CHAPTER 5

SOME METHODS OF CRIMINAL INVESTIGATIONS AND THEIR CONTROL

INTRODUCTION

1. In this chapter we consider the legal and policy problems identified in Part III which pertain to methods of investigation used by the criminal investigation side of the R.C.M.P. In contrast to our comprehensive treatment of investigative techniques required for the protection of national security, our consideration of legal and policy changes in relation to the investigation of crime is limited to those changes which we deem necessary in response to activities of the R.C.M.P. found to be not authorized or provided for by law. While our recommendations call for legislation to render lawful certain techniques of criminal investigation which have been used in the past (for example, searching mail for illicit drugs and obtaining information about suspects from confidential government files) we also call for a rigorous system of controlling intrusive techniques in criminal investigations and, in the final section of the chapter, where we consider the admissibility of illegally obtained evidence and entrapment by agents provocateurs, we recommend changes in the law designed to prevent police use of illegal or improper investigative techniques.

2. As with our recommendations on the security side, our recommendations in this chapter constitute an interconnected package: in our view, it would be unwise to adopt recommendations for greater police powers without at the same time adopting our recommendations with respect to controls and sanctions against unlawful or improper investigative activities.

A. A SYSTEM FOR CONTROLLING CRIMINAL INVESTIGATORY METHODS

3. In Part V, Chapter 4, we began by stating five principles which should form the basis of a system of controls governing the use of investigatory methods by the security intelligence agency. Using those principles, we developed a system of controls which divided investigatory techniques for the Security Service into three categories which we called levels one, two and three. In addition to these elements, our control system consisted of ministerial guidelines governing the use of certain techniques, and two "external" bodies — an independent review body (the Advisory Committee on Security Intelligence) and a joint Parliamentary Committee — with responsibilities for monitoring and evaluating the operation of the total system of controls.

4. We do not propose a parallel system of controls for the criminal investigation side of the R.C.M.P. Our terms of reference do not permit us to examine the command structure and decision-making processes of the R.C.M.P. as a whole, and without such an examination, we are unable to evaluate in a comprehensive manner the current system within the Force for controlling the use of investigatory methods. A clear, comprehensive system for controlling such investigation techniques is essential, in our view, if elected officials are to exercise properly their responsibilities with regard to the R.C.M.P. Consequently, we believe that the Solicitor General, in concert with his counterparts in the provinces, should give priority to reviewing the current system of controls in the R.C.M.P. We do not underestimate the difficulty of this task. Designing a control system on the criminal investigation side of the Force will be a complex undertaking because of the decentralized command structure of the C.I.B. and because of the contract policing role which the R.C.M.P. has in eight of the provinces. It is by no means certain that the control system has to be the same in each of these eight provinces. Furthermore, there is a very difficult question of what ought to be the respective responsibilities of the federal and provincial governments in the contract provinces with regard to the control of investigatory methods used by the R.C.M.P. Finally, adding to the complexity is another factor: the significant overlap in responsibilities of the R.C.M.P. and other police forces in this country. Consequently a proposal for a control system for the R.C.M.P. should be based on knowledge of how other police forces control their use of intrusive investigative methods.

5. We put forward the following questions as a suggested initial agenda for the review we are proposing:

(a) what should be the principles on which a control system should be based?
(b) to what extent can the main outlines of the system of controls be made public without harming the effectiveness of the individual investigatory methods?
(c) what is an appropriate method for periodically evaluating the effectiveness of this control system?
(d) to what extent should officials 'outside' the Force, in addition to those who now participate by law, be included in the control system in order to provide countervailing pressures to use of intrusive investigatory techniques?
(e) what should be the role of the Department of Justice lawyers assigned to the R.C.M.P. in this control system so as to ensure the lawful use of these methods?
(f) what role should the Solicitor General and the provincial attorneys general play in this system?

WE RECOMMEND THAT the Solicitor General, in concert with his counterparts in the provinces, initiate a review of the current system of controls governing the use of the R.C.M.P.'s investigatory methods.

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B. SURREPTITIOUS ENTRIES

6. In a brief to us concerning surreptitious entries the R.C.M.P. has made a strong case that this is a desirable, and often an essential, investigative technique when the manufacture of illicit drugs and alcohol comes under the scrutiny of resourceful investigators. Eventually a time comes when members employed on lengthy, difficult investigations, many involving great personal danger, are faced with the problem of having to know with certainty whether an illicit drug laboratory or still is secreted in a place, if the laboratory or still is producing or is in the development stage, if a cache of drugs or alcohol is in a place, or if quantities of illicit drugs or spirits are being removed from a cache bit by bit for trafficking purposes. The Force considers that it is extremely difficult, without the power to search in circumstances when a search warrant cannot now be obtained, to detect the existence of clandestine drug laboratories. The R.C.M.P. also asserts that surreptitious entry is a valuable tool generally in the fight against "white-collar" crime. This latter assertion, however, has not been substantiated before us.

7. We consider that any broad power to search private premises upon mere *suspicion* that there might be evidence of the commission of an offence or the intended commission of an offence, even if such a power were authorized by a judicial warrant, should be granted by statute only after a thorough review of all police powers of search and seizure — a review which should study this proposal in the context of the entire ambit of such powers. If what was being sought were the power to search upon warrant granted upon suspicion, and the search was to be made known to the occupant at the time of the search or soon thereafter, at least the power to enter and inspect would have many counterparts in federal and provincial regulatory laws. However, what is sought by the R.C.M.P. in these situations is a power to search covertly. Such a power, we think, should be granted by statute, only if a thorough review of all police powers of search and seizure demonstrates the need for such a power. We therefore decline to make any recommendation in regard to this proposal, except that the matter be referred to the Law Reform Commission of Canada, which is at present studying the laws relating to search and seizure.

> **WE RECOMMEND THAT the Solicitor General refer to the Law Reform Commission of Canada the matter of whether or not the Criminal Code should be amended to allow peace officers in Canada, under defined circumstances and controls, to make surreptitious entries.**
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C. ELECTRONIC SURVEILLANCE

8. In Part III, Chapter 3, we set forth statistics as to the use of electronic surveillance by the R.C.M.P. in criminal investigations. Based on these statistics and on knowledge which is common to those familiar with the operations of the criminal courts since 1974, we are confident that electronic surveillance is a valuable and necessary tool in the investigation of crime and the prosecution of offenders. Having said this, we believe that there are legal problems to resolve so that this investigative tool can be used legally and effectively. These problems fall into three categories: first, there are problems relating to the use

of information obtained as a result of a lawful interception; second, there is an inadequate review procedure to evaluate the use of electronic eavesdropping devices; and third, there is a set of problems paralleling those connected with the use of electronic surveillance under section 16 of the Official Secrets Act and involving a lack of legal authorization to examine premises prior to installation and to install, operate, repair, and remove electronic devices.

Use of information

9. A problem that the R.C.M.P. has drawn to our attention is whether or not members of the Force may give to a foreign law enforcement agency any information which the R.C.M.P. obtains from electronic surveillance. Section 178.2(1) of the Criminal Code prohibits disclosure of information obtained from the use of electrical eavesdropping devices, subject to several exceptions. In our view, it is doubtful whether any of these exemptions are applicable to foreign law enforcement agencies. Another aspect of the limited exceptions is that members of the R.C.M.P. are severely restricted as to what information they may give to anyone involved in preparing the Solicitor General's Annual Report to Parliament or a provincial attorney general's Annual Report to his provincial legislature on the use of electronic surveillance. A similar problem may arise for any other body reviewing the use of this power. We believe that section 178.2(1) should be amended to make it clear that information obtained from a lawful interception can be given to foreign law enforcement agencies, to those involved in producing annual reports and to federally authorized persons reviewing the use of this power.

Review mechanism

10. We think that there should be a mechanism to facilitate an effective review of the use of electronic surveillance. The yearly statistical reports of the provincial attorneys general and the Solicitor General of Canada to provincial legislatures and Parliament, while more useful than the yearly report on the Security Service's use of electronic surveillance, does not provide for an extensive enough review of this investigative method. In Part III, Chapter 3, we explained the constraints that make it difficult for a Commission of Inquiry to review thoroughly the manner in which the process of applying for authorization under section 178 is working. Any other government body would face at least equal difficulty in doing so. If our proposal for a more thorough review of the use of electronic surveillance in criminal investigations by all police forces in Canada is adopted, section 178 would have to be amended to allow access to sealed packets and to the product of interception. Presumably this access could be limited to certain federal Commissioners appointed under Part I of the Inquiries Act.

11. One means of improving the safeguards, both with regard to electronic surveillance and with regard to the search of mail for illicit drugs or narcotics, would be the creation of a committee appointed jointly by federal and provincial governments to review the exercise of these powers by peace officers across Canada. This committee, consisting of two judges, two lawyers, and two citizens (one of whom might, for example, be a person active in a civil liberties

organization) could review the documents filed in support of applications for judicial authorization, the orders themselves, the alternatives available to the police, the results of the investigative work to the extent that it was aided by the means authorized by the judicial authorizations, and so on. In addition, this committee could sponsor sessions in which judges from across the country could compare experiences and seek to arrive at high standards by which applications for authorization orders should be judged. Moreover, the committee could report annually to Parliament, taking care to keep its comments on specific cases at a general level so as not to prejudice the rights of individuals or the techniques and circumstances of past and continuing police investigative operations.

12. Results of our research, based on a broad survey of experience gained in administering the application procedure, raise issues which a more extensive review process might study thoroughly. These issues are of a kind that a yearly statistical summary cannot answer. Some of our research results are as follows:

(a) Applications to a judge are usually completed in less than half an hour — in many cases in less than 15 minutes.

(b) Frequently, but far from always, when the application is made privately to the judge, the agent of the Solicitor General of Canada or of the provincial attorney general is accompanied by the police officer who swore the affidavit.

(c) In order to supplement the information contained in the affidavit, many judges question the policemen. Some judges receive this additional information under oath, but most do not. Some judges require the additional information in writing, some do not.

(d) There is evidence that the applications are well prepared, but the fact that they lack detail about a variety of matters is a ground for some degree of dissatisfaction.

(e) There is substantial evidence that the fact that almost all applications are successful is due to the efforts of police forces and Crown agents to submit only those applications that have been well prepared and are likely not to encounter difficulty.

(f) Although, as has been disclosed by the Annual Reports of both the Solicitor General of Canada and the provincial attorneys general, very few applications have been refused by judges, there is some evidence that this information is somewhat misleading. It appears that applications are frequently withdrawn when the judge points to inadequacies in the affidavit. Thus the official statistics are misleading because they do not record the number of applications which are made but withdrawn.

(g) Some judges attach a condition to the authorization that there be periodic progress reports to the judge.

(h) In the several provinces in which research was conducted, there was evidence that the system adopted by each Court for determining which judge received applications has reduced but not eliminated 'judge-shopping' by the Crown — i.e. the selection of judges more likely to be amenable to such applications. Despite the minimization of this undesirable risk, it may be that, wherever possible, instead of all the

judges in the court being entitled to receive applications, there should be a limited number of designated judges who would be so entitled. This would reduce the possibility of 'judge-shopping' and at the same time develop a number of judges who have a certain expertise in analysing the quality of the applications.

13. Our research covered many other points concerning the application process, but the foregoing are the most significant. We make one further observation: it would be desirable that there be organized discussion among the judges of Canada of the many problems associated with the process. Many judges lack experience as criminal law practitioners before going to the bench, and consequently are not fully familiar with the alternative means of investigation that in many situations are available to policemen. If the judges are to be effective instruments of ensuring that electronic surveillance is used as an investigative tool of last resort, discussion would enhance the sharing of the knowledge which is possessed by those judges who are wise in the ways of criminal investigation.

Executing authorizations for electronic surveillance

14. An important question which we addressed at length in Part III, Chapter 3, in our discussion of the legal issues relating to electronic surveillance was the following: does a judge have the statutory power under section 178.13 of the Criminal Code to authorize *entries* to examine premises prior to installation and to install, repair and remove a listening device, and, if he does not expressly authorize entry for those purposes is the power to enter implied under section 25(1) of the Criminal Code or section 26(2) of the Interpretation Act? We believe that a judge does not have the authority to authorize entries, nor is the power to enter implied in any statute. Consequently, section 178.13 of the Criminal Code should be amended in a manner similar to that which we have recommended for the statute governing the security intelligence agency's use of electronic surveillance in Part V, Chapter 4. Specifically, the judge should be granted the authority to authorize peace officers to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device. The judge issuing the authorization should set the methods which may be used in executing it. These powers should be available only on the condition that their execution shall not cause significant damage to premises that remains unrepaired, nor involve the use of physical force or the threat of such force against any person. In addition, section 178.13 of the Criminal Code should be amended to provide for the use, without compensation, of the electrical power supply available in the premises.

15. A further problem relating to the installation and operation of electronic eavesdropping devices involves the possible violation of provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards. We believe that the Solicitor General should seek the co-operation of the provinces in order to effect the required administrative and legislative changes so that this investigatory method can be used in a lawful manner.

WE RECOMMEND THAT a committee be established with statutory powers to review the use of electronic surveillance by all police forces in Canada, including, but not limited to, the procedure by which authorizations are applied for.

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WE RECOMMEND THAT section 178.2(1) of the Criminal Code be amended so that information obtained as a result of lawful electronic surveillance can be given to

(a) a foreign law enforcement agency;

(b) any person who is involved in the preparation of the Solicitor General's Annual Report to Parliament on the use of electronic surveillance;

(c) any person who is involved in the preparation of a provincial attorney general's Annual Report to a provincial legislature on the use of electronic surveillance; and

(d) any person authorized by federal legislation to review the use of this investigative technique.

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WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device, providing the judge issuing the authorization sets out in the authorization

(a) the methods which may be used in executing it;

(b) that there be nothing done that shall cause significant damage to the premises that remains unrepaired;

(c) that there be no use of physical force or the threat of such force against any person.

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WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to use the electrical power source available in the premises without compensation.

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WE RECOMMEND THAT the Solicitor General seek the co-operation of the provinces to effect the necessary administrative and legislative changes to provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards in order to allow peace officers to install, operate, repair and remove electronic eavesdropping devices in a lawful manner.

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D. MAIL COVERS AND MAIL OPENING

16. On the criminal investigation side of the Force's operations, investigations of drug trafficking have relied not only on mail cover checks and mail openings, but also on controlled deliveries of drugs to bring the cases to a

successful conclusion. (See Part III, Chapter 4 for a description of controlled deliveries.) Various examples of drug-related investigations were cited in evidence to demonstrate the efficacy of these investigative techniques. However, in a number of cases, charges were not laid even though the evidence against the accused had been obtained, because the Force did not want to compromise postal or customs authorities (Vol. 18, pp. 2827-59; Vol. 23, pp. 3619-50). According to the R.C.M.P., letter bombs are another indication of the need for mail opening. One witness argued that not only is it necessary to have early evidence, if possible, in an attempt to predict the sending of the bomb, but if the item of mail is not delayed it may reach the recipient and be opened (Vol. 8, pp. 1032-35). We also heard evidence *in camera* of a fraud investigation, in which the accused had left Canada. Mail arrived in Canada from the country he was living in, and it was opened in the hope that it would disclose whether he might go to a country from which it would be possible to extradite him.

17. One senior R.C.M.P. officer told us that the Force should be empowered by legislation to open the mail, not only during the course of drug investigations, but also for investigations of all those offences concerning which a judge may now authorize electronic interception under section 178.13 of the Criminal Code (Vol. 8, p. 1146). The R.C.M.P. is not satisfied with limiting mail opening to drug investigations as was proposed in Bill C-26, introduced in the House of Commons in 1979.

18. In our view the need for mail cover checks and mail opening has not been established in the case of investigations other than for drugs. We think that the need to examine substances (not messages) in the mail has been established clearly if there is a reason to suspect that mail of any category contains narcotics or illicit drugs. A senior R.C.M.P. officer gave evidence before us about the extent to which the mail has been a channel of importation for narcotics and drugs — a channel "which has been taken advantage of in increasing fashion over the past several years... and has resulted in a tremendous influx of narcotic drugs into this country" (Vol. 8, p. 1013. See Vol. 8, pp. 1042-1150 for testimony on drugs and mail opening). While this evidence has convinced us of the need to open mail to search for illicit drugs and narcotics, because of the importance we attach to individual privacy we do not recommend that mail be opened for the purpose of reading messages about drug offences or any other criminal offences. Whatever may be our personal views as to the threat to our society that is posed by trafficking in narcotics and illicit drugs, we are not a Commission of Inquiry into the harmful effects of those substances. All we can properly say is that, if Parliament considers trafficking in narcotics and illicit drugs to be a grave problem, then we would point out that the police have great difficulty in lawfully investigating and even detecting such traffic unless certain legislative provisions are enacted. These provisions are as follows. First, the power to open mail and even to examine or photograph an envelope should be exercisable only on judicial authorization, subject to the same safeguards as are now found in section 178 of the Criminal Code in regard to electronic surveillance. In addition, just as section 178 makes it an offence for anyone to use electronic or other artificial means to eavesdrop, except upon consent or lawful authorization, so should the legislation make it

an offence to open mail except upon consent or lawful authority. The powers should be limited initially to examination and testing of any substance found in the mail. Only when a narcotic or illicit narcotic drug is found in the letter should a peace officer be empowered to read an accompanying written, printed or typewritten message. To ensure that in executing the judicial authorization no one has read any message contained in the mail unless a narcotic or illicit drug is found in the letter, there should be a procedure such as a statutory declaration by the official supervising the opening of the letter that the law has been followed. The declaration should be filed with the Solicitor General. Finally the Post Office Act should be amended so that it is clear that controlled deliveries in drug investigations may be made lawfully. The problem is that a controlled delivery may require a delay in the delivery of the letter to ensure that the police are present to witness the delivery and that the recipient of the letter is actually at the address to receive it. Such a delay is illegal under the present Post Office Act.

19. We wish to make one further proposal for legislative change. In Part III, Chapter 4, with regard to letter bombs, we noted that if it is *known* that an article of mail contains an explosive, then the article of mail is considered "non-mailable matter" under sections 1 and 2 of Schedule I of the Prohibited Mail Regulations, and consequently whether it is domestic or international mail, it can be disposed of by the Postmaster General's Department. A problem arises, however, if there is only reasonable belief or suspicion that an article of mail contains a bomb. In such cases, it appears that a postal employee or a member of the R.C.M.P. who opens an article of mail or delays it commits an offence except when the mail is international and the article opened by a Customs Officer (which includes R.C.M.P. members) is not a "letter". To rectify this problem, we believe that Schedule I of the Prohibited Mail Regulations should be amended so that an article of mail is considered "non-mailable matter" if there are grounds to suspect that it contains an explosive.

WE RECOMMEND THAT, not withstanding the present provisions of the Post Office Act, R.C.M.P. peace officers be authorized by legislation to examine or photograph an envelope and to open mail in order to examine and test any substance found in the mail, subject to the following conditions:

(a) this power is exercisable only on judicial authorization, subject to the same safeguards as are now found in section 178 of the Criminal Code;

(b) the offences concerning which this power can be exercisable are limited to narcotic and drug offences;

(c) the reading of an accompanying written, printed or typewritten message other than a message accompanying an illicit drug or narcotic is an offence;

(d) there is a procedure established (such as a statutory declaration by the official supervising the opening of mail) to ensure that in executing the judicial authorization no one has unlawfully read any message contained in the mail. The declaration should be filed with the Solicitor General.

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WE RECOMMEND THAT the Post Office Act should be amended so that it is clear that controlled deliveries of mail by R.C.M.P. peace officers or their agents may be made lawfully.

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WE RECOMMEND THAT Schedule I of the Prohibited Mail Regulations be amended so that an article of mail is considered "non-mailable matter" if there are grounds for suspicion or reasonable belief that the article of mail contains an explosive.

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E. ACCESS TO CONFIDENTIAL INFORMATION

20. It is clear that an investigation of crime will be more effective if a police force could gain access to names, addresses, family relationships, financial information, medical histories, physical characteristics and other data. Particularly fruitful sources of such information are the data banks of government departments and agencies. As we have seen, the R.C.M.P. in its criminal investigations has particularly sought such information from the Income Tax Branch of the Department of National Revenue, the Unemployment Insurance Commission (now the Canada Employment and Immigration Commission) and the Family Allowance Division and the Old Age Pension Division of the Department of National Health and Welfare.

21. In the case of information provided by taxpayers to the Income Tax Branch of the Department of National Revenue, we accept that both biographical information and financial information can be of substantial importance in the investigation of fraud, gambling and bankruptcy offences — whether by organized criminals or by single adventurers.

22. In the case of information from the Unemployment Insurance Commission, the R.C.M.P. consider that the kind of biographical data and employment records obtained was of importance — a "necessary tool" according to one senior R.C.M.P. officer who testified before us — in the location of persons wanted for the commission of crime, as well as the identification of dead bodies and missing persons, and the accurate identification of persons generally. We consider that the need for such information is evident, but as we stated in Part III, Chapter 5, there is some doubt as to whether it is within the power of the Minister of Employment and Immigration and of the Canada Employment and Immigration Commission under existing law to make it lawful for employees of the Commission to provide information to the R.C.M.P. or to other police forces.

23. We have no doubt that access by the R.C.M.P. to biographical information possessed by social welfare programmes, including the Social Insurance Number, is a valuable tool in the location of missing persons, the identification of stolen property and other matters of importance. Similarly, we are sure that access by the R.C.M.P. to some kinds of confidential information possessed by provincial government departments or agencies such as vital statistics and medical information, will be of vital importance in some criminal investigations or attempts to preserve the peace and protect lives and property.

24. As in the case of security intelligence investigations, it is necessary in the case of each category of confidential information to balance the need of the police force for the information to fulfill its public duties against the need to maintain confidentiality of information. Usually administrators of statutory programmes involving the collection of confidential information express concern that the integrity and effectiveness of these programmes will suffer if police forces are granted access to the information. Public knowledge of the fact of such access, these administrators argue, will discourage members of the public from candour and forthrightness in disclosing information. In addition to these concerns it is also necessary to take into account the concern of society to prevent unjustified and excessive intrusion by the state into the private lives of its people. Again, there is the argument that changing the present law to provide access by the police to information at present prohibited breaks a tacit understanding that the confidentiality dictated by the governing statute would be honoured.

25. We think that there will be a need in some criminal investigations, and in some other cases where the police are acting to maintain the peace and protect lives and property, for the state to enable them to have lawful access to the information which the state has received in confidence. What must be provided, however, is a system designed to prevent unrestrained and uncontrolled access. Putting it another way, there must be a means to limit access to those cases where the need is very clear and demonstrably outweighs the opposing considerations we have mentioned.

26. We prefer not to make any recommendations in regard to provincial statutes, except that the Solicitor General negotiate a similar solution with the provinces. The views of provincial and municipal police forces should be taken into account, as well as those of other interested persons and groups, since it is after all the provincial legislatures that will have to act. Perhaps those negotiating a solution will bear in mind, as possible answers on the provincial level, the recommendations we shall make in regard to confidential information held by federal government departments and agencies.

27. We turn, then, to the federal government. In Part V, Chapter 4, we noted that the "non-derivative use" section of Part IV of the Canadian Human Rights Act (section 52(2)) has been interpreted strictly by all departments and agencies, with the result that the R.C.M.P. Security Service and the criminal investigation side of the Force have now been denied access to virtually all personal information possessed by other federal government institutions. The proposed Privacy Act currently before Parliament, a section of which would replace Part IV of the Canadian Human Rights Act, provides that personal information under the control of a government institution shall, subject to certain exceptions, be used only for the purpose for which it was obtained. The exception which is most relevant for our purposes would permit a government institution to disclose personal information

> (e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed.

28. As we noted in Part V, Chapter 4, in certain respects this legislative change goes too far in opening up access of confidential information to investigative bodies including the R.C.M.P. For example, it does not provide a clear enough test of necessity for access to personal information. Moreover, it makes no distinction between information about a person which is publicly available (e.g. biographical information) and information which is not publicly available. In other respects, the legislative proposals do not go far enough. Thus, it does not provide access to income tax, family allowance, old age security and Canada Pension Plan information, all of which are protected by Acts of Parliament which bar disclosure of information, even with the permission of the Minister, for any purpose unrelated to the programme or purpose for which the information was obtained.

29. The changes in this legislative proposal which we recommended for the security intelligence agency should apply with appropriate modifications to the criminal investigation side of the R.C.M.P. We distinguish at the outset between 'biographical' and 'personal' information. The former would consist of an individual's name (including change of name), address (including change of address), telephone number, date and place of birth, physical description and occupation. We believe that this class of information, since for the most part it is publicly available, merits less protection than more 'personal' information. Consequently the R.C.M.P. should be able to request this type of information from government departments under a system of administrative controls provided for under section 8(2)(e) of the proposed Privacy Act. Such applications before being submitted should be approved by a designated senior officer at Headquarters in Ottawa.

30. With regard to 'personal' information, we believe that access should be conditional on the investigative body's receiving authorization from a judge upon meeting the same tests that are now found in section 178 of the Criminal Code for authorizing electronic surveillance. Because decision-making in criminal investigations is more decentralized than in a security intelligency agency, and because decisions in criminal investigation cases need to be made quickly, we propose that applications for judicial authorization be made to either a judge of the Federal Court of Canada or a judge of the superior court in the province in which the investigation, or a part of it, is taking place.

31. In the case of the security intelligence agency, we recommended that the Solicitor General should approve all requests for 'personal' information prior to the agency's seeking a judicial warrant. In addition, we recommended that the Minister or head of the government institution which holds the information should comply with the warrant unless the Prime Minister directs the Solicitor General not to execute it. This system of ministerial involvement in dealing with specific requests for 'personal' information is inappropriate in the case of criminal investigations conducted by the R.C.M.P. As proposed in Chapter 4 of this Part, the Solicitor General should become involved in the R.C.M.P.'s investigation of individual cases only in very exceptional circumstances involving significant policy matters. Thus, we propose that the R.C.M.P., in the same way that it now does with requests for electronic surveillance, submit applications for access to 'personal' information to the Minister of Justice, who, as the

Attorney General of Canada, can request an agent to apply for a judicial warrant authorizing the delivery of the information to the R.C.M.P. The Minister who receives the warrant should be required to comply with it, but as with access for security purposes, if he thinks the integrity of his department's programme is being seriously undermined by use of this power by the police and cannot resolve the matter through discussions with the Attorney General he should make representations to the Prime Minister. Whether the R.C.M.P. should be allowed to distribute information received under judicial authorization to other police forces is a matter for the Solicitor General of Canada to discuss with the provincial attorneys general.

32. Finally, the R.C.M.P.'s scope of access to government information should be the same as that which we have recommended for the security intelligence agency. Thus the Force should, subject to the controls referred to in the preceding paragraph, have access to all government data banks including those now protected by Acts of Parliament which bar disclosure of information for any purpose unrelated to the programme or purpose for which the information was obtained. One category of federal government information which it would be reasonable to exempt from the scope of legislation giving access to otherwise protected bodies of information is the census information compiled by Statistics Canada for reasons we gave in Part V, Chapter 4.

WE RECOMMEND THAT

(a) **legislation authorize the heads of federal government institutions to release information concerning an individual's name, address, phone number, date and place of birth, occupation and physical description on receiving a written request from the R.C.M.P. stating that such information is necessary for the purpose of conducting a criminal investigation.**

(b) **all other personal information held by the federal government with the exception of census information held by Statistics Canada, be accessible to the R.C.M.P. through a system of judicially granted authorizations subject to the same terms and conditions as are now found in section 178 of the Criminal Code with regard to electronic surveillance.**

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WE RECOMMEND THAT the R.C.M.P. obtain personal information held by government institutions under the jurisdiction of provincial governments only from persons legally authorized to release such information and that, with regard to any province in which there is no authorized means of access to information to which the Solicitor General of Canada considers that the R.C.M.P. should have access in order to discharge its policing responsibilities effectively, the Solicitor General should seek the co-operation of the province in amending its laws to make such access possible.

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F. PHYSICAL SURVEILLANCE

33. In Part III, Chapter 8 we described the importance in criminal investigations of the police being able to follow and watch suspects and apprehend criminals, often by the use of vehicles. In Part V, Chapter 4 we made

recommendations as to what should be done to enable physical surveillance operations to be conducted effectively yet lawfully by the security intelligence agency. What follows in regard to criminal investigation will be brief; the details of our approach may be found by referring to our identical recommendations in regard to the security intelligence agency.

34. In regard to criminal investigations, as in the case of security intelligence work, we think that the only proper way to resolve the legal difficulties that now place members of the R.C.M.P. in a dilemma is to make appropriate changes in the relevant provincial legislation and municipal bylaws, as to the rules of the road, pedestrian movement on the roads, the use of documents of identification and registration issued by the provincial government, the use of a fictitious name in registering at a hotel, and trespass to land or chattels. The details of the amendments are as set out in the recommendations in Part V, Chapter 4.

> **WE RECOMMEND THAT the amendments which we proposed in Part V, Chapter 4 to facilitate physical surveillance operations by the security intelligence agency be made applicable to physical surveillance in criminal investigations by the R.C.M.P.**
>
> (273)

G. UNDERCOVER OPERATIVES

35. In Part III, Chapter 9 we discussed the important contributions to the detection and investigation of crime which are made by regular members of the R.C.M.P. who serve under cover (particularly in combatting trafficking in narcotics and restricted drugs) and by other persons who serve as paid or volunteer sources of information about criminal activity. We have no doubt that these means of collecting criminal intelligence and evidence for use in prosecutions are vital to the effective functioning of the R.C.M.P., particularly in regard to some kinds of crime, especially drug and gambling offences and organized crime.

36. In Part III, Chapter 9, we analyzed the legal difficulties involved in the use of undercover operatives. This analysis causes us to doubt seriously whether operatives may be used by either the criminal investigation side of the Force or the security intelligence agency without violating existing federal and provincial laws. Some of these legal problems are common to both criminal investigations and security intelligence functions. Consequently, our recommendations, given in Part V, Chapter 4 are applicable to criminal investigations by the R.C.M.P. While there is no need to repeat them in detail, we outline them as follows:

(a) Legislation relating to income tax should be amended to permit the non-declaration as income of payments made by the police to sources. We considered and rejected the alternative of having the tax deducted at source and sent to the Department of National Revenue without the identity of the source being disclosed. Other fiscal legislation requiring deduction and remittance by or on behalf of employees ought to be amended to exclude such sources.

(b) Federal and provincial legislation should be amended where necessary, to allow R.C.M.P. undercover operatives, both members and sources, in defined circumstances, to obtain, possess and use false documentation, subject to administrative controls such as return of the documentation when the operation is completed.

(c) Section 383 of the Criminal Code should be amended to provide expressly that an agent or employee who gives information to the police about his principal's or employer's activities does not commit the offence provided for in that section, so long as the act is done or the favour that is exercised in relation to the business of the principal or employer is in fulfilment of a public interest or duty which transcends the private relationship. At the same time, the R.C.M.P. should have internal operational guidelines that reflect an awareness of the social value of the relationships which are affected by the operation of sources — an awareness which is to be balanced against the need for effective investigation. These guidelines should be approved by the Minister and publicly disclosed.

(d) In criminal investigations there should be no special power of access to confidential records in the private sector, with the exception of medical records, discussed below. We do not think that the police should encourage persons controlling such records to violate legal or professional requirements of confidentiality. We suggest that the R.C.M.P. should obtain legal advice in regard to particular problems of this sort; sometimes such advice will enable the supposed barrier to access to be 'lowered' because it will be found that there is none in law in the particular circumstances. Conversely, failure to obtain legal advice may result in the police encouraging individuals to breach their legal duties of confidentiality. There is one kind of confidential records in the private sector which requires specific consideration, namely, medical records. We have now read the report of the Krever Commission and concur with its recommendations as to access by police forces to such records if the police forces are under proper control as to how they use the information. Our comments on this matter are found in Annex 1.

37. One legal problem which pertains only to the criminal investigation work arises from the use of undercover operatives to investigate drug offences. The Narcotic Control Act and the Food and Drugs Act should be amended to broaden the circumstances in which it is lawful for agents or members of the R.C.M.P. to handle drugs for the purpose of gathering information or evidence concerning drug-related offences. The amendments should provide that a person who is employed as a member of the R.C.M.P. or a person acting under the instructions of the R.C.M.P. shall not be guilty of the following offences related to a narcotic or a controlled or restricted drug so long as his acts are for the purpose of and in connection with a criminal investigation: possession, trafficking, possession for the purpose of trafficking and sale. To prevent abuse of this exemption, and to ensure that it is relied upon to protect undercover members in the specific situations described in Part III, Chapter 9 (kickbacks,

administering, passing on, offering, distribution and possession), the R.C.M.P. should deal with this exemption in a detailed way in its guidelines governing the use of undercover operatives. For one thing, these guidelines should provide direction as to the extent to which undercover members or sources may release drugs into the market, a subject which we will discuss in a future Report.

38. There is one final matter concerning administrative policy to which we wish to draw attention. In Part III, Chapter 9 we referred to the isolation, stress and danger often associated with long-term undercover work by a regular member of the R.C.M.P. Long-term dissociation from his regular police milieu, prolonged simulation of the habits and manners of the milieu which he has penetrated, the risks of exposure and physical harm, his isolation from family and friends, and his inability to discuss what he is doing except with those in the R.C.M.P. associated with his operation, can produce significant disorientation. This may result in a decreased effectiveness while under cover, and difficulty upon "re-entry" into regular police work. If the latter occurs, he may become a less effective regular policeman during the remainder of his career, or he may even leave the Force. In either case, there is a heavy cost both in human terms and in terms of the loss of the state's financial investment in his training as a policeman. We are satisfied that the R.C.M.P. does not adequately recognize the problem as one that deserves systematic attention. It appears to be regarded as one that can be handled by the common sense and firmness of the undercover member's superior during his period of serving under cover and afterwards. We think that that is not enough. We think that there is a need for a sensitive and planned programme designed to assist the member (and indeed long-term sources) to overcome the personality disorders that can result from a long-term undercover assignment. In one other national police force the problem is considered to be serious and is met by the use of a psychiatrist who meets the member regularly while he is under cover and afterward. We recommend that the R.C.M.P. adopt such a programme.

WE RECOMMEND THAT the R.C.M.P. establish administrative guidelines concerning the use of undercover operatives in criminal investigations. These guidelines should be approved by the Solicitor General and should be publicly disclosed.

(274)

WE RECOMMEND THAT to facilitate the obtaining of false identification documents in a lawful manner for R.C.M.P. undercover operatives in criminal investigations, federal legislation be amended, and the co-operation of the provinces be sought in amending relevant provincial laws, in a similar manner to that recommended for the false identification needed in physical surveillance operations of both the security intelligence agency and the criminal investigation side of the R.C.M.P.

(275)

WE RECOMMEND THAT income tax legislation be amended to permit R.C.M.P. sources in criminal investigations not to declare as income payments received by them from the force and that other fiscal legislation requiring deduction and remittance by or on behalf of employees be amended to exclude R.C.M.P. sources.

(276)

WE RECOMMEND THAT section 383 of the Criminal Code of Canada concerning secret commissions be amended to provide that a person providing information to the R.C.M.P. in a duly authorized criminal investigation does not commit the offence defined in that section.

(277)

WE RECOMMEND THAT the R.C.M.P. develop a programme designed to assist its members who serve as undercover operatives in criminal investigations to overcome the personality disorders associated with long-term assignments in this role.

(278)

H. INTERROGATION TECHNIQUES

39. In Part III, Chapter 10 we outlined the policy of the R.C.M.P. towards the interrogation of suspects. We examined there four areas which give rise to concern. As we pointed out, there have been very few cases brought to our attention of R.C.M.P. members being involved in questionable interrogation techniques: nevertheless, in the light of those cases that we have looked at, we have concluded that some changes are necessary.

Reporting reasons for judicial decisions that statements are inadmissible

40. We consider that there should be more systematic mechanisms for review, within the R.C.M.P., of the standards members attain in their interrogation of suspects. A starting point would be collection of the reasons for which statements by an accused are held to be inadmissible at preliminary inquiries and trials, or indeed the reasons for which Crown attorneys decide not even to tender the statement. In our research programme a number of federal Crown attorneys were interviewed about their experiences with R.C.M.P. interrogations. Although in the experience of these counsel the vast majority of *voir dire* resulted in the admission of statements, in the few problem cases which did arise they gave the following as reasons for their not offering statements or for judges holding them to be inadmissible: (1) an atmosphere of general oppression due to the youth of the accused; (2) the number and size of the officers involved in the interrogation; (3) persistent questioning over a long period when the accused had made it clear that he did not want to speak. (There were other reasons beyond the control of the police.) Even so, none of these counsel had encountered cases of overt violence, tricks or obvious denial of counsel. We cite those in which difficulties have arisen, not so much to indicate a prevalence of these problems as to illustrate the kinds of reasons that should be collected in each division, and nationally. Problems that arise in court are already required to be reported on a form that is to be submitted to the divisional C.I.B. Director when a case is dismissed. But this procedure is an inadequate safeguard, for it allows two situations in which reports are not made: (a) when a conviction is obtained even though the accused's confession is held inadmissible; (b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained. Consequently, it would be desirable that there be a reporting and review procedure whenever an

accused's statement is held inadmissible, and whenever the Crown attorney decides not to tender it in court.

Right to counsel

41. We do not consider it necessary to make any recommendations with respect to oppressive conduct, brutality and trickery beyond what we have said above. However, some specific steps need to be taken with respect to the right to counsel. In our view, R.C.M.P. policy should be that members of the Force have a duty to inform a person in custody, within a reasonable time after being taken into custody, of his right to retain counsel. Furthermore, in order to comply with the spirit of the Canadian Bill of Rights the policy should require the provision of reasonable means to a person in custody to communicate with counsel.

42. Members of the R.C.M.P., both in their initial training and in later training courses, should receive instructions as to the duty to advise persons in custody of the right to retain and instruct counsel without delay, and of their right to have reasonable access to that counsel. Our research (including attendance by a researcher in the classroom) indicates that recruits in training at Regina, at least in sessions on interrogation, are not told of the right to retain and instruct counsel, and it follows that they are not told at that time that they should advise persons in custody of their right to do so. The topic is not mentioned in the lesson plan or the written materials on interrogation, and no mention is made by the lecturer of these matters. The right to counsel does not appear to be referred to during the day and a half spent on interrogation techniques, statements, admissions and confessions during the divisional training on the Criminal Investigators course. Even when it is referred to it may receive insufficient stress. For example, the right to counsel is referred to in the Polygraph Examiner Training Course only after there has been a lengthy period of training in interrogation. This is unlikely to be effective in stressing to the participants the importance of the right. Moreover, apart from the question of *when* the right to counsel is referred to, in our view, all materials relating to these subjects in any courses should be revised to include proper instructions on right to counsel, even if it is covered as a separate topic elsewhere.

43. Joint federal-provincial funding in recent years has provided meaning in substance to the "right to counsel", by supporting programmes of legal aid in criminal cases for those who could not otherwise afford counsel. The administrative means of providing legal aid vary from province to province. We believe that members of the R.C.M.P. should have a responsibility for seeing that persons in custody are advised reasonably soon after their arrest not only that they have a right to counsel but that arrangements exist to enable them to apply for counsel to advise and represent them without cost to themselves if they cannot afford to pay counsel. We do not think it is sufficient to have notices posted in cell blocks about the legal aid system. We emphasize that we are not proposing that it be a duty of R.C.M.P. members upon making an arrest to give that advice; what we do say is that the advice should be given reasonably soon thereafter. What is "reasonably soon" will depend on the circumstances. We propose this not as a legal duty, breach of which would

invalidate the arrest or imperil the prosecution, but as a duty imposed by Force policy.

44. Some forms of trickery may be clearly prohibited in regard to interrogations. No trick which includes criminal conduct by the police can be permitted. Another sound rule of conduct is provided in the Judges' Rules, one of which prescribes the method by which one accused or suspect is to be told of his co-accused's or co-suspect's written statement: a copy of the written statement is to be shown. This rule was designed to discourage oral misrepresentations by a police officer to an accused or suspect as to what a co-accused or co-suspect has said. Beyond that, it is desirable that policy disapprove of deceit in interrogation, not just because (as the Training and Development Branch booklet indicates) deceit may backfire, but because it is an unacceptable police practice. We make no recommendations about this subject, but we would expect that the Inspector of Police Practices (a new office we propose in Part X, Chapter 2) would show a continuing interest in the ethics of R.C.M.P. interrogation procedures.

WE RECOMMEND THAT the R.C.M.P. develop reporting and review procedures both at the divisional and the national levels to enable an internal review of the following cases:

(a) when a conviction is obtained even though the accused's confession is held inadmissible;

(b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained.

(279)

WE RECOMMEND THAT the R.C.M.P. adopt the following policies concerning interrogation:

(a) members of the Force have a duty to inform a person in custody, within a reasonable time after being taken into custody, of his right to retain counsel; and

(b) members of the Force should provide reasonable means to a person in custody to communicate with his counsel without delay upon the person making a request to do so.

(280)

WE RECOMMEND THAT the R.C.M.P. revise training materials and programmes relating to interrogation to include proper instructions on the right of an accused to retain and communicate with counsel.

(281)

WE RECOMMEND THAT members of the R.C.M.P. be required to advise persons in custody reasonably soon after their arrest that arrangements exist to enable them to apply for counsel, such counsel to be paid for by the state if they cannot afford to pay counsel.

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I. ADMISSIBILITY OF EVIDENCE OBTAINED BY ILLEGAL MEANS, AND ENTRAPMENT

45. In this section we address two important legal issues relating to the criminal justice system in Canada. The first concerns the conditions, if any, under which evidence that has been illegally or improperly obtained by the police should be admitted at trial. The second issue concerns the question of how the criminal justice process should treat the police use of *agents provocateurs*. We have examined these issues because they have a significant bearing on the penalties which may apply to illegal or improper acts by Canadian police forces, including the R.C.M.P.

46. As the Law Reform Commission of Canada has stated:

> Canadian law has followed English law: the illegality of the means used to obtain evidence generally has no bearing upon its admissibility. If, for example, a person's home is illegally searched — without a search warrant or reasonable and probable cause for a search — the person may sue the police for the damages incurred, complain or demand disciplinary action or the laying of criminal charges. But, the evidence uncovered during this search together with all evidence derived from it is admissible.[1]

In short, assuming that the evidence is relevant to an issue in the case, it is admissible even if it was obtained illegally, and the trial judge has no discretion to exclude it except in the most limited of circumstances.

47. The rule of Canadian law was expressed by the Supreme Court of Canada in *The Queen* v. *Wray* in 1970.[2] Mr. Justice Martland based his analysis on an English decision, *Kuruma* v. *The Queen*, where the following had been said:

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained.[3]

An exception to this general rule was stated as follows:

> In a criminal case, the Judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against an accused.

As an example of this, police trickery was cited.

48. Referring to the *Kuruma* case, Mr. Justice Martland said:

> It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the Trial Judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for

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[1] Law Reform Commission of Canada, Study Paper "The Exclusion of Illegally Obtained Evidence", 1974, p. 7.

[2] [1971] S.C.R. 272.

[3] [1955] A.C. 197.

> the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.[4]

49. The general rule of admissibility of illegally obtained evidence had been stated in previous Canadian cases. In one of them, which we select because we have found that it has been quoted in R.C.M.P. memoranda and training courses, the following was said in regard to a claim by the accused that the search warrant was illegal and that the police officers had obtained possession of the articles seized by means of their own trespass:

> . . . the question is not, by what means was the evidence procured; but is, whether the things proved were evidence; and it is not contended that they were not; all that is urged is, that the evidence ought to have been rejected, because it was obtained by means of a trespass — as it is asserted — upon the property of the accused by the police officers engaged in this prosecution. The criminal who wields the 'jimmy' or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers: it is still quite permissible to 'set a thief to catch a thief'....[5]

50. The Scottish law[6] is that "an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible" and that "irregularities required to be excused, and infringements of the formalities of the law in relation to these matters, are not lightly to be condoned". In Scotland, if evidence is "tainted by the method by which it was deliberately secured, . . . a fair trial. . . is rendered impossible".

51. There have been some important judicial decisions on the subject in other Commonwealth countries in very recent years.

52. The High Court of Australia, in *Bunning* v. *Cross,*[7] held that the law for Australia had been laid down in the following passage in an earlier case:

> Whenever such unlawfulness or unfairness appears, the Judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.[8]

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[4] [1971] S.C.R. 272, at 293.

[5] Mr. Justice Meredith of the Ontario Court of Appeal in *R.* v. *Honan*, (1912) 20 C.C.C. 10 at 16, 6 D.L.R. 276 at 280. The passage was quoted in a Quebec appeal case, *Paris* v. *The Queen* (1957) 118 C.C.C. 405 at 407, and it is that case which has been cited by the R.C.M.P. in recent years.

[6] As stated by Lord Fraser of Tullybelton, in *Regina* v. *Sang* [1979] 3 W.L.R. 263, at 282. He quoted from the leading Scottish cases.

[7] (1978) 52 A.L.J.R. 561.

[8] *R.* v. *Ireland*, (1970) 126 C.L.R. 321 at 335, per Chief Justice Barwick.

Thus the Australian law is more like that of Scotland than that of England or Canada.

53. The highest court in England has recently reasserted firmly the position to which Canadian law subscribes. In some lower court decisions in England it had been said (purporting to apply the exception recognized in *Kuruma*) that the trial judge has a discretion to refuse the admission of particular evidence if the police officers obtaining the evidence "have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible". However, in *Regina* v. *Sang*,[9] the House of Lords rejected that position. One of the judges, Lord Diplock, said that "there is no discretion to exclude evidence discovered as the result of an illegal search" and that

> the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge of the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.

He said that, while

> there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information,

nevertheless a fair trial according to law is provided, even if evidence obtained illegally is admitted:

> However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason.[10]

Similarly, Lord Scarman said that the trial judge "has no power to exclude admissible evidence of the commission of a crime" except for incriminating evidence which an accused has been compelled to produce or admissions or confessions not proved to have been made voluntarily.[11]

54. In the United States, the law excludes illegally obtained evidence completely.[12] This is known as the 'exclusionary rule'. Thus evidence obtained

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[9] [1979] 3 W.L.R. 263.

[10] *Ibid.*, at 271-2. Viscount Dilhorne agreed with Lord Diplock.

[11] *Ibid.*, at 288. The first exception was asserted again by Lord Diplock in *Morris* v. *Beardmore* [1980] 3 W.L.R. 283. He explained that the exception related to an offence that has already been committed.

[12] *Weeks* v. *U.S.* (1914) 232 U.S. 383; *Mapp* v. *Ohio* (1961) 367 U.S. 643.

by an illegal search and seizure is to be excluded, and in addition all evidence that indirectly results from the information obtained by the illegal search and seizure is also excluded. The latter is known as the "fruit of the poisoned tree" principle.

R.C.M.P. policy

55. We feel that the most important contribution which we can make to the public debate on this matter is to relate the issues to the policies of the R.C.M.P. and to the attitudes of members of the R.C.M.P. toward their investigative duties and powers in the light of their understanding of the law. Our powers under the Inquiries Act have given us an opportunity not possessed or exercised by other Commissions that have examined the subject. This may, we think, enable us to shed some new light on it.

56. The policy of the R.C.M.P., stated in the operational manual of the R.C.M.P. for criminal investigation purposes, clearly states that only lawful methods of investigation are to be employed. Moreover, whatever may be the case with other police forces in Canada, the research undertaken by the Commission, including inquiries made nationally among the judiciary, leads us to the conclusion that, so far as R.C.M.P. members' investigative conduct which reaches the attention of the Courts is concerned, the instances of conduct constituting a crime or civil wrong in the course of investigation are infrequent. We recognise nevertheless that there may be instances in which unlawful conduct has been employed which have not come to the attention of the courts. Moreover, the effect of the present law on police attitudes towards investigative conduct is of importance in regard to other police forces as well; but we are not in a position to comment on the conduct or attitudes of other police forces.

57. It is not only criminal conduct which is here of concern. We believe that the law should be concerned in some manner with ensuring that the standards of investigative conduct of our police forces are high in terms of their being acceptable and that they not violate the criminal law or the civil law (of tort or delict). As an English judge has said recently:

> ...I regard it as unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this is regardless of whether his contravention is of the criminal law or simply of the civil law.[13]

Thus, a police force should be encouraged by the law to ensure that its members use lawful investigative methods, and the requisites of propriety should go beyond mere questions of the absence of criminal conduct.

58. The files of the R.C.M.P. disclose that there is a significantly general attitude that, since the courts of Canada have held that illegally obtained evidence is admissible, this means that the judges do not condemn unlawful investigative conduct, and this in turn is taken as implied authorization of

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[13] Lord Edmund-Davies in *Morris* v. *Beardmore* [1980] 3 W.L.R. 283, at 291.

unlawful investigative conduct if the result is the obtaining of evidence relevant to an issue before the Court. Thus, for example, as far back as 1936 Assistant Commissioner G.L. Jennings reviewed the case law and concluded:

> It is considered that it may be necessary in connection with some of our work, more and more in the future, to resort to wiretapping.
>
> In this connection an opinion of the Justice Department was obtained, copy of which is enclosed for your very secret information. You will note the attached memo mostly refers to the admissibility of evidence obtained in an irregular manner. The consensus of the legal opinion is that if evidence so obtained is admissible it is not material to the case in what manner such evidence was obtained.
>
> (Ex. E-1, Tab 1A.)

(This was at a time when it was thought that telephone tapping might be in violation of the Bell Telephone Act.)

59. This attitude was stated very clearly in testimony before us and in briefs prepared by the R.C.M.P. for us. In a brief prepared by the R.C.M.P. it was stated, in regard to two cases in which it had been admitted by R.C.M.P. officers that surreptitious entries had been effected, that

> In neither case was any criticism levelled at the police officers or their forces by the judges or defence counsel over the fact that surreptitious entry had been employed.
> (Ex. E-1, Tab 2.)

And in another brief prepared by the R.C.M.P. the following statement was made:

> Numerous trials have taken place since June 30, 1974 in which intercepted material was accepted as evidence. Many courts were told that surreptitious entries had to be made into premises to carry out the interception as authorized.
>
> In no case has a court criticized the police action and in no case has a police officer been charged with a criminal offence respecting surreptitious entry. It appears that our procedures in this area have been accepted as sound.
>
> (Ex. E-1, Tab 1.)

In a similar vein, Commissioner Simmonds, in a letter to the Solicitor General, the Honourable Francis Fox on October 6, 1977, observed that

> Courts across the nation accepted evidence before and after passage of PART IV.I of the Criminal Code which clearly showed that premises had been surreptitiously entered by the police to successfully carry out their duties. To our knowledge, there has been no judicial criticism of this investigative technique.
>
> (Vol. 33, p. 5379.)

60. The logic of this reasoning is defective and its apparent acceptance at senior levels of the R.C.M.P. encourages the inference that it is accepted at low levels, where there is the most frequent day-to-day contact between policeman and citizen in the investigation of crime. Our discovery of this attitude is, in our opinion, the most significant contribution which we can make to the debate concerning this area of the law. Until now, the debate has been of a rather

theoretical nature, and writers and commentators have perforce guessed at the effect of the law on police investigative attitudes and conduct. It can now be said, at least in this country and in regard to the R.C.M.P., that the attitude of members of that Force, as expounded by its most senior officers, is to regard the absence of critical comment by the judiciary as tacit approval of forms of conduct that might be unlawful. In fact the absence of judicial comment will frequently be because no issue has been made by defence counsel about the illegality of the means used to obtain the evidence; and defence counsel has not made any issue of it because, even if he did, the law gives him no advantage as the law does not permit the exclusion of the evidence on that ground. It is in this sense that one may say that the present law has encouraged the police, quite erroneously, to infer that judicial silence implies approval of the investigative method that has been described in court.

61. In our view, the significance of our discovery is that, even though the number of known instances of unlawful or unacceptable investigative conduct in criminal investigations may, in the case of the R.C.M.P. at least, be relatively small, no rule of law which encourages such conduct can be tolerated unless there are other effective means in place which will discourage such conduct.

Arguments for and against the present law

62. We shall first set forth the arguments in favour of the present rule that illegally obtained evidence is admissible without any significant judicial discretion to exclude it, and comment on each of them.

(a) A rule excluding illegally obtained evidence would divert a criminal trial away from its essential function of discovering the truth and making a correct finding as to the guilt or innocence of the accused. However, if this argument is valid, it would logically justify the abolition of other rules of evidence that result in the exclusion of relevant evidence. For there are other rules that cause evidence to be excluded on the ground that some social value requires protection by an exclusionary rule of evidence, even if the result is that relevant evidence, which might result in the conviction of an accused person, is excluded. An example is communications between a client and his solicitor, which are generally protected from disclosure. In the case of each kind of evidence, the real question is whether the social value in issue is sufficiently important to justify the suppression of relevant evidence and whether the suppression of relevant evidence is an efficacious manner of achieving the social value.

(b) A rule excluding illegally obtained evidence would reduce the effectiveness of law enforcement. Correctly stated, the argument would be that the rules applying to search and seizure, for instance, reduce the effectiveness of law enforcement because they prevent searches and seizures except in certain controlled circumstances. We believe that if the laws of search and seizure can be demonstrated to impair the effectiveness of law enforcement, then it is the laws of search and seizure which require review, but the law of evidence should not

encourage their being undermined, particularly if the undermining is intentional and serious.

(c) Since criminals are unrestrained in the way they carry out their activities, the police should be given some leeway in pursuing them: they should be allowed to "fight fire with fire". This argument, like the first, if valid, proves too much. If it were valid and applied to its logical extreme, murder would be met with murder, robbery with robbery, kidnapping with kidnapping. We believe that the standard of conduct of our police forces should not be established on this basis.

(d) If the police know a person to be guilty but a rule of law excluding illegally obtained evidence would result in the person's acquittal, the police, as witnesses, will be tempted to lie about such matters as whether the search was lawful. An American scholar has supported this argument by saying that the American rule which excludes illegally obtained evidence "corrupts law enforcement personnel and degrades the whole system of criminal justice".[14] However, in our view it is unacceptable to fashion a rule of law on the premise that the police will perjure themselves to subvert rules of which they do not personally approve; to accept that premise as a working foundation in our view would libel and downgrade and treat as corrupt the system of criminal justice as a whole and law enforcement personnel generally. We have found no basis, as far as the R.C.M.P. is concerned, for regarding members of that Force as deserving such implicit condemnation.

(e) A rule excluding illegally obtained evidence would result in the acquittal and release of persons guilty of crime, which would shock the conscience of the community. We agree that if a murderer is freed because of a trivial and inadvertent error made by the police in the course of a search and seizure, the public is likely to be outraged at such a judicial decision. The confidence of the public in the entire judicial system may be undermined. There is, we think, some validity to this argument. On the other hand, this argument assumes that exclusion of the evidence will necessarily result in criminals going free. Yet in some cases in which evidence is obtained by police forces by illegal means, there would be other evidence to convict the accused. In any case, *any* effective rule of law or discipline which deters police illegalities in investigative conduct would equally have the result of permitting some guilty persons to escape punishment; yet no one argues that policemen who transgress the law should not be disciplined or prosecuted. Why, then, is there concern that a rule excluding illegally obtained evidence would result in more criminals being at large? Perhaps the real reason is that the effect of such a rule is more often the subject of public discussion than is the fact that the criminal law and the law of tort or delict and disciplinary rules also discourage illegal police investigative conduct and also result in guilty persons escaping punishment.

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[14] Oaks, "Studying the Exclusionary Rule in Search and Seizure", (1970) 37 *U. of Chi. L. Rev.* 665 at 740.

63. The following are the principal arguments which have been advanced against the admissibility of illegally obtained evidence (the American position of complete exclusion of such evidence):

(a) There is a need to protect the integrity of the judicial process. The government ought not to profit from its own lawless behaviour. Refusing to permit the court to become a party to police illegality contributes to the moral acceptability of judicial decisions. If the police engage in flagrant illegality in obtaining evidence against a burglar or a person in possession of drugs, the public may be outraged and lose some confidence in the judicial system if it permits the use of evidence collected in such a fashion. This position is represented by judgments of Mr. Justice Holmes and Mr. Justice Brandeis, both dissenting, in *Olmstead* v. *U.S.*[15] Mr. Justice Holmes observed:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained...I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.[16]

Mr. Justice Brandeis reasoned that the use of illegally obtained evidence

> is denied in order to maintain respect for law; in order to promote confidence in the administration of justice: in order to preserve the judicial process from contamination.[17]

The same point of view was expressed by Mr. Justice Spence, dissenting, in *The Queen* v. *Wray*. In defending an exclusionary rule he said

> I am most strongly of the opinion that it is the duty of every judge to guard against bringing the administration of justice into disrepute. That is a duty which lies upon him constantly and that is a duty which he must always keep firmly in mind. The proper discharge of this duty is one which, in the present day of almost riotous disregard for the administration of justice, is of paramount importance to the continued life of the state.[18]

These passages associate the courts with the governmental process as a whole, and it is a premise of their position that the public is unable to dissociate the courts from the rest of the government machinery for the detection, investigation and prosecution of crime.

(b) The exclusionary rule serves to educate people, including the police, as to the serious commitment which our society has to the proper and restrained

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[15] (1928) 277 U.S. 438.
[16] *Ibid.*, at p. 470.
[17] *Ibid.*, at p. 484.
[18] [1971] S.C.R. 272 at 304.

restrained exercise of power. Other rules of criminal procedure and evidence which shape the conduct of the criminal trial have a social effect in teaching people, including the police, about the proper exercise of power. Any rule which requires the admission of illegally obtained evidence runs the risk of teaching people, including the police, that society, including the courts, does not have such a serious commitment. The evidence which we have seen in R.C.M.P. documents and testimony supports this argument.

(c) A rule excluding illegally obtained evidence will deter the police from breaking the laws relating to search and seizure, unlawful arrest and imprisonment, and other unlawful investigative conduct. Is this true? Studies in the United States have come to differing conclusions as to the validity of this argument in practice. Here, no more need be said than that the case for the proposition that the exclusionary rule has a deterrent effect has been overstated. Reason tells us that there are grounds on which it may be unlikely that the exclusionary rule is an effective deterrent. The rule imposes no personal or financial penalty on the offending police officer; great delay may occur before the evidence is excluded at trial; the exclusionary rule cannot have a deterrent effect if the consequence of the illegal investigative conduct is not the production of evidence at trial. On the other hand, the existence of an exclusionary rule, or at least of a discretion to exclude illegally obtained evidence, will probably deter *some* police illegality: such a rule would be studied in police training and might result in the placing of increased emphasis on the importance of the laws of search and seizure, arrest and imprisonment; the existence of the rule or the discretion might assist a well-intentioned officer in resisting pressure from his colleagues and superiors to violate the law, and in persuading his colleagues and superiors that other investigative means should be attempted.

Our position

64. In our view, the law of Canada should, like that of Scotland and Australia, give the trial judge a discretion to exclude illegally and unfairly obtained evidence. It will be noted that we do *not* propose the adoption of the American rule requiring the absolute exclusion of all illegally obtained evidence. The Canadian rule should be discretionary rather than absolute, because:

(a) The state's commitment to due process would be seriously diluted if the court in the most serious of crimes were to exclude evidence that was obtained as a result of the most trivial breaches of the laws of search. Rather than demonstrating the commitment of the law to principle, such a result would confirm in the minds of many members of the public the commitment of the law to technicality and in their minds would bring the law into disrepute. Therefore, the protection of judicial integrity and encouraging confidence in the judicial system require a discretionary rather than an absolute rule.

(b) The rationale of deterrence ought logically to apply only to intentional breaches of the law. Generally, an absolute rule of exclusion fails to

distinguish between wilful and flagrant conduct on the part of the police on the one hand, and conscientious and careful police conduct undertaken in a difficult situation, on the other. An absolute rule fails to distinguish between errors of judgment that cause no harm and those that seriously violate fundamental values. An absolute rule fails to distinguish between a minor case such as shoplifting, and a grave case such as murder. Any rule that fails to discriminate between those different factual circumstances is too blunt an instrument to achieve any of its objectives, such as the preservation of judicial integrity and the deterrence of improper or illegal police conduct.

65. We do not believe that reliance upon a discretion will result in unequal application of the law, any more than the exercise of judicial discretion does in many other circumstances in which judges are given a discretion. Nor do we consider that delays caused by voir dires (a voir dire is a trial within a trial), in which the question of admissibility is decided, will result in significant lengthening of the judicial criminal calendar. For we have no reason to believe that the police forces in Canada, whether the R.C.M.P. or any other forces, engage frequently in illegal or unfair conduct that results in evidence being proferred by the prosecution in Court.

66. In its report in 1975, recommending the adoption of a code of evidence, the Law Reform Commission of Canada recommended that the code should include the following provision:

> 15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.
>
> (2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.[19]

The very brief commentary which accompanied the proposed code observed that the intent of the section "is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained...".[20]

67. We support the Law Reform Commission in recommending the adoption of this statutory provision, whether it is in a new code of evidence or by amendment to the Canada Evidence Act.

68. We would like to refer specifically to two of the factors which the Law Reform Commission's proposed section would require the Court to take into

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[19] Law Reform Commission of Canada, *Report on Evidence*, 1975, p. 22.
[20] *Ibid.*, at p. 62.

account. The first is the extent to which the violation was wilful and the police officer's ignorance inexcusable. We have already observed that, if one purpose of the rule is to deter illegal conduct by the police, it makes little sense to exclude the evidence if the officer's conduct was inadvertent. Moreover, if the officer's conduct was not culpable, the integrity of the court is not so much in jeopardy if the evidence is admitted. However, if only the wilfulness of the violation were to be considered, this would place a premium on the ignorance of the officer. Therefore, to ensure that police forces are motivated to train and educate officers adequately, the court should be required to consider whether the officer's ignorance was inexcusable. This would, we hope, have the effect, in the case of an inadvertent error, of requiring the judge to determine whether adequate police training procedures were undertaken.

69. The second is that the seriousness of the offence for which the accused is charged is a factor to be considered. An exclusionary rule that does not permit consideration of the seriousness of the crime produces a risk that dangerous offenders will more frequently be returned to the community and that the rule will be self-defeating. Instead of appreciating the moral purity of the court system and internalizing values of due process, citizens will see the system as the champion of errant technicality at the expense of other more humane values. Moreover, in terms of deterrents to police officers, it is in serious cases that it is most likely that alternatives to the exclusionary rule will be most effective.

70. We recognize, consequently, that the exclusionary discretion is likely to be exercised in favour of excluding the illegally obtained evidence in minor criminal cases. In serious criminal cases, such as murder, the trial judge is likely to admit the evidence.

71. This being so, if the system as a whole is to deter illegal and improper police conduct, the exclusionary discretion must be supplemented by other effective measures. The exclusionary discretion will not alone be a sufficient deterrent. Effective systems of training, discipline, complaint procedures and policy review must also be looked to. Conversely, we do not believe that proper training, disciplinary proceedings, complaint procedures and policy review will be enough, unless the police see that the rules applied by the courts as to the admissibility of evidence permit judicial scrutiny and sometimes condemnation of methods used.

WE RECOMMEND THAT the Criminal Code be amended to include the following provision:

(1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including:

(a) the extent to which human dignity and social values were breached in obtaining the evidence;

(b) whether any harm was inflicted on the accused or others;

(c) whether any improper or illegal act under (a) or (b) was done wilfully or in a manner that demonstrated an inexcusable ignorance of the law;

(d) the seriousness of any breach of the law in obtaining the evidence as compared with the seriousness of the offence with which the accused is charged;

(e) whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

(283)

Agents provocateurs and entrapment

72. It is undesirable to discuss and make recommendations about illegally obtained evidence without at the same time considering the use by police forces of *agents provocateurs* and the subject of entrapment. These subjects all raise the issue of the extent to which the courts should have a role in attempting to discourage illegal or improper police tactics.

73. We have already explained that there is a tendency in the R.C.M.P. to regard the present Canadian law that relevant evidence is admissible even if illegally obtained as an indication that Canadian judges do not disapprove of using unlawful means to obtain evidence. As for the use of *agents provocateurs*, since Canadian law does not recognize a defence of entrapment or exclude evidence obtained as a result of the instigation by the police of criminal conduct by another person, there has undoubtedly been, at least in the R.C.M.P., a failure on the part of the police to analyze whether some customary police practices are unlawful. Since the rules applied by the courts attach no significance to "entrapment", there has been, naturally, little incentive within the R.C.M.P. to consider the lawfulness of these practices.

74. There is confusion in the terminology of entrapment and *agents provocateurs*. The most common definition of an *agent provocateur* is that by his words and conduct he instigates an act by another that the other would not otherwise have committed in the sense that he had no pre-existing intention generally to commit that sort of act. It may be said that the conduct of the *agent provocateur* is "entrapment".

75. Sometimes the two phrases are used to describe a situation in which the other person had the general intention to commit such acts and the *agent provocateur* by his words or conduct has done no more than help to cause him to commit a crime by providing him with an opportunity, by passively acceding to the accused's suggestions or by exposing him to temptation. This situation at first sight seems remote from the first but in practice it is difficult to distinguish the two.

76. In Canada and England, in neither case does such conduct by the agent — an undercover policeman or an informer — affect the admissibility in law of the evidence of the act committed by the other person. Thus, for example, in neither case will the court exclude the agent's evidence that the accused has

sold him a narcotic. Such evidence is very common in prosecutions for trafficking in narcotics or in substances under the Food and Drug Act.

77. In the United States, however, the accused has a complete defence to the charge in the first situation. Critics of the English/Canadian rule propose that the American rule be adopted.

78. There is no question that in England and in Canada the first situation is deplored, even if the disapproval has not resulted in a rule excluding the evidence resulting from it. In 1977, Chief Justice Laskin, of the Supreme Court of Canada, said in *Kirzner* v. *The Queen.*

> The problem which has caused judicial concern is the one which arises from the police-instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught.[21]

79. The Supreme Court of Canada has not yet, as a court, held as a reason for decision in any case, that entrapment is, or is not a defence to a charge. However, members of that court have considered the question. In *Lemieux* v. *The Queen* Mr. Justice Judson, delivering the judgment of the court, said:

> Had Lemieux in fact committed the offence with which he was charged, the circumstances that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence.[22]

However, this statement was not essential to the decision, so that the question could be said to remain open. The members of the Supreme Court of Canada in *Kirzner* v. *The Queen* considered that it was not necessary to decide whether there is a defence of entrapment because the evidence did not show a "police-concocted plan to ensnare him going beyond mere solicitation".[23] But the Ontario Court of Appeal, in that case, had held that the defence of entrapment is not available.

80. In England, the Court of Appeal has held in a number of cases that the defence of entrapment does not exist in English law.[24] In *Regina* v. *Mealey and Sheridan*,[25] in 1974, Lord Chief Justice Widgery stated:

> If one looks at the authorities, it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be

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[21] (1977) 38 C.C.C. (2d) 131, at p. 136.

[22] [1968] 1 C.C.C. 187 at p. 190.

[23] (1977) 38 C.C.C. (2d) 131, at p. 142, per Mr. Justice Pigeon. Chief Justice Laskin preferred "to leave open the question whether entrapment, if establishment, should operate as a defence".

[24] e.g. in *R.* v. *Sang* [1979] 2 W.L.R. 439 at p. 444; *R.* v. *Mealey and Sheridan* (1974) 60 Crim.App.R. 59; *R.* v. *McEvilly* (1973) 60 Cp.App.R. 150.

[25] (1974) 60 Crim.App.R. 59 at 62.

> described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty.

He also stated that policemen

> must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all.

81. Now the highest court in England, the House of Lords, in *Regina* v. *Sang*,[26] in 1979, has assumed that the defence does not exist. Although the point was not, in fact, argued before the House of Lords, the judgments used sufficiently conclusive language that it would now require legislation to bring the defence into English law. Lord Diplock, for example, stated that "the decisions... that there is no defence of 'entrapment' known to English law are clearly right".[27] A Court of Appeal decision even more recent than the judgment of the House of Lords in *Sang* stated: "It has now been established beyond possibility of further argument that the doctrine of entrapment, as it is sometimes called, is not known to the English law".[28]

82. In both England[29] and Canada,[30] even if entrapment is not a defence, it may result in a reduced sentence. As we have seen, in *R.* v. *Mealey and Sheridan*, Lord Chief Justice Widgery said that it "may be an important matter in regard to sentence".[31] In England, entrapment may result in the granting of an absolute discharge in appropriate cases.[32] However, Canadian courts cannot grant an absolute or conditional discharge in cases where there is a minimum punishment prescribed by law or the possible penalty is 14 years or more.[33] Thus, entrapment could not result in a discharge in narcotics trafficking cases, where the sentence may be life, or wherever there is a minimum sentence such as seven years for importing a narcotic.[34]

83. It is not necessary that we analyze the arguments that might be advanced, based on section 7(3) of the Criminal Code or the concept of due process, in the hope of persuading a Canadian court to accept the defence. Suffice it to say that it is unlikely that the defence will be developed judicially

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[26] [1979] 3 W.L.R. 263.

[27] *Ibid.*, at p. 267. Similar statements were made by the other Law Lords: Viscount Dilhorne at p. 276; Lord Salmon, at p. 277; Lord Fraser of Tullybelton, at p. 280; and Lord Scarman, at p. 285.

[28] *R.* v. *Underhill*, July 27, 1979.

[29] *Browning* v. *Watson* [1953] 1 W.L.R. 1172 (Div. Ct.); *R.* v. *Birtles* (1969) 53 Cr.App.R. 469 (C.A.); *R.* v. *McGavin* (1972) 56 Cr.App.R. 359 (C.A.); *R.* v. *Sang* [1979] 3 W.L.R. 263 (H.L.); *R.* v. *Underhill*, July 27, 1979.

[30] *R.* v. *Steinberg* [1967] 3 C.C.C. 48 (Ont. C.A.); *R.* v. *Price* (1970) 12 C.R.N.S. 131 (Ont. C.A.); *R.* v. *Chernecki* [1971] 4 C.C.C. (2d) 556 (B.C.C.A.); *R.* v. *Kirzner* (1976) 32 C.C.C. (2d) 76 (Ont. C.A.).

[31] (1974) 60 Crim.App.R. 59 at 62.

[32] e.g. *Browning* v. *Watson* [1953] 1 W.L.R. 1172.

[33] Criminal Code, section 662.1(1).

[34] Narcotic Control Act, R.S.C. 1970, ch.N-1, s.4(3).

in Canada. It is also unlikely that the courts in Canada, in the light of decisions of the Supreme Court of Canada on the subject, will use the concept of abuse of process to bar a prosecution because of improper entrapment.[35] It is also unlikely that Canadian judges would follow New Zealand cases[36] or pre-*Sang* English cases[37] in which, although entrapment was not recognized as a defence, the evidence obtained as a result of the entrapment was excluded. In *R.* v. *Sang*, the Law Lords considered that to reject evidence on this ground would be, in effect, to bring the defence in through the back door. This, their Lordships said, "does not bear examination" and would be "inconceivable", "remarkable" and "odd".[38]

84. If there were, as we recommend, a limited discretion to exclude evidence illegally or improperly obtained, would it be applicable to the entrapment situation and thus be a sound technique for preventing those forms of entrapment that are objectionable? Probably not. It is true that, in the typical case, the act of the accused was instigated by the undercover policeman and consequently the policeman is a party to the offence or abetted it. So the policeman's evidence was obtained as a result of conduct on his part which was probably unlawful in that, quite apart from any liability for a substantive offence such as "trafficking" by purchase of drugs, he might be guilty of an offence because of his "counselling or procuring" as defined in section 22 of the Criminal Code. Even if his evidence were excluded on that ground, the rule might not permit exclusion of the evidence of another policeman to whom the accused has admitted the facts, or of another person who happened to be present at the time of the crime but was not a party to the instigation. These distinctions are unwarranted.

85. It must be borne in mind that there are some situations in which the conduct of a policeman will result in acquittal of the accused even if there is no defence of entrapment:

(a) In some cases, the conduct of the policeman may result in an element of the offence being absent so that the accused will be acquitted without resort to the notion of entrapment. For example, the physical act of possessing stolen goods will be missing if the police have passed the stolen goods to the accused, because the police involvement may mean that they are no longer considered "stolen".[39] There will not be the physical act of breaking and entering if the owner has really, unbeknown to the accused, consented to the entry as part of his co-operation with the police.[40] In the case of treason, the enemy may not actually have been assisted.[41]

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[35] *R.* v. *Osborn* [1971] S.C.R. 184; *R.* v. *Rouke* [1978] 1 S.C.R. 1021.

[36] *R.* v. *Pethig* [1977] 1 N.Z.L.R. 448 (S.C.); *R.* v. *Capner* [1975] 1 N.Z.L.R. 411 (C.A.).

[37] Several cases in the earlier 1970s are cited in *R.* v. *Sang* [1979] 3 W.L.R. 263.

[38] [1979] 3 W.L.R. 263, at 267, 277, 280 and 276.

[39] See, e.g., *Haughton* v. *Smith* [1975] A.C. 476, and *Booth*, v. *State of Oklahoma* (1964) 398 P. 2d 863 (C.C.A., Okla.).

[40] *Lemieux* v. *The Queen* [1968] 1 C.C.C. 187 (S. Ct. Can.).

[41] *R.* v. *Snyder* (1915) 24 C.C.C. 101 (Ont. C.A.).

(b) There are other, but not many, isolated instances where traditional concepts might make a defence available to an accused without resorting to the notion of entrapment. For example, an assurance by a peace officer that the proposed conduct is not illegal might enable the accused to raise a mistake of law defence,[42] particularly if the peace officer acts openly as a peace officer. The American Model Penal Code specifically deals with this in the entrapment section, providing a defence if the police make "knowingly false representations designed to induce the belief that such conduct is not prohibited".[43] And there may be cases where the police tactics are so excessive that they can amount to duress.

86. We think that it is unacceptable that a police force should be tacitly encouraged by the law to tolerate instigation by its members of crime by others when that instigation goes well beyond mere solicitation. If members of the R.C.M.P. engage in such conduct, we think that it is not surprising if they should regard such conduct as being tolerated by the courts and thus implicitly approved of: as the record shows, the same reasoning applies, in the minds of at least some members of the R.C.M.P. to illegal methods of obtaining evidence. Moreover, it would seem that entrapment cannot be the basis of a civil action for damages against the police, so such alternative means of discouraging such conduct are not available and the ability to establish criminal liability would, in most cases, be doubtful. Therefore, in our opinion, some mechanism should be available to the courts to register clear disapproval of such conduct in appropriate cases.

87. As we have pointed out, the discretion to exclude illegally or improperly obtained evidence is unlikely to provide a strong enough sanction against the use of evidence obtained by *agents provocateurs*. What is required is the establishment of either a criminal offence of entrapment or a defence of entrapment which, if established, would result in the acquittal of the accused. Our concern with using a new statutory offence of entrapment is that it would probably rarely be used and it would not give the required guidance to the police. Therefore, we opt for the latter alternative: a defence of entrapment.

88. The burden of proof of the defence should rest upon the accused. The accused should be required to give notice to the Crown before trial that he intends to raise the defence, so that the prosecution will not be taken by surprise.

89. The test of the availability of the defence should be subjective, according to some advocates of the defence, including the Canadian Committee on Corrections. Its Report recommended that legislation be enacted to provide:

(a) That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer or agent of a law enforcement officer, for the

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[42] See Friedland, *National Security: the Legal Dimensions*, Department of Supply and Services, 1980, at p. 101 et seq. This was a background study published by the Commission.

[43] Section 213(1)(a).

purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.

(b) Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.

(c) The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life.[44]

However, other proponents of the entrapment defence have preferred an objective test that requires proof not that the accused lacked pre-existing intention to commit the offence, but that there was police conduct of an importuning nature, or, as has been stated by many observers in the United States, the test should be "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power".[45] Only the latter test, it is argued, will discourage unacceptable police conduct. We see no reason why the objective and subjective tests should not be combined so that the police conduct and the accused's pre-existing intent would both be factors in determining whether a defence should apply. It is the combination of the two factors that make it unjust to convict in any particular case. Society should allow the police very little scope for entrapping the person who lacks a pre-existing intent, but substantially more scope in the case of the person who has a pre-existing intent. The test should reflect that the propriety of police conduct will vary from case to case depending on the crime charged and the accused's prior intent to engage in the activity.

90. It is the balancing of these interests, by the trier of fact, which is permitted by the availability of such a defence. Mere difficulty in application ought to be no reason for rejecting the proposal for such a defence. Society, represented by the jury, must frequently grapple with difficult legal concepts that are designed to reflect the need, in a particular case, to strike a fair balance between competing social interests.

91. We therefore propose that there be a statutory defence of entrapment, embodying the following principle:

> The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable, having regard to all the circum-

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[44] Report of the Canadian Committee on Corrections, 1969, pp. 79-80. The subjective test was adopted by the Supreme Court of the United States in *Sorrells* v. *U.S.* (1932) 287 U.S. 435 at 442, *Sherman* v. *U.S.* (1958) 356 U.S. 369, *United States* v. *Russell* (1973) 411 U.S. 423, and *Hampton* v. *U.S.* (1976) 425 U.S. 484.

[45] *Sherman* v. *United States* (1958) 356 U.S. 369 at p. 382, per Frankfurther, J. (dissenting), quoted in *United States* v. *Russell*, at p. 441, per Stewart, J.

stances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police.

92. In addition to the provision of a statutory defence, we think that the Commissioner of the R.C.M.P. should issue guidelines relating to informers and instigation, and these should be made public. Such guidelines have been issued and made public in England and the United States.[46] The guidelines should be approved by the Solicitor General. Breach of the guidelines should be regarded as a disciplinary offence. These guidelines should direct that "no member of a police force, and no police informant, counsel, incite or procure the commission of a crime".[47] This aspect of the guidelines has been discussed in Part V, Chapter 4 in relation to the use of informants by the security intelligence agency. On the issue now under discussion, they should require that the undercover policeman have reasonable grounds to believe that the person instigated had been engaged in similar conduct in the past. However, the guidelines cannot be too specific, for otherwise criminals will be able to test persons they are dealing with in the light of known detailed police procedures.

WE RECOMMEND THAT the Criminal Code be amended to include a defence of entrapment embodying the following principle:

The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable having regard to all the circumstances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police.

(284)

WE RECOMMEND THAT the administrative guidelines concerning the use of undercover operatives in criminal investigations which we recommended earlier be established by the R.C.M.P., include a direction that no member of the R.C.M.P. and no agent of the R.C.M.P. counsel, incite or procure an unlawful act.

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[46] In England, the Home Office circular is reproduced in Appendix 4 to the Law Commission's Report No. 83, Report on Defences of General Application, 1977. See also (1969) New L.J. 513, referred to with approval in *R.* v. *Mealley and Sheridan* (1974) 60 Crim.App.R. 59 at 64. In the United States, guidelines for the F.B.I. were issued in a memorandum by the Attorney General, Edward H. Levi, to the Director of the F.B.I., dated December 15, 1976.

[47] Quoting the British Home Office Circular to the Police on Crime and Criminal matters, *supra*, p. 46.

CONCLUSION TO THE REPORT

1. In this Second Report we have attempted to state our views as to the many policy issues that have come before us, and as to those legal issues which can be discussed without going into the facts of specific cases. Throughout, we have tried to develop recommendations for the future that are workable and practical and reflect the principles we stated at the beginning of the Report. We developed many of our recommendations in considerable detail. We did so, believing that we would be derelict in our duty if we left the development of detail in certain areas principally to the executive arm of government. Most of the persons who will be responsible for implementation will not have had the same opportunity as we to be immersed in the subject. Those who have been so immersed will likely be still active in the world of security intelligence or police work, and, while able to fill in detail, may not always have a detached perspective on these matters. In instances where those considerations did not apply, we have provided less detail and fewer concrete recommendations but even there we have tried to state in some depth the general principles which we think should be applied.

2. This Report has been written in a manner that will allow it to be published with few deletions. We recognize that there are some passages that will properly be deleted on the ground that their publication would, or might, prejudice the security of Canada, damage the privacy of individuals, or damage some other legitimate public interest. We believe that the excision of the limited number of passages that in our opinion is likely to be necessary will not impair the ability of Parliament and the public to understand our recommendations and the reasons for them.

3. We have entitled this Second Report "Freedom and Security under the Law". While we recognize that for a subject of this magnitude and complexity no title could fully express the whole message, we consider that three words are essential, and are at the heart of our considerations: Freedom, Security and Law.

4. Freedom and security are fundamentals to the preservation of the democratic process. They are interdependent, for without security freedom is imperilled, and without freedom the attainment of security will be to no avail. In striving for security we expect that our security intelligence agency and our police service will not only be effective in doing so but also will respect the rights of citizens.

5. Throughout this Report we have been uncompromising in our insistence on obedience to the law by members of our national police force and our security intelligence agency. Thus we have insisted that adherence to the Rule of Law is inseparable from attempts to attain the objectives of freedom and security. Without the Rule of Law, we do not believe that freedom and security can be obtained.

6. As we approach the end of this long and difficult inquiry we do not regret having sought to meet a profound challenge: how to assure the people of Canada that the functioning of their police force and their security intelligence agency will result in freedom and security, under policies and procedures provided for by law. We hope that our recommendations will enhance the *freedom and security of the people of Canada under the law.*

ANNEX I

ACCESS TO MEDICAL INFORMATION

1. At several places in this Report we stated that we would refrain from making recommendations with regard to the security intelligence agency's or the R.C.M.P.'s access to confidential medical information until we had the benefit of considering the findings and recommendations of the Ontario Commission of Inquiry into the Confidentiality of Health Information conducted by Mr. Justice Horace Krever. The Report of that Commission has recently been released and we can now put forward our views on the subject in the light of it.

The security intelligence agency

2. Mr. Justice Krever has found that the R.C.M.P. Security Service obtained medical information from Ontario Health Insurance Plan (O.H.I.P.) offices, hospitals and physicians in Ontario in a manner not authorized or provided for by law. He also reports instances in which the Security Service used medical information improperly (see especially, Vol. II, pp. 14-19 and 38-48). While he considers that there are law enforcement purposes which justify changing the laws of Ontario to provide the police greater access under law to medical information, he does not discuss the need for a security intelligence agency to have such access, nor does he make specific recommendations in this regard. However, because of his concern that medical evidence obtained for legitimate law enforcement purposes may be misused by the Security Service for disruptive or other improper purposes, and because of the inability of provincial authorities "... of following up and checking on..." how the R.C.M.P. uses medical information, he states that consideration should be given to allowing the R.C.M.P. access to provincially maintained health information for acceptable police purposes "only if the R.C.M.P. by federal-provincial agreement or otherwise, were first made accountable to a provincial authority for the information it was entitled to have". He further states that:

> One would want to reconsider this position if, in time, the security service responsibilities were removed from the R.C.M.P. and entrusted to a separate organization or agency, leaving the force with its conventional police role.
>
> (Vol. II, p. 48.)

3. In Part V, Chapter 4, we take the position that the security intelligence agency's access to confidential information held by provincial governments or private sources must be accomplished through lawful means. Further, in Part V, Chapter 6, we have recommended that the security intelligence agency should have no mandate to carry out disruptive activities of domestic political groups including activities involving the dissemination of medical information

such as occurred in the Riddell episode. We have also recommended in Part VII, which is concerned with security screening, that the function of obtaining information concerning an applicant's personal background, including any medical information, be transferred to security staffing officers in the Public Service Commission or government departments and that such information be sought only with the applicant's permission. Still, questions arise from the Krever Report, which we must address: is there a need to obtain amendments in provincial laws to permit the security intelligence agency to have access to confidential medical information, and, if there is, what arrangements should be made with the provinces to facilitate access?

4. On the question of need for access we should distinguish the three different kinds of information with respect to which the Krever Report makes recommendations:

(a) O.H.I.P. enrolment information — i.e. simple biographical information.

(b) O.H.I.P. medical records.

(c) Medical information held by physicians and hospitals.

As we noted in Part V, Chapter 4, the need to obtain the first kind of information, simple biographical information, from other sources may be greatly reduced if the legal barriers to obtaining such information from federal government data banks are altered in the ways we have recommended in that part of our Report. As we further noted, our recommendations on security screening procedures should remove any need to arrange security intelligence access to medical records for screening purposes. However, as we pointed out in Part V, Chapter 4, there may be a very real need for the security intelligence agency to have access to detailed medical information falling under either the second or third categories listed above, to enable it to carry out important counter-intelligence or counter-terrorist investigations. The Solicitor General should review this need with the security intelligence agency and, if he is convinced that the need exists, meet with appropriate officials of those provinces whose laws do not permit access for security purposes with a view to obtaining support for legislative changes which would allow access.

5. As to the arrangements which might be appropriate, we make several suggestions, based on the assumption that the concerns expressed and the solutions proposed in the Krever Report may apply to other provinces in addition to Ontario. First, we think that the changes in the mandate, management, structure and control of the national security intelligence agency which we have called for in this Report would provide much better assurance to provincial governments that medical information obtained by the federal security agency would be used for lawful and proper security purposes. Even with these changes, provincial authorities may wish to establish some way of participating in the review of security intelligence activities involving the use of provincially maintained and protected health information. If so, consideration should be given to employing the mechanism that, in Part V, Chapter 8, we recommended should be available to review decisions as to the disclosure to provincial attorneys general of criminal activities of members or agents of the

security intelligence agency. That mechanism would involve provincially nominated persons in the monitoring activites of the independent review body (the Advisory Council on Security and Intelligence). If this were done, we think it would be appropriate for provincial representatives on A.C.S.I. to be empowered to report any misuse of medical information to appropriate provincial authorities. In putting this proposal forward we are cognisant of the possibility that when arrangements of this kind are being considered, federal authorities may well wish to work out reciprocal arrangements which afford the federal government assurance that confidential information requested by provincial organizations from the security intelligence agency (or from the R.C.M.P.) is also used for legitimate and proper purposes.

6. One further issue that must be considered is the appropriateness for a security intelligence agency of Mr. Justice Krever's recommendations concerning police access to medical information. With regard to O.H.I.P. health information, he recommends

> 17. That no employee of O.H.I.P. be permitted to release health information to any police force without a search warrant. The district manager of O.H.I.P. or a person designated by him or her in writing at a district or satellite office should, however, be permitted to answer, yes or no, to the question of any police officer whether O.H.I.P. has specific health information about a named person.
>
> (Vol. II, p. 69.)

The approach contained in the recommendation would not serve the needs of the security intelligence agency, for two reasons. First, under sections 443 and 445 of the Criminal Code, a person or peace officer who is issued a search warrant must, after conducting the search and seizure, carry anything he has seized "... before [a] justice... to be dealt with by [the justice] according to law". Such a requirement, we believe, is inappropriate for a security intelligence agency, except in those rare cases where a prosecution is anticipated. Secondly, the requirements of section 443 of the Criminal Code with regard to reasonable belief about a specific crime are, for reasons we have fully set out in section F of Part V, Chapter 4, not likely to be met in many security intelligence investigations. Therefore, in place of Mr. Justice Krever's recommendation, we propose that access to provincial insurance health records by the security intelligence agency require that a judicial warrant be obtained on the conditions we have set out in Part V and which are contained in the proposed legislation at the end of that Part. Legislatively, this could be accomplished by the inclusion of an "opting in" provision for the provinces in the federal legislation.

7. The Krever Report also recommends that provincial laws forbidding doctors and hospital officials to disclose confidential information to the police without the patient's consent be modified so that such persons may do so without the patient's consent, if there is

> reasonable cause to believe that a patient is in such mental or emotional condition as to be dangerous to himself or the person of another or others and that disclosure of the information... is necessary to prevent the threatened danger.

He further recommends that senior hospital officials or doctors should be permitted to inform the police when they believe on reasonable grounds that a patient is a perpetrator or victim of a crime (Vol. II, pp. 93-4). These recommendations again, because they refer exclusively to the police and law enforcement concerns, may be too narrowly cast to allow the security intelligence agency to benefit from them. We think it quite likely that doctors and hospital employees may have information about terrorist or espionage threats vital to the security intelligence agency and, if this is so, the Solicitor General should endeavour to obtain the support of provincial authorities for a widening of legislative amendments to permit disclosure by doctors and senior hospital officials to the security intelligence agency (subject to conditions and controls such as those proposed in the Krever Report).

R.C.M.P. — Criminal Investigation Branch

8. The Krever Report also finds that the R.C.M.P. and provincial police forces have had access to medical information in a manner not authorized or provided for by law. The recommendations of that Report referred to above are designed to provide the police with greater access to medical information than Ontario law has permitted in the past. We have already noted Mr. Justice Krever's reservations about extending such access to the R.C.M.P.

9. We believe that our recommendations for separating the Security Service from the R.C.M.P. ought to allay the concern that if the R.C.M.P. are given access to medical information similar to that which is proposed for provincial police, the R.C.M.P. may give information to its Security Service which might use it for an improper purpose. Even if this particular concern is overcome, Ontario or other provinces might nevertheless wish to have some way of ensuring that confidential medical information is not misused by the R.C.M.P. in criminal investigations. If that is the case, we suggest that the Office of Inspector of Police Practices be used to monitor R.C.M.P. use of such information. When carrying out an audit for this purpose, the Inspector of Police Practices might use investigators seconded from provincial police forces or provincial government departments, and any misuse of information which is discovered could be reported to provincial authorities. We suggest that the Solicitor General discuss an arrangement of this kind with those provinces which have laws barring police access to the types of medical information which are of vital importance to the R.C.M.P.'s criminal investigation responsibilities.

MINORITY REPORT OF THE CHAIRMAN

Re: Part VII, Chapter 3

The last two sentences of paragraph 22 read as follows:

> However, we believe that what we earlier referred to as "revolutionary subversion" should be included in the citizenship rejection criteria. We would like to make it clear that, with regard to this criterion, the applicant should be judged on his merits rather than being judged by label alone.

That is the view of the majority. I am not convinced that it is necessary or desirable, in order to protect the security of Canada, to refuse to grant a person Canadian citizenship solely on the basis that he preaches violent overthrow of the government and may even proselytize others to his point of view. (I distinguish, of course, the person who in fact uses violence to achieve political ends.) I do not consider that my experience as a Commissioner enables me to arrive at a proper conclusion on this question. Both the Government and Parliament should address this issue when dealing with the recommendations in our Report.

MINORITY REPORT OF COMMISSIONER GILBERT

1. With due respect for the opinion expressed by my co-Commissioners, I wish to submit my own views and recommendations concerning an application of the War Measures Act, which is designed to be used in cases of national emergency. I shall not repeat here all the paragraphs of this report which will be affected by my remarks. Unless express mention is made in this minority report or unless there is an obvious incompatibility between my views and those expressed by my co-Commissioners, I subscribe fully to the tenor of the Chapter entitled "National Emergencies".

A. *The Scope of the War Measures Act*

2. The Chairman and Commissioner Rickerd have opted in favour of the continuation of this Act in its present form in so far as its scope is concerned. It should, they feel, grant to the executive the power to make regulations in the event of war, invasion or insurrection, real or apprehended. They consider that our country requires such an instrument to enable the restoration of order in cases of emergency. However, because they are concerned about abuses that might arise out of such legislation, they propose changes in its application. I shall consider the question of application later. First I want to set out my dissenting views with regard to the scope of the War Measures Act. In my opinion this legislation should only be applicable in cases of war and invasion, real or apprehended, as is provided in the corresponding British legislation, the Defence of the Realm Act. My reasons for taking this position follow.

3. It seems to me that a threat to established order made by an aggressor from outside the country is fundamentally different from a threat made by a group of citizens who rise up against the government, either to destroy it or to force a change of certain established policies. In the first case the aggressor has no right to interfere in the affairs of our government, while in the second, even if they are wrong in the methods they employ, it is citizens of the country who are expressing their disapproval.

4. Movements of insurrection act beyond the limits of legitimate dissent. But in practice, the clandestine nature of such movements can make it difficult to discover whether these activities are illegal and whether or not in a given situation in which violence is carried out, that violence was the expression of the insurrectional intent. We stated at the beginning of this Report that the right to legitimate dissent is one of the three values which must not be compromised by a true democracy (the other two values being responsible government and the rule of law). We would be well advised to bear in mind that the line is often narrow between what constitutes the expression of

legitimate dissent — a positive element essential to the health of a true democracy — and actual insurrection, which is an uprising by force and violence against the established authority.

5. Because insurrection and dissent are both expressed through confrontation with existing authority, such actions leave themselves open to abuse by that authority. In either case the existing authority tends to react against the aggressor by adopting a posture of self-justification. To sum up, it is not unfair to say that the existing authority is both party and judge in its confrontation with the dissenter, whether he be legitimate or insurrectional. It must be recognized that such a situation easily lends itself to vengeance and to the abuse of power.

6. To this point, I have examined the War Measures Act as a tool enabling the executive to act quickly to counter *surprise* aggression. By virtue of the Act, the Cabinet can legislate, without reference to Parliament, a proclamation being, by itself, conclusive proof of a state of war, invasion or insurrection, real or apprehended. While this element of surprise is appropriate for the idea of foreign aggression, as in an act of war or invasion, it is not compatible with the idea of insurrection, let alone apprehended insurrection. Since its passage on August 21, 1914, the War Measures Act has been used twice in cases of war and once to counter an apprehended insurrection. I do not wish to deal in any way here with the reasons for the government's recourse to the War Measures Act in 1970. But the history of the October Crisis provides an instance in which the aggressor was known for a number of years before the outbreak of the Crisis itself in the autumn of 1970. Insurrectional movements are not surprise movements by nature, as acts of war and invasion can be. On the contrary, insurrections take a long time to develop before they erupt with force and violence. Simply stated, a good government will be able to anticipate revolutionary movements, especially if it makes use of the intelligence provided to it by a well-informed national security service.

7. Thus, I conclude that the War Measures Act has a definite function in maintaining peace, security, order and good government. However, I feel that in a true democracy this function should be exercised only with respect to acts of war and invasion. In cases of insurrection, it seems to me that Parliament should be the instrument with the responsibility for adopting the legislation required in a given case. I therefore recommend that the War Measures Act be amended to apply only to cases of real or apprehended war or invasion.

8. It goes without saying that since my first recommendation is that the War Measures Act apply only to war or invasion, the severity of its implementing provisions is not as important a question as it would be if it applied also to internal insurrectional movements. Aggressive acts by foreign countries or foreign groups must be met on a war footing. Certainly, the government does not owe the same degree of respect for the rights of such aggressors as it does for its own citizens. It is appropriate, therefore, that the War Measures Act, when applied to a situation of war or invasion, should be severe; unfortunately, the rules of war require this. War has its own rules, and far be it from me to discuss here, even to a limited extent, how a country should make war.

B. *Application of the War Measures Act*

9. In the event that my recommendation on the scope of the War Measures Act is not accepted, I wish to consider certain provisions which I feel should be applied only in cases of real or apprehended insurrection. What follows applies only to such situations.

The framework of the regulations

10. Section 3 of the Act sets out the framework within which the executive may, after a proclamation, adopt regulations. Common sense dictates that such a framework should exist. It must be remembered, however, that when the executive is granted legislative power, the government acquires the power to make illegal all sorts of situations which otherwise would be legal. It is therefore especially important that such measures be specific and of short duration, but above all it is essential to orderly democratic process that they be submitted to Parliament within the shortest possible time. I am satisfied with our recommendation that a proclamation by the Governor in Council should be debated by Parliament immediately if Parliament is in session and within seven days if it is not. It should be necessary, however, that within that same period Parliament approve the regulations adopted by the executive, failing which the regulations should lapse.

Penalty for breach of regulations

11. Section 4 of the Act provides that violations of the regulations may be punished by fines of up to $5,000.00 or imprisonment not exceeding five years, or both. This provision is abusive. In England, the corresponding Act, the Defence of the Realm Act, provides for a maximum imprisonment of three months for breach of the regulations. Why five years in Canada? Some claim that the defence, peace, order, well-being and security of the country require nothing less. But in reply to that argument it must be borne in mind that the purpose of these regulations and the penalties for violation of them is not to supplant the penalties laid down in other laws, particularly the Criminal Code. Therefore, if in breaching a regulation adopted under the War Measures Act a person also commits another offence already provided for in the Criminal Code — for example, espionage — the penalties applying to that offence remain. I therefore recommend that the penalty attaching to the breach of a regulation under the War Measures Act be re-evaluated in the light of England's Defence of the Realm Act.

Duration of detention without charge

12. Presently, the law does not specify how long a person whom the police allege has breached regulations can be detained before a charge is laid. The regulations adopted during the October Crisis of 1970 provided for detention up to seven days without charge, with ministerial power to extend this period an additional 21 days. In the present structure of the Act there is a definite potential for abuse. In principle, no person should be arrested without being charged, so that he may know why he is being deprived of his liberty and take the necessary steps to regain it. I can see why, in a state of national emergency,

this principle should give way if the collective good requires concerted and rapid action on the part of the police, but it would be unjust, harmful and abusive to allow the police to make mass arrests and to take whatever time is required subsequently to sort out the real suspects. The period, in a national emergency, during which a person can be detained without charge should be stipulated by law, not by regulation. Since it can be presumed that in a given case an arrest would only take place after there has been a certain amount of proof that the regulations have been breached, the charge should be laid no longer than 48 hours after arrest. Here it must be remembered that when a crisis occurs, arrests are often more numerous and consequently the police would be better able to serve the ends of justice if allowed a short period of time between arrest and charge. I recommend that this period be 48 hours and that it be provided for in the Act itself.

SUMMARY OF RECOMMENDATIONS

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

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

   (a) activities directed to or in support of the commission of acts of espionage or sabotage (espionage and sabotage to be given the meaning of the offences defined in sections 46(2)(b) and 52 of the Criminal Code and section 3 of the Official Secrets Act);

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

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

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

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

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

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

the security of Canada in the legislation establishing the security intelligence agency.

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

7. WE RECOMMEND THAT a system for controlling the collection of information by the security intelligence agency be established which distinguishes three levels of investigation.

8. WE RECOMMEND THAT investigations at the first two levels be regulated by administrative guidelines developed by the security intelligence agency and approved by the Solicitor General.

9. WE RECOMMEND THAT the statute governing the security intelligence agency require ministerial approval for full investigations, indicate the techniques of collection that may be used in a full investigation and stipulate that a full investigation be undertaken only if

   (a) there is evidence that makes it reasonable to believe that an individual or group is participating in an activity which falls within categories of activities (a) to (c) identified, in the statute governing the security intelligence agency, as threats to the security of Canada; and

   (b) the activity represents a present or probable threat to the security of Canada of sufficiently serious proportions to justify encroachments on individual privacy or actions which may adversely affect the exercise of human rights and fundamental freedoms as recognized and declared in Part I of the Canadian Bill of Rights; and

   (c) less intrusive techniques of investigation are unlikely to succeed, or have been tried and have been found to be inadequate to produce the information needed to conclude the investigation, or the urgency of the matter makes it impractical to use other investigative techniques.

10. WE RECOMMEND THAT the security intelligence agency and the Solicitor General should move as quickly as possible to apply this system of controls to all security intelligence investigations which are underway at the time this new system of controls is introduced.

11. WE RECOMMEND THAT, with the exception of administrative and source files, the security intelligence agency open and maintain a file on a person only if at least one of the following three conditions is met:

(a) there is reason to suspect that the person has been, is, or will be, engaged in activities which Parliament has defined as threats to Canada's security;

(b) there is reason to suspect that the person, who is, or who soon will be, in a position with access to security classified information, may become subject to blackmail or may become indiscreet or dishonest in such a way as to endanger the security of Canada;

(c) the person is the subject of any investigation by the security intelligence agency for security screening purposes. (Once the investigation has been completed, the agency should not continue to add information to these files unless the information relates to category (a) or (b) above.)

12. WE RECOMMEND THAT the security intelligence agency and the independent review body (the Advisory Council on Security and Intelligence) develop programmes for reviewing agency files on a regular basis to ensure compliance with the general principles for opening and maintaining files on individuals.

13. WE RECOMMEND THAT the storage and retrieval system for information on individuals whose activities are relevant to the security intelligence agency's mandate be separate from those systems pertaining to administrative, source and research files.

14. WE RECOMMEND THAT the security intelligence agency's files, documents, tapes and other matter be erased or destroyed only according to conditions and criteria set down in guidelines approved by the Solicitor General.

15. WE RECOMMEND THAT the security intelligence agency consult the Department of External Affairs before initiating a full investigation involving the use in Canada of certain investigative techniques directed at a foreign government or a foreign national in Canada.

16. WE RECOMMEND THAT, in order to make it possible for physical surveillance operations to be carried out effectively by a security intelligence agency, changes be made in federal statutes and the co-operation of the provinces be sought to make changes in provincial statutes as follows:

(1) *Rules of the road*

(a) A defence be included in provincial statutes governing rules of the road for peace officers and persons designated by the Attorney General of the Province on the advice of the Solicitor General of Canada ("designated individuals") if such persons act

(i) reasonably in all the circumstances,

(ii) with due regard for the property and personal safety of others, and

(iii) in the otherwise lawful discharge of their duties;

(b) a defence similar to that referred to in (1)(a) above be included in relevant provincial legislation which authorizes municipal traffic by-laws;

(c) there be enacted by each of the provinces and territories, a provision for the protection of peace officers and designated individuals, saving them harmless from personal liability in civil suits, if such persons act

(i) reasonably in all of the circumstances;

(ii) with due regard for the property and personal safety of others; and,

(iii) in the otherwise lawful discharge of their duties;

(d) the Government of Canada compensate those persons who, but for recommendation (c) above would be entitled to recover damages in a civil suit brought against a federally engaged peace officer or designated individual in a cause of action arising by reason of acts done or omissions occurring in the course of the work of such peace officer or designated individual and on the principle that the quantum of compensation should be assessed on the same basis as is the practice in the civil courts.

(2) *False identification*

(a) Provincial highway traffic legislation regulating the licensing and identification of persons and property be amended to permit the Director General or designated member of the security intelligence agency (or a duly authorized member of a police force) to apply for false identification to the senior government official charged with the administration of the legislation. Provision be made to permit the documents related to the application to be sealed and not to be opened without court order. It is further recommended that such amendments be made as may be necessary to remove all statutory restrictions on the signing or holding of more than one piece of identification in each case;

(b) provincial hotel registration legislation be amended to make available a defence to peace officers and designated individuals who register in a hotel under a false name provided that

(i) they do so in good faith, and

(ii) the use of a false name is necessary for the performance of their otherwise lawful duties.

(3) *Trespass*

(a) Provincial petty trespass statutes be amended to make available a defence to peace officers and designated individuals who enter onto private property other than private dwelling-houses or

inhabited units in multi-unit residences but including vehicles, providing that

(i) entry onto private property is reasonably necessary in the circumstances;

(ii) they show due regard for the property rights of the owner; and,

(iii) they act in the otherwise lawful discharge of their duties.

(b) sections 387(1)(a) and 387(1)(c) and 388(1) of the Criminal Code be amended to make available a defence to peace officers and designated individuals in order to allow the attachment of tracking devices to vehicles, in order to assist in physical surveillance operations, provided that such persons

(i) act in the course of their otherwise lawful duties,

(ii) do no more damage or interference with the property than is reasonably necessary for the purposes of the operation; in any event, the damage or interference must not render the use of the property dangerous;

(c) civil remedies be preserved for both trespass and the affixing of devices in a manner similar to that recommended in respect of rules of the road.

17. WE RECOMMEND the establishment of administrative guidelines concerning the principles to be applied in the use of undercover operatives by the security intelligence agency. These guidelines should be approved by the Solicitor General, as the Minister responsible for the security intelligence agency and should be publicly disclosed. These guidelines should cover, *inter alia*, the following points:

(a) the forms of deceit which are unacceptable;

(b) sources and undercover members must be instructed not to participate in unlawful activity. If an undercover operative finds himself in a situation where the commission of a crime is imminent, he must disassociate himself, even at the risk of ending his involvement in the operation. In situations where there is time to seek advice as to the legality of a certain act required of the undercover operative, such advice should be sought. If the act is considered to be unlawful, alternative courses of action should be considered. In many situations, this will allow the operative to continue in his role while remaining within the law;

(c) undercover operatives should not be used in situations where it is likely that the operative will be required to participate in unlawful conduct in order to establish or maintain his credibility;

(d) the agency should report unlawful conduct by undercover operatives, in accordance with the procedures which we propose in Chapter 8 of this Part;

(e) undercover operatives must not be used for the purpose of disrupting domestic groups unless there is reason to believe such a group is involved in espionage, sabotage or foreign interference;

(f) undercover operatives should be instructed not to act as *agents provocateurs* and, in situations where they become aware of plans for violent activity, to do what they can to persuade the members of a group to adopt milder methods of protest;

(g) interviews of persons for security screening purposes should not be used as occasions for recruiting such persons as sources;

(h) great care should be taken in authorizing the use of undercover operatives to balance the potential harm to which the deployment of such individuals within a social institution may do to that institution against the value of the information which may be obtained;

(i) the security intelligence agency should respect confidential professional relationships and other legal barriers to the use of sources in the private sector and should be directed by expert legal advice as to the extent of such legal barriers;

(j) employees or persons under contract to the federal, provincial or municipal governments must not be used as undercover sources in regard to matters involving their government. Confidential information held by governments must be obtained through legally authorized channels; and

(k) the making of *ex gratia* payments for loss or damage suffered as a result of civil wrongs committed by undercover operatives.

18. WE RECOMMEND THAT to facilitate the obtaining of false identification documents in a lawful manner for undercover agents of the security intelligence agency, federal legislation be amended, and the co-operation of the provinces be sought in amending relevant provincial laws, in a manner similar to that recommended for the false identification needed in physical surveillance operations.

19. WE RECOMMEND THAT income tax legislation be amended to permit the security intelligence agency sources not to declare as income payments received by them from the agency, and that other fiscal legislation requiring deduction and remittance by or on behalf of employees be amended to exclude such sources.

20. WE RECOMMEND THAT section 383 of the Criminal Code of Canada concerning Secret Commissions be amended to provide that a person providing information to the security intelligence agency in a duly authorized investigation does not commit the offence defined in that section.

21. WE RECOMMEND THAT there continue to be a power to intercept communications for national security purposes but that the system of

administering the power and the statute authorizing the exercise of the power be changed as follows:

(1) All of the information on which an application for a warrant is based must be sworn by the Director General of the security intelligence agency or persons designated by him.

(2) Proposals for warrants should be thoroughly examined by a senior official of the Department of the Solicitor General and by the security intelligence agency's senior legal adviser, and the advice of the Deputy Minister should be available to the Solicitor General in considering the merits of proposals from both a policy and legal point of view.

(3) The legislation authorizing warrants should be amended so that, except in emergency situations, warrants are issued by designated judges of the Trial Division of the Federal Court of Canada on an application by the Director General of the security intelligence agency approved in writing by the Solicitor General of Canada.

(4) The legislation should authorize the judge to issue a warrant if he is satisfied by evidence on oath that the interception is necessary for obtaining information about any of the following activities:

(a) activities directed to or in support of the commission of acts of espionage or sabotage (espionage and sabotage to be given the meaning of the offences defined in sections 46(2)(b) and 52 of the Criminal Code and section 3 of the Official Secrets Act);

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

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

and the warrant should indicate the type of activity of which the targetted individual or premises is suspected.

(5) The legislation should direct the judge to take the following factors into consideration in deciding whether the interception is necessary

(a) whether other investigative procedures not requiring a judicial warrant have been tried and have failed;

(b) whether other investigative procedures are unlikely to succeed;

(c) whether the urgency of the matter is such that it would be impractical to carry out the investigation of the matter using only other investigative procedures;

(d) whether, without the use of the procedure it is likely that intelligence of importance in regard to such activity will remain unavailable;

(e) whether the degree of intrusion into privacy of those affected by the procedure is justified by the value of the intelligence product sought.

(6) The legislation should provide that the Director General may appeal a refusal of a judge to issue a warrant to the Federal Court of Appeal.

(7) The legislation should provide that an applicant must disclose to the judge the details of any application made previously with respect to the same matter.

(8) The legislation should authorize the Chief Justice of the Federal Court of Canada to designate five members of the Trial Division of that court to be eligible to issue warrants under the legislation.

(9) The legislation should provide that in emergency circumstances where the time required to bring an application before a judge would likely result in the loss of information important for the protection of the security of Canada, the Solicitor General of Canada may issue a warrant which can be used for 48 hours subject to the same conditions which apply to judicial warrants. The issuance of emergency warrants must be reported to and reviewed by the Advisory Council on Security and Intelligence.

(10) The legislation should require that warrants specify the length of time for which they are issued and that no warrants should be issued for more than 180 days.

(11) Before deciding to make application to renew a warrant the Director General of the security intelligence agency and the Solicitor General should carefully assess the value of the intelligence product resulting from the earlier warrants. The legislation should stipulate that applications for renewals of warrants be treated on the same terms as applications for original warrants with the additional requirement that the judge to whom an application for renewal is made be provided with evidence under oath as to the intelligence product obtained pursuant to the earlier warrant(s).

(12) The legislation should authorize persons executing warrants to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device, pro-

viding that the judge issuing the warrant sets out in the warrant (a) the methods which may be used in executing it; (b) that there be no significant damage to the premises that remains unrepaired; and (c) that there be no physical force or the threat of such force against any person. The legislation should also provide for the use of the electrical power supply available in the premises.

(13) The Solicitor General should seek the co-operation of the provinces to make lawful what would otherwise be unlawful under provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards, in order to allow the security intelligence agency to install, operate, repair and remove electronic eavesdropping devices in a lawful manner.

(14) The legislation should provide for warrants to be issued to the Director General of the security intelligence agency or persons acting upon his direction or with his authority, but require that in every case the persons carrying out an entry of premises or removal of property in the course of executing a warrant be accompanied by a peace officer. If the Director General proposes to use a person who is not a member of the agency or a peace officer, he should obtain the prior approval of the Minister to the use of such person.

(15) The legislation should make it clear that warrants may be issued for the interception or seizure of written communications, other than a message in the course of post, as well as oral communications. Warrants for these interceptions must not be used for the examination or opening of mail or the search of premises. Section 7 of the Official Secrets Act should be repealed. (See Part IX, Chapter 2 for recommendation as to total repeal of the Official Secrets Act.)

(16) The legislation should exempt from section 178.2(1) of the Criminal Code the communication of any information obtained from an interception executed pursuant to the legislation by members of the security intelligence agency for purposes within the mandate of the security intelligence agency or for the purpose of enabling the Advisory Council on Security and Intelligence or the Parliament Committee on Security and Intelligence to review the operation of the legislation.

(17) The legislation should require that the Solicitor General annually prepare a report to be laid before Parliament indicating the number of warrants for interception which have been issued during the year, the number of these which constitute renewals, and the frequency of renewals and that the Solicitor General prepare a report for the parliamentary Committee on Security and Intelligence assessing the value of the intelligence products

obtained from the warrants and problems encountered in executing warrants under the legislation.

(18) The use by the security intelligence agency of (a) hidden optical devices or cameras to view or film activities in places which are not open to the public and (b) dial digit recorders ("pen registers") should be permitted only under a system of warrants subject to the conditions of control and review as are recommended above for electronic surveillance.

22. WE RECOMMEND THAT the security intelligence agency be authorized by legislation to enter premises, to open receptacles and to remove property for the purposes of examining or copying any document or material when it is necessary to do so in order to obtain information about activities directed towards, or in support of, espionage or sabotage, foreign interference or political violence and terrorism, providing that this investigatory power is subject to the same system of control and review as recommended above for electronic surveillance.

23. WE RECOMMEND THAT section 11 of the Official Secrets Act be repealed.

24. WE RECOMMEND THAT, notwithstanding the present provisions of the Post Office Act, the security intelligence agency be authorized by legislation to open and examine or copy the cover or contents of articles in the course of post when it is necessary to do so in order to obtain information about activities directed towards or in support of espionage or sabotage, foreign interference or serious political violence and terrorism, providing that this investigatory power is subject to the same system of control and review as recommended above for electronic surveillance, except that instead of requiring that a peace officer accompany persons executing warrants issued for this purpose, the legislation should require that the Post Office Department be notified when such warrants are issued and expire and that Post Office officials co-operate with members of the security intelligence organization in carrying out the procedure specified in the warrant.

25. WE RECOMMEND THAT legislation authorize the heads of federal government institutions to release information concerning an individual's name, address, phone number, date and place of birth, occupation and physical description on receiving a written request from the security intelligence agency stating that such information is necessary for the purpose of locating or identifying an individual suspected of participating in one of the activities identified as a threat to the security of Canada in the statute governing the security intelligence agency, and that all other personal information held by the federal government, with the exception of census information held by Statistics Canada, be accessible to the security intelligence agency through a system of judicially granted warrants issued subject to the same terms and conditions and system of review as recommended for electronic surveillance, searches of premises and property, and the examination of mail.

26. WE RECOMMEND THAT warrants issued for obtaining personal information for security intelligence purposes be submitted to the Minister or head of the government institution which holds the information and that the Minister be required to comply with the warrant unless the Prime Minister directs the Solicitor General not to execute the warrant.

27. WE RECOMMEND THAT the security intelligence agency obtain personal information held by government institutions under the jurisdiction of provincial governments only from persons legally authorized to release such information and that, with regard to any province in which there is no authorized means of access to information to which the Solicitor General of Canada considers that the security intelligence agency should have access in order to discharge its responsibilities effectively, the Solicitor General should seek the co-operation of the province in amending its laws to make such access possible.

28. WE RECOMMEND THAT the security intelligence agency's responsibilities for the development of a competent analytical capability be explicitly stated in the statute establishing the agency.

29. WE RECOMMEND THAT the Act establishing the security intelligence agency specify the reporting function of the agency and require the Minister responsible for the agency to issue guidelines on how the agency should conduct its reporting activities. These guidelines should cover at least the following:

    (a) conditions under which the agency can report information about individuals;

    (b) conditions under which the agency can advise individuals outside governments and police forces about security threats;

    (c) (i) the general principle that the security intelligence agency should report only information relevant to its mandate, except that information which it has collected by accident which the guidelines specifically require or authorize it to report to government or to the police;

        (ii) the agency should report information which it has collected by accident, which relates to an offence, to the appropriate police force if, in the agency's opinion, to do so would not be likely to affect adversely the security of Canada.

        (iii) the types of information collected by accident which the security intelligence agency may report to the appropriate federal or provincial government include information pertinent to the economic interests of Canada.

    (d) the manner in which the agency should handle *ad hoc* requests for information from government departments and police forces;

    (e) the manner in which the agency should reveal the basis for its judgments, while at the same time providing reasonable protection for the sources of its information.

30. WE RECOMMEND THAT when the Solicitor General receives information from the security intelligence agency relating to the commission of an offence, and the agency considers that it would adversely affect the security of Canada to pass that information to the police, the Solicitor General should consult with the Attorney General of Canada with respect to the release of that information. If, after such consultation, the Solicitor General decides that the security of Canada would not be adversely affected by the release of that information he should instruct the agency to release it to the appropriate police force. On the other hand, if the Solicitor General decides that the release of the information would adversely affect the security of Canada, he should so advise the Attorney General of Canada who should proceed in accordance with arrangements to be worked out with provincial attorneys general. (See discussion in Chapter 8 of this Part.)

31. WE RECOMMEND THAT

    (a) the security intelligence agency retain, in one location, records of all accidental by-products reported to government or to the police, and that such records state what information was reported, how the information was collected, to whom it was given, and the history of the investigation which produced the information; and,

    (b) the independent review body have access to such records and that it monitor closely the investigations which produced the information to ensure that the investigations are not being misdirected for a purpose irrelevant to the security of Canada.

32. WE RECOMMEND THAT the agency, in addition to providing information about specific individuals and groups relevant to its mandate, place greater emphasis than is now the case on providing government with:

    (a) analysis and advice on the latest developments, techniques, and countermeasures relating to physical and V.I.P. security, and security screening; and,

    (b) reports which analyze broad trends relating to threats to the security of Canada and which advise government on ways to counter these threats.

33. WE RECOMMEND THAT the legislation governing the security intelligence agency include a clause which expressly denies the agency any authority to carry out measures to enforce security.

34. WE RECOMMEND THAT members of the security intelligence agency should not have peace officer powers and that, to remove any doubt, the legislation establishing the organization should explicitly state that members of the security intelligence organization are not to be considered as peace officers.

35. WE RECOMMEND THAT the security intelligence agency not engage in making known to employers in the private sector its availability to

receive information about employees alleged to be subversives, and that any such advice as to such availability should, if the government considers such advice to be desirable, be transmitted through another department or agency.

36. WE RECOMMEND THAT it not be a function of the security intelligence agency to publicize, outside government, threats to the security of Canada; and accordingly, the security intelligence agency should not maintain liaison with the news media; and further, that all public disclosure about the activities of the security intelligence agency should be made by responsible Ministers.

37. WE RECOMMEND THAT the security intelligence agency not be permitted to disseminate information or misinformation in order to disrupt or otherwise inflict damage on Canadian citizens or domestic political organizations.

38. WE RECOMMEND THAT if the security intelligence agency wishes to use another government programme to help deceive one of the agency's subjects of surveillance, the Solicitor General should seek the concurrence of the Minister responsible for the programme in question.

39. WE RECOMMEND THAT the security intelligence agency not be permitted to use informants against domestic political organizations primarily for the purpose of disrupting such organizations.

40. WE RECOMMEND THAT an informant of the security intelligence agency who has penetrated a political organization for intelligence gathering purposes should be instructed that, when persons in the organization have formed an intent to commit a *specific* crime, the informant should try to discourage and inhibit the members of the organization from carrying out that crime, but that the informant must not transgress the law in order to discourage or inhibit the commission of the crime.

41. WE RECOMMEND THAT it not be a function of the security intelligence agency to carry out defusing programmes and that the agency not be permitted to use conspicuous surveillance groups for the purpose of intimidating political groups.

42. WE RECOMMEND THAT for intelligence purposes falling within the security intelligence agency's statutory mandate and subject to guidelines approved by the Cabinet Committee on Security and Intelligence, the security intelligence agency be permitted to carry out investigative activities abroad.

43. WE RECOMMEND THAT the Director General of the security intelligence agency inform the Minister responsible for the agency in advance of all foreign operations planned by the security intelligence agency.

44. WE RECOMMEND THAT in cases which on the basis of policy guidelines are deemed to involve a significant risk to Canada's foreign

relations, the Minister responsible for the security intelligence agency inform the Department of External Affairs sufficiently in advance of the operation to ensure that consultation may take place.

45. WE RECOMMEND THAT the Director General and appropriate officials of the security intelligence agency should meet with the Under Secretary of State for External Affairs and the responsible Deputy Under Secretary on an annual basis to review foreign operations currently being undertaken or proposed by the security intelligence agency.

46. WE RECOMMEND THAT the statutory mandate of the security intelligence agency provide for foreign liaison relationships subject to proper control.

47. WE RECOMMEND THAT the terms of reference for each relationship specify the types of information or service to be exchanged.

48. WE RECOMMEND THAT the terms of reference for each relationship be approved by the Solicitor General and the Secretary of State for External Affairs before coming into effect and that any disagreement be resolved by the Prime Minister or the Cabinet.

49. WE RECOMMEND THAT the Government establish a clear set of policy principles to guide the security intelligence agency's relationships with foreign security and intelligence agencies and that the Joint Parliamentary Committee on Security and Intelligence be informed of these principles.

50. WE RECOMMEND THAT the information given to foreign agencies by the security intelligence agency must be about activities which are within the latter's statutory mandate; that the information given must be centrally recorded; that the security intelligence agency know the reasons for the request; and that the information be retrievable.

51. WE RECOMMEND THAT the Director General approve of each joint operation with a foreign agency and ensure that Canada control all foreign agency operations in this country.

52. WE RECOMMEND THAT the Solicitor General be informed of each joint operation, or operation of a foreign agency, in Canada.

53. WE RECOMMEND THAT the security intelligence agency have liaison officers posted abroad at Canadian missions to perform security liaison functions now performed by R.C.M.P. liaison officers, except that in missions where the volume of police and security liaison work can be carried out by one person, either an R.C.M.P. or a security intelligence liaison officer carry out both kinds of liaison work.

54. WE RECOMMEND THAT the relationship between the liaison officer representing the security intelligence agency and the Head of Post be governed by the terms of reference as laid down for the Foreign Services of the R.C.M.P., but that the security intelligence agency's liaison officer have the right to communicate directly with his Headquarters

and independently of the Head of Post when the intelligence to be transmitted is of great sensitivity. Except in extraordinary circumstances, which should in each case be reported by the Director General to the Solicitor General, such communications should be made available to the Under-Secretary of State for External Affairs.

55. WE RECOMMEND THAT the government examine, on a regular basis, both the resources which are being devoted to the technical security of Canadian missions abroad, and the policies and procedures which are being applied to the security of those missions.

56. WE RECOMMEND THAT the security intelligence agency's relationships with foreign agencies be subject to the following forms of review:

    (a) An account of significant changes in these relationships be included in the security agency's annual report to the Cabinet;

    (b) relations with foreign agencies be subject to continuing review by the independent review body;

    (c) the Joint Parliamentary Committee on Security and Intelligence be informed of the principles governing the security agency's relations with foreign agencies and, to the extent possible, of the terms of reference of particular relationships.

57. WE RECOMMEND THAT the Solicitor General approve all agreements which the security intelligence agency makes with other federal government departments and agencies and which have significant implications for the conduct of security intelligence activities.

58. WE RECOMMEND THAT the security intelligence agency, once it has separated from the R.C.M.P., negotiate a Memorandum of Understanding with the Department of External Affairs.

59. WE RECOMMEND THAT the Deputy Solicitor General, the Deputy Minister of National Defence and the Chief of the Defence Staff negotiate a memorandum of understanding to be ratified by their respective Ministers.

60. WE RECOMMEND THAT the security intelligence agency and the R.C.M.P., with the approval of the Solicitor General, provide, upon request, security screening services

    (a) to provincial governments for public service positions which have a bearing on the security of Canada;

    (b) to provincial or municipal police forces.

61. WE RECOMMEND THAT the security screening services provided by the security intelligence agency for provinces and municipalities be subject to the same conditions which apply to the screening services for federal government departments and agencies.

62. WE RECOMMEND THAT, if the security intelligence agency obtains security relevant information about provincial politicians or public servants in the course of an investigation unrelated to a security screening

programme for the Province in question, then the agency seek the approval of the Solicitor General before reporting this information to the appropriate provincial politician or official.

63. WE RECOMMEND THAT the Solicitor General encourage a provincial government which uses these security sceening services either to establish its own review procedures for security screening purposes or to opt into the federal government's review system.

64. WE RECOMMEND THAT the Solicitor General initiate a study of V.I.P. protection in foreign countries with federal systems of government with the aim of improving federal-provincial co-operation in this country.

65. WE RECOMMEND THAT the security intelligence agency, to facilitate the exchange of security relevant information with domestic police forces and generally to encourge co-operation,

    (a) establish a special liaison unit for domestic police forces, staffed, in part, by personnel with police experience;

    (b) develop written agreements with the major domestic police forces to include, among other things, the types of information to be exchanged, the liaison channels for effecting this exchange, and the conditions under which joint operations should be conducted.

66. WE RECOMMEND THAT the Director General approve all joint operations undertaken by the security intelligence agency and that the Solicitor General develop guidelines for the use and approval of intrusive investigative techniques in joint operations.

67. WE RECOMMEND THAT the Solicitor General develop in conjunction with his provincial counterparts a mechanism for monitoring the use by private security forces of investigative or other techniques which encroach on individual privacy, freedom of association, and other liberal democratic values.

68. WE RECOMMEND THAT

    (a) the federal government immediately initiate discussion with the provinces on the procedures which should apply to the reporting and investigation of criminal activity committed by members or agents of the security intelligence agency; and

    (b) the arrangements outlined in this chapter be followed on an interim basis.

69. WE RECOMMEND THAT

    (a) the Director General should be a person of integrity and competence; he should have proven managerial skills but need not have prior working experience in security intelligence matters; he should be knowledgeable about political and social movements, international affairs and the functioning of govern-

ment; he should have a high regard for liberal democratic principles; and he should have sound political judgment, not affected by partisan concerns;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76. WE RECOMMEND THAT

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

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

77. WE RECOMMEND THAT the security intelligence agency:

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

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

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

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

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

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

82. WE RECOMMEND THAT

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

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

83. WE RECOMMEND THAT

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

    (b) the security intelligence agency

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

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

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

84. WE RECOMMEND THAT

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

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

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

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

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

85. WE RECOMMEND THAT the security intelligence agency establish an employee counselling programme based on the two principles of

voluntary usage and confidentiality of information given to the counsellors.

86. WE RECOMMEND THAT the senior management of the security intelligence agency

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

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

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

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

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

(a) emphasizes remedial action rather than punishment;

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

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

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

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

88. WE RECOMMEND THAT the security intelligence agency develop

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97. WE RECOMMEND THAT

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

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

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

98. WE RECOMMEND THAT the security intelligence agency

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

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

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

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

99. WE RECOMMEND THAT screening procedures for security intelligence agency employees

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

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

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

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

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

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

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

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

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

103. WE RECOMMEND THAT agency employees be encouraged to provide information about questionable activities to the independent review

body (the Advisory Council on Security and Intelligence), and that any employees who do so should not be punished by the agency.

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

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

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

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

(ii) other Canadian police forces

(iii) foreign security agencies.

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

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

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

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

111. WE RECOMMEND THAT

(a) existing staff of the R.C.M.P. Security Service be assigned to the new agency but continue to belong to either the Public Service or the R.C.M.P. for an interim period to be established by the Solicitor General. No current employees of the Security Service should be forced to become permanent employees of the security intelligence agency.

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

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

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

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

115. WE RECOMMEND THAT the Cursory Records Check for Order-in-Council appointments be discontinued. Regular security screening procedures should be carried out for those appointed to positions requiring access to security related information.

116. WE RECOMMEND THAT

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

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

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

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

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

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

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

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

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

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

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

or

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

(a) vulnerable to blackmail or coercion, or

(b) indiscreet or dishonest,

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

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

121. WE RECOMMEND THAT the federal government establish a pool of security staffing officers under the direction of the Public Service Commission with responsibility for:

(a) carrying out security screening procedures on behalf of federal government departments and agencies;

(b) conducting field investigations for security screening purposes;

(c) assessing the information resulting from the various investigatory procedures related to security screening;

(d) providing departments and agencies with advice on whether or not to grant security clearances.

122. WE RECOMMEND THAT Public Service Commission security staffing officers be mature individuals

(a) well versed in the variety of political ideologies relevant to Canadian society;

(b) sympathetic to the democratic principles which the security screening process is designed to protect;

(c) knowledgeable about and interested in human behaviour and the various methods used by foreign intelligence agencies to compromise people;

(d) competent at interviewing a wide variety of people.

123. WE RECOMMEND THAT the Interdepartmental Committee on Security and Intelligence decide what departments or agencies should have responsibility for conducting their own security screening interviews and field investigations.

124. WE RECOMMEND THAT the following changes be made to the field investigation procedures:

(a) for Top Secret level clearances, the Public Service Commission security staffing officers should interview three referees named by the candidate. If the list of referees provided by the candidate is not satisfactory, then the Public Service Commission should request additional referees. The security staffing officers should also interview other persons as they see fit, except to seek medical information;

(b) for Top Secret and Secret level clearances, the Public Service Commission security staffing officers should interview the candidate;

(c) good employment practices, such as checking a candidate's credentials, academic records, and employment histories should not be the responsibility of security staffing officers;

(d) in those departments and agencies which are responsible for conducting their own security screening interviews and field investigations, the functions mentioned in (a) and (b) above would be performed by their own security staffing officers.

125. WE RECOMMEND THAT the security intelligence agency have responsibility for:

(a) providing the Public Service Commission and departmental security staffing officers with security relevant information from its files about a candidate, his relatives and close associates;

(b) conducting an investigation when necessary to clarify information or to update its assessment of a particular candidate or group relevant to the candidate's activities;

(c) advising the Public Service Commission and the employing department or agency through the security staffing officer on whether or not a candidate should be granted a security clearance;

(d) advising the federal government on general matters affecting the security clearance programme.

126. WE RECOMMEND THAT the R.C.M.P., as part of the security screening procedures in future, conduct

(a) a fingerprint records check and,

(b) a check of its various criminal intelligence records

for all persons with access to classified information.

127. WE RECOMMEND THAT pardoned or vacated criminal records not be included in screening reports.

128. WE RECOMMEND THAT the federal government widely publicize any review and appeal procedures established for security screening purposes and that the Interdepartmental Committee for Security and Intelligence establish monitoring and control mechanisms to ensure that departments and agencies follow these procedures.

129. WE RECOMMEND THAT the Interdepartmental Committee for Security and Intelligence prepare for the approval of the Cabinet Committee on Security and Intelligence a set of internal review procedures for adverse security reports, to include at least the following points:

(a) the procedures must be comprehensive enough to include all individuals who might be adversely affected by security clearance procedures;

(b) decisions which adversely affect individuals for security reasons should be made by the Deputy Minister of the department concerned about the security problem;

(c) before making such a decision, the Deputy Minister should provide the individual in question with an opportunity to resolve the reasons for doubt;

(d) before making his decision, the Deputy Minister should consult appropriate officials in at least the Privy Council Office's Security Secretariat.

130. WE RECOMMEND THAT the federal government establish, by statute, a Security Appeals Tribunal to hear security appeals in the areas of Public Service employment, immigration, and citizenship. In the case of Public Service employment all individuals who have been or who suspect that they have been adversely affected by security screening procedures should have access to the Tribunal. The specific responsibilities of the Tribunal concerning Public Service employment should be as follows:

(a) to advise the Governor in Council on all appeals heard by the Tribunal;

(b) to review all adverse screening reports of the security intelligence agency and the Public Service Commission's security screening unit;

(c) to report annually to the Interdepartmental Committee on Security and Intelligence about its activities and about any changes in security clearance procedures which would increase either their effectiveness or their fairness.

131. WE RECOMMEND THAT

(a) the Security Appeals Tribunal consist of five members appointed by the Governor in Council, any three of whom could compose a panel to hear security appeals;

(b) the chairman of the Tribunal be a Federal Court Judge;

(c) the other members not be currently employed by a federal government department or agency.

132. WE RECOMMEND THAT the Security Appeals Tribunal disclose as much information as possible to the appellant and that the Tribunal have the discretion to decide what security information can be disclosed to the appellant.

133. WE RECOMMEND THAT the procedures of the Security Appeals Tribunal be similar to those now established for appeals against the dismissal from the Public Service or against deportation, with the added feature that members of the security intelligence agency or personnel

security staffing officers be allowed to appear before the Tribunal to explain the reasons for denying a security clearance.

134. WE RECOMMEND THAT the security intelligence liaison officer at the post abroad be involved in any decision, on application for permanent residency, to waive immigration security screening for humanitarian reasons or in cases of urgency.

135. WE RECOMMEND THAT the security screening rejection criteria applied to visa applicants reflect the temporary nature of their stay. Where appropriate, non-renewable visas should be issued for applicants who could not pass the security criteria for permanent immigration.

136. WE RECOMMEND THAT applicants for the renewal of temporary permits or visas be required to undergo the security screening process.

137. WE RECOMMEND THAT the humanitarian and flexible procedures for dealing with Convention Refugees remain, but that the security intelligence agency, in co-operation with other government departments and agencies, help prepare regular threat assessment profiles of potential refugee situations for the Contingency Refugee Committee, which should be revived

138. WE RECOMMEND THAT the security intelligence agency, hold security screening interviews with Convention Refugees after their arrival in Canada, not as a matter of course, but only for cause.

139. WE RECOMMEND THAT section 19(1)(e), (f) and (g) of the Immigration Act be repealed and the following substituted:

19. (1) No person shall be granted admission if he is a member of any of the following classes:

(e) persons who it is reasonable to believe will engage in any of the following activities:

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

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

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

(iv) revolutionary subversion, meaning activities directed towards or intending ultimately to lead to the destruction or overthrow of the liberal democratic system of government.

140. WE RECOMMEND THAT administrative guidelines to interpret the statutory classes of persons denied admission to Canada on security grounds be drafted for Cabinet approval.

141. WE RECOMMEND THAT officers from the security intelligence agency carry out immigration security screening functions abroad. If they are tasked to obtain criminal and other intelligence pertinent to the suitability of an immigrant, they should pass it on to the Immigration Officer for assessment.

142. WE RECOMMEND THAT the security intelligence agency cross-check immigration screening information received. The security intelligence agency should assess the information on potential immigrants received from a foreign intelligence agency in the light of the political concerns and interests of the country of the providing agency.

143. WE RECOMMEND THAT the security intelligence agency not be authorized to transgress the laws of foreign countries in order to obtain intelligence for immigration screening purposes.

144. WE RECOMMEND THAT the criteria in s.83(1) of the Immigration Act, as far as they relate to security matters, be amended to read "contrary to national security".

145. WE RECOMMEND THAT the responsibilities of the Special Advisory Board under subsection 42(a) of the Immigration Act be transferred to the proposed Security Appeals Tribunal.

146. WE RECOMMEND THAT the ministerial certificates for the deportation of temporary residents and visitors continue to be considered as proof, and hence not subject to appeal, but that the security or criminal intelligence reports upon which the deportation decision is based should be subject to independent review by the same body that reviews the evidence in the case of permanent residents, namely the Security Appeals Tribunal.

147. WE RECOMMEND THAT the Security Appeals Tribunal review all the security reports written by the security intelligence agency where the recommendation for deportation or denial of permanent residency status or admittance was not followed by the Minister.

148. WE RECOMMEND THAT the discretionary power of the Governor in Council to reject citizenship on security grounds be retained. Upon receiving a request for citizenship screening, the security intelligence agency should report any significant security information, not only to the Citizenship Registration Branch for the rejection of citizenship, but also to the appropriate immigration authorities for deportation purposes.

149. WE RECOMMEND THAT the security intelligence agency continue to screen all citizenship applicants.

150. WE RECOMMEND THAT the security intelligence agency no longer process criminal record checks on citizenship applicants.

151. WE RECOMMEND THAT when the security intelligence agency feels that a competing security concern should take precedence over its security screening role in citizenship the Minister responsible for the security intelligence agency and the Minister responsible for the citizenship security clearance should be informed.

152. WE RECOMMEND THAT a person be denied citizenship on security grounds only if there are reasonable grounds to believe that he is engaged in, or, after becoming a Canadian citizen, is likely to engage in, any of the following activities:

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

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

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

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

153. WE RECOMMEND THAT any security intelligence agency interpretation of government security screening guidelines be reviewed for approval by the Minister responsible for the agency. Approval to apply the guidelines or to distribute them to other Ministers or interdepartmental committees should not be given until the Minister has satisfied himself that there are no discrepancies between the guidelines and the agency's interpretation.

154. WE RECOMMEND THAT guidelines be drawn up and approved by Cabinet interpreting the phrase "contrary to public order" as a ground for the rejection of citizenship; but that the security intelligence agency not be responsible for reporting information concerning threats to public order or reprehensible behaviour unless those threats fall within its statutory mandate.

155. WE RECOMMEND THAT any applicant recommended for denial of citizenship on security grounds be able to appeal that decision to the Security Appeals Tribunal. The Tribunal should follow the same procedures of appeal and review as for recommended denials of public service and immigration security clearances.

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

157. WE RECOMMEND THAT the security intelligence agency prepare at least annually a report on its activities for submission to the Cabinet

Committee on Security and Intelligence and that this report include an analysis of changes in security threats, changes in targetting policies, serious problems associated with liaison arrangements and legal difficulties arising from operational practices.

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

159. WE RECOMMEND THAT the Privy Council Office Secretariat for Security and Intelligence continue its existing functions with the exception of any responsibilities its seconded staff now has for the preparation of long-term intelligence estimates and that the Secretary to the Cabinet devote a considerable amount of time to security and intelligence matters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

178. WE RECOMMEND THAT the statute governing the security intelligence agency provide for the establishment of an Advisory Council on

Security and Intelligence to review the legality and propriety of the policies and practices (which includes operations) of the security and intelligence agency and of covert intelligence gathering by any other non-police agency of the federal government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) the extent and prevalence of improper and illegal activities by members of the security and intelligence agency or any other federal organization collecting intelligence by covert means, and the adequacy of the government's response to its advice on such matters;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

187. WE RECOMMEND THAT a proclamation invoking the War Measures Act be debated in Parliament forthwith if Parliament is in session or, if Parliament is not in session, within seven days of the proclamation. Parliament should be informed of the reasons for the invocation of the Act, either publicly in the House, in an *in camera* session or by means of consultation with the leaders of the opposition parties, or through a report to the Joint Parliamentary Committee on Security and Intelligence.

188. WE RECOMMEND THAT the War Measures Act limit the duration of a proclamation issued by the Governor in Council to a specific period not to exceed twelve months. Extensions for periods not to exceed twelve months should require further approval by Parliament.

189. WE RECOMMEND THAT orders and regulations to be brought into force when the War Measures Act is invoked be drafted in advance.

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

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

192. WE RECOMMEND THAT section 3(1)(b) of the War Measures Act be amended. There should be no executive power in emergencies to exile

or deport a Canadian citizen, nor should the Governor in Council have the power to revoke Canadian citizenship.

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

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

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

194. WE RECOMMEND THAT the War Measures Act be amended

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

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

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

195. WE RECOMMEND THAT the War Measures Act be amended to provide that an arrest under the War Measures Act should not be based solely upon the fact of simple membership in an illegal organization.

196. WE RECOMMEND THAT:

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

(b) if the regulations proscribe a course of conduct which was not previously an offence, and the conduct began prior to the making of the regulations, a reasonable period of grace be granted during which any person may comply with the regulations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

These alternatives to sending a complaint directly to the R.C.M.P. should be widely publicized by the Solicitor General, by the Force, by

the Office of Inspector of Police Practices and by provincial police boards and commissions.

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

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

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

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

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

220. WE RECOMMEND THAT the R.C.M.P. retain the primary responsibility for investigating allegations of improper, as opposed to illegal, conduct lodged against its members.

221. WE RECOMMEND THAT the Inspector of Police Practices be empowered to undertake an investigation of an allegation of R.C.M.P. misconduct when

    (a) the complaint involves a member of the R.C.M.P. senior to all members of the internal investigation unit;

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

    (c) the complaint is related to a matter which the Inspector is already investigating;

    (d) the Inspector is of the opinion that it is in the public interest that the complaint be investigated by him; or

    (e) the Solicitor General requests the Inspector to undertake such an investigation.

222. WE RECOMMEND THAT the Inspector of Police Practices be empowered to monitor the R.C.M.P.'s investigations of complaints and to evaluate the R.C.M.P.'s complaint handling procedures. The Inspec-

tor should receive copies of all formal complaints of R.C.M.P. misconduct and reports from the R.C.M.P. of the results of its investigations.

223. WE RECOMMEND THAT, as part of his monitoring and evaluating role, the Inspector of Police Practices inquire into and review at his own discretion or at the request of the Solicitor General any aspect of R.C.M.P. operations and administration insofar as such matters may have contributed to questionable behaviour on the part of R.C.M.P. members.

224. WE RECOMMEND THAT copies of all allegations of illegal conduct on the part of R.C.M.P. members, which are received by any of the bodies authorized to receive the allegations, be forwarded to the appropriate law enforcement body for investigation and concurrently to the appropriate prosecutorial authorities.

225. WE RECOMMEND THAT the Solicitor General adopt the necessary administrative machinery to allow provincial attorneys general to direct at their discretion members of municipal or provincial police forces to investigate an allegation of criminal misconduct lodged against an R.C.M.P. member.

226. WE RECOMMEND THAT whenever the R.C.M.P. is the police force undertaking the investigation into an alleged offence committed by one of its members, a separate, special R.C.M.P. investigative unit be directed to investigate the matter for internal (non-prosecutorial) matters.

227. WE RECOMMEND THAT an R.C.M.P. internal investigation into alleged illegal conduct not be undertaken until the regular police investigation has been substantially completed, unless there are exceptional circumstances which warrant an immediate internal inquiry.

228. WE RECOMMEND THAT

(a) the Office of Inspector of Police Practices be empowered to conduct an investigation into allegations of illegal conduct;

(b) any criminal investigation take precedence over the Inspector's investigation;

(c) the R.C.M.P. halt any internal investigation that it is conducting for disciplinary purposes; and

(d) any relevant information discovered by the Inspector during the investigation be transmitted to the appropriate prosecutorial authorities.

229. WE RECOMMEND THAT criminal investigatory files continue to be used by the R.C.M.P. for internal investigations.

230. WE RECOMMEND THAT the R.C.M.P. advise complainants whether it has found the allegation to be founded, unfounded, or unsubstantiated.

231. WE RECOMMEND THAT complainants have the right to appeal to the Solicitor General if they are not satisfied with how the R.C.M.P. has handled their complaint.

232. WE RECOMMEND THAT, upon request, the Inspector of Police Practices advise the Solicitor General as to the quality and thoroughness of any investigation of a complaint undertaken by the R.C.M.P. The Inspector of Police Practices should also re-investigate a complaint at the request of the Solicitor General.

233. WE RECOMMEND THAT the Inspector of Police Practices report directly to the Solicitor General the results of his office's investigations of complaints alleging misconduct.

234. WE RECOMMEND THAT the Inspector of Police Practices, as part of his role of monitoring the complaint handling procedures of the R.C.M.P., bring to the attention of the Solicitor General any specific complaints which, in the opinion of the Inspector, have not been properly handled by the R.C.M.P.

235. WE RECOMMEND THAT any punishment given an R.C.M.P. member arising from a complaint not necessarily be communicated to the complainant. Rather, the Force should tell the complainant that it recognizes the error, that it apologizes for the misconduct of its member, that it has taken steps to ensure that the activity will not be repeated, and that in those cases where the complainant has suffered damage or loss it will make an *ex gratia* payment.

236. WE RECOMMEND THAT the Inspector of Police Practices periodically review and report on the appropriateness of the disciplinary measures taken by the R.C.M.P. in regard to questionable conduct on the part of a member which affects the public.

237. WE RECOMMEND THAT the Office of Inspector of Police Practices be established within the Department of Solicitor General and that the Inspector report directly to the Solicitor General.

238. WE RECOMMEND THAT the Inspector of Police Practices be an Order-in-Council appointment and that the following conditions of employment be included in the statute establishing the office:

    (a) the Inspector should be subject to dismissal only for 'cause';

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

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

    (d) no Inspector should serve for more than 10 years.

239. WE RECOMMEND THAT the Inspector of Police Practices have access to the Prime Minister on matters concerning improper behaviour

on the part of the Solicitor General in the performance of his duties vis-à-vis the R.C.M.P.

240. WE RECOMMEND THAT the Inspector of Police Practices be a lawyer who has at least 10 years standing at the Bar, and that he have a small staff with experience in the field of police administration or criminal justice.

241. WE RECOMMEND THAT the Inspector of Police Practices be empowered to obtain on secondment experienced police investigators and other experts to conduct investigations, when appropriate, of misconduct on the part of R.C.M.P. members.

242. WE RECOMMEND THAT the Inspector of Police Practices report regularly to the Solicitor General on the results of investigations and annually to the Solicitor General on significant activities of his Office during the year. The Solicitor General should table this report in Parliament.

243. WE RECOMMEND THAT, subject to the restrictions which we have proposed when the R.C.M.P. are carrying out duties relating to the mandate of the security intelligence agency, the R.C.M.P. and the Inspector of Police Practices provide each provincial attorney general and each provincial police board with the following:

(a) information about all serious complaints in their province;

(b) reports on the disposition of such complaints;

(c) statistical analyses of complaints regarding R.C.M.P. misconduct.

244. WE RECOMMEND THAT the Inspector of Police Practices should

(a) obtain on secondment staff from provincial police forces, police boards, or appropriate provincial government departments when forming task forces to investigate allegations of R.C.M.P. misconduct;

(b) normally consult the appropriate provincial officials on recommendations he proposes to make arising out of a serious allegation in that province.

245. WE RECOMMEND THAT the Solicitor General

(a) initiate the establishment of a regular forum for Provincial and Federal ministers and officials to discuss problems and share information concerning complaint handling procedures; and

(b) ensure that provincial inquiries into allegations of R.C.M.P. misconduct, to the extent of their constitutionally proper scope, receive the full co-operation of the R.C.M.P. and the Inspector of Police Practices.

246. WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice relating to matters arising out of its administrative activities as an

agency of the Government of Canada from the federal Department of Justice.

247. WE RECOMMEND THAT the R.C.M.P. obtain all its legal advice with respect to its federal law enforcement role from the federal Department of Justice, and with respect to its law enforcement role pursuant to a provincial or municipal contract from the appropriate provincial attorney general.

248. WE RECOMMEND THAT if the R.C.M.P. is in doubt as to which governmental level is the appropriate one from which to seek its legal advice in a particular matter it should get an opinion from the federal Department of Justice as to which is the appropriate level and abide by that opinion.

249. WE RECOMMEND THAT the Department of Justice assign sufficient counsel to satisfy the requirements of the R.C.M.P.

250. WE RECOMMEND THAT there be no Legal Branch of the R.C.M.P.

251. WE RECOMMEND THAT THE R.C.M.P. continue to have within the Force regular members with law degrees and to assign a sufficient number of such members to work with the Department of Justice counsel to ensure that the R.C.M.P.'s needs are explained and interpreted to those counsel.

252. WE RECOMMEND THAT no member of the Force with a law degree be assigned to any duty requiring him to give a legal opinion to another member of the Force, with the exception of the normal assistance given by any superior to a subordinate in the course of the investigation of an alleged offence.

253. WE RECOMMEND THAT members with law degrees who are assigned to represent other members in disciplinary proceedings be supervised by Department of Justice counsel.

254. WE RECOMMEND THAT the Department of Justice counsel assigned to the Force have a specific duty to report to the Deputy Attorney General of Canada any past or future acts which he believes may be unlawful, of any past or present member of the Force.

255. WE RECOMMEND THAT the Deputy Solicitor General be considered as the deputy of the Solicitor General for all purposes related to the R.C.M.P. and that the Commissioner of the R.C.M.P. report directly to the Deputy Solicitor General rather than to the Solicitor General as at present.

256. WE RECOMMEND THAT the Solicitor General have full power of direction over the activities of the R.C.M.P., except over the 'quasi-judicial' police powers of investigation, arrest and prosecution in individual cases.

257. WE RECOMMEND THAT the Commissioner of the R.C.M.P. keep the Deputy Solicitor General, and through him the Solicitor General,

fully informed of all policies, directions, guidelines and practices of the Force, including all operational matters in individual cases which raise important questions of public policy.

258. WE RECOMMEND THAT if the Commissioner considers that the Deputy Solicitor General is giving him direction based on partisan or political considerations, the Commissioner take the matter up directly with the Minister. We further recommend that if the Commissioner, after consultation with the Deputy Solicitor General, considers that the Solicitor General is giving him, the Commissioner, direction based on partisan or political considerations, he should take the matter up directly with the Prime Minister.

259. WE RECOMMEND THAT in the contracts with the provinces covering the provision of R.C.M.P. policing services, the respective roles of the responsible federal and provincial ministers be clarified, so that the R.C.M.P. members involved have an accurate understanding of the division of their obligations and duties vis-à-vis those ministers.

260. WE RECOMMEND THAT the contracts with the contracting provinces incorporate as far as possible the principles of ministerial direction recommended above for the federal level.

261. WE RECOMMEND THAT the Solicitor General, in concert with his counterparts in the provinces, initate a review of the current system of controls governing the use of the R.C.M.P.'s investigatory methods.

262. WE RECOMMEND THAT the Solicitor General refer to the Law Reform Commission of Canada the matter of whether or not the Criminal Code should be amended to allow peace officers in Canada, under defined circumstances and controls, to make surreptitious entries.

263. WE RECOMMEND THAT a committee be established with statutory powers to review the use of electronic surveillance by all police forces in Canada, including, but not limited to, the procedure by which authorizations are applied for.

264. WE RECOMMEND THAT section 178.2(1) of the Criminal Code be amended so that information obtained as a result of lawful electronic surveillance can be given to

(a) a foreign law enforcement agency;

(b) any person who is involved in the preparation of the Solicitor General's Annual Report to Parliament on the use of electronic surveillance;

(c) any person who is involved in the preparation of a provincial attorney general's Annual Report to a provincial legislature on the use of electronic surveillance; and

(d) any person authorized by federal legislation to review the use of this investigative technique.

265. WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to take such steps as are reasonably necessary to enter premises or to remove property for the purpose of examining the premises or property prior to installing a device or for the purpose of installing, maintaining or removing an interception device, providing the judge issuing the authorization sets out in the authorization

(a) the methods which may be used in executing it;

(b) that there be nothing done that shall cause significant damage to the premises that remains unrepaired;

(c) that there be no use of physical force or the threat of such force against any person.

266. WE RECOMMEND THAT section 178.13 of the Criminal Code be amended to permit peace officers executing authorizations under this section to use the electrical power source available in the premises without compensation.

267. WE RECOMMEND THAT the Solicitor General seek the co-operation of the provinces to effect the necessary administrative and legislative changes to provincial and municipal regulations governing such matters as electrical installations, fire protection and construction standards in order to allow peace officers to install, operate, repair and remove electronic eavesdropping devices in a lawful manner.

268. WE RECOMMEND THAT, not withstanding the present provisions of the Post Office Act, R.C.M.P. peace officers be authorized by legislation to examine or photograph an envelope and to open mail in order to examine and test any substance found in the mail, subject to the following conditions:

(a) this power is exercisable only on judicial authorization, subject to the same safeguards as are now found in section 178 of the Criminal Code;

(b) the offences concerning which this power can be exercisable are limited to narcotic and drug offences;

(c) the reading of an accompanying written, printed or typewritten message other than a message accompanying an illicit drug or narcotic is an offence;

(d) there is a procedure established (such as a statutory declaration by the official supervising the opening of mail) to ensure that in executing the judicial authorization no one has unlawfully read any message contained in the mail. The declaration should be filed with the Solicitor General.

269. WE RECOMMEND THAT the Post Office Act should be amended so that it is clear that controlled deliveries of mail by R.C.M.P. peace officers or their agents may be made lawfully.

270. WE RECOMMEND THAT Schedule I of the Prohibited Mail Regulations be amended so that an article of mail is considered "non-mailable matter" if there are grounds for suspicion or reasonable belief that the article of mail contains an explosive.

271. WE RECOMMEND THAT

(a) legislation authorize the heads of federal government institutions to release information concerning an individual's name, address, phone number, date and place of birth, occupation and physical description on receiving a written request from the R.C.M.P. stating that such information is necessary for the purpose of conducting a criminal investigation.

(b) all other personal information held by the federal government with the exception of census information held by Statistics Canada, be accessible to the R.C.M.P. through a system of judicially granted authorizations subject to the same terms and conditions as are now found in section 178 of the Criminal Code with regard to electronic surveillance.

272. WE RECOMMEND THAT the R.C.M.P. obtain personal information held by government institutions under the jurisdiction of provincial governments only from persons legally authorized to release such information and that, with regard to any province in which there is no authorized means of access to information to which the Solicitor General of Canada considers that the R.C.M.P. should have access in order to discharge its policing responsibilities effectively, the Solicitor General should seek the co-operation of the province in amending its laws to make such access possible.

273. WE RECOMMEND THAT the amendments which we proposed in Part V, Chapter 4 to facilitate physical surveillance operations by the security intelligence agency be made applicable to physical surveillance in criminal investigations by the R.C.M.P.

274. WE RECOMMEND THAT the R.C.M.P. establish administrative guidelines concerning the use of undercover operatives in criminal investigations. These guidelines should be approved by the Solicitor General and should be publicly disclosed.

275. WE RECOMMEND THAT to facilitate the obtaining of false identification documents in a lawful manner for R.C.M.P. undercover operatives in criminal investigations, federal legislation be amended, and the co-operation of the provinces be sought in amending relevant provincial laws, in a similar manner to that recommended for the false identification needed in physical surveillance operations of both the security intelligence agency and the criminal investigation side of the R.C.M.P.

276. WE RECOMMEND THAT income tax legislation be amended to permit R.C.M.P. sources in criminal investigations not to declare as income payments received by them from the force and that other fiscal

legislation requiring deduction and remittance by or on behalf of employees be amended to exclude R.C.M.P. sources.

277. WE RECOMMEND THAT section 383 of the Criminal Code of Canada concerning secret commissions be amended to provide that a person providing information to the R.C.M.P. in a duly authorized criminal investigation does not commit the offence defined in that section.

278. WE RECOMMEND THAT the R.C.M.P. develop a programme designed to assist its members who serve as undercover operatives in criminal investigations to overcome the personality disorders associated with long-term assignments in this role.

279. WE RECOMMEND THAT the R.C.M.P. develop reporting and review procedures both at the divisional and the national levels to enable an internal review of the following cases:

(a) when a conviction is obtained even though the accused's confession is held inadmissible;

(b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained.

280. WE RECOMMEND THAT the R.C.M.P. adopt the following policies concerning interrogation:

(a) members of the Force have a duty to inform a person in custody, within a reasonable time after being taken into custody, of his right to retain counsel; and

(b) members of the Force should provide reasonable means to a person in custody to communicate with his counsel without delay upon the person making a request to do so.

281. WE RECOMMEND THAT the R.C.M.P. revise training materials and programmes relating to interrogation to include proper instructions on the right of an accused to retain and communicate with counsel.

282. WE RECOMMEND THAT members of the R.C.M.P. be required to advise persons in custody reasonably soon after their arrest that arrangements exist to enable them to apply for counsel, such counsel to be paid for by the state if they cannot afford to pay counsel.

283. WE RECOMMEND THAT the Criminal Code be amended to include the following provision:

(1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and

the manner in which the evidence was obtained shall be considered, including:

(a) the extent to which human dignity and social values were breached in obtaining the evidence;

(b) whether any harm was inflicted on the accused or others;

(c) whether any improper or illegal act under (a) or (b) was done wilfully or in a manner that demonstrated an inexcusable ignorance of the law;

(d) the seriousness of any breach of the law in obtaining the evidence as compared with the seriousness of the offence with which the accused is charged;

(e) whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

284. WE RECOMMEND THAT the Criminal Code be amended to include a defence of entrapment embodying the following principle:

The accused should be acquitted if it is established that the conduct of a member or agent of a police force in instigating the crime has gone substantially beyond what is justifiable having regard to all the circumstances, including the nature of the crime, whether the accused had a pre-existing intent, and the nature and extent of the involvement of the police.

285. WE RECOMMEND THAT the administrative guidelines concerning the use of undercover operatives in criminal investigations which we recommended earlier be established by the R.C.M.P., include a direction that no member of the R.C.M.P. and no agent of the R.C.M.P. counsel, incite or procure an unlawful act.

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