.P. had to operate under that disability, that they could not have surveillance of the R.I.N. as such.
>
> (Vol. C107, p. 14068.)

---

[2] House of Commons, *Debates*, May 11, 1976, p. 13389.

Mr. Robertson was referring to a decision of the Security Panel on September 23, 1964, chaired by himself, to recommend to the Cabinet that the R.C.M.P. be authorized, in security screening matters, to include in their report to departments

> the fact of membership in open organizations such as the R.I.N. together with the detailed information concerning length of attendance, degree of involvement and other pertinent information as was available, in order that the department, on whom final decision for the clearance rested, could consider the necessity of further investigation, as they would do in cases of information concerning membership in the Communist Party, front organizations or character weaknesses.
>
> (Ex. MC-182, Tab 2.)

He says that the words "other pertinent information as was available" contemplated that the R.C.M.P. "might get that information from heaven knows what sources, and if they had it they should produce it. But the R.I.N. was not subject to surveillance" (Vol. C107, pp. 14066-8).

14. On May 6, 1976, Mr. Allmand had told the House of Commons that the Cabinet's decision had

> ... confirmed that the R.C.M.P. should not survey legitimate political parties per se, but of course individuals in all political parties should be subject to surveillance if they are suspect with regard to criminal activities, subversion, violence or anything like that.[3]

This explanation corresponds with what Mr. Dare had written in a letter to some senior officers on June 9, 1975, with regard to "criteria used to investigate the Parti Québecois and its members". He said that

> The Prime Minister stated that the Security Service of the R.C.M.P. does not have a mandate to conduct these enquiries unless they fall within Items A to F of the Cabinet Directive of March 27, 1975.

15. If Prime Minister Trudeau's statement of May 11, 1976, were taken alone, one might infer that systematic surveillance by the Security Service of any "legal" party was not permitted. If that were so, an issue would arise as to whether the R.C.M.P. has conducted systematic surveillance of certain parties that are "legal", in the sense that they are not prohibited from organizing as political parties and that they nominate candidates in federal, provincial and municipal elections. The issue arises in respect to such parties as the Communist Party of Canada, the Communist Party of Canada (Marxist-Leninist), the New Democratic Party's Waffle Movement and the Parti Québecois. If the proper conclusion is that there has been systematic surveillance of such parties, the question then is whether it can be said that such surveillance was beyond the authority of the Security Service — i.e. whether, in the language of our terms of reference, it was "not authorized... by law".

[3] *Ibid.*, May 6, 1976, p. 13224.

16. The Royal Commission on Espionage, established as a result of the defection by Mr. Igor Gouzenko, reported in 1946 that the evidence "overwhelmingly" established

> that the Communist movement was the principal base within which the espionage network was recruited; and that it not only supplied personnel with adequately "developed" motivation, but provided the organizational framework wherein recruiting could be and was carried out safely and efficiently.
>
> In every instance but one, Zabotin's Canadian espionage agents were shown to be members of or sympathisers with the Communist Party...
>
> The evidence shows that the espionage recruiting agents made use in their work of reports, including psychological reports, on Canadian Communists which had been prepared as part of the routine of the secret "cell" organization of that Party...
>
> ...A preliminary feeling out of the selected recruit, before the latter realized the sinister purposes for which he was being considered, could also be made within the framework of normal Communist Party activities and organization, and there is also evidence that this was part of the technique of recruiting.[4]

The Commission then gave a detailed example of three scientists who were recruited from among the secret members of the Communist Party. The Commission concluded its exposition of this example by saying:

> Thus within a short time what had been merely a political discussion group, made up of Canadian scientists as members of a Canadian political party, was transformed on instructions from Moscow into an active espionage organization working against Canada on behalf of a foreign power...
>
> The evidence also discloses that secret members of the Communist Party played an important part in placing other secret Communists in various positions in the public service which could be strategic not only for espionage but for propaganda or other purposes.[5]

17. The Report of the Royal Commission on Security in 1969 observed that

> it seems clear that the main current security threats to Canada are posed by international communism and the communist powers, and by some elements of the Quebec separatist movement. The most important communist activities in Canada are largely directed from abroad, although domestic adherents of and sympathizers with communism pose considerable problems in themselves...[6]
>
> The communist powers conduct espionage and subversive operations ... through members of the communist parties in Canada, both overt and underground...[7]

---

[4] *Report of Royal Commission on Espionage*, 1946, pp. 44-5.
[5] *Ibid.*, at pp. 47 and 49.
[6] *Report of Royal Commission on Security*, 1969, para. 14.
[7] *Ibid.*, para. 16.

> As far as the trade union movement is concerned, there is a long history of attempts by the Communist Party to assume control at local levels and to take all possible measures to influence national policies; these attempts are usually, but not always, frustrated.[8]

The Commission made no observations as to whether the Communist Party of Canada was otherwise a threat to national security, or if it was, in what respects it was. We have no reason to disagree with any of the passages just quoted.

18. As a political party, the Communist Party of Canada has received only minimal electoral support. Since the conviction of Fred Rose, M.P. in 1947, there has never been a Member of Parliament elected under the auspices of the Communist Party of Canada. If the Party received more electoral support than it does, the grounds upon which its activities would be watched would be more obvious than they have been. The grounds on which surveillance has been justified have been the features noted by the Royal Commission in 1946: that the Party is a breeding ground for espionage, and that its secret members attempt to penetrate the government.

19. Both those grounds have been recognized by the government of Canada over the years as bases for the following intelligence activity by the R.C.M.P.:

(a) In the 1950s and 1960s the Advisory Committee on Internments, established and continued by successive Ministers of Justice, received "evidence briefs" from the R.C.M.P. on organizations which the R.C.M.P. proposed should be classified as "recognized Communist organizations". If so classed by the Committee, then, in an emergency, the organization could be declared an illegal organization under regulations adopted pursuant to the War Measures Act. The Advisory Committee was also to place names on a list of members of those organizations who were "prominent functionaries", and who would be interned in the event of a national emergency. In order that this system could operate, it was obviously necessary that the R.C.M.P. have accurate and positive proof of membership in the Party or other organizations. The Committee itself fell into decline in the late 1960s, but the collection and analysis of the same kind of intelligence has continued within the R.C.M.P. to the present time.

(b) Cabinet Directive 35, which has been the foundation for security screening in the Public Service since December 18, 1963, provides that the Government of Canada cannot place confidence in persons who are required to have access to classified information in the performance of their duties, if their "loyalty to Canada and our system of government is diluted by loyalty to any Communist, Fascist, or other legal or illegal political organization whose purposes are inimical to the processes of parliamentary democracy". It states that the following persons

> must not, when known, be permitted to enter the public service, and must not if discovered within the public service be permitted to have access to classified information:

[8] *Ibid.*, para. 18.

(i) a person who is a member of a communist or fascist party or an organization affiliated with a communist or fascist party and having a similar nature and purpose;

(ii) a person who by his words or his actions shows himself to support a communist or fascist party or an organization affiliated with a communist or fascist party and having a similar nature and purpose;

(iii) a person who, having reasonable grounds to understand its true nature and purpose, is a member of or supports by his words or his actions an organization which has as its real objective the furtherance of communist or fascist aims and policies (commonly known as a front group);

(iv) a person who is a secret agent of or an informer for a foreign power, or who deliberately assists any such agent or informer;

All departments of the government have expected the R.C.M.P. to give them information concerning applicants for positions in the public service so that the departments may decide whether the applicants fall within any of these categories. It is obviously impossible for the R.C.M.P. to provide this information without employing informers and other intrusive methods.

(c) When the Cabinet issued a Directive on March 27, 1975, defining the mandate of the Security Service (apart from its security screening functions, as was later made clear), the R.C.M.P. made it known that it considered that the authority that was requested would, if granted, be taken as permission to "monitor" the activities of (*inter alia*) Communists, Trotskyists and Maoists.

20. The inevitable conclusion is that there has been systematic surveillance of the Communist Party of Canada, and that there has been ample governmental authority for the systematic surveillance of the Communist Party of Canada and its members. It would be playing on words to assert that it has not been the Party but only certain of its members who have been under surveillance. No such distinction can reasonably be drawn when the surveillance is of the Party's leaders and officers, and is aimed at determining their every word and action. This very surveillance has been expected by government. Therefore it would not really be accurate to say that the Security Service has lacked authority from the government to conduct systematic surveillance of the Communist Party of Canada. Moreover, even if, as we think is the case in law, the Prime Minister's public statement or a Cabinet Directive cannot be taken as having effect in *law* as authority for the R.C.M.P. doing or not doing a thing, section 5 of the R.C.M.P. Act does give the Solicitor General power of direction. So what Mr. Allmand directed would have the authority of statute behind it, and we think that his public statement in the House of Commons on May 6, 1976, would have the status of a directive. That statement was that the R.C.M.P. "should not survey political parties per se". But that statement must be qualified by the fact that Mr. Allmand, like other Solicitors General, did authorize surveillance of the Communist Party of Canada. His doing so would be a "direction" under section 5. Consequently, the R.C.M.P. has had lawful authority to conduct systematic surveillance of the Communist Party; conse-

quently its systematic surveillance of this legal party has not been an investigative activity "not authorized. . . by law".

The Communist Party of Canada (Marxist-Leninist)

21. The activities of this Party have been under intensive investigation in the 1970s. Its leader has been the object of both close surveillance and certain of the disruptive tactics which were carried out under the "Operation Checkmate" umbrella. In 1972, when it ran a number of candidates in the federal election as "independents", the Security Service drew the true nature of these candidates to the attention of the press. As a result at least one newspaper published an article as to their true identity not long before election day. The Party's electoral support in the four federal elections of the past decade has been minimal.

22. There was governmental authority for the Security Service's interest in this Party. The basis of this has been the Security Service's view that the Party is "a self-styled revolutionary party whose activities are aimed at abolishing our parliamentary system of government by force or violence and replacing it with a worker dictatorship".[9] In addition, we have seen that when the Cabinet Directive of March 27, 1975, was issued, the R.C.M.P. made it known that the authority sought, if granted, would be taken as permission to monitor the activities of Maoists. The latter category was at that time represented by the Communist Party of Canada (Marxist-Leninist). In regard to this Party the same conclusion applies as that stated in regard to the Communist Party of Canada.

The New Democratic Party

23. The New Democratic Party has been in existence since 1961. It describes itself as a social democratic party. It succeeded the C.C.F. (Co-operative Commonwealth Federation), which had been founded as a socialist party in 1932. First the C.C.F. and then the N.D.P. elected Members to Parliament in every federal election since 1935. In the past decade the Party has received between 15.4 and 19.7 per cent of the popular vote in federal elections, and elected from 16 to 32 members. It has formed the provincial government in Saskatchewan most of the years since 1944, in British Columbia from 1972 to 1975, and in Manitoba from 1969 to 1977. It has formed the Official Opposition, and for many years it has been represented by significant numbers of members, in the Ontario legislature.

24. As we shall see in Part V, Chapter 3, in the early 1970s the R.C.M.P. Security Service conducted an investigation of the Waffle Movement, which was a faction within the N.D.P. The Security Service believed that Trotskyists and Communists were joining the Waffle in order to influence its members and attempt, through it, to take control of the N.D.P. nationally and provincially. It

[9] The words quoted are from an application for a warrant under section 16 of the Official Secrets Act.

sought and obtained intelligence on the activities of those individuals within the Waffle Movement and of the Waffle Movement within the N.D.P. It even volunteered information to one leader of a provincial New Democratic Party on the basis that he should be aware of subversives within his Party.

25. Some of the language used by members of the Security Service in their instructions, reports and their analysis of the objectives of their work in this area shows that they regarded their task as the surveillance of "left-wing" members of the N.D.P. For example, one of the stated types of information which was sought was simply "The Waffle Movement". General instructions were given by Headquarters to all field personnel as follows: "We are interested in determining national aims, strategies and planned tactics of the Waffle leadership, especially when insights we develop go beyond their open, public announcements". On the other hand, there is some evidence that the rationale for the investigations was understood to be for the more limited purposes we have stated. It may therefore be that there was an imprecise understanding that varied from person to person, as to what the rationale was. Whether or not surveillance of one faction of the New Democratic Party constituted systematic surveillance of a political party is very much a matter of definition. On balance, we believe that the investigation was understood within the R.C.M.P. not to be an investigation of the N.D.P. as a whole but rather of certain persons in one faction of that party. It follows from this conclusion that it would be unfair to characterize what occurred in practice as surveillance of a political party. Therefore, in our view, the investigation did not lack lawful authority. If we are wrong in this, we can nevertheless say without hesitation that we have found no evidence of any governmental or lawful authority to conduct systematic surveillance of the New Democratic Party. In Part V, Chapter 3, we shall discuss this matter from the point of view not of lawful authority but of its policy implications. Our concern there will be to identify some undesirable features of this episode and to make suggestions how these undesirable features can be avoided in the future.

The Parti Québecois

26. The Parti Québecois was formed in 1968 as a provincial party in Quebec, an official principal goal of which was described by the Party as sovereignty association. That goal was regarded by some of its members and some of its opponents as separatism. The concept includes the establishment of a nation separate from Canada politically. It ran candidates in the provincial elections of 1970 and 1973, in which it obtained 23 and 30 per cent of the electoral vote respectively, and from 1972 to 1976 it formed the Official Opposition. At the election of November 15, 1976, it obtained 41.4 per cent of the popular vote and formed the government.

27. In Part V, Chapter 3 we shall point out that in the late 1960s the federal government expected the R.C.M.P. to obtain information about membership in, and the finances of, separatist organizations. From this it was not unreasonable that the R.C.M.P. would infer that it had the authority to investigate the Parti Québecois. Additional reasons for the R.C.M.P.'s interest in the P.Q. from 1968 onward are discussed in that chapter. So are the difficulties

encountered by the Security Service from 1975 onward in determining just what its authority was in regard to the P.Q. and its members, under the Cabinet Directive of March 27, 1975.

28. An example of the R.C.M.P.'s interest in the P.Q. *per se* is found in instructions sent by Headquarters to "C" Division in Montreal in August 1970, directing that intelligence be obtained concerning the Parti Québecois, if possible at the highest level. The reason given was that the P.Q. was a group dedicated to the dissolution of Canada:

> It is our responsibility to inform the government of any, and all, groups or organizations that are dedicated to the dissolution of Canada. The Parti Québecois is clearly and publicly committed to the dissolution of Canada as it presently exists. It will, therefore, be our responsibility to monitor the various political influences which will infiltrate the Parti Québecois and also any policy decisions as it may involve plans for seditious activity or foreign involvement. We will not require detailed information en masse, as is the case with recognized subversive organizations, however, we should develop the capability of identifying and assessing the influential functionaries. . .

It is of further interest to note that the Headquarters instructions no longer regarded the justification for "this type of investigation" as being that the only interest was in possible terrorist activities or subversive infiltration.

29. As of 1972 the Security Service's position was that, as Mr. Starnes said in a letter to Mr. Bourne on September 25, 1972,

> Our Service is not engaged in the investigation of the Parti Québecois per se. The information that we have gathered on the Parti Québecois is incidental and comes to us through our investigation of the Quebec Revolutionary Movement as well as through the media and other overt sources.
>
> (Ex. MC-158.)

Mr. Starnes appears to have believed the statement in the first sentence of the passage quoted to be true. Thus, in a May 21, 1971, memorandum for file, not designed to be read outside the Security Service, he recorded that on that day he and Commissioner Higgitt had had a discussion with Mr. Goyer in which Mr. Starnes reasoned that the government could be seriously criticized if the Security Service assisted the efforts of the Liberal Party "to oppose and to defeat the aims of a political party such as the Parti Québecois". The criticism would be "for attempting to use the facilities of the Security Service to carry out political action, of one kind or another, against a duly constituted political party in Canada". Mr. Starnes added:

> I said that it was true that the Security Service had for some years taken an active interest in the Communist Party of Canada. However, in practical political terms, this was very different from directly supporting political action against the Parti Québecois.
>
> (Ex. MC-15, Tab G.)

30. As we have seen above, Prime Minister Trudeau and Mr. Allmand made it clear in 1976, in the context of questions about the surveillance of the P.Q.,

that individuals in a legal political party should not be subject to systematic surveillance unless their activities fall within the Cabinet Directive. Since then, the category upon which the Security Service has relied in instructing paid sources within the Parti Québecois has been "foreign intelligence activities directed toward gathering intelligence information relating to Canada". This rubric has been thought to justify the collection of intelligence concerning communications by foreign governments with the P.Q. government of Quebec. Nevertheless, other information has been obtained and not rejected as being irrelevant to the proper concerns of the Security Service, on matters of certain importance to the Parti Québecois. Some of the information gathered has been passed on by the Security Service to senior officials of the Public Service of Canada without receiving any criticism in return for having collected it, even though it is unrelated to any of the categories in the Cabinet Directive.

31. Thus, even since 1976, whether it has sought the information or has been the "passive" recipient of it, the Security Service has acted beyond its mandate by receiving such information and retaining and using it. The Security Service has, by receiving such information from its human sources, paid or otherwise, received information unrelated to the categories of activities itemized in the Cabinet Directive. Moreover, the kinds of information cannot be described as other than surveillance of a legal political party *per se*. The passage of time and the number of people involved make it extremely difficult to determine whether information of this sort, when received by the Public Service, has been transmitted to Ministers as a matter of course. If it has been, then, to the extent that Ministers have received the information without criticizing the Security Service, we do not feel that we should be more critical of the Security Service for having acted outside its mandate than of the Ministers who fixed the mandate in 1975.

32. We add that here we are discussing solely the issue of acting outside the authority of the mandate, and not any question of whether some illegality was committed by the manner in which the information was obtained.

33. In our review of this matter, we came to the view that there was an apparent disregard in practice by the Security Service of the government's attempt, in regard to the Parti Québecois, to limit Security Service investigations to such activities of its members as fell within the 1975 Cabinet Directive, which is illustrated by the following example from files. Before the provincial election in 1976 a memorandum to the Deputy Director General (Operations), read by Mr. Dare reported that the Service should not inquire into "legitimate activities" within the Parti Québecois but rather that their "main interest" was one of the six activities set out in the 1975 mandate. However, the genuineness of this purported self-limitation to matters within the "mandate" is put in question by the fact that a year earlier, an R.C.M.P. memorandum stated a specific area of interest was to be pursued. The area of interest was not one set out in the 1975 mandate. Again, after the electoral victory of the P.Q., and eighteen months after Mr. Dare had made known the limitations on the investigation of the P.Q., and R.C.M.P. officer wrote a memorandum in which he observed that a particular investigative technique would enable the Security

wrote a memorandum in which he observed that a particular investigative technique would enable the Security Service better to fulfill its mandate. He suggested that the technique be used to obtain information on "generalities which may be very important to the central government but have little to do" with any of the six activities set out in the 1975 mandate. He clearly expected the technique would be used to obtain information "concerning" members of the P.Q. Government. This recommendation was concurred with by a more senior officer. The conscious determination to develop the investigative technique beyond the authority given by the "mandate" is reflected still further by a memorandum to file, written a few days later by the same member. Again discussing the same investigative technique, he contemplated that information obtained would concern the P.Q. and "should help us to prepare realistic briefs for Government". A senior operational officer read that memorandum without expressing disapproval.

34. An R.C.M.P. Headquarters file disclosed another aide-mémoire written in 1978 by an officer on the same topic which indicated that the investigative technique would, on occasion, result in additional information being obtained which fell outside the Security Service mandate. According to the aide-mémoire, such information would not be sought, but if it came to the attention of an investigator when he was dealing with mandate matters, he was to report it in any event. Such information would "generally" concern "policy and direction of the Government of Quebec" and was described as being "of obvious value to the federal government in terms of national unity". The aide-mémoire records that the matter had been discussed with a senior operational officer and that "as for passing information to government, a decision will be made in each case as to whether material will be passed because of its possible bearing on national security". As we have said, there is therefore evidence that since the 1975 mandate and public announcements about surveillance of legitimate political parties, the Security Service has actively sought information about the P.Q., unrelated to the Security Service mandate.

The Liberal Party of Quebec

35. We have some evidence that from 1970 to 1976, while the Liberal Party of Quebec formed the government of that province, the Security Service collected intelligence about certain aspects of the activities of that government and at least one paid human source had access to sensitive information about that government's policies and its ministers. That source's objectives were defined in 1971 as follows:

1. The development of information on certain diplomatic personnel in Quebec.
2. To identify the disposition, propensity and ability to exercise influence, of independentists employed in the government of Quebec and other key sectors, who use their position to promote the separation of Quebec from Canada.
3. To determine the degree of influence that revolutionary or independentist influenced or controlled pressure groups (social, fraternal and political) have on the Quebec government.
4. To determine the influence independentists and revolutionary sympathizers may have over the policies of [a certain department of the

provincial government] particularly in its relations with other French-speaking countries.

36. In 1973, the source's handler commented on a detailed report that the source had given. We have not seen the report, but the handler described it as relating to infighting between individuals in ministries in the government of Prime Minister Bourassa. The handler commented that the report made evident that there were not very many individuals who are "died [sic] in wool separatists at the very upper levels of the various Ministries, however, at the lower level ... there are a number of individuals who harbour separatist sympathies". The handler also stated that the source reported that the Quebec Liberal Party had infiltrated the Parti Québecois at a very high level. The handler concluded that the report

> enables us to keep a close watch on individuals within the Bourassa Government and this I feel is extremely important as it enables us as a Security Service to be more fully aware of upcoming policies and activities within the Provincial Government of Quebec. I feel that as a Security Service it is one of our duties to be aware of what is happening in Quebec even if the government formed is of a federalist nature.

37. At almost the same time as the making of the report by the handler, officers at a senior level authorized the handler to instruct and to stress to the source that his objectives were not to report on the government of Quebec *per se*, but that he was to report on revolutionary individuals in the government of Quebec and on individuals responsive to foreign powers, and in addition he might report any information which we might pick up from governmental policy or governmental activities of a nature which he considered was "detrimental concerning the continuation of Quebec within Confederation".

38. For our purposes in the present context to draw a distinction between the Liberal Party of Quebec and the government which it formed would be irrelevant. It is clear that the source reported and was expected to report not only on public servants but on elected members of that government, far beyond any interest in foreign interference in Canadian affairs or foreign intelligence activities. We know of no mandate which the Security Service had before March 1975, to collect intelligence on such matters, and it would be clearly unacceptable under the 1975 Mandate.

The Liberal Party of Canada

39. The Liberal Party of Canada, when in power as the Government of Canada, may be said to have been of interest to the Security Service even though the information received cannot be said to relate to the mandate of the Security Service. An unpaid source reported to the Security Service from his vantage point which, as his handler reported in 1975, enabled him to "receive rather confidential information ... on Liberal strategy, and elected members."

40. According to the file, the source has provided information about the marital problems of two Ministers, suspicions entertained by some Ministers that the R.C.M.P. was directing a plot against the government, and proceedings in the Liberal caucus. None of this information was relevant to the security of Canada, as defined by the Cabinet Directive. The receipt, recording and reporting of this information was completely unauthorized and without justification.

PART IV

REASONS ADVANCED IN JUSTIFICATION OF ACTIONS "NOT AUTHORIZED OR PROVIDED FOR BY LAW"

INTRODUCTION

CHAPTER 1: Legal Defences

CHAPTER 2: Extenuating Circumstances

INTRODUCTION

1. In Part III we analyzed a number of investigative practices that may be unlawful. The picture is incomplete unless we also discuss defences that might be raised to exonerate those carrying out such practices. Our insistence throughout this Report that the national police force and the security intelligence agency should obey the law would be mere rhetoric if there were accepted defences that would make their conduct in carrying out those practices lawful. In the first chapter of this part of our Report we shall examine whether any of these arguments do in law constitute defences if members of the R.C.M.P. were to be charged with offences under the Criminal Code or other federal or provincial statutes, or have civil actions brought against them. In the second chapter we shall examine whether, if they are not defences to a charge or action, they may nevertheless be relied upon by members of the R.C.M.P. as factors justifying compassion or mercy, before prosecution or after conviction.

2. As will be seen these issues cannot be examined as if the courts have ruled decisively on their application to policemen. Even if there were more judicial authorities directly on point, police forces should not expect certainty and predictability in the application of principles to particular factual situations.

3. There is a further introductory point to be made. Even if one or other of these defences were to be available, if a particular investigative technique is adopted as a matter of practice or particular conduct is planned in a specific situation, it does not follow that the R.C.M.P. should adopt the practice or engage in the conduct. The availability in law of one of these defences ought not necessarily to be regarded as giving the green light from the policy point of view.

CHAPTER 1

LEGAL DEFENCES

A. SUPERIOR ORDERS — MISTAKE OF FACT AND MISTAKE OF LAW — RELIANCE ON APPARENT AUTHORITY — NECESSITY AND DURESS

(a) *Superior orders*

4. Can a policeman rely on the plea of obedience to the orders of his superior as a defence to a criminal or other charge? Judicial precedents are scarce. The problem has usually been considered in a military context and as a matter of international law.[1] However, it would appear that the answer is "no": obedience to superior orders is not generally regarded as a valid defence in criminal or civil law. There have been some judicial statements concerning the position in domestic law. For example, in an English case which was actually concerned with duress, Lord Salmon stated that the defence of superior orders

> ... has always been universally rejected. Their Lordships would be sorry indeed to see it accepted by the common law of England.[2]

In an earlier case, the then Lord Chief Justice of England said:

> I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences they ought also to be convicted and punished, for the order of their superior would afford no defence.[3]

A leading authority on criminal law has written that

> ... it is an established principle of constitutional law that official position and superior orders (whether of the Crown or of a private master) are not in themselves a justification for committing an act that would otherwise be a legal wrong.[4]

---

[1] See M.L. Friedland, *National Security: The Legal Dimensions*, Ottawa, Department of Supply and Services, 1979, at p. 104; L.C. Green, *Superior Orders in National and International Law*, Leyden, A.W. Sijthoff, 1976. See also Geoffrey Creighton, "Superior Orders and Command Responsibility in Canadian Criminal Law" (1980) 38 *U. of Toronto Law Rev.* 1.

[2] *Abbott* v. *The Queen* [1976] 3 All E.R. 140 at 146 (P.C.).

[3] *Brannan* v. *Peek* [1947] 2 All E.R. 572 at 574 (K.B.D.).

[4] Glanville Williams, *Criminal Law: The General Part* (2nd ed.), London, Stevens, 1961, at p. 296.

5. Alongside these dicta, which were expressed in the context of English criminal law, reference must be made to views expressed by several Justices of the Supreme Court of Canada. Thus, in *Chaput* v. *Romain*[5] and again in *Chartier* v. *A.G. Quebec*[6] the view was advanced, with specific reference to the legal position of police officers, that "a subordinate is not necessarily exempt from liability because the wrongful act was committed in order to comply with a superior's order".[7] In *Chaput* v. *Romain* the Supreme Court held police officers who obeyed their superior's order liable civilly, and Mr. Justice Taschereau, whose decision was concurred in by three other members of the Court, spoke of the law as to superior orders as follows:

> [Translation] Furthermore, no reliance can be placed on the fact that the respondents may have acted in obedience to a superior's orders. Obedience to a superior's orders is not always an excuse. The subordinate must not act rashly, and when he is made reasonably aware that the facts which led to the order he received were without foundation *he must back down.*[8]

This statement was cited with approval by four Justices of the Supreme Court of Canada in the *Chartier* case. It evokes distinct echoes of the principle that once prevailed in the area of military law, to the effect that the defence of superior orders could be successfully relied upon only if the order was not manifestly unlawful.

6. Modern international and military law has tended to deny the defence even when the order was not manifestly unlawful. Whatever the scope of the defence in military law, the analogy between the soldier and the policeman is not generally helpful. It is understandable that at least a limited defence of superior orders might be argued for in the armed forces where, at least in battle, there is a need for military discipline requiring prompt obedience.[9] There may be an analogy in police work when there is sudden violence or some other emergency, but in the kinds of investigative practices which we have examined, there is usually no such situation. These practices and acts involve careful preparation and ample time for reflection and refusal to participate. It cannot be said in these cases that a failure to obey promptly will imperil the safety of fellow policemen.

7. Our view is that in the present state of Canadian law it is doubtful that a member of the R.C.M.P. would, at least in the absence of sudden violence or some other emergency, be able to raise successfully a defence of superior orders to a charge under the Criminal Code or any other federal or provincial statute.

8. However, it must be noted that a defence of a superior's order may be relevant to the limited extent to which mistake of law gives rise to a defence. Moreover, there may be situations in which the superior's order will cause a policeman to labour under a mistake of fact, causing him to lack the intent

---

[5] [1955] S.C.R. 834

[6] (1979) 9 C.R. (3d) 97.

[7] Per Mr. Justice Pratte in *Chartier* v. *A.G. Quebec*, *ibid.*, at p. 177.

[8] [1955] S.C.R. 834 at 842, quoted in English in *Chartier* v. *A.G. Quebec*, (1979) 9 C.R. (3d) 97 at 155.

[9] See Glanville Williams, *Criminal Law: The General Part* (2nd ed., 1961), p. 298.

necessary for crime (*mens rea*). We turn now to a discussion of mistake of law and mistake of fact.

(b) *Mistake of fact and mistake of law*

(i) *Mistake of fact*

9. General propositions as to the availability of mistake as a defence to a criminal charge are difficult to express in categorical terms.[10] Indeed, it is doubtful if any propositions on the subject of mistake have a universal application. So much depends on the definition of particular offences and whether proof of *mens rea*, a guilty mind, is an essential element that must be established by the prosecution. To ignore the various qualifications that govern the availability, in criminal cases, of a plea of mistaken belief is to run the serious risk of misstating the law, or justifying questionable conduct by invoking legal principles that have a very limited application.

10. Several alternative circumstances need to be considered, the nature of which will dictate the scope of mistake as a legal defence. First, it is open to the legislative body, when it defines an offence, to state the criteria by which a mistaken belief must be judged. Where it does so, the mistake must be judged by an objective standard, in other words, according to whether a reasonable person would have been mistaken in the light of the prevailing circumstances. Anything less will not constitute a defence however genuinely mistaken the accused might have been. Examples of this category are to be found in the crime of extortion "without reasonable justification or excuse" (Criminal Code, section 305), or in pleading self defence which requires that the accused "believes, on reasonable and probable grounds that he cannot otherwise preserve himself from death or grievous bodily harm" (Criminal Code, section 34(2)). Other examples will be found in our recommendations with respect to the unauthorized disclosure of government information, in our First Report.[11]

11. The second situation relates to those offences which abound outside the Criminal Code, in federal and provincial statutes, and which are described as offences of strict or absolute liability. This means that there is no requirement of proving *mens rea*. Ordinarily, that would end the matter so far as invoking a defence of mistake is concerned. Recently, however, the Supreme Court of Canada in *R.* v. *Sault Ste. Marie*[12] has declared it to be the Canadian law that, unless Parliament or the legislature of a province has made its intention clear when defining the offence in question that liability is absolute, with no question of fault being involved, it is open to the accused to avoid liability by proving that he took all reasonable care in the circumstances. This defence, the Supreme Court has ruled, will be available "if the accused reasonably believed

---

[10] For a more detailed discussion, see J.Ll.J. Edwards, *Mens Rea in Statutory Offences*, London, Macmillan, 1955, Chapter XI.

[11] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report, Security and Information*, Ottawa, Department of Supply and Services, 1979, paras. 58 and 59.

[12] (1978) 40 C.C.C. (2d) 353.

in a mistaken set of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event".

12. In thus recognizing a potentially wide field of application for the defence of mistake of fact, it needs to be emphasized that the defence, in the context referred to above, has nothing to do with proof or disproof of *mens rea*. The principle expressed in the *Sault Ste. Marie* case comes into play only where the particular offence is interpreted in a manner that excludes the requirement of proving a guilty mind. Normally, establishing the requisite *mens rea* in a criminal offence is part of the prosecution's burden of proof. In the special circumstances outlined by the Supreme Court of Canada in the *Sault Ste. Marie* decision, however, it is open to the accused to exempt himself from criminal liability by showing that he was mistaken as to fact and that the mistake was one that a reasonable man would have made in similar circumstances.

13. The third situation — the one which has generated the most controversy surrounding the proper test to be applied — concerns those crimes that specifically require proof of *mens rea*. Proving a guilty mind involves proving that the accused had knowledge of the various factual elements that constitute the offence in question. This may involve proof of intention or recklessness or knowledge to the requisite degree. If it can be shown that the accused was mistaken as to one or more of the essential elements, it follows that the prosecution has failed to establish that the accused had the necessary *mens rea* and, therefore, the accused cannot be held criminally responsible. This defence is open to an objective and a subjective interpretation. Those who favour the objective interpretation argue that, not only must the mistake occur and be shown to have genuinely occurred, but it must also be shown to have been a reasonable mistake. By thus setting the standard of exemption at the level of ordinary, reasonable people, the likelihood of fanciful defences of mistake being successfullly raised in a criminal case is severely reduced. Proof of the necessary *mens rea*, however, is concerned with the actual state of mind of the accused, not with the mental state of some hypothetical person. How can these two positions be reconciled?

14. The courts have recently accepted the subjective interpretation but it will be seen that they recognize that the reasonableness of belief may be relevant as to whether the accused believed in the existence of the fact in question. After two judgments[13] delivered recently, one in the Supreme Court of Canada and the other in the English House of Lords, it can now be stated that in cases involving a defence of mistaken belief the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question. This principle does not state that an accused person is entitled to be acquitted however ridiculous his story might be. Neither does it imply that the reason-

[13] *Pappajohn* v. *R.* (1980) 14 C.R. (3d) 243 (Sup. Ct. Can.); *D.P.P.* v. *Morgan* [1976] A.C. 182 (House of Lords).

ableness or unreasonableness of his mistaken belief is irrelevant. The present law was expressed by Mr. Justice Dickson when he stated:

> . . . the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable. The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defence of mistake. Although 'reasonable grounds' is not a precondition to the availability of a plea of honest belief. . . those grounds determine the weight to be given the evidence. The reasonableness or otherwise of the accused's belief is only evidence for or against the view that the belief was actually held and the intent was therefore lacking.[14]

Put more shortly, the reasonableness or unreasonableness of the mistake is a question that goes to the credibility of the defence put forward by the accused. That is a matter of evidence in each individual case. It is no longer the governing criterion in cases of mistake, except in the two situations previously described in this chapter.

(ii) *Mistake of law*

15. So far we have been considering the nature and scope of a defence based on a mistake of fact. Many of the situations that we have examined involving the activities of the R.C.M.P., suggest, however, that the officers acted in the belief that they were lawfully entitled to act as they did. What is their position under the criminal law if the mistake in question is not as to the facts but as to the law? If the mistake is concerned with the existence of a legal prohibition that forbids the doing of the act in question, in other words if it is a mistake as to whether the particular conduct that is complained about is or is not a crime, the answer generally is that such a plea is no defence to a criminal charge. For reasons of public policy, ignorance of the law is not an excuse for committing an offence. Derived from English common law, this principle is enshrined in section 19 of the Criminal Code.

16. Greater difficulty is encountered where the mistake relates to the interpretation of a particular law, statutory or otherwise, or as to the existence of a right under the civil laws, for example, rights of property. This also qualifies as a mistake of law, but is it caught within the broad exclusionary principle contained in section 19 of the Code? It is in this area of what is loosely but compendiously referred to as "mistake of law" that confusion usually arises. We shall examine a series of situations in order to understand the true ambit of the "mistake of law" umbrella, which in one form or another has been relied upon by the R.C.M.P. in the belief that it excused or justified various activities that were subsequently called into question.

17. First, there are certain offences which by their very definition, including a requirement of *mens rea*, have traditionally been interpreted in such a way as to recognize a defence that is based on a mistake of law. Thus the offence of theft as defined in the Criminal Code (section 283) requires a fraudulent taking of the property of another without a colour of right. A long line of authorities has recognized that if an accused has a bona fide belief that he was

[14] *Pappajohn* v. *R.* (1980) 14 C.R. (3d) 243 at 267.

entitled to such property, even if his belief arises from a mistaken understanding of his rights under the law of property, he is not guilty of theft. The fact that his mistake is as to the law, and not as to the facts, does not preclude the accused from claiming that he was acting under a colour of right. The decision whether such a colour of right was honestly entertained in the circumstances is a question to be decided by the trier of fact, and what was said earlier on the subject of reasonableness applies equally to this kind of situation.

18. Second, it is far less certain that the principles will apply to those offences such as wilfully damaging the property of another, wilfully interfering with the enjoyment of another's property, arson or otherwise wilfully setting fire to property, which are contained in sections 387 to 402 of the Criminal Code. According to section 386 "No person shall be convicted of [any such] offence... where he proves that he acted with legal justification or excuse *and* with colour of right" (our emphasis). It might properly be argued that a bona fide mistake of law should entitle an accused person to claim that he was acting under a "colour of right", but this defence does not stand on its own, as in the case of theft. To a charge of arson or other wilful damage to property the defence must show both a "colour of right" and a "legal justification or excuse". Examples of the latter exemption from criminal liability or the even more familiar phrase "without lawful excuse" are numerous, whether the offence in question is contained in the Criminal Code or a federal or provincial statute. Irrespective of its source, the present legal position appears to leave no doubt that a mistake of law does not qualify as a "legal excuse" or "legal justification".

19. Third, we note the reservation expressed recently by one of Canada's foremost authorities on the criminal law. In *R.* v. *Walker and Somma*, Mr. Justice Martin of the Ontario Court of Appeal said:

> I would not wish to be taken to assent to the proposition that if a public official charged with responsibility in the matter led a defendant to believe that the act intended to be done was lawful, the defendant would not have a defence if he were subsequently charged under a regulatory statute with unlawfully doing that act.[15]

In principle, if the mistake of law arises from legal advice which is erroneous or is later held by a court to have been erroneous, there is still no defence. The reason, in part, is that it is undesirable to permit the definition of criminal conduct or of conduct giving rise to other offences to be dependent upon whether members of society can successfully shop around for a favourable legal opinion.[16] It may be assumed that even legal advice given by the Department of

[15] (1980) 51 C.C.C. (2d) 423 at 429.

[16] To the extent that the defence may exist, it is important that the efforts to ascertain the law be in good faith, which means by efforts which are as well designed to accomplish ascertainment as any available: see *Regina* v. *MacLean* (1974) 17 C.C.C. (2d) 84 at 106, per Judge O Hearn (Nova Scotia), quoting *Long* v. *State (Delaware)* (1949) 65 A. 2d 489. See Hall and Seligman, "Mistake of Law and *Mens Rea*" (1941) 8 *U. Chi. L. Rev.* 641 at 652; Arnold, "State-Induced Error of Law, Criminal Liability and *Dunn* v. *The Queen*: A Recent Non-Development in Criminal Law," (1978) 4 *Dal. L.J.* 559 at 579 *et seq.* Reliance on a lawyer's advice was rejected in *R.* v. *Brinkley* (1907) 12 C.C.C. 454 (Ont. C.A.) and *R. ex. rel. Irwin* v. *Dalley* (1957) 118 C.C.C. 116 (Ont. C.A.).

Justice to the R.C.M.P. that a practice is not criminal would not be recognized as the basis for a defence to a criminal charge, although there is no jurisprudence on the point. We think that the courts should be reluctant to permit such an exception. While the obtaining by the R.C.M.P. and the security intelligence agency of advice from the Department of Justice should be encouraged and facilitated, we do not think that such advice, if erroneous, should afford a defence to a charge. At most it should be considered as relevant to mitigation of sentence, and to the treatment of the offender within government. Any other approach would increase the tendency, which we have already observed, to seek an opinion from a higher level of the Department of Justice when the Department of Justice counsel assigned to the R.C.M.P. has given an opinion that the practice is unlawful.

20. Our view, that reliance on an official interpretation of the law ought not to be a defence, is contrary to that of the American Law Institute's *Model Penal Code* which allows a defence if the accused acts in reasonable reliance on

> . . . an official statement of the law, afterward determined to be invalid or erroneous contained in. . . an official interpretation of the public officer or body charged with responsibility for the interpretation, administration or enforcement of the law defining the offense.[17]

This proposed "official interpretation" defence assumes two things:

> . . . that the official is one to whom authority has been delegated to make pronouncements in a field of law, and that the authority can be held accountable by explicitly grounding it in the hands of an identifiable public official or agency. So grounded, the interest of both private citizens and government is served by protecting actions taken in reliance on that interpretative authority.[18]

Even if this defence were recognized by Canadian courts, we doubt that an opinion by some member of the Department of Justice, rather than the Attorney General himself, can properly be regarded as one by a public official who can be "held accountable".

21. A final point that might be argued related to mistake of law is that a policeman who commits an offence may have a defence if he believes that his superiors have obtained lawful authority to conduct the operation. In the Ellsberg break-in case, one of the judges held that because the "foot soldiers" who carried out the break-in were outsiders assisting an agent of the White House, they were entitled to act in objective good faith on the facts known to them:

---

[17] American Model Penal Code, Proposed Official Draft, section 2.04(3)(b)(iv).

[18] *United States* v. *Barker and Martinez* ("Barker II") (1976) 546 F. 2d 940, per Judge Leventhal (dissenting) at 957. This was the second *Barker* case. Barker and Martinez were the "foot soldiers" in the break-in at the office of the psychiatrist of Daniel Ellsberg, who had obtained the Pentagon papers. One of the majority judges, Judge Merhige, held that there was sufficient evidence of reliance on an official interpretation of the law that the defence of reliance on such a defence should have been submitted to the jury. The third member of the court, Judge Wilkey, approached the case without basing his judgment on this point.

> I think it plain that a citizen should have a legal defence to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law.[19]

One commentator has written that the defence so stated "would seem to be a narrow one and inapplicable to a police officer".[20]

22. In addressing this problem it is well to remember what has been said already as to the dangers of considering the defence of mistake of law or mistake of fact in the abstract. Much depends on the definition of the particular offence. If the crime charged involves proof of *mens rea*, a policeman who mistakenly thinks that a warrant is in existence when in fact none exists, may have a defence based on a mistake of fact. The critical question then is whether the factual mistake negates the necessary mental element of the particular crime. Mistake of law presents a more difficult hurdle for the accused to get over. Even if the definition of the offence in question includes the element of "unlawfully" or "without lawful excuse or justification", the overwhelming body of Canadian and English case law denies to the accused a defence that rests on a mistaken belief that he had the necessary lawful authority to act as he did. Thus, an R.C.M.P. officer who acts in the mistaken belief that his superior possessed due lawful authorization to command the doing of certain acts, when in reality no such lawful authority is conferred by the law, is precluded from successfully invoking a mistake of law as his defence. If the principle tentatively expressed in *R.* v. *Walker and Somma* comes to be recognized, it will have to find its justification in some basis other than the defence of mistake.

(c) *Necessity*

23. In criminal law the Supreme Court of Canada has expressed a qualified acceptance of the defence of necessity. In *Morgentaler* v. *The Queen*, Mr. Justice Dickson, speaking for the majority of the Court, said that, if the defence does exist,

> . . . it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible. No system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some higher social value.[21]

For the defence to be applicable, he said, the situation must be one of great urgency and the harm averted must be "out of all proportion to that actually caused by the defendant's conduct".

24. A situation in which the defence might arise is illustrated by an English case, *Johnson* v. *Phillips*, which held that a police constable in an emergency could violate a road traffic regulation without incurring a criminal penalty.

---

[19] *Ibid.*, at 954, per Judge Leventhal.

[20] M.L. Friedland, *National Security: The Legal Dimensions*, Ottawa, Department of Supply and Services, 1979, p. 103.

[21] (1975) 20 C.C.C. (2d) 449, at 497.

The court held that such action is justifiable if it is reasonably necessary for the protection of life or property. However the court emphasized the limits of the decision:

> No general discretion is given to a constable, even in cases where he himself considers that an emergency has arisen, to disobey traffic regulations or to direct other persons to disobey them.[22]

In other words, to use the language of Mr. Justice Dickson, the defence of necessity requires more than that the policeman himself thinks there is an emergency. There must in fact be an emergency, and in addition, the harm caused by violating the law must be less than the harm caused by not doing so.

25. Assuming, then, that the defence of necessity exists in Canadian criminal law, it becomes difficult to conceive of factual situations which have been placed before us in which the first test is satisfied — i.e. that there is an "urgent situation of clear and imminent peril". That test is certainly not satisfied by a perception, even if accurate, that in a vague and general sense Canadian society was faced with an emergency — or a "state of war", as Commissioner Higgitt described the situation confronting the R.C.M.P. in 1971-72. Nor is the second test satisfied. At most it can be said that in criminal investigations and the peace officer's role in the prevention of crime, the defence may stand against charges of breaking and entry and of violation of traffic laws. We refer to this further in Part III, Chapters 2 and 8.

26. Before leaving necessity as a defence, we should note that it may also be a defence if a policeman is sued for damages for a wrongful act. As far as the common law of tort is concerned, the extent to which the defence exists at all is unclear. One textwriter, in discussing necessity as a defence, says:

> The defence, if it exists, enables a defendant to escape liability for the intentional interference with the security of another's person or property on the ground that the acts complained of were necessary to prevent greater damage to the commonwealth or to another or to the defendant himself, or to their or his property... There is some authority that the subject as well as the Crown has a right and a duty at common law to justify a trespass or other tort on the ground of necessity in the defence of the realm, but such a right has been said to be obsolescent.[23]

The textwriters appear to agree that, if the defence exists, it cannot be relied upon unless there is a real and imminent danger.[24] As one writer says, "Only an urgent situation of imminent peril can ever raise the defence, lest necessity become simply a mask for anarchy".[25] This must be true whether the defendant is a private citizen or a policeman. Necessity, described by Milton as "the tyrant's plea", has not been accepted as a ground for action by the state that would otherwise be a tort. Ever since the case of *Entick* v. *Carrington* (see Part III, Chapter 2), it has been accepted that necessity "for the ends of govern-

---

[22] *Johnson* v. *Phillips* [1975] 3 All E.R. 682, at 685, per Mr. Justice Wien.

[23] *Salmond on Torts*, 16th ed. 1973 (ed. Heuston) p. 504.

[24] *Salmond on Torts*, 16th ed. 1973, p. 505; *Winfield and Jolowicz on Tort*, 10th ed. 1975, p. 635.

[25] Fleming, *The Law of Torts*, 5th ed. 1977, p. 94.

ment" — "state necessity" — is not a defence recognized by the common law. However, it should be noted that the question there was not one involving an urgent situation of imminent physical peril to any person or property.

(d) *Duress*

27. Unlike necessity, with respect to which the Canadian Criminal Code makes no express provision, the plea of duress is principally governed by section 17 of the Code which states:

> A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.[26]

When duress is pleaded, it is claimed that the wrong was committed in order to prevent harm to the accused or another person. The basis of the defence is not that the threat of immediate death or serious bodily injury is such as to destroy or neutralize the accused's will, nor indeed that it demonstrates the accused had no *mens rea*. Rather it is an acknowledgment of and a concession to human weakness. The law recognizes that in the face of an overwhelming threat of grave personal injury it cannot expect extraordinary standards of resistance.

28. Until lately, it had been thought that the above quoted section in the Criminal Code contained the all-embracing conditions of which the defence of duress must be judged in a criminal case. This is no longer so, following the decision of the Supreme Court of Canada in *R.* v. *Paquette*[27] which held that the restrictive terms of section 17 do not govern the situation where the accused is charged with aiding and abetting rather than being the principal offender who actually commits the crime in question. In the opinion of the Supreme Court section 17 codifies the law as an excuse for the actual commission of the crime but, by its very terms, it does not go beyond that. Should the accused therefore be faced with a charge of aiding or abetting he can invoke instead the defence of common law duress. After remaining static for several centuries this branch of the criminal law has been the focus of much attention in recent years by the English courts, culminating in the decision of the House of Lords in *Lynch* v. *D.P.P. of Northern Ireland*,[28] that the defence of duress is available even with respect to the crime of murder, at least if the charge is one of aiding and abetting. As for the other ingredients of the defence, e.g., the nature of the threats, there is no indication as yet that the common law principles will be relaxed. It can, however, be said that the whole

---

[26] For a full discussion of this defence, see Mewett and Manning, *Criminal Law*, Toronto, Butterworths, 1978, pp. 245 *et seq.*

[27] [1977] 2 S.C.R. 189.

[28] [1975] 1 All E.R. 913.

tenor of the most recent jurisprudence is towards a relaxation of the previously severe qualifying conditions of this defence.

29. What relevance then does the law of duress have towards the activities of members of the R.C.M.P. or of a security intelligence agency? As in the case of necessity it is difficult for us to imagine how the defence of duress would be applicable to any of the practices or factual situations involving the R.C.M.P. which have come to our attention. At most one could envisage the possibility of its application of an undercover operative who has penetrated a violence-prone group, whose true identity is suspected by the members of the group, and who is threatened with bodily harm if he does not participate in some act of violence. Such participation, it must be recognized, may take several forms ranging from merely facilitating the commission of the crime by others (e.g., driving the members of the violent group to the scene of the crime) to the actual perpetrating of the crime itself (e.g. setting fire to property or inflicting blows upon another). Furthermore, the amount of prior warning that a serious crime is planned by the group and that some degree of participation by the undercover operative is expected may vary according to the circumstances. It would be wrong to conclude that the situations revealed to us are necessarily conclusive as to the possible future eventualities that might befall undercover operatives of the R.C.M.P. or the security intelligence agency.

30. It is clear, both in the common law and section 17 versions of the defence of duress, that a person who, with knowledge of its nature, joins a criminal association which he realizes might bring pressure upon him to commit an offence, should normally not be entitled to avail himself of the defence. Nevertheless, it could be argued that the position of a police undercover operative is essentially different from that of an ordinary person. This argument commended itself to the English Law Commission which in its report to Parliament on the future law of duress stated[29]

> There may also be cases where a person, employed... by the police to infiltrate a ring of drug smugglers or to seek out information about an illegal organization, has to put himself in a situation in which he knows that he may be subjected to duress because of his activities. It would be wrong to deny him the defence in these circumstances, and for that reason we think that the defence should be excluded only where the person has acted without reasonable cause in putting himself in that situation.

31. The dilemma facing the undercover operative as to whether he should escape or not may vary in degrees of intensity, dependent upon the immediacy of the threats and the serious nature of the dangers to the lives of innocent people represented by the violence-prone group which has been infiltrated. Faced with the choice between personally engaging in the criminal activities of the group or dissociating himself from such activities, we think that the undercover operative should withdraw from the group. At the same time we are realistic enough to envisage extraordinary situations arising in the future for which provision must be made in the relevant law of duress. With one significant change we agree with the recommendation of the English Law

[29] *Law. Com.*, No. 83, p. 13.

Commissioners and exclude the availability of the defence where the undercover operative has acted without sufficient and reasonable cause in either (1) putting himself in the situation where threats to his life or person are to be expected or (2) remaining in such a situation. The burden of establishing the defence would remain upon the accused.

B. LACK OF EVIL INTENT

32. It has been contended by counsel for the R.C.M.P. that no criminal offence is committed by a member of the R.C.M.P. unless he has evil intention, or a "vicious will". Counsel for the R.C.M.P. place great stress, in support of this argument, on the following passage from the reasons for the judgment of the Supreme Court of Canada, delivered by Mr. Justice Dickson, in *Regina* v. *Sault Ste. Marie*:

> The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes, there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*. Blackstone made the point over two hundred years ago in words still apt: "to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will"... See *Commentaries on the Laws of England* (1809) Book IV, 15th ed., c. 15, p. 21. I would emphasize at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.[30]

33. The judgment as a whole does not suggest that the Supreme Court of Canada requires proof of a "vicious will" for a conviction in criminal cases.[31] Mr. Justice Dickson quoted Blackstone to make the point that the facts of the *Sault Ste. Marie* case did not concern a "true crime" but rather regulatory offences. At a later point in the judgment he stated the principle which our courts have followed:

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them.

It will be noted that in that statement he makes no mention of evil intent or "vicious will". This is not surprising, for any requirement that "vicious will" be present for a crime to be committed would introduce a fundamental change in Canadian criminal law, and if that were intended we would have expected that the Court's intention to do so would have been more clearly stated.

34. The text writers have stated the accepted law without reference to such a requirement. Indeed, on the contrary, the law has rejected such a requirement. One leading text says:

---

[30] (1978) 40 C.C.C. (2d) 353 at pp. 357-8.

[31] The actual decision in the case was that in regard to crimes of strict liability in which the definition of the offence does not refer to or require a guilty mind, the absence of negligence (or the presence of due diligence in an attempt to avoid the conduct complained of) is a relevant factor when considering liability.

> *Mens rea* refers to the mental element required for many crimes. It must not be read in its literal sense as requiring moral wrong or dishonest intent or conscious guilt. A person who breaks the law with a good motive, or for conscientious reasons, or from religious belief, still commits a crime. So also (in many cases) does a person who breaks the law in justifiable ignorance of its existence, and with no intention of committing even a moral wrong.[32]

Another text book says:

> *Mens rea* is a technical term. It is often loosely translated as 'a guilty mind', but this translation is frequently misleading. A man may have *mens rea*, as it is generally understood today, without any feeling of guilt on his part. He may, indeed, be acting with a perfectly clear conscience, believing his act to be morally, and even legally, right, and yet be held to have *mens rea*.[33]

35. It is true that in scattered cases in the nineteenth and twentieth centuries there have been judicial statements similar to Blackstone's — phrases such as 'an evil mind with regard to that which he is doing', 'a bad mind', or references to acts done not 'merely unguardedly or accidentally, without any evil mind'.[34] As Professor H.L.A. Hart has written:[35]

> Some of these well-known formulations were perhaps careless statements of the quite different principle that *mens rea* is an intention to commit an act that is wrong in the sense of legally forbidden. But the same view has been reasserted in general terms in England by Lord Justice Denning: 'In order that an act should be punishable, it must be morally blameworthy. It must be a sin.'[36] Most English lawyers would however now agree with Sir James Fitzjames Stephen that the expression *mens rea* is unfortunate, though too firmly established to be expelled, just because it misleadingly suggests that, in general, moral culpability is essential to a crime, and they would assent to the criticism expressed by a later judge that the true translation of *mens rea* is 'an intention to do the act which is made penal by statute or by the common law'.[37]

Professor Hart also pointed out that the use of language such as Blackstone's, excluding liability in the absence of fault or 'moral wrong'

> . . . may have blurred the important distinction between the assertion that (1) it is morally permissible to punish only voluntary action and (2) it is

---

[32] Glanville Williams, *Textbook of Criminal Law*, London, Stevens, 1978, at pp. 49-50. See *Proprietory Articles Trade Association* v. *Attorney General for Canada* [1931] A.C. 310 at 324, where Lord Atkin distinguished between morality and the criminal quality of an act, the latter being judged by whether the act is prohibited with legal consequences.

[33] Smith and Hogan, *Criminal Law*, 4th ed., London, Butterworths, 1978, at p. 47.

[34] Lord Esher in *Lee* v. *Dangar* [1892] 2 Q.B. 337.

[35] H.L.A. Hart, *Punishment and Responsibility*, Oxford, Clarendon Press, 1968, at p. 36.

[36] Sir Alfred Denning, *The Changing Law*, London, Stevens, 1953, p. 112.

[37] *Allard* v. *Selfridge* [1925] 1 K.B. at 137, per Mr. Justice Shearman. Hart notes that when quoting this passage in *Criminal Law: The General Part* (2nd ed.), p. 31, Glanville Williams commented that the judge should have added 'or recklessness'.

morally permissible to punish only voluntary commission of a moral wrong.[38]

36. In conclusion, we reject the general contention that the Supreme Court of Canada has made it the law of Canada that the absence of an evil mind is a defence by way of negativing *mens rea*.

C. INTERPRETATION ACT, SECTION 26(2)

37. The R.C.M.P. has advanced as a general defence for the conduct of its members, when they are authorized to do something specific, section 26(2) of the Interpretation Act.[39] This has been put forward particularly in connection with the subject of electronic surveillance. Section 26(2) provides:

> Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

In Part III, Chapter 3 we discussed whether section 26(2) is authority for concluding that when a judge grants an authorization under section 178.13 of the Criminal Code for electronic eavesdropping by microphone, or the Solicitor General issues a warrant for the same purpose under section 16 of the Official Secrets Act, there is an implied power of entry to effect the installation. Our opinion, expressed in that chapter, is that section 26(2) does not provide such authority.

38. Here we need say no more than that section 26(2) cannot, in our opinion, in general be relied upon as a defence where the act is otherwise unlawful. In the absence of *express* words permitting the subsection to be construed as granting not only lawful ancillary powers but also otherwise unlawful ones, we cannot accept a construction of the statute that would countenance such a result. The courts have traditionally presumed that a statute does not abridge common law rights, and that such abridgement can occur only by the use of express words or as a matter of "plain implication".[40] The argument has been advanced on behalf of the R.C.M.P. that the implied powers provided for in section 26(2) may be relied upon as a defence, generally, when methods otherwise unlawful, are used in the course of operations within the scope of the duties of a peace officer and reasonably necessary for their execution.

---

[38] H.L.A. Hart, *Punishment and Responsibility*, Oxford, Clarendon Press, 1968, at p. 40.

[39] R.S.C. 1970 ch. I-23.

[40] See Maxwell, *Interpretation of Statutes*, 12th ed., London, Sweet and Maxwell, 1969, at p. 116; *Manitoba Government Employees Association* v. *Government of Manitoba* [1977] 5 W.W.R. 247 at 258 (Supreme Court of Canada). See also *Attorney General for Canada* v. *Hallett & Carey Ltd.* [1952] A.C. 427 at 450-1 (P.C.); *Board of Commissioners of Public Utilities* v. *Nova Scotia Power Corporation* (1976) 18 N.S.R. (2d) 692 at 709-11 (N.S.C.A.); *Fullerton* v. *North Melbourne Electric Tramway and Lighting Co. Ltd.* (1916) 21 C.L.R. 181; *Quebec Railway, Light, Heat and Power Company* v. *Vaudry* [1920] A.C. 662 at 679-80 (P.C.).

39. Even if section 26(2) were available as a defence, it must be remembered that powers must not be implied unless the powers expressly granted by the statute in question "cannot otherwise be reasonably and effectively exercised" without the powers sought to be added by implication. The statutory provision does not alter the power to imply ancillary powers that the courts had at common law, nor does it extend the right to imply such powers.[41] Moreover, the word "necessary" in section 26(2) is to be distinguished from such words as "beneficial", "desirable" or "convenient" which are not found in the subsection.[42] The notion of necessity, in contrast with the other words just mentioned, is interpreted by the courts as meaning that the absence of the power sought to be implied would defeat either the purpose for which the statute was enacted or the express powers conferred by the statute.[43]

D. CRIMINAL CODE, SECTION 25(1) — "PROTECTION OF PERSONS ACTING UNDER AUTHORITY"

40. The R.C.M.P. has also submitted that section 25(1) of the Criminal Code provides a broad legal justification for conduct which would otherwise be unlawful. Section 25(1) provides:

> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
>
> (b) as a peace officer or public officer,
>
> (c) in aid of a peace officer or public officer, or
>
> (d) by virtue of his office,
>
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

41. We have already discussed this provision when we considered, in Part III, Chapter 3, whether it justifies an implied power of entry to install electronic eavesdropping devices. But of course the section is of broader relevance. Indeed, counsel for the R.C.M.P. has submitted that this section "affords a valid defence to a member of the R.C.M.P., as a peace officer, in the context of a prosecution arising out of any reasonably necessary act committed by the member while acting in execution of a lawfully imposed duty". However, this statement of the scope of section 25(1) does not include all three of the essential ingredients of the defence that may be founded on the section:

---

[41] *Township of Nelson*, v. Stoneham (1957) 7 D.L.R. (2d) 39 at 42-3 (Ont. C.A.).

[42] *H.P. Bukner Ltd.* v. *J. Bellinger S.A.* [1974] Ch. 401 (English C.A.). At p. 423, Lord Denning M.R. said that the word "necessary" is "much stronger than 'desirable' or 'convenient'". See also *In re The Haggert Brothers Manufacturing Company (Limited)* (1893) 20 Ont. A.R. 597 at 602.

[43] *Interprovincial Pipeline Ltd.* v. *National Energy Board* (1977) 17 N.R. 56 (Fed. C.A.).

(a) The peace officer must be acting in his capacity as a peace officer or, to use the more familiar phraseology, acting in the execution of his duties as a peace officer.

(b) The act in question — the act alleged to be unlawful and in breach of the criminal law or civil law — must be some act which the police officer is required or authorized by law to do in the course of the administration or enforcement of the law.

(c) There must be reasonable and probable grounds upon which the police officer claims (i) that his legally authorized actions were justified in the circumstance, and (ii) where appropriate, that the amount of force used was necessary in the circumstances.

It is the second of these requirements that fails to find a place in the formulation by counsel for the R.C.M.P. The importance of this requirement was emphasized by Mr. Justice Dickson in *Eccles* v. *Bourque*,[44] in a passage that we quoted from in Part III, Chapter 3, and with which we agree. Before the statutory protection can be relied upon, the act in question must be one which the policeman is required or authorized by law to do, and it is inaccurate and misleading to say that it is sufficient that the member was acting in execution of a "lawfully imposed duty".[45] This point was clearly stated by Judge Zalev of the County Court of Ontario in *R.* v. *Walker*.[46] In that case the accused was a police officer. He was charged with failing to stop at a stop sign. He had driven one of two police vehicles that had been dispatched to a bank because of a possible robbery. On approaching an intersection his emergency lights were flashing and he slowed to about 10 m.p.h., but he did not stop at the stop sign. His vehicle collided with another car in the intersection. The police officer was convicted at trial, and, on appeal, Judge Zalev upheld the conviction. He held that the defence of necessity did not apply, and he rejected a defence based on section 25(1). He adopted the reasoning of Mr. Justice Dickson in *Eccles* v. *Bourque* and properly posed the central question raised by the facts of the case as follows:

> . . . the question which must be answered in this case. . . is not whether the appellant was required to answer the call to the bank without delay, but whether the appellant was required or authorized by law to drive past a stop sign without stopping.

There being no specific provision in the Ontario Highway Traffic Act which requires or authorizes a police officer to ignore a stop sign, it became necessary to consider whether any common law protection could be invoked so as to bring the provisions of section 25(1) into play. He therefore discussed *Johnson* v. *Phillips*, an English case which we have already referred to.[47] As we understand Judge Zalev's conclusion, it is that while at common law the circumstances may afford a defence of necessity, the same circumstances would not

---

[44] (1974) 19 C.C.C. (2) at pp. 130-31.

[45] Neither of the authorities cited by counsel for the R.C.M.P. (*R.* v. *Redshaw* (1975) 31 C.R.N.S. 225; *R.* v. *Walker* (1979) 48 C.C.C. (2d) 126) provides support for the interpretation of section 25(1) urged by counsel for the R.C.M.P.

[46] (1979) 48 C.C.C. (2d) 126.

[47] [1975] 3 All E.R. 682 (Divisional Court). See footnote 22.

support a defence under section 25(1). We consider that conclusion to be an accurate statement of the law.

42. There are two further submissions made by counsel for the R.C.M.P. in regard to section 25(1) which we feel obliged to comment upon. One is that "section 25 affords a member of the R.C.M.P., as a peace officer, a valid defence to a prosecution in respect of acts that he was ordered to commit by a person who had the jurisdiction, or the colour of jurisdiction, to make such an order". This proposition is cited in Taschereau's 1893 edition of the Criminal Code.[48] However, a reading of what was said there makes it clear that what was envisaged was the kind of situation covered by section 25(2) of the Code (justification for a person required or authorized by law to execute a process or carry out a sentence, or for another person assisting him, even if the process or sentence is defective or made without jurisdiction) — and has nothing to do with section 25(1).

43. The other submission is that "a member of the R.C.M.P., as a peace officer, who acts in the honest belief that he was authorized to do what he did under the circumstances, where that belief was reasonable on the facts of the particular case, is entitled to assert the section 25 defence...". We disagree. The honesty or genuineness of the peace officer's beliefs is irrelevant where, as stated in section 25(1), the governing criterion is whether there are reasonable and probable grounds to support the police officer's claim that his legally authorized acts were justified in the circumstances, and whether there are reasonable and probable grounds for using the force which he used. The test in both instances is objective, not subjective; the issues involved in section 25(1) have nothing to do with the state of mind of the peace officer.

E. IMMUNITIES

44. In this section we shall consider the extent to which members of the R.C.M.P., acting in the course of their duty, are protected by some ground of immunity from successful prosecution for violation of federal statutes (such as the Criminal Code) or provincial statutes that impose penalties (such as the Highway Traffic Acts). There are four possible grounds on which immunity might be argued. Each of them will be discussed in turn. They are as follows:

(a) Crown immunity

(b) Intergovernmental immunity

(c) Exclusive power (interjurisdictional) immunity

(d) Immunity as a result of the paramountcy of the R.C.M.P. Act

Counsel for the R.C.M.P. has suggested that, if individual members of the R.C.M.P. were prosecuted for federal or provincial offences, they might raise a defence based on one or more of the foregoing if their acts in question were "reasonably necessary for the effective performance of their duties". This argument, if valid, would apply to a far broader range of factual situations

[48] As quoted in *Crankshaw's Criminal Code* (8th ed., 1979), at 1-133.

than would support the defence of necessity, which is discussed elsewhere in this Part.

45. Our analysis of this issue must be largely on principle and by reference to cases that do not decide the application or non-application of principle to the R.C.M.P. There is a paucity of reported cases in which members of the R.C.M.P. have been subject to prosecution under federal or provincial laws in regard to their actions carried out in the course of their duties; and no reported cases in which these grounds have been raised as a defence and considered by the court.

46. When we refer to provincial laws, we must be understood to include municipal by-laws, which depend on provincial legislation for their authority and validity. In the case of municipalities within Territories, their status depends on legislation enacted by the Parliament of Canada.

(a) *Crown immunity*

47. It has been submitted to us by counsel for the R.C.M.P. that members of the R.C.M.P. are servants of the Crown and as such enjoy the benefit of the immunity of the Crown itself from prosecution even under federal laws such as the Criminal Code. It was conceded that members of the R.C.M.P., while performing law enforcement functions, might be liable to prosecution under federal criminal law (but not under provincial law because of additional arguments advanced under later headings) because their functions and duties are similar to those of any peace officer or constable, rather than being uniquely Crown functions or duties. In other words their extensive discretionary powers may disentitle them to the status (and immunity) of an agent or servant of the Crown. On the other hand, according to the submission of counsel for the R.C.M.P., because members of the R.C.M.P. performing national security functions are exercising more restricted discretionary powers, they engage in federal Crown activities and may be immune from prosecution in the Courts for reasonably necessary acts committed in the course of their duties. Their accountability, so it is contended, is to the Commissioner of the R.C.M.P. and to the Solicitor General of Canada, not to the courts.

48. It is undoubtedly true that at common law the Crown enjoys an immunity from prosecution for a statutory offence unless the statute creating the offence expressly states that the Crown is to be bound. The common law rule is embraced by both federal and provincial legislation as to the interpretation of statutes. Thus, for example, the federal Interpretation Act provides:

> 16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as therein mentioned or referred to.[49]

[49] The statutory rule does not leave any room for a statute to bind the Crown by necessary implication, as had been possible under the common law formulation of the prerogative's effect: *Her Majesty the Queen in the Right of the Province of Alberta* v. *Canadian Transport Commission* [1978] 1 S.C.R. 61.

Therefore, in order to restrict the Crown, a federal enactment must be very specific in indicating that such an effect is intended.

49. The Supreme Court of Canada has held that the Criminal Code falls short of meeting this requirement: though the code includes the Crown in its definition of "person", a word used by the Code generally to refer to both offenders and victims of criminal conduct, the reference to the Crown is only to the Crown as victim rather than as wrongdoer.[50] Consequently, the Crown cannot be guilty of committing a Criminal Code offence and is, in effect, immune from prosecution for such an offence.

50. The rule of immunity from statute, in its prerogative or provincial statutory form, has been taken to afford immunity to the federal Crown from provincial statutes which do not specifically include the Crown.[51] Consequently the federal Crown enjoys a substantially similar degree of immunity from provincial legislation as it does from federal legislation, such as the Criminal Code, as a matter of construction of the relevant legislation.

51. The benefit of immunity from statute accrues not only to the Crown (in a practical sense — the government) but to servants and agents and others acting on behalf of the Crown, if the Crown would be detrimentally affected by prosecution. Thus in *Canadian Broadcasting Corporation* v. *Attorney General of Ontario* the Canadian Broadcasting Corporation (the C.B.C.), a federal Crown agency, was held to be free of any liability for broadcasting on Sunday contrary to the general prohibitions of the Lord's Day Act (Canada).[52] However, in an even more recent decision involving the C.B.C.,[53] the Ontario Court of Appeal held the C.B.C. liable to prosecution for broadcasting an obscene film contrary to section 159 of the Criminal Code because in so doing it was acting outside the scope of its statutory authority. This was particularly evident because the Regulations under the Broadcasting Act (Canada), to which the C.B.C. is subject, specifically prohibit the broadcast of anything contrary to law or any obscene, indecent or profane language or pictorial presentation.

52. Counsel for the R.C.M.P. argues that R.C.M.P. personnel, when acting in the course of duty, are agents of the federal Crown and therefore enjoy the same immunity as the Crown. It is at this point that the argument based on Crown immunity breaks down, since in our view, even if members of the R.C.M.P. are agents or servants of the Crown, it is only if contravention of the

---

[50] See *Canadian Broadcasting Corporation* v. *Attorney General of Ontario* [1959] S.C.R. 188. It is true that what was being interpreted in this case was the Lord's Day Act, not the Criminal Code. However, the Lord's Day Act incorporates the Code's definition of "person".

[51] See, for example, *R.* v. *Sanford* [1939] 1 D.L.R. 374 (N.S.S.C. in banco). There are numerous cases on this point, which are collected in McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada*, Toronto and Buffalo, University of Toronto Press, 1977, at p. 24, n.3.

[52] *Canadian Broadcasting Corporation* v. *Attorney General of Ontario* [1959] S.C.R. 188.

[53] *R.* v. *C.B.C.* (1980) 16 C.R. (3d) 78 (Ont. C.A.).

law were unavoidable in the course of carrying out their duties that it could be said that they could enjoy the protection of Crown immunity.

53. Let us first ask whether the R.C.M.P. itself is an agent of the Crown. If it is not, then *a fortiori* its members are not agents or servants of the Crown. If it is, however, it does not automatically follow that its members are entitled to rely on Crown immunity.

54. Is the R.C.M.P. itself an agent of the Crown? The general principle upon which courts determine whether an individual or organization is a Crown agent is as follows:

> Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it.[54]

A Crown agency is "a body which is subject at every turn in executing its powers to the control of the Crown".[55] Whether the R.C.M.P. is subject to that degree of control will depend very much upon the meaning of section 5 of the R.C.M.P. Act. In Part X, Chapter 4 we point out how ambiguous that section is. There is no need to repeat here what we there observe; the most we can say is that the ambiguity of the section makes it likely that the section alone cannot be regarded as the foundation for a proposition that members of the R.C.M.P. lack the traditional characteristics of constables. The characteristics that we refer to are those which leave the constables free from direct control in the exercise of their powers of investigation, arrest and initiation of prosecutions.

55. Suffice to say that the R.C.M.P. may not be a Crown agent. If it is not, R.C.M.P. personnel would not be able to claim Crown immunity from either federal or provincial laws. Yet, there is some implied support to be found in the R.C.M.P. Act for the proposition that members of the R.C.M.P. are agents or servants of the Crown. It is true that section 53 of the R.C.M.P. Act and section 37 of the Federal Court Act (Canada) specifically deem members of the Force to be servants of the Crown "for the purpose of determining liability in any action or other proceeding by or against the Crown". But those provisions appear on a strict reading to be referring to civil rather than criminal proceedings. The expression "proceedings by or against the Crown" is particularly apt to describe civil claims made by or initiated against the federal Crown and does not easily fit the situation of a criminal proceeding against a federal Crown servant. The proceedings by and against the Crown with which the Federal Court Act deals are restricted to civil proceedings. It would be logical to read section 53 of the R.C.M.P. Act in the same sense as the comparable section of the Federal Court Act unless there is something in the context of the former Act which clearly dictates another conclusion. The R.C.M.P. Act does not in fact contain any language which suggests that the larger meaning, embracing criminal proceedings, was intended in the deeming provision of that Act.

---

[54] *Westeel-Rosco Ltd.* v. *Board of Governors of Smith Saskatchewan Hospital Centre* (1976) 69 D.L.R. (3d) 334, at 342-3, per Mr. Justice Ritchie. More recently, see *Fidelity Insurance Co.* v. *Workers Compensation Board* (1980) 102 D.L.R. (3d) 255.

[55] Per Mr. Justice Ritchie in the *Westeel-Rosco* case, *Ibid.*, at 343.

56. Moreover, the provisions in the R.C.M.P. Act and the Federal Court Act create a master-servant relationship for two purposes only: liability to the Crown and liability of the Crown. They have no application to situations in which what is involved is the personal liability of the R.C.M.P. member. In conclusion, these sections do not assist in determining the status of a member of the R.C.M.P. in criminal proceedings. It may be, however, that the provisions of the R.C.M.P. Act, considered as a whole, support the conclusion that a member of the Force is a Crown servant for all purposes, including that of determining personal criminal liability.[56]

57. It does not follow that R.C.M.P. members, even if they are agents or servants of the Crown, are entitled to rely on Crown immunity. The immunity which they would be entitled to enjoy would not be absolute. It would have to be established in the particular case that the Crown would be prejudiced in some significant way by making the servant or agent subject to the prohibition contained in the statute. The decision in *R.* v. *Stradiotto*[57] makes this clear. In that case a member of the Canadian Armed Forces, who was driving an army truck in the course of his duties when the truck was involved in a serious traffic accident, was charged with an offence under the provincial Highway Traffic Act. The Ontario Court of Appeal held that he was not immune from prosecution under the provincial Act even though the legislation did not specifically refer to the Crown. The Court pointed out that it is only the Crown itself which is immune from legislation, not its servants and agents; the immunity is applicable to servants and agents only to the extent that Crown rights would be prejudiced if the servants or agents were subject to the legislation. Thus, it was observed in the *Stradiotto* case, army personnel are not required to have provincial drivers' licences in order to drive military vehicles within a province, because such a requirement would interfere with the right of the federal Crown to operate military vehicles in the province.[58] The immunity has been held to apply where, although unlicensed, the servicemen's duties or superior orders have necessitated that they drive government vehicles in the course of their military service.[59] If, on the other hand, it is possible for a servant or agent of the Crown to carry out his or her orders without contravening the provincial law, as was the situation in the *Stradiotto* case, the servant or agent is not immune from the law in question. Since the military driver in *Stradiotto* did not have to drive negligently or unlawfully in order to perform his duty, he was held to be subject to the provincial Highway Traffic Act. Indeed, in other cases servicemen have been held liable for highway traffic violations such as careless or unsafe driving.[60] Liability in that situation does

---

[56] This cannot be stated with conviction, for it requires an inference that the statute by implication deviates from the traditional principle that police officers are independent public officers rather than servants or agents of those who pay their salaries. For the latter principle, see *McCleave* v. *Moncton* (1902) 32 S.C.R. 106.

[57] [1973] 2 O.R. 375.

[58] Citing *R.* v. *Rhodes* [1934] O.R. 44.

[59] See *R.* v. *Henderson* [1930] 2 W.W.R. 595, and *R.* v. *Rhodes* [1934] 1 D.L.R. 251 (Ont. S.C.).

[60] See also *R.* v. *McLeod* [1930] 4 D.L.R. 226 (N.S.S.C. in banco) (serviceman guilty of reckless driving).

not interfere with the right of the Crown to direct the activities of its servant for normal Crown purposes. The R.C.M.P. has received legal advice that the case of *Stradiotto* is authority for the proposition that members of the R.C.M.P. do not break the traffic law if members are doing that which is reasonably necessary for the carrying out of the duties and responsibilities assigned to them by or under federal legislation. We do not think that the case is authority for that view. We consider that the decision in *Stradiotto*, which may support the conclusion that there is immunity when the member is carrying out a specific order and he cannot do so otherwise than by violating the traffic law, does not provide support for a similar conclusion when the member is merely carrying out his duties in a general sense.

58. Applying these principles to the R.C.M.P., we conclude that even if members of the R.C.M.P. are agents or servants of the Crown, they will be bound by provincial or federal laws while carrying out their duties, except to the extent that non-compliance is unavoidable in the sense that they were specifically directed to carry out the very conduct which is in question. In other words, even if his actions are in the course of duty, a member of the R.C.M.P. would be subject to successful prosecution for actions which violated a federal or provincial statute and which he was not specifically directed to carry out. It is at the very least doubtful that the member could successfully establish immunity on the basis that what he did was "reasonably necessary" to the performance of his duties, though not the subject of specific directions.

59. As a general rule, peace officers are subject to the criminal law except to the extent that specific statutory protection is afforded to them. As Mr. Justice Laskin said when he was a member of the Ontario Court of Appeal:

> In principle, the recognition of "public duty" to excuse breach of the criminal law by a policeman would involve a drastic departure from constitutional precepts that do not recognize official immunity, unless statute so prescribes... Legal immunity from prosecution for breaches of the law by the very persons charged with a public duty of enforcement would subvert the public duty...
>
> The Criminal Code presently prescribes justification for policemen and others in a number of respects where they are proceeding to enforce the law, as, for example, by arresting offenders. This is designed as an aid to enforcement, and presumes that the enforcing officers are not themselves participating in the criminal activity that they are seeking to curb. Recognition of "legal lawlessness" is, however, something far different. It does not represent a value that fits into our system of criminal law...[61]

More recently and briefly, in the context of a case concerning the use of police informers, Chief Justice Laskin has said:

> The police, or the *agent provocateur* or the informer or the decoy used by the police do not have immunity if their conduct in the encouragement of a commission of a crime by another is itself criminal.[62]

---

[61] *R.* v. *Ormerod* [1969] 2 O.R. 230 at 244-5 (Ont. C.A.).

[62] *Kirzner* v. *The Queen* [1978] 2 S.C.R. 487 at 491. See also *Attorney General of Quebec and Keable* v. *Attorney General of Canada et al* [1979] 1 S.C.R. 218 at 242, where Mr. Justice Pigeon said that members of the R.C.M.P. "enjoy no immunity from the criminal law".

60. In light of that principle, a criminal court would be unlikely to allow a peace officer, even if he is a servant or agent of the Crown, much latitude to rely on "reasonable necessity" unless a statute permitted it as a defence.

61. There is another point to be made, which seems to preclude the availability of Crown immunity to a member of the R.C.M.P. Section 25 of the Regulations under the R.C.M.P. Act imposes upon every officer and every person in charge of a post the duty and responsibility of ensuring "at all times strict observance of the law..." by all members of the Force. It may be argued, then, that each member of the Force should be taken to assume that orders given to him are to be carried out in accordance with the law.[63] However, if those orders were to direct clearly a breach of the law or could be carried out only by violating the law, then it may be that the superior from whom the orders originated would be liable on the basis that his discretionary authority did not extend to authorizing breaches of the law. If the orders emanated in the first instance from an officer, as defined in section 6 of the R.C.M.P. Act, or a person in charge of a post, then that individual would be in much the same position as the C.B.C. in the second C.B.C. case.[64] He would have exceeded a requirement to ensure compliance with the law contained in regulations governing his behaviour and should, accordingly, be subject to prosecution for his criminal conduct.

62. There is no general rule that peace officers are not subject to criminal liability because of the large degree of discretion entrusted to them. There is authority for the proposition that no superior authority is responsible for the tortious acts of a policeman or other public office holder who is exercising a discretionary power conferred directly upon him.[65] That rule does not remove the personal liability of the policeman or other public officer and is, in any case, a principle that has to do with civil rather than criminal liability.[66] The discretionary freedom which R.C.M.P. members may have in performing certain police or national security functions does not, therefore, detract from their personal responsibility for their conduct.

63. It is sometimes said, however, that a peace officer exercising an independent discretion is not to be considered as anyone's servant when he exercises that discretion.[67] That statement is usually relevant in the context of determining whether the Crown or some public authority is vicariously liable for the conduct of the peace officer, or whether his exercise of discretion as to whether

---

[63] See also section 25(o) of the R.C.M.P. Act which makes it a disciplinary offence for a member of the R.C.M.P. to conduct himself in an immoral manner, which may be taken to include acting in breach of the law. Reference may also be made to section 15(1), which requires every member of the Force to take an oath of office in which he swears that he "will well and truly obey and perform all lawful orders and instructions that I receive".

[64] *R.* v. *C.B.C.* (1980) 16 C.R. (3d) 78 (Ont. C.A.).

[65] See *Schulze* v. *The Queen* (1974) 47 D.L.R. (3d) (F.C.T.D.) and the cases referred to therein.

[66] See P.W. Hogg, *Liability of the Crown, in Australia, New Zealand and the United Kingdom*, Melbourne, Law Book Co., 1971, at pp. 104-8.

[67] *Ibid.*, at p. 212.

to arrest or to prosecute is subject to control. We do not think that the principle is one of general application to all the functions of a peace officer.

64. Even if members of the R.C.M.P. are not servants or agents of the Crown, Crown immunity might be applicable. There are instances in which persons other than Crown servants or agents have received the benefit of immunity, the important question in every case being whether the Crown would be prejudiced by subjecting that person to the burdens of the statute. Therefore, immunity is potentially available even if a peace officer who is a member of the R.C.M.P. does not act as a Crown servant in performing a particular function. The criterion for determining whether the rule of immunity from statute is available remains whether there might be prejudice to the Crown, or interference with Crown business (as it is sometimes put), in subjecting the peace officer to criminal liability.

65. Finally we turn to the suggestion made by counsel for the R.C.M.P. that members of the R.C.M.P. "performing national security functions" may be immune from prosecution for "reasonably necessary acts committed in the course of their duties". We think that this proposition is insupportable. It amounts to a defence of "Act of State" or "State necessity", but that defence is not recognized by our law. In the great case of *Entick* v. *Carrington*, the Chief Justice, Lord Camden, said:

> With respect to the argument of State necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take note of any such distinctions.[68]

As was said by an Australian judge,

> It is not the English view of law that whatever is officially done is law — a view adopted by some jurists on the Continent of Europe — on the contrary, the principle of English law is that what is done officially must be done in accordance with law.[69]

A writer on constitutional law has said:

> The Continental constitution often recognizes a "police power", under which the government may act in a general way for the preservation of the public peace or safety. No such doctrines are recognised by the common law of England. With us a public authority must point, if questioned, to some specific rule of law authorising the act which is called in question.[70]

We believe that Canadian law conforms to the above statements.

66. On several occasions we have seen references in R.C.M.P. files to the general proposition that government officials, who are responsible for national security, must be the sole judges of what national security requires. This is the old doctrine of state necessity, which is obsolete. R.C.M.P. memoranda cite, as

---

[68] (1765) 19 State Tr. 1065.

[69] *Arthur Yates & Co. Pty., Ltd.* v. *The Vegetable Seeds Committee* (1945) 72 C.L.R. 37 at 66, per Sir John Latham, C.J.

[70] R.F.V. Heuston, *Essays in Constitutional Law*, 2nd ed., London, Stevens & Sons, 1964, at p. 34.

modern authority for that view, the following words from a 1977 English case, *R.* v. *Secretary of State for the Home Department, ex parte Hosenball*:[71]

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

However, it is misleading to quote this statement out of context. The case concerned an alien whom the Home Office ordered to be deported in the interests of national security because the Secretary of State had information that the alien had obtained information for publication harmful to the security of the nation, including information prejudicial to the safety of servants of the Crown. The alien claimed that he was entitled to see the report which was made about him by a non-statutory advisory Committee which reported to the Secretary of State before the deportation order was made. He contended that natural justice so entitled him. It was in answer to that contention that the above statement was made by Lord Denning, who then continued:

> Even natural justice itself may suffer a set-back... In the first world war, in *R.* v. *Halliday*,[72] Lord Finlay L.C. said: 'The danger of espionage and of damage by secret agents... had to be guarded against.'... But times of peace hold their dangers too. Spies, subverters and saboteurs may be mingling amongst us, putting on a most innocent exterior...
>
> If they are British subjects, we must deal with them here. If they are foreigners, they can be deported. The rules of natural justice have to be modified in regard to foreigners here who prove themselves unwelcome and ought to be deported.

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

(b) *Intergovernmental immunity*

67. It is probably not within the constitutional powers of the provincial legislatures to impose liability on the Crown in the right of Canada. In the leading case, *Gauthier* v. *The King*, the Supreme Court of Canada held that provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion.[73]

---

[71] [1977] 3 All E.R. 452 at 457.

[72] [1917] A.C. 260 at 270.

[73] (1918) 56 S.C.R. 176 at 194. It may be difficult to reconcile this decision with the later decision of the Privy Council in *Dominion Building Corporation* v. *The King* [1933] A.C. 533. See D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 *Can. Bar Rev.*, 40 at 51. However, it has been argued that the two cases can be reconciled: McNairn, *Government and Intergovernmental Immunity in Australia and Canada*, p. 98. Moreover, there have been several *dicta* in the Supreme Court of Canada supporting the *Gauthier* decision: *The King* v. *Richardson* [1948] S.C.R. 57, *The Queen* v. *Breton* (1968) 65 D.L.R. (2d) 76 (S.C.R.).

It may be that this immunity is more extensive than the immunity called "Crown immunity", which, as has already been noted, is also available to the federal Crown when faced with the imposition against it of a provincial statute. The immunity now being considered is one rooted not in the Crown prerogative applicable to both unitary and federal states, but in the constitutional order peculiar to a federal state. This "intergovernmental immunity" may go as far as to protect the federal Crown from provincial statutes even when they, by their express terms, are said to apply to the federal Crown. In that case, of course, "Crown immunity" would not be available because of the specific reference to the federal Crown in the provincial legislation. While "intergovernmental immunity" *may* have this broader effect, it is not *clear* that it does.[74]

68. If "intergovernmental immunity" does have this larger role, a member of the R.C.M.P. would be able to assert immunity, in a proper case, from prosecution for a provincial offence even though the provincial statute creating that offence expressly purported to bind the federal Crown.

69. If a member of the Force should choose to rely on Crown immunity or intergovernmental immunity, it is likely that he would have to show some particular prejudice to federal Crown interests if the provincial statute in question were to apply to him. The threshold test of interference with Crown functions relates logically to both forms of immunity.

(c) *"Exclusive power" or "interjurisdictional" immunity: the general immunity of federally controlled operations from provincial laws*

70. Operations and enterprises which fall under the legislative jurisdiction of the Parliament of Canada must generally abide by the laws of the provinces within which they carry on operations.[75]

71. On the other hand, enterprises which are under federal jurisdiction with respect to their primary operational aspects are immune from provincial statutes which go to the heart of their operations. Such provincial legislation does not apply because the jurisdiction of the Parliament of Canada is exclusive in relation to all those matters which are "an integral part of its primary competence" over such enterprises.[76]

72. When it is held that provincial legislation does not apply to an area which is within the constitutional authority of the federal Parliament, there is sometimes said to be an "exclusive power immunity" or an "interjurisdictional immunity" from the provincial legislation.

---

[74] See McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada*, at pp. 33-40. McNairn's analysis is commented on by Gibson, (1978) 4 *U.T.L.J.* 445.

[75] e.g. *C.P.R.* v. *Notre-Dame de Bonsecours* [1899] A.C. 367.

[76] *Construction Montcalm Inc.* v. *Minimum Wage Commission* [1979] 1 S.C.R. 754, at 768-9 (Mr. Justice Beetz).

73. The federal Parliament has the constitutional authority to establish and provide for the management of the R.C.M.P.[77] The primary basis for this authority would appear to be the peace, order and good government clause of section 91 of the British North America Act.

74. The key question, therefore, is whether control of the conduct of R.C.M.P. officers, acting in the course of their duties, should be taken to be "an integral part of primary federal competence" over the Force. The answer to that question will depend upon the circumstances. The problems dealt with by certain provincial laws would in many situations not form "an integral part" of federal jurisdiction over the R.C.M.P. For example, a municipal by-law relating to garbage disposal and imposing a penalty for violation of its requirements would certainly apply to R.C.M.P. members responsible for operating a staff cafeteria. On the other hand, a member of the R.C.M.P. will have an immunity from provincial legislation based on this ground, if the application of that legislation to him would amount to an encroachment on Parliament's jurisdiction to deal with the management and supervision of the Force. For example, a provincial statute which provides rules of conduct for all peace officers and sets up disciplinary procedures to ensure compliance with them would not be applicable, on this basis, to peace officers in the service of the R.C.M.P.[78] Another example would be a municipal anti-noise by-law, which would not apply to the use of cruiser-car sirens by R.C.M.P. officers in the course of their duties, even if the by-law did not have a built-in exception for emergency vehicles.

75. Generally speaking, the application of provincial penal statutes to members of the R.C.M.P. would not appear to be inconsistent with maintaining the integrity of Parliament's power to provide for the management and administration of the force.[79] Disciplinary measures internal to the R.C.M.P. could still be taken with respect to conduct that constituted a provincial offence, subject to any applicable rules designed to prevent double jeopardy. To the extent that Parliament might see provincial laws as an embarrassment to the R.C.M.P. and their invocation against a member of the Force to be intolerable, it could effectively oust the provincial laws by providing specifically that they were not to apply to members of the R.C.M.P.[80] (The doctrine of paramountcy, discussed in (d) below, would apply.) There is in fact no federal legislation which currently does that. In the absence of such legislation, members of the

---

[77] See *Attorney General of the Province of Quebec and Keable* v. *Attorney General of Canada et al.*, [1979] 1 S.C.R. 218, and *The Attorney General of Alberta and the Law Enforcement Appeal Board* v. *Constable K.W. Putnam and Constable M.G.C. Cramer and the Attorney General of Canada*, [1980] 22 A.R. 510, [1980] 5 W.W.R. 83 [affirmed on appeal to the Supreme Court of Canada on May 28, 1981].

[78] See *The Attorney General of Alberta and the Law Enforcement Appeal Board v. Constable K.W. Putnam and Constable M.G.C. Cramer and the Attorney General of Canada*, [1980] 22 A.R. 510, [1980] 5 W.W.R. 83. This was a decision of the Court of Queen's Bench of Alberta. The Alberta Court of Appeal upheld the decision, but apparently on the ground of paramountcy, rather than on the ground of exclusive power immunity.

[79] But see *R.* v. *Anderson* [1930] 2 W.W.R. 595.

[80] See *R.* v. *Sanford* [1939] 1 D.L.R. 374 (N.S.S.C. in banco).

R.C.M.P. would, except to the extent of the availability of the immunities already discussed, be subject to provincial statutes creating offences, just as the operator of a bus service which constitutes an interprovincial undertaking, who is subject to exclusive federal jurisdiction for regulatory purposes, is nonetheless bound to comply with provincial highway traffic laws.[81]

76. We note that counsel for the R.C.M.P. has urged that this form of immunity has a much broader scope than we think is likely acceptable in law. He suggests that the immunity goes so far as to provide immunity from provincial legislation in relation to matters which, on their federal aspect, are simply "necessarily incidental" to the regulation of the R.C.M.P. In our opinion, the immunity that covers matters that are an "integral part" of the federal competence is not available when the matters are simply "necessarily incidental" to the regulation of the R.C.M.P. It is only with respect to matters which are "integral" to R.C.M.P. operations that provincial laws may be contravened with impunity. The words 'integral' and 'incidental' are virtual opposites.

77. Even if this "exclusive power" immunity might otherwise exist in favour of members of the R.C.M.P. (which we do not agree is so as a universal proposition), such an immunity may be eliminated by Parliament.[82] Presumably it may also be eliminated by delegated legislation enacted by authority of an Act of Parliament. If so, it becomes relevant to refer to section 25 of the R.C.M.P. Regulations:

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

This may be strong evidence of an intention on the part of the Governor in Council that not only federal but provincial laws be observed. There is nothing in the surrounding language of the Regulations or in the R.C.M.P. Act itself to indicate an intention that officers should comply with only some of the laws in the provinces where they function. In the absence of such indication, it is probable that the expression "strict observance of the law" should be given its normal full meaning. If so, such "exclusive jurisdiction" or "interjurisdictional" immunity as might otherwise be available to R.C.M.P. personnel has been eliminated.

78. Counsel for the R.C.M.P. also seems to suggest that "interjurisdictional" immunity would apply even to R.C.M.P. members performing the functions of a provincial police force in those provinces that have contracted with the

---

[81] See *Attorney General of Ontario* v. *Winner* [1954] A.C. 541, at 579 (P.C.). See also *R.* v. *Pearsall* (1977) 80 D.L.R. (3rd) 285 (Sask. C.A.), in which a provincial prohibition against using an aircraft for the purpose of hunting game was held to be valid notwithstanding that aeronautics is subject to federal jurisdiction under the peace, order and good government power of section 91 of the B.N.A. Act.

[82] See D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 *Can. Bar Rev.* 40, at 46 ff.

federal government for such services. Such arrangements are entered into by the Solicitor General under section 20(1) of the R.C.M.P. Act, which reads in part as follows:

> 20. (1) The Minister may, with the approval of the Governor in Council, enter into arrangements with the government of any province or, with the approval of the lieutenant governor in council of any province, with any municipality in the province, for the use or employment of the force, or any portion thereof, in aiding the administration of justice in the province or municipality, and in carrying into effect the laws in force therein;

We find it very difficult to see how the activities of the R.C.M.P., which are carried out pursuant to a contract relating to internal provincial policing, could be said to be "integral" to Parliament's "primary" jurisdiction over the R.C.M.P. Section 20 limits the purpose of all such contractual arrangements to "aiding the administration of justice in the province or municipality, and- . . . carrying into effect the laws in force therein". "Administration of Justice in the Province" is, of course, a specific head of provincial jurisdiction under section 92 of the B.N.A. Act. Since interjurisdictional immunity exists for the purpose of protecting the exercise of *federal* constitutional jurisdiction from provincial restrictions, it would make no sense to apply the immunity to individuals who are performing functions within the constitutional competence of the provinces.

79. Our conclusion in this regard is in no way affected by the provisions of the current form of agreement with eight of the provinces, which provides that the "internal management" of the Force while engaged in provincial policing shall remain under federal control. In our opinion the words "internal management" cannot be construed to include liability of members of the Force for breaches of provincial law. Moreover, paragraph 4 of the agreement makes it abundantly clear that the Force is generally responsible to the provincial attorneys general with respect to provincial policing:

> 4. (1) The Commanding Officer of the Provincial Police Services shall for the purposes of this agreement act under the direction of the Attorney-General in the administration of justice in the Province.
>
> (2) Nothing in this agreement shall be interpreted as limiting in any way the powers of the Attorney-General, relating to the administration of justice within the province.

In any event, whatever the provisions of the agreement, we think that such an agreement cannot alter the duty owed in law by a member of the R.C.M.P. in regard to conduct that is an offence under the provincial statute. For all these reasons, therefore, we conclude that whatever limited interjurisdictional immunity *may* be available to members of the R.C.M.P. (and we think there is no such immunity generally available except, for example, in regard to disciplinary powers), it does not extend to members performing functions under federal-provincial contracts.

(d) *Immunity as a result of the paramountcy of federal legislation*

80. It is a commonplace of Canadian constitutional law that if an otherwise valid provincial statutory provision and a competent federal statutory provision

cover the same ground and the application of each to a particular set of facts gives rise to a conflict, the federal enactment will be paramount.[83] The provincial provision will be displaced, at least in its application to that fact situation.

81. It is undeniable that the Parliament of Canada has the constitutional jurisdiction to make laws about the R.C.M.P.[84] So, according to counsel for the R.C.M.P., if the R.C.M.P. Act conflicts with provincial law, the paramountcy of the R.C.M.P. Act might be a basis for a claim of immunity from the provincial law by R.C.M.P. members. Counsel for the R.C.M.P. argues that a conflict, and therefore federal paramountcy, arises from the fact that "the area of discipline, management and control of members of the R.C.M.P. performing reasonably necessary acts in the course of duty is fully occupied by" Part II of the R.C.M.P. Act and the R.C.M.P. Regulations. The flaw in this argument is that Part II and the Regulations involve only such matters as insubordination, immorality and ineptitude, and do not include *illegal* acts. In other words, the disciplinary offences under the Act are by no means co-extensive with the offences generally provided by provincial laws. The disciplinary offences are, in many ways, much more extensive, reaching immoral conduct generally, and not just specifically proscribed acts. Far from being "fully occupied", the field of trial and punishment of R.C.M.P. personnel for breaches of the law — federal or provincial — is left entirely untouched by the R.C.M.P. Act. Indeed, in two respects the Act and the Regulations may be said to have an effect which is the opposite of "occupying the field". First, as far as civil liability is concerned, section 37(3) of the R.C.M.P. Act acknowledges that provincial laws will continue to operate with respect to R.C.M.P. personnel. It reads:

> Nothing in subsection (2) prejudices any right or remedy that may exist apart from this section against any person, including the Crown, for any injury to the person or damage to or loss of property in respect of which a member is under this section ordered to make payment of damages or restitution...

Second, section 25 of the Regulations, which has already been quoted, expressly requires every officer and every person in charge of a post "to ensure that there is at all times strict observance of the law". Apart from such specific points, the Canadian courts have adopted a very strict or narrow test of conflict for this purpose, with the result that there is considerable room for the concurrent operation of federal and provincial legislation.[85]

82. For all these reasons our conclusion is that there is nothing in the R.C.M.P. Act or Regulations which suggests that there was an intention to displace any provincial laws in their application to members of the Force. It

---

[83] See, for example, *Attorney General of Ontario* v. *Attorney General of Canada* [1896] A.C. 348 at 366 (P.C.).

[84] *Attorney General of Quebec and Keable* v. *Attorney General of Canada et al.* (1978) 90 D.L.R. (3d) 161 at 180, (S.C.C.) per Mr. Justice Pigeon.

[85] See P.W. Hogg, *Constitutional Law of Canada*, Toronto, Carswell, 1977, at pp. 101-110.

follows that there is no basis for a claim of immunity based upon the paramountcy doctrine.

F. AUTHORIZATION BY MINISTERS

83. If a member of the R.C.M.P. were charged with an offence, arising out of his selfless conduct intended to protect the security of Canada or the public good and not to advance his own interests, would he be entitled to raise as a defence that the Solicitor General or the federal Cabinet had, expressly or by implication, authorized illegal activities in general or the specific act or activity which gave rise to the charge?

84. Senior members of the R.C.M.P. have a habit of referring to Ministers as their "political masters". Does this mean that such authority might be regarded as a "superior order" (to the extent that there is a defence of superior orders)? The answer must be no in the case of the Cabinet, which is not in law a "superior" to members of the R.C.M.P. unless it speaks by regulation. In the case of the Solicitor General, he might be regarded as a "superior" in view of his power of direction found in section 5 of the R.C.M.P. Act.

85. However, the kind of hypothetical situation which we are considering here is the effect in law not of an "order" but an "authority", that is, some sort of express or implied permission or licence to do that which is unlawful. Does the law recognize that such a licence can relieve a member of the R.C.M.P. from liability for a statutory offence or a civil wrong such as trespass? The answer is no. To allow such a defence would violate a fundamental constitutional principle, established in the Bill of Rights in 1689 and the cases interpreting its prohibition of the prerogative of dispensing and suspending laws.

> In the Bill of Rights it was declared
>
> 1. That the pretended power of suspending of laws, by regal authority, without consent of parliament, is illegal.
>
> 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.[86]

As far as the dispensing power was concerned, the foregoing spoke only of the past. However, the dispensing power was prohibited for the future as well:

> ...[N]o dispensation by non obstante of or to any statute or any part thereof, shall be allowed, but... the same shall be held void and of no effect, except a dispensation be allowed of in such statute...

Thus the present rule of constitutional law is stated as follows by Halsbury's *Laws of England*:

> The Crown may not suspend laws or the execution of laws without the consent of Parliament; nor may it dispense with laws, or the execution of

[86] 1 Will. & Mar. sess. 2 c.2. *Halsbury's Statutes of England*, 3 ed., vol. 6, p. 489. Also found in C. Stephenson and F.G. Marcham, *Sources of English Constitutional History* (Rev. ed.), New York, Harper and Row, 1972.

laws; and dispensations by *non obstante* of or to any statute or part thereof are void and of no effect except in such cases as are allowed by statute.[87]

The suspending and dispensing powers which had been used before the Glorious Revolution of 1688 were explained in a Canadian case, in which Chief Justice Freedman of Manitoba said:

> The distinction between these two ancient powers may be briefly noted. By virtue of the suspending power the Crown suspended the operation of a duly enacted law of Parliament, and such suspension could be for an indefinite period...
>
> Under the dispensing power the Crown purported to declare that a law enacted by Parliament would be inapplicable to certain named individuals or groups. By virtue of a dispensation in their favour the law would not apply to them, but it would continue to apply to all others. It has been said that the dispensing power "was derived from the Papal practice of issuing bulls *non obstante statuto*, 'any law to the contrary notwithstanding'" . . . [88]

Chief Justice Freedman then quoted the English historian, F.W. Maitland, who in discussing the Bill of Rights, had asserted: "This is the last of the dispensing power". Chief Justice Freedman then continued:

> "This is the last of the dispensing power." Maitland could never have thought that in the year 1968, nearly three centuries after the *Bill of Rights*, a certain departmental official of Manitoba, acting in fact or in law under the authority of his Minister, would purport to grant a dispensation in favour of a certain group, exempting them from obedience to a particular law to which all others continued to remain subject.

Chief Justice Freedman then added:

> The other point is that nothing here stated is intended to curtail or affect the matter of prosecutorial discretion. Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney-General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. And the Attorney-General may in his discretion stay proceedings on any pending charge, a right that is given statutory recognition in s.508 [am. 1972, c. 13, s.43(1)] and s.732.1 [enacted idem, s.62] of the Criminal Code. But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. Today the dispensing power may be exercised in favour of Indians. Tomorrow it may be exercised in favour of Protestants, and the next day in favour of Jews.

[87] 4 ed., vol. 8, para. 912.

[88] *Regina* v. *Catagas* (1978) 81 D.L.R. (3d) 396 at 397-8 (Man. C.A.) per Chief Justice Freedman. See also *R.* v. *London County Council* [1931] 2 K.B. 215 at 228; *London Borough of Redbridge* v. *Jacques* [1971] 1 All E.R. 260.

> Our laws cannot be so treated. The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.

86. While the law precludes reliance on executive suspension or dispensation as a defence, the circumstances as a whole, including any such purported suspension or dispensation, may be invoked in mitigation of sentence. No generalization is possible as to the effect such a licence might have on the question of sentence.

CHAPTER 2

EXTENUATING CIRCUMSTANCES

1. In the foregoing chapter we discussed whether there are legal defences open to members of the R.C.M.P. if they were charged with offences or sued arising from their having been engaged in the kinds of investigative practices and other procedures we discussed in Part III, Chapters 2 to 10. Our conclusion was that in most cases the defences raised would likely fail as a matter of law.

2. That does not, however, dispose of the matter fully. Although all the issues discussed in Chapter 1 may not be the basis of defences in law to charges or suits, the same circumstances might properly be factors to be taken into account — not as a matter of right but of grace — when the decision is being taken whether or not to prosecute, what the appropriate sentence is, and whether a pardon should be granted. When these decisions are being made, at least two additional considerations may be applicable to members in the lower ranks of the police force. These are first, that a member's actions were motivated by noble objectives — enforcing the law or preserving national security — and second, that he received ambiguous policy instructions from senior management as to whether or not it was appropriate at times to commit an unlawful act or to refuse to obey an unlawful order. We cannot imagine any member of a lower rank successfully raising either of these considerations as a legal defence. Yet he might ask that these matters be taken into account when discretion is being exercised in making the three kinds of decisions referred to. We examine each of these considerations below.

The pursuit of law enforcement or national security objectives

3. A member of the R.C.M.P. might argue, in seeking a favourable exercise of prosecutorial discretion, or in mitigation of sentence or in applying for a pardon, or in seeking at least public sympathy, that what he had done was in pursuit of law enforcement or national security objectives as he understood them to be defined and approved by the senior management of the Security Service or the R.C.M.P., or by the "political masters". Thus, it would be argued, he was motivated by noble purposes and not self-interest. This is a question with which we shall deal in a subsequent Report when we consider specific factual situations. All we wish to say here is that, while mercy and compassion are among the important considerations to be taken into account in assessing such an argument, it is also important not to encourage a belief by members of a police force or a security intelligence agency that if they break the law they will be protected by "the system", even if not by the law. We note that this justification of noble purpose — justification which in this context

may affect the treatment which might be afforded the member consequent upon a breach of the law — is distinct from the defence based on lack of "evil intent". We examined and rejected this defence in Chapter 1 of this Part. Nevertheless, common to both the 'defence' and the 'extenuating circumstances' arguments is the motivation of the member. The point at which and purpose for which each of these arguments is advanced often become blurred, thus leading to considerable confusion.

Ambiguous policies adopted by senior management

4. It is also important that members of the police force or security intelligence agency who are at the level of senior management should not think that members should consider it as a duty to obey policies adopted (formally or informally) by senior management, that tolerate violations of the law. On the other hand, members are entitled to expect senior management to give them clear instructions as to what conduct is permissible and within the law, and what conduct is unacceptable and unlawful. Senior management has a duty to ascertain what the law is in order that the law may be obeyed by the members. An opinion of the Judicial Committee of the Privy Council has stated that

> It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.[1]

Moreover,

> ... matters of practice and policy of the Government and of any department thereof are not to be permitted to override the performance of the duty [quoted above].[2]

5. It will not always be possible or desirable for the instructions to be applied mechanically. Some doctrines of the law that give a defence to a criminal charge or a civil suit must be stated in broad terms, such as the doctrine of necessity, which we discussed in Chapter 1 of this Part. No answers can be provided in advance as to how to react lawfully in the case of emergencies such as are contemplated by that defence: no one can expect senior management to do more than state guidelines that are in accordance with the law.

6. However, more can be expected in the direction of operations that do not involve emergencies. Instructions can be more precise. The member engaged in an operation is entitled to expect direction based upon carefully conceived policies that comply with the law.

7. Members are entitled to receive more assistance than Commissioner Higgitt thought sufficient in 1970. In June 1970, some members of the Security Service, in a training class, questioned their position if criminal or civil action were to be brought against them. Their concern referred to carrying out what were described, in a memorandum (Ex. M-1, Tab 2) summarizing the

---

[1] *Eastern Trust Co.* v. *McKenzie, Mann & Co.* [1915] A.C. 750, 22 D.L.R. 410 (Privy Council).

[2] *Glazer* v. *Union Contractors Ltd.* (1960) 25 D.L.R. (2d) 653.

discussion, as "certain tasks performed by S.I.B. [Security and Intelligence Directorate] or C.I.B. personnel" that required "that the law be transgressed, whether it be Federal, Provincial or Municipal law, in order that the purpose of the undertaking may be fulfilled". The memorandum observed that "The particular task will have been sanctioned in many cases by a number of officers who will at least be aware of the means required to achieve the end product, and who will have given their tacit or express approval".

8. The members of the class wanted to know to what extent the Force would back its members in these circumstances, whether their families would be cared for in the event of imprisonment and where members stood in terms of future employment. The Legal Branch suggested that members be told that if there were express approval of a particular operation by a superior, or a superior were aware of "the means required to achieve the end results" and had given implied approval by communicating the fact of his knowledge to the member, an attempt should be made to persuade the Attorney General to stay any criminal proceedings; if conviction should result, the Commissioner should retain the member in the Force; the Force should pay any fine; and, in the event of imprisonment, the member's employment should be continued. The Legal Branch also suggested that if a member acted independently without authority, and if he were convicted the Commissioner could, both morally and legally, discharge the member as he was acting outside the scope of his employment. In both situations the Legal Branch also suggested when counsel should be provided, but that need not be summarized here (Ex. M-1, Tab 3).

9. The Deputy Commissioner (Criminal Operations), J.R. Carrière, expressed approval of these views, which he felt could not be published in policy instructions but could be made available to Commanding Officers and C.I.B. officers so that they could advise members. He also felt that these views could be imparted to members attending certain training courses and seminars. In addition, the Director General, Security and Intelligence, Mr. Starnes, agreed with the views expressed by the Legal Branch and made similar suggestions as to how they might be transmitted to members engaged in Security and Intelligence work.

10. A three-page policy memorandum was then prepared for Commissioner Higgitt's approval. This memorandum, in addition to incorporating the points noted above, contained the following paragraph which is ambiguous and may even contradict itself:

> It must also be borne in mind, of course, that where a member is directed to perform a duty which may require him to contravene the law for any purpose or where the means required to achieve a specific end can reasonably be foreseen as illegal, a member is within his rights to refuse to do any unlawful act. Such a refusal may be given with *impunity*. Though no disciplinary action would be taken, *a transfer may be indicated in such a situation* (Ex. M-1, Tab 7).
>
> (The emphasis is ours.)

11. Commissioner Higgitt refused to sign this policy memorandum. Instead he decided, and noted on the memorandum that

> Under no circumstances should anything of this nature be circulated in written or memo form. The reasons ought to be obvious. I do not believe this is the problem it is being made out to be. Members know or *ought* to that whatever misadventure happens to them the Force will stand by them so long as there is *some* justification for doing so.
>
> (Ex. M-1, Tab 7.)

In view of this decision, the Deputy Commissioner (Administration) instructed the Director of Organization and Personnel to put the communications concerning this matter away "in secret envelope on policy file", and that the contents were "to be relayed to S. & I. and C.I.B. classes orally when convene [sic] at H.Q. Ottawa". The draft policy memorandum was conveyed to an officer for the information of lecturers and to Mr. Starnes.

12. In his testimony concerning this policy matter, Mr. Higgitt made several noteworthy points. First, he confirmed the validity of the problem which gave rise to efforts within the R.C.M.P. to develop the policy memorandum referred to above:

> The problem at the moment was members of the Force... getting themselves into difficult situations as a result of quite straight forward, honest carrying out of their duties, getting themselves into difficulties, it could be with transgressions of a law or it could be with a number of other things; it was a problem that was inherent in not only the Security Service, in the law enforcement generally, that occasionally placed members in difficult circumstances. (Vol. 88, p. 14452; see also Vol. 85, pp. 13965-6 and Vol. 87, pp. 14330-1.)

13. Second, it is not clear from his testimony what Mr. Higgitt believed the R.C.M.P. policy to be for dealing with this problem. At several points, Mr. Higgitt stated that the draft policy memorandum was, in effect, Force policy:

> Q. So, the text of the draft letter did remain the policy as it is explained there, as it is expressed there?
>
> A. Right, in essence it was the policy. (Vol. 85, p. 13948; see also Vol. 84, p. 13751.)

Nonetheless, at other points, he testified that the draft memorandum did not represent Force policy. Rather, he said that his handwritten note quoted above was the extent of Force policy (Vol. 87, pp. 14282, 14289, 14303). Notwithstanding this lack of clarity about what precisely was Force policy, Mr. Higgitt testified that this policy had been in effect for over 30 years and that his handwritten note was not intended to change the policy in any way. Rather, it was "restating the obvious" (Vol. 85, p. 13992 and Vol. 86, p. 14190). Furthermore, he gave three reasons why the policy on this matter should not have been written down and circulated among R.C.M.P. members:

(a) the policy was well known to members (Vol. 84, p. 13751 and Vol. 86, pp. 14190-1);

(b) the problem addressed by the policy was not as significant as it was being made out to be and publication of the policy might have the effect of

". . . giving some degree of freedom which, certainly, I did not wish to give in that way to members at large to engage in this sort of thing" (Vol. 84, pp. 13751-2); and

(c) Mr. Higgitt believed that there was ". . . really no answer that one can put in written form to the problem involved here. . . you could not begin to describe the various things that could happen. You can't describe, except in a very general way, what the Commissioner's response would be to those things" (Vol. 87, pp. 14282-3). Notwithstanding these reasons for not writing down the policy, Mr. Higgitt believed that the policy should have been communicated orally to those members of the Force likely to be affected (Vol. 85, p. 13940).

14. Third, contrary to the draft policy memorandum, Mr. Higgitt testified that the Force would not necessarily stand behind the member who obeyed an unlawful order given by a superior:

> Q. Would I be correct then that in a situation, say, where a senior N.C.O. instructed a constable to do something that involved a transgression of the law, that under your policy, that the constable would be protected by the policy, but the N.C.O. would not be?
>
> A. That is a question that could only be answered given the circumstances. Protection wasn't necessarily always involved. (Vol. 85, pp. 13992-3.)

On the other hand, Mr. Higgitt stated that if a member disobeyed an unlawful order, he might well be transferred, although in Mr. Higgitt's view, such a transfer would not be "a disciplinary matter" (Vol. 85, pp. 13959-64).

15. Members of a police force or a security intelligence agency at the operational level are entitled to receive guidance as to the law so that they may obey the law, not disregard it. Because the members of any agency of the State must abide by and obey the law, they are entitled to receive advice that is as precise as possible so that they may remain within the law. While support for members who are charged with offences is acceptable, the rationale of the support must not be expressed in such a way as to suggest that express or tacit approval by a superior will relieve members in all circumstances of the obligation to obey the law. Based on our review of this episode, we conclude that a member of the R.C.M.P. during this period could argue with considerable justification that he did not receive the advice and guidance he was entitled to. Rather, it would be surprising if he did not find Force policy on this matter vague, confusing and at times contradictory. Moreover, he would have grounds for concluding that (a) there were times when the Force would expect him to disobey the law, and (b) he might be punished if he refused to obey an unlawful order.

16. In conclusion, while the blame to be attached to "foot soldiers" for breaking the law cannot be absolved by the failure of management to provide clear and proper instructions, the consequences which flow from such law breaking may be affected by that failure. It is a factor that, depending on all the circumstances, may properly be taken into account in the exercise of prosecutorial discretion, the determination of the appropriate sentence, or the decision whether to grant a pardon.

PART V

A PLAN FOR THE FUTURE: ROLE, FUNCTIONS AND METHODS OF A SECURITY INTELLIGENCE AGENCY

INTRODUCTION

CHAPTER 1: Fundamental Principles

CHAPTER 2: A Security Intelligence Plan for the Future: A Summary

CHAPTER 3: The Scope of Security Intelligence

CHAPTER 4: Information Collection Methods

CHAPTER 5: Analysis, Reporting, and Advising Functions

CHAPTER 6: Executive Powers and Preventive Activities

CHAPTER 7: International Dimensions

CHAPTER 8: Relationships with other Departments, Provincial and Municipal Authorities

INTRODUCTION

1. We now turn from the past to address the future. In Parts V to IX we present an outline for the future of security intelligence work in Canada and make recommendations for statutory and administrative reform. These reforms encompass: the functions of the security intelligence agency; the investigative and other techniques which it should be permitted and enabled by law to employ; the structure of the agency; its relationship with its Minister and the federal government generally; its relationship with Parliament; its relationship with provincial governments and the agencies of foreign countries; the means by which it should be held accountable to ensure effectiveness and to prevent abuses of its powers either by the agency itself or by the federal government; and, changes in existing laws relating to national security.

2. We stress that the recommendations contained in these Parts are put forward as a set of interlocking proposals, of countervailing forces. To accept the recommendation as to the kinds of activities about which the agency should be empowered to collect intelligence, without implementing the recommendations as to scrutiny and control by the Minister, Parliament, and the independent review body would be dangerous. To accept the recommendations about relationships between the agency and the agencies of foreign countries without the same régime of scrutiny or oversight would be dangerous. To accept the recommendations as to the qualities of the men and women who should carry out the agency's tasks without accepting our conviction that those qualities cannot be achieved if the agency remains within the R.C.M.P. would be an exercise in futility. To accept our recommendations as to the ultimate responsibility of the federal government in matters of security intelligence without adopting our views as to the role of the provinces would bedevil the effectiveness of the agency. To expect the agency to carry out the mandate which is imposed upon it by statute without giving it the statutory powers of intelligence collection that are necessary for its effectiveness would be to invite disaster in the face of crisis. To grant the agency powers of intelligence collection which are not possessed by the ordinary citizen without imposing the recommended system of ministerial approval, judicial authorization and *ex post facto* scrutiny by the independent review body and Parliamentary Committee would open the way to unacceptable levels of intrusion into the private lives of our people and perhaps a repetition of the institutional acceptance of disregard of the law.

CHAPTER 1

FUNDAMENTAL PRINCIPLES

1. In Part II of this Report we stated that we have been guided by the fundamental precept that Canada must have effective security within a democratic framework. We must return to that theme here, for it provides the bedrock of principle on which our recommendations for a new security system are based. The changes in structures, procedures and laws that we will recommend should be judged in terms of how well they serve this basic objective. Although in Part II we have already set out our understanding of the requirements of security and the requirements of democracy, we must return to them and relate them more specifically to the role of the Security Service.

2. When we speak of the need for security we have in mind the need for protection against the clandestine activities of agents of foreign powers in Canada and the activities of individuals or groups which threaten the fundamental rights, structures and processes of our democratic system. We believe that it is a responsibility of government in Canada to protect Canadians against these kinds of activities.

3. The protection needed goes beyond apprehending and punishing those who are in the process of committing a crime. There are many contexts, other than law enforcement, in which government needs accurate advance intelligence about persons or groups who may threaten the security of Canada. Foreign powers should not be able to establish networks of espionage and secret interference in this country. If security against attempts to establish such networks is not provided, Canadians' enjoyment of self-government on their own territory is in jeopardy, as is the trust of our allies. Similarly, we think Canadians are unwilling to risk the danger to the exercise of their democratic rights and liberties that would result if the responsible government agencies remained ignorant of the plans and preparations of terrorist or subversive organizations until they surfaced in the form of outright criminal acts. In the next chapter we shall expand on this theme, as it is essential to understanding the need for a security intelligence agency.

4. Thus, the effectiveness of the R.C.M.P. in enabling government to identify and prevent activities threatening the security of Canada is one standard by which we must assess the policies, procedures and laws governing it in the discharge of its responsibility.

5. Effectiveness must not be the only standard for judging security arrangements. As we stressed in the first chapter of Part II, it is essential that our security system also meet the requirements of democracy. This means that because Canada is a democratic country it must tolerate security risks which a

non-democratic state would not. A totalitarian state need put no limit on the extent to which it spies on its own citizens to ensure its survival. In such a country all dissident opinion is suspect, the enjoyment of privacy is not a protected social value, foreign visitors are not free to travel on their own, secrecy rather than openness is characteristic of government decision-making, and the subjection of government officials to the sanctions of the law is not a hallowed feature of the political tradition. In such countries security arrangements need be judged only in terms of their effectiveness. But in Canada the overriding objective of our security arrangements is the preservation of our democratic system. It follows that our security system must be assessed in terms of both its effectiveness and its conformity with the requirements of democracy.

6. In Part II we identified three essential requirements of democracy: responsible government, the rule of law, and freedom of legitimate political dissent. These, we would emphasize, are *requirements* of democracy. As requirements they are not to be compromised, whittled down, or balanced off to make effective security possible.

7. Responsible government must mean that responsible Ministers can know about all the practices and policies of security agencies and about any of their operations which raise policy or legal issues. The security system must be an open book to responsible Ministers and to the Prime Minister. No pages in that book should be sealed because security officials think they contain information too sensitive for Ministers' or Prime Ministers' eyes or ears. Responsible Ministers cannot be expected to know everything that a security agency does, but they *can* and *must* be expected to know the policies governing the operations of the security agency and to establish procedures for ensuring that operations raising difficult policy issues are brought to their attention.

8. Nor is the rule of law a principle that should be compromised for the sake of national security. Government agencies, including a security service, should not pick and choose which laws they will obey. We do not accept the idea that there are some 'minor', 'regulatory', laws which security agencies should be free to ignore when they stand in the way of security investigations. There may well be a need to change the laws so that exemptions are provided for members of a security agency or police force, but it is not for security agencies, or police forces, or even for the Ministers responsible for these agencies, to decide which laws apply to them and which do not. Under the rule of law in our system of government, the legislators, federal and provincial, determine general rules of law, and disputes about the application of the laws to particular cases are decided ultimately by the judges and juries.

9. We should make it clear that when we insist on the rule of law as an absolute principle we have in mind the absolute prohibition of institutionalized unlawfulness. We realize that in all organizations, public and private, there will be members who from time to time break the law. That will happen in the best managed police forces and security agencies. When it does, the rule of law requires that such incidents be reported to the prosecuting authorities and be subject to the regular procedures for the administration of justice. What is

completely intolerable is to permit police and security forces, as a matter of institutionalized practice, to condone certain legal violations by their members as a necessary means of carrying out the responsibilities of their organizations.

10. If governments and police forces do not strictly apply the rule of law to themselves it will become increasingly difficult for them to persuade private organizations and individuals in our society to respect the law. It is essential that those whose function it is to uphold the law should adhere to it themselves. In the words of Mr. Justice Brandeis of the United States Supreme Court:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine the Court should resolutely set its face.[1]

11. The third requirement — democratic dissent — is perhaps the most difficult to maintain because its observance requires such careful judgment. Still, we believe that the distinction can be made between, on the one hand, those who wish to overthrow our democratic system or use violence or threats of violence to violate our democratic procedures, and on the other hand, those who seek radical change in our social, economic or political arrangements within our democratic system. The difficulty of making this distinction in particular cases is not a reason for abandoning it. On the contrary, the importance to democracy of drawing the line correctly between legitimate dissent and subversion calls for sophisticated judgment and political understanding on the part of those who carry out security operations. It also requires sensitive direction by responsible Ministers and independent review of security operations to ensure that the line is properly drawn and maintained.

12. In addition to the essential features of democracy which we have described there are other liberal democratic values which must be balanced against the requirements of security. One such value is individual privacy. In a liberal society the extent to which the state pries into the private life of the individual, secretly intercepts his private communications or enters without his consent onto his private premises, should be kept to a minimum. Individual privacy may not be an absolute value in our society but it is one facet of the enjoyment of freedom and we are sure that Canadians greatly value it and would qualify it only for very pressing, countervailing reasons. Thus, when we turn to consider the investigative techniques which should be available to a security intelligence agency our concern will go beyond maintaining the rule of

---

[1] *Olmstead* v. *United States*, (1928) 277 U.S. 438.

law. It is fundamental that all investigative techniques not lawfully available to the ordinary citizen be provided for by law. However, in considering whether to recommend any changes in the law to provide additional investigative powers for security or police purposes, the need for more effective security or law enforcement must be balanced against the cost of making additional inroads on individual privacy. Indeed we must consider whether the reduction of privacy inherent in existing police and security service powers is justified in terms of the contribution such powers make to security and effective law enforcement.

13. Another liberal value which must be balanced against the requirements of security consists of certain norms of procedural justice. One of these norms requires that when an individual is threatened with penalties by the state, he should know the case against him and has a chance to refute it. But in security screening cases, for instance, there may well be situations where to disclose to the individual the entire case against him would do grave damage to continuing security investigations and imperil the lives of those who have provided security information. Total adherence to the norms of due process in such cases would make it difficult to maintain a feasible security screening system. Similarly, in situations of grave national emergency it may be necessary to extend the period during which persons may be detained without being brought before a judge or magistrate beyond that which we normally deem compatible with our ideal of due process. Here again a careful balancing of security needs and democratic values is required.

14. In judging the extent to which security arrangements should be permitted to encroach on individual privacy or deviate from the requirements of due process, our principle should be to minimize the extent of encroachment or deviation. If these democratic values are as highly prized by Canadians as we believe, they should be departed from only when there is a strong case for holding that it is essential to do so in order to protect the security of Canada. Such values cannot be inviolable: effective protection against genuine threats to the security of Canada will require secret and intrusive methods of investigation and other departures from democratic values. But the guiding principle should be that these reductions in the enjoyment of liberal democratic values and procedures should be held to the minimum required for the safeguarding of the democratic system itself.

15. One further element of Canada's constitutional system, which must be recognized by Canada's security system, is its federal character. Given the national and international character of threats to the security of Canada, it makes good practical sense for the federal government to play the lead role in obtaining advance information about these threats and in ensuring that this information is reported to governments and police forces having the executive responsibility for dealing with such threats. It makes equally good sense for the provincial and municipal authorities to play the lead role in taking police and prosecutorial measures against threats of political violence at the local level. We think the practical requirements of sound security demand effective cooperation among federal, provincial and municipal authorities in determining the division of labour between them in national security matters.

16. Above all, national security must be a field of intergovernmental cooperation: it must not be permitted to become a field of federal-provincial competition. The security of Canadians would be damaged by rival investigative forces spending as much effort watching one another as watching those who threaten Canadian democracy. National security must be recognized as embracing interests that transcend those of either level of government. The measures adopted to protect the security of Canada must recognize that principle.

17. The principles we have set out above are the standards by which we hope our recommendations will be judged. The security system we recommend constitutes a structural edifice of law, institutional arrangements and administrative practice. In our view, the merit of that edifice should be judged in terms of how well it reconciles the requirements of security with the requirements of democracy within the Canadian federal system of government.

CHAPTER 2

A SECURITY INTELLIGENCE PLAN FOR THE FUTURE: A SUMMARY

A. REASONS FOR HAVING A SPECIAL FEDERAL AGENCY FOR SECURITY INTELLIGENCE

1. In considering the policies, procedures and laws which should govern the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, we are concerned first and foremost with the R.C.M.P. Security Service. It is the Security Service which now fulfills the function of Canada's security intelligence agency. Thus our recommendations for Canada's security arrangements will focus on the future of the Security Service. We will be concerned with its intelligence collection role and powers, its role in providing advice to government, especially with respect to security screening and in crisis situations; its relationship with police forces, other federal departments and provincial and municipal authorities, and with foreign agencies; its personnel, internal management and organizational structure; its direction and control by Ministers, and the review of its activities by Parliament and independent bodies.

2. Before we deal with these various features of the security plan for the future, a preliminary question must be faced. Does Canada need an agency at the federal level with the specialized task of a security intelligence agency? Or could the various tasks involved in collecting, analyzing and reporting information about threats to the security of Canada be left to other existing government departments and agencies and to regular police work at the federal, provincial and municipal levels? This is clearly an essential question, for if there were no need for the federal government to maintain an agency which specializes in security intelligence functions, then our leading recommendation in this part of our Report would be to abolish the R.C.M.P. Security Service and not replace it with any distinct organization devoted to security intelligence responsibilities.

3. The question as to whether there is a need for a federal security intelligence organization is also fundamental in terms of public accountability. We believe that we have reached a point in Canadian history when a security service, if it is to serve Canada effectively, must have a clear public mandate. Whatever the merit in the past of keeping the existence and responsibilities of such an organization secret, that practice has had its day in Canada. If there is

to be a security service, especially one with intrusive investigatory powers, both the government and the public must have a clear understanding of the need for it.

4. The question of the need for a national security intelligence organization has two aspects: first, is there a need for intelligence pertaining to national security? Second, is there a need in Canada for a specialized agency at the federal level to provide that security intelligence?

5. Our answer to the first part of the question, as we indicated in Part II, is in the affirmative: Canada does need security intelligence. But this answer means very little unless we explain what we mean by security intelligence. Security intelligence is essentially advance warning and advice about activities which threaten the internal security of Canada. In our First Report we put forward the view that the term 'security of Canada' (or 'national security') involves at least two concepts: first, the need to preserve the territory of our country from attack; second, the need to protect our democratic process of government from violent subversion. In Part II of this Report we referred in general terms to the activities which we regard as constituting the principal threats to the security of Canada. Such activities fall into three general categories: foreign intelligence activities, terrorism, and domestic subversion. With respect to each of these categories we think it important to indicate in more detail the types of activity about which governments and police forces in Canada should have advance intelligence.

Nature of the threats

6. First, as to foreign intelligence activities, it is evident that all of the major powers and a number of other powers have foreign intelligence agencies with mandates to operate in a clandestine or deceptive manner in foreign countries. As we reported in the historical overview at the beginning of this Report, there is ample evidence that members of many of these agencies have been active in Canada. The intelligence agencies of Communist countries remain the most significant threat of this kind in Canada today. There is every indication that these agencies will continue their efforts in Canada in the foreseeable future. But there are many other countries whose secret intelligence activities pose a threat to Canadian democracy and sovereignty, now and in the future. Several Middle Eastern countries, for example, have developed aggressive foreign intelligence agencies and we have reviewed evidence of their activities in Canada. Furthermore, it would be naïve to believe that our sister democracies and military allies would never in the future attempt to pursue their economic or political interests in Canada through their well-funded and highly professional secret intelligence agencies. In a world of increasingly scarce energy resources and tough economic competition it is essential that Canada have a capacity to detect the efforts of any country to advance its interests in Canada by clandestine means.

7. In many instances the objectives of foreign 'intelligence' agencies embrace much more than collecting intelligence. They include a wide range of efforts to promote their own country's interests in Canada by means that go well beyond

acceptable lobbying and diplomatic representation. Such activities have taken several forms. An example is trying to manipulate the political leadership of an ethnic community in Canada by threatening reprisals against relatives in the country of origin. Another is compromising a politician or government official so that under threat of blackmail he acts as an agent of influence for a foreign country. Yet another is cultivating a friendship within our scientific community which leads by imperceptible steps from obtaining open scientific information to obtaining information that could be used to damage Canada's competitive position in international trade. The protection of our citizens, the trust of our allies and, above all, our capacity for self-government, require that we make an effort in Canada to ensure that the government is well-informed about the operations in Canada of all foreign intelligence agencies. Canada's sovereignty as a nation would, we believe, be seriously undermined if the secret intelligence agencies of the world had reason to believe that they had, as it were, a free ride in Canada and could operate here without any fear of detection.

8. Information about foreign intelligence activities is needed in a number of contexts. There is, of course, the law enforcement context, in which information about a foreign agent's preparations to commit espionage or sabotage or actual acts of espionage or sabotage may be used by law enforcement agencies for prosecutorial purposes. But if Canada's security is effectively protected, situations of this kind should be exceptional. The aim should be to have advance intelligence which will enable the government to take preventive measures. It should be borne in mind that foreign intelligence agents very often operate under cover of diplomatic status and because of such status are normally not prosecuted. Those responsible for Canada's international relations need timely and well-informed advice about the secret intelligence proclivities of foreign diplomats, preferably before they are granted diplomatic visas to enter Canada and certainly after they are granted such visas. Numerous other examples of the need for information about foreign intelligence activities can be cited. It is sometimes necessary to warn Canadians travelling abroad about recruitment techniques employed by foreign intelligence agencies, to advise Canadian businessmen about the interest of foreign intelligence agencies in acquiring Canadian technology for their country, and to inform departments of government about the technological capacity of foreign intelligence agencies to intercept communications and gain access to protected information. All of these contexts are well outside regular law enforcement responsibilities.

9. The second category of activity about which security intelligence is needed concerns those political acts which, while not amounting to full-scale rebellion or revolution, involve the use or threat of violence to influence the political process. The modern term for activity of this kind is terrorism. Although terrorism is by no means a new phenomenon, it has assumed dimensions which pose a serious threat to Canada's internal security. To begin with, there has been a significant increase in the international dimension of terrorism. Modern means of communication and transportation have shrunk the world, politically speaking. For example, a group whose terrorist activity is directed at changing political conditions in the Middle East or Latin America may secure financial backing from an African, European or Caribbean country and stage a terrorist

act at an international event hosted by Canada. Mass media have increased the impact which a very small group of fanatics, through a symbolic act of violence, can hope to make on public opinion and government decision-making. The leverage which terrorists can exert increases with the availability of means of mass destruction, including nuclear and bacteriological devices. Although we do not know whether any terrorist group today has the capability of making a nuclear bomb, we do know that the increase in nuclear facilities and traffic in fissionable material will increase the opportunities for this drastic form of political blackmail in the future.

10. We should stress that it is the political form of terrorism with which security intelligence is primarily concerned. Threats or acts of violence by persons with no political motive, while of great concern to those responsible for the security of life and property in Canadian communities, do not threaten to subvert Canada's democratic process of government or infringe on its national sovereignty. But threats of violence designed to force a municipal, provincial or federal government to change its policies are a serious violation of the Canadian system of democratic government. Similarly, politically motivated attacks on representatives of foreign countries visiting Canada or on the embassies or consulates of foreign countries in Canada reduce Canada's capacity to participate responsibly in the community of nations.

11. Acts of political terrorism, when there is reason to believe they are about to occur or after they occur, are properly the concern of law enforcement agencies. But governments and police forces in Canada should have advance intelligence. Immigration authorities, for example, should have information about international terrorists to be able to identify them when they apply for entry to Canada. When international events such as the Habitat Conference, the Olympic Games or the Commonwealth Games are staged in Canada it is essential to have up-to-date assessments of terrorist techniques and possible sources of attack. In crisis situations such as hijackings of aircraft or kidnappings, intelligence is needed on the character and methods of terrorists to guide those who are dealing with the situation. Furthermore, Canada, as a signatory to several international conventions concerning international cooperation in combatting terrorism (most recently the Bonn convention of 1978), is obliged to contribute to the international pool of intelligence about terrorists.

12. The third category of activity about which Canada should have security intelligence is domestic subversion. This term must be very carefully defined. If it is used loosely so as to embrace the legitimate political dissent which is the life blood of a vibrant liberal democracy, the gathering and dissemination of security intelligence will impair rather than secure Canadian democracy.

13. The key element in the subversive activity which is a *proper* subject of security intelligence activity is the attempt to undermine or attack through violence or unlawful means, the basic values, processes, and structures of democratic government in Canada. Using legal means to advocate radical change in social practices or economic relationships, or in the Canadian Constitution, must not be considered a subversive activity. Strong dissent from the *status quo* is not a category of activity about which security intelligence

should be collected; nor is the planning and carrying out of political demonstrations and processions which, although they may involve violations of local by-laws and confrontations with law enforcement officials, are not aimed at destroying fundamental elements of Canadian democracy. However, a group's activities are subversive if it aims at preventing other Canadians from enjoying such democratic rights as the right to express publicly and disseminate political opinion or the right to assemble peacefully for political purposes, or if its activities are directed towards destroying the process of democratic elections, the functioning of parliamentary institutions, adjudication by independent courts of law, or the peaceful negotiation of constitutional differences. Advance intelligence about such activities should be available to governments and to police forces.

14. Fortunately, in Canadian history political organizations on the extreme left or the extreme right have not posed a significant threat to Canadian democracy. In recent years, there has been a splintering and factionalization of groups committed to various versions of Marxism and Leninism. Most of these groups are small and appear to have no viable programmes for carrying out their anti-democratic objectives. While such groups may obtain a good deal of publicity for their totalitarian philosophies, they have not succeeded in attracting the allegiance of significant numbers of Canadians. On the extreme right, there has been an even more substantial decline in the significance of Nazi- or Fascist-type groups since pre-World War II days. Their activity in Canada today consists mostly of racist propaganda and local vandalism — activities which can, for the most part, be effectively dealt with by local police.

15. Although anti-democratic groups on the extreme right and left do not at present pose a significant threat to Canadian democracy, there is a need to keep track of their strength and of their public espousal of anti-democratic political programmes. It is also essential to detect attempts by foreign powers to use such organizations for foreign intelligence purposes. Canadians should not forget the evidence reported by the Taschereau-Kellock Royal Commission in 1946 as to the way in which the Soviet Union recruited Canadian espionage agents through the Labour Progressive Party. Security intelligence about members of organizations committed to anti-democratic ideologies is also needed in the security clearance context. Immigration and citizenship authorities, as well as government departments filling positions involving access to classified information, require advice about persons who belong to such organizations — especially those whose membership is covert.

16. For purposes of analysis we have separated the kinds of activities about which security intelligence is necessary into three distinct categories. In fact there may be considerable overlap amongst these categories. A foreign intelligence agency, for instance, has been known to provide support for terrorist groups within Canada, and Canadian political organizations committed to anti-democratic ideologies have been supportive of foreign espionage activity and acts of political violence in Canada. The common element in these three categories is that each undermines Canada's capacity for democratic self-government. That is why Canada, and indeed any prudent state in today's world, needs advance security intelligence.

Alternatives to a security intelligence agency

17. We now turn to the second part of our basic question: given that Canada needs security intelligence, is there a need at the federal level for a security intelligence agency which specializes in providing security intelligence? This question is best answered by considering the principal alternatives.

18. One alternative is to leave it to those government departments which need advice on security threats to gather the intelligence about such threats themselves. Federal and provincial immigration authorities might collect intelligence about the possible threat to Canada's internal security of applicants for immigration visas, the Department of External Affairs would be responsible for keeping track of the activities of foreign intelligence agents in Canada, the Canadian Armed Forces would collect what intelligence they need about internal threats to defence bases, government departments filling Public Service positions requiring access by the employee to secret information would secure their own information about the applicant's membership in subversive political organizations, and so on. We think this alternative would be highly impractical. It would entail the proliferation of a number of investigative agencies, each of which would have to develop the expertise required to detect the often very secretive and professional tactics of foreign intelligence agencies or to penetrate the tight security maintained by terrorist cells. This proliferation of security intelligence agencies would also have the effect of depriving Canada of a central agency for carrying out international liaison, to which foreign intelligence agencies might entrust intelligence pertaining to the internal security of Canada. Besides reducing effectiveness in intelligence gathering, this alternative would increase problems of accountability and control of intrusive intelligence collection activities.

19. The other alternative which is more frequently urged is to blend security intelligence responsibilities into the regular work of national, provincial and municipal police forces. In discussing this alternative we should make it clear that we are not considering here whether a security intelligence agency should take the form of a special division of a police force. We now have a security intelligence agency at the federal level organized as a special division of our national police force — namely the R.C.M.P. Security Service. Later we shall have much to say about whether this organizational structure should be maintained or whether the Security Service should be separated from the R.C.M.P. Here we are concerned with the more elementary and radical possibility of doing without a security intelligence agency altogether, and relying on regular police activity to provide at least the raw information upon which security intelligence is based.

20. We think it would be a serious mistake to adopt this alternative in Canada. Such an approach completely ignores fundamental differences between most police work and security intelligence responsibilities. These differences have led over the years to an increasing specialization of personnel and organizational distinctiveness of the part of the R.C.M.P. devoted to security intelligence work. The main product of security intelligence work takes the form of advice to both government and regular police forces. The ingredients of

this advice are twofold: first, the raw information obtained through investigations, and second, an analysis of the information based on an assessment of its significance in both a national and international context. The basic stages of the intelligence cycle — the selection of targets, the collection of information, its analysis and the writing of intelligence reports — require a *combination* of specialized investigative and intellectual skills that are not found in regular police forces.

21. The combination of investigative and analytical skills is an essential feature of a security intelligence agency. It would, we believe, be a serious mistake to assign the investigative and analytical roles to two different agencies. Analysis is required in the investigative process if the subjects of investigations are to be selected intelligently and the behaviour of what is observed is to be intelligently reported. In addition to the analytical and research capacity of the security intelligence agency, there is a need for government to have an analytical capacity independent of the agency to receive its reports, to integrate these reports with information obtained from other departments and to ensure that the legitimate intelligence needs of government departments are being met. But such a second level analytical bureau cannot be a substitute for research and analytical strength in the security intelligence agency itself.

22. Also, we must stress the extent to which security intelligence work must be directed by political judgment. The political judgment must be sensitive not only to the nature of security threats but also to Canada's international relations and to the civil liberties of Canadians. For instance, decisions which concern the investigation of foreign diplomats in Canada, or assessments of security risks associated with political refugees, or the choice of countries with which it is appropriate to trade intelligence, must all take Canadian foreign policies into consideration. Those involved in these decisions must have close and effective working relationships with the Department of External Affairs and the Canadian Employment and Immigration Commission — relationships which would be much more difficult to maintain if this work were distributed amongst Canadian police forces. In the area of domestic subversion, we have already stressed the need to confine security intelligence collection to a very carefully defined category of political behaviour which constitutes a genuine threat to the democratic process in Canada. The protection of civil liberties requires that the collection of intelligence in this area, particularly when intrusive techniques are involved, be subject to a thorough system of controls and independent review. The effectiveness of the system of controls and review (which we will be recommending later in this part of our Report) would be very much reduced if this function were carried out by a number of police forces.

23. Another characteristic of security intelligence work which makes it inappropriate for regular police forces is the long-term nature of many security threats. Espionage networks and terrorist support systems, for instance, may develop slowly over a long period of time, during which there is no evidence of a probable crime. It is unlikely that regular police forces in Canada, local or national, would deploy the resources required to keep such developments under surveillance for extended periods of time. We think the security of Canada

would be ill-served if there were no surveillance of these developments until a crime were about to occur or had occurred, since it would then be too easy for foreign intelligence agencies and terrorist organizations to establish a firm footing in Canada.

24. Finally, while we are convinced that national security is not an exclusively federal responsibility, we are equally convinced that there is a need for a strong security intelligence agency at the federal level of government in Canada. Certainly the provinces and their police forces have an important role to play in protecting what we have defined as the security of Canada. Provinces are concerned about securing the democratic processes of municipal and provincial government. They have a vital stake in the protection of installations such as nuclear power stations and a responsibility for protecting visiting representatives of foreign countries. When activities threatening the security of Canada reach the point of actual crime, for instance when terrorist acts occur, provincial and municipal police forces have the leading role to play in responding to the crime. In these and many other areas of security concern there is a very great need for effective provincial participation in protecting national security. But provincial contributions to Canada's internal security, however essential, cannot remove the need for an effective security intelligence agency at the federal level.

25. It is difficult to think of a serious threat to the security of Canada that does not have both national and international dimensions. This is certainly true of politically motivated terrorist organizations whose agents or supporters have been active in Canada and of organizations committed to the use of violence to change our system of government. Clandestine activities of foreign intelligence agencies are directed by foreign powers against Canada as a nation. The organization with the prime responsibility for collecting intelligence about such activities must operate across Canada on a national basis and have access to international sources of information.

26. It is important to stress the need for, and problems associated with, obtaining information about security threats from foreign sources. Many of the activities which threaten Canada's internal security have their origin in foreign countries. Canada cannot afford to be cut off from international information about threats to its security. Such information is not easily obtained. Canada requires a national security intelligence agency which is sufficiently respected internationally to obtain from the intelligence agencies of foreign countries such security intelligence pertinent to Canadian interests as may be in their possession. Without the ready co-operation of such agencies and their willingness to be forthcoming with such intelligence, the ability to protect Canada's internal security would be hobbled. Because of the sensitivity of such intelligence, foreign agencies would be unwilling to pass it to a proliferation of Canadian agencies. It is also essential that Canada's security intelligence agency be sufficiently accountable to government to ensure that the arrangements it enters into to obtain information from foreign intelligence agencies are in accord with Canada's international policies, and adequately protect the rights and interests of Canadian citizens.

27. Thus, we conclude, for all of the reasons advanced above, that it is necessary to maintain a security intelligence agency at the federal level of government in Canada. A national security intelligence agency must be a central element in Canada's security plan for the future.

B. ESSENTIAL CHARACTERISTICS OF A SECURITY INTELLIGENCE SYSTEM

28. Before we embark on a detailed discussion of each part of our proposed security plan for the future, we will provide a brief overview of the entire plan. The elements of the plan interlock and the merits of each cannot be assessed in isolation. For instance, whether or not to assign certain tasks to a security intelligence agency depends in part on the qualities of its personnel, just as the decision to give the agency certain investigative powers depends on the controls over the use of such powers. In developing our proposals we have tried to provide for a coherent system of laws, policies and procedures in which the merit of each part can best be judged by its contribution to the whole. Thus, we think it useful to set out at the beginning a brief survey of our proposed system.

29. Our conception of the functions of a Canadian security intelligence organization follows logically from our analysis of the need for a security intelligence agency at the federal level in Canada. Its basic functions should be to obtain information about threats to the security of Canada, assess and analyze that information and report intelligence about the threats to appropriate government and police authorities. More specifically, the threats about which it should collect and report intelligence are those which arise from the clandestine activities of foreign intelligence agencies in Canada, from international and domestic terrorist groups, and from organizations whose objective it is to destroy Canadian democracy. The primary functions of the security intelligence agency recommended are the collection and reporting of intelligence. The agency's purpose is to provide those with executive responsibilities — police forces or government departments — with advance intelligence about threats to security, rather than to enforce security measures by executive actions of its own.

30. The intelligence collected by the security intelligence agency must combine information obtained from relatively open sources with information that can be obtained only by covert and undercover techniques. It should be able to make good use of the best sources of public information available on the international and national contexts of security threats. It should not see itself as an investigative agency which attaches significance only to information obtained through secret means. But because the most serious immediate threats to Canada's security, especially those stemming from foreign intelligence and terrorist activities, are carried on in a highly secretive fashion, the security intelligence agency must be able to use, under proper controls, techniques that will enable it to obtain information about secret activities. These techniques should include surreptitious physical surveillance, secret informants, various forms of aural and visual surveillance, the interception of mail, the surreptitious search of private premises and access to confidential

personal information in government files. All of the security intelligence agency's methods of intelligence collection must be provided for by law and subject to effective mechanisms of control and review.

31. The security intelligence agency should rely primarily on liaison with foreign intelligence agencies for obtaining information about secret activities abroad which threaten Canada's security. For this purpose the agency should be permitted to enter into intelligence-sharing arrangements with foreign agencies. But these arrangements must be subject to thorough government scrutiny to ensure that they are consistent with Canada's international policies and democratic values. On rare occasions, in order to obtain information important for Canada's security, it may be necessary for the security intelligence agency to collect information outside Canada through its own sources. Where this is essential, the agency should be permitted to function abroad subject to a system of government control which takes into account both Canada's security needs and international policies. There is a need for strict limitations and controls on these activities. We discuss them in Chapter 7 of this Part.

32. To fulfill its role effectively Canada's security intelligence agency will need strength in both investigation and analysis. The judgment and skill involved in deciding which subjects should be investigated, and in assessing the significance of information and reporting it in a useful way to government, require personnel recruited from diverse backgrounds. The training and continuing education of the personnel of the security organization must emphasize an understanding of, and loyalty to, the democratic system which it is the aim of the security organization to secure, as well as a firm grounding in the craft of counter-intelligence and the skills of analysis. The personnel of the security intelligence agency must not be split into first-class and second-class citizens: analytical strength must be possessed by its intelligence officers at all levels of the organization, and must not be a specialty of a small, isolated group.

33. Retaining and melding such personnel into an effective team will require management policies which emphasize collegiality rather than hierarchy, and are designed to establish an internal environment in which respect for legality and propriety is a governing norm. Well-informed but independent legal advice must be easily accessible. The organization must have an effective system of internal security and the capacity to detect and prevent penetration attempts by hostile agencies. To obtain the desirable diversity of outlook and the range of talent, senior management should include persons with experience in various sectors of private and public life. Given the organization's responsibility to provide timely and useful advice to government, its members must be well-equipped to deal with government, and adept at interpreting its intelligence needs. At the same time they must have a sufficient understanding of our constitutional system to be able to recognize and resist improper government direction.

34. An organization with the personnel, management and relationship to government which we think are desirable for an excellent security intelligence service is not, in our view, likely to be developed and maintained within the

R.C.M.P. Therefore we shall be recommending that the security intelligence agency be separated from the R.C.M.P. but kept under the direction of the same Minister, the Solicitor General of Canada, who is responsible for the R.C.M.P. The Canadian security intelligence agency, like similar organizations in Australia, New Zealand and the United Kingdom, should not have police powers. When it determines that its investigations will lead to arrests and prosecutions it should turn to the police and prosecutorial authorities for action. Thus effective liaison must be maintained between the security intelligence agency and police forces, both national and local, to facilitate cooperation and avoid duplication.

35. The agency should be established by an Act of Parliament. That Act should define the organization's mandate, its basic functions, its powers and the conditions under which they may be used, and its organizational structure. It should also provide for its direction by government and for independent review of its activities. The statutory definition of its mandate should define the types of activity constituting threats to the security of Canada to which the intelligence collection work of the agency must be confined. There must be no undisclosed additions to this mandate by the agency itself or by the executive branch of government, whether such additions be inadvertent or deliberate.

36. Security screening programmes for Public Service employment, immigration and citizenship should not assign intelligence collection tasks to the security intelligence agency which may be outside its statutory mandate. Thus, it is important to ensure that the definition of threats to the security of Canada in the laws and administrative directives governing these programmes is consistent with the definition of threats to the security of Canada in the statute governing the security agency. Further, the security screening programmes should be more carefully managed and monitored so that they are confined to areas where they are really necessary and to ensure that they are effective in those areas. Poor administration of security screening programmes will have the undesirable consequence of unnecessarily expanding the scope of security service investigations into the personal backgrounds of individuals.

37. In addition to its role in providing security intelligence about individuals for security clearances, the agency should also have the function of providing advice to government departments and police forces responsible for maintaining physical security. This means, among other things, that as a source of accurate and timely intelligence on activities threatening the security of Canada the agency should play an important role in protective security programmes for the protection of vital points and the protection of V.I.P.s. In emergency situations, involving foreign military threats to Canada or grave political violence, the agency must also be an effective source of intelligence on individuals or groups who threaten the internal security of the country. But it is also essential that the procedures and laws which govern such emergencies entail the minimum encroachment on civil liberties consistent with effective security. For this purpose, we will be recommending amendments to the War Measures Act and changes in the draft internal security regulations.

38. Overall responsibility for overseeing the implementation of the security organization's statutory mandate should rest with the Prime Minister and the Cabinet. It is the function of the Cabinet to establish the intelligence priorities for the security intelligence agency and other departments or agencies of the federal government which have intelligence collection responsibilities. Modifications in the system of interdepartmental committees centred on the Privy Council Office are needed to assist the Cabinet in establishing security policy, in coordinating intelligence collection activities, and in ensuring that intelligence which is collected is assessed and put to good use by government departments.

39. Ministerial direction of the security intelligence agency should be the responsibility of the Solicitor General of Canada. The Solicitor General should be responsible both for ensuring that the Cabinet's policies with respect to the agency are carried out and for submitting proposals for new policies to Cabinet. The Minister's responsibility for policy must extend to the policy of operations. He must have knowledge of all investigative techniques and liaison arrangements. Difficult or sensitive operational decisions must not be kept from the Minister but, on the contrary, brought to him for decision and, if necessary, taken by him in turn to the Prime Minister or Cabinet. To carry out these responsibilities, Solicitors General must have the assistance of well-informed senior officials who are not themselves members of the security organization. Thus, the Deputy Solicitor General must have the full powers of a Deputy Minister in relation to the agency.

40. One of the Solicitor General's major responsibilities should be to establish and maintain procedures for ensuring effective cooperation between federal, provincial and municipal authorities with respect to national security matters. Regular briefings of provincial attorneys general and solicitors general should be arranged. The Solicitor General of Canada should in this forum seek the agreement of the provincial governments to propose to the respective provincial legislatures changes in provincial laws required to ensure that undercover investigations essential for the security of Canada can be carried on without violating provincial statutes.

41. The security intelligence agency's determination of the subjects about which it should collect information and make intelligence reports must be guided by the intelligence priorities set by the Cabinet. The Cabinet's identification of general areas of interest and the security agency's choice of specific 'targets' must fall within the categories of activities which Parliament has presented as proper subjects for the security agency's surveillance. The security agency should be willing and able to ascertain the security implications of many phenomena by using public sources of information. Decisions to use investigative techniques which entail surreptitious methods, or methods which invade individual privacy, should adjust the intrusiveness of the technique in proportion to the danger of the threat, and the more intrusive the technique the more senior should be the person or committee required to approve its use.

42. A decision-making system, with special provision for emergency situations, must be established which ensures that investigations involving the most

intrusive techniques of investigation, deep cover human sources and undercover agents, the interception of private communications and the surreptitious entry and search of premises must be undertaken only after approval by the Director General of the agency and the Solicitor General and on the basis of well-defined standards of necessity. There must also be provision for ensuring that the legality of proposed investigations is reviewed by a member of the Department of Justice and that the Department of External Affairs is consulted on investigations affecting foreigners or foreign missions in Canada. In addition to ministerial approval, the use of certain aural and visual surveillance techniques, mail checks, surreptitious entries of private premises and access to confidential personal information in government files should require judicial warrants. The role of the judge is to ensure that the standard set down by statute for the use of these techniques has been met.

43. The thoroughness of ministerial direction and control of security intelligence activities which our proposals call for raises the danger of improper political or personal use of the security intelligence agency. Our democratic system of government would be endangered if the 'targets' of security investigations were selected or vetoed for partisan political reasons or for personal reasons. To guard against this possibility, the Director General should have by statute some security of tenure for his term of office, and he should have direct access in urgent situations to the Prime Minister and to an independent review body. Also, the leaders of parliamentary parties should be consulted on the appointment of the Director General.

44. A constant and thorough review of the efficacy, legality and propriety of security intelligence operations must be carried out by the Director General and senior management of the agency itself. It is especially important that investigations be carried out for limited time periods and that a careful assessment be made of an investigation's contribution to the security of Canada. The Solicitor General should not authorize the extension of an investigation beyond a year, unless he is satisfied that it is likely to yield essential security intelligence. The Prime Minister and Cabinet should also receive, on no less than an annual basis, a report of the agency's activities. This report should indicate the extent to which the security intelligence agency has met the government's security intelligence requirements and any problems it has encountered. These reports should serve as a basis for the Cabinet's reassessment of those requirements.

45. Just as it is essential to maintain a thorough review of security intelligence activities on the executive side of government, it is also crucial to have independent review, both parliamentary and non-parliamentary. The secrecy of intelligence operations, their lack of exposure to judicial examination and comment, the danger to civil liberties of excessive surveillance, and the record of past wrong-doings, all point to the need for an effective review of security operations by persons independent of the government of the day. For this reason we will be recommending the establishment of an independent review body with complete access to all of the security intelligence agency's records. This body, which we suggest might be called the Advisory Council on Security and Intelligence, would carry out a continuous *ex post facto* review of the

agency's activities, focussing on their legality and propriety. It would have no executive powers but would report on an advisory basis to the Solicitor General. It would also report to a joint standing committee of Parliament and, at least annually, issue a public report. The Advisory Council on Security and Intelligence should assist the Solicitor General in providing opportunities for wider public discussion and study of security problems than has occurred in the past.

46. Parliament requires an enhanced capacity to scrutinize security and intelligence activities. The necessarily secret nature of these activities makes it impossible for Parliamentary scrutiny to be exercised effectively through any mechanism other than a small committee whose members either include the party leaders or are specially selected by them. This committee's effectiveness will depend on its capacity to develop and maintain the confidence of all parliamentary parties, as well as that of the government and the security agency. The scope of the scrutiny exercised both by the Joint Parliamentary Committee on Security and Intelligence and by the Advisory Council on Security and Intelligence should extend to the activities of all those intelligence collecting agencies and departments of the federal government whose activities involve the use of covert techniques of investigation. If independent and parliamentary review focusses solely on the security intelligence agency, there is a danger that a government might, wittingly or unwittingly, circumvent this scrutiny by assigning surveillance tasks to other agencies.

47. In the field of security screening, where individual rights are directly affected by government decisions based on security intelligence reports and the individual does not have access to his security file, a review body is needed to provide some assurance of fair and reasonable treatment. This body should be independent of the government of the day. Because it will be dealing with individual cases on an advisory basis it should operate as a tribunal and be separate from the Advisory Council on Security and Intelligence. The scope of the security tribunal's review should extend to security screening cases with respect to Public Service employment, immigration and citizenship.

48. The paragraphs above describe what might be termed the bare essentials of our security plan for the future. Every point, every proposal requires detailed elaboration and reasoned defence. In what follows we will endeavour to provide just that. But we urge that in assessing each of the detailed proposals which follows there be kept in mind the security system as a whole and the extent to which it can coherently meet *both* the requirements of security and the requirements of democracy.

CHAPTER 3

THE SCOPE OF SECURITY INTELLIGENCE

INTRODUCTION

1. The first task we face in defining the functions of a security intelligence agency is to identify the categories of activity about which the agency should be permitted to collect, analyze and report intelligence. The identification of security threats which constitute the proper subjects or 'targets' of security intelligence operations provides one component of what might be called the security agency's 'mandate'. It is this aspect of the mandate which we deal with in this chapter. In subsequent chapters we deal with two other elements of its mandate, namely the methods it uses to collect intelligence and what it does with the intelligence it collects.

A. A STATUTORY DEFINITION OF SECURITY THREATS

2. The current mandate of the R.C.M.P. Security Service is diffuse and ambiguous. It is not clearly provided for in law. The security intelligence functions of the R.C.M.P. are not explicitly and comprehensively set out in an Act of Parliament, Order-in-Council or administrative directive. Over the years security intelligence functions have been assigned to the R.C.M.P. by ministerial correspondence (for example, in citizenship vetting) and by Cabinet directive (for example, Cabinet Directive 35 governing security screening in the Public Service). Sometimes functions have been assigned by decisions of committees of senior officials (for instance, the Security Advisory Committee's decision that the Security Service should provide information about the separatist associations of persons applying for security clearance). Functions were also assumed by the Security Service when its members, on the basis of general policy positions adopted by the government, inferred that they were to carry out those functions (for example, disruptive tactics).

3. It was not until March 1975 that a Cabinet Directive entitled "The Role, Tasks and Methods of the R.C.M.P. Security Service" was issued. This Directive was far from comprehensive: it did not mention a number of the then current functions of the Security Service, some of which, for instance its role in security clearance programmes, required the Security Service to collect information about activities not covered by the Directive. Similarly the methods and powers used by the R.C.M.P. Security Service to investigate and counter threats to security were not clearly and comprehensively set out in either law or

directive. It is our firm conviction that this situation should not be permitted to continue. The functions of the security intelligence agency and the powers and methods it may use in carrying out those functions must be explicitly, coherently and comprehensively stated.

4. We believe that the definition, by several categories, of the activities about which the agency should be authorized to collect, analyze and report intelligence should be established by Act of Parliament. Such a definition would not refer to specific groups or activities. Its purpose would be to fix the boundaries of security intelligence activities. We believe it is essential to set these boundaries in legislation. This statutory definition of the limits of security intelligence operations should express Parliament's will as to the kinds of political activities it regards as threats to the security of Canada and therefore as the proper subjects of security intelligence surveillance.

5. Past experience has demonstrated the dangers involved in leaving the definition of these limits to the discretion of the government or to the security agency itself. In the past, as our examination in section B of this chapter will show, neither the government nor the R.C.M.P. has had clear and consistent policies on the proper limits of security intelligence investigations. As a result R.C.M.P. surveillance on occasion went beyond the requirements of the security of Canada. Of equal concern is the fact that on other occasions it may have fallen short of what was required to meet Canada's security needs. Therefore, we think that whether the security intelligence functions continue to be the responsibility of the R.C.M.P. Security Service or are assigned to a separate civilian agency, their proper limits should be defined by an Act of Parliament.

6. In proposing statutory limits on security intelligence surveillance, we must acknowledge that when the security intelligence agency begins to collect information on a subject it cannot always be expected to know, or to have reason to believe, that a particular individual or group is in fact engaging in one of those activities defined by Parliament to be a proper subject of security intelligence surveillance. In the next chapter we shall consider and make recommendations with respect to the full range of intelligence collection techniques, from open sources, such as the media, books and public meetings, interviews, casual sources, and reports from other agencies, to the more intrusive techniques of physical surveillance, paid informants, undercover agents, certain aural and visual surveillance techniques, surreptitious entry, mail checks and access to confidential personal information in government files. A basic principle in the system of controls we shall propose for the use of these techniques is that the more the use of a technique encroaches on individual privacy and freedom of political association and of speech, the stronger the evidence should be of a significant threat to the security of Canada. To use a shorthand phrase: the more intrusive the technique, the higher should be the threshold. When the security intelligence agency begins to take an interest in a subject through information obtained by collection techniques at the least intrusive end of the spectrum, it need have only minimal evidence on which to base its suspicion. Its interest might be triggered by newspaper reports or a tip received from a police force or a foreign agency: all

that can be required initially is that the activity which the agency suspects an individual or group may possibly be involved in is within the categories of activity defined by Parliament to constitute threats to national security.

7. The statutory definition of security threats should be designed to identify at the most general level the activities which *may* be lawfully investigated by the security intelligence agency. Within these statutory limits the Cabinet should be responsible for determining the principal areas of activity about which the government *requires* intelligence. The Cabinet should establish intelligence requirements, thus indicating the foreign and domestic threats which are of greatest concern to it. While the security intelligence agency's assessment of intelligence threats will be an important factor in the Cabinet's determination of its intelligence requirements, the Cabinet should have the fundamental responsibility for establishing these requirements. (In Part VIII of this Report we shall make recommendations about the process of determining intelligence requirements at the Cabinet level.) Within the general statutory limits defined by Parliament, and following the more specific designation of areas of concern by the Cabinet, the security intelligence agency should identify the particular individuals and groups of security interest.

8. Thus we envisage a three-step process in discerning or identifying threats to the security of Canada. At the level of greatest generality, the Act establishing the security intelligence agency should contain the legislative framework within which all security operations are conducted, and should set out the definitions of threats to the security of Canada. At a somewhat more specific level, constituting the highest level of government direction of the security agency, are the intelligence requirements of the Government of Canada as determined from time to time by the Cabinet. Finally, at the most specific level, are the decisions of the security intelligence agency to 'target' particular groups or individuals. When the latter decisions entail the use of the more intrusive techniques of investigation, ministerial approval and, with regard to certain techniques, judicial authorization should be obtained. We will be setting out our proposals with regard to controls of these intrusive techniques in the next chapter.

9. The system we have described above expresses our general expectation of the roles to be played by Parliament, Ministers and the security intelligence agency itself. The three stages of decision-making we have identified should not be regarded as water-tight compartments: there must be a good deal of interaction among those involved at the different levels. At the outset, this system will no doubt require some adjustments before it functions in a manner which effectively reconciles efficiency with the requirements of responsible government.

10. In recent years a number of western democracies have defined more precisely the kinds of activities about which their security intelligence agencies should collect and report information. Some have done this by Act of Parliament, notably Australia and New Zealand. Others have proceeded by way of administrative guidelines issued by the Minister responsible for the security agency (for example, Great Britain and the United States), or by an executive

order of the government (for example, the Netherlands) or a Cabinet Directive, as in the case of Canada.

11. In Canada, Cabinet Directive of March 27, 1975, on the "Role, Tasks and Methods of the R.C.M.P. Security Service", lists six kinds of activities which the Security Service is authorized to "discern, monitor, investigate, deter, prevent or counter". These are:

(i) espionage or sabotage;

(ii) foreign intelligence activities directed toward gathering intelligence information relating to Canada;

(iii) activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;

(iv) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada;

(v) activities of a foreign or domestic group directed toward the commission of terrorist acts in or against Canada; or

(vi) the use or the encouragement of the use of force, violence or any criminal means, or the creation or exploitation of civil disorder, for the purpose of accomplishing any of the activities referred to above.

This list of 'targettable' activities corresponds closely to the activities listed in section 16(3) of the Official Secrets Act which came into effect on July 1, 1974. That section defines "subversive activity" in relation to which the interception and seizure of private communications may be authorized by the Solicitor General of Canada. The 1975 Cabinet Directive adds the activities of *domestic* terrorist groups in paragraph (v) and the activities leading to civil disorder referred to in its sixth paragraph.

12. We have studied the ways in which the 1975 Cabinet Directive and section 16(3) of the Official Secrets Act have been interpreted. We have also examined the definitions and guidelines developed by a number of other democratic countries. On the basis of our examination of Canadian and foreign experience and our consideration of Canada's needs we shall now identify the activities about which a security intelligence agency should be authorized to collect, analyze and report intelligence.

Espionage and sabotage

13. One of the most important functions of a security intelligence agency is to obtain information about efforts to conduct espionage and sabotage against Canada. The emphasis in the agency's mandate on this subject should be to detect activities that are preparatory to actual espionage or sabotage. Actual acts of espionage and sabotage often occur when a foreign power has succeeded in secretly obtaining the services of a government employee in a sensitive position. Clearly, the security intelligence agency should try to detect these recruitment activities at the earliest possible stage. Similarly, the security of Canada requires the detection of foreign agents who may try to remain undercover for many years with the objective of participating in espionage or

sabotage only in the event of hostilities. In the process of investigating suspected foreign agents, the security intelligence agency may uncover actual acts of espionage or sabotage in which case it may bring the matter to the attention of appropriate law enforcement officials or, in the case of persons with diplomatic immunity, to the attention of the Department of External Affairs. But the principal objective of the agency should be to detect espionage and sabotage efforts before offences occur.

14. The words 'espionage' and 'sabotage' are not defined in either the 1975 Cabinet Directive or section 16(3) of the Official Secrets Act. We think that where these words are used to define activities which may be investigated by the security intelligence agency, they should be given the meaning which they have under the statutes dealing with the offences of espionage and sabotage.

15. The word 'espionage' is not used in the Criminal Code, but section 46(2)(b) of the Criminal Code provides that:

> Everyone commits treason who, in Canada, . . .
>
> (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada.

Another statutory offence which is a form of spying is defined in section 3 of the Official Secrets Act as follows:

> 3. (1) Every person is guilty of an offence under this Act who for any purpose prejudicial to the safety or interests of the state,
>
> (a) approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place;
>
> (b) makes any sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; or
>
> (c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or password, or any sketch, plan, model, article, or note, or other document or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

In our First Report we recommended that there be new legislation incorporating in a single enactment the offences now set out in section 3(1) of the Official Secrets Act and section 42(2)(b) of the Criminal Code. We also recommended that the offence of 'harbouring' espionage agents be more carefully defined and that possession of the tools of espionage, without lawful excuse, be made a criminal offence. We think the implementation of these recommendations will bring greater clarity and precision to the identification of activities falling under this component of a security intelligence agency's mandate.

16. Similarly, in relation to sabotage we recommended in our First Report elimination of the "prohibited place" provisions of the Official Secrets Act, leaving the sabotage section of the Criminal Code to cover activities threaten-

ing defence installations. The sabotage section of the Criminal Code is section 52 which makes it an offence to do

> a prohibited act for a purpose prejudicial to
>
> (a) the safety, security or defence of Canada, or
>
> (b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada.

Section 52(2) defines "prohibited act" as meaning

> An act or omission that
>
> (a) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing, or
>
> (b) causes property, by whomsoever it may be owned, to be lost, damaged or destroyed.

It is in the sense of this definition in the Criminal Code rather than in any colloquial or dictionary sense that the term "sabotage" should be understood and used by a security intelligence agency.

Foreign Interference

17. Espionage and sabotage are not the only kinds of foreign directed activities which should be monitored and investigated by a security intelligence agency. Foreign governments and foreign political organizations may in a clandestine manner try to interfere in Canadian political life. Programmes of secret political interference by foreign intelligence agencies are sometimes referred to as "active measures" (a Russian term) or "covert action" (an American term). The latter was defined (with reference to U.S. foreign intelligence agencies) by the Church Committee as:

> ...Clandestine activity designed to influence foreign governments, events, organizations or persons in support of U.S. foreign policy conducted in such a way that the involvement of the U.S. Government is not apparent. In its attempts directly to influence events it is distinguishable from the clandestine intelligence gathering — often referred to as espionage.[1]

As this definition makes clear, deception is an essential feature of "active measures" or "covert action". Diplomatic and military measures can be used against open attempts by foreign powers to interfere in Canadian affairs. A security intelligence agency is necessary to warn government of clandestine programmes of foreign intervention.

18. Active measures of foreign interference are effected in many different ways. Sometimes a member of an ethnic community is forced by a foreign diplomat to support the government of the country from which the person emigrated through threats of harm to family or friends who live in that country. Covert interference may also take the form of secretly employing a Canadian government official to support a foreign government's interests. Yet

[1] U.S. Senate, *Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities*, Book 1, U.S. Government Printing Office, Washington, 1976, p. 131.

another variation would be the secret funding by a foreign government of a political party, movement or group in Canada. Foreign powers may also use covert means to obtain technological information from both the public and private sectors. There is evidence on the public record that the carrying out of active measures or covert actions is part of the mandate of foreign intelligence agencies of a number of major powers, Communist and non-Communist. There is no reason to believe that Canada has been or would be declared "off-limits" for these activities.

19. While we think it should be part of a security intelligence agency's mandate to keep governments in Canada informed of these activities, we also think it important that the agency should distinguish generally acceptable diplomatic, commercial and cultural activities of representatives of foreign powers in Canada from activity which constitutes an improper interference in Canadian political life. The ability to make this distinction will depend to a large extent on the agency's analytical capabilities and political understanding, as well as on the assistance it receives from the Department of External Affairs. In our First Report we said we would give consideration to the establishment of a system requiring the registration of all agents of foreign governments, thus making it an offence to operate as an unregistered agent, or the enactment of a provision which would make it an offence to be the secret agent of a foreign power. While proposals of this kind might provide a firmer legal basis for identifying foreign interference activities, for reasons which we set out in Part IX, Chapter 3 of this Report, we have concluded that it would not be wise to introduce either of these changes into Canadian law.

20. To define the scope of the security intelligence operations in relation to this kind of security threat we favour the language used in the Australian Security Intelligence Organization Act of 1979. Section 4 of that Act defines "active measures of foreign intervention" as follows:

> clandestine or deceptive action taken by or on behalf of a foreign power to promote the interests of that power;

This definition has the merit of identifying the two distinctive features of the foreign interference which we consider to be a proper subject for security intelligence surveillance: their covert nature and their purpose. It should be noted that this definition would justify surveillance of covert acts of foreign agents in Canada which may not be primarily directed *against* Canada but are designed to promote the interests of a foreign power.

21. We think the above definition used in the Australian Act is to be preferred to the language now used in the 1975 Cabinet Directive and in section 16(3) of the Official Secrets Act, in both of which the second and fourth clauses read as follows:

> (ii) foreign intelligence activities directed toward gathering intelligence information relating to Canada;
>
> (iv) activities by a foreign power directed toward actual or potential attack or other hostile acts against Canada.

22. The first of these two clauses, clause (ii), is too narrow in one sense and too broad in another. It is too narrow in that it might be interpreted as

referring only to intelligence collection activities of foreign powers in Canada and to exclude political interference. It is too broad in that it would appear to embrace the collection of intelligence about Canada by agents of foreign powers by open and public means as well as by covert means.

23. The second clause, clause (iv), strikes us as unnecessary. An early draft of a 1978 Security Service discussion paper interpreting the 1975 Cabinet Directive referred to this paragraph as a 'catch-all' designed to refer to "the wide variety of 'hostile acts'... only limited (by) the scope of the reader's imagination". The final version of this paper, entitled *A Discussion Paper on the Interpretation of the Security Service Mandate*, and dated October 17, 1978, gave the following four examples of activities which might come under clause (iv):

(a) encouragement and active support for actions which would undermine the unity of Canada including the secession of any Province;

(b) an attack in Canada against a person or property of another country;

(c) using Canada as a staging area for agent infiltration into another country;

(d) infringement of Canadian sovereignty or integrity including, but not restricted to, attempts by another country to maintain and exercise control over its former citizens residing in Canada.

Example (a) refers to activities which, on the basis of our understanding of the meaning of national security, should be of interest to the Security Service only if they constitute what we have defined as active measures of foreign intervention, namely clandestine or deceptive action taken by or on behalf of a foreign power to promote the interest of that power in Canada. In section B of this chapter we point out that, in the past, confusion has arisen from equating in all respects the two concepts of national security and national unity. Example (b) refers to activities which should be under surveillance by the security intelligence agency only if they constitute acts leading to sabotage or international or domestic terrorism (we will deal with these latter two concepts in the next section below). Otherwise such activities should be dealt with by the police. Examples (c) and (d) should be of interest to the agency if they involve espionage, foreign interference (as we have defined that term) or international terrorism.

24. We think it unwise to include broad 'catch-all' phrases in the security intelligence agency's mandate. We are satisfied that the four kinds of threat to the security of Canada which we shall recommend as the basis for the statutory definition of the security agency's mandate will adequately cover those activities in relation to which Canada should have security intelligence and which might have been brought under clauses (ii) and (iv) of the existing mandate. Therefore we shall recommend removing clauses (ii) and (iv) from both the mandate of Canada's security intelligence agency and from section 16(3) of the Official Secrets Act.

25. In interpreting references to "foreign power" in section 16(3) of the Official Secrets Act and in the 1975 Cabinet Directive, some doubt has been expressed as to whether a Commonwealth country should be considered

"foreign". We think that the reference to foreign interference in the legislation governing the security intelligence agency should extend to unacceptable activities on behalf of Commonwealth countries, should such ever occur.

Political violence and terrorism

26. The democratic process in Canada requires that political objectives be pursued through public discussion, legislative debate and lawful representation of interests. The democratic process is jeopardized when groups or individuals attempt to gain their political objective by threatening to carry out acts of serious violence or actually carrying out such acts. As we have explained in Chapter 1 of this part of the Report, the protection of the democratic process should be the central purpose of Canada's security arrangements. Thus, we believe that Canada's security intelligence agency should be empowered to provide intelligence about any activities of an individual or group which involve the threat or use of serious violence against persons or property for the purpose of accomplishing political objectives.

27. For more than a decade the most prominent form which this threat to security has taken is terrorism. The political fanaticism and frustration which engender terrorism are not, unfortunately, likely to disappear in the foreseeable future. As we suggested earlier in this Report, modern means of transportation, communication and destruction have increased the damage that a small group of terrorists can inflict on a large country such as Canada. We should re-emphasize here that the kind of terrorist acts which should be of concern to the security intelligence agency are those which have political objectives. Acts of violence for personal gain or by mentally disturbed persons which do not threaten the democratic process of government should be of concern to law enforcement agencies, not the security intelligence agency.

28. The security of Canada requires the detection of activities of persons who belong to or support terrorist groups before there is evidence which would support a criminal prosecution. Recent experience with terrorist groups has shown that their success has often depended on their ability to maintain their cover and security while operating in a modern community. Mr. Paul Wilkinson, an English author, has provided the following apt description of this phenomenon and the intelligence needs it generates for the contemporary liberal state:

> . . . mass support is not a prerequisite for launching a terrorist campaign. Indeed the archetypal terrorist organization is numerically small and based on a structure of cells or firing groups, each consisting of three or four individuals...
>
> ...The terrorists' small numbers and anonymity make them an extraordinarily difficult quarry for the police in modern cities, while the ready availability of light portable arms and materials required for home-made bombs makes it difficult to track down terrorist lines of supply. Yet once the key members of a cell have been identified it is generally practicable to round up other members. And on the basis of information gleaned from interrogating a relatively small number of key terrorist operatives it is possible to spread the net more effectively around the whole organization.

> A crucial requirement for defeating any political terrorist campaign therefore must be the development of high quality intelligence, for unless the security authorities are fortunate enough to capture a terrorist red-handed at the scene of the crime, it is only by sifting through comprehensive and accurate intelligence data that the police have any hope of locating the terrorists. It is all very well engaging in fine rhetoric about maximising punishment and minimising rewards for terrorists. In order to make such a hard line effective the government and security chiefs need to know a great deal about the groups and individuals that are seeking rewards by terrorism, about their aims, political motivations and alignments, leadership, individual members, logistic and financial resources and organizational structures...
>
> ...The primary objective of an efficient intelligence service must be to prevent any insurgency or terrorism developing beyond the incipient stage. Hence a high quality intelligence service is required *long before the insurgency surfaces*. It is vital moreover, that such a service should have a national remit — to avoid duplication and rivalry between area police forces — and that it should be firmly under control of the civil authorities, and hence democratically accountable.[2]

29. Accurate intelligence about terrorists is needed not only to enable the government and police forces to take effective action against them but also to avoid over-reacting to their threats. Assessments of the strength and location of terrorist groups based on sound intelligence enable the government to cope with a terrorist crisis by methods appropriate to the real rather than the imagined dimensions of the threat. A small group of terrorists could realize a very great victory for their undemocratic cause by frightening a government into adopting measures which encroach on the civil liberties of citizens to a degree far in excess of what may be necessary to deal with the actual threat.

30. The security agency's mandate should provide for the collection of intelligence about the activities of terrorists in Canada (including activities in preparation for and in support of terrorist acts) whether such activities are directed against Canadians or Canadian governments or against foreigners or foreign governments. In an era which has witnessed a startling expansion of international terrorism, Canada must not become a haven for those planning to use the methods of terrorism to gain their political ends in other countries. But it is important to distinguish international groups secretly pursuing in Canada terrorist objectives against foreign governments, from representatives of foreign liberation or dissident groups who come to Canada to promote their cause openly. This latter activity should be kept under surveillance by the security intelligence agency only when there is reason to suspect that it is accompanied by clandestine activity or may lead to serious political violence in Canada. Again we should emphasize that in distinguishing between these foreign groups good judgment, sensitive to Canada's foreign policies and democratic ideals, must be exercised.

31. The need for Canada's security intelligence agency to obtain information about foreign terrorist activities in Canada, whether or not directed against

---

[2] Paul Wilkinson, *Terrorism and The Liberal State*, Toronto, Macmillan/MacLean-Hunter, 1977, pp. 133-35.

Canada, arises not only from the requirements of national security but also from Canada's international obligations. Canada, as we mentioned earlier, is party to a number of international conventions concerning the prevention of terrorism.[3] For our purposes, the most pertinent of these is The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, which was adopted by consensus at the General Assembly of the United Nations on December 14, 1973. This convention covers the most serious terrorist crimes: murder, kidnapping and violent attacks or threats of violent attacks upon the official premises, private accommodation or means of transportation of "an internationally protected person" likely to endanger his or her person or liberty. Canada signed this convention in 1974 and passed implementing legislation to introduce a definition of "an internationally protected person" into the Criminal Code.[4] Article 4 of the Convention requires all contracting parties to cooperate in the prevention of these terrorist crimes by:

> (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories;
>
> (b) exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.[5]

Canada's security intelligence agency should have the primary responsibility for supplying Canada's contribution to the information referred to in paragraph (b) of this convention. It should be noted that paragraph (a) explicitly commits contracting parties to do what they practically can to prevent these serious terrorist acts from taking place *outside* their territories.

32. Section 16(3) of the Official Secrets Act and the 1975 Cabinet Directive are both deficient in their coverage of foreign terrorist activity. Section 16(3)(e) of the Official Secrets Act refers to:

> activities of a foreign terrorist group directed toward the commission of terrorist acts in or against Canada;

Section 16(3), which provides the definition of "subversive activity" is governed by section 16(2) which empowers the Solicitor General to issue warrants for the interception or seizure of communications "for the prevention or detection of subversive activity directed against Canada or detrimental to the security of Canada". The phrase "detrimental to the security of Canada" has been interpreted by the Department of Justice as not extending to terrorist activities in Canada directed towards carrying out terrorist acts in a foreign country. The fifth paragraph of the 1975 Cabinet Directive extends the

---

[3] For an account of these conventions and Canada's participation in them see "Terrorism — the Canadian Perspective", by L.C. Green, in Y. Alexander (ed.) *International Terrorism: National, Regional and Global Perspectives*, New York, Praeger, 1976.

[4] *Statutes of Canada*, 1974-75-76, ch.93, s.2(1).

[5] *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, United Nations, 1974.

Security Service mandate to domestic as well as to foreign groups and there is no clause limiting the Security Service's interest in terrorist acts to those which in the narrowest sense are detrimental to Canada's security. Still, paragraph (v) of the Cabinet Directive appears to be too narrow, as it refers only to the commission of terrorist *acts* in Canada and not to activities directed towards the commission of terrorist acts in foreign countries.

33. The statutory definition of the limits of the security agency's intelligence role should be designed to overcome these deficiencies and extend the agency's mandate clearly to activities in Canada directed toward the commission of terrorist acts in Canada or abroad against Canadians or foreigners.

34. There are activities involving the use of acts of serious violence against persons or property for the purpose of accomplishing political objectives which would normally not be described as terrorist acts. For example, political organizations which endeavour to use 'goon squads' or other strong-arm tactics to intimidate their political opponents or to break up peaceful political meetings or to turn peaceful assemblies into violent confrontations, pose a threat to the democratic process and as such should be of concern to a security intelligence agency. Or, to take another example, an organization that plans to mobilize a large group to attack physically the officials or premises of a government department in an attempt to change a particular policy also threatens the democratic system of government. It would be wrong for the security agency to treat the need for advance information about such activities as authorization for the surveillance of every group which might be suspected of initiating some act of vandalism against its political opponents. Only when the activities pose a serious threat to the basic democratic processes of public discussion and debate should they be the concern of the security intelligence agency. The responsibility for dealing with such political violence when it occurs rests primarily with locally based police forces. The security intelligence agency's role should be confined to collecting intelligence about those who appear to be organizing political violence as systematic strategy or on a very large scale or who have international sources of support.

35. The terms of the Security Service's existing mandate are poorly phrased to cover the kind of political violence which we think should be within the mandate of a security intelligence agency. Paragraph (iii) of the 1975 Cabinet Directive refers to

> activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means;

The ambiguous words "governmental change" have been interpreted by the Security Service to include changing a government policy as well as overthrowing a government or our system of government. Thus this clause is wide enough to cover the use of violence to attain political objectives falling short of overthrowing the government or the entire democratic system. The words "force" or "any criminal means" have the potential for expanding the security agency's mandate too widely. Strikes and demonstrations, for instance, designed to bring pressure to bear on government to change a policy, might be considered to involve the use of "force". Participants in popular assemblies,

public meetings, parades and demonstrations may be guilty of violating traffic regulations, municipal by-laws and committing other minor offences. While political activities of this kind may be of concern to peace officers at the local or provincial level they should not be the concern of a national security intelligence agency, unless there is some indication of clandestine foreign interference or of deliberate attempts to turn peaceful demonstrations into violent confrontations destroying the democratic process.

36. The sixth paragraph of the 1975 Cabinet Directive is very broad and would probably cover the political violence which we think is properly the concern of the security intelligence agency, but it might also be interpreted to cover a great deal more, much of which we think should not be within the security agency's mandate. That paragraph reads as follows:

> (vi) the use or the encouragement of the use of force, violence or any criminal means, or the creation or exploitation of civil disorder, for the purpose of accomplishing any of the activities referred to above;

Earlier when we traced the development of the 1975 Cabinet Directive, we pointed out that this clause was added as a 'basket clause' to the list of activities which constituted the definition of subversive activity in section 16(3) of the Official Secrets Act. Its purpose was to enable the Security Service to continue the full range of surveillance activities which it was then conducting, a number of which, as we shall contend in section B of this chapter, are outside the proper ambit of a security intelligence activity. We think that it is a serious mistake to include any 'basket' clause in the definition of the security intelligence agency's mandate: clauses should not be designed primarily for the purpose of accommodating the Security Service's present range of activity. The general terms of the statutory mandate must be chosen as carefully as possible to reflect what, as a matter of principle, Parliament believes should be regarded as activity threatening the security of Canada.

37. The one phrase in paragraph (vi) which appears to have been the most significant addition to the activities covered by paragraphs (i) to (v) is "the creation or exploitation of civil disorder". While we agree that deliberate attempts to turn peaceful demonstrations into violent confrontations for the purpose of destroying the democratic process of government should be the concern of the security intelligence agency, at the same time we think it is dangerous to include in the mandate of the security intelligence agency any words which might suggest it is authorized to collect intelligence about any organization whose activities might lead to "civil disorder". Here we part company with the Australian Security Intelligence Organization Act of 1979 which includes in its definition of domestic subversion the following:

> (i) activities directed to promoting violence or hatred between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth;

In our view, dealing with disorderly assemblies and communal violence is primarily a police responsibility. A mandate to investigate political activity which may lead to civil disorder could justify spying on groups whose radical or

dissenting views may provoke opposing demonstrations. Surveillance of such activity by the state's security agency may seriously interfere with the right to criticize the government or the established social, political and economic order, a right which, so long as it is exercised legally, is basic to the form of democracy we value in Canada. Individuals and groups should not be spied upon or have security files kept on them solely because they plan or participate in political demonstrations to protest government policies or criticize other groups in the community. If the security intelligence agency has reason to suspect some persons taking part in such events of being secret agents of foreign powers or persons who might try to turn a peaceful demonstration into a violent confrontation in order to discredit the democratic process, it should inform the appropriate government officials or the police force whose responsibility it is to maintain the peace at such demonstrations.

38. The activities under the heading of political violence and terrorism about which the security agency should gather intelligence are those directed towards the use or threat of serious acts of violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country. We emphasize that it is only if the violent acts threatened or carried out are serious that they should be the concern of the security intelligence agency. The objective of security must always be kept in view: the security of the democratic process. We regard activities directed toward political violence as being serious only when they are significant enough to constitute a threat to the effective functioning of the democratic process. Only such activities justify surveillance by a security intelligence agency.

Revolutionary subversion

39. In the preceding paragraphs we dealt with foreign and domestic terrorism and other serious acts or threats of violence directed towards accomplishing political objectives. There is one other category of political activity which could be said to constitute a distinct threat to the security of Canada and should be specifically provided for in the security intelligence agency's mandate. That is the activity of political parties and movements which subscribe to ideologies advocating the ultimate overthrow of the liberal democratic system of government but may not actually be involved in political violence. We refer to the activities of such groups as "revolutionary subversion" for their basic aim goes far beyond the influencing of a particular government policy to the eventual replacing of our system of liberal democratic government by an authoritarian government of the extreme right or left. Such subversion, if successful, would truly be revolutionary.

40. Fortunately, throughout Canada's history such revolutionary movements have not posed a serious threat to Canadian democracy. The principal defence against their growth has been the good judgment of the Canadian electorate. With reference to one of these movements, in 1953, Mr. Justice Ivan Rand of the Supreme Court of Canada, in upholding the right of Communists to serve on the executive of labour unions held that one of the basic considerations shaping legislative policy in Canada was that

> The dangers from the propagation of the Communist dogma lie essentially in the receptivity of the environment. The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole...[6]

We agree with the philosophy expressed in this dictum. So long as political organizations which espouse totalitarian ideologies stick to the methods of liberal democracy to promote their cause, they should not, simply by virtue of their beliefs, be subject to intrusive investigations by the security intelligence agency. However, through its security intelligence organization the government should be able, by the use of non-intrusive techniques, to keep track of the growth of such movements and understand the impact they are having on Canadian democracy. On the other hand, we must stress that if there is reason to believe that such an organization is involved in activities leading to espionage, sabotage, foreign interference, terrorism or serious political violence, then it should be subject to more intrusive investigation by the security agency.

41. Paragraphs (iii) and (vi) of the 1975 Cabinet Directive cover, among many other things, political activity which is directed towards the ultimate overthrow of liberal democratic government in Canada. But we think this category of revolutionary subversion should be designated as a distinct category of activity in the statutory mandate of the security intelligence agency. Bearing in mind what we say in the preceding paragraph, individuals or groups whose activities fall only under this category should not be subject to intrusive investigations by the security intelligence agency.

WE RECOMMEND THAT legislation establishing Canada's security intelligence agency designate the general categories of activity constituting threats to the security of Canada in relation to which the security intelligence agency is authorized to collect, analyze and report intelligence.

(1)

WE RECOMMEND THAT the categories of activity to be so designated be as follows:

- **(a) activities directed to or in support of the commission of acts of espionage or sabotage (espionage and sabotage to be given the meaning of the offences defined in sections 46(2)(b) and 52 of the Criminal Code and section 3 of the Official Secrets Act);**
- **(b) foreign interference, meaning clandestine or deceptive action taken by or on behalf of any foreign (including Commonwealth) power in Canada to promote the interests of a foreign power;**
- **(c) political violence and terrorism, meaning activities in Canada directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective in Canada or in a foreign country;**
- **(d) revolutionary subversion, meaning activities directed towards or intended ultimately to lead to the destruction or overthrow of the democratic system of government in Canada.**

(2)

[6] *Smith and Rhuland Ltd.* v. *The Queen* [1953] 2 S.C.R. 99.

WE RECOMMEND THAT, for category (d), revolutionary subversion, only non-intrusive techniques be used to collect information about individuals or groups whose known and suspected activities are confined to this category.

(3)

42. We recognize that the definitions of statutory boundaries of security intelligence activities proposed above are cast in very general terms. The meaning which these terms have in practice will depend in large measure on how they are interpreted by members of the security intelligence agency's senior management, government officials and Ministers. That is why we shall lay great emphasis on the quality of the personnel who lead the security agency and carry out its responsibilities. The members of the agency must not see the general statutory definitions of the agency's mandate as something that may be stretched to cover what they personally believe are threats to Canada's security. They must understand and accept the purpose for which the statutory definition is designed. The statutory definitions must also serve as the framework for government direction and review of the agency's functioning.

The need for a limiting clause

43. In addition to positive statutory standards to define what the security intelligence agency may do, we think it would be wise to include in the statute establishing the security intelligence agency a clause indicating what it clearly must not do. For example, section 4(2)(b) of the Act governing New Zealand's Security Intelligence Service states that it shall not be a function of the Security Intelligence Service

> To institute surveillance of any person or class of persons by reason only of his or their involvement in lawful protest or dissent.[7]

The Directive issued by the Secretary of State for the Home Department (Sir David Maxwell Fyfe) in 1952 to the Director General of the Security Service, which remains to this day the fundamental public statement on the role of Britain's security intelligence organization, contains clauses designed to restrict the Security Service's work to what is necessary for the purposes of national security. The Directive first defines the Security Service's purpose in the following terms:

> 2. The Security Service is part of the Defence Forces of the country. Its task is the Defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organizations whether directed from within or without the country, which may be judged to be subversive of the State.

It then adds these limiting clauses:

> 3. You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purpose of this task.
>
> 4. It is essential that the Security Service should be kept absolutely free from any political bias or influence and nothing should be done that might lend colour to any suggestion that it is concerned with the

[7] New Zealand Security Intelligence Service Amendment Act (1977), s.4(2)(b).

interests of any particular section of the community, or with any other matter than the Defence of the Realm as a whole.

5. No enquiry is to be carried out on behalf of any government department unless you are satisfied that an important interest bearing on the Defence of the Realm, as defined in paragraph 2, is at stake.[8]

44. Nowhere in the various strands of authority to which the R.C.M.P. Security Service looks for a definition of its functions is there any statement of the need to limit security intelligence investigations to what is strictly necessary for the security of Canada. The 1975 Cabinet Directive does not contain any statement which may be interpreted as providing a brake or rein on security intelligence activities. Director General Dare's letter of May 22, 1975, explaining the significance of the Cabinet Directive to senior officers of the Security Service emphasized the expansive nature of the Cabinet's mandate and the lack of constraint, as in the following passage:

> Being granted a broad intelligence base and not being constrained by either ideological or criminal considerations alone, we are now free to respond to current and rapidly changing factors affecting National Security.
>
> (Vol. 141, pp. 21761-63; Ex. M-135.)

Nowhere in the letter is there a reminder to senior officers that there is need for constraint in the exercise of the powers conferred.

45. At the beginning of this part of our Report, in defining the fundamental principles on which Canada's security system should be based, we emphasized the need to ensure that the requirements of security are compatible with the requirements of democracy. Both the government which directs the security agency and the agency itself must constantly keep this fundamental precept in mind. As Rebecca West wrote:

> . . . if we do not keep before us the necessity for uniting care for security with determination to preserve our liberties, we may lose our cause because we have fought too hard. Our task is equivalent to walking on a tightrope over an abyss.[9]

We think a statutory clause stating the need to restrict the security intelligence activities to what is strictly necessary for the security of Canada would make it more likely that those who direct and carry out security work will keep in mind the danger to liberty which can result from an overly expansive interpretation of the security intelligence agency's mandate. Such a clause should combine at least one part of the British Home Secretary's Directive with the restriction contained in the New Zealand Security Intelligence Service Act.

> **WE RECOMMEND THAT the legislation establishing Canada's security intelligence agency contain a clause indicating that the agency's work should be limited to what is strictly necessary for the purpose of protecting the security of Canada and that the security intelligence agency should not investigate any person or group solely on the basis of that person's or group's participation in lawful advocacy, protest or dissent.**
>
> (4)

[8] Quoted in Cmnd 2152, paragraph 238.

[9] Rebecca West, *The New Meaning of Treason*, New York, Compass Books, 1964, p. 370.

The need for coherence and consistency

46. The tasks assigned by government to a security intelligence agency must not require it to collect intelligence on matters which are outside its statutory mandate. As we showed in Part II, Chapter 2, government direction of the security intelligence agency in the past lacked consistency and coherence in this regard. A particularly glaring example of inconsistency, which we outlined in that chapter, was the incompatibility between the instructions given with regard to reporting on "separatist sympathies, associations, and activities" in Public Service Security Screening[10] and the mandate given in the Cabinet Directive of March 27, 1975.

47. In Part VII of this Report, which deals with the security screening work of the security intelligence agency, we shall review the criteria on which decisions to grant security clearances are based. These criteria might be more specific or limited than the general categories which define the statutory limit of security intelligence, but they must not be wider than these definitions nor refer to subjects which cannot be brought under these definitions. Similarly it will be essential to ensure that the definitions of subversive activity or the security of Canada, in legislation such as section 16 of the Official Secrets Act providing special powers (or exemptions) for security purposes, are consistent with the definition of threats to the security of Canada in legislation establishing the security intelligence agency.

WE RECOMMEND THAT all intelligence collection tasks assigned to the security intelligence agency by the government be consistent with the statutory definition of the security intelligence agency's mandate and that all legislation and regulations providing special powers or exemptions for security purposes be consistent with the definition of threats to the security of Canada in the legislation establishing the security intelligence agency.

(5)

The need for flexibility

48. The definitions we have proposed for the security intelligence agency's statutory mandate are cast in quite general terms and should, we think, cover all the specific activities in relation to which Canada may in the foreseeable future require security intelligence. Still, it may be argued that there may be types of activity which we have not anticipated which might pose a serious threat to Canada's security in the future but which would be outside the statutory mandate of the security intelligence agency and outside the scope of criminal investigation agencies. If some new threat to the security of Canada developed which appeared to fall outside the statutory mandate, but which the government believed urgently required investigation by the security agency, there might be difficulty in obtaining quickly enough the statutory amendment needed to provide authorization for the surveillance. There is the danger that the public addition of words to cover the new situation would expose the interest of the agency in the proposed target. Even though we may find it impossible now to give an example of such an eventuality, should the scope of

[10] Paraphrased in Vol. 160, p. 24427. See Ex. M-135.

our national security legislation be bound by our limited knowledge of the future? Or should we avoid trying to legislate for what is presently inconceivable and leave it to future generations of legislators to modify Parliament's identification of the classes of activity about which Canada requires security intelligence?

49. We have concluded that, on balance, it would be best to include an emergency provision in the security intelligence agency's statutory mandate empowering the government by Order-in-Council to extend the security intelligence agency's mandate to an activity which in the government's view constitutes a serious threat to the security of Canada but which is not included in the general categories of activity listed in the agency's statutory mandate. If the statute contains a provision of this kind it should require that the Special Parliamentary Committee on Security and Intelligence be notified on a confidential basis when the Order-in-Council is passed and that within 60 days of its passage such an Order require for its continuation approval by an affirmative resolution of both Houses of Parliament.

WE RECOMMEND THAT there be a provision to extend by Order-in-Council in emergency circumstances the mandate of the security intelligence agency to a category of activity not included in the agency's statutory mandate, providing that the Joint Parliamentary Committee on Security and Intelligence is notified on a confidential basis when the Order-in-Council is passed and that within 60 days of its passage the Order-in-Council is approved by an affirmative resolution of both Houses of Parliament.

(6)

B. DISTINGUISHING DISSENT FROM SUBVERSION: LESSONS FROM THE PAST

50. In the remaining sections of this chapter we review some of the policies and practices which have governed the counter-subversive activities of the R.C.M.P. Security Service. In the decades since World War II, and especially in the 1960s and early 1970s, Security Service surveillance of domestic 'subversion' expanded considerably. Often individuals and groups were investigated who were not involved in espionage, foreign interference or terrorism, or any form of political violence. It is in this area of domestic subversion that improper targetting is most likely to encroach on legitimate dissent. Our objective in reviewing this past activity of the Security Service as part of our proposed Plan For the Future is not primarily to judge past policies — although some judgments must be made — but rather to learn from them and to indicate how these controversial areas would be treated under our recommendations concerning the proper scope of security intelligence surveillance. In keeping with this objective, we shall make no further recommendations in this chapter. Where recommendations appear to be called for, they will be included in a more complete discussion in other parts of our Report.

51. The most important lesson to emerge from a review of counter-subversion activities is that security intelligence activities must be subject to well-defined,

clearly communicated government policies. In the past the Security Service was left without guidance or else was given too much discretion in determining appropriate targets or subjects of investigation. In large part, the lack of a clear legislative mandate and of continuing supervision by government of security intelligence activities left the Service on its own to make important policy decisions often involving sophisticated political judgment. At times, either through misinterpreting the position of government or perhaps just acting cautiously, the Security Service failed to respond adequately to Canada's security needs; at other times we think there was an excess of zeal.

52. When Cabinet did give attention to security matters, as with R.C.M.P. operations on university campuses and the coverage of separatism in Quebec, its directives were not always clear, or else were not accurately transmitted by the Security Service to members in the field. Throughout, there have been problems of communication between the Security Service and government, heightened no doubt by the need for secrecy and by the lack of formal and effective institutions of supervision and control. Much has depended on the close but uncertain relationships between senior officers of the Security Service and various Commissioners of the R.C.M.P., senior civil servants and Ministers. The result has been that in determining broad operational policy the Security Service has often taken its own counsel and functioned in isolation from the other organs of government.

53. There will always be isolation in security work. To the limited extent that investigators and analysts talk about their work they do so only with colleagues in the security community. Their perceptions are therefore likely to become somewhat conformist and cautious. This makes it all the more important in a free society for major policy decisions on investigations to be made with the full and active involvement of Ministers and senior officials. But as some of the cases that we review in this chapter illustrate, the involvement of Ministers and senior officials is not enough to ensure legal and proper behaviour in an area of government shrouded in secrecy. Thus, we shall recommend in later chapters of this Report the establishment of a parliamentary committee and an independent review agency to scrutinize security intelligence activities. In addition, we shall propose the involvement of the judiciary in authorizing the use of certain particularly intrusive investigative techniques.

54. In reviewing the past we readily acknowledge the benefits of hindsight. Second guessing is far easier than making decisions on complex matters, especially when such decisions are made under great time pressures with little or no direction from government. We should also note that we are examining policies developed for the most part in the 1960s and early 1970s. This was a period of some turbulence in Canada in contrast to the present, which, from a security perspective, is a relatively placid time in our history. This marked change in the level of social conflict adds to the difficulties of being fair and balanced in our assessment of the past.

55. Another factor to keep in mind when reading this chapter is that these events were not unique to Canada. Book III of the *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence*

Activities[11] (commonly referred to as the Church Committee's Report) contains close to 1000 pages of evidence of questionable activities of the FBI, CIA, and other United States intelligence agencies in the area of counter-subversion during the 1960s and early 1970s. Acting Justice White's report on *Special Branch Security Records*[12] completed in 1977 in the State of South Australia also covers topics similar to those dealt with in this chapter. While the activities of security agencies in other liberal democracies are, with few exceptions, not a matter of public record, we would be surprised if these countries were completely immune from the kind of excesses recorded in this chapter. That at least some of the Security Service's sister agencies were engaged in similar activities does not excuse what happened in Canada, but it does increase our understanding of why improprieties and illegalities occurred. In the secret and closely knit world of security intelligence, the perspectives and activities of sister agencies must have had some influence on the Security Service, especially in a situation where little direction was forthcoming from government.

56. We are under no illusions about the ease of drawing a clear line between dissent and subversion. For those responsible for making targetting decisions about domestic groups and individuals, the task is akin to distinguishing between subtle shadings of grey. There are few 'blacks' and 'whites' in this business. Thus, while it is appropriate for a security intelligence agency to investigate individuals suspected of planning political violence, or acts of foreign interference, it is not nearly so obvious what the agency should do in the case of individuals who merely advocate the use of violence. Moreover, once an investigation is launched, there is the question of how the investigation should proceed with regard to the legitimate organizations to which the individual under investigation belongs. Given the difficult and continuing nature of this dilemma, we believe that those within the security intelligence agency must exhibit great care and sensitivity in making targetting decisions, that others outside the agency, including Ministers, should be involved in these decisions, and that there be some mechanism for *ex post facto* review so that the agency and the government will continually learn from the past.

57. Having made these preliminary observations let us turn to the lessons of the past. We shall discuss a number of topics which relate to surveillance policies regarding domestic subversion: separatism and national unity, surveillance on university campuses, the Extra Parliamentary Opposition, political parties, labour unions, blacks, Indians and right wing groups. It must be emphasized that these subjects do not constitute a comprehensive description, or even a profile, of the work of the Security Service. There has been no attempt to provide examples of counter-espionage, international terrorism or the surveillance of Communist or other groups whose avowed objective is the

[11] U.S. Senate, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, Book III, U.S. Government Printing Office, Washington, 1976.

[12] *Special Branch Security Records*, an Initial Report to the Premier of South Australia, Mr. Acting Justice White, Adelaide, 1977.

ultimate overthrow of our democratic system. Generally speaking, the Security Service experienced fewer difficulties in understanding and implementing its role in connection with espionage, foreign interference and international terrorism.

58. In discussing these topics, we shall tend to treat them as if they were in distinct pigeonholes. Of course, some subjects are unrelated. However, in the early '70s the Security Service's perception that Communists and Marxists were adopting new techniques, outside the Communist Party, to infiltrate a variety of institutions (including governments, universities, ethnic movements and a political party) resulted in a concerted effort to investigate the extent of such penetration of "key sectors" of society. Impetus for this development also came from the rising tide of student violence in this country, the United States and Europe, and the emergence of philosophies that preached violent assault on the established order. In 1970 the Director General of the Security Service predicted (wrongly, as it turned out) a decade of increasing disorder, and so advised the government. Consequently, throughout Canada — and totally unrelated to the separatist concern — the Security Service perceived the future as requiring an intensified level of investigation in order that government and police forces would not be caught unawares in the event of serious outbreaks of violence for political purposes. The Security Service terminated the "key sectors" programme in 1977 after a long internal review of the value of the programme.

(a) *Separatism and national unity*

59. Since the early 1960s one of the most difficult policy questions relating to the R.C.M.P. Security Service has been the proper definition of its role with respect to Quebec separatism and the national unity issue. It is an urgent question for Canadian democracy and Canadian security and it is still unanswered. Too broad a role can endanger Canadian democracy by undermining constitutional methods of settling the future of the Canadian federation. A role which is too narrow can deprive the federal government, as well as provincial governments and local police forces, of timely and useful intelligence about threats of *violent* political action.

60. The record of policy-making on this issue reveals a great deal of vagueness, confusion and ambiguity in both government direction and the Security Service's response to that direction. The story of the R.C.M.P.'s role in this area provides one of the best illustrations of the need for a clear definition of the role of the security intelligence agency — one which is understood and accepted by Parliament and the Canadian people.

61. The historical record can be divided into four distinct periods:

1. 1963-67: when the focus of R.C.M.P. security intelligence collection was strictly on terrorist elements in the separatist movement.
2. 1967-75: when R.C.M.P. security intelligence collection activities expanded to include open and democratic separatist parties and groups.
3. 1975-76: when confusion resulted from conflicting government directions on general surveillance and security screening.

4. 1976-78: when there were efforts to clarify or redefine the Security Service's role with respect to separatism.

62. In examining this historical record our focus is exclusively on policy rather than on actual operations in the field. A later Report will contain our findings as to some R.C.M.P. practices not authorized or provided for by law in gathering intelligence about and countering separatism in Quebec. The basic policy question of concern to us here is the extent to which separatism and any other attempts to bring about fundamental changes in Canada's Constitution have been, and ought to be, subject to the surveillance of a security intelligence agency.

1963-67: focus on terrorism

63. In the early and mid-1960s the Security Service understood that its basic role in relation to separatism was to collect information about separatists who used violent or terrorist methods to gain their ends. Assistant Commissioner Bordeleau, the Director of Security and Intelligence, writing to the officer in charge of the Quebec Division in October, 1963, explained that:

> It is fundamental in defining the extent of our interest in the movement to accept that there is nothing intrinsically illegal about it (i.e. separatism), nor should the "separatists", "independentists" etc. come under police investigation provided they confine themselves to constitutional methods.

64. F.L.Q. bombings were beginning to occur. The R.C.M.P.'s main security intelligence task was to penetrate the terrorist elements of the separatist movement. Assistant Commissioner Bordeleau said that the biggest obstacle in performing this task was that "most F.L.Q. activities were taking place amongst university students and teachers, who are presently practically immune from investigation". This understanding of government policy with regard to university surveillance differed from that of certain Ministers and their officials. Moreover, the R.C.M.P. made little effort to have changed what it believed to be an overly restrictive policy. As a result, there may have been a failure to carry out investigations of F.L.Q. terrorism — investigations which might have prevented some of the serious terrorist attacks before and during 1970. This episode is an indication of how the security of Canada may suffer when communications between a security intelligence agency and the rest of government are poor. (We discuss the question of investigations at educational institutions in more detail later in this chapter.)

65. The only other policy problem which arose during this period was that of providing security clearance reports on government employees who were members of open, legal, democratic separatist groups. Departments were beginning to request such information about employees and applicants. The Security Panel had a lengthy discussion of this matter on September 23, 1964. There was some support at that meeting for confining screening reports to information about participation in separatist activities of an illegal and terrorist nature. But the view prevailed, according to the minutes of the meeting, that the R.C.M.P. should include in their reports to Departments the fact of membership in open separatist organizations together with the "detailed information concerning length of attendance, the degree of involvement, and

other pertinent information as was available". Also according to the minutes, the decision of that Panel was to be referred to the Cabinet Committee on Security and Intelligence for its consideration. We have found no record of Cabinet Committee consideration of this matter, except several years later.

66. The Security Panel's decision raises a crucial question which was not discussed at its meeting: *how* was information about membership, degree of involvement and other aspects of open separatist organizations to be 'available' to the R.C.M.P.? Failure to face this question created ambiguity as to the Security and Intelligence Directorate's role in *collecting* intelligence about open separatist organizations. Was it to begin collecting information by reading the newspapers or by developing sources? Was it simply to sit back and wait for someone to drop relevant information into its lap? When intelligence agencies are told by senior members of the government to report certain information "if it is available", there is a danger that they will treat such direction as an instruction to collect as well as to report.

67. In any event, the security screening branch of the Security and Intelligence Directorate began reporting "separatist information" to Departments in April 1965. The R.C.M.P. and the Assistant Secretary to the Cabinet for Security worked out an arrangement whereby information was to be reported if it fell into one of the following three categories:

(1) subject or a relative of the subject participates in or is connected with "separatist/terrorist activities or movement"

(2) subject is an active participant or member of a Separatist movement

(3) subject has a relative who is an executive member of a Separatist movement.

Some of the people who would come within these categories — namely, those whose only separatist activity was of the open, democratic kind — clearly did not fall within the categories of persons set out in the Cabinet Directive governing security screening.[13] Thus the Security Panel's direction, the vagueness of which was graphically symbolized by the use of an ambiguous oblique in the phrase "separatist/terrorist activities", and the R.C.M.P.'s response to it, raise the question of whether the Force was involved in the reporting (and possibly the collection) of information in areas not authorized by the Cabinet. (We have discussed this matter in Part III, Chapter 11.)

1967-75: expansive coverage of separatism

68. In 1967 there was a decisive change in the federal government's perception of the separatist threat. It was now not only a security threat, it was a serious political threat. The federal government was concerned not only about threats of political violence but also with the political support the separatist movement was attracting from the Quebec electorate. Politicians and officials involved in government decision-making naturally and quite properly should be

[13] See Part VII, Chapter 1 for that section of Cabinet Directive 35 which sets out the categories of persons who are to be denied a security clearance on "disloyalty" grounds.

concerned with both the political and security dimensions of a political movement as important as Quebec separatism, but it is quite another matter to use a security intelligence agency to gather information about not only its security dimensions but its political dimensions. The central characteristic of this period is a vague intermingling of political and security concerns in government direction of the Security Service, and, not surprisingly, in the Security Service's response to that direction.

69. On August 14, 1967, at Prime Minister Pearson's direction, the Security Panel met to discuss ways and means of increasing the intelligence on separatism available to the government. According to Deputy Commissioner Kelly's record of this meeting, separatism was identified as a greater danger than Communist activities. Three overlapping concerns were identified: terrorists, constitutional separatism and foreign involvement. Mr. Kelly reported that "the general tone" of the meeting indicated that the R.C.M.P. were expected at this time to know more than it did about what was going on in the Province of Quebec in relation to Separatism.

70. This meeting was a critical turning point in the broadening of the R.C.M.P.'s security intelligence coverage of separatism. In his testimony Mr. Starnes stated that:

> ... there is no doubt that if the government had not wished to have separatism dealt with by the Security Service in the way in which they dealt with it, there is no question that the Security Service would not have done it, in its wildest dreams, there is no way the Security Service on its own would undertake that kind of investigation.
>
> (Vol. 100, p. 15938.)

Mr. Starnes admitted that the government never made "any declaration that the separatist movement was subversive" (Vol. 100, pp. 15935-6). Still he insisted that the Security Service had a broad mandate from government to investigate separatism as a whole, not simply its terrorist or violent elements, and traced that mandate back to "when they first started their discussions of this matter... in 1967, and the continuum from that time through to the early '70s was quite clear and it is established" (Vol. 100, p. 15939).

71. The government's vague broadening of the R.C.M.P.'s mandate for collecting information about separatism caused senior R.C.M.P. officers to be extremely concerned about the political consequences such a broadening might have for the Force. This concern is clearly reflected in the records of meetings held within the R.C.M.P. in August 1967. Security intelligence officers in the R.C.M.P. regarded such an expanded mandate as outside the role of a "defensive service". Intelligence requirements would, among other things, require forms of surveillance within Canada and the collection of intelligence outside Canada which, they thought, would be work appropriate to an offensive intelligence agency. These senior R.C.M.P. officers were very worried about the political consequences if surveillance of this kind were publicly exposed and considered that the Force should not enter into this new area without new terms of reference. There was some discussion of the merits of setting up a separate agency under Privy Council Office auspices for this intelligence task,

so that the R.C.M.P. would not bear the brunt of any potential political criticism.

72. Despite these qualms and the desire for clear government authorization, the R.C.M.P.'s Security and Intelligence Directorate expanded its coverage of Quebec separatism to include "constitutional separatism" and "foreign intervention". This was done without a written authorization from the government. Instructions sent on November 1, 1968, by a senior officer in the Security and Intelligence Directorate to the officer commanding the Quebec and Montreal security intelligence subdivisions indicate the extent to which the R.C.M.P. was endeavouring to expand its surveillance of separatism. These instructions were issued at the time when the Ralliement pour L'indépendence Nationale (R.I.N.) was breaking up and a large segment of it was merging with René Levesque's Mouvement Souveraineté Association to form the Parti Québecois. Intelligence was to be collected within the P.Q. The instructions made it clear that two kinds of information were wanted:

> (a) An *Intelligence interest*: we seek information on the identity, attitudes and potential of executive and other significantly important members of the Parti Québecois as part of an attempt to assess and anticipate potential and future course (sic) of the Party. We are also interested in both open and closed information as to the Party's strategy and tactics, financial condition, membership quantity and quality, relations with other political parties and pressure groups (such as trade unions and media of information) and on any existing or future relationships with foreign countries or subversive groups such as Communist or Trotskyist parties and so on.
>
> (b) A *Police* interest: we must continue to seek to identify and maintain a continuing study of those individuals in the Parti Québecois who advocate subversive or illegal courses of action or who are members of or sympathizers with outside groups which do so.

73. Information of the first type — the "Intelligence Interest" — is clearly information that goes beyond purely security matters and into the realm of politics. The closest the R.C.M.P. seems to have come to obtaining an explicit mandate from the Cabinet for the collection of this type of information was at the meeting of the Cabinet Committee on Security and Intelligence held on December 19, 1969. According to Commissioner Higgitt's notes of that meeting, one of the Committee's recommendations included the following:

> R.C.M.P. asked to provide a detailed report on the present state of separatism in Quebec in terms of organization, numbers involved, organizational inter-relationship, apparent strategy and tactics and outside influence.

74. The blending together of political and security purposes can be seen in subsequent targetting directions issued by the Security Service. In September 1970, when "G" Branch was being established in "C" Division (i.e. the Quebec Division) to focus on Quebec separatism, the Director General, Mr. Starnes, wrote to the officer in command of the security intelligence units in "C" Division, attaching terms of reference for "G" Branch. These terms of reference set out the following objectives for the branch:

To be as fully informed as possible on:

— all Separatist/Terrorist activities in the Province of Quebec

— all activities by foreign powers which may affect the position of Quebec in Confederation

— all activities by subversive organizations which touch on the Quebec problem

— developments of a subversive nature among the French speaking population of other provinces.

The terms of reference went on to give sweeping instructions with regard to separatism:

> In order to obtain adequate information regarding Separatist activities, "G" Branch must develop sources in all organizations and among all persons supporting the separation of Quebec from Canada...
>
> Clearly, the Parti Québecois, because it has attracted so many persons who are prepared to go to great lengths to achieve a separate Quebec, must be regarded as a prime target. Investigation of the P.Q., of course, has as its main purpose the achievements of a better insight into those activities within the party which clearly are subversive and have as their aim the break-up of confederation. In particular "G" Branch should build up an intimate knowledge of the party, its structure, its finances, its aims and those responsible for its direction. Among other things such knowledge is necessary in order to identify those elements in the party who may attempt to subvert it to the achievement of a separate Quebec by any means, including the use of force and terroristic acts. In addition the Branch should develop information regarding individuals or groups of individuals within other political parties who seek a separate Quebec by any means.

Mr. Starnes' covering letter stated that "the resources available to us in "C" Division will have to be utilized to the full if the government's priority of maintaining national unity is to be aggressively pursued."

75. The instructions quoted above show how easy it was at this time for members of the Security Service, including Mr. Starnes, to consider that any attempts to "break up Confederation" by democratic or any other means constituted a security threat warranting surveillance and investigation by the R.C.M.P.'s security intelligence branch. In his testimony, Mr. Starnes said that the Prime Minister congratulated him on a brief he had prepared in 1970 for the Interdepartmental Committee on Law and Order analyzing Separatist activities — a brief which included a section on the Parti Québecois. He testified that:

> ... we were not targetting the Parti Québecois as such, and we were very careful not to do so.
>
> But we were concerned with some of the elements which are described in the Royal Commission Report, which would be: foreign involvement, subversive activities, terrorist activities, infiltration of the Parti Québecois by some of the elements.
>
> (Vol. 100, pp. 15951-2.)

His testimony that there was a narrow focus and purpose of Security Service surveillance of the P.Q., limited strictly to concerns of security, is difficult to

reconcile with the broad references to political concerns about the future of Confederation found in his instructions to "G" Branch, quoted above. Nor is it easy to reconcile his testimony with the activities of the Security Service throughout most of the 1970s in collecting intelligence about the Quebec Liberal Government and the Parti Québecois.

76. Two further developments in the early 1970s accentuated the tendency to merge political and security interests in the Security Service's coverage of separatism. The first was a decision made by the Security Advisory Committee in 1972 which, in effect, formalized the arrangement made nearly eight years earlier with respect to reporting separatist information for security clearance purposes. At a meeting on November 14, 1972, the Committee noted that with respect to "information relating to separatism":

> neither Cabinet Directive 35 nor the security policy statements made by Prime Minister Pearson and Justice Minister Chevrier in 1963 provided authority for Security Service reporting of information in this area, in relation to screening public servants.

The Committee took cognizance of the fact that despite the lack of explicit Cabinet authorization the Security Service had been reporting information on a person's involvement in the separatist movement directly to the Privy Council Office, which would in turn consult with the Departments on the weight to be given such information in the security clearance process.

77. A month later, the Security Advisory Committee resolved this matter, at least to its own satisfaction. The Security Service was now to report information on a person's links with separatism directly to departments. But the Privy Council Office was to be consulted before any decision was taken to deny clearance on the basis of such information. The scope of Security Service information on separatist links was defined as follows:

> Separatist sympathies, associations and activities on the part of the subject will be reported as will significant separatist information on relatives and associates.[14]

This decision was circulated to Deputy Ministers and heads of agencies on December 15, 1972 in a memorandum signed by the Secretary to the Security Advisory Committee. There is no indication that it was considered by the Interdepartmental or Cabinet Committees on Security and Intelligence. Once again there is no indication that the implications of this decision for the R.C.M.P. Security Service's programme of *collecting* information were considered. Again there was no conscious recognition of the connection between government direction to report information and a security intelligence agency's mandate to collect it.

78. The second development occurred late in 1974, when the Security Service re-adjusted and clarified its policy with regard to surveillance of the Parti Québecois. This reconsideration was prompted by the emergence of the P.Q. as a major political party in the Province of Quebec and a serious contender for

[14] All but the last nine words of this sentence were discussed in evidence publicly: Vol. 141, p. 21672.

power. Thus Security Service targetting of the P.Q. now entailed surveillance and investigation of a democratic political party which was in the mainstream of provincial politics and might in the foreseeable future win an election and form a provincial government. The political implications of targetting, which had always worried the Force, were now more apparent than ever. Nonetheless, the new policy adopted by the Security Service called for sufficient surveillance of the P.Q. to determine how influential it was becoming in key sectors of Quebec society and whether or not the Party was receiving assistance from foreign countries. Thus, this new policy explicitly rejected the recommendation of the Royal Commission on Security whose recommendation on security intelligence surveillance of separatists had been as follows:

> Separatism in Quebec, if it commits no illegalities and appears to seek its ends by legal and democratic means, must be regarded as a political movement, to be dealt with in a political rather than a security context. However, if there is any evidence of an intention to engage in subversive or seditious activities, or if there is any suggestion of foreign influence, it seems to us inescapable that the federal government has a clear duty to take such security measures as are necessary to protect the integrity of the federation. At the very least it must take adequate steps to inform itself of any such threats, and to collect full information about the intentions and capabilities of individuals or movements whose object is to destroy the federation by subversive or seditious methods.[15]

The rationale for security surveillance of the Parti Québecois was based on the P.Q.'s objective of breaking up the Canadian federation; the Security Service decided that it should analyze "the forces actively working at destroying the unity of the country", so that the Security Service could become "a meaningful depository of this data which the Government could rely upon before taking decisions affecting national unity". This policy was approved by the Director General, Mr. Dare, on June 3, 1974. The operational implications of the policy were summarized in an internal Security Service memorandum as follows:

— No coverage of electoral activities.

— No collecting of membership lists.

— Selective clippings only.

— Minimal investigation of financial resources.

— Monthly analytical review of:

(a) Influence of newspaper "Le Jour".

(b) P.Q./labour unions relationship.

(c) P.Q. activities within politicized pressure groups.

— Investigate leads of foreign interference tied in with P.Q.

— Isolate radical elements operating under P.Q. cover.

— Investigate leaks of privileged information belonging to federal government.

— Tightening of security concerning the reporting of investigations of P.Q. activities.

[15] *Report of Royal Commission on Security*, 1969, para. 21.

— No discussion of our policy on P.Q. with Q.P.F. and S.P.C.U.M. [i.e. with the Quebec Provincial Police and the Montreal Urban Community Police Force].

— Initiation of discussion with P.S.P.B. [i.e. Police and Security Policy Branch in Solicitor General's Department] to formalize above mentioned coverage.

79. It is important to note that Mr. Dare approved all of these recommendations except the proposal to discuss the matter with the Solicitor General's Department. The Director General gave the following reasons for not seeking explicit approval for this policy from the Minister:

> Firstly, the information gathered will be made available to the government by a report to the Minister as required from time to time. Secondly, the Prime Minister has expressed to me and my predecessor his concern regarding separatism and I have the responsibility to report to both he [sic] and the Minister any major events or trends. We must all realize that the unity of our country is vital to the federal government.

80. Thus this period ends with the adoption of a formal policy by the Security Service on its coverage of separatism in Quebec. Apparently this policy was not submitted for approval to the Minister responsible for the Security Service nor to the Cabinet. It was a policy which in effect rejected the recommendations of the Royal Commission on Security. Finally, it was a policy which did not differentiate between the political and the security aspects of the P.Q. or of separatism. Indeed the tone of the policy statement and Mr. Dare's letter of approval indicate how difficult it was for members of the Security Service and, indeed, senior officials and Ministers, to adopt the approach recommended by the Royal Commission and to differentiate between the political and security implications of Quebec separatism.

1975-76: attempts to develop policy

81. In 1975 the government, at the Cabinet level, finally began to make policy with regard to the Security Service surveillance of the P.Q. and separatism. But policy was developed and enunciated in a manner which resulted in great confusion for the R.C.M.P.'s Security Service and for the public, and perhaps even for the policy-makers themselves. The heart of the confusion was and is the relationship between the direction the government gave the Security Service with respect to investigation of separatism generally, and the direction it had earlier given the Security Service concerning security clearances. Our perception is that at the time the March 1975 mandate was established the government did not consider that relationship and the Security Service did not bring the relationship to the attention of the government. The failure of the Security Service to do so was probably due to its lack of appreciation of the significance of the relationship.

82. The problem began in March 1975, when the Cabinet approved the Security Service's "mandate" in the form of a Cabinet Directive which we discussed in some detail earlier in this chapter. One interpretation of the mandate might be that the authorization given to the Security Service to investigate separatism and the Parti Québecois had been considerably reduced.

Thus, both the wide coverage approved by Mr. Dare in June 1974 and the collection of information about "separatist sympathies, associations and activities" which the Security Panel had formally authorized in 1972, might be precluded by the 1975 mandate. However, it was possible to read the mandate otherwise; there is evidence that the Cabinet may have expected paragraph (f) of the mandate to allow the monitoring of the activities of separatists. This interpretation, which may be justified by Mr. Dare's knowledge of the background of the Cabinet's decision, was stated in the following paragraph of his letter of May 22, 1975, in which he communicated the terms of the Cabinet Directive to all branches of the Security Service.

> In seeking new guidelines, the R.C.M.P. Security Service did not attempt to fundamentally alter our current activities — the collection of intelligence relating to espionage, sabotage, subversion and terrorism — rather we sought to formalize guidelines which Government had already recognized in a general way. Due to the fluid nature of national and international events, we will continue to monitor traditional areas of interest — such as Communists, Trotskyists, Maoists, *separatists*, black revolutionaries, native extremists, right-wing extremists and revolutionaries from other countries resident in Canada — although in many of these areas we may shift from aggressive collection to a passive monitoring role. Being granted a broad intelligence collection base and not being constrained by either ideological or criminal considerations alone, we are now free to respond to current and rapidly changing factors affecting National Security.
>
> (Our emphasis.)

83. However, on June 9, 1975, Mr. Dare wrote to the officers in charge of the Ottawa and Quebec area commands of the Security Service with reference to his earlier approval in June 1974, of policy concerning coverage of separatism in Quebec. In his letter he said:

> Recently I met with the Prime Minister of Canada, Mr. Pierre Elliot [sic] Trudeau, and we discussed the criteria used to investigate the Parti Québecois and its members. The Prime Minister stated that the Security Service of the R.C.M.P. does not have a mandate to conduct these enquiries unless they fall within Items A to F of our Role, Tasks and Methods of the R.C.M.P. Security Service.
>
> Therefore, will you please ensure that all enquiries being conducted on the Parti Québecois and its members cease unless they fall within Items A to F of the Role, Tasks and Methods of the R.C.M.P. Security Service.

As we shall see, nearly a year later, when an opposition member in the House of Commons raised the matter, Mr. Trudeau and Mr. Allmand stated that the "recent meeting" referred to by Mr. Dare had been the March 1975 meeting of the Cabinet Committee on Security and Intelligence when it agreed to the general mandate of the Security Service.

84. On June 13, 1975, Mr. Dare wrote to Mr. Bourne, Chairman of the Security Advisory Committee that the Prime Minister's guidelines "restricting the Security Service's enquiries with regard to the Parti Québecois" may conflict with the 1972 Security Panel's requirement concerning the reporting of information about separatist sympathies, associations and memberships for

security screening purposes. He asked that the Security Advisory Committee consider this matter at its next meeting. Despite at least this one documented attempt, Mr. Dare did not get the matter resolved by the government committees.

85. By February 1, 1976, the Security Service considered that its information on separatists was out of date, and that the Security Service was unable to provide accurate assessments of current activities and was providing incomplete and possibly erroneous assessments and information to departments. Consequently, Mr. Dare wrote to Mr. Bourne to inform him that the Security Service could not be expected to provide the type of information Deputy Ministers and heads of agencies required for security screening purposes. On May 5, 1976, a newspaper article quoted from Mr. Dare's letter of February 1, 1976 under the banner heading: TRUDEAU HALTS SCREENING OF CIVIL SERVICE SEPARATISTS. On May 5, 1976, Mr. Erik Nielsen, M.P., questioned Prime Minister Trudeau in the House of Commons about the leaked letter. The focus of his questions concerned the possible impropriety of the Prime Minister's personally having issued guidelines to the R.C.M.P. Mr. Trudeau replied:

> There were no guidelines issued by me or any interference by me. There is a cabinet committee on security and intelligence which oversees the operation of government agents in the area of security and intelligence. Certain conclusions were reached which were communicated to the police. They were not communicated by me personally or under my name. They were the object of a cabinet decision.[16]

86. The next day the Solicitor General, Mr. Allmand, reported to the House of Commons that what Mr. Dare referred to as guidelines was actually the Cabinet decision (of March 27, 1975) with regard to the mandate of the Security Service. This decision, Mr. Allmand said, was based on a submission he himself had presented to Cabinet and among other things it:

> . . . confirmed that the R.C.M.P. should not survey legitimate political parties per se, but of course individuals in all political parties should be subject to surveillance if they are suspect with regard to criminal activities, subversion, violence or anything like that.

He said that these guidelines dealt with general operations only and not with security screening. He also stated that:

> . . . the decision General Dare was talking about, the cabinet decision, was a decision of the cabinet as a whole and the cabinet committee as a whole and was not the result of any private meeting between General Dare and the Prime Minister.[17]

87. On May 11, 1976, in the House of Commons, Prime Minister Trudeau gave the following explanation of Mr. Dare's mistake in having referred to the Cabinet's general directive as if it had been a personal instruction from the Prime Minister to restrict surveillance of the Parti Québecois:

> The mistake probably arises from the fact that as a member of that cabinet committee, I did of course participate. I do not mind admitting I was one of

[16] House of Commons, *Debates*, May 5, 1976, p. 13193.
[17] *Ibid.*, May 6, 1976, p. 13224.

those who would argue that a democratic political party should not be under systematic surveillance by the RCMP.

Mr. Trudeau went on to explain his general position on Security Service surveillance of political parties:

> My opinion on that, which was expressed in cabinet, is certainly protected by the usage concerning cabinet secrecy, but I do not mind repeating it here. It is my view and the view of the government that if the party is legal, it should not be under surveillance systematically by the Royal Canadian Mounted Police or any other police. I hope that is the view of the other side of the House.

Finally Mr. Trudeau told the House that Mr. Dare was incorrect in drawing an inference regarding security screening from the Cabinet Directive. That mistake he explained was the following:

> This inference, that because the party is not under surveillance the government does not want to have security clearance on everyone who occupies a sensitive position in the federal government, is wrong.[18]

88. Material in R.C.M.P. files confirms that Ministers, during the meeting of the Cabinet Committee on Security and Intelligence on March 20, 1975, did indeed discuss the question of Security Service surveillance of democratic political parties. An excerpt from a memorandum written by Mr. Gordon Robertson, Secretary to the Cabinet, to Prime Minister Trudeau on April 1, 1976 is as follows:

> At a meeting on 20 March, 1975, the Cabinet Committee on Security and Intelligence considered a memorandum of the Solicitor General on the role, tasks and methods of the R.C.M.P. Security Service. The Cabinet Committee agreed to (and the Cabinet confirmed) the Solicitor General's recommendation that the Security Service be authorized to monitor and investigate individuals and groups in Canada when there are reasonable grounds to believe they may be engaged in, or planning to engage in, a number of specified categories of activities, including espionage, sabotage, terrorist acts and change of government by force or violence. The decision was in general terms, and made no reference to the Parti Quebecois or any other specific group and the categories did not include the activities or goals of the Parti Quebecois. However, you may recall that, during the meeting, Ministers discussed at some length the relation between the proposed role of the Security Service and a legal organization which advocated fundamental change (e.g. dissolution of a federation) by peaceful democratic means. There was a general consensus that in such cases, Security Service surveillance should occur only when it seemed justified in the light of the approved categories.

There is contradictory evidence as to whether, in addition, a "private meeting" between Mr. Dare and Mr. Trudeau occurred to discuss this matter. On the one hand, Mr. Dare testified that, when he referred in his letter of June 9, 1975, to a meeting with the Prime Minister, he did not mean that there had been a private meeting between himself and the Prime Minister. Rather, he stated that he received instructions regarding surveillance of the P.Q. at a

[18] *Ibid.*, May 11, 1976, p. 13389.

meeting of officials and ministers, at which the Prime Minister was present. This meeting took place ". . . towards the end of May or very early June", 1975 (Vol. C89, p. 12252). It is not clear from his testimony whether this meeting was "the fringe of a Cabinet meeting", a formal meeting of the Cabinet Committee on Security and Intelligence, or a meeting held just prior to a formal Cabinet Committee meeting (Vol. C89, pp. 12252-53; Vol. C90A, p. 12431 and 12434). On the other hand, Mr. Gordon Robertson testified that he had ". . . no recollection of any Cabinet Committee meeting of the kind that Mr. Dare is apparently referring to" (Vol. C116, p. 15001), nor did he recall ". . . a meeting at which people stayed behind in order to have a subsequent private discussion" (Vol. C116, p. 15003). Rather he was under the impression that ". . . the discussion was in a meeting in the Prime Minister's office and was a private meeting" (Vol. C116, p. 15002).

89. On May 18, 1976, the Cabinet Committee on Security and Intelligence met and agreed upon the security screening implications of the March 27, 1975 Cabinet decision. The Committee's decision was confirmed by the full Cabinet on May 27, 1976. It was as follows:

Security screening: implications of Cabinet decision of March 27, 1975

> The Committee agreed that the Cabinet decision of March 27, 1975 (166-75RD) was not intended to alter the policy of the government with respect to the screening of persons for appointment to sensitive positions in the Public Service, namely that:
>
> (a) information that a candidate for appointment to a sensitive position in the public service, or a person already in such a position, is a separatist or a supporter of the Parti Québecois, is relevant to national security and is to be brought to the attention of the appropriate authorities if it is available; and
>
> (b) the weight to be given to such information will be for consideration by such authorities, taking into account all relevant circumstances, including the sources and apparent authenticity of the information and the sensitivity of the position.[19]

The Cabinet Committee did not explain how information about a person's separatist leanings or associations was to be available if the Security Service could not systematically collect such information.

90. As a result, on February 8, 1977, instructions were sent by Security Service Headquarters to the officers in charge of the Security Service's Ottawa and Montreal divisions explaining that the Cabinet had directed that inquiries could be made concerning "separatists and supporters of the Parti Québecois". Mr. Dare's testimony gave additional insights into Security Service policy for carrying out these enquiries. For example, he testified as follows regarding field investigations for security screening purposes:

> Q. Would I not be correct that under the directives given ... .that when the inquiry was made of the neighbour one of the questions to be asked would be "Is X a separatist, to your knowledge?"

[19] The contents of paragraph (a) were stated in evidence publicly: Vol. 141, p. 21676.

A. It could well be, Mr. Chairman, yes.

Q. Would a further question also not be "Is X a supporter of the Parti Québecois?"

A. Well, I suppose it could be, Mr. Chairman, but I think we are touching on — yes, it could Mr. Chairman.

(Vol.C90A, p.12383)

Mr. Dare also testified that except for one brief period between February 8, 1977 and April 12, 1977, Security Service policy has been to obtain information about separatism in Quebec for security screening purposes from existing sources and files. Thus, the Security Service appears not to have been cultivating new sources for this purpose (Vol.C90A, pp.12367-12372). According to Mr. Dare, the Security Service, for security clearance purposes regarding separatists, also relied on "spin-off" information — that is information collected accidentally in the course of another investigation (Vol.C-89, p.12278).

91. That is the end of the chronology of a confusing situation. The testimony of Mr. Gordon Robertson, who was the senior government official dealing with security matters from 1963 to 1977 (Vol. C107, pp.13850-1), reveals that this confusion was not the result of the ignorance of Ministers and senior officials about the difficulties that their instructions posed for the Security Service:

Q. So, you were familiar with the dilemma that the Security Service felt in attempting to respond to the government's request for more information about separatists and terrorists and the fact that some of these elements or individuals could be regrouped in a political party which was not subject to or not supposed to be subject to surveillance?

A. Oh, I knew it. I understood it. I had great sympathy with the problem. I think that the Ministers who were connected with it, like the Prime Minister, also understood the terrible difficulty of the problem.

(Vol.C107, p.14057.)

But Mr. Robertson's testimony also reveals that, according to him, instructions to collect information on separatists were premised on a policy established as early as 1964 that "democratic parties" were not subject to surveillance. Consider the following testimony of Mr. Robertson:

Q. The Prime Minister on...May 11th, 1976 issued this statement in the House of Commons:

> It is my view and the view of the Government that if the party is legal it should not be under surveillance systematically by the Royal Canadian Mounted Police or any other police. I hope that is the view of the other side of the House.

Is this the policy that you understood having been in force from 1964 on through the various governments that were in office at the time?

A. It is.

Q. Is it also an accurate statement to say that at least from 1964, as we have seen through various periods, that there was pressure or direction given to the R.C.M.P. for them to collect as much information as they could, to keep the Government informed (a) of separatists and (b) of the individuals who may want to apply for Civil Servant jobs?

A. That's correct, I think, subject to two points I would make: number one, the point you just finished making, the Parti Québecois and the other democratic parties were not subject to surveillance. So that there was always a qualification on that. The second point, I made earlier, that the R.C.M.P. were not to be limited by their own specific information, but should use all the information that was available from all sources, to try to get the maximum information possible, brought together. So that it was not just a matter for them to do alone by normal security methods. It was a bigger problem than that and there were more sources of information.

(Vol. C107, pp. 14091-3.)

92. The testimony of Mr. Robertson quoted above leads us to the following observations. First, it was not until 1976 that the instructions given the Security Service concerning the separatism movement in Quebec explicitly contained the qualification that the Parti Québecois and other democratic parties were not subject to surveillance. As we have seen, there was great confusion within the Security Service on this point for over a decade. Second, Mr. Robertson's point that the Security Service was to use other sources of information and not rely solely on "normal security methods" must be viewed in the light of other remarks he made during his testimony. For example, Mr. Robertson told us that as early as 1970, Ministers and senior officials realized that the Security Service was weak in gathering and analyzing information from open sources (Vol. C107, pp. 14093-5). Finally, we should note that Ministers and senior officials, despite their realization of the "terrible difficulty of the problem" faced by the Security Service in responding to requests for information on separatists, had effectively insulated themselves from any knowledge of how the Security Service was in fact dealing with this problem on a day-to-day basis. Consider the following excerpt from Mr. Robertson's testimony.

Q. . . . in order to bring you a policy or present to you a policy problem which could lead to a recommendation or changing of some legislation, were you not exposed to explanations as to the operations themselves, in a general way?

A. In a general way, if it would be something that would be relevant to a decision, that could be. Never about a specific case. And I think that in case the distinction seems artificial or tight, I think I should make the point that there was a very strict principle that was applied, and I hope is still applied, in security work, which was called "the need-to-know" principle; and if a person didn't need to know, he shouldn't ask and he shouldn't be told. And this was in order to maintain as tight security and information as possible. So that I was never told about a specific case and I never asked about a specific case.

(Vol. C107, p. 13854.)

93. A measure of the confusion within the ranks of the Security Service as to what the government expected with regard to its collecting information about separatism in Quebec is provided by the following extract from an R.C.M.P. audit report of the Security Screening Branch, written in 1978:

Although the most recent "H.Q." Policy statement clearly requires enquiries to be conducted to develop information reflecting on the loyalty and

reliability of an applicant or employee, "including support of the separatist cause", this policy is not being adhered to by all field commanders and investigators. Most investigators are mindful of the relevancy of separatist activity to an applicant's security status when enquiring into that individual's loyalty, but there is no concerted effort to enquire into separatist or Parti Québecois support. The expression "if it is available" was never clarified by C.C.S.I. and the resultant "H.Q." efforts to interpret it have created confusion, particularly when "H.Q." policy does not appear to coincide with the Prime Minister's public statements to the effect that the Security Service does not investigate the Parti Québecois.

This also illustrates the failure of the government's interdepartmental committee system for security and intelligence to resolve such problems.

1976-78: the search for a clearer mandate

94. Following the victory of the Parti Québecois in the Quebec provincial election on November 15, 1976, the Security Service re-evaluated its security intelligence role with respect to separatism. In December, Mr. Dare wrote to both Mr. Bourne and Mr. Robertson (the latter in his capacity of Chairman of the Interdepartmental Committee on Security and Intelligence) indicating that it was the intention of the Security Service to play the following role:

(a) adopt and maintain a low profile in discharging our mandate within Quebec;

(b) enhance our intelligence collection and monitoring capability in the province particularly with respect to [foreign interference, increasing tension among minorities, terrorist and revolutionary power bases in Quebec and penetration of the federal government by separatists who may be trying to thwart moves by the government to keep Quebec in Confederation];

(c) in accordance with our mandate continue to monitor closely the activities of subversives within legitimate political parties, groups and organizations;

(d) maintain dialogue and liaison with appropriate provincial authorities with the aim of preventing misunderstanding regarding the role of the Security Service;

(e) maintain and promote our long standing working relationship with Quebec's provincial and municipal law enforcement agencies.

With respect to foreign interference, Mr. Dare explained that the Security Service's concern was with those countries which adopt "a semi-clandestine posture in deference to federal sensitivities". He also stated that with reference to paragraph (d), he intended to meet privately and discreetly with two P.Q. Cabinet Ministers to explain the Security Service's interest in ensuring that "the democratic process is free to work, unhindered by criminal, subversive, terrorist or espionage activities".

95. Mr. Dare discussed these intentions on January 4, 1977 at a meeting chaired by Mr. Robertson and attended by Commissioner Nadon, and Messrs. Tassé, Bourne and Hall.[20] This meeting approved the security intelligence

[20] Mr. Hall was the Assistant Secretary to the Cabinet, Security, Intelligence and Emergency Planning.

programme which Mr. Dare had outlined. However, the members of the group felt that the Security Service's mandate to collect this intelligence should be clarified by a letter from the Prime Minister authorizing an interpretation of the March 27, 1975 "guidelines" broad enough "to include activities by an individual or group of a subversive as distinct from a normal political character directed toward the fragmentation of the country or designed to undermine its integrity". This group of officials thought that a new special unit being set up in the Federal-Provincial Relations Office (Mr. Tellier's group) might "ask the Security Service to obtain information". They also called for a watering-down of the commitment to close liaison with the Quebec Government and police and concluded that Mr. Dare "would reconsider" his intention to meet with Quebec Ministers.

96. Senior officers of the Security Service subsequently worked out the specific wording of "the interpretation" of the March 27, 1975 guidelines which they hoped the Prime Minister would authorize. With some alterations resulting from a meeting of Mr. Dare with Commissioner Nadon and Messrs. Bourne and Tassé, the suggested interpretation was as follows:

> 1. The Security Service will, consistent with approved Cabinet Guidelines dated 27 March 1975, subparagraphs (c) and (d), investigate:
>
> (a) individuals or groups who are suspected, on reasonable grounds, of engaging in or planning to engage in criminal, subversive, or other activities aimed at effecting the secession of any constituent of the Canadian federation;
>
> (b) accredited representatives or other agents of foreign governments, or other foreign interests, fostering by any means the secession of any constituent of the Canadian federation.
>
> 2. To accomplish the foregoing, the Security Service will be required to:
>
> (a) develop sources in the milieux relevant to 1(a) and (b);
>
> (b) direct agents in these milieux relevant to 1(a) and 1(b);
>
> (c) employ such other Security Service investigative techniques as may be necessary to obtain intelligence on persons mentioned in 1(a) and 1(b) provided that, in all of the foregoing, the Security Service will operate within the framework of the law and in accordance with government policy.

It should be noted that the words "subversive" and "other" in 1(a) have a considerable potential for expanding the March 27, 1975 guidelines.

97. The proposed interpretation of the March 27, 1975 guidelines did not receive ministerial approval. Instead, officials in the Privy Council Office drafted a letter which they proposed that Mr. Trudeau would send to Mr. Fox, the Solicitor General. Of particular relevance is the following:

> Clearly what was intended was that the Security Service should try to inform itself of activities outside the normal political process which are intended to be subversive of our system of government or of public order even if they might not have the particular characterizations referred to in [the clause in the 1975 mandate which reads "activities directed toward accomplishing governmental change within Canada or elsewhere by force or

violence or any criminal means"] and to [sic] "hostile acts against Canada" that are not necessarily motivated by a foreign power or carried through by "attack" in the usual sense of military aggression.

Mr. Fox was asked his opinion of this draft letter. He expressed a desire for much more specific authorization, but officials in his Department now raised a number of considerations about the merits of "interpreting" the mandate in the manner originally proposed by the Security Service and senior officials. They drafted a letter addressed to a Privy Council Office official for Mr. Tassé's signature raising the following questions:

> Is it in fact a proper function of one element of a national police force to collect information about a provincial government?... For how long would it be possible to keep this activity from public knowledge? In other words, is the value of the information collected going to be worth the political damage done to the Federal Government and the long-term damage which will probably be done to the R.C.M.P. by public disclosure of this activity. The R.C.M.P. cannot afford to become suspected of "political spying".

This letter went on to suggest that the R.C.M.P. Security Service should hold back on collecting intelligence with respect to Quebec separatism until Mr. Tellier's group has identified "gaps in the information which is being collected and reported about Quebec".

98. The final chapter in the search for a new mandate for the R.C.M.P. Security Service in relation to Quebec separatism was the Security Service's submission of a discussion paper entitled "National Unity Intelligence Requirements As Perceived By the R.C.M.P. Security Service". This paper was apparently requested by Mr. Gordon Robertson, who at the time was Secretary to the Cabinet for Federal-Provincial Relations. Its purpose was to advise senior government officials "on the optimum and appropriate role of the R.C.M.P. Security Service relative to the information requirements of federal policy-makers on national unity matters."

99. The discussion paper set out five options ranging from an expanded mandate to use all techniques to collect information about virtually all aspects of the Parti Québecois and the Quebec Provincial Government, to research and analysis of open information of those aspects of separatism that might fall under the existing mandate. The paper did not recommend or reject any of the options. It did point out the serious political implications of the most expansive option, and considered that:

> Enhanced collection should be supported by a public statement by the Government to the effect that all Government resources will be dedicated to the national unity question. Disclosure of enhanced R.C.M.P. Security Service activity in the national unity field without such public support could result in a harsh "backlash" against the R.C.M.P. (and the Federal) presence and activities in Quebec.

The paper also pointed out that because the analysis and research of open information would require "the acquisition of additional personnel with the necessary skills", it "could perhaps be best performed by other departments and agencies".

Conclusions

100. Throughout our analysis of Security Service policy with respect to separatism we have made a distinction between the security and the political dimensions of separatism. We have shown how neither the government nor the Security Service consistently made this distinction in the past. We realize that there are Canadians, we hope not many, who will refuse to make the distinction in the future. But we think it is a distinction which can be made and which must be made. We quote again from the Report of the Royal Commission on Security in 1969 that:

> Separatism in Quebec, if it commits no illegalities and appears to seek its ends by legal and democratic means, must be regarded as a political movement, to be dealt with in a political rather than a security context.[21]

We strongly endorse that position. Indeed we would extend it to all the parties and political groups participating in the "national unity" debate. All should be free to participate in discussions over the future of Canada and none should be the target of investigation by the security intelligence agency so long as they adhere to legal and democratic means of pursuing their aspirations.

101. The reason we take this position and endorse it strongly is the grave danger to the democratic and constitutional process of government in Canada which we believe will result from a failure or refusal to accept this position. It has been a constant theme of this Report that the heart of this nation's security is its democratic process — it is that process above all which must be secured from external attack and internal subversion. That democratic process is threatened when governments or political parties at the federal or provincial level use the methods of espionage to gain information about one another's political intentions and capabilities. Targetting a security intelligence agency against one's democratic political opponents can in itself become a threat to a most fundamental dimension of the security of Canada.

102. The principles which govern the security intelligence agency's surveillance of a separatist political party should be the same as apply to its surveillance of all other political parties. They must be the principles expressed in the Act of Parliament which establishes the agency's mandate. That Act of Parliament, as we conceive it, will establish the kinds of activity which can be the subject of surveillance by the agency. We have recommended that these activities be confined to the four categories which we described in section A of this chapter. No political party nor any group of party members should become a subject of investigation by the security intelligence agency unless there is some evidence to suggest that it or they may be participating in one or more of these four kinds of activities. Further we have recommended that the Act should prohibit the security intelligence agency from launching an investigation of any person or group of persons solely because of their involvement in lawful protest or dissent. That last principle would preclude the security intelligence agency's investigating a group or a party solely because the group or party wishes to bring about, by democratic and lawful means, changes in the

[21] *Report of the Royal Commission on Security*, 1969, para. 21.

structure of the Canadian federation, including the separation of one or more provinces.

103. The historical record provides ample evidence of the need for strict *statutory* rules with respect to the permissible limits of security intelligence surveillance. This record also shows the danger of a security intelligence agency or government officials developing their own interpretation of directives from higher authorities without confirming the validity of those interpretations. That is why our recommendations on government direction of a security intelligence agency will insist upon the accountability of the security intelligence agency to the Minister responsible for the agency and the accountability of that Minister to the Cabinet and to Parliament for the manner in which the Parliamentary standards are interpreted. We will also be recommending an independent review body to provide an additional check that surveillance by the security intelligence agency does not exceed the limits established by Parliament. In our view these controls and checks on security intelligence activities are nowhere more necessary than in relation to surveillance of members of a political party.

104. It must be emphasized that the position we have taken on this issue does *not* preclude the collection and analysis of *open* information by the security intelligence agency about democratic political parties or their members, including the Parti Québecois and its members. In this period of our history when Canadians are engaged in a passionate debate about the future of Confederation, a security intelligence agency has an important role to play in collecting and analyzing information from open sources to assess the likelihood of political violence occurring and advising both the federal and provincial governments of any threats it perceives to the use of democratic and constitutional methods of conducting and resolving this debate. The Security Service's inability to provide analysis and advice of the highest quality is one of the reasons why we will be recommending in this Report important changes in the personnel and structure of the agency responsible for security intelligence.

105. The security intelligence agency may have evidence from public sources or confidential private sources, justifying the use of more intrusive techniques for gathering information about separatists (or anti-separatists). In the following chapter we shall recommend the standards of evidence that must be met to justify the use of covert methods of information collection. At the very least, proposals to make members of a democratic political party or a provincial or municipal government the targets of covert investigative techniques must be subject to these standards and the control mechanisms for applying them. But there is a need for extra caution and consultation in using covert methods of collecting information about the members of a democratic political party or of a provincial or municipal government.

106. The question of foreign interference in the political activities associated with the constitutional debate is a particularly difficult one. In the past the R.C.M.P. Security Service has had great difficulty in distinguishing the kind of foreign intervention which constitutes a significant security threat from that which — although perhaps politically objectionable to many Canadians — is

not a security threat. In our discussion of this subject earlier in this chapter, we emphasized that it is the clandestine or deceptive nature of active measures of foreign intervention which marks them as properly subject to the surveillance of a security intelligence agency. We concede that it may often be difficult in particular circumstances to identify these measures. In doubtful cases the Director General and senior officials of the security intelligence agency should seek guidance from their Minister, the Department of External Affairs and the Interdepartmental Committee on Security and Intelligence, and ultimately from the Cabinet Committee on Security and Intelligence.

107. Finally, there is one source of confusion with respect to security intelligence activities in relation to separatism which must be removed — the conflict between the mandate to conduct surveillance and the mandate to report information for security clearance purposes. Earlier in this chapter we showed the need for consistency and coherence. The criteria which define the kinds of information the security intelligence agency must report on candidates for security clearances must be consistent with the criteria set out in the Act of Parliament which define exhaustively the activities about which the security intelligence agency may collect information.

108. In Part VII, Chapter 1 of this Report, we shall return to this question of security screening and Quebec separatism. There we take the position that, in performing its security screening responsibilities, a security intelligence agency should not collect or report information about separatists who are pursuing their cause in a legal and democratic fashion, and who, consequently, do not fall within our proposed definition of a security threat. In short, we believe that democratically committed separatists should not be regarded as a national security problem. Thus, we consider it to be outside of our terms of reference to recommend to the government whether or not such individuals should be barred from some, if not all, positions within the Federal Public Service. If the government should decide to restrict these individuals from public service employment, and further, if the government assigns an agency to collect and report information about separatists for staffing purposes, then we strongly urge that (a) this agency not be the security intelligence agency and (b) this agency not have intrusive investigatory powers. We realize that an agency without such powers will not likely identify covert separatists who seek public service employment for questionable motives. Nonetheless, the history of the last 15 years strongly suggests to us that the problems associated with covert separatists in public service jobs are insignificant when compared to those associated with active surveillance of a democratic party. Thus, the May 27, 1976 decision of the Cabinet, a decision which authorized the Security Service to report separatist information if available, for security screening purposes, should be rescinded.

(b) *Members of Parliament, election candidates, and surveillance of the Waffle*

109. As we have stated several times in this chapter, it is essential that the activities of a security intelligence agency not violate the basic principles and practices of liberal democratic government. Adherence to this principle, how-

ever, does not require exempting M.P.s or election candidates from the security intelligence process. The conviction in 1947 of a Member of Parliament, Fred Rose, for espionage demonstrated that M.P.s can perform acts damaging to national security. In so far as *investigating* M.P.s or candidates is concerned, at the very least the laws and guidelines that we shall recommend in the following chapter for the use of intrusive investigative techniques should be applied with an extra degree of caution. There is a significant difference between the investigation of 'subversives' in a private club or ethnic organization, business corporation or trade union, and the investigation of 'subversives' in political parties, especially those represented in Parliament and provincial legislatures. The competition of political parties in elections is fundamental to a democracy: for the party in power to employ a security intelligence agency to spy on its political opponents is a grave undertaking, and should be considered only where there is evidence of a serious threat to the security of Canada as defined by Parliament. In the past the Security Service and those directing it have not been sufficiently aware of the significance of such an undertaking, as testified to by some of the Security Service's activities in relation to the Parti Québecois. Nowhere is there a stronger case for control of intrusive investigative techniques, for the independent review of the use of such techniques, or for accountability to Parliament through a committee representative of all parliamentary parties, than in security intelligence activities related to M.P.s and candidates.

110. We examined many of the Security Service files on persons who were members of Parliament between 1974 and the election of May 22, 1979. This examination, together with information obtained through informal meetings with Security Service personnel, reveal that there are a number of reasons for collecting and retaining information about Members of Parliament. We think it worthwhile reviewing these reasons in order to give some indication of how the general principle we have stated above should be applied and to consider a number of policy issues that arise. In doing so we shall give some examples described in such a way as to make it most unlikely that even the M.P. concerned would be able to identify himself as the subject. The examples, of course, are based entirely upon the Security Service records. We have not necessarily included all of the information on each file. The Commission has not attempted to test the accuracy of the information. The point is not whether the information collected is true or worthwhile, but that it illustrates the various reasons put forward by the R.C.M.P. for collecting information about M.P.s. In the next chapter of our Report, we make several recommendations about the kinds of information in general that a security intelligence agency should and should not record.

111. One important reason for keeping 'security relevant information' on file on M.P.s (or candidates) is that if their party forms the government, the Prime Minister may wish to consider an M.P. for appointment to the Cabinet or as a Parliamentary Secretary. We will consider below some of the issues which arise in determining what information is 'security relevant', but there will unquestionably be cases in which the Security Service in its investigation of security threats does come upon information that is clearly security relevant.

Case 1:

— an informer reported that the M.P. was a friend of a suspected agent of a foreign country's intelligence service;

— the M.P. was visited by a diplomat who was not a suspected intelligence officer but was from another Communist country;

— The M.P.'s name and address were found among the effects of a diplomat from that country who was identified as being involved in clandestine intelligence activities.

In our view the first and third items should be kept on file about any person because it may well turn out to have operational significance in investigating the activities of a foreign intelligence agency. It should not matter that the person involved is a Member of Parliament. If the proposal which we develop later in our Report is accepted, calling for a Joint Parliamentary Committee on Security and Intelligence with access to important confidential information, the case against protecting Members of Parliament from legitimate security intelligence investigations will be even stronger. The second item should be recorded in only those cases (such as Case 1) where other information relating to a potential security threat exists. Such an item should not be recorded if it stands in isolation

112. On the other hand, if there is no security relevant information about the M.P., there is no justification for opening a file. Take for example the following case:

Case 2:

— a file was opened when an M.P. was appointed Parliamentary Secretary

— there was no other information on the file.

In this case there was clearly no justification for opening the file.

113. In a number of cases a file had been opened on a person before he became a Member of Parliament. Here again, if the file was opened because there was security relevant information on it, then it should certainly be retained after the individual is elected to Parliament. Election to Parliament should not in itself be a reason for destroying information which associates an individual with a threat to security, but if, as is true with a fair number of these files, the file was originally opened at a time when the person applied for employment with the Public Service, it is unacceptable that the file be maintained as an "M.P. file", unless there is additional security relevant information on it.

114. We turn now to the much more difficult question of what information is sufficiently relevant to security to justify its being kept on file. Our guide here must be the definition of targettable security threats which we have recommended earlier in this chapter for the statutory mandate of the security intelligence agency. Although the issues we examine here are in the context of M.P.s and candidates files, most of them apply to the retention of information about persons who are not M.P.s or candidates.

Files opened because of foreign travel and contacts with foreign diplomats

115. In many files the information recorded was about travel to Communist countries or contacts with Communist diplomats.

Case 3:

— the file was opened on the M.P. when he called on an officer of the Security Service with regard to a proposed visit to Canada of a certain group of persons from a Communist country;

— many persons who had emigrated to Canada from that country resided in the M.P.'s city;

— the M.P. and other M.P.s had visited the U.S.S.R.

Case 4:

— the file was opened on an M.P. when he declined an invitation to a Communist country's embassy reception;

— he later became a Minister and his file records contacts with Soviet bloc officials and visits to several Communist countries on official business.

Case 5:

— the file was opened on an M.P. because a woman had contacted a Communist bloc embassy on behalf of the M.P. with regard to visas for constituents;

— the M.P. had declined an invitation to a Communist country's embassy cocktail party.

Case 6:

— a file was kept active because of the M.P.'s frequent attendance at Soviet bloc embassy functions;

— the file noted that "Our sole concern in this regard is that (the M.P.) may be the target of an agent of influence campaign on the part of the Soviet bloc".

These cases raise at least two questions: first, whether the security intelligence agency should record apparently innocuous travel to Communist countries and second, whether the security intelligence agency should record apparently innocuous social or business contacts with Communist bloc embassies or officials.

116. We think that very great caution should apply to the collection and use of this foreign contact information. Our views on this point apply not only to M.P.s and candidates but to *all* persons subject to security screening. The Security Service has been known to collect systematically, information on all persons who travelled to Communist bloc countries. If information about such apparently innocuous contacts or travel is reported or is thought to be reported in the security screening process, some Canadians will be deterred from having perfectly acceptable, indeed entirely desirable, contacts with the Communist world. If it is thought that one earns a "plus mark" for declining an invitation to a reception at a Communist bloc embassy but a "minus mark" for accepting an invitation, then our politicians and other citizens, if they wish to rise to positions of responsibility in Canadian government, will be careful to avoid all contact and communication with the Communist world and its representatives.

We think this would be extremely detrimental to the opportunity of all Canadians, including their political leaders, to acquire first hand knowledge of the Communist world. No reasonable Canadian wants that result. Furthermore, we believe that it is a waste of resources for a security intelligence agency to collect and record such innocuous information, without there being additional reason for suspicion.

117. In Part VII of this Report we consider in detail the entire security screening process and make recommendations on the major policy issues. There we recommend that an independent review tribunal be established to hear appeals from those individuals whose careers have been or are suspected of having been adversely affected by federal government screening procedures. We envisage M.P.s having access to this tribunal which provides an important protection against the misuse of information in the security clearance process. The protection against the misuse of information about an M.P. who is being considered for a security sensitive position in the Cabinet or Parliament must also rest with the good judgment of his leader. The names of such M.P.s should be given to the security intelligence agency. That agency should report only information which indicates a significant association with an activity which threatens Canada's security. This information should be reported only to the Prime Minister or party leader.

118. One further point should be noted about foreign contact information. Nearly all of the information of this kind in the M.P.s' and candidates' files relates to Communist bloc countries. Many other countries, of course, have secret intelligence agencies, and none of them, so far as we can ascertain, has declared Canada off-limits. We think that the security intelligence agency should not be so preoccupied with the Communist threat as to neglect the possibility that relationships between M.P.s and non-Communist countries may also develop in a manner which threatens Canada's security. This points up the need for balance and sophistication in the direction of the security intelligence agency's targetting.

Files opened because of expression of political opinion

119. In many files on M.P.s and candidates the information included opinions expressed before or after being elected to Parliament:

Case 7:

— The file was opened on a person before he became an M.P., when he was opposed to certain policies of a foreign state;

— after he became an M.P. the file was maintained because of the possibility that certain organizations considered 'subversive' and certain foreign governments might try to influence or use him, in which case (according to the rationale expressed for maintaining the file) the Security Service should be in a position to warn him of the possibility of a compromise or of pitfalls.

Case 8:

— an M.P.'s file was opened because an article in a Communist Party newspaper reported that speeches delivered by him recognized a need for a grass-roots peace movement;

— the file contains references to views expressed by leaders of the Communist Party as to whether the Communist Party should support the M.P. or run its own candidate against him;

— the file contains the comment that "In spite of numerous references made about [the M.P.] by [the Communist Party of Canada] people, there is no firm indication of any affiliations or outward support by him for the Party". The note concluded that therefore "Little significance is. . . placed on these references";

— the reason given for maintaining the file was "to monitor any new information in the event investigation and/or interviews become necessary".

Case 9:

— a file was originally opened on a person prior to his election to Parliament when a security clearance was required. The report praised his character;

— later when he was elected to Parliament, the file was transferred to the M.P. s category of files;

— the next item on file records his public criticism of certain legislation;

— several years later the continuance of the file was justified in part by the fact that he supported "grass roots" politics.

Case 10:

— a file was opened on an M.P. because a person being interviewed by a Security Service member in a proper counterespionage operation happened to mention in a quite unrelated way that the M.P. wanted to launch a campaign to examine the activities of the R.C.M.P.

Case 11:

— a file was opened many years ago when the person was elected to a municipal body;

— when he was elected to Parliament, his election was recorded as were the results for other candidates of certain of the political parties;

— several years later, after public statements of the M.P. had been recorded on file, a review memo stated that his reputation was that he was "anti-security and anti-R.C.M.P.".

Case 12:

— a file was opened on an M.P. because, after being interviewed by a Security Service member to whom his name had been given as a reference by a person who had applied for security clearance, the R.C.M.P. officer reported that he considered the M.P. to be "somewhat officious and abrupt". The memo on file noted that the M.P.'s attitude may have been due to the fact that the House of Commons was about to meet and time was short. (The Security Service member in question advised us that he recorded his impression as it might alert someone else in a future investigation.)

120. In all of these cases (and there are others) we cannot see the security relevance of the information, whether its eventual use is for security clearance or operational purposes. Indeed the cases show that members of the Security

Service have not understood the difference between legitimate political dissent, which is essential to our democratic system, and such political advocacy or action as would constitute a threat to the security of Canada. One mistake that appears in a number of these files is the conclusion that because a person supports a policy option in Canadian politics which is also supported by the Communist Party of Canada, that person and the advocacy of the particular policy option are threats to the security of Canada. It would be just as wrong to categorize support for, say, capital punishment by a committee of Chiefs of Police as possibly subversive because it is also the position favoured by a violence-prone right-wing political group such as the Western Guard. The kind of thinking reflected in these files shows both an anti-left bias in the judgment of members of the Security Service and a tendency towards the worst kind of 'guilt by association'. Such files should be destroyed.

121. Cases 11 and 12 illustrate a particularly dangerous tendency to open files on persons who have done nothing more than take a special interest in the Security Service. Here we are reminded of the fact that one category of Security Service files is devoted to individuals who have criticized the Security Service. We think it is wrong to collect and keep information on file solely because a person has criticized or who is perceived to have criticized the security intelligence agency or has been "somewhat officious and abrupt" with one of its members. Files containing nothing more than information of this kind should be destroyed. This is not to say that the security intelligence agency should not collect information about the activities of foreign intelligence agencies or genuinely subversive groups which may be directed towards destroying the effectiveness of the security intelligence agency.

122. These files further illustrate our reasons for recommending that the security intelligence agency must be staffed and led by persons capable of better judgment than was shown in these cases. They also point to the importance of having an independent review body (a proposal we will develop in detail in Part VIII, Chapter 2) to review the agency's files periodically to make sure there is a reasonable connection between the information in its files and threats to the security of Canada as defined by Parliament.

Files opened because of associations with 'subversive' individuals or groups

123. There are numerous ways in which M.P.s and candidates may be associated with individuals or groups that are under investigation for security reasons. We believe it is impossible to formulate precisely the kind of association that may justify opening a file, but two cases may illustrate situations on either side of the line:

Case 13:

— a file was opened on an M.P. because he had a contractual arrangement with a person under investigation by the Security Service;

— a year later the M.P. was considered for appointment as a Parliamentary Secretary. It was reported that he had no adverse record;

— in 1978 the file was reviewed and destruction recommended.

Case 14:

— a file was opened on a man because it was reported that a woman suspected of being a Communist had given the man's wife's name as a reference for security screening purposes;

— when the man was elected to Parliament, the file was tranferred to the M.P. s category:

— when he was being considered for an appointment to a position where he would have access to classified information, the Security Service advised that there was "No Adverse Record" but went on to note that he had attended a Soviet reception and that some years earlier his wife had a friendship with a suspected member of the Communist Party of Canada. (This was not based on the information which had caused the file to be opened).

124. In Case 13, assuming there was reason to believe that the person was involved in an activity threatening the security of Canada, it was reasonable to keep the information about his association, since it might turn out to be important in the investigation. The information was not misused in the security clearance process and it was reasonable to recommend in 1978 that the file be destroyed. But in case 14 the association was too tenuous to justify opening a file in the first instance, and the information, which was not relevant to security, was not accurately reported when used in the security screening process.

Files opened because of personal characteristics and behaviour

125. A number of files contain information, not about political beliefs or associations, but about behaviour which, in the judgment of the Security Service, is relevant to the likelihood that an M.P. might be threatened with blackmail by a hostile foreign intelligence agency. Consider the following cases:

Case 15:

— the sole reason for opening a file on an M.P. was that his name appeared on a list, of "known or suspected homosexuals", prepared by another police force.

Case 16:

— the sole reason for a file on an M.P. was a memo recording that an informer of unknown reliability had said that a second person had told him that the M.P. was "gay";

— the security screening branch recommended that the file be retained because although the information "is inconclusive and is now of little significance. . . it could be exploited by a foreign intelligence service";

— when the M.P. was being considered for appointment to a position where he would have access to classified information, the Security Service advised, in somewhat contradictory fashion, that he had "No Adverse Record" but added "There is an unconfirmed report that he may be homosexual".

126. We believe that some of the files we have examined should not have been opened by the Security Service. We agree with Lord Denning, who, in his

Report in 1963 on the circumstances leading to the resignation of the Secretary of State for War, Mr. J.D. Profumo, made this important statement about the relationship of the behaviour of prominent public figures to security:

> All the rumours reported to me were to the effect that a Minister or person prominent in public life had been guilty of immorality or discreditable conduct of some kind or other. But it is not every piece of immorality or discreditable conduct which can be said to be a "security risk". In my opinion immorality or discreditable conduct is only a security risk if it is committed in such circumstances that it might expose the person concerned to blackmail or to undue pressures which might lead him to give away secret information.[22]

Thus, in some cases, there was no evidence recorded on the file that the behaviour of the M.P.s was in "such circumstances that it might expose the person concerned to blackmail or to undue pressures". Indeed, there was no reliable evidence on either file that the conduct was even "immoral" or "discreditable".

127. In Part VII, Chapter 1, we shall return to the question of the circumstances in which the security intelligence agency should collect and report information on the behaviour of Ministers and public servants. There we shall argue that the agency should be interested in the so-called "reliability" (as distinguished from "loyalty") dimension of security screening for the Public Service in two instances: first, when the conduct relates directly to a security threat as defined by Parliament (for example, a senior official having an affair with a suspected foreign intelligence agent); and second, when the conduct results in a significant risk of blackmail (for example, an official with access to classified information, involved with a prostitute). We think that these principles should apply to M.P.s and candidates. If they had been applied in the past, some files would not have been opened.

Briefing M.P.s on security threats

128. As we noted in a number of the cases we examined, the Security Service often collects information on an M.P.'s contacts with Soviet bloc officials so that it can warn the Member if there is reason to believe that these officials are intelligence officers using their diplomatic status as a cover for clandestine espionage or political intervention activities.

129. In principle, this type of warning or briefing is an acceptable kind of 'countering' activity. (We shall discuss the full range of countering activities in Chapter 6 of Part V.) But the security intelligence agency's briefing of M.P.s and candidates must be conducted on an open and candid basis. The M.P.s' files indicate that there has been a conscious programme on the part of the Security Service to use interviews with M.P.s arranged for one purpose (for instance, because an M.P. has been named as a reference by a person applying for a security clearance) as opportunities for conducting dialogues about the activities of Communist bloc intelligence officers. In our view, members of the security intelligence agency should approach the M.P.s with open and candid

[22] Cmnd. 2152, paragraph 294.

explanations of why they wish to speak with them. We are confident that M.P.s will understand and accept such open approaches, whereas to continue with subterfuge can only, in the long run, undermine Parliamentary confidence in the security intelligence agency.

Election candidates

130. On April 25, 1978, a newspaper report based on an anonymous letter sent to several newspapers (a copy of the letter was sent to this Commission) quoted a document purporting to be "I" Directorate (an earlier name for the Security Service) Policy Instructions dated January 1, 1971, entitled "ELECTIONS — Federal, Provincial, Municipal Subversive and Separatist Activities Within". The Security Service does not retain discarded pages from its manual. Consequently there can be no absolute confirmation that the policy as of 1971 was as indicated in the document disseminated anonymously. However, we are satisfied that it was quite probably genuine, as the content is, for all practical purposes, the same as the policy which existed throughout most of the 1970s, and which has only recently been modified.

131. The 'election policy' of January 1975 stated that field units were to report on

> All election candidates (federal, provincial and municipal) who are of significant and continuing subversive interest... regardless of their organizational affiliation, political orientation or geographic location... The term 'of subversive interest' will apply to candidates who run for office under the banner of a known subversive or separatist group or is himself a known subversive or separatist. These individuals should be the subject of a Security Service file at the Division or H.Q.'s level...
>
> Although "Election" files are of value to the security screening programme, their main purpose is to gather *statistical* information for various briefs, comparative analysis, and federal government requirements.

The information to be supplied included the percentage obtained by the candidate of the total vote cast and the identity of the official agent. In the case of a municipal election, the information was to include an assessment as to "whether or not conditions are favourable with respect to subject being able to exercise his/her political philosophy". Other information expected to be submitted as being "of intelligence value" included the identity of persons giving donations of amounts in excess of ten dollars to the candidate's campaign. A group of officers, each in charge of an operational branch of the Security Service, told us that they did not know what the words "federal government requirements" meant. We view with great alarm the Security Service having involved itself in the country's political process to this extent, even where no security problem was evident.

132. The direction given to the Security Service in May or June 1975 — that it should not investigate separatists unless their activities bring them within the six categories of activities referred to in the Cabinet Directive of March 27, 1975, — did not seem to have had any effect on the 'election policy' or the manner in which it has been carried out. In other words, until recently, reports

have been expected on any candidate who is 'known' to be a separatist in the sense that there is already a file on him.

133. The current policy as expressed in the Security Service's operational manual requires that area commanders

> Within one month following federal, provincial and municipal elections (including by-elections) submit to Headquarters a report outlining:
>
> 1. The percentage of votes obtained by each candidate on whom we have a record of activity described in [the relevant sections of the 1975 mandate which relate to "subversion".]
> 2. The impact on candidates created by groups or individuals on whom we have a record of such activity.
> 3. The impact on the results of the election created by groups or individuals on whom we have a record of [subversive] activity.

134. This policy is an improvement on the January 1975 statement cited above, provided that the 1975 mandate is not interpreted to include non-violent separatists as security threats. Our concern with the current policy, therefore, is not that it encourages improper acts so much as whether there is a genuine need for a policy on elections. If an individual identified as a security threat runs in an election, an analysis of that election should quite properly be made, evaluated and put on file. If the individual is elected, then the security intelligence agency should likely make an evaluation as to whether his new position of power implies some increased ability to endanger the security of the nation. We also believe that it is appropriate for a security intelligence agency to analyze broad political trends in the country so that it has a context in which to understand the significance of political activity which is genuinely subversive. Having said this, we see no need for a mechanical reporting process in which each field commander sends reports to Headquarters after each election. Such activity appears to us to be a poor use of security intelligence agency resources.

Surveillance of political parties: the N.D.P.'s Waffle Group

135. The Waffle came into being at the National Convention of the New Democratic Party in October 1969, when a resolution was put forward by Professor Mel Watkins and his supporters calling for an independent socialist Canada. This resolution, which became known as the Waffle Manifesto, was supported by the left wing of the Party but was defeated at the Convention. Waffle supporters continued to work as a group within the N.D.P. until the summer of 1972 when the Ontario Waffle Group was formally expelled from the provincial party. The Waffle was non-violent and did not advocate the overthrow of democratic government.

136. In November 1977, there were questions in the Ontario legislature about an alleged investigation by the R.C.M.P. of the New Democratic Party during the 1971-73 period. On December 9, 1977, the Honourable Roy McMurtry, Attorney General of Ontario, after receiving a report from the Federal Solicitor General and the R.C.M.P., told the legislature that there had not been any investigation into the activities of the New Democratic Party nor had

any entries of N.D.P. premises or offices been committed by an agent or members of the R.C.M.P. However, he was informed that the R.C.M.P. had conducted an investigation into the activities of certain members of the Waffle Group between 1970 and 1973. In his statement to the Ontario Legislature, Mr. McMurtry quoted from the R.C.M.P. report as to the reasons for the investigation:

(a) When the Waffle group came into being, it invited persons outside the N.D.P. to join its ranks. These persons included ex-members of the Communist Party of Canada and members of the Canadian Trotskyists movements. The leaders of the League for Socialist Action (Trotskyists), in fact directed their members to join the Waffle group.

(b) The R.C.M.P. investigation of certain members of the Waffle group established that subversive elements penetrated the N.D.P. through the Waffle in order to gain more respectability, credibility and influence. Although the R.C.M.P. investigation concentrated on individuals of security interest, inquiries were broadened sufficiently to put the activities of these individuals in proper perspective. The investigation was de-emphasized after the N.D.P. decided to rid itself of the Waffle. The individuals of concern to the R.C.M.P., having lost the legitimacy of membership in the N.D.P., also lost interest in the Waffle. The R.C.M.P. concern with these individuals was not reduced but any concerns that the R.C.M.P. had that these subversive elements were using the Waffle as a means of penetrating the N.D.P. and therefore as a means of acquiring credibility and influence was [sic] accordingly eliminated.

(c) During the period referred to in paragraph (b) above, the R.C.M.P. concern with individuals in the Waffle was increased when it was found that a Canadian news media person, closely associated with leading people in the Waffle, was meeting clandestinely with Konstantin Geyvandov, a Russian K.G.B. Intelligence Officer, who between August 1968 and September 1973, operated in Canada as a Pravda correspondent. The R.C.M.P. investigation confirmed that this Canadian provided reports to Geyvandov during these clandestine meetings and on at least six occasions was paid money by Geyvandov. Amongst other things, the Canadian was specifically asked by Geyvandov to provide reports to him on the N.D.P. and the Waffle.

(d) The R.C.M.P. believed that Geyvandov's purpose in seeking such reports was to assist the Russian K.G.B. Intelligence Service in deciding whether the Waffle group or any of its members were worthy of further attention by the K.G.B.

(e) Geyvandov returned to the Soviet Union in September of 1973. On January 8, 1974 the U.S.S.R. Embassy in Ottawa was advised by the Department of External Affairs that because of activities unrelated to his work as a journalist, Geyvandov would not be permitted to return to Canada.

(f) Consideration was given by the R.C.M.P. to the possibility of laying a charge against this Canadian news media person but the conclusion reached was that no charge could be laid.[23]

[23] Ontario, *Debates*, December 9, 1977.

137. Our examination of R.C.M.P. counter-subversive policies over the past decade has given us additional information on the R.C.M.P.'s interest in the Waffle Group. First of all, it is useful to place R.C.M.P. activity with regard to the Waffle in context. In the 1960s there was a shift of interest within the Counter-Subversion Branch of "I" Directorate (now the Security Service) away from the activities of Communist and front organizations to new political groups and movements which were sympathetic to the use of force or violence to achieve political purposes: student radicals of the New Left, domestic terrorists and militant members of some ethnic organizations. In addition, the Counter-Subversion Branch began to take an interest in the activities of a significant number of radicals who were non-violent in nature. The officer in charge of the Counter-Subversive Branch described some of the implications of this shift of emphasis in graphic terms in a letter to field units in September 1972. He noted that, in addition to the Communist Party and front groups, subversive activity, as defined in Canada by the Security Service, fell into two main divisions:

> ...The first division includes those individuals and organizations who constitute a violent revolutionary threat, such as Maoists, Trotskyists, violent elements of the New Left, right wing extremists, Black Power advocates, and terrorist-oriented organizations such as the F.L.Q. or urban guerrillas. Intelligence coverage and counter-measures in these cases will entail expanded human and technical source coverage, the initiation of legal action through co-operation with police agencies and government departments such as Immigration, and any such other measures deemed necessary by the Security Service to contain, defuse or neutralize the threat posed by such individuals or groups...
>
> The second primary division of interest includes essentially non-violent elements whose major strategy, whether individually or collectively, is to infiltrate or penetrate existing groups or institutions for the purpose of promoting dissident or subversive influence aimed ultimately at promoting revolutionary activity. Such elements are comprised of individuals or groups in the New Left, those in Trade Union organizations, and those in Key Sectors of society such as government, education, the mass media and political parties. It is in these areas that an increased awareness and consciousness of social change on the part of the Security Service will serve to ameliorate situations which could become polarized, extreme, and thus potential threats...

138. We find such a wide definition of subversion dangerous and unacceptable because it does not clearly distinguish radical dissent from genuine threats to Canada's security. Under our definition of security threats developed earlier in this chapter, a security intelligence agency would have no business instituting surveillance of any person or class of persons by reason only of his or their involvement in lawful protest or dissent. Indeed, we have recommended that a clause to this effect be included in the legislative mandate of the agency. Even in the case of what we have called "revolutionary subversion", meaning activities directed toward the destruction or overthrow of our liberal democratic system of government, a security intelligence agency should use only non-intrusive means to collect information on such groups or individuals unless there is some reason to suspect foreign interference, espionage, or political

violence. The other ambiguous and potentially dangerous aspect of this definition of subversion lies in the phrase "Intelligence coverage and counter-measures in these cases will entail. . . *any such other measures deemed necessary by the Security Service* to contain, defuse or neutralize the threat posed by such individuals or groups" (our emphasis). We are deeply disturbed by such an attitude, especially after hearing evidence on the Checkmate operations and other countering activities of the Security Service. We shall have more to say on countering operations in Chapter 5 of this part of our Report.

139. Given the context, then, in which the counter-subversion branch was operating, it is not surprising that the Security Service's interests in the Waffle were broader than those described in Mr. McMurtry's statement. Below is a portion of a memorandum to Divisions dated December 29, 1970 from the counter-subversion branch:

> We are obviously not interested in the normal activity of any legitimate political party as such, however, we do have a responsibility to investigate information of a potentially subversive or espionage nature within such parties. Because of its socialist nature, the NDP has always attracted subversive and radical elements in society. However, it has become increasingly apparent that these elements are now polarizing around the Waffle Group in even greater numbers, particularly in view of the willingness of the Waffle leadership to accept dissident Communists, Trotskyists and "leftists" generally in an attempt to unite the "left". Consequently, the Waffle Group is of particular interest due to the number of persons of subversive interest involved, especially on the National Leadership Committee and the National Steering Committee. As will be noted in the attachment, only ten of a total 32 individuals were elected to the Steering Committee at the Waffle National Convention. We are extremely interested in learning the identity of the remaining 22 individuals who were to be chosen as follows; two from the National Leadership Committee and 20 from the various provinces. We are also interested in the objectives of the Waffle as a group, and, together with such information as outlined in the following points, this may serve as a guideline for the submission of reports on the file "New Left Activities in Political Parties";
>
> (a) Penetration by individuals and/or groups of a subversive nature; their aims and objectives in relation to the political party. To include information on executive positions held by such persons.
>
> (b) The influence which individuals of subversive interest exert over other party members.
>
> (c) Resolutions put forward for party policy by individuals of subversive interest.
>
> (d) Recruitment activities within political parties by individuals of subversive interest.

140. In 1972, the Security Service's interest in the Waffle was premised on an additional reason — the Waffle's "extreme left posture". As well, the phrase "objectives of the Waffle as a group", quoted in the memorandum above, was more clearly defined as "National aims, strategies and planned tactics of the Waffle leadership", especially those which were not public

knowledge. Consider the following excerpt from a memorandum from the Counter-Subversion Branch, dated February 25, 1972:

> With respect to political parties, the area of primary (almost exclusive) concern at present is the N.D.P. Waffle Group. Although Security Service general interest in Waffle has been mentioned in previous correspondence to the field, we have tended to avoid delineating specific areas of interest with the result that reporting often-times deals with largely innocuous matters, much of it available through the mass media and other overt sources. It is hoped that human source coverage of Waffle will be reserved for more penetrating insight and analysis.
>
> Commencing from the premise that our interest in the movement is made obvious by the extreme left posture it has adopted, and because so many persons of interest to us have gravitated towards its ranks, it does not follow that we are interested in *all* that the Waffle Group does. That should eliminate one of the first apparent misconceptions and underline the need for greater selectivity in reporting information to H.Q.
>
> By way of broad parameters, we are interested in determining National aims, strategies and planned tactics of the Waffle leadership, especially when insights we develop go beyond their open, public announcements. That is, do they have designs which exceed their publicly declared aims and, if so, by what means (strategies) do they hope to attain them and, where possible, some estimate of their probability of success in effecting those ends would certainly place areas of concern in a more balanced perspective. Until these major, national questions are resolved, there hardly seems any point in reporting about grass roots activity, local Waffle councils, attendance at meetings, membership below executive, etc.

141. Contained in this memo is a good illustration of the Security Service's inability to distinguish radical dissent from threats to national security. A non-violent political group's "extreme left posture" should provide no rationale whatsoever for a security intelligence agency to use intrusive intelligence-gathering techniques to collect information about the group's activities and intentions. Moreover, it is even more objectionable when such a rationale is used to justify the collection of information about an element of a legitimate political party which is in opposition to the party in power.

142. A final point of interest concerning the Waffle was that the Security Service kept the Solicitor General informed of their interest in this group. A brief on the Waffle was forwarded to the Solicitor General, Mr. Goyer, and to the Privy Council Office with a letter dated March 5, 1971. The letter noted:

> Attached for your information is a secret paper prepared by the Security Service on the Waffle group of the New Democratic Party. The growing interest and participation of subversives and radical elements within this group since mid 1969, prompted the preparation of this material which has been gathered through our normal intelligence role, and not through any investigation of a particular political party.
>
> At present the Waffle is of interest from a security point of view and is rapidly becoming a faction within a political party around which radicals may polarize and subsequently be a viable political force in the N.D.P.

> The delicate position of the government in matters relating to another political party is appreciated, however, I feel you should be kept informed of these developments.

143. The brief described how the Waffle came into being, its leadership, its objectives, the support of the Waffle for the separatist movement in Quebec, and the influence of Communist and Trotskyist radicals in the group. The brief concluded:

> The prime aim of the Waffle group within the N.D.P. is the establishment of an independent socialist Canada to be achieved through the existing structure of the New Democratic Party. The Waffle Group hope to change the N.D.P. from within and radicalize the N.D.P. socialist policies.
>
> Considering the Waffle Group as a whole, it is felt that they will be a viable political force within the N.D.P. In its present relatively infant form, the Waffle Group is rapidly becoming a melting pot for radicals of all "Left" groups as well as for dissident members of the Communist Party of Canada.

Attached to the brief were notes on some individual members of the Waffle who apparently were of particular interest because they had contacts with Communist or Trotskyist front organizations. We believe that it is unnecessary and indeed undesirable to provide the Solicitor General with detailed information on individuals who are in any political party, unless of course, the information indicates that the activities of such persons are likely to threaten the security of Canada, or the investigation has reached a stage where specific action, such as a request for a warrant or the laying of a criminal charge against such individuals, is being considered. A security intelligence agency must exhibit extreme care when circulating information about individuals. In Chapter 5 of this Part, we shall be recommending the establishment of guidelines which would state explicitly the conditions under which such information should be distributed.

144. To complete our review of the surveillance of the Waffle Group by the Security Service we turn to the matter of the KGB intelligence officer mentioned by Mr. McMurtry in his earlier quoted statement to the Ontario legislature. It is both proper and necessary, in our view, for a security intelligence agency to investigate the activities of known or suspected foreign intelligence officers. Such investigations, however, should not extend to the surveillance of an entire wing of a political party where there is no evidence (as in the case of the Waffle) that it is engaged in espionage, political violence, or clandestine interference in Canadian affairs on behalf of a foreign power.

145. In conclusion, the Security Service's surveillance of the Waffle Group is an illustration of some of the major problems that have plagued Canada's security intelligence function over the past decade: the lack of vigorous review and monitoring of Security Service activities by government; the lack of a clearly defined mandate for the Security Service; and insensitivity on the part of the Security Service about what constitutes legitimate dissent in a liberal democracy and about the dangers inherent in any surveillance of a non-violent political party. All of these problems require attention if Canada is to avoid future activities akin to the Security Service's investigations of the Waffle. As we noted in our discussion earlier in this chapter on investigation of the P.Q.

and surveillance of M.P.s, a security intelligence agency must exhibit extreme caution and sensitivity in deciding to collect intelligence on those active in the political arena. In the case of the Waffle, this care and sensitivity appears to have been woefully lacking.

(c) *Colleges and universities*

146. One policy issue that *has* received a good deal of attention from Ministers and senior officials has been the conduct of security intelligence investigations in relation to the students and faculty of universities and colleges. For our purposes, the historical record here can be divided into three distinct periods:

1. 1961-1963: when the federal government established policy with regard to surveillance of universities and colleges;
2. 1964-1970: when the R.C.M.P. interpreted and applied this policy;
3. 1970-1971: when the government reviewed and refined its policy regarding surveillance of universities and colleges.

As in other sections of this chapter, our examination of this historical record is focussed on policy, not on actual operations. Two important issues stand out in this review of the past: first, the relationship of the R.C.M.P. to government in the development and implementation of security surveillance policy; and second, ministerial control of the use of informers by the Security Service.

1961-1963: the development of policy

147. During the 1950s the R.C.M.P. was preoccupied with the activities of the Communist Party and front organizations and as part of this overall programme Communist clubs and student organizations were closely monitored and a number of informants were developed. By 1960 the interest of the R.C.M.P. had broadened to include the activities of many student and faculty radicals.

148. Although student violence was not as serious a security threat in Canada as it was in Western Europe, it was watched with considerable apprehension by the R.C.M.P. security and intelligence staff. A handful of student activists were suspected to be behind the first political bombings and thefts which broke out in Montreal in 1963. A few years later there were violent confrontations in several Canadian universities. In 1968, students occupied the Administration Building at Simon Fraser University in Burnaby, B.C., and in 1969 students took over and then destroyed the computer centre at Sir George Williams University in Montreal. Many arrests were made as a result of these incidents. Also, there was evidence that violence-prone separatists in Quebec had many supporters in the universities and colleges.

149. In 1961, the Minister of Justice, the Honourable E.D. Fulton, apparently reacting to unfavourable publicity about R.C.M.P. activities on campus, gave verbal instructions to the Commissioner to suspend all investigations of subversive activities on the campuses of universities and colleges until a review of the subject could be completed. At the time, the only activities which the

R.C.M.P. deemed subversive were those of Communist organizations. Consequently, a directive issued by the R.C.M.P. on June 21, 1961, stated that all investigations connected with "Communist penetration of universities and colleges or similar institutions" were to be suspended for the time being with the exception of reports from established human sources.

150. Yet criticism of the R.C.M.P. continued. On December 14, 1962, the Honourable Donald Fleming, Minister of Justice, stated in the House that the R.C.M.P. was not developing sources on campus.[24] On January 21, 1963, the Parliamentary Secretary to the Minister of Justice stated in the House that the R.C.M.P. was not interviewing students and faculty members about the political views and activities of their colleagues.[25] In June 1963, the Council of the Canadian Association of University Teachers (C.A.U.T.) passed a resolution which criticized the R.C.M.P. and urged faculty members not to reply to questions from the R.C.M.P. as to the opinions and activities of colleagues and students.

151. On July 31, 1963, representatives from the C.A.U.T. met with Prime Minister Lester B. Pearson and the Honourable Lionel Chevrier, the Minister of Justice, to urge the new government to review the security functions of the R.C.M.P., in particular with respect to investigations carried out on university campuses. The C.A.U.T. recommended that there should be no general surveillance of the university community, that investigations should not be instituted by local officers on the basis of verbal information or press reports, that there should be no recruitment of informers in classrooms, societies or clubs, and that appropriate guidelines should be established for security clearance investigations.

152. A general review of security clearance procedures was undertaken by government at this time and on October 25, 1963, Mr. Pearson reported to the House on the policy changes that had been approved by Cabinet. (See Part VII, Chapter 1, for details of these changes).

153. On November 15, 1963, representatives of the C.A.U.T. and the National Federation of Canadian University Students met again with the Prime Minister. After this meeting a formal statement was issued on behalf of the Prime Minister, the C.A.U.T. and the President of the students' federation. It stated in part:

> There is at present no general R.C.M.P. surveillance of university campuses. The R.C.M.P. does, in the discharge of its security responsibilities, go to the universities as required for information on people seeking employment in the Public Service or where there are definite indications that individuals may be involved in espionage or subversive activities.[26]

As we shall see, this statement of policy has been reiterated by the Government of Canada on several occasions since.

---

[24] House of Commons, *Debates*, December 14, 1962, p. 2660.

[25] House of Commons, *Debates*, January 21, 1963, p. 2920.

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

154. At this meeting, according to Security Service files, the C.A.U.T. was advised that the Soviet Union did not hesitate to exploit university students for espionage purposes and that all known instances of this were investigated. There was also a detailed discussion on security clearance procedures since the C.A.U.T. felt that R.C.M.P. members were inept in the way they conducted investigations on campus and, in particular, that the R.C.M.P. lacked sophistication and frequently acted on the basis of rumour and unconfirmed verbal reports. Commissioner McClellan, who was also present at this meeting, was asked whether faculty and staff or students were being asked to serve as informers with respect to the opinions and activities of the members of the university community. He replied (according to the R.C.M.P. record of the meeting):

> Since 1961 the R.C.M.P. has not made this kind of inquiry on a university campus. It should be remembered that it is the information that is obtained off campus that often relates to activity on the campus.
>
> ...However, it cannot prevent university staff or even presidents of universities who are concerned with subversive activities in universities from going to the R.C.M.P. with information.

Commissioner McClellan also stated that there is "no interest in anyone's opinions or beliefs in a university except where in the field of subversion it is translated into action". The R.C.M.P. record indicates that he went on to note:

> The R.C.M.P. has operated in the field of subversion for over 40 years and are in a position to know how ideological subversion is translated into positive action. It does feel competent to differentiate between the radical and the conspirator.

155. Headquarters advised divisions, by letter dated December 24, 1963, of the meeting with the C.A.U.T. This letter did not recite Mr. Pearson's policy statement verbatim but stated that at the meeting absolute assurance had been given that there was no general security surveillance of universities or of any university organizations as such. Furthermore this letter noted the assurances given the C.A.U.T. that it was not the policy of the R.C.M.P. to ". . . permit an investigating officer to ask members of the university body, staff and/or students, to keep a general lookout for suspicious or subversive opinions or activities in university affairs". From the R.C.M.P.'s perspective Mr. Pearson's policy statement was consistent with the policy established by Mr. Fulton in 1961, a policy which virtually curtailed all R.C.M.P. investigative activity on campus with the exception of security screening inquiries.

1963-1970: interpreting and applying the policy

156. The evidence from the R.C.M.P. policy files in this period indicates that the Force believed it was unduly restricted in conducting investigations on campus, even in regard to terrorism. Thus, in Quebec, with the emergence of separatist violence, there was little effort to recruit new sources on campuses and there was no technical surveillance. In a letter dated July 8, 1968, to the Royal Commission on Security, a senior officer in the Security and Intelligence

Directorate noted that the R.C.M.P. had not been able to employ on campuses investigative procedures used prior to 1961:

> It is emphasized, however, that we continued to make use of already established sources of information, but we did not actively seek new ones. The situation remains roughly the same at present except that we are now, in fact, very cautiously endeavouring to develop a few additional sources of high reliability so that we may be in a position to continue to be informed of certain campus activities of the subversive element. However, we are not making any of these approaches on university campuses.

157. In its brief to the Royal Commission on Security in 1967, the C.A.U.T. provided confirming evidence of this cautious approach being employed by the R.C.M.P. The association observed that since 1963 no formal reports of surveillance on university campuses had reached its national office.[27] The Royal Commission on Security said in its published report that Communist subversive activity in universities and trade unions was of special significance, but did not discuss this aspect of the matter further. In the unabridged version of its Report, however, the Royal Commission noted:

> More generally, however, it is clear that as a result of government instructions originating in 1961 the security authorities do not operate as effectively in universities as they do in other areas.

158. Despite the Force's belief that the surveillance policy regarding universities was overly restrictive, we found no evidence of any serious attempt by the R.C.M.P. to have this policy reviewed by government until 1969. There is evidence, however, that the Security and Intelligence Directorate attempted to circumvent the policy. It developed a programme of accelerated 'security clearance' interviews with university faculty members with the objective of developing friendly contacts who might volunteer useful information in the future. We cannot condone the use of security clearance interviews as pretexts for developing informers even though such informers may be unpaid and may only volunteer information. If the R.C.M.P. considered that the Fulton policy (if it was ever really intended to apply for more than a year or so) was unduly restrictive, the remedy was to present the problem to government and have the policy changed. We have discussed this use of pretext interviews in more detail in Part III, Chapter 11.

1970-1971: review and refinement of government policy

159. After the October Crisis, senior officials in government were of the view that the restrictions on R.C.M.P. operations on university campuses should be relaxed. There was evidence that a significant number of terrorist sympathizers in Quebec appeared to be employed in the field of education. The question was discussed at meetings of the Law and Order Committee and the Cabinet Committee on Priorities and Planning in November 1970. In December 1970, the question was placed before Cabinet, supported by a memorandum on "Academe and Subversion" prepared by the R.C.M.P. which recommended:

> (a) that the Security Service be freed from the current restrictions governing its investigations of subversive activities at educational institutions.

[27] C.A.U.T. brief to the Royal Commission on Security, p. 28.

(b) that before such investigations are resumed, careful plans be made for making public the change in policy and the need for it; possibly to include consultations with organizations like the C.A.U.T.

Cabinet, at its meeting of December 23, 1970, agreed that the Security Service be freed from "current restrictions" provided no undertaking had been given in the past to consult with the C.A.U.T. in the event of a change in policy. The decision was not communicated to the C.A.U.T.

160. This Cabinet decision, cast as it was in general terms, seems to have been regarded by some members of the Security Service as overturning the 1963 Pearson policy. The new Solicitor General, Mr. Goyer, who was sworn in on December 20, 1970, did not view the matter in this light and as a result of his initiative the question was referred back to Cabinet, which approved the following explicit statement of policy at its meeting of September 30, 1971:

(a) that the following statement, which was agreed to by the Canadian Association of University Teachers in 1963, is confirmed as a statement of government policy regarding the activities of the R.C.M.P. on university campuses:

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

(b) that no informers or listening devices will be used on university campuses except where the Solicitor General has cause to believe that something specific is happening beyond the general free flow of ideas on university campuses;

(c) that the current restrictions placed on the activities on university campuses of the R.C.M.P. Security Service, either written or verbal, which differ from the policy statement in (a) above be lifted forthwith;

(d) that the Solicitor General is authorized to inform the Canadian Association of University Teachers that the policy agreed to in 1963 has not been changed;

(e) that the Solicitor General make clear to representatives of the Association that while there is no policy of general surveillance on university campuses or elsewhere, the university campus would not be regarded differently from any other Canadian institutions where espionage and subversive activities were involved; and

(f) that the Cabinet decision entitled "Academe and Subversion" of December 23, 1970, be modified accordingly.

Mr. Goyer met with the C.A.U.T. on October 13, 1971 and confirmed that the 1963 policy statement was still in force. In a letter to the C.A.U.T. dated November 24, 1971, the Solicitor General added that the "university campus would not be regarded differently from any other Canadian institution when espionage and subversive activities were involved".

161. Mr. Starnes was concerned that there would be great difficulties if the Solicitor General were required to give personal approval to operations on

campus and discussed the question with Mr. Goyer and Mr. Bourne during the ensuing weeks. On December 13, 1971, the Solicitor General wrote to Commissioner Higgitt, giving his instructions as to what was required by paragraph (b) of the Cabinet decision.

> This decision means that if in the judgment of the Director General, R.C.M.P. Security Service, there is a specific requirement to use informers or listening devices as investigative aids on university campuses where there are indications that individuals may be involved in espionage or subversive activities, then the Solicitor General must agree to the requirement before the use of these investigative aids is authorized.
>
> Accordingly, I would expect to receive from the Director General R.C.M.P. Security Service a memorandum justifying the use of these investigative aids in a specific situation at a university campus on which I would note my authorization.
>
> In cases of emergency where operational necessity made it impractical or even impossible to obtain the Solicitor General's approval on time, then the Director General R.C.M.P. Security Service may authorize the use of these investigative aids and then report to me within 48 hours of the time of authorization the full circumstances of the urgent situation.
>
> I should make it clear that I do not expect this procedure to apply to those who volunteer information to the Security Service about activities on university campuses and are not paid for the information they provide. My authorization will be required, however, as stated above, for the use of paid informants as investigative aids.
>
> Since the matter of R.C.M.P. activities on university campuses has remained unsettled for a considerable length of time, I would be pleased to discuss with you your proposed instructions to the Force as soon as possible.

162. The Security Service carried out a survey to identify for approval by the Solicitor General those paid informants who were committed to inquiries on university campuses. (In 1972 there appear to have only been five such cases.) The Solicitor General was also advised that there were no listening devices of any kind deployed on university or college campuses. The Director General then informed the Minister that there were other sources who went on campus from time to time but that it was presumed they were not covered by the Cabinet Directive.

> 2. Beyond the category of those paid informants whose campus activity now requires ministerial authorization, I wish to draw to your attention those Security Service sources who, although their prime responsibilities lie elsewhere, do go onto the college and university campuses from time to time. Often, they are sent there by the organizations which they have infiltrated. An example of this type of person would be a paid agent who attends a function [of the targetted group] taking place within the university precincts and who later submits a report on the proceedings which transpired. Since the area of operations of these informants is only marginally related to campus activities in general, I have understood your correspondence and the Cabinet directive as not necessitating your prior approval for their actions. I hope you will concur that this assessment accurately reflects the full scope of the Cabinet's instructions.

We note that this seems to be a somewhat unwarranted interpretation of the Cabinet decision, even though it was accepted by the Minister. The Cabinet Directive states simply "that no informers or listening devices will be used on university campuses..." without the authorization of the Solicitor General. The same observation applies to Mr. Goyer's interpretation in his letter of December 13, 1971, referred to above, that his authorization was not necessary in the case of unpaid informers. (It is worth noting that the Senior Executive Committee of the R.C.M.P., in late 1979, decided that as a matter of policy, ministerial authorization should be sought for the use of all informers on university campuses, whether paid or not. On June 30, 1980, the Commissioner wrote to the Solicitor General informing him of this internal decision and suggesting that the matter be reviewed by Cabinet).

163. Following this exchange of correspondence between Mr. Goyer and the R.C.M.P., Mr. Starnes sent a memorandum to Divisions which interpreted the Cabinet Directive along the lines of Mr. Goyer's letter quoted above. In forwarding these instructions to the field, Mr. Starnes, stated as follows:

> The enclosed memorandum has been seen and approved by the Solicitor General.
>
> A first reading of the document may give you the impression that the effect of this new directive is to make little difference in the restrictions on Security Service investigations at universities which have existed since 1963. Though one might wish for a far freer policy in this regard, I feel that any disadvantages inherent in this policy directive are more than off-set by the fact that it is the first unequivocal statement we have had in many years covering our role in this area.
>
> Accordingly, I wish to emphasize that this directive does *not* mean that the Security Service will abandon its interest in subversive or espionage activities which occur within the confines of Canadian colleges or universities. On the contrary, now that there is a well-defined channel by which we can acquire complete authority for our presence on the campuses, I expect Division Security Service officers to intensify or maintain, as the situation warrants, our coverage of the university milieu.

164. What seems clear from our review of this period is that the R.C.M.P. felt hampered by restrictions imposed by the Minister of Justice in 1961 and by the Prime Minister in 1963, but that it chose to live with the restrictions rather than place the question before the government for clarification. Furthermore, it then circumvented what it thought to be the policy by using security screening interviews as pretexts for recruiting 'voluntary' sources on university campuses.

165. From the government's point of view, its policy on university investigations has not changed since 1963. In fact, in a letter dated January 23, 1978 to the C.A.U.T., Prime Minister Trudeau reiterated Mr. Pearson's 1963 statement and, indeed, extended it to apply not only to the R.C.M.P. but also to "all government security forces". (The C.A.U.T. had referred in earlier correspondence to an allegation that the Department of National Defence had been involved in a surveillance operation at the University of Ottawa in 1969 and 1970.) In his letter the Prime Minister added:

> I think it is important to add that, in the extremely difficult area of security operations, no person in Canada can be regarded as immune from observa-

tion or surveillance if there are reasonable grounds for believing that the person is, or has been, engaged in subversive activities. This is a point I made recently to the Leader of the Opposition in relation to a question concerning surveillance of Members of Parliament.[28]

Clearly, Mr. Trudeau's interpretation of Mr. Pearson's policy statement was not the same as that adopted by the Force throughout most of the 1960s. The R.C.M.P. believed that it was precluded from conducting virtually any investigation on campus.

166. The current policy regarding Security Service surveillance of universities and colleges appears sensible to us. The main reason for limiting the activities of the security intelligence agency on university campuses is that excessive surveillance will have a chilling effect on the freedom of discussion and debate which is an essential characteristic of the liberal university. Students and faculty must feel free to express all kinds of ideas without any fear that their views may be recorded in reports by the security intelligence agency to government. On the other hand, we agree with Prime Minister Trudeau's observation, quoted above, to the effect that no person in Canada should be regarded as immune from surveillance if there are reasonable grounds for believing that the person is participating in subversive activities, so long as "subversive activities" are defined according to the definition we have proposed in section A of this chapter. University and college campuses, as well as other valued institutions in our society, should not be treated as sanctuaries in which terrorists or secret agents of foreign powers can operate free from surveillance by the security intelligence agency. A security intelligence agency, however, should be concerned with only those acts of political violence on campuses that pose a *serious* threat to the democratic order. Most attempts by violence-prone groups to interrupt the process of rational discussion on campus appear not to fall in this category and should be handled by local police.

167. In addition to agreeing with the current policy regarding universities and colleges, we also concur with the requirement that ministerial approval should be obtained before using developed human sources (as described in the next chapter) on campuses. We say this primarily because of the dangers that an indiscriminate use of informers can pose to valued freedoms within a liberal democratic society. As one American author states:

> ... the impact of covert informant surveillance on an American citizen's sense of privacy is probably greater than the effect of an overt police contact. The fear of unknown, secret surveillance was one of the main reasons for the establishment of judicial warrant and probable cause requirements for electronic surveillance. Hence, the Church committee placed the use of informants in the category of "intrusive techniques," along with mail opening, surreptitious entries, and electronic surveillance. It found "that their very nature makes them a threat to the personal privacy and constitutionally protected activities of both the targets and of persons who communicate with or associate with the targets." One legal expert has compared "police spies" and electronic surveillance this way: "The only

[28] As cited in the C.A.U.T. brief to this Commission, Appendix 18.

> difference is that under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under a spy system you are afraid to talk to anybody at all."[29]

We shall have much more to say about the use and control of informers both in this chapter and the one which follows. In Part III, Chapter 9 we have already outlined some of the legal and policy issues relevant to this area of security intelligence and police work.

168. We wish to make one final comment about this historical review of policy with regard to universities. This episode reveals a pattern of poor communications existing between the government and the R.C.M.P. In our view, this pattern of poor communications, which we observed in the previous section on Quebec separatism and which will be evident in other sections of this chapter, is due in part to a lack of understanding, both in government and the R.C.M.P., of the proper role that Ministers and government officials should play in security intelligence. This lack of understanding in turn has led to poorly developed and under-utilized structures in government to handle security matters. We believe that when Prime Ministers, Cabinets or Ministers 'make policy' on operational matters, it is imperative that those responsible for carrying out the policy report to the responsible Minister as to how the policy is being interpreted and applied. The Minister should require the security intelligence agency to send him all interpretative bulletins and letters relating to the policy.

(d) *Labour unions*

169. It is clear that many prominent union members are convinced that the R.C.M.P. has a distorted perception of labour, that its surveillance of the labour movement has been excessive and that, at times, the R.C.M.P. has served as a tool of management. Here, for example, is an excerpt from the brief submitted to us by the Canadian Labour Congress:

> The Canadian Labour Congress has, on occasion, had reason to suspect that the R.C.M.P. attempted to infiltrate legitimate trade unions and has, at times, employed disruptive tactics in strike situations... We suggest the R.C.M.P. suffers from tunnel vision in its efforts to assess the roles of legitimate trade unions in this country. The result of this is that the force is overzealous in creating files on any union member whose activities are perceived by the R.C.M.P. as subversive. Too often, the right to dissent, when exercised, is construed as a subversive act.

The C.L.C. brief asked us to

> ... explore the degree of surveillance to which trade unions are subjected, the reasons for that surveillance and determine whether the justification for such surveillance as perceived by the military or the R.C.M.P., is real or imagined.

170. In this section, we deal with the policy of the Security Service on the scope of surveillance of labour unions. However we do not deal here with the methods which were employed nor do we deal with the activities in this area on

---

[29] John T. Elliff, *The Reform of FBI Intelligence Operations*, Princeton, N.J., Princeton University Press, 1979, p. 122.

the part of the criminal investigation side of the Force. We should add that in our third Report, we shall deal with certain specific allegations of R.C.M.P. illegalities or misconduct with regard to labour unions.

171. The interest of the Security Service in the Canadian labour movement has deep roots. Indeed, in the years immediately following World War I the major preoccupation of the intelligence side of the Force was with politically motivated violence in labour unions. In 1918 a proclamation was issued by government, under the authority of the War Measures Act, which declared illegal a number of anarchist and Communist labour organizations, such as the Industrial Workers of the World and the Workers International Industrial Union. During the inter-war years regular reports on strikes and labour violence were submitted by the field to Headquarters. Frequently, the R.C.M.P. was called in to respond to industrial unrest, most notably during the Winnipeg general strike of 1919, an event which blackened the image of the Force in the eyes of labour for years to come.

172. After World War II the policy of submitting routine reports on strikes and labour unrest was changed. Field investigators were directed to report only on those situations which indicated subversive activity or a likelihood that the R.C.M.P. would be called in to restore order. Subversive activity in the immediate post-war period was equated by the Security Service with Communist control or domination of unions or locals. In October 1960, as a result of a request for information from the Joint Intelligence Bureau (now called the Bureau of Economic Intelligence in the Department of External Affairs), Headquarters also directed divisions to report on industrial disputes in which a slow-down of production, or a strike, was likely to occur. Divisions were advised that Headquarters was "mainly concerned with Communist-inspired disputes which could have an adverse effect on the Canadian economy".

173. The policy of the Security Service with respect to labour unions has not changed significantly over the past two decades: the Security Service claims to be concerned with subversive activity within trade unions, not with the activities of unions generally. For the most part, it has equated subversion with membership in a Communist or Marxist political organization. Thus, a March 1970 policy directive stated:

> 2. Our interest in the labour field is generally confined to establishing the extent and effectiveness of subversive infiltration and domination of any labour union or organization.
>
> 3. Reports should be submitted when:
>
> (a) There is any change in the executive which would place or remove a subversive to/from a position of influence either by election or appointment.
>
> (b) There is information to indicate the union is receiving support or direction from any subversive organization.
>
> (c) Information indicates financial or moral support by a union to any subversive organization.
>
> (d) Information indicates an active subversive caucus or group exists within the union.

174. In the 1970s, the Security Service continued to investigate the penetration of the trade union movement by Communists. The Security Service also investigated the presence of criminal elements in certain unions, particularly in the construction industry in Quebec. Here is how one senior officer in the Security Service, in a letter to the division dated February 23, 1977, described the objectives of the Service in relation to labour:

> Identify and monitor the degree of penetration and/or the effectiveness of infiltration and domination of any labour organization by subversives, criminals or persons/groups intent on creating civil disorder or conducting activities aimed at disrupting or overthrowing the democratic process of Government; and, recommending preventive or remedial action.

175. Under the mandate we are proposing for the security intelligence agency, these objectives would require substantial modification. (Indeed, we believe that some of these objectives lie outside of the Security Service's current mandate.) Thus, under our proposals, it would not be enough to justify the use of intrusive investigative techniques against a member of a labour union solely on the grounds that he is a Communist or a Marxist. Rather, the agency would require some indication of activities related to espionage, sabotage, foreign interference, or serious political violence before it could use paid informers, electronic surveillance or similar intrusive means for collecting information about this person. Consequently, a Communist's becoming a member of a union executive would not be grounds for launching such an investigation. Nor would a union's receipt of financial support from a domestic Communist organization necessarily justify close attention by the security intelligence agency. In addition, "criminals or persons/groups intent on creating civil disorder" would not *per se* fall within our proposed mandate, nor would all activities "aimed at disrupting. . . the democratic process". Such a broad category might be thought to contain numerous activities — for example, a prolonged Public Service strike or a non-violent occupation of a government building — which a security intelligence agency should have no business investigating. Finally "recommending preventive or remedial action" is far too ambiguous for our liking. It might be used to justify "dirty tricks" or other questionable countering activities which we believe a security intelligence agency should not be authorized to undertake. We should add that even when there are sufficient grounds for launching an investigation of a union, the security intelligence agency must exercise caution so as to collect and report only security relevant information.

Criminal activity in labour unions

176. In the course of reporting on strikes and other labour disturbances, the Security Service often played a dual role. It covered the activities of persons considered to be subversive and it reported, usually to the C.I.B. side of the Force and sometimes to local police forces, on criminal activities that came to its attention. The reporting on crime within unions was, in a sense, a 'spin off' of regular security investigative work. The extent to which the Security Service should let itself become involved with the detection of crime and violence in unions has been debated extensively within the agency during the last few years.

177. Justification for the surveillance by the Security Service of a trade union organization in 1972 was based on the presence of serious criminal elements in construction unions. A Security Service brief prepared in 1979 described the shift in interest which had occurred within the Security Service:

> 2. Our interests in the [trade union organization] have been to determine the number and degree of influence by subversives within the organization. It was established that from 1959 to 1964 the [union] was infiltrated by subversives to a minor degree. In 1965, there were seventeen (17) subversives at the [union] convention, however, in 1968 this number was reduced to six (6) delegates.
>
> 3. During the period 1968 to 1972, the [union] was infiltrated with numerous subversives, however, their influence was of no consequence due to the fact that once their communist ideology became apparent, the general congress of the [union] took steps to have them removed from office at the next general election.
>
> 4. With the advent in 1972 of . . . , the Security Service began monitoring the union from a criminal perspective. The major threat to National Security was perceived as control by criminal elements of the . . . industry . . . The Service began collecting criminal intelligence and supplied it to the police force with local criminal jurisdiction for investigation and ultimate prosecution. As more and more criminal activity was exposed . . . [the provincial government set up a commission of inquiry]. [As a result of this commission] the key members of the . . . unions responsible for the violence on picket lines, goon squads and shylocking were publicly identified and removed from any executive position within the unions. At the same time, various unions were placed under trusteeship.

178. The mandate approved by the Cabinet in March 1975 referred to "activities directed toward accomplishing governmental change. . . by force or violence or any criminal means". As we have noted the Director General, in sending copies of the mandate to his area commanders, interpreted this broadly to mean that "the use of crime or violence to accomplish any form of change (not merely the overthrow of the federal or provincial governments as provided for in the treason provisions of the Criminal Code) will also warrant attention". And in a meeting on May 22, 1975, the Director General told his staff that the Security Service should keep abreast of activities

> which may give rise to violence and civil disorder in the labour sector be it for political/subversive reasons or be it for other reasons.

This statement left many questions unanswered and the matter was discussed again in a Security Service staff paper prepared later in the year:

> When criminal elements are able through their influence in unions to pressure governments to act in a manner favourable to them, it could be construed as falling within our mandate.
>
> If it is agreed that this is the case, how do we proceed and how far do we go? We would be clearly encroaching on or at least overlapping with our own law enforcement arm as well as those of other police forces. There is a definite possibility that if we proceed unilaterally we would risk jeopardizing operations, and cause duplication of effort, confusion and bad relations. Further, members of the Security Service by and large are not equipped

with the necessary police skills to deal with sophisticated criminals and their conspiracies.

179. In August 1979, the Labour Section of the Counter-Subversion Branch, in an extensive brief, recommended that criminal activities in the labour movement should not be investigated unless there were reasonable and probable grounds to believe that such activities could escalate to civil disorder. Local law enforcement officers, however, should be informed of these criminal activities, according to the brief. It would appear that the debate on this question within the Security Service has not been satisfactorily resolved. The brief to which we referred earlier, noted:

> The criminal activity has abated somewhat, however, a review of our source files reveals that the greatest bulk of them are still aimed at criminal intelligence and have never been re-aligned to meet the security needs of our Intelligence Requirements.

180. The failure to resolve this question within the Security Service is puzzling. We cannot see any justification for allocating resources of a security intelligence agency to the investigation of criminal activity, whether in unions or in other sectors of the community, which is not related to threats to national security. Such an allocation of resources is both inefficient and inappropriate. In the context of relations between labour and the police it is one further area of possible friction which should be avoided. Finally, we do not think the Director General's broad interpretation of the mandate in this case can be supported; whatever was meant by "governmental change" it surely does not extend to the coverage of criminal activity which occurs in labour unions and which is unrelated to security.

Labour disturbances of a national character

181. Another question as to the mandate in relation to labour is the extent to which the Security Service should report on labour disturbances of a national character which, while they may not be criminally inspired, nevertheless have the potential for the interruption of essential services and civil disorder. Examples of such situations are the formation of a "common front", as happened in Quebec in 1972, or a country-wide work stoppage in essential services such as the air line pilots and traffic controllers strike.

182. The policy on such national labour disturbances is not clear. From time to time reports have been sent to government on what were perceived as potentially explosive situations. Briefs have also been prepared on "subversive influences" within certain unions.

183. Under the mandate we have recommended for the security intelligence agency, surveillance of labour unions would not be justified solely on the grounds that a union's activity might lead to a major strike or even an industrial strike involving civil disorder. The agency should keep itself well informed through *public* sources about labour relations and union activities, just as it should be well-informed about other institutions which may play an important political role in Canada's economic life. But, under the policies we have recommended, to justify *investigative* activity there would have to be

some indication that members of a union are using union activity as a means of destroying the democratic system in Canada or clandestinely promoting the interests of a foreign power or preparing or supporting espionage, sabotage, terrorism or serious political violence. The vague references to 'subversives' within unions and "potentially explosive situations" are indicative of superficial analysis which can lead to excessive surveillance of labour union activity, and have led to it in the past.

184. The security intelligence agency should take particular care in deciding to investigate and report on activities relevant to its mandate within Public Service unions. A zealous agency runs the risk of harming the collective bargaining process between the government and Public Service unions. There does not appear to be a clear written policy on the reporting of security intelligence information regarding Public Service unions, and the arrangements between the Security Service and the Department of Labour seems to have evolved on a case by case basis. Recently, at the request of the Department of Labour, circulation of such information outside the Security Service has been terminated entirely. While we appreciate the caution being exercised here, we believe that the security intelligence agency should continue to report information, albeit with great care, about security threats within Public Service unions. No institution in this country should be regarded as a safe haven for those involved in espionage, sabotage, foreign interference or serious political violence.

Liaison programmes with labour

185. A comparatively recent development in the labour field was the implementation of an active public relations programme to improve the R.C.M.P.'s relationship with labour. On the security side of the Force there has been a willingness to attempt dialogue in appropriate situations in order to reduce confrontation. Thus, in a letter to the field in September 1972, the officer in charge of the Counter-subversion Branch suggested this strategy in relation to non-violent dissident groups:

> Forms of constructive encounters between the Security Service and moderately dissident groups or individuals could be both socially and operationally useful in defusing possible problem areas. Through a programme of increased dialogue and contact with such persons, channels of communication could be established, resulting in several and various advantages and opportunities. Through the judicious exploitation of such channels and contacts, the Security Service might act as an intermediary between dissidents and political and legal institutions, thus lessening the possibilities of alienation and confrontation; it would provide for better access to our organization and increase our operational scope and credibility with these elements; and it would render such channels available for the employment of counter-influence. Common interests on the part of dissidents might also be exploited by the Security Service acting in concert with government departments involved in youth and employment programmes and monetary grants. Those individuals and groups who could not be approached in this manner would continue to be monitored and dealt with as circumstances warrant. Similar procedures will also be employed in circumstances and

areas such as those dealing with native Indian groups as they fit mainly into the non-violent category, although in a different manner.

186. In 1974, as the result of a general study involving all elements of the R.C.M.P., it was decided to launch a systematic programme to improve the relationship between labour and the police. The objective of the Labour/Police Liaison Programme was stated in the 1977 Security Service policy instruction on labour in this way:

> Participate with the enforcement personnel in establishing and maintaining a labour-police liaison programme under the police-community relations concept; and through attendance at labour conferences and conventions and by dialogue with labour leaders, enhance our knowledge about the labour movement as an interest area to be able to provide informed analysis relative to the above stated objectives.

187. Members of the Security Service attended labour conventions and seminars, and briefings were arranged for labour leaders in collaboration with the C.I.B. side of the Force. The provision of information to labour leaders on the work of the Security Service and the C.I.B. was intended to reduce the risk of confrontation and improve contacts. The Security Service usually took the lead in arranging conferences and seminars because they were considered to have better contacts with labour than did the C.I.B.

188. The dialogue between police and labour had its problems. In several provinces difficulties were encountered and in Quebec the programme never got off the ground. In British Columbia, however, members of the R.C.M.P. met with local labour councils throughout the province and the Security Service felt that there was an interest among many labour leaders in expanding the programme. However, in March 1979 a series of articles in a Vancouver newspaper charged that the Security Service was involved in the labour liaison programme. One article alleged that the Solicitor General, in response to a reporter's inquiry, had stated that the only reason for the presence of the Security Service would be to monitor subversive activities in unions. Although the involvement of Security Service personnel in the programme was never hidden, the publicity provoked union leaders in British Columbia to comment that they would have nothing more to do with a programme in which the Security Service was involved. In April 1979 the Security Service decided to withdraw from the liaison programme entirely. Henceforth the programme would be conducted by C.I.B. personnel.

189. We do not think "constructive encounters" or "defusing programmes" are an appropriate kind of activity for a security intelligence agency. In Chapter 6 of this Part we advance our reasons for recommending that in the future the security intelligence agency not be permitted to take part in countering activities of this kind. Such liaison activities in the labour field are very apt to be misused as occasions for trading information with private employers about the alleged political proclivities of their employees. They may also damage the security agency by exposing its members to undesirable publicity.

190. To conclude, the activities of the Security Service in the labour field have followed a pattern similar to that which we have observed in other

sections of this chapter. There has been far too little government direction and review of the Security Service policies with regard to unions. Consequently, the Security Service has had to define for itself the security threats facing Canada. Using as a standard the mandate we are proposing in this chapter, we conclude that the Security Service has been overzealous in investigating 'subversive elements' in the labour field. In part, this zealotry is a result of faulty analytical and political judgment within the Security Service. But in the absence of a clearly defined mandate, there is a natural tendency for a security intelligence agency, no matter how good its analytical capabilities, to err on the side of excessive intelligence-gathering, lest it be faulted by government for not having intelligence when asked. Intelligence-gathering is not something that can be simply turned on and off like a tap. This is another reason for the importance of Parliament's establishing a coherent, comprehensive mandate for security intelligence activities in this country.

191. We should make one final point concerning the surveillance of labour unions. As with universities, labour unions are valuable elements of a liberal democratic society. We see no reason why the principle of requiring ministerial approval for the use of developed sources on university campuses should not be extended to labour unions and indeed to other valued institutions in our society. The chilling effect that the indiscriminate use of informers can have on the free flow of ideas within universities surely applies as well to other institutions, including labour unions. In the chapter which follows, we shall make several recommendations as to when a security intelligence agency should employ informers and how it should proceed in obtaining ministerial approval for their use.

(e) *Right-wing groups*

192. After World War II investigations into the whereabouts and activities of German war criminals were conducted by R.C.M.P. security units. Such persons were suspected of living under assumed identities and it was logical for the R.C.M.P. to take on the investigations. In a sense, this task was an extension of its responsibility for the internment of persons who were enemies or members of organizations declared illegal under the War Measures Act.

There has been little activity in this area during recent years. In 1977 all files on Nazi War Criminals were transferred to the Criminal Investigation Branch of the Force.

193. In the late 1960s Canada experienced the problem of political violence by anti-Communist émigré groups, usually directed against Communist bloc diplomatic missions or delegations. In February 1967, as a result of a number of bombings at Yugoslav missions in Toronto and Ottawa, the Cabinet directed that

> the R.C.M.P. be authorized, and other police forces encouraged, to intensify their surveillance over, and penetration of, right-wing extremist organizations likely to commit terrorist acts; and
>
> the federal government make known its readiness to provide, on request, guard protection to any diplomatic missions which had good reason to feel in need of it.

Following this directive, divisions were instructed to pay special attention to émigré groups that were likely to commit hostile acts against diplomatic missions or foreign visitors, especially during Expo '67. This has remained a priority of the Counter-subversion Branch which made a number of organizational changes in the early 1970s to improve its coverage of terrorist-related activities.

194. In the United States, and to a lesser extent in Canada, political groups such as the Ku Klux Klan and the American Nazi Party have been active during the past two decades. Although their efforts to achieve significant political power in Canada have so far not been successful, they have been involved in the dissemination of hate propaganda, vandalism and violent confrontations. Violent terrorist elements have emerged on the fringes of such groups.

195. A number of home-grown right-wing groups with a potential for violence have been investigated by the Security Service. One such group was the Western Guard Party which was active in Toronto in recent years. The Western Guard Party, originally called the Edmund Burke Society, was founded in Toronto in 1967. Its members were anti-Communist and many also had an anti-semitic and anti-black orientation. One of its members, Geza Matrai, came to national attention when he attacked Premier Kosygin during the latter's visit to Ottawa in October 1971. There was evidence that the Western Guard had established contacts with similar organizations in the United States and was attempting to infiltrate the Ontario Social Credit Party. Although the group never achieved any national following, the Security Service believed that it was capable of political violence. In a brief prepared in 1973 the Security Service noted:

> The Western Guard does not pose a threat to national security or to the Government; however, its propensity for aggravating potentially violent situations could create problems in the area of law and order or, as evidenced in the attack on Premier Kosygin, create an embarrassing international incident.

196. Reporting on the Western Guard began in 1967, shortly after its formation had been announced in the Toronto press. Later, the Security Service had feared that the Party was accumulating firearms and holding shooting practices. During 1970 liaison with provincial police forces was established and from then on the Metro Toronto Police and the Ontario Provincial Police were informed of planned demonstrations and disruptive activity by the Western Guard. By 1973 a more intensive investigation was launched, and in May 1975, the Security Service was able to recruit an informer who joined the Party. During the later stages of the investigation, the Security Service, in collaboration with the Metro Toronto Police, were able to use this source to gather evidence for a criminal prosecution. Although the policy of the Security Service is not to 'surface' informers, it decided to do so in this case and the informer testified at the criminal trial. We discuss the legal and policy issues related to the handling of this informer in Part III, Chapter 9.

197. On February 1, 1978, after a three-month trial, Donald Andrews, one of the leaders of the Western Guard Party, was found guilty of having explosive

substances in his possession and of conspiracy to commit arson and public mischief. Dawyd Zarytshansky, another member of the Western Guard Party, was also found guilty of similar charges. Both were sentenced to prison. After the trial, which was given much publicity, the influence of the Western Guard Party declined.

198. Under the mandate which we have recommended, groups such as the Western Guard Party, committed to race hatred and to an authoritarian philosophy of government, would be a legitimate subject of interest for the security intelligence agency. The agency should be knowledgeable about the growth and significance of such movements in Canadian political life. However, the extent to which such a movement would become the target for investigation using intrusive undercover techniques of investigation would depend on whether there is evidence of activity in support of, or leading to, espionage, sabotage, foreign interference, serious political violence or terrorism.

199. One matter that has been brought to our attention relates to the investigation of groups alleged to be spreading defamatory statements about prominent Canadians. The Security Service has been asked, from time to time, to investigate individuals or groups responsible for spreading defamatory information about Parliamentarians and persons in the Public Service of Canada. Such statements are malicious gossip or, in extreme cases, false information of the type brought to light in the United States in the Watergate investigations. The question that arises is whether such a case properly falls within the mandate of the security intelligence agency. We believe that scandalous stories about a Cabinet Minister or a senior civil servant, even if untrue, are hardly a matter of national security. Unless there is the possibility of espionage through blackmail, we are of the view that such matters properly fall within the jurisdiction of the regular police, and the Director General should decline to be of assistance. The same might be said in the case of a request to investigate a group said to be engaged in criminal activities; if the organization does not appear to fall within the mandate of the agency, the request should be declined.

200. No doubt the Director General is in a difficult position when a senior official makes a request for information which is outside the agency's mandate to collect. In Part VI, Chapter 2, we shall discuss this problem in some detail, and shall make recommendations to make it easier for the Director General to refuse improper requests. Suffice it to say now that a request coming from a Minister or a senior government official does not bring a matter within the mandate of the agency. A security intelligence agency has a distinct role to play in relation to government. It has special powers but it must exercise them only in relation to security matters. It is important that it not permit itself, and that it not be asked, to stray into areas which are properly the province of the police or of the civil courts if defamatory statements have been made.

(f) *Surveillance of Black Power and Indian groups*

Surveillance of Black Power groups

201. In the late 1960s the Security Service began to devote attention to the possibility of political violence in black communities in Canada. For the most

part this concern was a result of the Black Power movement in the United States. As one senior officer in the Counter-subversion Branch noted in a letter to an official in the Department of Manpower and Immigration in January, 1968:

> Those who concern us most are the individuals, known as "black nationalists" who knew "Black Power" as a means of maintaining obedience to an extremist racist movement which advocates violence to enable coloured communities to secure dominant political and social status. Although numerically small, the influence of these black nationalists has been witnessed in Negro communities throughout the U.S.A. Their activities, affiliations and connections in this country cannot be overlooked. We do not look upon Black Power in any of its varied interpretations as an immediate threat to the security of Canada, nor is it likely to assume major proportions in the politics of this country in the near future. Nevertheless, we believe that should a large number of militant black nationalists gain admission to Canada, they would eventually form a definite problem.

202. The Counter-subversion Branch increased its investigations within black communities following the destruction of the computer centre at Sir George Williams University in February 1969, in which black students, most of them from the Caribbean, were involved. Shortly after this incident, Deputy Commissioner Kelly was asked about Black Power militancy when he appeared before the House of Commons Standing Committee on Justice and Legal Affairs.

> Mr. Alexander [M.P.]: Mr. Chairman, I noticed that the witness indicated that they are studying Black Power. I understand that you are not studying the culture or the economic aspects of Black Power but rather the militant side of it. In that regard I would think that you are making some study of it here in Canada.
>
> Deputy Commissioner Kelly: That is right.
>
> Mr. Alexander: To what extent have you found the existence of militant Black Power in Canada and where is it concentrating?
>
> Deputy Commissioner Kelly: We think there is a direct relationship between the Black Power movement in the United States and Canada. We think that the Black Panther movement in the United States has a direct contact with certain people in Canada. We know that the movement in the United States is endeavouring to expand its relationship outside the United States. Canada, being where it is geographically, is a natural. You may recall that at the Hemispheric Conference last fall in Montreal the Black Panther people came up and at one stage of this conference they actually took over. It was only with some difficulty that the organizers got it back on the rails. Then as a result of that these same people travelled to various points in Canada, Halifax being one, and wherever they went they either created trouble at the time or laid the basis for future trouble. We are very concerned that this is going to increase and, in my mind, there is no doubt that there will be more activity in due course.[30]

[30] House of Commons, Standing Committee on Justice and Legal Affairs, May 6, 1969, pp. 890-891.

203. On June 12, 1969, the Counter-subversion Branch at Headquarters instructed field units to review the extent of their reporting on racial intelligence. Those at Headquarters believed that certain individuals whom they considered to be 'militants' were entering Canada from the United States to create dissension among the black and and native populations and that there was a significant increase in racial tension across Canada. It was in connection with the surveillance of individuals in the black community that Mr. Warren Hart was recruited by the Security Service as an informer (Vol. 143, pp.21821-30). His testimony provides evidence that certain members of the black community were intent on achieving political goals through violent means and that, indeed, several of them committed criminal acts including the theft of firearms (Vol. 143, pp.21952-3). Despite these efforts, the threat of violence from members of black communities in Canada declined by the early 1970s.

204. We now consider how Security Service surveillance of black power groups would have been affected by the mandate we are proposing in this chapter. Under this proposed mandate, the Security Service would have been justified in launching some investigations using intrusive intelligence-gathering techniques, including the use of informers. For example, the Security Service considered that the destruction of the Sir George Williams computer centre was an act of serious political violence. Having said this, we have found some evidence of a lack of sensitivity in distinguishing between dissent on the one hand and activities aimed at violent confrontations, terrorist acts or violent revolution on the other. In one paper written by the Security Service in 1972 entitled "Black Nationalism and Black Extremism in Canada" — a paper which was widely distributed not only within the Security Service but also to other federal government departments and to some foreign agencies — we find this disturbing assessment:

> Having become more conscious of their black identity, *the danger is that Canadian blacks of nationalist persuasion will become more tuned in on themselves and become more willing to protest.* The immigrant groups, particularly, under the shock of exposure to a society where whites and white values are predominant, will probably become increasingly resistant to integration and assimilation and more likely to take offence at real or imagined discrimination. (Our emphasis.)

Furthermore in this paper and indeed in some of the letters and memos we have quoted above, we are concerned about the vague references to links between foreign "militants" and blacks living in Canada. The Security Service saw these links at times as posing a grave danger to Canada, and yet there is very little analysis of the nature of these foreign "militants" and their implications for Canada. Under the proposed mandate in this chapter, the security intelligence agency should be concerned about these links only if there is a threat of espionage, sabotage, foreign interference, terrorism or serious political violence. It is not enough to refer vaguely to foreigners and describe them in such loose language as "militants".

Surveillance of the Indian movement in Canada

205. In 1973 the Security Service became interested in the danger of political violence within the Indian community. The interest was generated in part by

the formation of the American Indian Movement (A.I.M.) in the United States. A.I.M. came to public attention particularly after the confrontation at Wounded Knee, South Dakota, in February 1973. The R.C.M.P. also believed that there were links between Black Power and native leaders both in Canada and the United States.

206. On August 30, 1973 a group of approximately 150 Indians took over the offices of the Department of Indian Affairs and Northern Development in the Centennial Tower Building in Ottawa. The building was occupied for 24 hours and then was vacated in a peaceful manner; however, a number of government documents were stolen in the course of the occupation. More incidents followed. In October 1973, there was an outbreak of violence at the Caughnawaga Reserve near Montreal. In 1974, from July 22 until September 3, Indians occupied Anicinabe Park in Kenora, Ontario. On August 11, a road block was set up for one day across a provincial highway through the Bonaparte Indian Reserve near Cache Creek, B.C. Finally, a group of native activists formed a cross-country 'caravan' to publicize their grievances. The Indian Caravan arrived in Ottawa on September 29, 1974, and occupied an abandoned building on Victoria Island, northwest of the Parliament Buildings. This occupation lasted over the winter until March 1, 1975, when the building was destroyed by fire.

207. Violence marked several of these demonstrations. When the Indian Caravan, accompanied by a number of non-Indian supporters, arrived at Parliament Hill on September 30, 1974, a major confrontation with the R.C.M.P. took place. Five demonstrators were charged and two were convicted in connection with the incident.

208. In 1975 and 1976 there were further incidents, mostly in British Columbia and Alberta, but acts designed to confront authorities were on the wane. For example, in September 1976, Indian militants occupied the offices of the Band Council on the Morley Reserve in Alberta, but the occupation was short-lived and, in the opinion of the Security Service, local native leaders appeared to be opposed to the occupation.

209. Prior to 1973, the Security Service had few points of contact with native groups. After the occupation of the Centennial Towers in Ottawa on August 30, 1973 — an event which took the R.C.M.P. by surprise — the Security Service decided to devote additional resources to an investigation of Indians advocating violence in order that government might be fully briefed and forewarned of future confrontations. At this time the Security Service had information that A.I.M. organizers were visiting reserves throughout Canada and the situation was regarded as volatile. The following is an excerpt from a letter from a senior officer in the Counter-subversion Branch to field units, written in September, 1973:

> There is no domestic situation which currently equals the Indian movement in terms of unpredictable volatility. The object of this programme is to bring that situation under security control so that, as a minimum, the element of surprise will not confront us again.

210. This initiative by the Security Service did not go unquestioned. For example, the R.C.M.P. Division in British Columbia, which had a long history of working with the native people, was concerned that much past work would be jeopardized by the Security Service recruiting informers. Work on the mandate of the Security Service resulted in renewed internal questioning about the investigation of native activities. Nevertheless, the Security Service continued its interest in the Indian Movement. By 1977, in a report which was distributed to senior officers of the Departments of Indian Affairs and Northern Development, National Defence and the Solicitor General and to the Privy Council Office on problem areas in the native community in Canada, the Security Service described its role with regard to Indians as follows:

> We interpret the role of the R.C.M.P. Security Service as one of monitoring the tone and temper of the Native population in Canada for the purpose of forewarning government and law enforcement agencies of impending disorder and conflict. Within this context, it is necessary to identify subversive elements (foreign or domestic) striving to influence or manipulate Native grievances for ulterior motives. This programme is pursued through normal investigative procedures and by establishing contacts and an ongoing dialogue with every relevant sector of the Native community. Although not considered a part of our role, but resulting from this dialogue, we have been consulted periodically by Native leaders to assist with specific issues which appeared to be heading towards confrontation. In these instances, the rapport already developed by our investigators contributed to neutralizing hostilities.

211. Under the mandate which we have proposed, the Security Service would be able to investigate persons in the Indian community whose activities were directed towards serious acts of violence to achieve a political objective. The extent of involvement by a security intelligence agency should depend on the seriousness of the problem. Violence on a reserve, even though politically motivated, cannot justify a massive involvement by the security intelligence agency any more than can violence on the picket line. Very often the local police will be better able to assess the situation than the security intelligence agency. We should also note that under our proposed mandate, the security intelligence agency would not be permitted to establish "ongoing dialogue" with groups with the aim of "defusing" situations.

212. Another example of Security Service involvement in the Indian movement was an investigation that was launched into the activities of the Indian Brotherhood of the Northwest Territories (I.B.N.W.T.). In 1975 the I.B.N.W.T. published its manifesto, the Dene Declaration, proclaiming the sovereignty of the Dene Nation over a large area of the N.W.T. The Security Service had received reports of white 'radicals' working with the Dene and there were rumours that the Dene were being trained in the use of weapons and the techniques of guerrilla warfare. After conducting an investigation the Security Service reached the conclusion that the rumours of possible violence among the Dene were largely unfounded. As noted in a letter forwarded to the Department of the Solicitor General on June 20, 1978:

> The ensuing investigation has proven our apprehensions to be largely unfounded. The I.B.N.W.T. is seeking special status for the Dene within

> confederation. The methods used in pursuit of this goal — extensive lobbying and public relations campaigns — are completely legitimate. The white advisors, although exerting considerable influence, never to our knowledge, counselled violence or subversive activity; they were, furthermore, dismissed by the I.B.N.W.T. in December 1977. And with the government's decision in favor of the Alcan route, the threat of pipeline sabotage in the N.W.T. was removed...
>
> I should point out that the Security Service now regards the Dene Nation no differently that it does other legitimate native groups. We are interested in these groups only to the extent that they are involved with persons or groups who might attempt to exploit native grievances for subversive ends.

213. We think this is a reasonable conclusion to have reached, providing that "subversive ends" are not interpreted to include land claims proposals that go beyond current government policy or call for significant constitutional changes. The fusing together of activities prejudicial to national security with activities prejudicial to "national integrity" or "national unity" would point to a failure to distinguish between those who are intent on destroying the democratic system in Canada and those who seek major constitutional change within the democratic system.

214. One incident that came to our attention adversely affected the relations between the R.C.M.P. and the Indian community. At the time of the United Nations Congress on Crime, which was held in Toronto in 1975, an unclassified working paper on terrorism, which had been prepared by the R.C.M.P. for the Canadian delegation, found its way into the press. The paper contained a few paragraphs on the Indian movement, including a sentence that characterized the "Red Power" movement in Canada as the "number one menace to national stability". This paper was not the responsibility of the Security Service nor did it have any part in its preparation.

(g) *The Extra Parliamentary Opposition*

215. In January 1977, it was reported in the news media that the Solicitor General had written in June 1971, to his Cabinet colleagues with respect to certain federal employees who were suspected of being supporters of the "Extra Parliamentary Opposition" (E.P.O.) and whose loyalty was put into question. There were questions in the House about the circulation of a "blacklist" and much public attention was given to the incident. Many of the facts, including the text of the Solicitor General's letter, are already in the public domain.

216. The phrase "Extra Parliamentary Opposition" needs explanation.[31] It was first used in the 1960s by European writers to describe how the traditional institutions of parliamentary democracy could be drastically reformed, if not destroyed, by pressure from "counter or parallel institutions" representative of "the masses" rather than the establishment. The Extra Parliamentary Opposi-

[31] A description of the philosophy of the Extra Parliamentary Opposition may be found in *The New Left in Canada*, published in 1970. See particularly the chapter by Dimitrios J. Roussopoulos "Towards a Revolutionary Youth Movement and an Extra Parliamentary Opposition in Canada".

tion, as it was called, would be brought about through the development of "counter institutions" in labour unions, community groups, schools and so forth. There never was, in Canada or elsewhere, any group or organization that styled itself as the Extra Parliamentary Opposition; the phrase was merely a catchword for a philosophy of a certain type of change.

217. The Security Service, in common with other security intelligence agencies in the West, began to study student radicals of the New Left in the mid 1960s. In Canada, after the Combined Universities Campaign for Nuclear Disarmament had run its course, New Left study groups and committees became established in many universities. In 1968 and 1969, as we have noted earlier in this chapter, several violent confrontations took place at Canadian universities and colleges. In other countries there were also violent incidents involving students who battled police in the Federal Republic of Germany, France, Mexico and elsewhere.

218. The New Left was not regarded by the Security Service as a disciplined organization but rather as an amorphous group of idealistic 'revolutionary' young people. It was feared by the Security Service that the movement would find support at the grass roots level which could lead to violence and civil disorder. From 1967 to 1973 surveillance of the New Left was an important priority of the Security Service. A New Left desk, later a section, was established in the Counter-subversion Branch to co-ordinate reporting and analysis. In a few years the movement had run its course and by 1972 the Security Service reached the conclusion that it no longer represented a threat to the security of Canada. After 1973, reporting on the New Left was abandoned.

219. As we noted earlier in this chapter, during 1969 and 1970 the possible penetration of New Left radicals into labour unions, community groups, government and other key sectors of society was a matter of great interest and concern to the Security Service. There was evidence that government grants to certain community groups were being used for political purposes. Within government itself a number of documents had been leaked to the press. The Privy Council Office had asked the Security Service to investigate all such thefts and leaks of documents and in the course of these investigations former student activists fell under suspicion. The October Crisis heightened the interest of government and the Security Service in the New Left movement. The Strategic Operations Centre in the Privy Council Office, for example, had referred to the influence of the New Left and the Extra Parliamentary Opposition in its report to government in December 1970.

220. The new Solicitor General, Mr. Goyer, was conscious of New Left sympathizers in government service and it appears that he discussed the question with the Director General of the Security Service early in 1971. Mr. Goyer in fact told us that he had asked the Security Service to prepare a report on the E.P.O. phenomenon (Vol. 158, p. 24171). At any rate, the Counter-subversion Branch decided in January 1971, to prepare a report on the New Left in government. The Security Service hoped that the report would alert government to the E.P.O. problem and to the close links between some federal

employees and certain community organizations which were controlled by New Left radicals.

221. The paper prepared by the Security Service was entitled "The Changing Nature of the Threat from The New Left — Extra Parliamentary Opposition, Penetration of Government". It was classified SECRET and CANADIAN EYES ONLY. Although it had been revised and edited it was still a lengthy document running to 32 pages. The paper described the concept of the Extra Parliamentary Opposition in the following terms:

> However in the context of the New Left, E.P.O. refers to the creation of "counter" or "parallel" institutions which are opposed to, and seek the destruction of, the existing social order. The strategy is to use these parallel organizations to organize the poor and the dispossessed, the workers, and the radical students, and to boycott the normal socio-political structure, thus challenging and eroding the political legitimacy of duly elected Government in the eyes of the "oppressed".

222. The paper pointed out that the central idea of the Extra Parliamentary Opposition — the destruction of the parliamentary system — had been taken up both by radicals who sought to bring about "creative disorder" and by those advocating only moderate forms of political action. The paper described in detail the activities of Praxis Corporation, a private research organization in Toronto, which was founded in the late 1960s to support community groups and promote a higher level of citizen participation in government. Praxis, according to the paper, had come to be dominated by New Left activists and had links with community action groups in Toronto and Montreal, with the labour movement and with government agencies. Attempts by Praxis to secure government funding had been supported by certain federal government employees who were said to be sympathetic to the philosophy of the New Left. (An allegation of a break-in at the Toronto office of Praxis will be dealt with in a later Report.)

223. The paper prepared by the Security Service on the E.P.O. concluded by describing the activities of a small group of New Left supporters who were employed in federal departments or agencies. Some of these employees had formed an organization, one of whose main objectives, according to the Security Service, was to politicize tenants action groups in Ottawa. The paper stated that members of the group were involved in passing official information to persons outside the federal government and that some had used their influence to recommend other New Left supporters for positions in government service. Other federal government employees were alleged to have links with the Praxis Corporation. Despite these allegations, the paper noted that "there is as yet no direct evidence of manipulation of policy and decision-making functions in the federal government".

224. Before proceeding with the chronology of events, we wish to make several points about this E.P.O. paper. We consider it to be an inadequate analysis, inflammatory in tone, and, at times, faulty in its logic. As with other papers we have reviewed in writing this chapter, the E.P.O. paper demonstrated an insensitivity to the difference between a threat to Canada's security on the one hand and legitimate dissent on the other. The careless use of language

to create sinister impressions was one manifestation of this insensitivity. Thus, certain individuals, when they joined or attempted to influence an organization, were said to be "penetrating" it. When left-leaning people met, the group was described as a "cell". An individual attending a conference was said to be "talent spotting" as he approached like-minded individuals. Another way in which the paper failed to distinguish dissent from threats to national security was the implicit assumption of guilt by association. The logic of the paper was built around the "radical" rhetoric of several individuals. Those with left leanings who then come into contact with these individuals were assumed to be part of a wider conspiracy to alter society radically. Related to all of these shortcomings was the paper's failure to analyze the E.P.O. rhetoric carefully. The assumption throughout the paper was that "E.P.O. equals subversive activity". The fundamental question of what types of E.P.O. activity, if any, constituted threats to security was never addressed.

225. The aspect of the E.P.O. matter which we find especially objectionable, however, was the circulation outside of the Security Service of a paper which names particular individuals and records many of their thoughts without any reference to their planning or engaging in activity relating to terrorism or serious political violence. Thus the paper was a prime example of the dangers which a security intelligence agency can pose to two cherished values of our society — the right of association and the right to privacy. In addition, by making certain allegations about federal government employees, the Security Service ran the risk of harming their careers.

226. In making these criticisms of the E.P.O. paper, we do not mean to imply that a security intelligence agency should ignore a phenomenon like the New Left or the E.P.O. Rather, we are arguing that to be both useful to government and sensitive to liberal democratic principles, the agency must have a competent analytical capacity. Moreover the agency should not be left on its own to make all-important judgments about when it is appropriate to use intrusive investigative techniques to collect information about domestic groups. We shall have more to say on both of these themes in subsequent chapters of this Report.

227. The E.P.O. paper was widely circulated within the Security Service before being sent by Assistant Commissioner L.R. Parent to the Solicitor General under cover of a three-page letter dated May 12, 1971. After describing the nature of the E.P.O. threat in general terms and the activities of the Praxis Corporation, Mr. Parent concluded as follows:

> Although the number of such contacts is relatively small, probably not in excess of twenty-five, the picture presented is worrying, suggesting as it does, a conscious, although perhaps not co-ordinated, attempt by various persons to use the knowledge and the influence gained by their employment with the federal government to further their own ends. Perhaps you will wish to forward a copy of this paper to the Secretary of State for his information and, as he sees fit, comment. Also you may consider it advisable to have the Security Panel study the paper.

228. After reviewing the E.P.O. matter with Mr. Robin Bourne, the Head of the Security Planning and Research Group in his Department, the Solicitor

General decided that letters should be sent to certain of his Cabinet colleagues who had responsibility for the departments in which the persons mentioned in the E.P.O. paper were employed. Thus a letter marked "Personal and Secret" and dated June 15, 1971 was sent to five Cabinet Ministers. Attached to each letter was a list of the names of 21 federal employees listed under seven departments. The letter referred to the R.C.M.P. paper (which was not enclosed) and used much the same language to describe the E.P.O. concept, Praxis Corporation and the existence within government of a group of "campus revolutionaries". Mr. Goyer concluded:

> Though the number [of E.P.O. supporters] within the Public Service is small, probably not in excess of twenty-five, the picture presented is worrying, suggesting as it does a conscious attempt by various persons to use the knowledge and the influence gained by their employment with the federal government to further their own ends. For this reason, I have attached a list of those we suspect of being engaged in or sympathetic to E.P.O. activity in one way or another, with the recommendation that steps be taken to ensure that these people have been fully briefed as to their responsibilities for ensuring the security of government information and that their activities be watched with more than normal care.

It is worth noting that the list of federal employees was prepared in the Solicitor General's Department by the simple process of extracting from the R.C.M.P. paper the names of all persons therein mentioned who were apparently in federal employment. There was no consultation with the Security Service with respect to the letter or the list of names (Vol. 158, pp. 24132, 24138).

229. The letter was delivered to the addressees and copies were given to the Privy Council Office and the Security Service. The letter was not sent to Deputy Ministers or departmental security officers. Mr. Goyer told us that he met the Prime Minister at the time and he had advised the Prime Minister of his decision to send the letter to certain of his colleagues (Vol. 158, p. 24152). In 1977, after a copy of the letter found its way into the press, the Privy Council Office made inquiries as to what had happened to the letters and what action had been taken. The result of these inquiries was that, with only one exception, the original letter could not be found on departmental files and there was no record of any action having been taken by Ministers. Nor was the matter followed up by Mr. Goyer in 1971. He told us that in his view further action was the responsibility of each Minister (Vol. 158, pp. 24165, 24170, 24172). The matter was never discussed in the Security Panel although this had been recommended by the Security Service.

230. After questions were raised in the House in 1977, the Security Service reviewed the status of the persons named in the attachment to Mr. Goyer's letter. None of these persons was of any operational interest to the Security Service. About half the persons in the list had received security clearances in the normal way, while the remainder had either left government service or did not require a security clearance in order to carry out their duties. A file review disclosed that there was no activity on any individual files after 1972, with the exception of correspondence relating to routine security clearance matters.

231. How would a matter similar to the E.P.O. affair have been handled by the security intelligence system we are proposing? One important lesson that we have drawn from this affair is the need for guidelines on the kinds of information that a security intelligence agency can report to government. In Chapter 5 of this Part, we shall emphasize in particular the care required by the agency in reporting information about individuals. Such individuals must fall within the statutory definition of security threats. (There was no effort made in the E.P.O. affair to assess the actual threat posed by each individual mentioned in Mr. Goyer's letter.) Further, the information must be relevant to the department receiving it. If these two principles are followed, a security intelligence agency would not likely send the same information about 21 individuals to five different departments.

232. A second point concerns the role of Ministers and their deputies in security matters related to public servants. Given that deputy ministers are responsible for departmental security, a Minister should become involved in only those matters concerning a member of his exempt staff (i.e., his personal staff who are not part of the Public Service, but rather, are appointed by Order-in-Council). As well, the Minister should be briefed on a departmental security matter if it is likely that he will be asked a question in Parliament about the matter. With these exceptions, the Director General of the security intelligence agency should communicate directly with the deputy minister on a departmental security matter. In Part VII, Chapter 1 we shall recommend procedures as to how a deputy minister should exercise his responsibilities when an employee or prospective employee is alleged to be a security threat. (In the E.P.O. affair, there appeared to be little action taken by those who received Mr. Goyer's letter.) We shall also propose an appeal mechanism for those who believe that their careers have been harmed by the government's security screening process. Such an appeal mechanism was not available to those individuals named in Mr. Goyer's letter.

233. There is a further matter: the paper, without deletion except for the removal of the classification CANADIAN EYES ONLY, was distributed by the Security Service to four foreign intelligence agencies without consulting either the Solicitor General or any of his officials (Vol. 158, pp. 24166 and 24143). While the letter forwarding the paper contained the usual caveat that the material was not to be used outside the foreign agency without permission of the Security Service, we are of the view that it should have been circulated only after the names of the Canadians who were under suspicion had been deleted. We are also concerned that the Security Service, when it provides such names, has no way of controlling the subsequent utilization of the information by the foreign country. The security intelligence agency should exercise great discretion in providing foreign agencies with the names of Canadians. Under no circumstances should it provide the names of Canadians involved only in domestic movements where there is no evidence of actual or planned political violence, terrorism, espionage or foreign interference. We shall return to this question in Chapter 7 of this Part.