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

Third Report

Certain R.C.M.P. Activities and the Question of Governmental Knowledge

August, 1981

CERTAIN R.C.M.P. ACTIVITIES AND THE QUESTION OF GOVERNMENTAL KNOWLEDGE

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

Third Report

CERTAIN R.C.M.P. ACTIVITIES AND THE QUESTION OF GOVERNMENTAL KNOWLEDGE

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May 15, 1981

TO HIS EXCELLENCY
THE GOVERNOR IN COUNCIL

MAY IT PLEASE YOUR EXCELLENCY

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

BEG TO SUBMIT TO YOUR EXCELLENCY
THIS THIRD REPORT ENTITLED:
"CERTAIN R.C.M.P. ACTIVITIES AND THE
QUESTION OF GOVERNMENTAL KNOWLEDGE"

Mr. Justice D.C. McDonald (Chairman)

D.S. Rickerd, Q.C.

Guy Gilbert, Q.C.

le 15 mai 1981

A SON EXCELLENCE
LE GOUVERNEUR EN CONSEIL

QU'IL PLAISE À VOTRE EXCELLENCE

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

AVONS L'HONNEUR DE PRÉSENTER À VOTRE EXCELLENCE CE TROISIÈME RAPPORT INTITULÉ: «CERTAINES ACTIVITÉS DE LA GRC ET LA CONNAISSANCE QU'EN AVAIT LE GOUVERNEMENT»

M. le juge D.C. McDonald, président

D.S. Rickerd, c.r.

Guy Gilbert, c.r.

NOTE BY COMMISSIONERS

We are not publishing a Foreword to this Report. We invite the reader to read the Foreword to our Second Report in which we express gratitude to the many people who have helped us to perform our duties.

Our published reports are as follows:

FIRST REPORT: "Security and Information"

- submitted to the Governor in Council October 9, 1979 in one official language.
- formally submitted to the Governor in Council in both official languages November 26, 1979.
- released by Prime Minister Clark to the press January 11, 1980
- later in 1980 published by the Department of Supply and Services.

SECOND REPORT: "Freedom and Security Under the Law"

- submitted to the Governor in Council January 23, 1981, in one official language, and subsequently translated into the other.
- printed, after deletion of some passages on various grounds, by the Department of Supply and Services, August, 1981, for public release at an early date thereafter.

THIRD REPORT: "Certain R.C.M.P. Activities and the Question of Governmental Knowledge".

- submitted to the Governor in Council May 15, 1981, in one official language, and subsequently translated into the other.
- printed, after deletion of some passages on various grounds, by the Department of Supply and Services, August, 1981, for public release at an early date thereafter. (It is expected that some further sections of the Third Report will be published at a later date: see the Commissioners' Note to Part VI, and comments in Part VIII).

In addition, on August 28, 1980, we submitted a "Special Report" to the Governor in Council. In it we reported information that had been supplied to us by Mr. Warren Hart concerning an alleged murder to which he had referred publicly in a television interview broadcast in January, 1979, on CFCF-TV, Montreal.

We considered that the information should be communicated to the Governor in Council so that the Government could in turn communicate it to the Attorney General of Ontario for investigation. We add that we have been advised that the information was communicated to the Attorney General of Ontario and that the police force having jurisdiction on criminal matters in Ontario conducted an investigation.

We do not intend to publish our Special Report, for in it we did not assert the truth or the contrary of the information given to us by Mr. Hart, and we consider that it would be unfair to an individual, who was named, to publish what as far as we were concerned was an uninvestigated allegation.

August 5, 1981

NOTE

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

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

A complete set of the transcripts of the public hearings of the Commission may be found at the following libraries:

Faculty of Law
University of Victoria
Victoria, British Columbia

Vancouver Public Library
750 Burrard Street
Vancouver, B.C.

Library
Faculty of Law
University of Alberta
Edmonton, Alberta

Library
University of Saskatchewan
Saskatoon, Saskatchewan

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Windsor, Ontario

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Palais de justice
12, rue St-Louis
Québec, Québec

Bibliothèque de la Ville de Montréal
Montréal, Québec

Dalhousie University Library
Halifax, Nova Scotia

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PART I

GENERAL INTRODUCTION

1. Our terms of reference, as set forth in our Commission, and the Order-in-Council (P.C. 1977-1911) authorizing its creation, are as follows:

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

2. Our Second Report, entitled "Freedom and Security under the Law", dealt essentially with the mandate given to us in paragraph (c), cited above. We did, however, also cover certain aspects of the mandate found in paragraphs (a) and (b), particularly in Part III of our Report where we reported in general terms on a number of practices that have been employed by the R.C.M.P. and that were or might have been "activities... not authorized or provided for by law", and on the "extent and prevalence" of such activities. We sought to avoid, as far as possible, the reporting of specific acts or activities. We made that effort for two reasons.

3. First, the description of specific situations was not necessary to the reasoning that led to our recommendations in matters of policy and law.

4. Second, the description of specific situations cannot be accomplished adequately without naming the individuals who were involved, and naming individuals may be taken to imply comment on their conduct. Where such comment would be negative, we could not report unless a notice was first given to the individual of the charge of misconduct that might be made against him in the Report, and we gave him an opportunity to make representations in person or by counsel. Such a procedure is required by section 13 of the

Inquiries Act. This procedure is lengthy and requires painstaking care. It could not be completed until very recently. Consequently, it was not possible to include such matters in our Report on policy and legal questions submitted in January 1981.

5. The process of giving notices and hearing representations in response to them has been completed and we are therefore now in a position to deal, in this Third Report, with a number of incidents involving conduct of named members of the R.C.M.P. We shall state whether, in our opinion, the conduct of certain individuals was "not authorized or provided for by law".

6. In addition to dealing with the specific incidents, we shall also cover, in this Report, several matters which fall within paragraph (c) of our Commission. They were not included in our Second Report, either because the research has been completed since submission of that Report, or because they have to be discussed in conjunction with a particular incident in order to be understood.

7. Although this Report is essentially a catalogue of a number of incidents, we have attempted to structure it not only so that conclusions can be reached with respect to each incident but also so that the incidents can be placed within a broader framework. We therefore examine first, in Part II, the extent to which senior government officials and Ministers, in the context of Cabinet committees and interdepartmental committees, were made aware, in general terms, of the fact that the R.C.M.P. were committing acts "not authorized or provided for by law". We then narrow the focus, in Part III, to an examination of the degree of knowledge by senior government officials and Ministers of particular practices "not authorized or provided for by law" of the R.C.M.P. The chapters in Part III correlate with chapters in Part III of our Second Report where we described those practices in detail.

8. The chapters of Parts IV, V and VI contain descriptions of the many incidents that we have inquired into, and the conclusions we have reached, concerning the participants. We have divided these incidents into three categories, based on the conclusions that we have drawn and the recommendations which we have made with respect to the participants. In the first category, which are all found in Part IV, although we may have been critical of individuals involved, we have made no recommendations for any further consideration of their conduct, for reasons stated in the introduction to that Part. Part V contains a number of incidents involving conduct on the part of members of the R.C.M.P. which, although not in our opinion unlawful in any other respect, might be contrary to the provisions of the R.C.M.P. Act and thus make the members subject to internal disciplinary proceedings. The incidents described in Part VI all give rise to conduct by members which may, in our opinion, have been illegal.

9. Having reviewed all the incidents, we turn, in Part VII, to a discussion of the factors which might be considered by the appropriate authorities in deciding what, if any, action ought to be taken, by way of prosecution or disciplinary proceedings, against individuals whose conduct is considered to be in breach of the general statute law or the R.C.M.P. Act.

10. Finally, in Part VIII, we make our recommendations with respect to publication of this Report. Those recommendations are made with a view to ensuring the fairest possible treatment for individuals who may be prosecuted or disciplined for their conduct.

11. This Report on a number of specific incidents and general practices involving members of the R.C.M.P., and like parts of our Second Report, is based on our formal hearings, interviews with officials within and outside the R.C.M.P., and examination of documents. Our report as to specific incidents is almost, but not entirely, the product of formal hearings. One exception to that generalization is the selection of matters that have arisen principally from complaints made to us by members of the public (Part IV, Chapter 10), as to which our Report is based mainly on the work of our investigators. Early in most chapters we list the volumes in which the testimony concerning the subject-matter can be located, but we do not, in the text, give page references for each point. The reader who wishes to refer to the transcripts will have little difficulty in locating the testimony in which he is interested. However, in some chapters where the testimony concerning the subject matter is located over a broad range of volumes we have cited page references throughout the text.

12. The scholar, journalist or general reader who in the future reviews the transcripts of our public and *in camera* hearings will find passing references to problems, or sometimes detailed hearings about particular matters, that are not referred to in any way in our Reports — not even in the classified Reports delivered to the Governor in Council. This should not occasion surprise. The absence of a discussion of such a matter in any of our Reports will mean no more than that we concluded, after inquiring into the matter, that there was no object in our reporting on it from the point of view of either paragraph (b) or paragraph (c) of our terms of reference. In other words, we concluded that the evidence did not establish that there was any "action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law" (para. (b) of our terms of reference). We felt it was not "necessary" and "desirable in the interest of Canada" to refer to the matter in our Reports in order to make a full and informative report "regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibilities to protect the security of Canada" or to give advice as to the "means to implement such policies and procedures" or "the adequacy of the laws of Canada as they apply to such policies and procedures" (para. (c) of our terms of reference). Another way of putting the point we are making is that some of our inquiries have led, in the result, to what in our opinion have been "blind alleys" in terms of whether we need to report on them.

13. In this Report we describe the conduct of a number of individuals as being "not authorized or provided for by law" or as "unacceptable" or "improper". An explanation of what we mean by those words is necessary before we move to a review of the conduct of the individuals.

The meaning of activities not authorized or provided for by law

14. In our Second Report we explained how we have interpreted the phrase "not authorized or provided for by law". For ease of reference, we reproduce as follows what we said:

> 38. In our opening statement on December 6, 1977 (Appendix D), we stated that the words "not authorized or provided for by law" directed us to inquire into and report on acts which were offences under the Criminal Code or under other federal or provincial statutes, or were wrong in the eyes of the law of tort in the common law provinces or of the law of delict in Quebec. We stated also that in interpreting those words we did not intend to ignore the moral and ethical implications of police investigative procedures.
>
> 39. Also in our opening statement we pointed out that those words required us to examine the legislative and constitutional basis for the existence of the R.C.M.P. generally, and for the existence of the Security Service of the R.C.M.P. in particular.
>
> 40. In reasons for decision pronounced on May 22, 1980 (Appendix H), we added that those words also require us to examine whether a particular act or practice, even if not an offence or civil wrong, was nevertheless beyond the statutory authority of the R.C.M.P., or was itself not authorized by normal procedures within the R.C.M.P.
>
> 41. In our opening statement we stated that in our report of a particular allegation we would give our view as to whether the conduct established by the evidence constituted an action or activity "not authorized or provided for by law". We confirmed that position in the reasons for decision dated May 22, 1980, but noted that our functions were not those of a court of law and that we could not render a judgment of acquittal or conviction. We stated that the duty imposed upon us to "report" facts that disclose an activity which was "not authorized or provided for by law" could not be performed unless we undertook an analysis as to whether the facts, *as disclosed by the evidence before us*, constituted an offence or a civil wrong or in some other way conduct "not authorized or provided for by law". At the same time, we recognized that, in situations where there is evidence as to the acts of specific individuals in specific cases, a dilemma arises as to how we can "report" publicly, including a commentary on the legal status of the acts as it appears on the evidence before us, without causing unfairness or the appearance of unfairness to any such individual if he is then tried on a criminal or other charge after all the publicity that the report may be given. In our separate Report on activities in which there is such evidence of specific cases we shall face this dilemma. It does not require further comment here. However, we might say that in a Practice Directive dated June 20, 1980 (Appendix I), we attempted to reduce the scope of the dilemma by directing that legal submissions concerning such cases where there is evidence about individuals (as compared with cases where there is merely evidence about general practices) be given to us in private.

The meaning of "unacceptable" and "improper" as those words are used in this Report, and their relationship to "activities not authorized or provided for by law"

15. In this and the next Parts of this Report, we frequently describe the conduct of a member or a past member of the R.C.M.P. as being "unacceptable" or "improper". It is appropriate to explain the sense in which those words are used.

16. At the outset, we wish to state that, in our opinion, it is axiomatic that any unlawful conduct is unacceptable and improper. One statute describing unlawful conduct to which we specifically draw attention is the R.C.M.P. Act, and particularly section 25 of that Act which deals with major service offences. The very broad provisions of section 25(o) make it a major service offence if a member

> conducts himself in a scandalous, infamous, disgraceful, profane or immoral manner.

As the interpretation of those words is ultimately in the hands of the Commissioner of the R.C.M.P., to whom the final appeal lies, it seems to us to be unhelpful to pass judgment on whether the conduct which we consider unacceptable or improper falls within any of those categories. However, whenever we do refer to the conduct of a serving member of the R.C.M.P. as unacceptable, we intend that, and we recommend that, the R.C.M.P. consider whether proceedings under section 25(o) or any other subsection of that section would be appropriate. If the person is no longer a serving member of the R.C.M.P., he would not appear to be subject to proceedings under section 25.

17. However, even if a form of conduct is not unlawful under the Criminal Code or any other federal or provincial statute (including the R.C.M.P. Act) or any non-statutory rule of law, it may nevertheless be considered to be unacceptable or improper. We therefore must discuss the sense in which we use those words.

18. Reference to dictionary definitions, both French and English, confirms a broad range of meaning attaching to the words "unacceptable" and "improper". Clearly the precise shade of meaning that the use of the words implies when they are used in this Report must depend on the context in which they are used. Thus, the commission of a serious crime is "unacceptable" or "improper" in a sense that evokes indignation more than a lawful act that is a violation of Force policy but does not have any consequences external to the Force. Assuming that the two examples represent extreme ends of the spectrum, there may be many shades of "unacceptability" or "impropriety" in between and it does not seem to us to be useful to attempt a detailed analysis in the abstract.

19. What is more important is that by our use of these words we are indicating that we think that the conduct described, on the part of members of any police force, particularly one with great pride in its record of upholding the law, such as the R.C.M.P., cannot be tolerated and is to be discouraged. The manner in which the discouragement should be attempted may vary from

attempts at positive remedial action to rebuke to specific punishment. Again, the result should depend upon the context. We shall ordinarily try to explain the reasons for which we think the conduct is unacceptable or improper, and our doing so will assist others to understand the sense in which we have used the words in a particular case.

20. In applying our judgment as to what the conduct of a good policeman should be, we have attempted to apply those standards which we believe to have been recognized in our Canadian society. We realize that in attempting to interpret and apply objective standards of such an imprecise nature, we must draw, to a certain extent, on our own assessment of what those standards are. Not only is there no avoiding that process: we believe that that is what, after all, is expected of Commissioners of an Inquiry.

21. Our use of the words "unacceptable" and "improper" is in each case a rebuke to the person concerned. The degree of criticism will depend on the reasons that are given or that may be obvious in the circumstances. In arriving at a conclusion that a member's conduct was "unacceptable" or "improper", we shall take into account the context of the conduct — the circumstances that gave rise to it and surrounded it. The presence or absence of a malicious intent, the presence or absence of a motive of self-interest, the prejudice that may have been caused to someone or its absence, the effect of the conduct on the reputation and honour of the police force, the degree of seniority of the person whose conduct is in question, whether the conduct was an independent act or one that was part of an "accepted" systematic practice, whether the conduct represented disobedience or mere lack of judgment — these are among the circumstances that will be taken into account. No body of jurisprudence exists to guide us in weighing the conduct of members when we are assessing "acceptability" or "propriety" apart from the commission of offences. The fact of rebuke by a Commission of Inquiry may itself serve as a warning to the members and to other members in the future not to engage in such conduct. As we have said, whether any further action of a disciplinary nature should be taken is a matter for the discretion of the R.C.M.P. according to its proper procedures.

22. We consider this to be an appropriate juncture at which to make recommendations as to how our findings as to unlawful, unacceptable and improper conduct should be dealt with. In our opinion the public ought to be informed as to the disposition of the charges of misconduct made by us against members. We recommend that the Solicitor General and the Inspector of Police Practices (a position whose creation we recommended, and whose functions we defined, in our Second Report, Part X, Chapter 2) should keep under continuous review (a) the manner in which the provincial and federal attorneys general deal with the potential illegalities identified by us, and (b) the way in which the R.C.M.P. deals with members whose conduct is found by us to be unacceptable or improper. We further recommend that, within two years of the publication of this Report, and periodically thereafter, the Solicitor General report publicly on the status of each case of misconduct. Those cases which emanate from the Security Service, and are of a sensitive national security nature, should be referred to the Parliamentary Committee on Secu-

rity and Intelligence, whose creation we also recommended in our Second Report. Similarly, the Solicitor General should expect to be fully informed from time to time by the Commissioner of the R.C.M.P. as to disciplinary proceedings launched in regard to the matters we have reported on and their result (including the nature of punishment imposed). The Commissioner should report also as to decisions taken not to institute disciplinary proceedings.

23. This is also an appropriate point at which to record a further recommendation. We consider that copies of the public version of both our Second Report and this Report should be readily accessible to members of the R.C.M.P. and to members of the security intelligence agency whose creation we recommended in our Second Report. We recommend that the R.C.M.P. and the security intelligence agency should submit plans to the Solicitor General that ensure that, at government expense, copies are made readily accessible to members of the R.C.M.P., personnel of the agency, and all Department of Justice counsel assigned to the R.C.M.P. The goal should be broad acquaintance with our recommendations throughout the R.C.M.P. We do not think it sufficient that members of the Force should know of our recommendations and our reasons only from newspaper accounts or such information as is officially issued by Headquarters. It is especially important that a copy be available to all members who are involved in training programmes, whether they are initial training programmes or programmes for experienced members.

The relationship of deceitful conduct by members of the R.C.M.P. toward the government, to the notion of "unacceptability"

24. It may here be pertinent to give an example of conduct which in our opinion is "unacceptable" even though the Commissioner of the R.C.M.P. may not, perhaps, regard it as covered by any of the adjectives found in section 25(o) of the R.C.M.P. Act. We refer to conscious misleading of a Solicitor General or of a Parliamentary Committee as to some fact, by a member of the R.C.M.P. Such conduct is unacceptable. In this regard we can see no difference between a Commissioner or Deputy Commissioner or other officer of the R.C.M.P. or a Director General of the R.C.M.P. Security Service, and a Deputy Minister or Assistant Deputy Minister or other public servant in any other department of government. In both categories, surely, the public servant, be he policeman or not, is bound to be truthful, candid and forthcoming with his Minister. Indeed, he is "bound" not only by propriety and ethics but also by law. For, if he is not truthful, forthright and candid, it seems to us that he fails to carry out a duty that is implied in his contract of employment — a duty to be all those things to his Minister, and indeed to any committee of Ministers or public servants or of Parliament to which he may be called upon to report. A failure to carry out that duty may quite properly, to use the words found in our terms of reference, be described as an "activity. . . not authorized by law".

25. When we speak of "truth", "candour" and being "forthcoming", we intend to convey that a Minister is entitled to expect a public servant to meet those standards not only when a Minister expressly asks a question, but even when silence will cause a Minister to be misled or to be ignorant of that which

his position in responsible government should require him to know. It would therefore be unacceptable to attempt to prevent the Minister from learning of illegalities being committed by members of the Force, and it would also be unacceptable not to volunteer such information, if such be known. An Assistant Commissioner of the Force told us:

> Q. I think that to bring this thing to a level of understanding, at least, and not necessarily of agreement, do you not see that hiding the truth is a lie, form of lie?
>
> A. No, sir. I see a great difference between lying to a Solicitor General, if he asks you a question, and not volunteering information.
>
> (Vol. 190, p. 28063.)

We fail to appreciate the difference. The same officer told us in January 1980:

> I would have thought that after all this time your Commission has been sitting, it would have become rather obvious that the Security Service kept certain operational things from the Solicitor General.
>
> (Vol. 190, p. 28058.)

His candour was startling — even though we had then completed over two years of our inquiry. For, although it is clear from other remarks made by that officer that, in discussing the period up to 1977, he was not suggesting that members of the Security Service had lied to Solicitors General, he clearly accepted that the management of the Security Service had, by its silence "... kept certain operational things from the Solicitor General". He said he was thinking of such things as Operation Cathedral ("the opening of mail was clearly illegal") (Vol. 190, pp. 28053-4). The following question and answer then appear:

> Q. ... are you stating today openly and unequivocally that the Force had meant never to let the Solicitor General, whoever he was, know of practices or operations that were not authorized or provided for by law?
>
> A. Yes, sir.

26. Until such a senior officer made those remarks to us, although we had a suspicion that there might be some such underlying reason, we had been prepared to accept the explanations offered to us that several incidents apparently involving lack of candour were either aberrations from the accepted norms of conduct or, in certain cases, could be subject to a different interpretation. We had assumed that the senior management of the R.C.M.P. would find it natural to be candid and open with the civilian authority. The issue of candour to Ministers had already been raised in connection with specific practices, but there had, until then, been no suggestion — at least none that had made an impression upon us — that the issue should be scrutinized in a more general fashion. We referred to the issue in very general terms in our Second Report, Part III, Chapter 1. The issue is reflected in more specific terms in several chapters of this Report: see, for example, all of Part V.

The conduct of senior public servants, Ministers and other persons not members or ex-members of the R.C.M.P.

27. In this Report we shall also report on the extent to which persons who were senior public servants or Ministers participated in, or knew of and tolerated, the acts of members of the R.C.M.P. reported on. In our Second Report this is what we said concerning our interpretation of our terms of reference in regard to such persons:

> 45. In the reasons of October 13, 1978, we concluded that our duty to report on the facts "relating to any investigative action or other activity" involving "members of the R.C.M.P. that was not authorized or provided for by law" might result in our reporting "whether members of the R.C.M.P. who, in our opinion, have, or might be held in a court to have, committed a wrongful act, were doing so upon the direction or with the consent or at least without the disapproval of a Minister of the Crown, for that might be a fact which any Attorney General might consider relevant to the process of his deciding whether or not to prosecute the members of the R.C.M.P.". We added that our Report would be incomplete as to relevant facts, and unfair to any members of the R.C.M.P. against whom in our Report we might make a "charge of misconduct" (to use the language of section 13 of the Inquiries Act) and who might otherwise feel that facts tending to exonerate them had not been brought to light, unless we inquired into and reported on the extent to which such members had express or tacit authority from Ministers to perform wrongful acts. We now add that the considerable time we have taken to examine the issues of approval or knowledge or toleration, express or implied, by government officials of wrongful acts by members of the R.C.M.P. has led us inevitably into the receipt of much testimony and the examination of many documents which relate to the relationship between government officials and the R.C.M.P. This testimony and these documents have been invaluable to us in giving us a comprehension of that relationship as a formulation for our recommendations under paragraph (c). As we, in this Report, summarize this evidence as a preliminary to making recommendations as to the future relationship between the government and the R.C.M.P. or between the government and the security intelligence agency, it will be difficult to avoid using language which may appear to some readers as an expression of opinion about the quality of the conduct of a Minister or his competence. Because of this, we think that it is important that we say something about our interpretation of our terms of reference as they may relate to the review of political judgment or the quality of decisions made by Ministers of the Crown.
>
> 46. We have had no hesitation in considering ourselves entitled to inquire into, and report on, any implication on the part of such persons in specific acts "not authorized or provided for by law" in which members of the R.C.M.P. are involved, or any implication on the part of such persons in wrongdoing generally by members of the R.C.M.P. This would include complicity or knowledgeable acceptance before the event, and also knowledge after the event. Moreover, we have inquired into, and will report on, the extent to which such persons knew of the existence of any policies or practices of the R.C.M.P., the implementation of which would result in acts not authorized or provided for by law.

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

28. Our terms of reference empower us to conduct investigations to determine "the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P." and "to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law." No one has suggested to us that we could not report *facts* that might involve persons who are not members of the R.C.M.P. — if doing so were considered by us to be necessary to give effect to our terms of reference. It was, however, forcefully submitted to us that our terms of reference did not authorize us to "investigate" the conduct of non-members of the R.C.M.P. or to "report" our opinions or judgments about their conduct. We think this submission has considerable merit, subject to what we say in the following paragraph. We think it fair to add that this submission was first made, not by counsel for any Minister or public servants, but, very ably, by counsel for a human source.

29. In the case of senior public servants or Ministers, we propose to report upon their conduct as it relates to activities involving members of the R.C.M.P. that were not authorized or provided for by law, in two cases:

Firstly, if we consider that the conduct amounts to:

(i) active participation before or after an event, or

(ii) knowledge of illegal activity combined with a failure to stop it or deal with it in some other way, or

(iii) wilful blindness;

and secondly, if it is related to, or part of, the relationship between government officials and the R.C.M.P. and is thus, in our opinion, relevant to the consideration of the policies and procedures governing the activities of the R.C.M.P. under paragraph (c) of our terms of reference. We will, quite naturally, be referring on a number of occasions to the fact that conduct does not fall within any of the above-noted categories, and hence no criticism of the person involved is warranted.

30. In the case of other persons (including human sources) who are not members or past members of the R.C.M.P., whose conduct has come before us, their conduct will be reported on by us if they participated actively in a given activity with, or upon the encouragement of, members of the R.C.M.P. Since there may be some doubt as to the ambit of our terms of reference in such cases as far as passing judgment is concerned, we will report only the facts that might involve such persons to the extent considered necessary to give effect to what is clearly within our terms of reference but we will leave it to others to pass judgment on such facts as they affect those persons.

PART II

GOVERNMENT KNOWLEDGE OF R.C.M.P. ACTIVITIES NOT AUTHORIZED OR PROVIDED FOR BY LAW

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NOTE BY THE COMMISSIONERS

There have been no deletions to Part II except for two short passages — one, from a letter written by the Honourable Jean-Pierre Goyer to the Honourable Herb Gray (ex. M-23), the other, from a letter written by Mr. Starnes to the Honourable Jean-Pierre Goyer (Ex. HC-2). The nature of these deletions is explained in footnotes found on pages 28 and 29 where we quote from these letters.

August, 1981

INTRODUCTION

1. The mandate of this Commission is to conduct an investigation into the extent and prevalence of the investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law, to inquire into "the relevant policies and procedures that govern the R.C.M.P. in the discharge of its responsibility to protect the security of Canada" and, further, to "advise as to any further action that the Commissioners may deem necessary or desirable in that public interest". Our investigation of these "relevant policies and procedures" governing the R.C.M.P. has led us to examine the knowledge of the Ministers of the Crown and the Cabinet Committee members responsible for the conduct of the Force in the discharge of its responsibility.

2. In carrying out our mandate we have heard and examined detailed evidence over many months with respect to whether or not responsible Ministers of the Crown (including successive Solicitors General) and senior officials of government were aware of particular activities engaged in by the R.C.M.P. which were not authorized or provided for by law. That evidence is reviewed in Part III of this Report. The question for consideration in the present part is whether those Ministers of the Crown and senior officials of government were made aware of such activities in a general way, that is without being provided with, or requesting, specific instances.

3. In this connection we repeat what was said by this Commission in Part I of its Second Report:

> We have had no hesitation in considering ourselves entitled to inquire into, and report on, any implication on the part of such persons in specific acts 'not authorized or provided for by law' in which members of the R.C.M.P. are involved, or any implication on the part of such persons in wrong-doing generally by members of the R.C.M.P. This would include complicity or knowledgeable acceptance, and also knowledge after the event. Moreover, we have inquired into, and will report on, the extent to which such persons knew of the existence of any policies or practices of the R.C.M.P., the implementation of which would result in acts not authorized or provided for by law.

4. Why are we reporting the state of knowledge of senior public officials and Ministers? First, because whether they had such knowledge, and, if they did, what they did or not do in consequence, is relevant to assist the Governor in Council and other readers in appreciating the "policies and procedures" that have in the past governed "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada". This in turn will enable the Governor in Council and other readers to understand the system of controls which we have proposed in our Second Report.

5. Second, if such knowledge was imparted to a responsible Minister by the Director General of the Security Service or the Commissioner of the R.C.M.P., and a positive direction to cease such activities was not given by the responsible Minister, then, depending upon the particular facts, it may be argued, whether successfully or not, that there was a tacit assent to the continuation of such activities. Such inference, if it were to be drawn properly from the facts, is therefore related to "the relevant policies and procedures that govern the R.C.M.P. in the discharge of its responsibility to protect the security of Canada". It may also be relevant to the position in law of members of the R.C.M.P. who have committed offences. For, while in Part IV of our Second Report we disagree with the contention, it might be contended in a court of law that knowledge at the level of Ministers or senior government officials that the R.C.M.P. had been engaged in illegal activities in a general sense is relevant to the guilt or innocence at law of the individual members of the R.C.M.P. involved in such activities. If they are found guilty of illegal acts, it might be contended that such knowledge is a consideration properly to be taken into account by the court in imposing sentence.

6. We dealt with this issue in our Reasons for Decision of October 13, 1978, (Second Report, Appendix "F") when we said:

> Among the facts which the Commission will wish to report in some cases will be whether members of the R.C.M.P. who, in the opinion of the Commission have, or might be held in a Court to have, committed a wrongful act, were doing so upon the direction or with the consent or at least without the disapproval of a Minister of the Crown, for that might be a fact which any Attorney General might consider relevant to the process of his deciding whether or not to prosecute the members of the R.C.M.P. . . .
>
> Finally, to interpret the terms of reference in such a way as to permit the Commission to report on wrongful acts by members of the R.C.M.P. without also reporting on the extent to which they had from Ministers express or tacit authority to perform those acts would not only compel the Commission to deliver an incomplete report on the relevant facts but would also be unfair to the members of the R.C.M.P. who while 'charged' by the Commission (to use the words found in Sections 12 and 13 of the Inquiries Act) would have reason to feel that facts tending to exonerate them perhaps from guilt and perhaps from punishment had not been inquired into, or had not been reported upon, and would never come to the attention of the appropriate Attorney General.

7. Again in Part IV of our Second Report we said:

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

8. The issue of whether Ministers of the Crown were aware of illegal R.C.M.P. activities has been explored by taking the testimony of Prime

Minister Trudeau, some former Solicitors General, their Deputies, certain other public servants, the present and some past Commissioners of the R.C.M.P. and the present Director General of the Security Service and his predecessor, covering the period from 1968 onward. We have also examined documents in R.C.M.P. files, which occasionally have included internal R.C.M.P. memoranda summarizing what was said at meetings of Cabinet Committees and of committees of public servants which had been attended by R.C.M.P. officers.

9. When, in the fall of 1978, our counsel first examined some of the persons referred to, it became apparent that our inquiry into this issue — which by this time had been raised by allegations by former Commissioner Higgitt and Mr. Starnes, the former Director General, that the record would show that Ministers had been informed — could not be regarded as thorough unless we had access to the Minutes of meetings of Cabinet and of Cabinet Committees. In our reasons for decision dated October 13, 1978 (Second Report, Appendix "F") we recognized the importance that has been attached by the courts to the confidentiality of Cabinet minutes and other high level minutes and correspondence, but we also listed some potentially countervailing considerations. Later, in reasons for decision delivered *in camera* on February 23, 1979, part of which was reproduced in our Second Report, Appendix "Z", we pointed out that one of those considerations was as follows:

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

We added:

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

for the interest which arises out of the continuation of these proceedings.[1] [our emphasis]

We also stated:

> ... it is desirable and in the public interest not only to produce in public such documents as disclose government malfeasance, but also, when government malfeasance is alleged or suspected, to produce such documents as exonerate those suspected from any such suspicions. In the courts, what is commonly described as Crown privilege does not apply in criminal cases, as Viscount Simon said in *Duncan* v. *Cammell Laird*.[2] We have already observed that it does not apply to protect an accused, nor ought it to apply so as to prevent an accused from raising a defence. As Kellock J. said in the Supreme Court of Canada in *Reg.* v. *Snider*:[3]
>
> ... there is ... a public interest which says that 'an innocent man is not to be condemned when his innocence can be proved': per Lord Esher M.R. in *Marks* v. *Beyfus*.[4]
>
> Thus evidence of sources of police information "must be forthcoming when required to establish innocence at a criminal trial": per Lord Simon of Glaisdale in *D.* v. *National Society for the Prevention of Cruelty to Children*.[5] It is true that the proceedings before this Commission are not criminal proceedings and this is not a court of law. Nevertheless, questions have arisen before this Commission as to whether members of the R.C.M.P. have committed criminal acts, and the Commission may conceivably in its report make a 'charge' of misconduct against them. Those members have a legitimate interest in being able to make representations to the Commission, if the facts permit them to do so, that their conduct was in accordance with policy accepted, condoned, or even encouraged by senior officials of government and cabinet ministers. Yet they are in no position to do so unless the evidence in this regard is made public. (This is the fifth of the considerations listed in the Commission's reasons of October 13, 1978.) Moreover, the conduct of such senior officials and Cabinet Ministers may be the subject of a 'charge', and they cannot effectively make representations to the Commission unless the documents disclosing policy vis-à-vis the R.C.M.P. in relation to these matters are made public.

10. Those observations were delivered in regard to the rendering public of certain passages from high level documents that had already been referred to by former Commissioner Higgitt and Mr. Starnes at *in camera* hearings. The same reasoning applies to the question whether, if we, as Commissioners, obtained access to them, we should be able to produce them, even *in camera*, in the presence of such persons as counsel for Messrs. Higgitt and Starnes.

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[1] (1978-79) 142 C.L.R. 1 at pp. 97-100. There are slight clerical differences between the decision in the unofficial form in which it was available to us in February 1979, and the decision as now reported in the Commonwealth Law Reports. We have revised our quotation here so as to comply with the reported decision.

[2] [1942] A.C. 624 (House of Lords).

[3] [1945] 4 D.L.R. 483 at pp. 490-1.

[4] (1890) 25 Q.B.D. 494 at p. 498.

[5] [1977] 2 Weekly L.R. 201 at p. 221.

11. Because our counsel had asked the government to produce some such documents, Order-in-Council P.C. 1979-887 (reproduced in our Second Report, Appendix "J") was adopted on March 22, 1979. It read, in part:

> WHEREAS the said Commissioners have requested access to and copies of Cabinet and Cabinet Committee minutes which are relevant to the matters within the Commission's terms of reference as set out in the said Order in Council;
>
> WHEREAS it is a matter of convention and practice in Canada that access to records of Cabinet meetings and of Cabinet Committee meetings has been restricted to the Prime Minister and the Ministers who were members of the Cabinet at the time the meetings took place, the Secretary to the Cabinet, and such persons on the Secretary's staff as the Secretary authorizes to see them, on a confidential basis, where necessary for the proper discharge of their duties;
>
> WHEREAS this convention and practice is, in the opinion of the Committee, essential for the proper functioning of the Cabinet system of government;
>
> WHEREAS the Prime Minister, on behalf of his Ministry, has recommended to the Committee that, having regard to the particular nature of the inquiry being conducted by the Commission, an exception be made to the convention and practice in order to enable the Commissioners to ascertain whether any such documents relating to the terms of reference of the Commission contain evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, or evidence implicating a Minister in such act; and
>
> WHEREAS the Secretary to the Cabinet, as the custodian of the records of all Cabinet and Cabinet Committee meetings of previous ministries, has recommended the adoption of such an exception in respect of such records.
>
> THEREFORE, the Committee of the Privy Council, on the recommendation of the Prime Minister, and with the concurrence of the Secretary to the Cabinet, advise that:
>
> (1) subject to paragraph (5)* the Commissioners shall be granted access to read the minutes of any Cabinet or Cabinet Committee meeting held prior to the establishment of the Commission which relate to the terms of reference of the Commission as set out in Order in Council P.C. 1977-1911 and which on reasonable and probable grounds they believe provide evidence establishing the commission of any act involving members of the RCMP or persons who were members of the RCMP that was not authorized or provided for by law, or evidence implicating a Minister in such act;
>
> (2) where the Commissioners are of the view that any minute or portion of a minute to which they have been granted access as provided for in paragraph (1) above contains evidence establishing the commission of any act involving members of the RCMP or persons who were mem-

* This paragraph is not quoted because it relates to access to Minutes of the administration of the Rt. Hon. John G. Diefenbaker.

bers of the RCMP that was not authorized or provided for by law, they may request the Secretary to the Cabinet to deliver a copy of any such minute, or portion thereof, to the Commission, and the copy of any such minute or portion thereof so requested shall be delivered to the Commissioners;

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

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

12. As a result of this Order-in-Council, we, from time to time, read certain Minutes of meetings of the Cabinet, of Cabinet Committees and meetings of Ministers of the administration of the Right Honourable Pierre Elliott Trudeau from 1968 to 1974, certain drafts of such Minutes, and certain handwritten notes of such meetings. The Clerk of the Privy Council interpreted paragraph (1) of P.C. 1979-887 in a liberal fashion so that we had access to such documents upon request.

13. However, there were limitations on our ability to satisfy ourselves as to whether we had seen all such minutes and documents which were relevant to our concerns. Those limitations arose out of the convention of the confidentiality of cabinet documents. That convention was modified to a certain extent under the terms of the Order-in-Council. Under the Order-in-Council, before we could examine any minute or document, we had to have some ground for believing that it was relevant. We could arrive at that conclusion in one of two ways. Either some external source, such as testimony of an individual or examination of other documents, would have to ignite our interest, or a review of the indexes to Cabinet documents would have to give some inkling of relevant information which might be found in a particular minute or document.

14. With respect to external sources, we reviewed such documents in the possession of the R.C.M.P. and asked such questions of witnesses as we considered necessary to identify possible relevant minutes and documents relating to meetings of Ministers, whether in Cabinet, Cabinet committee or otherwise. We know of no other way to tackle this aspect and we consider what we have done in this regard to have been as thorough as it could be.

15. We are less sanguine about the process of examination of the indexes to Cabinet documents and minutes. For this process to work in a wholly satisfactory way, we would have to be sure that the indexes disclosed sufficient information to enable us to identify any relevant minute or document. We have no way of satisfying ourselves that they do. Yet, the alternative to the process followed would have been an examination of all Cabinet documents and minutes — something which would clearly not have been acceptable to any

government or the custodians of the documents and minutes. However, we are bound to note that, without such full and unrestricted access, our inquiry must be regarded as being less thorough than if we had had unlimited access.

16. However, we have had access to those minutes that appeared from either other sources or an examination of the indexes to be of potential importance, particularly during the period of November and December 1970. To that extent we believe our inquiry to have been as thorough as is consistent with the traditions of Cabinet confidentiality. It has been a long and difficult process, but the result, we think, enables the history to be narrated accurately in what follows, so far as is allowed by the sometimes enigmatic quality of written records and the failure of human memory.

17. As a result of the access provided pursuant to Order-in-Council P.C. 1979-887, dated March 22, 1979, we attended at the Privy Council Office, on March 30, 1979, to examine the minutes of Cabinet meetings and meetings of Cabinet Committees that, from the evidence of such witnesses as Mr. Starnes and Commissioner Higgitt, appeared to us as of potential relevance to the issues before us. As a result of reading a section of the minutes of the meeting of the Cabinet Committee on Priorities and Planning that had been held on December 1, 1970, we requested delivery to us of a copy of that part of the minutes. For reasons that included the intervention of two federal elections, in May 1979 and February 1980, and a question whether we had satisfied the conditions set forth in P.C. 1979-887 that entitled us to such delivery, it was not effected until April 30, 1980. The delivery was not effected under the provisions of the Order-in-Council. The Clerk of the Privy Council stated, in his letter delivering the minutes to us, that the Deputy Attorney General and government counsel had advised him that our letters requesting delivery of the whole or a portion of the minutes of the meeting did not comply with the provisions of Order-in-Council P.C. 1979-887. The Clerk of the Privy Council further advised that

> Notwithstanding this conclusion, the Prime Minister, in the exercise of his prerogatives, has decided to authorize government counsel to deliver to you a copy of the entire portion of the minute of the December 1, 1970 meeting referred to in your letter of April 10, 1979, together with related material. The Prime Minister has made this decision in order to remove any question whether the Commission had before it the material necessary to enable it to arrive at a final determination of the matters under consideration by it.

At the same time we were given a copy of some longhand notes that had been made at the meeting of December 1, 1970, by the two recording secretaries, Mr. L.L. Trudel and Mr. M.E. Butler. Hearings based on these documents were held *in camera* on the following dates, when the following witnesses were heard:

June 26, 1980 — Mr. John Starnes; Mr. Leonard Lawrence Trudel (Vol. C96)

July 22, 1980 — Right Honourable Pierre Elliott Trudeau (Vol. C98)

September 18, 1980— Mr. Robert Gordon Robertson (Vol. C108)

December 4, 1980 — Mr. Raoul Carrière; Mr. Leonard William Higgitt; Mr. Peter Michael Pitfield (Vol. C117A)

January 28, 1981 — The Honourable John Napier Turner; Mr. Donald Henry Christie (Vol. C118)

February 25, 1981 — Mr. Michael E. Butler (Vol. C119)

At these hearings the extract from the Minutes, the extract from the notes by Mr. Trudel and the extract from the notes by Mr. Butler were marked as a single exhibit: Ex. VC-1.

18. Two of our senior counsel were thoroughly familiar with the evidence that had been developed, with a great deal of difficulty, in regard to studies and discussions at high levels of government in 1970 concerning the difficulties faced by the R.C.M.P. in carrying out its security and intelligence work in the framework of existing laws. One or other of these two counsel, or our Secretary, interviewed every additional person who was shown by the minutes as being present at the meeting of December 1, 1970, Cabinet Ministers and officials alike, except one who was living in Europe. Every person interviewed, as was the case with every person who testified, lacked any memory of the words attributed to Mr. Starnes in Mr. Trudel's notes, or of the discussion recorded in the notes of the two secretaries and in the Minutes. We therefore called to testify only those persons who were most likely to have been specially interested in the subject matter because of the positions they held in 1970, and who therefore were more likely to have a memory of the matter than the others.

19. When we were about to prepare our Report on what had occurred at various discussions in 1970, including that of December 1, the Privy Council Office delivered to us (on March 27, 1981) a copy of some longhand notes that had been made at a meeting of the Security Panel on November 27, 1970, by its recording secretary, Mr. Donald Beavis. We had already inquired, as best we could, into certain discussions that occurred at that meeting. We were advised by the Privy Council Office that these longhand notes had been discovered by the Privy Council Office staff not long before they were delivered to us. Mr. Beavis, who had testified before us on other matters on February 12, 1980 (Vol. C84, released publicly in edited form as Vol. 313), died in August 1980. Because the notes contained words which Mr. Beavis attributed to Mr. Starnes at that meeting that were strikingly similar to the words attributed to Mr. Starnes in Mr. Trudel's handwritten notes of the December 1 meeting, we held hearings as soon as possible — on April 2, 1981 — at which the witnesses were Mr. Starnes and Mr. R. Gordon Robertson (Vol. C129A). In 1970 Mr. Robertson was Secretary to the Cabinet and Clerk of the Privy Council, and he chaired the meeting of the Security Panel held on November 27. Neither Mr. Starnes nor Mr. Robertson had any memory of the words which the notes attributed to Mr. Starnes. As we considered it to be unlikely that other persons, shown in the minutes as having been present, would have any better memory than Mr. Starnes and Mr. Robertson of the events of ten years ago, we have not called any more of the persons present to testify in regard to what Mr. Starnes said at that meeting. In any event, we are, in our Report, treating the notes as acceptable evidence that Mr. Starnes did utter the words attributed to him in Mr. Beavis' notes.

20. As a final precaution, to ensure as best we could that there were no other documents or notes which we had not seen or been aware of, our Secretary wrote, on April 9, 1981, to the Clerk of the Privy Council. That letter read as follows:

> As you are aware, the Commission has inquired into certain subjects which appeared on the agenda of the following meetings:
>
> 1. November 24, 1970 — Meeting of the Cabinet Committee on Priorities and Planning
> 2. November 27, 1970 — Meeting of the Special Committee of the Security Panel
> 3. December 1, 1970 — Meeting of the Cabinet Committee on Priorities and Planning
> 4. December 21, 1970 — Meeting of the Cabinet Committee on Security and Intelligence
>
> The portion of the November 27, 1970 meeting which is of interest to the Commissioners is that relating to the discussion of an R.C.M.P. paper entitled "Police Strategy in Relation to the F.L.Q.". In that connection the Commissioners have examined the minutes of the meeting and the hand-written notes taken at the meeting by the recording secretary, Mr. Beavis.
>
> With respect to the December 1, 1970 meeting the relevant portion is that which dealt with Cab. Doc. 1323-70, which consisted of the "Maxwell Memorandum" and a two-page document entitled "Various Questions Raised by Law and Order Paper". With respect to this meeting the Commissioners have seen the minutes of the meeting and the handwritten notes taken at the meeting by the recording secretary, Mr. Trudel, and by the secretary of the committee, Mr. Butler.
>
> With respect to the December 21, 1970 meeting the relevant portion is that which dealt with a paper entitled "R.C.M.P. Strategy for Dealing with the F.L.Q. and Similar Movements". The Commissioners have seen the minutes of the meeting dealing with this subject matter. They have also seen a memorandum dated December 23, 1970 from Mr. Starnes to his immediate subordinate recording what took place at the December 21st meeting with regard to that paper.
>
> The purpose of this letter is to enquire from you as to whether, in addition to the documents the Commissioners have seen, as noted above, there are, so far as you are aware, any other documents in the possession of the Privy Council Office or elsewhere which record in any way the discussions which took place at the four meetings mentioned above with respect to the topics of concern to this Commission. The Commissioners would like your advice as to the existence of any and all such documents of which you are aware.
>
> Without limiting the above request, the Commissioners would like to examine the handwritten notes of the recording secretary at the meeting of December 21, 1970 or any other drafts or notes that may be available as they relate to the discussion of the documents mentioned above.
>
> Also, from an examination of the minutes of the November 27th meeting of the Security Panel and Mr. Beavis' handwritten notes made at that meeting, it appears most likely that the minutes were prepared not only

from his notes but from someone else's notes. Since Mr. Wall was also at that meeting, Mr. Robertson, in his testimony before the Commission, speculated that it was likely that Mr. Wall also had notes of the meeting. We have written to Mr. Wall asking him if he has any such notes in his personal possession but, having regard to the practice in the Privy Council Office, it is more likely that his notes, if they still exist, are in the possession of the Privy Council Office. The Commissioners would like to have those notes also made available to them.

I look forward to receiving your advice on the above matters.

The reply from the Clerk of the Privy Council, dated April 22, 1981, is as follows:

You wrote to me on April 9, 1981, enquiring about documents in the possession of the Privy Council Office, or elsewhere, which record in any way the discussions which took place at four meetings of Ministers and Senior Officials held during November and December, 1970. You asked on behalf of the Commissioners for my advice as to the existence of any and all such documents of which I am aware.

Following receipt of your letter, I instructed the Assistant Secretary, Security and Intelligence, to provide me with the information you requested. He and his staff, with the assistance of Privy Council Office Central Registry staff, have now completed a search of files touching upon the meetings in question, as well as some subject-matter files which it was felt might possibly have a bearing on the issues.

The search of Privy Council Office material has not established the existence of any material not previously identified for, and seen by, the Commissioners, or the Chairman acting on their behalf. In particular, we have found no handwritten notes of the recording secretary, or other notes relating to the discussions, which took place at the meeting of the Cabinet Committee on Security and Intelligence on December 21, 1970. No handwritten record of the discussion in the Security Panel at its meeting on November 27, 1970, other than that apparently recorded by Mr. Beavis, has been located. In this connection, I note that you have already written to Mr. Wall.

In reviewing the meetings referred to in your letter, I note that the Commissioners, but in one case the Chairman only, have seen or taken delivery of the following documents and written material relating to the agenda items of interest to the Commission:

1. *November 24, 1970* — Meeting of the Cabinet Committee on Priorities and Planning.

— Minutes of the meeting.

— Draft minutes of the meeting.

— Handwritten notes of the recording secretary.

2. *November 27, 1970* — Meeting of the Special Committee of the Security Panel.

— Minutes of the meeting.

— Handwritten notes of the recording secretary (apparently Mr. Beavis).

3. *December 1, 1970* — Meeting of the Cabinet Committee on Priorities and Planning.

— Minutes of the meeting.

— Draft minutes of the meeting.

— Handwritten notes of the recording secretary (Mr. Trudel).

— Handwritten notes of the secretary (Mr. Butler).

4. *December 21, 1970* — Meeting of the Cabinet Committee on Security and Intelligence.

— Minutes of the meeting.

As far as I, and my staff, are aware, this list represents the entirety of the material in the custody of the Privy Council Office which records the discussions which took place with respect to the matters referred to in your letter.

One further issue must be addressed in response to your letter. You have asked me to advise the Commissioners of the existence of documents of the kind to which you have referred, and of which I am aware, not only in the Privy Council Office, but elsewhere. You may wish to note that the existence of any record of the discussions at Cabinet and Cabinet Committee meetings taken or held by other than the Cabinet Secretariat would be a clear breach of the rules under which we have operated for many years. No one other than Secretariat officials, whose duty it is to record the sense of the discussion and to prepare the official minutes and decisions of the meeting, is authorized to make a record of it. Although the rule apparently has been breached from time to time by officials of other departments and agencies, I have no possible way of knowing if and when this occurs. However, you should be aware that, with the exception of documents discussed in previous correspondence with the Commission and the memorandum by Mr. Starnes, referred to in your letter, none have been drawn to my attention.

21. In response to our letter to him, referred to in the above exchange of correspondence, Mr. Wall advised us verbally that he had no notes in his possession and that he had destroyed all his notes while he was still employed in the Privy Council Office.

The nature of the evidence

22. A variety of witnesses, including Prime Minister Trudeau, several former or current Ministers of the Crown, Deputy Ministers and senior government officials as well as some former Commissioners and the current Commissioner of the R.C.M.P. and the former and the current Directors General of the Security Service, gave evidence with respect to the knowledge, or lack thereof, of responsible Ministers of the Crown and senior officials of government as to the particular activities of the R.C.M.P. which we have examined because they give rise to legal concerns. Several of them also gave evidence with respect to a body of documents presented before us and known collectively as the 'Law and Order Documents'.

23. Certain of these witnesses also gave evidence as to whether Senator George McIlraith was made aware, at a time when he was Solicitor General

and therefore responsible for the conduct of the Security Service, that the Security Service engaged in illegal activities in carrying out its responsibility to protect the security of Canada. Our summary of the evidence in this regard, and our conclusions, are found in a section at the end of this chapter.

24. The Law and Order Documents comprise two streams of documentation. The first stream began with the Record of Decision of the Cabinet Committee on Priorities and Planning of May 5, 1970 (Ex. M-86, Tab 2). That Committee directed that an interdepartmental committee comprised of senior officials of government prepare a "Law and Order" paper for consideration by the Cabinet Committee on Priorities and Planning (C.C.P.P.). The interdepartmental committee, formed as a result of this direction, was known as the Interdepartmental Committee on Law and Order (I.C.L.O.) and was chaired by the then Deputy Minister of Justice, Mr. Donald S. Maxwell. The final product of the Committee was a memorandum to the C.C.P.P. dated November 20, 1970, and expressed to be from the I.C.L.O. (Ex. M-36, Tab 7; MC-6, Tab 3). That memorandum, known before us as the Maxwell Memorandum, was ultimately dealt with by the C.C.P.P. at its meetings of November 24, 1970, and December 1, 1970.

25. The second stream of documentation comprising the Law and Order Documents finds its origins in the Cabinet Committee on Security and Intelligence (C.C.S.I.). At a meeting of the C.C.S.I. on November 6, 1970, the Committee requested that the R.C.M.P. prepare a Report setting out the Force's strategy to deal with the F.L.Q. and other similar movements (Record of Decision of the C.C.S.I. dated November 6, 1970, Ex. M-86, Tab 7). The final Report authorized by the R.C.M.P. pursuant to this request, entitled "R.C.M.P. Strategy for Dealing with the F.L.Q. and Similar Movements", (Ex. M-36, Tab 21; M-22) and being Cabinet Document S & I 14, came before the C.C.S.I. at its meeting of December 21, 1970.

A. THE INTER-RELATIONSHIP OF THE LAW AND ORDER DOCUMENTS AND THE ISSUE OF GOVERNMENT KNOWLEDGE OF SECURITY SERVICE ACTIVITIES

26. Given the existence of the Law and Order Documents and the contents of certain of these documents, the question arises whether Ministers or senior officials responsible for the conduct of the Security Service, were advised in 1970 by representatives of the R.C.M.P. that the Security Service, in carrying out its responsibilities, had, on occasion, engaged in activities which were "not authorized or provided for by law".

(a) The evidence of former Commissioner Higgitt

27. Former Commissioner Higgitt testified before us that he "did indeed" discuss with Ministers the concept that there are times when the Security Service of the R.C.M.P. needs to break the law, or may need to do so, if it is to do its job (Vol. 87, p. 14315). Mr. Higgitt stated that he did not have a precise

memory with respect to such a discussion or discussions but that he had had from time to time discussions at which he told Ministers of various things of this nature (Vol. 87, p. 14316). He testified that there were at least one or two documents to support his statement. In later testimony Mr. Higgitt stated that in these discussions what was being discussed was not the Security Service transgressing the law but rather "situations where this kind of thing [transgressing the law] was a possibility" (Vol. 87, p. 14358).

28. Mr. Higgitt was requested to indicate to us the documents upon which he relied to support his statement. He marked the following passages of the Law and Order Documents, which at the time were marked as exhibits before the Commission for identification only and thus not then disclosed publicly:

Ex. M-22: Memorandum for the Cabinet Committee on Security and Intelligence dated December 17, 1970, from D.F. Wall, Secretary, with attached copy of memorandum prepared by RCMP entitled "RCMP Strategy for Dealing with the F.L.Q. and Similar Movements" attached:

At pp. 2-3 of the RCMP paper:

> If such continuing revolutionary activities are to be effectively countered, an increased effort to penetrate movements like the FLQ by human and technical sources will have to be undertaken. We have had only limited success in being able to penetrate the FLQ and similar movements with human sources. Changes in existing legislation will be required if effective penetration by technical means is to be achieved. The greatest bar to effective penetration by human sources is the problem raised by having members of the RCMP, or paid agents, commit serious crimes in order to establish their bona fides with the members of the organization they are seeking to infiltrate. Among other things, this involves the difficult question of providing some kind of immunity from arrest and punishment for human sources (usually paid agents) who have ... to break the law in order successfully to infiltrate movements like the FLQ. What should be the responsibility of the government towards a member of the Security Service or an agent paid by it who is arrested for committing a crime in the line of duty as it were? What measures can be suggested by the law officers of the Crown to ensure that such persons escape a jail sentence and a criminal record without prejudice to their safety? Perhaps those clauses of the Letters Patent of the Governor General having to do with pardon might be resorted to in such cases, but it is difficult to see how this could be done without revealing the true role of the person concerned.
>
> It will be obvious from a reading of the account of the discovery by the RCMP of Mr. Cross and his abductors that this probably could not have been successfully accomplished without the interception of telephone conversations and that electronic eavesdropping was of assistance to the investigation. Yet it should be realized that the application of telephone interception techniques in coping with the FLQ, and, indeed, with similar revolutionary activity across Canada, has only been possible by a most liberal interpretation of the provisions of the Official Secrets Act. The Report of the Royal Commission on Security makes a number of useful comments about the interception of telephone conversations and electronic eavesdropping, and, in particular, about the importance of ensuring that any legislation contemplated to deal with such matters should contain a

clause or clauses exempting interception operations for security purposes from the provisions of the statute.

At p. 5:

10. In addition to these broad strategic plans, we propose to intensify our efforts in such obvious ways as the infiltration of the FLQ, selected surveillance, recruitment of members of revolutionary groups and the development of improved techniques to collect, collate and assess raw intelligence, e.g., computers and information systems analysis.

Ex. M-23: Letter dated July 27, 1971, from the Honourable Jean-Pierre Goyer to the Honourable Herb Gray — re access for RCMP Security Service to records of Department of National Revenue, Income Tax Branch:

... *To do this successfully it would be necessary to have access to your Income Tax Branch Records.

I understand Section 133 of the Income Tax Act creates difficulties in this regard but if you agree, I would like to determine by means of discussions between your officials and representatives of my department whether the requirement of the Security Service could in fact be met within the framework of existing laws and regulations and in a manner which would attract no attention or criticism.

Ex. M-26: Minutes of meeting of the Cabinet Committee on Security and Intelligence held December 21, 1970, at p. 9:

II. *RCMP Strategy for Dealing with the FLQ and Similar Movements*

The Committee agreed to defer consideration of document S & I-14 dated December 16, 1970, on this topic until a future meeting.

Ex. M-27: Memorandum dated December 23, 1970, from Mr. Starnes re: meeting of Cabinet Committee on Security and Intelligence December 21, 1970, at p. 2:

5. The Prime Minister said that he assumed I would like to have some discussion of the RCMP paper dealing with strategy, and, as a consequence, suggested that it be put aside to a later date. I assume that in practice this means that it will now not be taken until the Prime Minister returns from his Far Eastern tour late in January. Perhaps this is not too important except insofar as the paper we put up deals with the vexing problem of telephone interception. I do not think that we should sit idle waiting until the end of January on this score. I suggest, therefore, that Mr. Bennett, or some other competent person, get in touch with the Justice Department and find out precisely what is now being done on:

(a) Wiretapping legislation.

(b) Amendments to the Official Secrets Act.

Ex. M-29: Minutes of a meeting of the Special Committee of the Security Panel dated November 10, 1970, at p. 4:

In relation to the Interdepartmental Committee on Law and Order, the Deputy Minister of Justice said that, once an evaluation of the FLQ and similar organizations elsewhere was available through Mr. Côté, his department would be attempting to produce a new document for the end of

* Here the letter refers to the purpose for which the information would be sought.

November. He envisaged that the new paper would raise questions for ministerial decision —

(i) as to alternatives to make the security service more effective by removing previously imposed restrictions on infiltration activity: on whether the administration of justice could continue to be based on the acceptance of substantial police forces not responsible to the federal government and which, by this lack of direct control, could either through insistence on jurisdiction or inefficiency work against the national interest.

Ex. HC-2: Security Service, 'In-Camera', Ministerial correspondence:

(a) Letter from Mr. Starnes to the Honourable Jean-Pierre Goyer dated June 3, 1971, at p. 2:

. . . *To do this successfully, it is necessary to have access to the records of the Department of National Revenue, Income Tax Branch which is difficult to do in the face of Section 133 of the Income Tax Act.

Part of the difficulty, of course, arises from legislation such as the Income Tax Act and certain government regulations which prohibit the dissemination of this kind of information and in some cases provide stiff penalties for so doing. I recognize that there would be political and other difficulties in the way of seeking to amend legislation merely to meet the needs of the Security Service, but, in many cases, and we believe that with Ministerial agreement, arrangements could be worked out with the different departments and agencies concerned to meet our requirements within the framework of existing laws and in a manner which would attract no attention or criticism.

(b) Letter from the Honourable Jean-Pierre Goyer to the Honourable Bryce Mackasey, Minister of Labour, dated July 27, 1971 re access to Master Index of the Unemployment Insurance Commission for RCMP Security Service:

If you agree in principle to my request, I would like to determine by means of discussions between officials of the Unemployment Insurance Commission and representatives of my Department whether the requirement of the Security Service could be met within the framework of existing laws and regulations in a manner which would attract no attention or criticism.

(c) Letter from Inspector R.W. Shorey for the Deputy Director General to the Commanding officer of "A" Division, Ottawa, to the attention of the Officer in Charge of the Security Service, re: Co-operation — Government Departments, at pp. 1-2:

In the Minister of Labour's reply he mentions the provisions of the new Unemployment Insurance Act affecting the release of information, and in that connection we attach pertinent extracts from that Act. In your further discussion with Mr. Urquhart, please bear in mind that we want to convince the U.I.C. that we feel that the Security Service of the R.C.M.P. can be categorized as "such other persons as the Commission deems advisable" (Section 98). In this connection he can be assured that U.I.C. will not be compelled by the Security Service to produce records or documents or to give evidence in any proceedings.

* Here the letter refers to the purpose for which the information would be sought.

> The type of information we seek from U.I.C. is as set out in paragraph 3 of the attached copy of Sgt. Claxton's memorandum. You must make a point of assuring U.I.C. that the information they give us in this connection will be handled with the greatest secrecy and used only as investigative leads in security investigations.

29. At the time that Mr. Higgitt marked the foregoing passages from the Law and Order Documents, the documents had not been declassified and could not, therefore, be made public. In the result it was, therefore, not then possible to discuss in public whether the passages relied upon by Mr. Higgitt in fact support his evidence as to discussions he alleged took place with his Ministers.

30. With reference to the passages so marked by him Mr. Higgitt testified that those documents "... are only examples, and there are other examples" (Vol. 87, p. 14327). He testified further that those marked passages support his

> evidence ... that whether or not the acts were 'illegal' or 'not legal' is a matter for perhaps others to decide but that, in fact, they were not done without the general knowledge, at least, and again I return to the words 'political masters'.
>
> (Vol. 87, p. 14325.)

31. This statement by Mr. Higgitt suggests that the documentary passages marked by him support the proposition that his Ministers knew of past and existing operational practices of the R.C.M.P. Later in his testimony, however, when asked what he meant by the word "acts" in the testimony just quoted, (Vol. 87, p. 14325) Mr. Higgitt stated:

> It is probably fair to say investigative procedures which involved the possibility of these situations arising.
>
> (Vol. 87, p. 14326.)

(b) The evidence of Mr. John Starnes

32. Mr. Starnes testified that having, in the first few months of his tenure as Director General, become aware of "the scope of the problem", he decided that it should be raised with senior officials and Ministers. He testified before the Commission that documents establish that he did so (Vol. 90, p. 14947). Further, he gave evidence as follows:

> It is quite clear that in the Law and Order context, the question of the commission of crime in the national interest was clearly discussed by Ministers. There is no doubt about that. It is a matter of record. The same problem was raised in another forum, namely, the Cabinet Committee on Security and Intelligence, and, therefore, one should not forget that there has been or there was this dual avenue of discussion of the same problem.
>
> (Vol. 106, pp. 16620-1.)

(c) The first stream of Law and Order Documents

33. Following the request by the C.C.P.P. in its decision of May 5, 1970 for the preparation by an inter-departmental committee of a Law and Order paper, the R.C.M.P. prepared such a paper and submitted it to the I.C.L.O. at its meeting of July 8, 1970 (Ex. M-36, Tab 5; Ex. MC-6, Tab 1). In discussing

the placing of undercover sources in subversive organizations, the following statement was made by the authors of the paper (para. 6):

> A serious problem arises in the placement and development of sources in the more violence-prone groups, e.g. . . . in order for a source to penetrate any of these groups to a point where he can provide useful information, he must be prepared to participate, (the authorities must be prepared to support his participation) in the activities of the group. That would require that he become involved in criminal acts. At the present time this is not permitted....

On the face of it this paper makes it clear that the then policy of the R.C.M.P. was not to permit sources to become involved in the commission of criminal acts to establish their bona fides in penetrating such organizations. The paper, however, does underline the risks inherent in the penetration of such organizations.

34. The Minutes of the Meeting of the Special Committee of the Security Panel dated November 10, 1970 (Ex. M-29) recorded in part as follows:

> In relation to the Inter-departmental Committee on Law and Order, the Deputy Minister of Justice said that . . . his Department would be attempting to produce a new document for the end of November. He envisaged that the new paper would raise questions for Ministerial decision:
>
> (i) as to alternatives to make the Security Service more effective by removing previously imposed restrictions on infiltration activity...

It is reasonably clear on the evidence that the "previously imposed restrictions on infiltration activity" referred to the policy that agents of the Security Service were not to engage in criminal activities in infiltrating violence-prone organizations. Mr. Maxwell, who at the time of these Minutes was the Deputy Minister of Justice, testified that certain kinds of infiltration "were frowned upon . . . those kinds that required participation in criminal activity" (Vol. C66, p. 9158). This, he said, involved penetration of "radical groups . . . that as a price of admission required people to do criminal things". In his testimony he agreed that the groups with which the authorities were concerned at that time ". . . were, by and large, all radical groups . . . " and further that if effective penetration was to take place "the risk that the penetrator will have to engage in illegal activities is axiomatic . . . the price of penetration may well be that sort of thing" (Vol. C66, p. 9162).

35. The next relevant document prepared by the R.C.M.P. was entitled "Law and Order — suggestions for Improving R.C.M.P. Capabilities" (Ex. M-36, Tab 6; MC-6, Tab 2). This paper is undated, but counsel for the R.C.M.P. advised that it was prepared on or about November 15, 1970 (Vol. 101, p. 16053). Mr. Starnes, in his evidence, stated that, while he was not certain, he speculated that copies of this paper were disseminated to the members of the I.C.L.O. Mr. Ernest Côté, then Deputy Solicitor General, testified that he assumed it had been so disseminated (Vol. C77, p. 10606).

36. The paper, *inter alia*, enunciated several problems faced by the R.C.M.P. "in its efforts to fulfill its internal Security role", one of which was that "it . . .

is faced with an apparent insoluble dilemma in regard to penetration of terrorist organizations . . . ".

37. In discussing that problem, the paper stated:

> *Examination of the Rules of Evidence*
>
> Although there doesn't seem to be any way that the Rules of Evidence (statute and common law) can be altered to sanction the use of *agent provocateurs* in obtaining convictions, it is to be recognized that penetration of terrorist cells by police agents will inevitably involve commission of crimes on their part to establish their *bona fides*. A similar difficulty would exist in connection with terrorist cell members not under police control who can be induced to operate in place. Surveillance, (human and technical) and inducements made to terrorists to 'defect' are useful aids to investigation but they are not anywhere near as effective as an agent in place...
>
> The question that must be asked is whether we as a police force can go outside the rule of law to detect criminal activities. If affirmative, this could be done through penetration by informer-members or non-members. Particularly in the case of non-members, we must be prepared to pay them well and protect them under all circumstances.
>
> Although it is evident that legal changes are required and not police policy changes, it appears that that may be politically impossible in a democracy like Canada except by way of Federal legislation by Order-in-Council (secret, not published). Possibly we require something similar to the European system, where the police can work outside the rule of law to detect crimes and penetrate illegal organizations. In this system the court acts as an inquisitionist, as opposed to merely an umpire, in our system — where the court diligently sees that both sides of the controversy stay and play within the strict rules of evidence.

This paper indicated that the Security Service was then making attempts to infiltrate violence-prone organizations and that the entrance fee could involve the commission of a criminal act or acts. The paper did not indicate that such acts were at that time being committed by agents of the R.C.M.P. but rather asked the question whether such agents should be permitted to go outside the law to effect their purpose successfully.

38. The next key document is the Maxwell Memorandum, dated November 20, 1970, to which we have previously referred (Ex. M-36, Tab 7; MC-6, Tab 3). A draft of this document, which was substantially the same as its final form, was dealt with by the I.C.L.O. at its meeting of November 23, 1970. Mr. Starnes returned to his duties on that day, following a lengthy illness. He has no actual memory of the discussion that took place at this meeting. In a memorandum for file, Assistant Commissioner E.W. Willes of the R.C.M.P. summarized the discussion that took place at that meeting (Ex. M-36, Tab 10; MC-6, Tab 4). That memorandum states in part as follows:

> The Memorandum to Cabinet was not received by the Committee members until the afternoon of November 22. Consequently, several of those present pointed out that they had not had an opportunity to study it in detail. . . .

The Deputy Solicitor General ... also mentioned item (b) of Police Operations (Inherent Contradiction) and touched upon the difficulty that the Security Service has in infiltrating Terrorist groups such as the FLQ

...

Deputy Commr. Carrière then offered criticism of the two items on the Administration of Justice (Police Organization) and Police Operations (Inherent Contradiction) ...

Deputy Commr. Carrière then went into more details in describing the difficulties that the Force faces in penetrating the FLQ Cells and organizations and pointed out the difficulty that we face when an Agent or even a regular member is manoeuvered into a position when he has to participate in a serious criminal offence. Some discussion then followed as to the position of the Federal Government should an Agent of the police become involved in a serious crime during the course of his duties and the thought was expressed that the Government would undoubtedly not support him in the light of present policy...

39. The Maxwell Memorandum was distributed to the members of the C.C.P.P. for discussion at its meeting of November 24, 1970. The addendum to the agenda for that meeting of the Cabinet Committee (Ex. M-36, Tab 12) discloses that CAB. DOC. 1323-70 was circulated. The evidence discloses that the Cabinet Document consisted of the Maxwell Memorandum and a two-page document entitled: "Various Questions Raised by Law and Order Paper". This document contained a list of questions for consideration, the seventh of which was: "What should be done to eliminate inherent contradiction in existing Security Service which turns around the question of crime in the national interest?"

40. The portion of the Maxwell Memorandum that is relevant to the issues considered here is entitled: "*Police Operations (Inherent Contradiction)*". The discussion of this item included a quote from Paragraph 57 of the Royal Commission on Security Report, and then stated:

When the Report of the Royal Commission was being discussed by the Cabinet Committee on Security and in Cabinet, the view was expressed that an inherent contradiction existed between the role of the R.C.M. Police as a law enforcement agency at the municipal, provincial and federal levels and its role in the field of security and intelligence. In its first capacity, the R.C.M. Police should and does strive towards ensuring that the conduct of its members is at all times lawful and above reproach. On the other hand, as the Royal Commission recognizes, security and intelligence work may require those engaged in it to undertake activities that are contrary to law and which would prove to be unacceptable and embarrassing to a properly administered police force whose duty it is to uphold and enforce the law.

While the recommendations of the Royal Commission respecting a separately organized civilian security service have not been accepted, it seems reasonably clear that this inherent contradiction has not been resolved and that an early solution must be found to it if our security and intelligence service is to be expected to provide not simply an interesting historical chronology of events but to inform Government in an effective way in advance of them.

41. Several witnesses who appeared before us were present at the meeting of the C.C.P.P. that was held on November 24, 1970, including Mr. McIlraith, Mr. Maxwell, Mr. Côté, and Mr. Starnes. Any questions put to those witnesses before this Commission as to what was said at that meeting on this subject were objected to by counsel for the government and certain of their clients on the ground that such discussions ought not to be revealed, even *in camera*, because of the importance of protecting the confidentiality of discussions in Cabinet or Cabinet Committee. When these objections were taken, we reserved our decision as to whether it was well-founded in the circumstances. Eventually, pursuant to the provisions of Order-in-Council P.C. 1979-887, dated March 22, 1979, we read the Minutes of that meeting, a draft of the Minutes, and handwritten notes of the meeting that were taken by a Cabinet secretary. We have not considered it necessary to decide upon the objection, for there was nothing in the documents which we read that indicated that those in attendance were informed of illegal activities by the R.C.M.P., and no one has suggested that at that meeting any such information was imparted. We did not consider that the issue raised by the objection was one which in the circumstance justified our giving consideration to a ruling that might result in Privy Councillors and others insisting, by resort to remedies that might be available to them, that the tradition of Cabinet confidentiality should be respected. However, we are satisfied, on the basis of our examination of relevant documents, that the two-page list of questions did accompany the Maxwell Memorandum at the meeting of November 24, 1970, and that it was drawn to the attention of those present as a helpful summary of the Maxwell Memorandum.

42. There is, accordingly, no evidence before us as to the substance of the discussions on this subject before the C.C.P.P. on that date. The Maxwell Memorandum was, however, considered as well at a meeting of the C.C.P.P. held on December 1, 1970, and evidence, which is discussed below, has been adduced before this Commission with respect to deliberations before the C.C.P.P. on that date.

(d) The December 1, 1970 meeting of the C.C.P.P.

43. As noted above, the Maxwell Memorandum was again before the C.C.P.P. at its meeting of December 1, 1970. Those present at this meeting included Prime Minister Trudeau, Mr. John Turner, then Minister of Justice, Mr. R. Gordon Robertson, then Clerk of the Privy Council, Mr. Donald Maxwell, then Deputy Attorney General and Deputy Minister of Justice, Mr. John Starnes, then Director General of the Security Service, Mr. D.H. Christie, then Assistant Deputy Attorney General and Assistant Commissioner R. Carrière. The Honourable George McIlraith, the then Solicitor General, was absent from this meeting by reason of impending eye surgery which took place on the next day.

44. Our inquiry into the December 1st meeting of the C.C.P.P. began when access was obtained by us to the minutes of the meeting and subsequently, in response to our request and upon the decision of Prime Minister Trudeau, we were given a copy of an extract of those minutes. We were also given a copy of

certain notes that had been made at the meeting by Mr. L.L. Trudel and Mr. M.E. Butler, then Assistant Secretaries to the Cabinet (these documents together form Exhibit VC-1). Mr. Trudel's notes are entitled "Police Operations page 5". The fourth page of those notes recorded the following discussion:

> Starnes: misunderstanding of contradiction
> — has been doing S & I illegal things for 20 years but never caught
> — no way of escaping these things
>
> Turner: If you are caught . . .
> then what of police image
> Should you not be disassociated
>
> Starnes: Can be done within RCMP — Has been. What do we do in these circumstances, guidelines.
>
> (Vol. C98, pp. 12964-65.)

45. The extract from the final typed minutes of that same meeting reads as follows:

> On the question of the inherent contradiction in police operations, the PM said that certain activities in the Security and Intelligence Service might not result in prosecution for security reasons. The Cabinet Committee on security and intelligence was the more appropriate place to look at the whole question of the integration of information and intelligence, Dr. Isbister's Report on it, and the other questions on security and intelligence raised in the document. He added that: overview of the current FLQ situation and the status of security and intelligence could be examined, and a decision made on a briefing in Cabinet. He noted that the image of the RCM Police could be misrepresented if the security and intelligence forces were caught breaking the law in order to obtain information. This situation had existed for some time in the RCM Police and he asked that the whole question be referred to the Cabinet Committee on security and intelligence for consideration.

(i) The evidence of Mr. L.L. Trudel

46. Mr. Trudel testified (Vol. C96, pp. 12878-9) that the notes related to page five of the Maxwell Memorandum entitled "Police Operations — Inherent Contradiction" (Vol. C96, pp. 12879-80).

47. Mr. Trudel has no present recollection of the meeting, apart from his notes. However he testified that he recorded as best he could what in fact was said and did not paraphrase the statements made by the participants to the discussion (Vol. C96, pp. 12887-8).

(ii) The evidence of Prime Minister Trudeau

48. Prime Minister Trudeau also testified in respect to the meeting of December 1, 1970 and in particular with respect to the discussion recorded in the notes of Mr. Trudel. He testified that he did not have "a precise recollection of that being said, but I am perfectly happy to recognize that

words to that effect were said if it was written down here and I see in the minutes...". He was then asked whether, by reason of his memory or any document, he had reason to dispute or challenge the accuracy of Mr. Trudel's handwritten notes of the meeting of this subject and he answered:

> Well, quite honestly, his notes don't mean anything to me. So, I wouldn't challenge, infirm or affirm the accuracy of them. But in the minutes, what you have just quoted as S & I doing illegal things for twenty years, I suppose he said that, and I honestly can't remember him saying that. You know, he was sitting there and he said that, but I don't want to make an issue of not remembering this kind of thing.
>
> (Vol. C98, p. 12942.)

49. Mr. Trudeau testified he had no recollection of anyone at the meeting inquiring of Mr. Starnes as to the kind of illegal things that S & I had been doing for 20 years (Vol. C98, pp. 12942-4). Nor does he recall any discussion with Mr. Starnes, after the meeting, as to what he was talking about (Vol. C98, p. 12944).

50. The Prime Minister stated, however, that if Mr. Starnes had said "these guys have been breaking the law and committing crimes for twenty years, I think there would have been a hell of a lot of questions asked: 'What do you mean?' And you know, 'how do they get away with it?' and so on" (Vol. C98, p. 12944).

51. In his evidence, Mr. Trudeau did not deny that Mr. Starnes said at the meeting that S & I had been doing illegal things for 20 years and were never caught (Vol. C98, p. 12950). However, reasoning *ex post facto*, Mr. Trudeau expressed the thought that "maybe he didn't even use the word illegalities, and maybe it is shorthand by Mr. Trudel for what Mackenzie calls against the spirit if not the letter of the law" (Vol. C98, p. 12946).

52. However, Mr. Trudel, as noted above, testified that he did not paraphrase the statements made by the participants to the meeting but, rather, he recorded as best he could what in fact was said (Vol. C96, p. 12894).

53. Mr. Trudeau further stated that whatever Mr. Starnes did say at the meeting it:

> . . . certainly didn't convey to me at the time or in my memory of it today the assertion that the police were out committing crimes.
>
> (Vol. C98, p. 12951.)

54. The Prime Minister further testified that if Mr. Starnes had referred at the meeting to "stretching the spirit of the law because we are putting in listening devices" that statement would have had a different meaning than if someone at the meeting had said "Well, we just have to blow up a bridge so as to get one of our guys accredited to one of the F.L.Q. cells" and Mr. Starnes had said "Yes, and we have been doing that kind of thing for twenty years" (Vol. C98, p. 12951). Mr. Trudeau stated that if the word "illegality" was used, in the atmosphere of the discussion, that word did not strike him as being "the commission of crimes". Otherwise, he believes, there would have been a different reaction and different minutes of the discussion (Vol. C98, p. 12952).

55. Moreover, Mr. Trudeau reasoned, if Mr. Starnes had meant to convey the commission of crimes as compared with things in the nature of those that he referred to in his testimony, he would not have "blurted it out in front of seventeen people". The things Mr. Starnes had referred to, as summarized in a question to Mr. Trudeau, were

> documents to establish false identities; someone being put at risk — on an operation of being put at risk to engage in something unlawful; entering without consent to install surveillance devices; entering to examine the trade of illegal agents documents ... that sort of thing; false registration in a hotel; false documentation for watcher service vehicles.
>
> (Vol. C98, p. 12947.)

56. Mr. Trudeau stated "without any hesitation" that the minutes "never came into my possession" because he had issued an order that Ministers should not get copies of Cabinet minutes unless they requested them. He testified "without any hesitation that barring the first few months of my ... job as Minister of Justice, I don't think I ever read these minutes ..." (Vol. C98, pp. 12953-4). To Mr. Trudeau, "the relevant part of the minutes was the record of that decision, and that record of decision was circulated", and Ministers frequently would make representations that they disagreed with the record of decision (Vol. C98, p. 12955).

57. Mr. Trudeau questioned in his evidence the accuracy of the minutes on this subject. He stated that when he compared the minutes with the notes (Mr. Trudel's notes), in his view it is clear from the notes that it was not the Prime Minister but someone else who uttered the words which in the Minutes are attributed to the Prime Minister:

> On the question of inherent contradiction in police operations, the Prime Minister said that certain activities of the Security Service might not result in prosecution for security reasons.

58. Mr. Trudeau however, earlier in his testimony had stated that he would not challenge, "infirm" or affirm the accuracy of Mr. Trudel's handwritten notes (Vol. C98, p. 12942). Further, he recognized that the minutes of the above-quoted passage are capable of being read as indicating that he was aware at the meeting that there were illegal activities being engaged in by the Security Service but that there would not be prosecutions because, for example, a prosecution would "spill the beans, as it were" (Vol. C98, p. 12958). In other words, according to Mr. Trudeau,

> if that one reading were held, I might find it a bit embarrassing, as meaning: you know, we shouldn't prosecute the police when they break the law because we might want to keep a veil of secrecy on it.
>
> (Vol. C98, p. 12959.)

However, Mr. Trudeau asserted that Mr. Trudel's longhand notes justify a completely different interpretation of what was said. Those notes read, in this connection:

> Maxwell: legal pt. of view is not assessing intelligence
>
> PM: Why legal, if for security reasons we decide not to prosecute.

From these notes, Mr. Trudeau concluded that what was being discussed at that point was not illegal activities by the police, or the "non-prosecution of S & I people who might have skirted the law" (Vol. C98, p. 12961) but "quite clearly" (Vol. C98, p. 12961) illegal activities by a suspect (e.g. a suspected terrorist), and a decision not to prosecute the suspect because to do so would reveal Security matters, such as the identity of sources. Mr. Trudeau's own words in this regard are as follows:

> . . . they might find that a suspect has broken the law, but we are not going to put him to the courts because in order to prove that he broke the law, or committed espionage or whatever it is, we will have to unveil all our security batteries and reveal our sources and everything else. And therefore, Maxwell says: we look at the policeman's point of view. It is not the same point of view of S & I people who are gathering intelligence, assessing intelligence. And I sort of say the same thing: if there is a suspected spy . . .
>
> Q. Is that somewhere in Trudel's notes . . .
>
> THE CHAIRMAN:
>
> Just a minute, Mr. Kelly?
>
> THE WITNESS:
>
> A. Yes. If there is a suspected spy, why invoke the force of the law against him if it is essential to your security operations that you don't want to put him in jail, you want to use him to catch other spies. And I think that's what both Maxwell and I are saying.
>
> MR. W.A. KELLY:
>
> Q. Did you say: Maxwell? or Trudel?
>
> A. Maxwell and I.
>
> Q. In Trudel's notes?
>
> A. In Trudel's notes. And therefore, the minutes, the final minutes, "might not result in prosecution for security reasons" can mean something different than what we presumably are both saying.
>
> Q. So, what you are saying is that the reference to activities and not prosecution is the reference to activities of terrorists and not the activities of members of the Security Service?
>
> A. Exactly.
>
> (Vol. C98, pp. 12959-60.)

And later, on the same point, Mr. Trudeau said:

> Maxwell is really saying: look, there is the policeman's point of view, and then there is the intelligence gathering assessment point of view. One is the legal point of view, and the other is the Security and Intelligence point of view. And I am saying that it may well happen that the legal point of view which could lead you to put a target before the courts as having broken the law of espionage might be rejected for security reasons when you decide not to put him before the courts because you might have caught a lesser spy, you might go for the bigger fish.
>
> Q. Is that your recollection of what was said? Or are you interpreting Mr. Trudel's notes at page 3?
>
> A. Yes, mainly the latter. I don't recollect that discussion at all.
>
> (Vol. C98, p. 12962.)

59. It is clear, on the basis of Mr. Trudeau's evidence, that these comments were the result of a construction placed by him on Mr. Trudel's notes without the benefit of any express recollection of what in fact was discussed at the meeting.

60. Mr. Trudeau's examination of the minutes turned then to the last two sentences, which read as follows:

> He noted that the image of the RCM Police could be misrepresented if the security and intelligence forces were caught breaking the law in order to obtain information. This situation had existed for some time in the RCM Police and he asked that the whole question be referred to the Cabinet Committee on Security and Intelligence for consideration.

He noted that an examination of Mr. Trudel's notes would support the inference that in drafting those two sentences and attributing what was said to Mr. Trudeau, Mr. Trudel appears to have run several passages together and attributed to Mr. Trudeau observations which were, in fact, made by other persons (Vol. C98, p. 12967). The portion of Mr. Trudel's notes to which Mr. Trudeau referred reads as follows:

> Starnes: misunderstanding of contradiction
> — has been doing S & I illegal things for 20 years but never caught
> — no way of escaping these things
>
> Turner: If you are caught...
> then what of police image
> Should you not be dissociated
>
> Starnes: Can be done with RCMP — Has been. What do we do in these circumstances, guidelines.
>
> (Vol. C98, pp. 12964-65.)

61. Mr. Trudeau dealt further with the following sentence in the minutes: "He noted that the image of the RCM Police could be misrepresented if the security and intelligence forces were caught breaking the law in order to obtain information". Mr. Trudeau suggested in evidence that the key to the meaning of whatever was in fact said lies in the words "in order to obtain information". These words, he suggests, make it clear that what was being discussed was not "breaking the law in order to penetrate a cell or to be recognized" (which would imply commission of a crime) but "breaking the law in order to obtain information, whether it be by bugs, or by petty trespass or by writing a false name in a hotel register" (Vol. C98, p. 12968).

62. However, we note that, whether the law is broken to penetrate a terrorist or violence-prone group or to install eavesdropping devices, or to gain entry to a hotel under a false name or otherwise, the purpose in each case for the breaking of the law is to gather information or intelligence considered by the Security Service to be of value. In each case there is a breach of some legal rule (including perhaps a criminal offence) to further the activities of the Security Service.

63. In addition to his evidence regarding specifically Mr. Trudel's handwritten notes of the December 1, 1970 C.C.P.P. meeting, Mr. Trudeau gave evidence with respect to the consideration given by the C.C.P.P. to the Maxwell Memorandum at its December 1st meeting. In this regard, Mr. Trudeau testified that he could not actually recall reading the Maxwell Memorandum (Vol. C98, p. 12922). Similarly he stated that he had no present recollection of having seen the two-page document entitled "Various Questions for Decision Raised by Law and Order Paper", including the seventh question contained therein and which, as referred to above, dealt with the elimination of this "inherent contradiction" (Vol. C98, p. 12930).

64. Mr. Trudeau stated that normally his staff briefed him on such documents and would draw his attention to particular parts of it. In this case Mr. Trudeau stated that a briefing note was prepared for the C.C.P.P. meetings of November 24 and December 1, 1970 respectively (Vol. C98, p. 12924). The briefing note did not, however, refer to "illegal activities" (Vol. C98, pp. 12927-9).

65. Mr. Trudeau's attention was drawn to that part of the Maxwell Memorandum in which paragraph 42 of the Report of the Royal Commission on Security was referred to. That paragraph, as quoted by Mr. Maxwell in a section of his paper entitled "Police Operations (Inherent Contradiction)" (Ex. M-36), read as follows:

> Finally, although we have been unable to reach any firm conclusion about the effectiveness of many of the operations currently being undertaken by the RCMP, we are left with a clear impression that there has been some reluctance on their part to take the initiative or even to cooperate in certain forms of more aggressive penetration operations; government policy has been especially inhibiting in this area, but we are not sure that the RCMP has made a sufficient — or a sufficiently sophisticated — effort to acquaint the government with the dangers of inaction.

The Report of the Commission went on to say:

> Furthermore, there is a clear distinction between the operational work of a security service and that of a police force. A security service will inevitably be involved in actions that may contravene the spirit if not the letter of the law, and with clandestine and other activities which may sometimes seem to infringe on individuals' rights; these are not appropriate police functions. Neither is it appropriate for a police force to be concerned with events or actions that are not crimes or suspected crimes, while a security service is often involved with such matters. Generally, in a period in which police forces are subject to some hostility, it would appear unwise either to add to the police burden by an association with security duties, or to make security duties more difficult by an association with the police function.

Mr. Maxwell's Memorandum then referred to a discussion in Cabinet that had occurred when the Report was considered, and said that the view had been

> expressed that an inherent contradiction existed between the role of the R.C.M. Police as a law enforcement agency at the municipal, provincial and federal levels and its role in the field of security and intelligence. In its first capacity, the R.C.M. Police should and does strive towards ensuring

that the conduct of its members is at all times lawful and above reproach. On the other hand, as the Royal Commission recognized, security and intelligence work may require those engaged in it to undertake activities that are contrary to law and which would prove to be unacceptable and embarrassing to a properly administered police force whose duty it is to uphold and enforce the law.

While the recommendations of the Royal Commission respecting a separately organized civilian security service had not been accepted, it seems reasonably clear that this inherent contradiction has not been resolved and that an early solution must be found to it if our security and intelligence service is to be expected to provide not simply an interesting historical chronology of events but to inform government in an effective way in advance of them.

Mr. Trudeau stated that he understood the "inherent contradiction" to be that

> ... when you have a police force like the R.C.M.P. which is entrusted with the enforcement of the law and is highly respected as a law enforcement ...
>
> Q. On the CIB side?
>
> A. On the CIB side, and you have, on the S & I, Security and Intelligence side, the same force doing things which, in Mackenzie's words, are against the spirit if not the letter of the law, then you have this inherent contradiction of a police force that you must respect because it is enforcing the law; and on the other hand, the same people skirting the law — not necessarily breaking it, but stretching, shall we say, its spirit. And that is the contradiction, if my recollection is correct, that Mackenzie pointed out, and which Maxwell refers to here.
>
> (Vol. C98, p. 12934.)

66. When this passage from the Maxwell Memorandum was discussed, Mr. Trudeau was present at the meeting (Vol. C98, p. 12938). He stated, when questioned as to the specific date that the C.C.P.P. considered the "inherent contradiction" faced by the Security Service, that he remembers this subject having been discussed around "that time" [December 1st, 1970]. Generally, however, he would not

> ... honestly say in my memory I am able to draw out ... either the substance or the particular fact that the discussion took place on that date.
>
> (Vol. C98, p. 12939.)

67. In addition to the evidence of Mr. Trudel and Mr. Trudeau with respect to the December 1, 1970 meeting of the C.C.P.P. and Mr. Trudel's handwritten notes thereon, we heard oral evidence on this issue from several other persons who attended the meeting.

(iii) The evidence of Mr. John Starnes

68. As with Mr. Trudeau, Mr. Starnes testified that he cannot remember "what precisely was said" at the December 1st meeting, with the result that his evidence as well on this issue is a reconstruction based on Mr. Trudel's handwritten notes (Vol. C96, pp. 12840, 12844 and 12856).

69. He interprets the words "no way of escaping these things", which are attributed to him in the notes, as an attempt to capture what he was trying to say, which

is the thought that in my view a number of these things were being done by the Security Service, which might be illegal, could not be avoided, if they were to do their job properly and to do the things the Government wanted them to do.

(Vol. C96, p. 12841.)

70. He told us that he does not recall having mentioned at the meeting any specific occasion on which an illegal "thing" was done.

71. Mr. Starnes was asked what he would have told the Cabinet if someone at the meeting had asked what illegal activities he was referring to. In reply (at Vol. C96, p. 12848) he referred to a list of problems he had mentioned in earlier testimony (Vol. C30, p. 3622). The problems, as they had been identified in his earlier testimony, were as follows:

— the creation of false identity documents, to provide cover for an undercover agent;

— the fact that an undercover agent might be put in the position of having to break some law in order to establish his bona fides with an organization;

— the fact that, in installing electronic devices, members of the Security Service would have to enter private premises without the consent of the owner or tenant in order to look about and install the devices;

— the conducting of intelligence probes, namely, entries into private premises without the consent of the owner and without a warrant, to examine documentation or physical things, and photograph or copy them;

— registration in a hotel under a false name;

— defectors might bring documents with them, belonging to another person;

— false documentation for the purpose of establishing a legend;

— disguising the ownership of safe houses; and

— false documentation for vehicles.

However, Mr. Starnes testified that after almost ten years

It is straining my memory now to suggest, you know, to you precisely what those things might have been.

(Vol. C96, p. 12848.)

He also said that the items listed were

things which I might have known about but which I do not remember as having known as of the 1st of December or November or whenever it was, 1970.

(Vol. C96, p. 12849.)

72. Mr. Starnes stated further that he does not know whether at that time he knew of intelligence probes, namely, entries without consent or warrant for the purpose of removing things or documents from premises or to examine the premises or things on the premises. He repeated his earlier testimony that he was not aware of the opening of mail. As we note in Part III, Chapter 5, Mr.

Starnes said that he has no recollection that there were arrangements whereby members of the Security Service could obtain information from the Department of National Revenue records. He subsequently modified that position by saying that his knowledge depended on the point in time being referred to. Still later he told us that he "must have been" aware of such access, although he could not recall his earlier testimony on the subject (Vol. 149, pp. 22826, 22835, 22871; Vol. C96, p. 12849).

73. Mr. Starnes testified that his "impression" was (in December 1970) that "they already knew" that S & I had been doing illegal things for 20 years (Vol. C96, p. 12863). In this regard the following exchange took place during his testimony:

> Q. But, you say apart from this reinforcement [the notes of the meeting by M. Trudel] you did in fact, you are swearing today, on December 1st, 1970, you had the impression at that meeting that they, that is to say, Mr. Turner and Mr. Trudeau, already knew that S & I had been doing illegal things for twenty years?
>
> A. Well, maybe I'm wrong . . . I don't know. You know, I simply cannot recall precisely and exactly what took place.
>
> (Vol. C96, p. 12868.)

And further:

> Q. Again I ask you whether, when you say that your impression is reinforced, does that mean that you are saying today that you now can remember that on December 1st, 1970, you had formed a certain impression?
>
> A. No, I cannot say that truthfully.
>
> (Vol. C96, p. 12869.)

74. Mr. Starnes relied on testimony he had given earlier, which he said was "the way I can best describe it" (Vol. C96, p. 12866):

> I find it very difficult to accept the thesis that Ministers were not aware in general terms of the problems of the Security Service in carrying out their activities of this kind...
>
> (Vol. 106, p. 16583.)

Mr. Starnes testified that after November 27 and December 1, 1970, he was never told by anyone in government that any illegal activities should be halted. Asked whether he was speaking from memory, he answered:

> I certainly would remember that, because that would be an order and I would have acted on it.

He also testified that after those two dates he did not ever receive any inquiry from any government official or Minister as to what he had meant by reporting that the R.C.M.P. had been "committing criminal acts" or "doing illegal things". Asked whether he was speaking from memory, he answered:

> I would have remembered. That is surely, would have been something. You know, Mr. Chairman, I suspect that after the meeting of — I have forgotten the date now — December the 19th, I guess it was, 1970, when we were supposed to discuss these matters, and the Prime Minister put if off and we never did...I can remember no discussion thereafter of the

subject, and I think it probably led to the disillusionment which, eventually, caused me to take my early retirement and I can say now, had I been fifty-five then, I probably would have retired earlier.

(Vol. C129A, pp. 17281-2.)

75. Mr. Starnes testified that after November 27 and December 1, 1970, he does not remember having gone to any government official or Minister to volunteer the details of what he had meant by the words "committing criminal acts" or "doing illegal things" and to ask for guidance in regard to such activities. He says that he is "quite sure" that "there were other occasions" when he raised the matter — i.e. "when the problems associated with this kind of thing and the need for guidance would have been raised with Ministers" — but he "cannot remember them" and "cannot be specific" (Vol. C129A, pp. 17282-5). Again, he says that "Ministers were aware or had been made aware, that we had been breaking the law" (Vol. C129A, p. 17274). He added:

> The closest one I might have come to it, was by the time I had decided to leave, and engineered a meeting with the Prime Minister, to try to make my successor's lot a little easier... You see, interlinked with all this, intertwined with all this, is the equally frustrating and difficult problems associated with not being able to do what it was the Government wanted done, in terms of making a Security Service more civilian and all the rest of it... The difficulties between the RCMP, as such, and the Security Service, and the whole future and more than that, all the problems that lay on the plate of the Security Service at that time, and, you know, particularly in the field of espionage, I just did not think it was wise to rock the boat and have a big row again over nothing... Well, not over nothing, but I guess I had run out of steam by that time.
>
> (Vol. C129A, pp. 17286-7.)

(iv) The evidence of Mr. R.G. Robertson

76. Mr. R. Gordon Robertson was Clerk of the Privy Council and Secretary to the Cabinet in 1970. He normally attended meetings of the C.C.P.P. He has no specific recollection of the meeting of that Committee held on December 1, 1970, or of the discussion of the question of "Police Operations (Inherent Contradiction)" (Vol. C108, pp. 13892, 13903). His review of the minutes of the meeting and Mr. Trudel's handwritten notes did not assist him in this regard (Vol. C108, p. 13894).

77. Mr. Robertson stated that he has no specific recollection of having seen the documents that related to the December 1st meeting, but believes that he would have seen them. It was his practice to read such documents in advance of the scheduled meeting (Vol. C108, p. 13896).

78. While he does not specifically remember the discussion, he does remember that at about that time he thought that the Maxwell Memorandum reflected a misunderstanding by the author of the observations of the Royal Commission (Vol. C108, p. 13908). In Mr. Robertson's view the important distinction drawn by the Royal Commission was between a police force that is not appropriately concerned with non-criminal activity, and a Security Service which "is often involved" in such matters. He felt that the other distinction,

concerning "the spirit if not the letter of the law", was not very important, "pretty nearly a non-issue", because, so far as he knew at the time, the Security Service did nothing in its operational methods that the C.I.B. did not do (Vol. C108, pp. 13909-10). The only problem that the Security Service had in its operations, which was drawn to his attention and which was different from the problems on the C.I.B. side, was the problem of penetration of the F.L.Q. namely, that when the F.L.Q. realized that members of the R.C.M.P. were not authorized to commit crimes, penetration could effectively be prevented by requiring people joining a cell to commit a crime as a requirement of admission. (The problems associated with such penetration efforts were raised in a paper prepared by the R.C.M.P. in the second stream of Law and Order Documents discussed below.)

79. Although Mr. Robertson does not recall any part of what was discussed at the meeting of December 1, 1970, he testified that he could, with the aid of documents he read in preparation for testifying, "reconstruct to a degree the kind of discussion" which took place, having the result that he thought he remembered "some of the comments" (Vol. C108, p. 13915). Mr. Robertson stated that he remembers that at one of the meetings of the C.C.S.I. he discussed the Committee structure as it then existed; the notes by Mr. Trudel enabled him, as a matter of reconstruction, to say that "it looks as though I said something about this on December 1st" (Vol. C108, p. 13917). However, apart from his remembering that the Prime Minister talked about the Deuxième Bureau in France — which the notes indicate — Mr. Robertson stated that he does not recall and cannot reconstruct from the notes any of the specific comments made by persons other than himself (Vol. C108, p. 13918).

80. Mr. Robertson testified that he does not doubt that Mr. Starnes must have said something like "the S & I has been doing illegal things for twenty years but never caught", or such words would not, in his view, appear in the notes. Mr. Robertson infers, from the fact that the notes do not record that anyone at the meeting asked Mr. Starnes what he meant by that statement, that what everyone around the table must have thought Mr. Starnes was talking about was

> the kind of thing that I think all of us who were connected with police work or security work thought had to be done by police forces, not just the R.C.M.P., but by police forces in general, and not just the Security Service, but the police forces, which involved minor misdemeanours where things like traffic violations, false registrations in hotels, completing ownership certificates for cars falsely, surreptitious entry, other things of that kind took place; and this was thought to be a perfectly normal and necessary part of police work.
>
> (Vol. C108, pp. 13920-1.)

81. Mr. Robertson stated that at the time of the December 1st meeting, he assumed that all police forces committed traffic violations; he knew that police registered in hotels under assumed names in order to eavesdrop electronically on the adjoining room, and he thinks he probably knew that there was a statute requiring registration in the guest's own name; he knew that all police forces completed false applications for vehicle registration certificates; and he knew

that evidence had been introduced in courts that had been obtained as a result of a surreptitious entry (Vol. C108, pp. 13992-6).

82. Mr. Robertson testified that the two-page list of questions before the C.C.P.P. meeting of December 1, 1970 and referred to above, was prepared in the Department of Justice (Vol. C108, p. 13897). He stated that the seventh question therein; namely "the question of the commission of crime in the national interest" was not, as such, raised at the December 1st meeting "... because nobody thought there was any crime being committed by the Security Service" and further, "... there is nothing in the Mackenzie Report that refers to crime" (Vol. C108, p. 13927).

83. In Mr. Robertson's view, the reference in the Report of the Royal Commission on Security to "actions that may contravene the spirit if not the letter of the law" referred to "minor peccadilloes" (Vol. C108, p. 13931). The Commissioners did not say in their Report that crimes were being committed, and, Mr. Robertson testified, they did not say it to him, or to his knowledge, to the Prime Minister (Vol. C108, p. 13932). Mr. Robertson pointed out that no reader of the Report, in Parliament or in the press, had ever asked whether those words meant that the R.C.M.P. were committing crimes (Vol. C108, p. 13934). He thought that, if the Commissioners had meant to say that the S & I Branch was doing something unlawful, they would have communicated the details to the government (Vol. C108, p. 13991).

84. Mr. Robertson confirmed what Mr. Trudel had stated in evidence that at a meeting of the Cabinet Committee it was the "normal practice" of Prime Minister Trudeau, before reaching a conclusion, to summarize the discussion and to try to bring out what he thought had been points of agreement and what had been particularly difficult issues raised (Vol. C108, pp. 13943-9).

85. Mr. Robertson, like Mr. Trudeau, considers that the words found in Mr. Trudel's notes, that certain activities of the Security and Intelligence Service might not result in prosecution for security reasons, did not refer to non-prosecution of members of the R.C.M.P. but rather to non-prosecution of persons under investigation (Vol. C108, pp. 13953-4).

86. Finally, Mr. Robertson testified as to the procedure by which minutes of such meetings were prepared, and stated that it was "most unlikely" that a draft of the minutes was submitted to him (Vol. C108, p. 13981).

(v) The evidence of Mr. P.M. Pitfield

87. Mr. P. Michael Pitfield was Deputy Secretary, Plans, in the Cabinet Office in December 1970. In this capacity he attended meetings of the C.C.P.P. and was present at the December 1st meeting of that Committee (Vol. C117A, pp. 15290-91). Mr. Pitfield testified that his function at this meeting was to serve as a "general sort of ringmaster within the meeting", arranging for the admission of people to the meeting and for subsequent or previous items on the agenda, taking telephone calls, etc. He was not, however, directly concerned with items that were under discussion at the meeting nor was he present consistently throughout the meeting (Vol. C117A, pp. 15291-92).

88. Mr. Pitfield testified that he had no recollection of the December 1, 1970 meeting and that a reading of the minutes of the meeting or of Mr. Trudel's handwritten notes did not help him to remember (Vol. C117A, pp. 15293 and 15299). Mr. Pitfield stated that Mr. Trudel reported, in December 1970, to the Assistant Secretary of the Cabinet who was responsible for the C.C.P.P. (Mr. Butler) who in turn reported to Mr. Pitfield. Mr. Pitfield himself was not involved in the preparation of minutes of meetings of the C.C.P.P. but was involved in preparing the record of decision of such meetings, that is, the circulation of the last paragraph of the minutes (Vol. C117A, pp. 15295-96).

89. Mr. Pitfield testified that the words attributed by Mr. Trudel, in his handwritten notes, to Mr. Starnes, did not assist him in recalling any discussion which he may have heard at the December 1st meeting. In addition, Mr. Pitfield stated:

> The minutes do not stimulate any memory that I may have or should have of this; and indeed, I quite frankly do not understand the minute very well either.
>
> (Vol. C117A, pp. 15300-01.)

and further:

> ...I think it is, from my point of view, this is a very embarrassing and unprofessional minutes [sic] and it is difficult to trace the association between the notes and the minute. The minute is a hodge-podge of what a number of people said, attributed to one person, and that is, when you play the notes and the minute one against the other, that is what appears to be the case. The notes themselves are a sort of collection of snapshots. One has the impression that the note taker is trying to keep up with a discussion as it goes along and he is just taking enough of the words that are said, that he will be able, when he gets back to the office, to jog his memory, so that he can put it all together, in some sort of replay. I suspect that when he got back and tried to put it all together, he found it didn't fit, so he had to push it a little bit, in order to get the reconstruction he has come up with here.
>
> (Vol. C117A, pp. 15301-02.)

90. In Mr. Pitfield's view the notetaker, Mr. Trudel, was "trying to summarize" and "not only is he trying to summarize but he is trying to summarize a series of snapshots and he has to bend a little in order to do it, . . . it is a lousy set of minutes and it is not one we would be very proud of" (Vol. C117A, p. 15307).

91. With respect to the Maxwell Memorandum, and the two-page list of questions which accompanied it, Mr. Pitfield stated that the list of questions "came in very late, and it would not have been circulated in time for Ministers to have had an adequate opportunity to read and digest it" (Vol. C117A, pp. 15294-95). (In fact, as we have stated, we are satisfied that the two-page list of questions was attached to the Maxwell Memorandum a week earlier, at the meeting of November 24.) Neither the list nor the Memorandum assisted Mr. Pitfield, however, in recalling the discussions at the December 1st meeting (Vol. C117A, p. 15295).

(vi) The evidence of the Honourable J.N. Turner

92. The Honourable John Turner was Minister of Justice and Attorney General of Canada from July 6, 1968 to January 1972. Mr. Turner was a member of the C.C.P.P. during 1970 and attended the meeting of that Committee on December 1, 1970 (Vol. C118, pp. 15326 and 15328). He confirmed that the minutes of the meeting indicated that he presented the Maxwell Memorandum to the meeting (Vol. C118, p. 15328). Although he has no present recollection of the document, Mr. Turner did confirm that the two-page list of questions (Ex. M-36, Tab 7; MC-6, Tab 3) in fact accompanied the Maxwell Memorandum when it was introduced by him at the meeting (Vol. C118, pp. 15331-32).

93. Mr. Turner stated that he was unable to reconstruct the discussion that occurred at the meeting and accordingly could not recall whether the questions contained in that list and, in particular, question number seven were discussed (Vol. C118, p. 15333). He testified that the minutes of the meeting did not refresh his memory, nor did the handwritten notes of Mr. Trudel (Vol. C118, pp. 15337 and 15338). Asked "do you have any indication or any recollection . . . that the notes would be incorrect?" Mr. Turner replied "No, I couldn't say one way or the other" (Vol. C118, pp. 15338 and 15339, 15340-41).

94. When asked what he would have done had he been told that the Security and Intelligence Branch of the R.C.M.P. had been doing illegal things for some 20 years he replied "I would have considered it my duty to investigate" (Vol. C118, p. 15342).

(vii) The evidence of former Commissioner W.L. Higgitt

95. Former Commissioner Higgitt attended meetings of the C.C.P.P. and other Cabinet Committees frequently during his tenure as Commissioner of the R.C.M.P. (Vol. C117A, p. 15248). With respect to the Maxwell Memorandum, Mr. Higgitt testified, when asked whether he recalled a discussion at Cabinet level of the problems expressed in that memorandum, that

> ...I am aware that these things were discussed, these topics were discussed. I have a memory of — I can't put a date to it — I have a memory of Mr. Maxwell himself being at a meeting of Cabinet Ministers, at which I was present. The date, I cannot identify — at which matters of this nature were discussed.
>
> I think, without violating the truth at all, I could say that this document was discussed, but again, it is ten years ago.
>
> (Vol. C117A, p. 15251).

and further:

> ...I really can't, in honesty, say what the actual discussions were, but certainly these kinds of things were laid before the Ministers that were present.
>
> (Vol. C117A, p. 15252.)

96. With respect to question number seven of the two-page list, Mr. Higgitt testified:

> The inherent contradiction question certainly was one of the questions that was discussed and had been discussed on one or two or more occasions in

different forums. There is no question in my mind about that. I remember that.

and further:

> . . . it was the kind of question — it was one of the questions that certainly was discussed. I would be pushing my memory too far to say precisely where, but certainly with Cabinet Ministers.
>
> (Vol. C117A, pp. 15254-55.)

Mr. Higgitt stated in evidence that he was not surprised to see in Mr. Trudel's notes the statements attributed to Mr. Starnes and Mr. Turner "because they are indeed, the things that were discussed" (Vol. C117A, pp. 15271 and 15273). Mr. Higgitt did not, however, recall the actual discussions at the December 1, 1970 C.C.P.P. meeting. His direct evidence in this regard was as follows:

> Q. Did you ever hear Mr. Starnes express the view that 'has been doing, S & I illegal things for twenty years but never caught'. Do you recall Mr. Starnes ever expressing that to you or in front of you?
>
> A. Yes. Mr. Starnes and I have discussed that on a number of occasions.
>
> Q. That Security & Intelligence were doing illegal things or had been doing illegal things for twenty years?
>
> A. Yes. Those were the kind of discussions that we had on a number of occasions.
>
> THE CHAIRMAN:
>
> Q. Through the year 1970?
>
> A. Yes.
>
> Q. During the first year of his term as Director General?
>
> A. Yes. I am quite sure that is true, sir.
>
> MR. GOODWIN:
>
> Q. Did you ever hear him express them to Cabinet Ministers?
>
> A. Here I have to say I really can't remember that.
>
> Q. Did you ever express that to Cabinet Ministers?
>
> A. Yes. I don't know that I would have used those precise words, but yes, that thought was expressed by me.
>
> Q. That illegal things had been going on for twenty years?
>
> A. Whether I put twenty years on it or not is another question, but certainly there was no secret about that, or illegal type of things, so-called. I must underline those so-called illegal things were being done.
>
> Q. Would you explain to us what you mean by this expression so-called?
>
> A. Well, for example, I would use an example as a surreptitious entry into a premises, and perhaps it is a matter of opinion where the legality or illegality comes in . . . but that type of thing.
>
> (Vol. C117A, pp. 15275-77.)

97. According to Mr. Higgitt, the minutes of the December 1, 1970 meeting supported "the certain knowledge [he had], that this sort of thing occurred in

these meetings" (Vol. C117A, p. 15279). He could not, however, "put a date" to the discussions by Ministers which he stated to have occurred on this matter (Vol. C117A, pp. 15280-81).

(viii) The evidence of former Deputy Commissioner R. Carrière

98. Mr. Carrière testified before the Commission that in his entire career with the R.C.M.P. he had attended only one meeting of the C.C.P.P. and that meeting was chaired by Prime Minister Trudeau (Vol. C117A, pp. 15225-26). Mr. Carrière stated that, while he had no clear recollection as to who was present at this meeting, Commissioner Higgitt, Mr. Starnes and Cabinet Ministers "must have been there". The meeting recalled by Mr. Carrière "wasn't too long before Mr. Cross was found. It could be days, it could be a week or two weeks, but not much more than that" (Vol. C117A, p. 15229).

99. Mr. Carrière recalled this meeting not only because it was chaired by Mr. Trudeau but, as well, because there was a non-Cabinet Minister present at the meeting who was critical of the intelligence results being obtained by the police with respect to the Cross kidnapping case. This criticism prompted Mr. Carrière to seek permission from Mr. Trudeau to respond to it, which he then in fact did (Vol. C117A, pp. 15229-30; 15232-33). Mr. Carrière did not, however, have any recollection of the discussion recorded by Mr. Trudel in his notes as having taken place at the C.C.P.P. meeting he attended. Neither the minutes of the meeting nor the Maxwell Memorandum assisted him in this regard.

(ix) The evidence of Mr. D.H. Christie

100. Mr. Christie was the Assistant Deputy Attorney General in 1970 and in that capacity was in charge of all matters relating to criminal law and to legislative matters (Vol. C118, p. 15371). Mr. Christie testified that he was the author of the first draft of the Maxwell Memorandum and that after he discussed it with Mr. Maxwell certain changes and corrections were made in the document (Vol. C118, p. 15373). He has no recollection of discussing the document with Mr. Turner prior to the meeting of the C.C.P.P. on December 1, 1970 (Vol. C118, pp. 15373-74).

101. He attended that meeting although, he testifed, it was unusual for him to attend such a meeting (Vol. C118, p. 15376). Mr. Christie has no recollection of having seen the two-page list of questions prior to his preparation for his testimony (Vol. C118, pp. 15379-80). He stated that he had recently had an opportunity to review the documents that make up Exhibit VC-1, that is the handwritten notes of Messrs. L.L. Trudel and M.E. Butler and the extract from the minutes of the meeting, that these documents did not refresh his recollection, and that he had no independent recollection of the meeting (Vol. C118, pp. 15380-82). When asked whether he questioned the content of Mr. Trudel's notes he replied: "No, I can neither affirm or deny the validity of these notes" (Vol. C118, p. 15390).

102. He was asked whether he had the impression in 1970 that the operations carried out by the Security Service were not in accordance with the highest standards of conduct and he replied:

> There was an impression abroad that the second quotation from the Mackenzie Report, which appears in the documents, reflected what was, I think, understood to be pretty common knowledge among those who were involved at all in this area.
>
> (Vol. C118, p. 15378.)

Later in his evidence he was asked whether he had any discussions with Mr. Maxwell concerning the commission of crimes by members of the Security Service and he responded:

> No, not specific crimes. Nothing beyond, sort of, general belief, as reflected in the Mackenzie-Coldwell Report. But we never discussed particular types of crimes that they may or may not have been committing.
>
> (Vol. C118, p. 15387.)

In this regard he was referring to that portion of the Mackenzie Report which stated that

> A security service will inevitably be involved in actions that may contravene the spirit if not the letter of the law and with clandestine and other activities which may sometimes seem to infringe on individuals' rights. These are not appropriate police functions.

He further testified he had not addressed his mind to whether this statement included conduct on the part of the Security and Intelligence Branch that was illegal. He agreed that the actions referred to in the Mackenzie Report, that gave rise to the impression he had described, would "not necessarily" involve illegality (Vol. C118, pp. 15394 to 15396).

(x) The evidence of Mr. M.E. Butler

103. In late 1970 Mr. Michael Butler had been an Assistant Secretary in the Privy Council Office for a year and a half. He was specifically responsible for the work of the Cabinet Committee on Priorities and Planning. His functions included "being the active practical secretary at meetings". He says that he was at the December 1 meeting as its "working secretary", which means that he was the "active secretary, facilitating the meeting" but that at the same time he "was taking notes" so that if Mr. Trudel, whose "job was to take and prepare minutes", could not do so, he could prepare minutes himself (Vol. C119, pp. 15403-4). He told us that, even before he was, in February 1981, shown documents relating to the December 1 meeting he "had some memory of what took place at the meeting" (Vol. C119, p. 15401). What he has independent recollection of is that

> at one stage in the meeting, Mr. Robertson and the Prime Minister together decided to refer a lot of the material that was being discussed to another committee, a Security Committee...
>
> (Vol. C119, p. 15402.)

And later he testified:

> ... I recall that the meeting had largely ground to a halt while the Prime Minister and Mr. Robertson were sorting out where to take it from here.

> And I remember watching them very carefully, because it was a critical turning point in the meeting. And I recall all of this without having the documents — without having seen the documents to refresh my memory — which resulted in a lot of material being referred to the Cabinet Committee on Security; and the decision subsequently being taken to get on with some of the basic homework on that Law and Order.
>
> (Vol. C119, pp. 15425-6.)

Mr. Butler says that he "kept notes in a ring-binder and on the document that was being discussed at the time."

104. Mr. Butler says that if Mr. Starnes had uttered the words attributed to him by Mr. Trudel,

> I think the alleged statement is of such consequence that I would have recorded it if I had heard it.
>
> (Vol. C119, p. 15482.)

His notes do not contain those words or anything similar. He confirmed, however, that "Mr. Trudel is a very careful and precise man" (Vol. C119, p. 15484). He does not recollect anything that was said at the meeting except that, as the Minutes say, the Prime Minister asked that the whole question be referred to the Cabinet Committee on Security and Intelligence for consideration (Vol. C119, p. 15473). We must point out, however, that Mr. Butler's handwritten notes of the discussion of this subject are extremely sparse compared to those of Mr. Trudel, whose notes appear to have formed a running record of the meeting.

(xi) Summary

105. The evidence of Mr. Trudel is that his handwritten notes reflect what was said on this subject at the December 1st meeting and further that he recorded, to the best of his ability, what was in fact said and that his notes did not amount to a paraphrase of the statements made at the meeting. Prime Minister Trudeau testified "... I am perfectly happy to recognize that words to that effect were said if it was written down here ..."; Mr. Robertson testified that he did not doubt that Mr. Starnes said something like "the S & I has been doing illegal things for twenty years but never caught" or such language would not appear in Mr. Trudel's notes.

106. In the extract from the typed minutes of the meeting of December 1, 1970 the following statement is attributed to Prime Minister Trudeau:

> He noted that the image of the RCM Police could be misrepresented if the security and intelligence forces were caught breaking the law in order to obtain information. This situation had existed for some time in the RCM Police and he asked that the whole question be referred to the Cabinet Committee on Security and Intelligence for consideration.

Prime Minister Trudeau testified that he had no recollection of making that statement and, comparing Mr. Trudel's notes with the typed minutes, pointed out that the handwritten notes indicated that these thoughts were, instead, expressed by Mr. Starnes and Mr. Turner. Mr. Pitfield was critical of the

typed minute for the same reason, that it contained incorrect attributions of statements to Prime Minister Trudeau.

107. We are satisfied that the Trudel notes record words used by Mr. Starnes at the meeting of December 1, 1970. Accordingly, we find that the extract from the typed minutes of the meeting is incorrect to the extent that it attributes the statements just quoted as if they had been made by Prime Minister Trudeau. However, we also find that those statements were made at the meeting of December 1, 1970, even if not by Prime Minister Trudeau, and that they may have been repeated by Prime Minister Trudeau in the summary of the whole matter which he gave at the conclusion of the discussion.

108. In our view the significance of that meeting is not so much in the *identity* of the person to whom the statements are attributed, as it is in *what* was said, provided that the statements were made by a person who would reasonably be expected to be knowledgeable on the subject under discussion. In our opinion, the Director General of the Security Service was such a person.

109. As stated above, no witness before us denied that the statements recorded by Mr. Trudel in his notes were in fact made. Mr. Trudeau and Mr. Robertson, however, offered an interpretation of the statements which, in effect, denies that those present at the meeting had brought home to them the fact that the Security Service had been engaged in the commission of crimes. The evidence of both these witnesses in essence suggests that *whatever* meaning was intended by Mr. Starnes when he used the words

> misunderstanding of contradiction
>
> — has been doing S & I illegal things for 20 years but never caught
>
> — no way of escaping these things

those present at the meeting did not understand those words to mean that *crimes* had been committed by the Security Service. Mr. Starnes was handicapped in his evidence before us inasmuch as he also lacked a direct recollection of the meeting and was basing his evidence on a reconstruction of the matters discussed. It is, however, fair to infer from his evidence that the kind of "illegal things" to which he was referring at the meeting were those of which he was aware at that time.

110. Notwithstanding the evidence as to what was apparently meant by Mr. Starnes at the December 1 meeting and as to what meaning in fact was taken by those present, the fundamental question is what meaning a reasonable person present at the meeting would have taken from Mr. Starnes' statements. In essence the issues arise whether or not those present:

— understood from the discussion that activities of the specific nature described by Mr. Starnes in his verbal evidence before the Commission and as referred to by Mr. Trudeau were then being engaged in by the R.C.M.P.;

— can properly be said to have been told by Mr. Starnes that illegal activities of some nature or kind were then being engaged in by the

Security Service, so as to require further inquiry and action by those present at the meeting; and

— by not undertaking such further inquiry and action, can be taken or were taken, to have tacitly assented to the continuation of those "illegal activities" of the Security Service of which Mr. John Starnes was then aware; or

— by not undertaking such further inquiry and action, can be taken to have tacitly assented to the continuation generally of "illegal activities" by the Security Service in the performance of its functions.

111. The minutes of the December 1, 1970 meeting indicate that the "whole question" was referred to the C.C.S.I. for consideration. However, at no subsequent meeting of the C.C.S.I. was there an item on the agenda which by its title called for a discussion of the "whole question". Nevertheless, at the C.C.S.I. meeting of December 21, 1970, the agenda included an item entitled "R.C.M.P. Strategy for Dealing with the F.L.Q. and Similar Movements". No doubt because that paper raised the difficulty of members of the R.C.M.P. or paid agents committing serious crimes in order to penetrate violence-prone groups, the witnesses before us have clearly assumed that the "whole question" raised by the discussion of the Law and Order paper at the C.C.P.P. on December 1, 1970, by implication merged, for discussion purposes, under the R.C.M.P. "Strategy" agenda item on December 21, 1970. In the next section we trace the historical development of the "R.C.M.P. Strategy Paper". At the conclusion of that section we shall see that at the C.C.S.I. meeting of December 21, 1970, the Committee agreed to "defer consideration" of "this topic until a future meeting".

(e) The second stream of Law and Order Documents

112. The issues raised in the second stream of Law and Order Documents centres on a more specific problem, namely, the risks attendant on the infiltration by human sources of violence-prone organizations.

113. The documents concerning this issue originated at a meeting of the C.C.S.I. held on November 6, 1970. At this meeting the C.C.S.I. determined that the R.C.M.P. should prepare a report for the next meeting of the Committee, setting out:

(a) proposed strategy to deal with the F.L.Q. and similar movements;

(b) a preliminary analysis of documentation available from seizures made so far;

(c) statistical data having to do with the numbers of persons arrested, detained, released and charged, to clarify the points raised by the Prime Minister and other members of the Committee.

(Ex. M-86, Tab 7.)

114. This direction from the C.C.S.I. resulted in the preparation by the R.C.M.P. of a number of draft reports, of which our Commission has three, (Ex. M-36, Tab 14 (M22(c)(b); M-36, Tab 8 (M22(c)(a); MC-85) and a final report (Ex. M-36, Tab 21 (M22)).

115. The first draft, prepared in mid-November 1970, was a six-page memorandum entitled "Police Strategy In Relation to the FLQ" and dealt with the subjects enumerated in the November 6th decision of the C.C.S.I. (Ex. M-36, Tab 14 (M22(c)b)). At page 6 of the memorandum it was stated:

> New techniques must be adopted by enforcement authorities if this threat is to be effectively countered. Increased emphasis must be placed on the infiltration of individual cells by human sources. In conjunction with this, the risk of allowing these sources to participate in lesser criminal activities must be accepted. Such participation is mandatory if they are to prove themselves and gain admission to cells. Without official sanction of such activities all penetration attempts are destined to failure.

This memorandum spelled out:

> (i) the method necessary to deal with the F.L.Q., i.e. infiltration by human sources; and
>
> (ii) the risk involved in employing this method, i.e. that the sources would, in the course of infiltration, of necessity become a party to "lesser criminal activities".

116. The second draft, similarly entitled, was dated November 20, 1970 and consisted of 12 pages (Ex. M-36, Tab 8 (MC22(c)a)). In the first paragraph on page 9 of that draft it was stated:

> More aggressive techniques will have to be adopted by enforcement authorities if this threat is to be effectively countered. Increased emphasis must be placed on the infiltration of individual cells by human sources. In conjuction with this however, the risk of allowing these sources to participate in lesser criminal activities will have to be accepted. Such participation by sources may often be necessary if they are to prove themselves and gain admittance. The risks of such operations will have to be faced at an official level which may have to include immunity from criminal prosecution.

117. Significant changes in language were effected in the second draft of the R.C.M.P. report. The phrase "New techniques..." became "More aggressive techniques..."; "participation" in "lesser criminal activities... may often be necessary" as compared with the earlier statement that such participation was "mandatory"; and one kind of official approval is suggested for the first time: "immunity from criminal prosecution".

118. Unlike the first draft, the second draft, at pages 10 and 11, sets out the intended strategy of the R.C.M.P. "for the purpose of keeping the government informed of current situations and for countering the F.L.Q. and similar groups". The intended strategy was to include:

> 1. The continuation of present efforts to penetrate these groups by every means possible, including, in particular:
>
> (a) infiltration;
>
> (b) recruitment of members from within;
>
> (c) technical penetrations.

On the face of this document it seems reasonably clear that the intended R.C.M.P. strategy included infiltration and the attendant risk that the infiltrator may become a party to "lesser criminal activities".

119. This second version of the report was delivered to Mr. McIlraith and to Mr. R.G. Robertson, the then Secretary to the Cabinet, by letters from former Commissioner Higgitt dated November 20, 1970 (Ex. M-36, Tab 9; Ex. M-20 and M-21). The transmittal letter to Senator McIlraith stated: "This is the report we discussed in draft form a few days ago" (Ex. M-20).

120. This second draft was also before the Special Committee of the Security Panel at its meeting of November 27, 1970 (Ex. M-36, Tab 13; Ex. M-22, Tab 6). That Committee was chaired by Mr. Robertson and was attended by 12 other senior officials of government including Mr. Côté, Mr. D.S. Maxwell, then Deputy Minister of Justice, Commissioner Higgitt and Mr. Starnes.

121. At that meeting the following discusion was recorded in the minutes of the meeting:

> Commissioner Higgitt and Mr. Starnes explained ... that the Security Service had been breaking and entering in order to place technical aids for years, that such activity against foreign agents would continue and there should be the same approach to dealing with native Canadians seeking the destruction of our society by similar methods, even if for allegedly different reasons. The risk of eventual exposure was virtually inevitable, but worth the result; risks in infiltration applied not only to this area, but to paid agents who, if jailed as accomplices to a criminal act in the process of infiltration, could not be protected by any existing mechanism. The Chairman agreed with Commissioner Higgitt that Ministers *must* know what was involved and the attendant risks, both at the present level of activity and of any accepted increase in it. He considered that the RCMP must be totally frank with Ministers, who in the past had been reluctant to face up to problems of this sort. A detailed, thorough examination of the problem would be essential at the Cabinet Committee on Security and Intelligence. It would also be important for Ministers not to misinterpret the Commissioner's previous denials of criminal activity on the part of the Force: to which Mr. Starnes replied that there was a world of difference in investigating dynamite thefts and the techniques used, as opposed to breaking and entering to introduce technological devices in cases handled by the Security Service.
>
> (Ex. M-36, Tab 13; MC-22, Tab 6, pages 4, 5.)

122. This discussion brought to the attention of those present at the meeting the following activities of the R.C.M.P.:

(a) breaking and entering to introduce technical devices and,

(b) the fact that paid agents employed by the R.C.M.P. to infiltrate target groups may become accomplices to a criminal act engaged in by members of those groups whether or not such activity was approved by Headquarters.

123. The minutes of the meeting record Mr. Robertson, as Chairman of the Special Committee, as having indicated that a "detailed, thorough examination of the problem would be essential at the C.C.S.I." and further, that "the R.C.M.P. must be totally frank with Ministers, who in the past had been reluctant to face up to problems of this sort".

124. In his testimony before us Mr. Robertson stated, with reference to these passages, that he recalls

> . . . very clearly personally saying at the meeting that I thought there was no prospect whatever that they would be given the authorization to permit personnel to commit crimes, in order to penetrate.
>
> (Vol. C108, p. 14020.)

125. As we have indicated, we had a copy of the minutes of the Security Panel meeting of November 27, 1970, when we examined witnesses concerning the "R.C.M.P. Strategy Paper" in late 1979 and 1980. However, as we have stated early in this chapter, in March 1981 we became aware of the existence and content of notes made at that meeting by the late Mr. Beavis. In his notes, two pages are devoted to notes of what was said during the discussion of the "R.C.M.P. Strategy Paper". It will be recalled that on page 9 of that paper it was said: "The risk of allowing these sources to participate in lesser criminal activities will have to be accepted". Mr. Beavis, under the heading "P-9", wrote:

> St — crim acts — for 20 yrs. & will get caught
>
> Ch — ensure good disc in CC — *frank* — & make clear what Hig meant re crime

The first of those lines we interpret as saying:

> Starnes — criminal acts — for 20 years and will get caught.

Mr. Starnes was recalled to testify on April 2, 1981, only five days after we had first received and read Mr. Beavis' longhand notes (Exs. MC-202, 203, and 204). He was asked whether these notes enabled him to recall what went on at that meeting other than what he had previously testified to. He replied "Not really". He said he "can't honestly say that" he remembers making the statement "Crim acts — for twenty years — will get caught" (Vol. C129A, p. 17264). Mr. Starnes was asked whether he has any memory of Mr. Robertson having said that the R.C.M.P. had little hope of getting the authority of government for the commission of illegal acts in the future, whether on the part of R.C.M.P. or paid agents. Mr. Starnes answered: "No. That would have depressed me even more, and I certainly would remember that" (Vol. C129A, pp. 17288-9).

126. Following the November 27th meeting, a third draft of the R.C.M.P. report was prepared by the R.C.M.P. and was delivered by Commissioner Higgitt to Mr. Côté, to Mr. McIlraith's office and to Mr. D.F. Wall, then Secretary of the Security Panel, by transmittal letters dated December 4, 1970, respectively (Ex. M-36, Tab 16; Ex. M-10 to M-13). The letter to Mr. Wall stated in part as follows:

> The document has been amended to reflect the discussions at that meeting and the subsequent discussions on 'law and order' which took place on December 1st, 1970 in the Cabinet Committee on Priorities and Planning. I assume that, in accordance with decisions reached on December 1st, this paper will be further discussed at the next meeting of the Cabinet Committee on Security and Intelligence.

The words "that meeting" refer to the meeting of the Special Committee of the Security Panel of November 27, 1970.

127. Some confusion is apparent on the evidence before us as to which draft in fact was the draft forwarded to Mr. McIlraith's office and to Messrs. Côté and Wall on December 4, 1970. Ex. MC-85, a seven-page memorandum again entitled "Police Strategy in relation to the F.L.Q." contains references to arrest statistics as at December 2, 1970. Accordingly, it seems probable that the draft comprising Ex. MC-85 before this Commission is the third draft of the R.C.M.P. report referred to in former Commissioner Higgitt's correspondence of December 4, 1970. Paragraph 19 of Ex. MC-85 stated, in part, as follows:

> If such continuing revolutionary activities are to be effectively countered, an increased effort to penetrate movements like the FLQ by human and technical sources will have to be undertaken. This at once raises the difficult question of providing some kind of immunity from arrest and punishment for human sources (usually paid agents) who have to break the law in order successfully to infiltrate movements like the FLQ. What should be the responsibility of the government towards a member of the Security Service or an agent paid by it who is arrested for committing a crime in the line of duty as it were?

Paragraph 21 stated in part:

> 21. To keep the government informed of current developments and to counter the continuing activities of the FLQ and similar groups throughout Canada, the RCMP, propose, inter alia:
>
> 1. Continuation of present efforts to penetrate such groups by every means possible, including, in particular:
>
> (a) Infiltration;
>
> (b) Recruitment of members of revolutionary movements;
>
> (c) Technical penetration.

128. Mr. Starnes then redrafted the report in its final form which was entitled "RCMP Strategy for dealing with the FLQ and Similar Movements" (Ex. M-36, Tab 21 (M-22) which we shall hereinafter call the "R.C.M.P. Strategy Paper". This document was forwarded to Mr. Robertson by former Commissioner Higgitt by letter dated December 14, 1970 (Ex. M-18). That letter concludes: "This document, which is intended to replace an earlier paper on R.C.M.P. strategy, has been drafted to reflect recent discussions by Ministers and senior officials".

129. Mr. Starnes forwarded a copy of the same report to Mr. Côté by letter dated December 15, 1970 (Ex. M-36, Tab 17, M-19). In this letter he stated that the paper had been "... revised in the light of recent discussions which have taken place between Ministers and senior officials". He concluded: "I hope it more adequately reflects the requirements of the Prime Minister and his colleagues, and that it deals lucidly and frankly with some of the more delicate problems which we face in attempting to carry out our responsibilities".

130. It would seem reasonable to infer that the "recent discussions" referred to by Commissioner Higgitt and Mr. Starnes in their transmittal letters were

those that had occurred at the meeting of the Special Committee of the Security Panel on November 27, 1970, and at the meeting of the C.C.P.P. on December 1, 1970 (See Ex. M-13 and Vol. C29, p. 3597: Evidence of Mr. Starnes).

131. Paragraphs 5, 9 and 10 of the final version of the report read as follows:

> 5. If such continuing revolutionary activities are to be effectively countered, an increased effort to penetrate movements like the FLQ by human and technical sources will have to be undertaken. We have had only limited success in being able to penetrate the FLQ and similar movements with human sources. Changes in existing legislation will be required if effective penetration by technical means is to be achieved. The greatest bar to effective penetration by human sources is the problem raised by having members of the RCMP, or paid agents, commit serious crimes in order to establish their bona fides with the members of the organization they are seeking to infiltrate. Among other things, this involves the difficult question of providing some kind of immunity from arrest and punishment for human sources (usually paid agents) who have to break the law in order successfully to infiltrate movements like the FLQ. What should be the responsibility of the Government towards a member of the Security Service or an agent paid by it who is arrested for committing a crime in the line of duty as it were? What measures can be suggested by the law officers of the Crown to ensure that such persons escape a jail sentence and a criminal record, without prejudicing their safety? Perhaps those clauses of the Letters Patent of the Governor-General having to do with pardon might be resorted to in such cases, but it is difficult to see how this could be done without revealing the true role of the person concerned. . .
>
> 9. It will be obvious from a reading of the account of the discovery by the RCMP of Mr. Cross and his abductors that this probably could not have been successfully accomplished without the interception of telephone conversations and that electronic eavesdropping was of assistance to the investigation. Yet it should be realized that the application of telephone interception techniques in coping with the FLQ and indeed, with similar revolutionary activity across Canada, has only been possible by a most liberal interpretation of the provisions of the Official Secrets Act. The report on the Royal Commission on Security makes a number of useful comments about the interception of telephone conversations and electric eavesdropping, and in particular, about the importance of ensuring that any legislation contemplated to deal with such matters should contain a clause or clauses exempting interception operations for security purposes from the provisions of that statute.
>
> 10. In addition to these broad strategy plans, we propose to intensify our efforts in such obvious ways as the infiltration of the FLQ, selected surveillance, recruitment of members of revolutionary groups and the development of improved techniques to collect, collate and assess raw intelligence, e.g. computers and information systems analysis.

132. This final version of the report was then distributed to the members of the C.C.S.I. and was before that Committee at its meeting of December 21, 1970. The Minutes of the meeting of the C.C.S.I. of December 21, 1970, as they relate to these pages, record that the Committee agreed to defer consider-

ation of this topic to a further meeting (Ex. M-36, Tab 23). In a memorandum dated December 23, 1970 to his immediate subordinate, Mr. Starnes recorded of the December 21st meeting of the C.C.S.I. that

> the Prime Minister said that he assumed I would like to have some discussion of the R.C.M.P. paper dealing with strategy, and, as a consequence, suggested that it be put aside to a later date.
>
> (Ex. M-36, Tab 24.)

133. The matter does not appear to have again been discussed by the C.C.S.I. or the C.C.P.P. at any subsequent meetings. Mr. Starnes testified that he, to the best of his present recollection, did not again discuss the matter with the Prime Minister or with the Ministers. He stated further in evidence that he has no recollection of pressing for the matter to be raised again for discussion; according to his recollection, the thrust of the discussions in the Cabinet Committee meetings following December 21, 1970 shifted to other legislative proposals (Vol. 103, pp. 16220-1, 16267, 16269 and 16773).

134. In the light of the contents of the final version of the R.C.M.P. report, viewed in the context of the language contained in its predecessor drafts, the issue arises whether the legal problems raised as risks inherent in infiltration efforts by the Security Service referred to past problems, existing problems or prospective concerns faced by the Security Service.

135. In this regard Mr. Starnes testified that the infiltration problems described in paragraph 5 of the final version of the R.C.M.P. report, that is, for example, the problem raised by having members of the R.C.M.P. or paid agents commit "serious crimes" in order to establish their bona fides with the members of the target organization, and the problem of providing some kind of immunity from arrest and punishment for sources who "have to break the law" in order to successfully infiltrate, were "current or prospective problems" and not problems that had been experienced by the Security Service in the past (Vol. 102, pp. 16201-3). Mr. Starnes stated in evidence that he did not have any knowledge of "serious crimes" having in fact been committed by undercover members or agents in order to achieve infiltration (Vol. 102, p. 16198).

136. Former Commissioner Higgitt in his evidence agreed that these portions of the final report referred to prospective problems and did not support his previous testimony which had been to the effect that he discussed with Ministers the concept that there were occasions on which the Security Service had broken the law in carrying out its responsibilities. However he testified that paragraph 10 of the final report set out an intended course of action by the Security Service that would involve the risks described in paragraph 5 (Vol. 111, pp. 17100-1). He stated further:

> I don't think at that time that I knew that our paid agents were engaging in criminal activities.
>
> (Vol. 111, p. 17140.)

And further:

> From memory I don't think we ever faced a case where we had to do one of those things ... I don't of memory, have a case, by luck or by good management, where we were in the end absolutely faced with this sort of thing.
>
> (Vol. 111, pp. 17101-2.)

(f) Disposition of the two streams of documents after December 21, 1970

137. There is no direct evidence before us as to how or why this particular item failed to reappear on the agenda of the C.C.S.I. Mr. Robertson was questioned extensively about this, and about the system. Because of the importance of the matter we set forth his evidence at some length (Vol. C108, pp. 14011-7):

> Every Secretary kept a list of the items that were before whatever Committee it might be. The Secretary would periodically review — he would record the disposition of the item, and if it was disposed of, he would strike it off. If it was still on his list it meant that it had not been disposed of or it had not been dropped. So that he would have a record of these items and he would review that periodically. But, as I say, the situation might emerge in which circumstances had changed or a Minister had said I'm not going to pursue that or something. That might have happened. In which case it would be struck off. But it would not be a matter — if I get the point of your question. . . it would not be a matter of just forgetting about something and losing sight of it.

Q. So that it would be your view, and I am aware that you do not have documentation on this point in front of you, but it would be your view, I take it, that the eventual removal of this particular item from any agenda of this Committee, would be the result of a conscious decision on the part of somebody?

A. That's correct.

Q. In other words, it would not have gotten lost in the shuffle?

A. It would not have got lost. I think this system was good enough that things did not get lost. There was a reason — mind you, things often did get delayed, and delayed for a variety of reasons. To that extent events might alter them or overtake them. But certainly, the items simply would not be forgotten or lost.

Q. So that it might be a decision based upon a turn of events that would make it unrealistic to put the item back on discussion, when all the problems associated with Item X might have receded into past history?

A. That's right. In this particular case I can only speculate that it could be that Ministers were not back together .. I don't remember how long the adjournment was. It might have been until the end of January. That would be not unusual. They might not have been back until February. Discussion, if my memory is right, was still involved on the question of special measures and legislation of that kind. I don't remember when that was completed. That sort of discussion could have been considered by the new Solicitor General as something that ought to be considered before this matter came back. By the time that was disposed of, it might have been the end of April or something . . . By which time, penetration of the FLQ might be considered not nearly as important an issue. So it might have been dropped for that kind of reason.

Q. And the planning of an agenda for a meeting of the Cabinet Committee on Security and Intelligence would be the responsibility of the Secretariat of that Committee?

A. That's correct.

Q. Do I gather from what you said earlier this morning, that because the Prime Minister has so many other duties, his Chairmanship of this particular Committee is unlikely to result in his being as involved in such matters as the preparation of agendas and the review of minutes and so forth, as might be the case with some other Committee?

A. Oh, definitely. The Prime Minister would not be consulted as to the agenda or the sequence. This would be the Secretaries' responsibility and in the briefing note to the Prime Minister it was not infrequent, and is not now infrequent, to say something such as I suggest you take the items in the following sequence, and that might not be the sequence in the agenda. Then there would be reasons why such and such a sequence might be desirable: Mr. X has to go to a speaking engagement in Montreal and leave at such and such a time or something of that kind.

Q. Was it usual for a committee such as the Cabinet Committee on Security and Intelligence, to alert members and other people who were expected to be present, some time in advance, so that if they had items they wanted to add to the agenda, they could before the agenda was finalized?

A. Yes. There were rules — the details of which I now forget — which prescribed periods in advance of the meeting by which notice had to be given of items for a meeting. They also prescribed when Ministers had to receive agendas and documents, to give them adequate time to prepare for them.

Q. It would, I take it, be your view that no argument could be advanced by a person who was present at this Committee, that the mere fact that an item on the agenda had not been reached, was in any way to be interpreted as the matter having been rejected or turned down or turned back or not to be brought up again on a future agenda?

A. No.

Q. If we look at the list of people who were in attendance at this particular meeting, I would assume it is a fair understanding to assume that at least the Solicitor General — soon to be replaced by his successor . . . the Deputy Solicitor General, the Commissioner, the Director General of the Security Service and possibly, the people from the Department of Justice, would all in the normal course of events be expected to have this particular item in mind, if they wanted to bring it up at a future meeting? It related even more specifically to their duties, than to the duties of Mr. Cross from the Department of Manpower and Immigration and certain others who were present?

A. That is correct. It, of course, would be of particular concern to the Commissioner and Mr. Starnes. Because it was in a document that came from the RCMP and was relating to the security work.

Q. Again recognizing that you do not have documentation on this point before you, you would be quite sure in your own mind that if a further meeting of the Committee had been scheduled for the end of February, and notice was given, it would still be open to them to file in writing or via a phone call, a special request that this particular item be on that agenda, if it were not already shown to be on the draft agenda?

A. Yes.

138. Mr. Robertson's knowledge of the system that existed at that time was undoubtedly extensive. As is indicated in the foregoing passage, his view is that the removal of this item from any agenda of the Committee would be the result of a conscious decision on the part of somebody. We have no evidence as to who made such a decision, if there were one made. We note Mr. Robertson's testimony that the secretariat of the C.C.S.I. would not consult the Prime Minister as to the agenda. As for the reason such a decision might have been made, we note Mr. Robertson's speculation that by the spring of 1971 the issue raised in the R.C.M.P. Strategy Paper might have been dropped because penetration of the F.L.Q. had become an issue of lesser importance with the passage of time.

139. Finally, we think that it is important not to lose sight of the fact that it would have been open to several persons, at any time after the deferment of the matter at the C.C.S.I. meeting of December 21, 1970, to write or telephone the secretariat of the committee, to ask that this item be placed on the agenda for a subsequent meeting, if it were not already on such an agenda.

(g) Overview and conclusions

(i) Did documents which disclosed the possible future commission of offences by members or agents in the course of penetrating violence-prone groups also disclose that the R.C.M.P. had engaged in activities "not authorized or provided for by law"

140. As noted above, the second stream of Law and Order Documents relates to a particular problem facing the Security Service, viz: the infiltration of violence-prone organizations and the risks attendant thereon. These documents describe an existing problem that inhibited effective infiltration by R.C.M.P. members or paid agents into violence-prone organizations such as the F.L.Q. These documents do not, however, on their face, indicate that R.C.M.P. sources (whether members or paid agents) as at December of 1970 had engaged in criminal activities or activities contrary to law in order to achieve effective penetration, whether with or without the authority or acquiescence of the Security Service. (More specifically, the testimony of former Commissioner Higgitt and Mr. Starnes before us is that the commentary set forth in these documents with respect to such infiltration risks was entirely prospective in nature — in other words, that crimes might have to be committed in the future in order to penetrate groups.) We conclude unhesitatingly that this stream of documents did not disclose to government officials or Ministers that members or agents of the R.C.M.P. had committed unlawful acts.

(ii) Did documents which discussed the "inherent contradiction" of the Security Service, or discussion of those documents, result in senior officials and Ministers being advised that the Security Service had been carrying out illegal activities?

141. The first stream of documents and the discussions relating to them raise a much broader issue. The nature of the broader issue, as set forth in Mr. Starnes' document of November 26, 1970 (Ex. M-36, Tab 11), is whether senior officials and Ministers were advised that the Security Service had been

carrying out illegal activities for some twenty years in the carrying out of its responsibilities.

142. No witness has any memory of what Mr. Starnes said. The evidence is that of Mr. Trudel's notes. It has been submitted to us by counsel for the government that his notes would not be admitted into evidence in a court of law, and are not reliable. In our Appendix to this Part we shall deal with each of these points in turn, and then deal with a third issue raised by counsel for the government. Our conclusions are that his notes would be admissible in a court of law, are admissible before this Commission of Inquiry, and are reliable. On the third issue, we give our reasons for reporting the facts even though the words were spoken at a meeting of a cabinet committee.

143. We find that on December 1, 1970, Mr. Trudeau, Mr. Turner and other persons present were told that the Security Service had been doing illegal things for twenty years. We are satisfied that Mr. Trudel's handwritten notes record words used by Mr. Starnes at the meeting of December 1, 1970, namely that the Security Service had been doing illegal things for 20 years and had not been caught. We further find that those notes support the conclusion that the Honourable John Turner heard what Mr. Starnes said since he replied "If you are caught... then what of police image... should you not be dissociated". As for Prime Minister Trudeau, although it is only fair, in our opinion, not to attribute to him all the statements in the typed minutes which appear to us to have been really the minute-drafter's summary of what was said by others at the meeting, we do consider that the notes disclose that he heard and reacted to the statement made by Mr. Starnes.

144. We also find that there is no evidence to support a conclusion that either Mr. Trudeau or Mr. Turner was made aware of any specific kinds of activity of an illegal nature, in which the Security Service was engaged. Nor is there any evidence before us as to what those who heard Mr. Starnes' words understood them to refer to.

145. At the conclusion of Part I of this Report we made reference to our views concerning expression of opinion or passing of judgment as to the conduct of Ministers and senior public servants. The information presented to the meeting of December 1, 1970 that "illegal things" had been engaged in for twenty years past by the Security Service, resulted in, to employ the words we used in Part I, steps being taken to "deal with it in some other way". These steps consisted of a decision on the part of the Prime Minister, and recorded in both the handwritten notes of the meeting and the final Minutes of the Meeting "that the whole question be referred to the Cabinet Committee on Security and Intelligence for consideration". We accept that the Committee which was meeting on December 1, i.e. the C.C.P.P., was not the Cabinet Committee in which this subject matter raised by the Maxwell memorandum should appropriately be discussed. The subject matter was referred to the Cabinet Committee on Security and Intelligence whose responsibility was to deal with matters of this nature.

146. The evidence of Mr. Trudeau, Mr. Turner and Mr. Starnes establishes that, neither at the meeting itself nor afterward was any inquiry made by or at

the instruction of Mr. Trudeau or Mr. Turner. We have already noted Mr. Starnes' testimony that after December 1 he did not receive any inquiry from any government official or Minister as to what he had meant. Mr. Trudeau testified as follows:

> Q. Do you recall any discussion after the meeting, with Starnes, concerning what he was talking about?
>
> A. No, I don't.
>
> (Vol. C98, p. 12944.)

Mr. Turner testified as follows:

> Q. Do you recall this topic — I'm sorry, do you recall ever participating in later assemblies where this topic would have been discussed?
>
> A. I don't.
>
> (Vol. C118, p. 15344.)

147. Thus it would be open to infer that Mr. Starnes could reasonably conclude, after the meeting of December 1, and after there were no inquiries made of him about these illegal "things" during the weeks and months that followed, that the government by implication assented to the continuation of those activities. That inference may have been unjustified in that the government may have had no intention to give any such assent, and no one has any memory of how the matter was dealt with. It is therefore impossible to reach any conclusion as to whether there was any such assent intended. However, the matter seems to us to be of academic importance, for Mr. Starnes at no time has said that he permitted any of the institutionalized practices of which he was aware (such as surreptitious entries and speeding by drivers of Watcher Service vehicles) to continue *because* he considered that the government had assented to such activities. Indeed, Mr. Starnes was asked whether he remembered having, as the months went by after November 27 and December 1, 1970, addressed his mind to this and having concluded in his own mind that, in the absence of being told to stop any activities he considered to be illegal, he had, in effect, authority from the government to allow such activities to carry on. He replied:

> I don't think I would have rationalized it quite the way you have put it. My mind doesn't work quite like that. Probably the net effect would be the same, but I don't think I sat down and looked at myself, as it were. I am not that kind of a person. But probably the net effect would have been just that.

He was then asked how his mind would "work so that the net effect would be the same". His reply, and a further question and answer, were as follows:

> A. I think my concerns would have been more how to get an extremely difficult job done in the circumstances you have described, with a minimum amount of risk and damage to the people who were working for me, because they were on the front line, not me.
>
> Q. I interpret that answer as meaning: I wouldn't have addressed my mind to any implication of authority arising from not being told to stop, but I would have taken the lack of help that I received off my back and looked forward and decided to address my mind to what practical ways there might be of enabling people in the field to get the job done with the minimum possible legal and other risks.

Q. Is that right?

A. That is correct.

(Vol. C129A, pp. 17289-91.)

148. Nor has he ever claimed that he communicated to any other member of the R.C.M.P., as a fact or understanding or in any way at all, that the government had given its implied assent to the R.C.M.P. Security Service's doing illegal things. Nor did he claim that any subordinate to whom he may have said that he had informed the government that the R.C.M.P. had been doing illegal things interpreted the lack of a request for details as implied authority to carry on with illegal practices. Indeed, Mr. Starnes was asked whether, after November 27 and December 1, 1970, he ever told any subordinate in the Security Service, that he had told the government that the R.C.M.P., in its security and intelligence work, had been doing illegal things but had never been caught, and that he had not received any request for details. His reply, and further questions and answers, were as follows:

A. I'm quite sure that I would have come back on occasion just steaming, to my people who were working for me, like Draper and Sexsmith and so on, and said — you know, I won't use the language which I might have used, but I would have come back probably extremely irritated and frustrated on these very points: Now, we are getting nowhere; we are getting no advice; no help.

Q. But you have no memory of this?

A. No, I haven't, but I am darned sure that I must have, knowing myself.

Q. Do you have any memory that any subordinate, on any such occasion when you said anything of that sort to them, replied anything to the effect: Well, I guess that gives us the green light we need, the back-up we need, the authority we need to carry on with any particular practice?

A. No, I can't say that.

(Vol. C129A, p. 17293.)

The same is true of Mr. Higgitt; he has never told us that he allowed any institutionalized practices of which he was aware to continue because he considered that his "political masters" (as he calls them) had given their implied assent to them. At most they have invited us to note that the government knew certain things; but they have not asserted that they regarded such knowledge as a defence for their allowing institutionalized practices to continue.

149. Even more clearly, knowledge by the government in December 1970 that the R.C.M.P. in its Security and Intelligence work had been doing illegal things, without further inquiry or remonstrance, cannot reasonably be taken as implied assent to any subsequent illegal acts in which Mr. Starnes was involved or of which he knew, which went beyond the bounds or practices which had been institutionalized by December 1970 and were then known to him. To treat the matter otherwise would be to regard the government's silence as carte blanche, and we think that it is unreasonable to infer that a failure to inquire or to direct cessation of "illegal things" can be taken as carte blanche. In any event, the only two incidents of which we are aware and that we think *may*

have involved illegal conduct on the part of Mr. Starnes after 1970 were Operation Ham (described in Part VI, Chapter 10) and the destruction of an article (described in Part IV, Chapter 9). In neither of these cases has Mr. Starnes claimed before us that his conduct was motivated by reliance upon tacit or implied consent by the government to "illegal things". Indeed, Mr. Starnes was asked whether, after speaking in government circles of the commission of criminal acts and the doing of illegal things on November 27 and December 1, 1970, and after not being asked for details or being told to stop, he ever authorized any particular practice or particular act or particular operation, and in doing so, relied, in his own mind, on the fact that he had told this to government and not been told to stop illegal activities. He replied:

> A. Oh, I get the purport of your question, but I wish I could answer it in another way. I simply cannot say that, you know, I remember any specific occasion that that sort of reasoning would have occurred to me.
>
> (Vol. C129A, p. 17294.)

150. As far as officers subordinate to Mr. Starnes and Commissioner Higgitt are concerned, or the "foot-soldiers" of various ranks who carried out operations whether of an institutionalized or of a special nature, we do not consider that they can point to the government's knowledge of December 1970 as justification for what they did, if it was otherwise illegal. The kind of argument based on "apparent authority" which has developed in the United States, and was discussed by us in our Second Report, Part IV, Chapter 1, cannot succeed on that ground unless those who advance it can assert that they believed that what they were doing was done with the authority of the government or some official in government who they thought could cloak them with authority. No evidence has been presented to us by any member of the R.C.M.P., or found by us in any documents, that would support an inference that any member of the R.C.M.P. performed any act because he thought that it was covered by a blanket of authority consisting of what he understood had been tacit or implied assent by the government to the performance of otherwise illegal acts in order to protect the security of Canada.

151. Thus, our view is that the knowledge of the government, and its subsequent failure to inquire or to direct the cessation of "illegal things", whatever may be said of those facts in political terms (as to which, for the reasons we have given, we make no comment), has no relevance to the legal quality of any acts by members of the R.C.M.P. committed thereafter. Nevertheless, because a prosecuting authority or a judge may be of a different view, we think that the facts of such knowledge and subsequent lack of inquiry or direction to desist should be made known to those who are directly affected by this Report.

152. In this section of this Part we have discussed the history of the Law and Order documents in great detail. We have found that the matters placed before Ministers and senior officials by the R.C.M.P. were never fully discussed and resolved within government. Although we have concluded that the submissions made to Ministers and senior officials cannot relieve members of the R.C.M.P. from responsibility for subsequent illegal acts, there is no doubt in our minds that an attempt was made by senior members of the R.C.M.P. to have aspects

of the question of illegal acts discussed at the highest level of government, both as to what had happened in the past and as to what might take place in the future. This confirms the testimony of senior officers of the R.C.M.P. that the problem of illegal acts was, to a certain extent, raised with Ministers and senior officials over the years.

B. R.C.M.P. ATTITUDE TOWARDS MEMBERS OR SOURCES ENGAGED IN "SENSITIVE OR SECRET OPERATIONS"

153. Here we discuss another body of evidence, which related to a "policy" or "procedure" that had been developed within the R.C.M.P. to apply if R.C.M.P. members or paid agents became exposed to court process by virtue of their involvement in "sensitive or secret operations".

154. Documentation in R.C.M.P. files indicated that in the summer of 1970 an issue arose within the R.C.M.P. as to what would happen to members of the Force who "became subject to criminal and civil process" as a result of their participation in "sensitive or secret operations". As a result of our discovery of this documentation, and in the light of the existence of the Law and Order Documents, we heard evidence from several witnesses as to whether in fact such a "policy" or "procedure" as referred to above existed within the R.C.M.P. and as to whether or not Ministers or senior officials were informed by the R.C.M.P., or otherwise became aware, of the existence of such a "policy" or "procedure".

155. The manner in which the question arose, and how it was dealt with within the R.C.M.P., were described by us as follows in Part IV, Chapter 2 of our Second Report:

> 7. . . . In June 1970, some members of the Security Service, in a training class, questioned their position if criminal or civil action were to be brought against them. Their concern referred to carrying out what were described, in a memorandum (Ex. M-1, Tab 2) summarizing the discussion, as "certain tasks performed by S.I.B. [Security and Intelligence Directorate] or C.I.B. personnel" that required "that the law be transgressed, whether it be Federal, Provincial or Municipal law, in order that the purpose of the undertaking may be fulfilled". The memorandum observed that "The particular task will have been sanctioned in many cases by a number of officers who will at least be aware of the means required to achieve the end product, and who will have given their tacit or express approval".
>
> 8. The members of the class wanted to know to what extent the Force would back its members in these circumstances, whether their families would be cared for in the event of imprisonment and where members stood in terms of future employment...
>
> 10. A three-page policy memorandum was then prepared for Commissioner Higgitt's approval. This memorandum, in addition to incorporating the points noted above, contained the following paragraph which is ambiguous and may even contradict itself:

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

(The emphasis is ours.)

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

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

(Ex. M-1, Tab 7.)

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

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

The problem at the moment was members of the Force... getting themselves into difficult situations as a result of quite straight forward, honest carrying out of their duties, getting themselves into difficulties, it could be with transgressions of a law or it could be with a number of other things; it was a problem that was inherent in not only the Security Service, in the law enforcement generally, that occasionally placed members in difficult circumstances.

(Vol. 88, p. 14452; see also Vol. 85, pp. 13965-6 and Vol. 87, pp. 14330-1.)

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

Q. So, the text of the draft letter did remain the policy as it is explained there, as it is expressed there?

A. Right, in essence it was the policy.

(Vol. 85, p. 13948; see also Vol. 84, p. 13751.)

Nonetheless, at other points, he testified that the draft memorandum did not represent Force policy. Rather, he said that his handwritten note quoted above was the extent of Force policy (Vol. 87, pp. 14282, 14289, 14303). Notwithstanding this lack of clarity about what precisely was Force policy, Mr. Higgitt testified that this policy had been in effect for over 30 years

and that his handwritten note was not intended to change the policy in any way. Rather, it was "restating the obvious" (Vol. 85, p. 13992 and Vol. 86, p. 14190). Furthermore, he gave three reasons why the policy on this matter should not have been written down and circulated among R.C.M.P. members:

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

(b) the problem addressed by the policy was not as significant as it was being made out to be and publication of the policy might have the effect of ". . . giving some degree of freedom which, certainly, I did not wish to give in that way to members at large to engage in this sort of thing" (Vol. 84, pp. 13751-2); and

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

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

Q. Would I be correct then that in a situation, say, where a senior N.C.O. instructed a constable to do something that involved a transgression of the law, that under your policy, that the constable would be protected by the policy, but the N.C.O. would not be?

A. That is a question that could only be answered given the circumstances. Protection wasn't necessarily always involved.

(Vol. 85, pp. 13992-3.)

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

156. We concluded in our Second Report that "it would be surprising if [a member of the R.C.M.P.] did not find Force policy on this matter vague, confusing and at times contradictory". In other words, there was a "policy" or "practice" but just what it was is not susceptible of definition. As to whether the "policy" or "practice" (whatever it was) was intended to provide protection to members of the Security Service or paid agents who would become involved in criminal activities in order to infiltrate groups, we have found no evidence that it was.

157. Mr. Higgitt was asked in evidence whether or not he had discussed this policy or procedure with those persons to whom he was responsible. He testified in this regard:

I discussed it with Ministers, from time to time, in oral as well as in written form. The problem was placed on Ministers' desks.

Q. And did you, at any time receive any instructions from the Ministers with whom you discussed it, that such a policy was inappropriate?

A. No, I never did.

(Vol. 84, p. 13756.)

158. Asked whether he discussed it with Mr. McIlraith, Commissioner Higgitt answered "Yes", and stated that he did not recall Mr. McIlraith's having given any indication that he was not in accord with such a policy (Vol. 84, pp. 13756-7). He was then asked whether he discussed this matter with Mr. Goyer, namely, the policy referred to in the three-page policy memorandum. Mr. Higgitt stated:

> ...I must frame my answer to this specific memorandum as such. It was not necessarily discussed, but the principle involved and the fact that our members were required... to put themselves at risk in the carrying out of their obligations and their duties. This was discussed ... with all ministers that I served under.
>
> (Vol. 84, p. 13757.)

159. When asked about "the intention... that the Force would stand behind the members if they were acting in accordance with the orders and policy of their senior officers", Mr. Higgitt answered that it

> was discussed in the context that very often we are trying to get some legislative support for it.
>
> (Vol. 84, p. 13758.)

160. Mr. Higgitt was then asked whether he discussed "the same problem and the resolution so far as the members are concerned" with Mr. Allmand. He replied: "Yes, there is no doubt in my mind of that" (Vol. 84, p. 13758).

161. Mr. Higgitt's evidence on this issue is not however, entirely consistent. Notwithstanding his prior testimony, when cross-examined further on this subject Mr. Higgitt stated at one point that he did not think that he passed on to "the Ministers" the information as to the "procedures" to apply (Vol. 110, p. 16970). Still later in his evidence he stated expressly:

> There was no question but that very senior people in government and including Ministers knew that this problem existed.
>
> (Vol. 110, p. 16986.)

162. Mr. Higgitt in this regard was referring to the procedure whereby "the Force would protect its members" depending on the facts of the particular activity concerned (Vol. 110, p. 16987). When asked to which Ministers he had described this "procedure", he replied that "... it wasn't something that even had to be discussed" (Vol. 110, p. 16989) because it was such an obvious and simple procedure. His evidence was marked by further inconsistencies as he then stated that he was not sure that he had discussed it with "the Minister" but that "... in the course of general discussions this kind of thing would have been probably mentioned" and that he was "sure" that it was part of their general discussions (Vol. 110, p. 16990).

163. According to Mr. Higgitt, he "must have" discussed the matter with the Solicitor General to whom he was responsible (Vol. 110, p. 16992). "Logic"

dictated that he "undoubtedly" did but he had no "absolute recollection of it" (Vol. 110, p. 16994).

164. In the light of this testimony Mr. Higgitt was asked specifically to identify the Solicitors General with whom he had discussed this policy or procedure. In reply to this questioning he stated on the one hand, that he couldn't "really answer that question" but nevertheless "I certainly think it would have been with Mr. McIlraith" (Vol. 110, pp. 16994-5).

165. In support of this assertion, and despite his admission that he had no precise recollection of such a discussion with Mr. McIlraith, Mr. Higgitt stated that it was during Mr. McIlraith's tenure as Solicitor General that the general question of the extent to which members of the Force would be required to transgress the law in order to carry out their functions was being considered by various responsible government committees. Based on this fact, Mr. Higgitt told us that he thought that the protection or support policy of the Force was discussed with Mr. McIlraith, but he was not sure (Vol. 110, pp. 16995-6).

166. In view of the inconsistencies in Mr. Higgitt's evidence with respect to this matter, we are of the view that it cannot reasonably be concluded that, as originally asserted by him, he did in fact discuss this issue with Mr. Goyer and Mr. Allmand. However, as alluded to by Mr. Higgitt, it is correct that the Law and Order Documents were generated during the tenure of Mr. McIlraith and were before various governmental committees in the fall of 1970 (most notably, the C.C.P.P. at its meetings of November 24, 1970 and December 1, 1970 respectively, and the Special Committee of the Security Panel at its meeting of November 27, 1970).

167. At most, then, it could only be suggested that he discussed the matters with Mr. McIlraith. It is submitted, however, that it is unreasonable to draw this inference inasmuch as Mr. Higgitt's overall evidence on this particular issue is inconsistent and contradictory. At the same time, however, the minutes of the C.C.P.P. meeting of December 1, 1970 and the R.C.M. Police Strategy Report as before the Special Committee of the Security Panel on November 27, 1970 do support the view that infiltration problems had been brought to the attention of government officials and that "guidelines" were being sought. In this regard it should be remembered that although Mr. McIlraith was not present at the C.C.P.P. meeting of December 1, 1970 nor at the Security Panel meeting of November 27, 1970, he had been forwarded a copy of both the Maxwell Memorandum and the "R.C.M.P. Strategy Paper". In addition, his immediate subordinate, Mr. Ernest Côté, was present at the November 27 meeting as were other senior officials of government.

168. Assuming, however, that the specific inference is drawn by us that the "policy" or "procedure" was discussed with Mr. McIlraith, the question arises as to what matters, specifically, were discussed with Mr. McIlraith and what "sensitive or secret operations" were referred to in such discussions. In this regard Mr. Higgitt testified that the matter which he logically felt had been discussed was the "procedure" followed when members of the R.C.M.P. put themselves "at risk" in the course of their duties. Mr. Higgitt did not testify

that "activities not authorized or provided for by law" or indeed, unlawful or illegal activities, were so discussed.

169. It is our opinion, therefore, that a discussion of the problem faced by members of the R.C.M.P. when they place themselves at risk, cannot in itself properly be regarded as support for the inference that a Minister or Ministers were informed that a Force policy or procedure existed whereby activities not authorized or provided for by law, or activities giving rise to legal concerns, were sanctioned or approved by the Force whether through an existing protection or support policy or otherwise.

C. WHAT, IF ANYTHING, DID MR. STARNES TELL MR. McILRAITH ON NOVEMBER 24, 1970?

170. A further meeting, however, allegedly arising on November 24, 1970, or thereafter and prior to the C.C.P.P. meeting on December 1, 1970, must be considered. Introduced in evidence before us was a document, dated November 26, 1970, by Mr. John Starnes (Ex. M-36, Tab 11). That document records a discussion allegedly held between Mr. Starnes and his Minister at the time, Mr. McIlraith, on November 24, 1970. The document, apparently a personal note recorded by Mr. Starnes, reads as follows:

> On November 24, 1970, George McIlwraith [sic], the Solicitor General, raised with me the question of what should be done to eliminate inherent contradiction in the existing Security Service which centres around the question of the commission of crime in the national interest.
>
> I had pointed out that this had been the subject of discussion for some time; especially the question of the protection, if any, which can be provided members of the Security Service or agents of the Security Service who may on occasion have to break the law. As the Minister was aware, the theory being advanced in some quarters was that breaking the law might somehow be easier for a civilian service than for the R.C.M.P. I mentioned to the Minister that the R.C.M.P. had in fact been carrying out illegal activities for two decades and that this point had been made in various discussions.
>
> The Minister had remarked that in his view, in the public mind, it would probably be more acceptable for the R.C.M.P. to commit crime in the national interest than for this to be done by some civilian body.

171. Mr. Starnes in his evidence affirmed that this discussion with Mr. McIlraith had taken place. He stated further that, although he had no actual memory of the words used during the discussion, he believed that the memorandum prepared by him in substance set out the discussion which had taken place. With respect to the reference in the memorandum to "illegal activities", Mr. Starnes testified that he did not recollect Mr. McIlraith inquiring what activities Mr. Starnes was referring to, nor did he himself provide to Mr. McIlraith a list of such activities.

172. Mr. McIlraith, in turn, denied in his evidence before this Commission that this discussion took place on November 24, 1970 or indeed that such a discussion took place between Mr. Starnes and himself at any time (Vol. 118, pp. 18429-40).

173. When questioned before the Commission with respect to Mr. Starnes' document of November 26, 1970 and its contents, Mr. McIlraith expressly stated that "There was no such meeting with Mr. Starnes" (Vol. 118, pp. 18431 and 18438). When asked whether Mr. Starnes had raised with him the question "... what should be done to eliminate inherent contradiction in the existing Security Service which turns around the question of the commission of crime in the national interest?", Mr. McIlraith replied:

> No sir. If he raised ... well, I do not believe that you can ... you cannot have commission of crime in the national interest. There just is no such thing. Our whole system is to run a system of the operation of a democratic government under the law.
>
> (Vol. 118, p. 18431.)

174. He was asked whether Mr. Starnes had said "... that the R.C.M.P., in fact had been carrying out illegal activities for two decades and that this point had been made in various discussions", and he replied "He did not..." (Vol. 118, pp. 18433-34).

175. In concluding this portion of the examination, Commission Counsel enquired whether the contents of Mr. Starnes' document were false and the witness responded:

> No I don't say that at all. I say the contents of the document, if they ever took place, do not relate to me. There is a big difference. Mr. Starnes is not a man who is going to do a false document. That just isn't good enough. That is not right at all ... I am saying it does not record any meeting with George McIlraith, the Solicitor General.
>
> (Vol. 118, pp. 18438-39.)

176. Mr. McIlraith testified that the phrase "commission of crime in the national interest", if used by Starnes in such a discussion, would have caused "... a flare up right away" (Vol. 119, p. 18638). He testified that he has no recollection of this two-page document entitled "Various Questions Raised by Law and Order Paper". He further testified that he has a good recollection of the C.C.P.P. meeting of November 24, 1970, but cannot recall whether the two-page list of questions was annexed to the Maxwell Memorandum for the purpose of discussion at the meeting (Vol. 120, p. 18691). If it was, he testified, "then I still think it was not discussed or referred to at all" (Vol. 118, pp. 18416-17 and 18442). He told us that, if he had read the two-page series of questions, and question seven in particular — which contained language identical to that found in Mr. Starnes' memorandum, namely "the commission of crime in the national interest" — he would have been "very sensitive on that suggestion" and would have had the same reason to have "a flare-up" (Vol. 120, p. 18692).

177. In light of the conflicting evidence of Mr. Starnes and Mr. McIlraith regarding the subject of this discussion, it is relevant to note some of the evidence of Mr. Ernest Côté, Deputy Solicitor General during the period of Mr. McIlraith's and Mr. Goyer's respective tenures as Solicitor General.

178. Following the creation of the I.C.L.O. consequent upon the meeting of the C.C.P.P. held on May 5, 1970, Mr. Côté became the representative of the

Department of the Solicitor General on the I.C.L.O. (Vol. 309, p. 300876). Mr. Côté testified that on one occasion Mr. Starnes, as Director General of the Security Service, was in Mr. Côté's office and:

> . . . he was bothered about certain acts, were close to the line, and there may have been trespassing, which is a civil affair, in eavesdropping, or other matters, close to the line, which he was concerned about.
>
> (Vol. 307, p. 300770.)

179. By "close to the line" Mr. Côté stated that he meant activities bordering on the limits of legality. Mr. Côté further stated that although he did not recall when this discussion with Mr. Starnes took place, he did recall vividly that Mr. Starnes had been in his office waiting to see the Minister, and that Mr. Côté had told Mr. Starnes, with respect to the concern he expressed, that Mr. Starnes should talk to the Minister about it ". . . that it was a matter between the Minister and Mr. Starnes" (Vol. 307, pp. 300770-2).

180. Mr. Starnes, during this discussion with Mr. Côté was:

> . . . bothered about the position of members of the Force on the security side who may have to act very close to the line of the law and what is to be done with these people, how to protect them.
>
> (Vol. 307, p. 300772.)

181. Mr. Côté stated that he did not have any other conversation with Mr. Starnes of a like nature, nor was the matter again raised with him by Mr. Starnes or by Mr. McIlraith (Vol. 307, p. 300773).

182. Mr. Côté testified that he did not have any recollection as to whether Mr. Starnes raised with him at this time any specific activities with which he was concerned (Vol. 307, pp. 300770-2).

183. Still later in his evidence, however, Mr. Côté stated, with reference to electronic eavesdropping, that he recalled this matter being raised with him by Mr. Starnes during this discussion (Vol. 308, pp. 300809-10). Further, he testified that the question of intelligence probes being made by the Security Service in the course of their operations "may also" have been a matter discussed between him and Mr. Starnes on the occasion of this discussion (Vol. 308, pp. 300840-2). Similarly, mail opening by the Security Service "may have" been a matter raised by Mr. Starnes at this time, although Mr. Côté did not recall one way or another (Vol. 308, p. 300853). Perhaps more significantly, the problems experienced by human sources in penetrating "violence-prone groups" may also have been a matter raised by Mr. Starnes with Mr. Côté during this discussion. Mr. Côté did not however know whether or not Mr. Starnes had raised this issue with Mr. McIlraith (Vol. 309, p. 300886).

184. Mr. Côté, when questioned as to when this discussion took place with Mr. Starnes, was unable to recall a specific date or indeed, whether it had occurred during the tenure of Mr. McIlraith or Mr. Goyer (Vol. 307, p. 300771; Vol. 309, p. 300888). From time to time during his evidence in this regard, however, Mr. Côté specifically referred to Mr. McIlraith as the Minister concerned (Vol. 307, p. 300773; Vol. 307, pp. 300886-8).

Conclusions

185. Obviously we are facing here a direct contradiction in the evidence as to what took place between the only two participants, Mr. McIlraith and Mr. Starnes. Were there no corroborative evidence, the issue would have to be resolved on a straight credibility basis.

186. Fortunately, there are some facts of corroborative value which, coupled with the oral testimony of Mr. Starnes, lead us to accept his version of the facts. They are:

(a) The striking similarity in the phraseology used by Mr. Starnes in his November 26 memo concerning his November 24 meeting with Mr. McIlraith, at the November 27 meeting of the Security Panel and again on December 1 at the Cabinet Committee on Priorities and Planning.

(b) The similarity of phraseology in Question No. 7 attached to the Maxwell memorandum and the language attributed to Mr. McIlraith by Mr. Starnes in his November 26 memorandum, concerning the November 24 conversation.

(c) The fact that the issue was actually on the agenda for the meeting of the Cabinet Committee on Priorities and Planning on November 24, as Question No. 7, attached to the Maxwell memorandum, which had been circulated for the meeting of that day.

(d) The Côté-Starnes conversation at Mr. Côté's office.

187. We now discuss briefly how we perceive these facts to be of corroborative value.

(a) The striking similarity in the phraseology used by Mr. Starnes on November 24, November 27 and again on December 1

188. There is little need to do more here than quote how the message was expressed on those three dates.

189. In his memorandum of November 26, 1970, covering his meeting of November 24 with Mr. McIlraith, Mr. Starnes wrote:

> ...I mentioned to the Minister that the RCMP had in fact been carrying out illegal activities for two decades and that this point had been made in various discussions...

190. At the meeting of the Security Panel held on November 27, 1970, and the meeting of the Cabinet Committee on Priorities and Planning held on December 1, 1970, the identical message to the one Mr. Starnes contends he had conveyed to Mr. McIlraith on November 24, 1970, i.e. 3 and 6 days earlier, respectively, was voiced by Mr. Starnes. The handwritten notes of the recording secretaries at each of those meetings, Mr. Beavis and Mr. Trudel, respectively, not only relate to the same issue but also record much the same wording. The notes of Mr. Trudel read:

> misunderstanding of contradiction
> — has been doing S & I illegal things for 20 years but never caught
> — no way of escaping these things.

The notes of Mr. Beavis read:

> St — crim acts — for 20 yrs. & will get caught
>
> Ch — ensure good disc in CC — *frank* — & make clear what Hig meant re crime.

We believe that the striking similarity between Mr. Starnes' language in his memorandum of November 26 and Mr. Trudel's and Mr. Beavis' notes covering Mr. Starnes' statements on November 27 and December 1, are corroborative of the likelihood that Mr. Starnes spoke to Mr. McIlraith on November 24 in the language similar to what he recorded in his memorandum very shortly after the event.

(b) The similarity between Question No. 7 attached to the Maxwell memorandum and the language used in the November 26 Starnes memorandum

191. It will be recalled that the Maxwell memorandum was placed on the agenda of the meeting of the Cabinet Committee on Priorities and Planning of November 24, 1970, that being the same day that Mr. Starnes is supposed to have spoken to Mr. McIlraith. Question No. 7 reads as follows:

> What should be done to eliminate inherent contradiction in existing security service which turns around the question of crime in the national interest?

192. In his memorandum Mr. Starnes writes that Mr. McIlraith had, in conversation, posed the following question to him:

> The Solicitor General raised with me the question of what should be done to eliminate inherent contradiction in the existing security service which centres around the question of the commission of crime in the national interest.

193. Obviously, the language attributed to Mr. McIlraith borrows the phraseology of Question No. 7. The similarity between the two texts is such that one could well conclude that both Mr. Starnes and Mr. McIlraith had read from the same pages.

(c) Cabinet Committee on Priorities and Planning — November 24 and the Maxwell memorandum

194. Further corroboration of the likelihood that this conversation between Mr. McIlraith and Mr. Starnes took place on November 24, 1970, as Mr. Starnes contends, stems from the fact that, as already noted, it was on that same day that this problem was scheduled for discussion. That would have been a likely time for Mr. McIlraith to speak to Mr. Starnes about the subject, in preparation for the meeting.

195. November 24, 1970 was the day when this problem was to be raised at the meeting of the Cabinet Committee on Priorities and Planning. The Maxwell memorandum had been issued in advance and distributed for the briefing of those attending this meeting. Amongst those persons was Mr. McIlraith.

(d) The Côté-Starnes conversation at Mr. Côté's office

196. The facts relating to this event are set forth in paragraphs 177 to 184 inclusive. On the strength of those facts, we conclude that there was an encounter between Mr. Côté and Mr. Starnes at a time when Mr. McIlraith was the Minister. The problem raised by Mr. Starnes on the occasion of the meeting with his minister was the one that Mr. Starnes' note says he raised with Mr. McIlraith on November 24. We believe that Mr. Côté did advise Mr. Starnes to discuss this matter with the Minister.

Conclusion

197. We therefore conclude that all these factors, put together, give credence to the contents of Mr. Starnes' memorandum. We believe that a conversation between Mr. McIlraith and Mr. Starnes did in fact take place as set out in that memorandum. Mr. McIlraith's firm denial of such an encounter that day on that subject is a result, we believe, of an inability to remember a brief event that took place a decade ago.

A minority report by the Chairman as to what Mr. Starnes told Mr. McIlraith on November 24, 1970

198. I am not prepared to conclude that Mr. Starnes told Mr. McIlraith on November 24 what is recorded in the memorandum in Mr. Starnes' writing bearing a November 26 date. We have Mr. McIlraith's denial that Mr. Starnes told him that the R.C.M.P. had been carrying out illegal activities for two decades and that this point had been made in various discussions. As against this denial under oath what is there?

199. There is, first, Mr. Starnes' memorandum, but Mr. Starnes has no memory of what words he used. While Mr. Starnes may have sincerely attempted on November 26 to record a conversation he had had with Mr. McIlraith, it does not follow that he did so accurately. This is not like Mr. Beavis' notes of the meeting of November 27 or Mr. Trudel's notes of the meeting of December 1. In those instances the reliability of the notes is enhanced by the fact that they were made by a disinterested third party who owed a duty to his employer to take notes contemporaneously as to what was said. In this case Mr. Starnes was not disinterested, he owed no duty to anyone to record what was said, and he did not make his notes contemporaneously or even the same day.

200. Apart from Mr. Starnes' note, there is only circumstantial evidence, namely the four items enumerated in the report of the majority. The existence of "Question No. 7", attached to the Maxwell memorandum at the meeting of November 24, and the presence of that subject-matter on the agenda of the November 24 meeting, are evidence that a conversation took place, and that the conversation dealt with the issue that was raised in Question No. 7 that was attached to the Maxwell memorandum — the question of the commission of crime in the national interest. However, it is not evidence that during the discussion Mr. Starnes spoke of past illegal activities. The issue that was raised in the Maxwell memorandum related to prospective matters, not past acts. It concerned the difficulties faced (as Mr. Maxwell saw it) by a Security Service in doing its job if it was required not to commit crimes. It did not report that

the Security Service had been committing crimes in the national interest. It did not even report that the Security Service had been carrying out illegal activities in the national interest. Therefore Question No. 7 and the presence of this item on the agenda of the November 24 meeting are not evidence that on November 26 Mr. Starnes told Mr. McIlraith something very different — viz., that the R.C.M.P. had been carrying out illegal activities for two decades.

201. Nor, in my opinion, does the evidence of Mr. Côté tend to prove that Mr. Starnes spoke those words to Mr. McIlraith. There is nothing significant in Mr. Côté's testimony on this matter, other than that Mr. Starnes told him at some time that he was bothered about certain acts which "were close to the line", by which he meant "bordering on the limits of legality". That is not the same as being bothered about "illegal activities". It is further to be noted that Mr. Côté was not able to say when Mr. Starnes had spoken to him. Without there being a date or even a rough time attached to Mr. Côté's evidence, it lacks probative value as to whether the same sort of subject matter was discussed by Mr. Starnes with Mr. McIlraith on November 24. Mr. Côté recalls electronic eavesdropping being referred to by Mr. Starnes; there was nothing illegal about electronic eavesdropping *per se* at the time. As for intelligence probes, Mr. Côté can say no more than that they "may" have been discussed. Mr. Côté put them on the same plane as mail opening, which he says "may have" been raised by Mr. Starnes; but it is unlikely that Mr. Starnes ever raised the opening of mail with Mr. Côté, in the light of our conclusion, in Part III, Chapter 3, that while he was Director General Mr. Starnes did not know that mail was being opened or that an operational policy envisaged the opening of mail. Finally, the penetration problems experienced by human sources in penetrating violence-prone groups, according to Mr. Côté, "could well have been" raised by Mr. Starnes; but we have seen that, even if this matter was raised, the work Mr. Starnes had been doing on this problem by November 24 had been entirely in regard to possible future offences by sources attempting to penetrate such groups, and he did not have in mind any offences that had been committed. My conclusion, therefore, is that Mr. Côté's evidence is not in the least corroborative of Mr. Starnes having said to Mr. McIlraith on November 24 that the R.C.M.P. had in fact been carrying out illegal activities for two decades.

202. The final argument of the majority, which is the first in their enumeration of what they consider to be corroborative facts, is what they describe as "the striking similarity in the phraseology used by Mr. Starnes in his November 26 memo concerning his November 24 meeting with Mr. McIlraith, at the November 27 meeting of the Security Panel and again on December 1 at the Cabinet Committee on Priorities and Planning". However, I consider that the similarity does not afford adequate corroboration of the accuracy of Mr. Starnes' memo as far as the vital sentence is concerned. At most, I think, it is evidence that on November 26 these thoughts were in Mr. Starnes' mind. He may well have been preparing himself mentally to make his disclosure to the Security Panel the next day. In preparing the November 26 memo he may have imagined that the words he planned to use the next day had been used by him two days earlier. We do not know, and cannot know, for Mr. Starnes has no

memory of what he said to Mr. McIlraith, or of what the circumstances of the conversation with him were, or of what Mr. McIlraith's reaction was, and we are faced with the inscrutable face of the memo, which cannot be cross-examined as to its accuracy or reliability or even as to when it came into existence or why.

203. For all these reasons, I am not prepared to conclude, and I do not find, that Mr. Starnes, on or about November 24, 1970, told Mr. McIlraith that the R.C.M.P. had in fact been carrying out illegal activities for two decades.

APPENDIX TO PART II

204. Would the notes made by Mr. Trudel at the meeting of the Cabinet Committee on Priorities and Planning on December 1, 1970, be admissible in a court of law? In a sense this question is not directly relevant to our proceedings, for we are a Commission of Inquiry, not a court of law, and a Commission of Inquiry is not bound by the rules of evidence that would be applied by a court in a trial. On the other hand, if it were the case that the notes would not be admissible in a court of law, we would want to examine the reasons for inadmissibility and decide whether those reasons, or the rationale constituting the root of inadmissibility, ought nevertheless to be applied by us even though we are not a court of law. It is for that reason that we shall examine this question.

205. As the author of the notes does not have his memory refreshed by them and cannot testify on the basis of his recollection, the notes would be approached by a court just as if the author were not a witness. They would be hearsay evidence of what was said at the meeting. Nevertheless, counsel for Mr. Starnes has submitted to us that the notes would be admissible in a court of law, and are equally admissible before a commission of inquiry, on two grounds. The first is that they are admissible by virtue of the provisions of section 30 of the Canada Evidence Act.[6] That section applies to any "legal proceeding", which it defines as meaning

> any civil or criminal proceeding or inquiry in which evidence is given, and includes an arbitration.

We think a commission of inquiry comes within that meaning. Subsection (1) of the section states:

> Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

The word "business" is defined as including

> any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government. . . or by any other body or authority performing a function of government.

We think that the Governor in Council falls within the definition of "government", that one of its meetings is an "activity" carried on by it, and that Mr. Trudel's notes are a record made in its usual and ordinary course of business. Would "oral evidence in respect of" the matter covered by Mr. Trudel's notes

[6] R.S.C. 1970, ch. E-10.

"be admissible in a legal proceeding"? Those words must be read in conjunction with the provisions in subsection (10) that

> Nothing in this section renders admissible in evidence in any legal proceeding
>
> (a) such part of any record as is proved to be
>
> ...
>
> (iii) a record in respect of the production of which any privilege exists and is claimed...
>
> (b) any record the production of which would be contrary to public policy:...

There is no doubt that, in a sense, a privilege has been claimed, but it is not a privilege from production of the notes to us, but an assertion that the contents of the notes ought not to be reported on to the Governor in Council. Therefore we do not think that it can truly be said that a "privilege" from the admission of the evidence before us "is claimed". Would the production of the record be contrary to public policy? Again, the production of the document before us at a hearing at which evidence was given was not objected to, and it was in fact produced. Consequently, we think that it cannot now be argued that they are not admissible before us. Indeed, we note that that has not been argued; the submission is that the notes would not be admitted into evidence in a court of law. That, of course, would depend on such matters as whether there had been compliance with the requirements of section 30(7), which requires at least seven days' notice of the intention to produce the document "unless the court orders otherwise". Another consideration would be whether, in the context of the nature of the proceeding in court, an objection based on privilege or public policy would succeed. As that cannot, in the abstract, be the subject of anything but speculation, we cannot say whether the notes would be admissible in a court of law or not.

208. Counsel for Mr. Starnes also argued that the notes are admissible under the principle of *Arès* v. *Venner*.[7] There, speaking of facts relating to the condition of a hospital patient, as recorded in notes made by a nurse, Mr. Justice Hall, delivering the judgment of the Supreme Court of Canada, said:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so...[8]

The rationale of the decision is not limited to hospital records, as is made clear by the variety of facts of the cases cited with approval by the court. In one of

[7] [1970] S.C.R. 608; 14 D.L.R. (3d) 4; 12 C.R.N.S. 349; 73 W.W.R. 347. The effect of *Arès* v. *Venner* is thoroughly canvassed by J.D. Ewart, "Documentary Evidence: The Admissibility at Common Law of Records Made Pursuant to a Business Duty", (1981) 59 Can. Bar Rev. 52.

[8] [1970] S.C.R. 608 at p. 626.

those cases, *Omand* v. *Alberta Milling Company*,[9] Mr. Justice Stuart, of the Appellate Division of the Supreme Court of Alberta, was considering the admissibility of written reports made by inspectors, as to the quantity and quality of flour purchased. He held that the records were admissible "as proof of the facts stated therein". One of the grounds on which he so held was stated as follows:

> Then there is the circumstantial guarantee of trustworthiness arising from (1) complete disinterestedness, (2) duty to test, (3) duty to record the test at the time, this duty being to superior authorities who would be liable to punish or reprimand for failure to perform it.[10]

Applying the principles stated by Mr. Justice Hall and Mr. Justice Stuart to Mr. Trudel's notes, we conclude that Mr. Trudel, a completely disinterested person, had a personal knowledge of the matters then being recorded (i.e. he heard the words spoken),[11] and he had a duty to make the record (i.e. his notes of what was said at the meeting).[12] Therefore, applying that principle, the notes (apart from any objection based on privilege or public interest) would be admissible in a court of law as *prima facie* evidence that the words written in the notes were spoken by the person named in the notes.

207. It has been contended by counsel for the government that section 30 of the Canada Evidence Act and the decision in *Arès* v. *Venner* "deal with records in which factual data are recorded", and that such records are "readily distinguishable from the recording of a discussion where the completeness is essential in order to give context and accuracy". The submission continued:

> In the case of VC-1, it has been demonstrated that the notes did not purport to be a verbatim recording of the conversation and, in fact, are not complete. It is also, in our submission, incorrect to equate the nurses' duty to record with that of the persons who took notes at the December 1st, 1970 meeting. A Court reporter or official stenographer would be the person who might be considered to be in a position comparable to that of the nurse in the *Ares* case. The notetakers neither had the qualifications nor carried out the functions of a Court reporter or official stenographer. In our submission, a Court of law would not accept, as evidence, a Court reporter's or official stenographer's incomplete transcript of a discussion.

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[9] [1922] 3 W.W.R. 412, 69 D.L.R. 6.

[10] [1922] 3 W.W.R. 412 at p. 413.

[11] The duty was to listen and record. There is no logical difference between such a case and that found in *Arès* v. *Venner*, where there was a duty to look and record. In *Arès* v. *Venner*, the notes were admitted as evidence of the state of the body looked at. In the present case the notes are admitted as evidence of what words were spoken. Even if the notes in the present case could not be admissible as evidence of the truth of the words spoken, they are admissible as evidence that the words were spoken. See *Setak Computers* v. *Burroughs* (1977) 15 O.R. (2d) 750 at p. 755 (per Mr. Justice Griffiths, Ont. High Court).

[12] Unlike the notes made in *Regina* v. *Laverty* (1979) 9 C.R. (3d) 288 (Ont. C.A.). See the discussion in Ewart's article, *supra*, at p. 66, as to the importance of the notes being made in the fulfillment of a duty, or as a necessary step in that fulfillment.

We do not agree with that submission. The nurses' notes in *Arès* v. *Venner* did not purport to set forth all the circumstances of the observations made of the patient's condition. While the notes stated the colour and the degree of warmth of the patient's toes, which were a vital issue in the lawsuit, the notes did not indicate the lighting conditions, or whether there had been any discussion of the condition of the patient at the time the notes were made, or whether the observations were made in haste or with care, and so on. A limitation on admissibility, of the nature suggested by counsel for the government, is not found in the common law exception to the hearsay rule which admits evidence of declarations made by a person, since deceased, who owed a duty to do an act and to record it — the exception which was applied and extended (to circumstances in which the person making the record is not dead) by *Arès* v. *Venner*. While the absence of completeness may be a reason for scrutinizing the evidence of incomplete notes of what is said at a meeting — notes made by a person doing a duty to listen to what was said and to make a record of what was said — with some care, that, in our opinion, would be regarded by a court of law as going to the weight to be attached to the evidence, rather than to its admissibility.

208. The first argument raised by counsel for the government has been approached by us so far on the basis of what would be admissible in a court of law. However, we are not a court of law. We are a Commission of Inquiry, and we are not bound by the rules of evidence as they would be applied in a court of law. Indeed, counsel for the government, in his written submission, said: "This being a Royal Commission, we, at no time... suggested that VC-1 should not be considered by reason of the hearsay rule". Nevertheless, it remains a fact that we would not permit evidence to influence our conclusions if it lacked probative value or reliability. We consider that Mr. Trudel's notes, being made contemporaneously by a disinterested person with a duty to record what he heard, were more likely than not to be reliable and accurate, and that they consequently possess substantial probative value as to whether the words in question were spoken by Mr. Starnes. In arriving at this conclusion we derive support from the evidence of Mr. Butler, who worked with Mr. Trudel in circumstances that would have enabled him to judge Mr. Trudel's aptitude for accuracy, that "Mr. Trudel is a very careful and precise man". Mr. Trudel himself told us: "...I took down as best I could the discussion that took place". He also testified that he would try to record, as best he could, what people said, not by way of paraphrase.

209. The reliability of Mr. Trudel's notes is enhanced by the fact that a different disinterested person, Mr. Beavis, who owed an identical duty, had made contemporaneous notes of another meeting three days earlier, on November 27, in which he recorded Mr. Starnes as saying almost exactly the same thing. Accepting the possibility of inaccuracy by both men on the two occasions depends on a willingness to accept the probability of coincidence, to which, in the circumstances, we find ourselves unable to subscribe.

210. The second point made by counsel for the government is that Mr. Trudel's notes are not reliable. For the reasons just given, we think, quite to the contrary, that the evidence justifies the inference that they are reliable.

211. There is an additional legal issue to be considered. Even if the notes are reliable and would be evidence of what was said in normal circumstances, counsel for the government has made written representations that the evidence should not, in the present circumstances, be relied upon by us unless it

> is sufficiently clear and is of adequate weight to seek a departure from the application of the constitutional privilege

but that, if there is such a "departure", the "information gleaned" should be "used with the least encroachment upon the principle of confidentiality". The "constitutional privilege" is described by counsel for the government as follows:

> Any consideration of this matter must take account of the traditional secrecy attaching to the proceedings of the cabinet and its committees, and the privilege from disclosure that minutes of proceedings and discussions at these meetings enjoy. The confidentiality of discussions in the cabinet is a matter of great importance. The principle is one of the cornerstones of our system of government. The uninhibited, candid, and spontaneous exchanges that form the strength of the cabinet system and are essential to it depend upon the confidentiality of the cabinet's proceedings. The roving nature of discussion in the cabinet, the freedom to think out-loud, to speculate conceptually, to consider the extremities of problems and solutions as a means of identifying acceptable compromises, are the essence of collective decision-making among responsible ministers. To do so effectively ministers must feel unfettered in the privacy of their open expression of thought, and they must be confident that officials will not be inhibited from advising them as fully and as straight-forwardly as possible. Any action that undermines such privacy and confidence can only damage the delicately balanced mechanism that makes possible the collective character that is the genius of our system of responsible democratic government.

212. When we delivered "Reasons for Decision" on October 13, 1978 — which are reproduced as Appendix "F" to our Second Report — we quoted extensively from judicial decisions which have recognized the public interest that may result in the protection from disclosure or publication of the proceedings of the cabinet and its committees. For example, we quoted the following passage from the judgment of Lord Widgery, C.J., in *Attorney General* v. *Jonathan Cape Ltd.*:[13]

> It has always been assumed by lawyers and, I suspect, by politicians, and the Civil Service, that Cabinet proceedings and Cabinet papers are secret, and cannot be publicly disclosed until they have passed into history. It is quite clear that no court will compel the production of Cabinet papers in the course of discovery in an action, and the Attorney General contends that not only will the court refuse to compel the production of such matters, but it will go further and positively forbid the disclosure of such papers and proceedings if publication will be contrary to the public interest.
>
> The basis of this contention is the confidential character of these papers and proceedings, derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not,

[13] [1975] 1 Q.B. 752.

unless they feel compelled to resign. It is contended that Cabinet decisions and papers are confidential for a period to the extent at least that they must not be referred to outside the Cabinet in such a way as to disclose the attitude of individual Ministers in the argument which preceded the decision. Thus, there may be no objection to a Minister disclosing (or leaking, as it was called) the fact that a Cabinet meeting has taken place, or, indeed, the decision taken, so long as the individual views of Ministers are not identified.

However, it is important to note that Lord Widgery did not regard the protection from publication which the court would extend as unlimited. Thus, he said:

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

Again, he said:

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

213. In other "Reasons for Decision" which we delivered on February 23, 1979, and are reproduced as Appendix "Z" to our Second Report, we referred

to a number of considerations that might be pertinent to a decision as to the publication of documents received *in camera*. One of them was as follows:

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

In those reasons we made the following additional observations which are relevant to the issue now being considered:

> . . . the evidence given in public by Mr. Higgitt included statements reflecting on the conduct of senior officials and Cabinet Ministers, and an indication that certain specified documents supported adverse inferences against such persons. A pertinent consideration in respect to some of the documents under consideration is that those persons would have no way to meet that evidence in public without their counsel being able to refer to the actual content of such documents in public. Not to allow them to do so would expose the Commission to the risk of being an instrument of injustice and unfairness, a consideration far more important in the generally accepted scale of values than such possibility as there may be that disclosure in these instances would adversely affect the efficiency of the governmental process.
>
> Of considerable importance is the evidence of Mr. Starnes generally as to the extent to which senior officials and cabinet ministers knew that members or agents of the R.C.M.P. had committed offences. It is true that all of Mr. Starnes' evidence in this regard has been given in camera. Not to disclose publicly the documents to which Mr. Starnes refers in his in camera evidence would have the result that in effect none of his testimony on this vital issue could be made public — whether his testimony upon being examined by counsel for the Commission or that upon being cross-examined. In other words, his testimony on this issue would remain behind closed doors. Yet it is obvious to all that, as Director General of the Security Service, he had access in writing and in person to senior officials and to Cabinet Ministers. To keep his testimony, and the documentary passages which form such an important part of his testimony, from the public eye would not engender "confidence that everything possible has been done for the purpose of arriving at the truth".
>
> Another pertinent consideration is that the documents to be considered are now at least eight years old. In *Sankey* v. *Whitlam*, Mason J. said: [here we quoted the passage which we have already quoted earlier in this Part]

214. Counsel for the government has questioned whether Mr. Beavis' notes of the meeting of the Security Panel on November 27, 1970, would be admissible in a court of law. The short answers to this depends not on section 30 of the Canada Evidence Act or the case of *Arès* v. *Venner*, but on the earlier common law "regular entries" exception to the hearsay rule. As has recently been said in an article on the subject:

> . . . the common law evolved seven strict requirements for admissibility under this exception. To be admissible, the record must have been (i) an

> original entry, (ii) made contemporaneously with the event recorded, (iii) in the routine, (iv) of business, (v) by a person since deceased, (vi) who was under a duty to do the very thing and record it, (vii) and who had no motive to misrepresent.[14]

In regard to requirement (iv), we believe that Mr. Beavis' notes satisfy this requirement, for the word "business" has been applied broadly. Thus, in *Conley* v. *Conley*,[15] the Ontario Court of Appeal approved of a definition of "business" for the purpose of this rule, as "a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood". In regard to requirement (v), Mr. Beavis is dead. The other requirements are also satisfied.

[14] J.D. Ewart, "Documentary Evidence: The Admissibility at Common Law of Records Made Pursuant to a Business Duty", (1981) 59 Can. Bar Rev. 52 at pp. 54-5.

[15] [1968] 2 O.R. 677, 70 D.L.R. (2d) 352 (Ont. C.A.).

PART III

KNOWLEDGE OF SENIOR MEMBERS OF THE R.C.M.P., SENIOR GOVERNMENT OFFICIALS AND MINISTERS OF CERTAIN R.C.M.P. INVESTIGATIVE PRACTICES THAT WERE NOT AUTHORIZED OR PROVIDED FOR BY LAW

INTRODUCTION

1. In Part III of our Second Report we set out the details of a number of practices of the R.C.M.P. which raised questions of unlawful or improper activity. We described the development of the policies, identified the legal issues when appropriate and catalogued the extent and prevalence of the activities. We thus examined the degree to which the practices had become institutionalized within the Force. Later in the Second Report, in Parts V and X, we made recommendations as to legislative and administrative changes which we considered ought to be made to permit some of those practices to be carried on within the confines of the law and government policy.

2. In our Second Report we considered that an analysis and explanation of past practices was necessary for a proper understanding of the recommendations we were making in that report with respect to the future. We did not attempt, however, to identify the extent of knowledge about the practices which could be attributed to Ministers, senior government officials and senior members of the R.C.M.P. Our reason for not doing so was that any such attribution would have required that notices pursuant to Section 13 of the Inquiries Act be provided to the persons so identified, and those persons would have been entitled to make representations to us prior to submission of our Report. We therefore determined that we had no alternative but to refrain from referring to knowledge by individuals.

3. In Part III of this Report, we now consider the degree of knowledge of the various practices which was held by Ministers, senior government officials and senior R.C.M.P. members. For a full understanding of what is being referred to in each chapter, it is necessary to refer to the related chapter in our Second Report. At the beginning of each chapter in this part we have referred to the appropriate chapter in our Second Report.

4. Before proceeding with consideration of the individual practices, we wish to note the receipt of certain information, with respect to them, from Prime Minister Trudeau. The Prime Minister has an ultimate responsibility for the security of Canada and he is chairman of the Cabinet Committee on Security

and Intelligence. Furthermore the Commissioner of the R.C.M.P. and the Director General of the Security Service have had an extraordinary right of access to the Prime Minister. For those reasons we considered that we should question Mr. Trudeau about five matters in particular. We must say that in regard to each of them, the Commission had no evidence that pointed to Mr. Trudeau having had knowledge of any of the practices that were or might have been illegal.

5. From the outset of our inquiry we adopted the principle, which we stated on several occasions, that the testimony we heard would be given in public unless reasons relating to national security, the privacy of individuals or some other ground of public interest justified the receipt of the testimony *in camera*. We did not consider that the five areas of concern that we wished to ask Mr. Trudeau about fell into any of these categories. Consequently, we had expressed to Mr. Trudeau's counsel our desire that the Prime Minister testify on these five matters in public. However, at an *in camera* hearing on July 22, 1980, when Mr. Trudeau was testifying concerning an issue arising from a meeting of a Cabinet Committee, he volunteered then and there to answer the questions we might have on those five areas of concern. It was at that hearing that we were advised by his counsel unequivocally for the first time that Mr. Trudeau would not appear on a separate occasion to answer questions in public. Nevertheless, in view of our established principles of procedure, we declined to have the five basic questions posed to the Prime Minister at that *in camera* hearing, on the basis that we, rather than the witness, should determine the forum, as we did with all other witnesses.

6. Very shortly thereafter, on August 1, 1980, counsel for Mr. Trudeau wrote us a letter, with which he enclosed a letter written by Prime Minister Trudeau, which we shall quote now in its entirety (it will be observed that questions 1 and 5 deal not with practices but specific matters which, it seemed to us, should also be raised with Mr. Trudeau):

> Dear Mr. Nuss:
>
> In light of the McDonald Commission's refusal to hear my testimony on the five questions set out in the Chairman's letter of July 17, 1980, at the *in camera* hearing on July 22, 1980, I have given consideration as to whether or not my answers should be submitted to the Commission in writing. I have concluded that I should respond to the questions in writing.
>
> My answers to the questions follow:
>
> *Question* 1. Whether Prime Minister Trudeau was, before the testimony of former Constable Samson at his trial in March 1976, aware of the A.P.L.Q. incident.
>
> *Answer* I was totally unaware of any involvement on the part of the RCMP in the APLQ incident prior to former Constable Samson's testimony in March 1976.
>
> *Question* 2. With regard to mail check operations, whether Prime Minister Trudeau was aware that the R.C.M.P., whether in criminal investigations or the work of the Security Service, opened first class mail; whether he was aware of the report of the Royal Commission on Security concerning this matter; and whether

he received a letter from Mr. Ralph Nader on this subject and, if so, how it was dealt with.

Answer As to the first part of the question, no. The first knowledge I had of R.C.M.P. mail opening was when it was drawn to my attention in November 1977. With respect to my knowledge of the Report of the Royal Commission on Security (Mackenzie) concerning this matter, I must either have read their comments on the "interception of mail for security purposes" or had them drawn to my attention. I have no recollection of having had detailed discussions on the point.

I did not personally receive or reply to Mr. Nader's letters nor was I briefed about the answers which I understand were sent.

Question 3. With regard to surreptitious entries, whether Prime Minister Trudeau was aware that the R.C.M.P., in criminal investigations or in the work of the Security Service, entered premises without a warrant and without the consent of the owner or occupier, to install electronic listening devices, or to search and photograph or copy physical or documentary evidence.

Answer I neither knew nor was I informed of any specific instance where a surreptitious entry was effected. However, it was not inconceivable to me that on occasion the Security Service or a Police Force would use investigative or intelligence gathering techniques which would have involved clandestine activities, including surreptitious entries.

Question 4. With regard to the provision of income tax information by the Department of National Revenue to the R.C.M.P. Security Service or C.I.B., whether Prime Minister Trudeau was aware that such information was provided for purposes unrelated to enforcement of the Income Tax Act or Regulations.

Answer No.

Question 5. Whether Prime Minister Trudeau ever changed the policy he announced in June 1969, concerning greater autonomy and civilianization of the Security Service.

Answer No.

I would like you to transmit the answers to the Commission on my behalf. As I have already indicated to you I am prepared to have the answers made public.

Yours sincerely,

"P.E. Trudeau"

7. Following receipt of this letter, we considered whether we should attempt to have Mr. Trudeau appear at a public hearing to answer the five questions and supplementary questions relating to those matters. We considered that we could do so if in law we would be successful, if necessary, in compelling the Prime Minister's attendance. We asked our chief counsel to advise us in this regard. His opinion was as follows:

Mr. Johnson has informed me that the Commissioners would like an opinion as to whether or not the Prime Minister is compellable as a witness

before the Commission and also that the opinion should be provided promptly so that a decision can be made as to how to proceed....

It may be as well to summarize my views before setting out the reasoning which leads me to the conclusions I express:

1. The Prime Minister is compellable as a witness.
2. In the circumstances, however, it is my opinion that the Prime Minister could have the subpoena of the Commission set aside in the courts if he chose to do so.
3. In view of the conclusion which I have reached, I have not examined the procedure for compelling attendance should the Prime Minister decide to ignore a subpoena.
4. Accordingly (although I have not been asked for a recommendation) I recommend as strongly as I can that answers to the five outstanding questions be obtained in writing and added to the transcript of 22 July 1980, and then released by agreement as suggested at Volume C98, pp. 13013, 13016 and 13019.

In my view the legal position with respect to the matter may be summarized as follows:

The Prime Minister is in the same position as any other citizen with respect to the subpoena powers of courts or other tribunals, but the Court will protect the Prime Minister, as it will protect any other citizen, by setting aside a subpoena where it appears that:

(i) the evidence sought is irrelevant;

(ii) the use of a subpoena is an abuse of process;

(iii) the subpoena is oppressive;

(iv) the evidence sought is recognized by law as privileged from production; and

(v) the Court may exercise a residual discretion to set aside in appropriate cases where none of the first four grounds above are present....

Having read the transcript of 22 July 1980 there are clearly substantial arguments which can be advanced on behalf of the Prime Minister under each one of the foregoing grounds. In my view this is particularly so when there has been voluntary attendance, answers tendered but questioning refused, partial answers or references to four of the five remaining questions in answers already given, the text of answers provided to counsel, and the person concerned will be, at least, the principal recipient of the Commission's report. Frankly, I would be astonished if a Court did not in these circumstances set aside a subpoena.

As a result of the foregoing opinion, we decided that we should not seek to compel the attendance of Prime Minister Trudeau before us at a public hearing. In consequence, we have not been able to examine Mr. Trudeau in detail as to these matters.

CHAPTER 1

SURREPTITIOUS ENTRY

1. In our Second Report, Part III, Chapter 2, we described surreptitious entry, a practice of the R.C.M.P., whereby premises were secretly entered in the course of an investigation, without the consent of a person entitled to give such consent. The Second Report also described the techniques involved, the reasons advanced for their use, the extent and prevalence of such use, the Force's operational policies with respect to the techniques, and the legal issues arising from this practice.

2. We now attempt to examine the extent to which this practice was known and reviewed at the level of Ministers, senior government officials and senior members of the R.C.M.P. The knowledge of the latter individuals will be reviewed in general terms with respect to the two main operational techniques during which this practice is deployed by the Force, namely: in the installation of electronic listening devices, and in conducting intelligence probes. Finally, we examine the extent to which the practices were known to specific Ministers, senior government officials and senior R.C.M.P. members.

A. SURREPTITIOUS ENTRY FOR THE PURPOSE OF INSTALLING A LISTENING DEVICE: KNOWLEDGE OF THE PRACTICE IN GENERAL TERMS AS DISTINGUISHED FROM KNOWLEDGE OF SPECIFIC CASES

3. In a letter in 1965, Commissioner McClellan drew to the attention of the Deputy Minister of Justice the absence of any statutory authority for a police officer to enter premises surreptitiously to install an electronic eavesdropping device such as a concealed microphone. Commissioner McClellan expressed his belief

> that if a peace officer was to enter a premise under certain conditions to install an eavesdropping device, the peace officer would be contravening certain sections of the Criminal Code, making himself not only liable for criminal prosecution, but also liable in a civil action.

However, he did not indicate what sections of the Criminal Code he had in mind. His letter, which was a lengthy proposal for legislation to authorize the various means of electronic eavesdropping, recommended that "legislation be enacted to authorize the issuance of a search warrant for the purpose of entering premises to effect the installation of eavesdropping equipment" (Ex. E-1, Tab 2H).

4. On July 5, 1968, according to a memorandum by Commissioner Lindsay, there was a meeting in the office of the Solicitor General, then the Honourable J.N. Turner, attended by Mr. Lindsay, the Director of Criminal Investigations

(Assistant Commissioner Cooper), the Director of Security and Intelligence (Assistant Commissioner Higgitt) and the Deputy Solicitor General (Mr. T.D. MacDonald). The purpose was to brief Mr. Turner generally on the use of electronic intrusion in the investigation of crime, because of an impending specific operation. The memorandum records that Mr. Turner

> questioned us about the legal implications and we advised there was no legal bar, except a case against us for civil trespass, to which Mr. T.D. MacDonald agreed.
>
> (Ex. E-1, Tab 2C.)

A longhand note on the same document, by Commissioner Lindsay, records that on July 11, 1968, he discussed the same matter "in very general terms" with the new Solicitor General, Mr. McIlraith.

5. While the Protection of Privacy Act was being considered, the R.C.M.P., on April 10, 1972, explained to the Associate Deputy Attorney General, Mr. D.H. Christie, the desirability of legislation explicitly providing for surreptitious entries to enable devices to be installed. On May 24, 1972, the Solicitor General, Mr. Goyer, wrote the Minister of Justice, the Honourable O.E. Lang, expressing hope that active consideration be given to amending the proposed legislation to provide expressly that a peace officer be able to enter premises in order to install devices.

6. Thus, while the issue was well-known at the level of Ministers and senior officials, as well as within the R.C.M.P., it is doubtful that it was present in the minds of any of the members of the Standing Committee on Justice and Legal Affairs who were considering the Protection of Privacy Bill in 1973. We have read the proceedings of the House of Commons and of the Standing Committee on Justice and Legal Affairs. It is true that members were undoubtedly aware that surreptitious "methods" were often utilized — an apt reference to telephone tapping of telephone company facilities, the tapping of wires and the use of induction devices. However, the fact that, in order to install eavesdropping devices, trespass would often be necessary was not brought to the attention of members of Parliament. There was no clause in the bill expressly dealing with the issue, which would have focussed their attention.

B. SURREPTITIOUS ENTRY FOR THE PURPOSE OF 'INTELLIGENCE PROBES': KNOWLEDGE OF THE PRACTICE IN GENERAL TERMS AS DISTINGUISHED FROM KNOWLEDGE OF SPECIFIC CASES

7. There is little direct evidence before us as to the extent to which senior personnel in the R.C.M.P. knew that on occasion members of the Force investigating crime would enter premises without a search warrant and without the permission of the owner or occupier. However, we have already commented on the circumstantial evidence that points to a tolerance of the practice — a tolerance that must have existed at high levels.

8. There is no evidence whatever before us that senior public servants or Ministers were ever made aware that this technique was used on occasion in the investigation of crime.

9. Many of the cases in which, since July 1, 1974, judges have given authorizations as a result of applications by agents of the Solicitor General of Canada under section 178.13 of the Criminal Code have been in respect to interception by microphones. Leaving aside the first half-year of the operation of the Protection of Privacy Act (of which section 178 was a part), from 1975 to 1979 the average annual number of interceptions by microphone under authorization was 193.[1] Taking 1979, for example, the number of interceptions by microphone in that year in all of Canada was 142, compared with 1,494 cases in which there was interception of telecommunications. (It must be remembered that these figures do not include interceptions authorized as a result of applications made by agents of provincial attorneys general.) Many of these interceptions required trespassory entry to be made, unless the authorizations given by the judges expressly or by implications of law can be said to have lawfully authorized the entries and thus negated trespass. As far as we can tell, most judicial authorizations of interception by microphone installations in what ordinarily would be trespassory situations have not expressly authorized entry. Consequently, the authority for lawful entry, if it existed, must have rested upon the operation of section 26 of the Interpretation Act or section 25 of the Criminal Code. This issue is discussed at length in Part III, Chapter 3, of our Second Report.

C. SUMMARY AND FINDINGS AS TO THE KNOWLEDGE OF CERTAIN SENIOR MEMBERS OF THE R.C.M.P., AND MINISTERS, OF THE PRACTICE OF SURREPTITIOUS ENTRY

(a) Commissioner W.L. Higgitt

Summary of evidence

10. Mr. Higgitt agreed that if a long-term microphone was to be installed and operative, either the cooperation of someone who had a right to be in the premises would have to be obtained or a surreptitious entry would have to be effected (Vol. 84, p. 13833). The installation of microphones was more likely to involve surreptitious entry than would telephone interceptions (Vol. 88, p. 14508). Mr. Higgitt said he recalls being advised that the Criminal Investigation Branch had legal opinions that surreptitious entries for the installation of microphones "might not necessarily be criminal violations because of the intent involved". He added that: "There was no assurance given that there would never be". He said that this opinion was provided by the Department of Justice to the R.C.M.P. and the Solicitor General's Department (Vol. 88, p. 14510). We have already noted that Commissioner Higgitt was present at a meeting with the Solicitor General, Mr. Turner, on July 5, 1968, when that advice was passed on to Mr. Turner.

11. Commissioner Higgitt testified that after he became Commissioner, he continued to advise Solicitors General that there was no legal bar in such

[1] The annual statistic for the years 1975 to 1978 that has been used in calculating the average is found in "updated" form in appendices to the Annual Report of the Solicitor General of Canada for 1979 as required by section 178.22 of the Criminal Code.

situations, certainly insofar as the entry itself was concerned, except possibly a case for civil trespass (Vol. 88, p. 14513). He said he was never advised by the legal advisers to the government that there was a crime involved (Vol. 88, p. 14514). A person installing an electronic device might be caught by surprise by the owner of the building or house, or by patrolling police. The risk of being caught in the premises troubled Mr. Higgitt and others placed highly in the Force, and according to Mr. Higgitt, was one of the factors taken into account when these operations were being considered (Vol. 89, pp. 14581-2).

12. In his meeting of March 1972, with the Minister of Justice, Mr. Lang, the Solicitor General, Mr. Goyer, and officials of the two Departments, Commissioner Higgitt indicated that the R.C.M.P. might have to engage in some kind of illegal or quasi-illegal activity to accomplish the installation of electronic listening devices, but he did not define before us what the illegal activity he mentioned was. He denied that when he spoke at that meeting of illegal methods of operation he was speaking only of trespass. Thus he disagrees with the implications of Supt. Cain's notes of the meeting (Ex. M-44) which state that Commissioner Higgitt indicated "unorthodox (perhaps illegal) methods (trespassing) might have to be committed" (Vol. 112, pp. 17287-8).

13. Mr. Starnes prepared a memorandum dated July 26, 1971, which he intended to show to Mr. Goyer. It concluded as follows:

> Unlike the Certificates of Review for telephonic and telegraphic interceptions, which are made under the authority of the relevant sections of the Official Secrets Act, we are not suggesting that you authorize the continuance of such operations, thereby avoiding some of the political and other difficulties which could arise from having a Minister of the Crown directly involved in operations which are or may be outside the law.
>
> (Ex. M-36, Tab 26; Vol. 111, p. 17153.)

The document was never shown or given to Mr. Goyer. Mr. Higgitt stated that he asked Mr. Starnes not to give it to Mr. Goyer (Vol. 111, p. 17156). Mr. Starnes had no idea why Mr. Higgitt made this decision (Vol. 103, p. 16333); Mr. Higgitt stated that it was conceivable that he decided not to use the memorandum because the sentence quoted above would give rise to problems. "You don't go out of your way to put Ministers at risk, if indeed, that was putting them at risk. I don't know whether it was or not" (Vol. 111, p. 17159). Mr. Higgitt maintained, however, that he had advised Mr. Goyer concerning the problems involved with respect to entering premises for the purposes of installing technical devices (Vol. 111, pp. 17166-7).

14. We turn now to Commissioner Higgitt's knowledge of the use of surreptitious entry for other purposes. In 1966, when Mr. Higgitt was the Officer in charge of the Counter-espionage Branch, the Director of Security and Intelligence declared a moratorium on the use of surreptitious entry for the purpose of obtaining documents and physical intelligence (Vol. 84, pp. 13842-3). The moratorium was lifted by the D.S.I. in 1969 (Vol. 84, p. 13844). Commissioner Higgitt told us that there was a requirement to use this method to get certain documentation very urgently required by the government (Vol. 84, p. 13844). In 1971, while he was Commissioner, there was a detailed revision of Security Service policy which gave to officers in charge in the field the right to mount

an operation to enter premises to obtain documentary or physical intelligence, prior to obtaining the consent of Headquarters, if the time factor precluded obtaining prior consent. Commissioner Higgitt told us that he had discussed with Ministers entries for the purpose of obtaining physical and documentary intelligence. He also told us that documents existed which would support his assertion that he had discussed with them the legal problems involved in such operations (Vol. 110, pp. 16953-60). We have not found any such documents, nor have any Ministers who have testified acknowledged any such conversations. Nor did his counsel, who have access to R.C.M.P. files, produce such documents.

Conclusion

15. Clearly Commissioner Higgitt, who had had extensive experience on the Security and Intelligence side of the R.C.M.P., knew everything there was to know about the various circumstances and reasons giving rise to entering private premises without a warrant and without the permission of any person entitled to give such permission. He knew that such entries were common for the purpose of installing listening devices, that the entry itself might constitute trespass, and that things done in the course of the entry might constitute criminal offences (e.g. when damage occurred). He knew that such entries were common for the purpose of obtaining documents and physical intelligence. Having statutory management of the Force, his failure to determine the legal quality of these acts and to ensure that the entries were in all respects lawful was unacceptable.

(b) Mr. Starnes

Summary of evidence

16. Mr. Starnes knew that, prior to the enactment of the Protection of Privacy Act in 1974, the R.C.M.P., both for security and intelligence purposes and C.I.B. purposes, were conducting electronic surveillance (Vol. 107, p. 16687). Mr. Starnes was aware that members of the Security Service might have to enter the premises to install microphones, although telephonic interception was usually made without entering premises (Vol. C30, pp. 3736-7). He stated that microphone operations and surreptitious entries could sometimes not be carried out without being in breach of the law (Vol. C30, p. 3704). Mr. Starnes' understanding of the law, based upon the legal opinion that the Force had obtained from the Department of Justice, was that no legal bar existed, except for a case for civil trespass against a member of the Force who might be caught (Vol. 91, pp. 14849-50). He acknowledged on another occasion before us that technical surveillance involves various risks, and indicated that a person involved in a delicate counter-espionage surveillance operation might have to accept being charged with an offence in order to ensure the safety of the operation (Vol. 90, p. 14696).

17. Mr. Starnes was aware that members of the Security Service entered premises to inspect written or physical intelligence (Vol. C30, pp. 3734-35). He stated that on some occasions he was asked to approve such operations (Vol.

104, pp. 16371-2), but that he did not think that he had been asked to approve more than two or three (Vol. C27, p. 3143). No ministerial authority was sought for the acquisition of documentary and physical intelligence through clandestine entry and departure (Vol. 90, pp. 14720-21). Since 1959, entry for the purpose of obtaining documentary or physical intelligence had required the approval of the Director of Security and Intelligence, as Commissioner Higgitt had told us. Mr. Starnes said that this procedure continued through his own term of office (Vol. 90, p. 14721). Mr. Starnes told us that he "certainly" could not recall specific discussions with Mr. Goyer or Mr. Allmand, although he possibly had discussions with Deputy Ministers, as to entering premises surreptitiously to obtain written or physical intelligence (Vol. 103, p. 16355; Vol. 109, p. 16933; Vol. C38, p. 5172).

Conclusion

18. Mr. Starnes knew that entry into private premises without a warrant and without the permission of any person entitled to give permission was a common technique used by members of the Security Service to enable them to install listening devices, and for the purpose of obtaining documents and physical intelligence. As exemplified by Operations Bricole and Ham, he knew that on occasion documents and other things were removed from such premises. His failure to ensure that any entries were in all respects lawful was unacceptable.

(c) Mr. Dare

Summary of evidence

19. Mr. Dare told us that he was not aware that Mr. Starnes and Mr. Higgitt had expressed concern (i.e. at the meeting of March 1972, before Mr. Dare became Director General) that entering for the installation of devices could be illegal, and that specific provisions should be made in the statute under consideration in 1974 to provide for entry as well as installation (Vol. 125, p. 19556). Mr. Dare became aware only recently — that is, during the period of our Commission of Inquiry — that this might be a problem (Vol. 125, p. 19556).

20. Before June 30, 1974, electronic eavesdropping devices, other than for the interception of telephone conversations, were installed without warrant but with the authorization of the Director General of the Security Service. Naturally, therefore, Mr. Dare was aware of this procedure and in fact authorized it (Vol. 125, pp. 19557-8). At that time, Mr. Dare felt that neither the installation nor the entry into premises to install was illegal. He stated that this view was not based upon a Department of Justice or a legal opinion but rather was an "internal operating opinion" (Vol. 125, p. 19559).

21. Mr. Dare was aware, both before and after June 30, 1974, that the Security Service entered premises for the purpose of locating documents or other physical evidence (Vol. 125, p. 19583). Mr. Dare was aware that those operations were conducted without any type of warrant until July 1, 1974 (Vol. 125, p. 19584). During the fourteen months he was Director General before June 30, 1974, he felt that this operation "was not legal", although at that

time, he had no legal opinion from Justice or the R.C.M.P. Legal Branch (Vol. 125, pp. 19584-5). Subsequent to the amendment of June 30, Mr. Dare felt, basing his view on internal discussions within the Force, that such entries without warrants and without consent were in fact legal (Vol. 125, p. 19585). He said that it was the policy of the Security Service not to approve any such operation after July 1, 1974, unless a warrant to intercept oral communications was in effect with respect to the premises.

22. Mr. Dare maintained that at no time did he seek a warrant with the intent of misleading the Minister by saying that the warrant was for an oral intercept, while not himself believing that the Security Service was installing the electronic device (Vol. 125, p. 19615). According to Mr. Dare, he did not know of any instance in which an application for a warrant to install a microphone was made and a warrant obtained where the sole purpose was in fact to conduct a physical intelligence operation (Vol. C88, pp. 12107-8).

Conclusion

23. Mr. Dare knew that members of the Security Service entered private premises without a warrant and without the permission of a person entitled to give such permission, before and after July 1, 1974, for the purpose of installing listening devices. We believe that both before and after that date he considered that to do so was lawful. He has also known, throughout his tenure as Director General, that such entries were carried out for the purpose of examining and photographing documents and things, and he candidly admits that before July 1, 1974, he thought that doing so was illegal. Since July 1, 1974, as will be seen when we discuss Mr. Allmand's role, Mr. Dare has considered that the practice is legal if carried out in conjunction with the installation of a listening device when that installation has been authorized by a warrant under section 16. We believe that Mr. Dare has not been a knowing party to the two occasions of which we are aware, when applications for such warrants have been made and the sole real purpose has been to have a warrant to "cover" a search for documents. In other words, he was not a party to the deception of the Minister.

(d) Commissioner Nadon

Summary of evidence

24. Commissioner Nadon was questioned about the "Damage Report", prepared in the summer of 1974 as to what "damage" former Constable Samson could do if he revealed publicly practices or occurrences of which he knew (M-88, Tab 4). Commissioner Nadon stated that at the time of the Report he did not know what a PUMA operation was, and that, while he knew there were such operational codewords as PUMA, COBRA and VAMPIRE, he could not tell the difference between one and the other unless it was explained to him (Vol. 128, p. 19998). Mr. Nadon's whole career in the R.C.M.P. had been spent on the C.I.B. side of the Force. Commissioner Nadon stated that he "gathered" that a PUMA operation was an intelligence operation in which individuals, while on particular premises, would observe documents, make

notes, or photocopy the documents. He told us that such an operation, in his mind, did not include taking away documents or photocopying them in other premises (Vol. 128, p. 19999). On the criminal operations side, Mr. Nadon said he had heard of "intelligence probes". These he said involved the examination of and obtaining information from documents "on the spot" in any place. Mr. Nadon said he was not aware of entry into premises "illegally" on the criminal side for the purpose of an intelligence probe (Vol. 128, pp. 20000-1). (This reference to "illegally" appears to relate to going onto premises without a warrant and without the consent of the owner or occupant.)

Conclusion

25. We have no reason to doubt Commissioner Nadon's testimony on this point, and we therefore conclude that he did not know about surreptitious entries on the Security Service side, and that on the Criminal Investigation Branch side he did not know about "intelligence probes" in the sense of warrantless trespassory entries. In regard to each side of the Force he appears to have understood the members of the Force to take the opportunity, while lawfully on premises, to examine and copy documents found there, but he does not appear to have been aware of non-consensual entries without a warrant.

(e) The Honourable John N. Turner

Conclusion

26. On the sole basis of Commissioner Lindsay's memorandum of July 5, 1968, and in the absence of testimony from either Mr. Lindsay or Mr. Turner on the subject, we are not prepared to draw any inference as to exactly what Mr. Lindsay said to Mr. Turner that day about whether electronic intrusion would involve the commission of civil trespass.

(f) The Honourable George J. McIlraith

Summary of evidence

27. Commissioner Lindsay, who was not called to testify on the subject, recorded on July 11, 1968, a note that the memorandum which he had prepared concerning his meeting with Mr. Turner "was discussed with Honourable George McIlraith, today in very general terms, but it was not read by him. He indicated that he understands the situation". It is not at all clear from this note whether the "legal implications" mentioned in para. 4 of the memorandum were discussed with Mr. McIlraith.

28. Senator McIlraith, when asked about Commissioner Lindsay's note, did not think there was any discussion with him by Mr. Lindsay or anyone else at any time about the legality of entering premises as compared with installing such devices (Vol. 118, p. 18347). On the other hand, to the extent that (telephone) wiretaps might involve entering premises, Senator McIlraith told us that he was told, he suspects by the Commissioner, that it was legal according to the Department of Justice (Vol. 118, p. 18359). He says that he was not aware of entries made for the purpose of searching for documents or things, photographing or copying them, or removing them to be photographed

and copied and then returned. He says that these subjects were not discussed with him (Vol. 118, p. 18365; Vol. 120, p. 18798). Nor did he know that, once inside premises to install a wiretap, those doing so would search and copy material of interest (Vol. 118, p. 18365).

29. Mr. Starnes said he was unable to recall whether he discussed with Mr. McIlraith the question of surreptitious entries for the purpose of obtaining physical and written intelligence (Vol. C30, p. 3782; Vol. 103, p. 16355; Vol. C38, p. 5172). Mr. Starnes told us that he understood that Mr. McIlraith had accepted the recommendations of the Royal Commission on Security (although Mr. Starnes could not recall specifically reviewing the recommendation and determining Mr. McIlraith's position) that the head of the Security Service, not the Minister, should be responsible for approving audio surveillance ("bugs"). Therefore, Mr. McIlraith was not being asked to approve audio surveillance, and he had not asked to approve it (Vol. 106, pp. 16627, 16631-4). There was no question in Mr. Starnes' mind, however, that Mr. McIlraith was well aware that the Security Service was using audio surveillance methods (Vol. 106, p. 16632). Mr. McIlraith was asked to approve telephone interceptions under the Official Secrets Act (Vol. 106, p. 16633). When a new request for telephone interception was being made, Mr. Starnes stated that Mr. McIlraith would have been provided with a brief. If that brief was not sufficient for his purposes, it would have been expanded. Installations which had been in existence for some time would be listed. The Minister would review those if he wished, and there would be a further list of telephonic interceptions which were being revoked (Vol. 106, pp. 16628-9).

Conclusion

30. By his own admission, Senator McIlraith knew that what was then known as the Security and Intelligence Branch of the R.C.M.P. entered premises, without the consent of the owner or occupier, to install at least one kind of listening device — telephone wiretaps. He understood that legal advice had been obtained that such entries were legal. We are not prepared to conclude, solely on the basis of Commissioner Higgitt's testimony unsupported by documentation, that Mr. McIlraith was informed that entries were made for any other purpose.

(g) The Honourable Jean-Pierre Goyer

Summary of evidence

31. In a written statement which he placed before us, Mr. Starnes stated:

> In the case of Jean-Pierre Goyer and his successor, I can personally attest to their having been informed about various clandestine activities since I participated in those briefings. They were not, of course, informed about all the different techniques used by the Security Service to obtain certain kinds of information. However, both Ministers were shown the sophisticated installations .... where material derived from microphone and telephone interception operations is received, taped and processed. It would be impossible for anyone receiving such briefings not to be aware, for example,

that some of the microphones in question have been installed by other than normal methods.

Mr. Starnes also recalled the meeting held in March 1972 with the Minister of Justice (Mr. Lang), Mr. Goyer, and Commissioner Higgitt, which discussed draft legislation on electronic surveillance. At that meeting, Mr. Starnes recalls pointing out that he could hardly imagine any judge issuing a warrant for the installation of electronic eavesdropping devices when he knew that the devices probably would have to be installed by methods which might be slightly outside the law. Mr. Starnes told us that he pointed out that microphones did not get installed by ringing the front doorbell.

32. Mr. Goyer testified that he assumed that the installation of electronic eavesdropping devices was legal, and says that he was told that it was legal and that the Minister of Justice had confirmed its legality (Vol. 121, p. 18991.) (No such advice is known to the Commision, although the Varcoe opinion of 1954 advised that *telephonic* interception could be undertaken by virtue of a warrant issued by a justice of the peace under section 11 of the Official Secrets Act. We know that the R.C.M.P. came to regard this opinion as somehow authorizing interception of non-telephonic conversations, although in practice the Force did not require microphone interceptions to comply with the section 11 procedure.) He also knew that the Department of Justice had said that there was a "grey area" of "civil trespass" which was a concept unknown to him as a civil law lawyer from Quebec. He says that it was explained to him that in certain provinces the penetration of private premises could give rise to a civil action for damages (Vol. 121, pp. 18976-7). He is also of the impression that the Department of Justice had advised that, if the law authorized electronic eavesdropping, the law authorized the doing of a thing which is essential to accomplish it. He says that the R.C.M.P. explained to him that there was no need to provide in the law for entries for the purpose of installing devices, as there was no liability for "civil trespassing" (Vol. 121, p. 18978; Vol. 122, p. 19022).

33. Mr. Goyer told us that at the meeting in Mr. Lang's office in 1972, the principal preoccupation of the R.C.M.P. was the problem of "civil trespassing" in relation to electronic eavesdropping. He said that no one at the meeting indicated that criminal acts would occur at the time of installation. He said that the prevailing opinion in the Department of Justice was that, if there was a right to install an electronic listening device, there was a right to take measures to do so (Vol. 122, pp. 19023-5). Mr. Goyer told us that it is only in some of the provinces, other than Quebec, that there is such a thing as "civil trespass". From his testimony it appears to be his impression that the existence of such a law depends upon the existence of a statute (Vol. 122, p. 19018). In this impression we believe he is mistaken.

34. Mr. Goyer was asked about the monthly reports on microphone installations which he initiated in 1971. He stated that he did not authorize the installations, but merely took notice of them. Mr. Goyer said that he wanted to know where the R.C.M.P. concentrated its efforts, and to assure himself that there were no witchhunts (Vol. 121, p. 18974). Mr. Starnes told us, however,

that when Mr. Goyer decided to ask for monthly reports on microphone installations, it was his (Mr. Starnes') understanding that the Minister, having involved himself in this process, was implicitly at least looking at an area of Security Service operations and *ex post facto* saying "I think those are appropriate" (Vol. 103, p. 16344; Vol. 108, p. 16719). Mr. Starnes accepted Mr. Goyer's decision that Mr. Goyer would receive and sign a report monthly as to installations that had been made. Mr. Starnes had prepared a memorandum to be submitted to Mr. Goyer with the first such report, but said that he accepted Mr. Higgitt's suggestion that the memorandum not be given to Mr. Goyer. The memorandum (Ex. MC-1, Tab 5) stated that the Security Service was:

> not suggesting that you authorize the continuance of such operations, thereby avoiding some of the political and other difficulties which could arise from having a Minister of the Crown directly involved in operations which are or may be outside the law.

By these words Mr. Starnes told us (Vol. C30, pp. 3742-3) that he was referring to the caution that had been given by the Deputy Solicitor General, Mr. T.D. MacDonald, (recorded in Commissioner Lindsay's memorandum of July 5, 1968, concerning the meeting held that day with Mr. Turner). Mr. MacDonald had warned that entries for such purpose might occasionally involve petty trespass (Ex. E-1, Tab 2C). Although Mr. Starnes did not show Mr. Goyer the memorandum, he told us that he thinks that he discussed the substance of the memorandum with Mr. Goyer on July 26, 1971 (Vol. C30, p. 3749).

35. Mr. Starnes testified that Mr. Goyer was not willing to accept the recommendations of the Royal Commisson on Security that the head of the Security Service, rather than the Minister, authorize microphone installations. Mr. Starnes said that he and Mr. Higgitt had suggested to Mr. Goyer, when he first raised the question, that since microphone operations sometimes involved "extraordinary" measures for their installation, Mr. Goyer might prefer not to be aware of such operations as a Minister of the Crown (Vol. 103, pp. 16334-5). Mr. Higgitt stated that, when Mr. Goyer asked in July 1971 for the monthly report on microphone installations, he did not inform Mr. Goyer in detail as to how these devices were installed. Later Mr. Higgitt stated that he had advised Mr. Goyer of problems involved with entering premises in order to install technical devices (Vol. 111, pp. 17152, 17166-7). Mr. Higgitt later told us that Mr. Goyer did not want to know how the various devices were being installed, but certainly knew in a general way how this was done (Vol. 112, pp. 17309-10). Mr. Starnes told us as well that Security Service officials tried to inform Mr. Goyer, that in order to install microphones, it was sometimes necessary to do so by surreptitious means (Vol. 107, pp. 16689-90). Mr. Starnes told us that he could not recall orally telling Mr. Goyer how each of these installations was made, although he said that if Mr. Goyer had asked the question, he would have told him. Mr. Starnes told us that he had no recollection of a discussion of that kind, but that one may have taken place (Vol. C32, pp. 4009-10).

36. Mr. Starnes cannot recall having specifically discussed with Mr. Goyer the question of surreptitious entries for the purpose of obtaining physical and written intelligence (PUMA operations) (Vol. C30, p. 3782). A briefing document used in conjunction with a tour of the R.C.M.P. electronic surveillance installation dealt with telephone intercepts and permanent audio installations, but did not refer to PUMA (entries to install devices) at all. Mr. Starnes did not think that this was unusual, since, when Ministers were taken into the electronic surveillance installation, PUMA would not enter into the discussion, because it was not a technical audio surveillance operation (Vol. C30, p. 3782).

Conclusion

37. Unquestionably Mr. Goyer knew that entries were made onto premises without the consent of the owner or occupier to install listening devices and, by his own admission, he knew that in certain provinces the penetration of private premises could give rise to an action for damages. On the other hand, he was under the impression that the installation of the devices was legal, and it is regrettable that the memorandum that Mr. Starnes prepared in July 1971, was not shown to him, for it would have alerted him to the possibility of illegality. As for the meeting in Mr. Lang's office, we note that even Mr. Higgitt and Mr. Starnes did not go so far as to testify that they had told those present of any specific acts that might be offences. We do not consider it possible to go beyond the notes of Supt. Cain, made by him shortly after the meeting and therefore more likely to be reliable then memory a number of years later. We think that only trespass was referred to at that meeting.

38. We are not prepared to conclude, solely on the basis of Commissioner Higgitt's testimony unsupported by documentation, that Mr. Goyer was ever told about surreptitious entries for purposes other than the installation of listening devices.

(h) The Honourable Warren W. Allmand

Summary of evidence

39. In the period prior to the Protection of Privacy Act coming into effect on July 1, 1974, applications were made to Mr. Allmand for warrants for telephone intercepts both in cases of espionage and in cases of internal subversion or terrorism. Mr. Allmand was aware that applications for telephone interception were being made for non-espionage matters, that is, matters of internal terrorism or subversion (Vol. 114, p. 17686). Mr. Allmand did not seek an official legal opinion on this matter, but it appeared to him that requests for warrants involving espionage and subversion, including domestic terrorism, were within section 11 of the Official Secrets Act (Vol. 114, pp. 17687-9). His reading of the section, although he never discussed it in detail with the R.C.M.P., led him to believe that section 11 could also be used for warrants for the installation of bugging devices (Vol. 114, p. 17582). (However, the R.C.M.P. did not in fact obtain warrants from a justice of the peace under section 11 when they intended to install listening devices in premises.)

40. The R.C.M.P. sought Mr. Allmand's authorization only for telephone interceptions and not for bugging, but they reported to him each month on

microphone installations ("bugs") they had carried out both on the criminal investigation side and on the Security Service side (Vol. 114, p. 17602). Mr. Allmand stated that neither Mr. Higgitt nor Mr. Starnes had told him about being concerned about the question of trespassing in the course of installing bugs and wiretaps (Vol. 114, pp. 17652, 17654, 16756-60). Mr. Allmand was told at his initial briefing sessions in December 1972 that there was a legal basis for wiretapping and bugging (Vol. 114, pp. 17581, 17608-9). There was no intimation that any of the matters he was briefed on were illegal (Vol. 114, p. 17609). Mr. Dare confirmed this last point. He testified that before the Protection of Privacy Act came into effect on July 1, 1974 he never discussed with Mr. Allmand the legality of microphone installations listed in his monthly report he presented to the Minister (Vol. 125, p. 19566).

41. Mr. Allmand referred to his testimony before the House of Commons Justice and Legal Affairs Committee in June 1973, where he indicated that the R.C.M.P. and the Security Service engaged in bugging (Vol. 114, p. 17610). At that time no one suggested that the bugging carried out according to the authorization system was illegal (Vol. 114, pp. 17653, 17611). On another occasion he asked his Deputy Minister, Mr. Tassé, to check on its legality. Mr. Tassé later reported that he had checked with the Department of Justice and that entry for bugging was legal (Vol. 114, p. 17586; Vol. 115, p. 17703, 17719; Vol. 116, p. 18059). Mr. Allmand told us that this opinion confirmed what he had believed up to the time the concern arose (Vol. 116, p. 18059; Vol. 114, pp. 17582-3). On another occasion, Mr. Allmand stated that throughout his term of office — which included a period of about nine months before the Protection of Privacy Act came into effect — he was "convinced" that, just as entries to observe were legal, so too entries to place "bugs" were legal (Vol. 115, p. 17709).

42. Turning to surreptitious entries for purposes other than electronic surveillances, Mr. Allmand told us that he did not know of specific instances when members of the R.C.M.P. had entered premises surreptitiously and taken documents or evidence away with them. Nor did he know of any specific incidents of entries to observe or to photograph, although he was "convinced" that entries for those purposes were legal and he was aware that they did occur (Vol. 115, p. 17701, 17717-9; Vol. 114, pp. 17663-4). He said that he did not seek an opinion on the legality of such entries by the Security Service because he did not recall it ever becoming an issue (Vol. 114, pp. 17665-6). He said that he did not have an indication from anyone that the practice was illegal. He could not recall who told him that such entries were legal, but felt it was part of his general briefing over a period of time. Furthermore, he said that he had been told that the general work the Security Service was carrying on was within the law and that various investigative techniques were within the law (Vol. 114, pp. 17666-7).

43. In October 1974, an article appeared in the Montreal newspaper, *Le Devoir*, which discussed a book by Professor Guy Tardif, a former member of the R.C.M.P. The article mentioned Operation 300, which was said to be surreptitious entry into homes when the owner was away, to obtain evidence by taking photographs, and then leaving without a trace. Mr. Allmand said he was

not aware of Operation 300 before this time (Vol. 114, pp. 17675-6). Mr. Allmand's assistant, Mr. Vincent, asked for guidance from the R.C.M.P. The R.C.M.P. suggested a reply, in case a question was asked in the House of Commons, and the memo was placed on a card in a briefing book for Mr. Allmand's use in the House of Commons. The suggested reply was "I am aware of the article and am examining it". Mr. Vincent's memo stated that he had been told "that this touches on a very sensitive aspect of the operations of the R.C.M.P. The R.C.M.P. officials at a senior level are investigating and will provide you with a report on the matter". Mr. Allmand does not recall seeing the memorandum, although he did see the card. No report was ever received from the R.C.M.P., no question was asked in the House of Commons and the card was probably taken out of the book and the matter dropped out of sight — perhaps because Mr. Vincent did not ordinarily deal with R.C.M.P. matters (Vol. 114, pp. 17672-85; Vol. 115, pp. 17722-26; Vol. 116, pp. 18059-60). Mr. Allmand did not make any inquiries as to the legal basis for such operations despite the Tardif incident (Vol. 114, p. 17678), but, as we have already noted, he was "convinced" that entries for such a purpose were legal. Mr. Dare told us that during the period of his tenure from May 1, 1973 to June 30, 1974, he did not specifically make Mr. Allmand aware of the fact of this kind of operation (Vol. 125, p. 19586). Mr. Dare also testified that he did not discuss the legality of those operations during that period, and that Mr. Allmand never raised the question of their legality with him (Vol. 125, pp. 19586-7).

44. While Mr. Allmand was asked about his knowledge of surreptitious entries for the purpose of observing and photographing documents, he was not specifically asked whether he knew that sometimes members of the Security Service, when they entered premises to install a listening device pursuant to a warrant issued by him under section 16, "rummaged" around and examined and photographed documents and things. However, Mr. Dare testified on this subject. He said that after June 30, 1974, the "oral communications warrant" obtained from the Solicitor General under section 16 of the Official Secrets Act was used by the Security Service as a basis on which to examine documents on premises, and photograph them where necessary (Vol. 125, p. 19588-9). Mr. Dare stated that this technique was clearly discussed with Mr. Allmand, and Mr. Dare believes that Mr. Allmand had been assured by his then Deputy Minister, Mr. Tassé, that this procedure was entirely legal (Vol. 125, p. 19589; Vol. C88, pp. 12106-7). Mr. Dare said that, although Mr. Allmand would not be advised on every occasion that a physical intelligence operation would be conducted at the same time a microphone was installed pursuant to a warrant, nevertheless Mr. Allmand was, from time to time, informed of the practice (Vol. 125, pp. 19589-90). Yet, in the majority of cases when oral communications warrants were sought from Mr. Allmand, Mr. Dare did not indicate to him that he was also contemplating a physical intelligence operation (Vol. 125, pp. 19598-99).

Conclusion

45. Whether, since July 1, 1974, the law permits surreptitious entry for the purpose of installing a listening device when the electronic surveillance has been authorized under section 178 of the Criminal Code or section 16 of the

Official Secrets Act, is a matter of uncertainty even today. Of course Mr. Allmand knew of such a practice, and regarded it as legal, as unquestionably has the Department of Justice more recently. As for his nine months as Solicitor General preceding the present legislation, Mr. Allmand by his own admission knew of the practice then, too, and we accept his evidence that he thought it was legal.

46. As for entries for the purpose of looking around and photographing things on site, Mr. Allmand candidly admitted that when he was Solicitor General he presumed that they occurred, but he said that he thought that they were legal. He and Mr. Tassé both said that the issue never came up for discussion, so that Mr. Allmand did not actually inquire about the legality of such operations, and his inference that they were legal was based on the general assurances that the R.C.M.P. gave him, that their work was within the law.

(i) The Honourable Francis Fox

Summary of evidence

47. Mr. Fox testified that after Commissioner Nadon's statement in 1973 before the Standing Committee on Justice and Legal Affairs, he thought it was clear that all members of the House of Commons were aware that the R.C.M.P. was engaging in electronic surveillance both in the form of telephonic interceptions and in the form of what is commonly known as bugging. He thought it would be impossible for them to know that electronic surveillance was taking place without thinking that the individuals involved had to enter a building to install a listening device (Vol. 163, pp. 24966-7). During Mr. Fox's term as Solicitor General, it was his impression that the problem had been solved completely with the passage of the 1974 law authorizing electronic surveillance. Nonetheless, the question was raised again. Mr. Fox relied upon a legal opinion prepared by Mr. Landry of the Department of Justice either during his or Mr. Allmand's respective tenures as Solicitor General. Mr. Fox thought that the opinion provided, in effect, that if Parliament had authorized the use of electronic surveillance, the individuals involved, under certain conditions, could employ reasonable means to carry out their tasks (Vol. 163, p. 24968).

48. Mr. Fox testified that in January or February 1977, the question was first raised about a police officer examining a place and documents he might find in the place while in the course of installing an electronic device when there was lawful authorization to make the installation. Mr. Fox did not think that the warrant authorizing the installation of devices authorized an individual to examine files, documents, etc. found in the premises (Vol. 163, pp. 24969-70). He said that, as far as he was concerned, when he gave authority for someone to undertake electronic surveillance, the authority was only for electronic surveillance (Vol. 163, p. 24970). He felt that the warrants he issued should have been read and interpreted in a restrictive fashion (Vol. 163, p. 24970). Mr. Fox told us that, when the matter was raised with him early in 1977, he asked Mr. Tassé to obtain a legal opinion from the Department of Justice to see whether, on entering for the purpose of placing an electronic surveillance

device, the R.C.M.P. could undertake other types of interceptions of documents, such as reading the documents, copying them or photographing them (Vol. 163, p. 24970). Mr. Fox said he received an opinion to the effect that the words "interception of communications" in the Official Secrets Act could apply to the interception of not only oral communications, but also written communications (Vol. 163, p. 24971). Mr. Fox did not think, however, that interception of written communications included removing documents in order to photocopy them and then returning them. However, he said it was proper to photocopy documents on the premises (Vol. 163, p. 24971).

49. Mr. Dare confirmed that he discussed with Mr. Fox the use of entries for the purpose of installing devices as an opportunity for the examination and photographing of documents (Vol. 125, p. 19600). Mr. Tassé also confirmed that there had been that discussion in early 1977 (Vol. 156, pp. 23803-4). He said that the issue was then considered and the conclusion was reached that if the Security Service wanted to look at documents, the warrant should be modified to say so (Vol. 156, p. 23820). Mr. Tassé said also that it was not indicated that intelligence probes were used, or that in executing a warrant under section 16 of the Official Secrets Act the police could take possession of documents and remove them to photograph or analyze them and then to return them (Vol. 156, p. 23810).

Conclusion

50. Mr. Fox, before the establishment of our Commission of Inquiry, relied on the opinion of the Department of Justice that a surreptitious entry was lawful when it was for the purpose of installing a listening device and the installation was authorized under the 1974 legislation. As we have seen, that opinion has been re-asserted more recently, and whether it is valid is uncertain.

51. As for "rummaging" while on premises to install an authorized listening device, when he found out that this went on, he obtained an opinion from the Department of Justice that written communications could be searched for, examined and copied.

CHAPTER 2

ELECTRONIC SURVEILLANCE

1. In our Second Report, Part III, Chapter 3, we discussed institutionalized wrongdoing in the field of electronic surveillance. Here we examine the knowledge and response of Ministers and senior government and R.C.M.P. officials in this area of operations. Because of the different legislation applicable to electronic surveillance in the two branches of the R.C.M.P., we discuss each branch separately.

A. SECURITY SERVICE

2. Over the years the Commissioners of the R.C.M.P. and Directors General of the Security Service have been aware of the use by the Security Service of all forms of electronic surveillance. An opinion of the Department of Justice was given in 1954 that telephonic interception could be undertaken by virtue of a warrant issued under section 11 of the Officials Secrets Act. From 1969 until July 1974, when the present legislation came into effect, the Solicitors General knew of telephone tapping, and indeed gave their approval to the issuance of warrants under section 11 of the Official Secrets Act. The Ministers also approved monthly certificates reviewing existing warrants. They were also aware of the use of microphones, although Ministers did not have anything to do with that technique of eavesdropping until Mr. Goyer instituted the practice of being informed monthly about it. Since 1974, the use of both techniques has been subject to section 16 of the Official Secrets Act, and Commissioners, Directors General and Solicitors General have all participated in the perfectly lawful process of issuing warrants. They have also been aware, in the case of microphone installations, that in many instances, an installation can be made only by entering private premises without the consent of any person who could give permission to do so. We noted in our Second Report that such entries may give rise to a legal issue, but that the R.C.M.P. and the Solicitors General have acted under the advice of the Department of Justice, given when the legislation was being drafted and since the early months of its operation, that such entries are legal.

B. CRIMINAL INVESTIGATION BRANCH

3. In our Second Report, Part III, Chapter 3, we reported that in the criminal investigation work of the R.C.M.P., the policy from 1959 onward forbade the use of telephone tapping. This was so until the Protection of Privacy Act came into effect on July 1, 1974. Although the last written policy dealing with

electronic surveillance issued on January 1, 1973 was silent as to telephone tapping, the evidence is clear that the policy against wiretapping continued until the Act came into force. We also reported that Commissioners advised Solicitors General in 1966 and 1968 that R.C.M.P. policy forbade wiretapping in criminal investigations.

4. Throughout the greater part of the 1960s the policy against wiretapping seems to have been rigorously enforced by Headquarters. An incident in Montreal in 1964 illustrates this. Two senior officers were dismissed from the Force for misapplication of public funds designated for the payment of informers. It came out in the service investigation and trial of the senior officers that the funds had not been used for the payment of informers but for the acquisition of wiretapping components and equipment. The Commissioner reported to the Minister of Justice that the use of this equipment was completely contrary to the policy of the Force. The files show that the equipment was impounded and subsequently destroyed.

5. Prior to 1974 there was, except in Alberta and Manitoba, no legal prohibition against wiretapping, and the reluctance of the R.C.M.P. to embark on the use of this technique for criminal investigations stems from internal policy considerations. An important factor was that the Security Service, which used wiretapping, was anxious to protect its technical operations, many of which were of a long-term nature. Assistant Commissioner Venner explained that:

> the Security Service and the people who had their responsibilities perhaps uppermost in mind were concerned that the C.I.B. entry into this field with the obvious ramifications of that — taking the evidence to court, in some cases — would raise the profile of this technique to the detriment of the Security Service.
>
> (Vol. C123, p. 16223.)

This reason can be found stated in a memorandum dated March 26, 1968, from Sergeant D.A. Cooper to the Officer in Charge of the C.I.B. (Ex. E-5). He said: ". . . the Commissioner forbids telephone tapping for criminal investigations, the main reason being to protect the responsibilities of "I" Directorate". Commissioner Higgitt told us that the protection of Security Service operations was an important reason for the C.I.B. policy (Vol. 199, p. 29496). This concern of the Security Service diminished somewhat as time went on and by June 12, 1973 the Solicitor General in testimony before the House of Commons Standing Committee on Justice and Legal Affairs did not hesitate to refer publicly to the use of wiretapping in security work.

6. It should also be noted that during the period when wiretapping legislation was in preparation the R.C.M.P. was reluctant to authorize wiretapping in criminal investigations since this might produce a public reaction adverse to the R.C.M.P. In our Second Report we said:

> Nevertheless, these senior R.C.M.P. officers wanted the use of this investigative aid to be kept out of the public eye as much as possible, particularly as they had hopes of obtaining legislation that would permit the use of wiretapping by warrant, and they feared that public exposure might prejudice the enactment of the legislation.

We based this conclusion on the testimony of Assistant Commissioner T.S. Venner. He testified before us in April 1978:

> Q. Did you have any discussions with your superiors as to the reasons why the policy remained that there shall be no telephone tapping, notwithstanding the opinions that in most circumstances no offence would be created, even an offence under the Petty Trespass Act; did you ever have any discussions as to why they wanted it maintained?
>
> A. Yes, many such discussions, sir.
>
> Q. What was your conclusion as to the reason for maintaining the policy, in spite of the opinions that they had with respect to law?
>
> A. At that period of time, the legislation was impending, and I think it was accepted, rightly or wrongly, within our Force that we would stand a better chance of getting favourable legislation, or not jeopardizing the passage of what we believed to be favourable legislation, if our policies remained the same, if they remained prohibitive with respect to wiretapping. But I might say these decisions were taken by people from whom our activities were withheld in the field.
>
> (Vol. 33, pp. 5452-3.)

The conduct of Assistant Commissioner Venner

7. In our Second Report, Part III, Chapter 3, we discussed the evidence of Mr. Venner with respect to wiretapping in Toronto in 1973:

> 19. It is clear that the policy enunciated by Headquarters, and the assurances given so positively to government that telephonic interception was not permitted, were somewhat meaningless. Assistant Commissioner T.S. Venner testified that in "some areas" R.C.M.P. investigators "simply relied on their local, municipal and provincial police counterparts to do this work for them". In other areas,
>
> > . . . our policy was held to be just a guideline, and key personnel, when operational circumstances warranted it, went ahead with the necessary activity, either not reporting it at all, reporting it only up to certain levels or reporting it in an incomplete, less than fully informative fashion.
> >
> > (Vol. 33, p. 5404.)
>
> One such area was "O" Division (Southwestern Ontario), to which Mr. Venner was transferred from Edmonton in the summer of 1973. Put more bluntly by him, the fact that telephone tapping was being carried on in the field was "withheld" from senior officers of the Force who were responsible for the policy and were assuring Parliamentary Committees that there was no wiretapping for criminal investigation purposes (Vol. 33, p. 5453). Indeed, in those areas where the policy was ignored in practice, the R.C.M.P. now recognizes that the telephone tapping was "carried on in an atmosphere of non-accountability, fear of discovery, even deception".
>
> (Vol. 33, p. 5407.)
>
> 20. Mr. Venner told us that when he moved from Alberta to Toronto in 1973 as Officer in Charge of the Criminal Intelligence Division
>
> > It also became apparent that telephone tapping was going on, was being conducted by our criminal investigators, and to a very high degree it also became apparent that this was an underground activity, that it was not

being reported, that information as to the character and extent of our technical activity was being withheld from superior officers, and the people who were doing it were people who became immediately subordinate to me as soon as I arrived there.

(Vol. 33, p. 5440.)

So, after examining the situation, he concluded that it was "impractical" not to tap telephones, "policy notwithstanding". Although it was "clear" to Assistant Commissioner Venner that in 1973 "it was still a policy of the Force not to wiretap" (Vol. 33, p. 5454), he considered the policy to be

> ... a guideline to be followed wherever possible, but when it was just not practical to live within that policy, and where there was a greater public interest, in my assessment, at stake, then telephone intrusion would form part of our electronic surveillance program.
>
> (Vol. 33, p. 5441.)

He was aware not only that the practice was contrary to Force policy, but that, in the small percentage of cases in which it was necessary to enter premises in order to tap a telephone, there was ("at most") a violation of the Ontario Petty Trespass Act and possibly civil trespass.

(Vol. 33, pp. 5441-44.)

21. This attitude was not restricted to Southwestern Ontario. In a letter to the Solicitor General on October 6, 1977, Commissioner Simmonds wrote

> Efforts to have our policy changed met with no success for a variety of reasons and it became evident that there was a wide range of interpretation being applied with respect to the prohibition against telephone tapping. In some areas, our investigators simply relied on their local, municipal and provincial police counterparts to do this work for them. In other areas, our policy was held to be just a guideline, and, key personnel, when operational circumstances warranted it, went ahead with the necessary activity either not reporting it at all, reporting it only up to certain levels or reporting it in an incomplete, less than fully informative fashion. In some other areas, the policy was rigidly adhered to, occasionally because local enforcement programs were sufficient without this investigative aid, but more often because the policy and public pronouncements by the Commissioners were held to be an absolute bar to telephone tapping in the investigation of criminal matters. I think it is fair to say that where this interpretation existed and was applied, telephone tapping simply continued in an "underground" fashion and our previously high standards of accountability became subject to violation. The damage this did has not yet been fully repaired.
>
> (Vol. 33, pp. 5404-5; Ex. E-5.)

8. It has been represented to us that it is unfair to comment on Mr. Venner's conduct in Toronto in 1973 since the evidence was supplied by Mr. Venner himself when he put himself forward in April 1978, as the present Director of Criminal Investigations, to testify as to the history of the policy on this subject, and in particular when he was asked by our counsel to tell what had happened in Toronto. Our counsel's question (Vol. 33, pp. 5439-40) was a request that Mr. Venner elaborate upon the statement that had been contained in Commissioner Simmonds' letter that there had been misleading reporting and that information had been withheld from superiors.

9. We recognize that, in a sense, it is unfair that Assistant Commissioner Venner should be commented upon if there were other officers who were doing the same thing but are not named in this Report. Nevertheless, we cannot be expected to refrain from commenting on conduct which is known to us merely because others, unknown to us, may have done the same thing.

10. We do not believe, however, that Assistant Commissioner Venner intended to mislead Headquarters or contribute to misleading the Solicitor General or the Justice and Legal Affairs Committee. We accept his assurances, given under oath, that he tried to get the wiretapping policy changed. He made written submissions "pointing out our difficulties and asking for changes", some of which "got to Headquarters" while others did not get beyond the sub-divisional or divisional level. He says that

> in one way or another, and, in fact, in every way I could, I attempted to get this policy changed and to bring to the attention of Headquarters the difficulties that it was causing us in the field and the effect it was having on our character and the fabric of the Force, really.
>
> (Vol. C123, p. 16191.)

Nonetheless, the evidence is that in 1973 he permitted wiretapping operations in Toronto to continue and he did not report the true state of affairs to his superior officers.

11. Assistant Commissioner Venner says that by 1973 there was a decline in leadership standards and that this was "primarily because of the atmosphere created by this policy, that most criminal investigators couldn't live with" (Vol. C123, p. 16190). He described to us a very serious state of affairs:

> There were many officers in this Force who simply did not want to know the problem existed. They wanted to shut their eyes and tell them to go away. They did not want people to tell them that this practice was going on in criminal investigation. Because then they would be possessed of knowledge, which they would either have to do nothing about, and thereby accept the responsibility, or do something about; and many of them did not want to do either. So, there was an atmosphere of not wanting to know what was going on.
>
> This reporting system contributed to that and to some extent facilitated that. In both Alberta and Toronto there were officers, superior to me, in the division, who I did not want to discuss this kind of activity with. I was more prepared to discuss it with the D.C.I. in Headquarters, than I was with officers within my division, because of their own perceptions and their own personal approval to this kind of activity. It was a very unhealthy and very unsatisfactory and very disturbing situation. But that's the way it was and that is how it existed.
>
> (Vol. C123, p. 16268-9.)

He says that the junior members who were carrying out telephone tapping

> had developed disrespect for their senior officers, for any officers, most of whom just were not about to get involved and to know what the practice was, and didn't want to do anything about it.
>
> (Vol. C123, p. 16188.)

Thus,

> the fabric and the character of the Force. . . was being seriously eroded.
>
> (Vol. C123, p. 16189.)

12. Assistant Commissioner Venner considers that the proper way to interpret what he did in Toronto in 1973 is that

> during a short period of time, when there was confusion and uncertainty and a very unhealthy arrangement within the Force with respect to policy in this area [he] took it upon himself to do some reasonable, thoughtful, sensible things to bring an acceptable practice under control; that [he] lived with and worked within a reporting system which may not have been fully informative — it may not have been deceitful, but it may not have been fully informative or complete — that reporting system may have allowed some people at Headquarters to be misled.
>
> (Vol. C123, pp. 16231-2.)

He explained that his motive was to bring a measure of accountability (to himself) and control to what he found was going on in "an underground fashion, uncontrolled" (Vol. C123, p. 16181). He found that the fact that telephone tapping was used at all was withheld from the officers of "O" Division in Ontario and that "no officer was overseeing the programme, to see this technique was only used when it was absolutely necessary" (Vol. C123, p. 16182). Misleading reporting practices were being used to camouflage telephone tapping operations (Vol. C123, p. 16188) and he found that members who carried out telephone tapping "hid it from their superiors", resulting in "a very, very dangerous climate of deceit, really, and lack of accountability" which "was growing up in the C.I.B. side of the Force" (Vol. C123, p. 16181). He considers that had he "religiously tried to stamp it out", it "would have continued in an underground fashion" (Vol. C123, p. 16185). He recognizes that the policy was regarded as a very significant one in that he was aware, when he arrived in Toronto and before that, as were "all of our criminal investigators", that "if a criminal investigator was caught in this procedure, caught telephone tapping, he would lose his job" (Vol. C123, p. 16187).

13. Indeed, he considers that, far from his conduct being unacceptable, it would have been unacceptable "to have done nothing about the situation, other than to allow it to continue, or drive it further underground with repressive action of my own". He says that he did his duty —

> my duty as I perceived it, to the Force, in many ways, and to the younger members of the Force in particular.
>
> (Vol. C123, p. 16189.)

14. Here it is disturbing to note than an officer perceives his "duty to the Force" as being distinct from his duty to obey the policy of the Force. We reject the concept that there is some overriding duty to the Force that may be invoked by members as a reason for disregarding a policy decided upon by senior management or by the Solicitor General, no matter how unreasonable members consider the policy to be or whatever adverse consequences they may perceive the policy to have for the "fabric" or the "character" of the Force.

15. We recognize that Mr. Venner was in a most difficult position when he arrived in Toronto and found that wiretapping was going on in an "underground fashion". The evidence before us makes it clear that the official policy of the Force was not to engage in wiretapping. It is therefore hardly surprising that certain superior officers in Divisions, such as Mr. Venner's own superior in Toronto, were insisting on strict compliance. However, it is equally clear that senior officers on the C.I.B. side of Headquarters were aware, at least by the fall of 1972, that the policy was often not being observed in the field. Not only were they aware of this, but they did nothing about it. The policy was not changed, neither were attempts made to bring practice into line with policy. In this state of affairs it is understandable that Mr. Venner found it easier to discuss the situation with Headquarters managers than with officers in the field. It was a situation in which the management of the Force had broken down as far as this question was concerned.

16. Commissioner Simmonds testified on this matter and stated that in his view Mr. Venner dealt with "a very difficult problem in a very responsible way", and described his own experience as an officer in the field. We have given careful consideration to his representations.

17. We recognize that Mr. Venner volunteered the information about his own experience to our counsel and to us, and for that we give him credit. Yet, when all is said and done, one fact remains. It was Force policy that the technique of wiretapping was not to be employed in criminal investigations. Those who did not obey that policy may have done so for a noble motive, but their conduct cannot be excused, for that road can only lead to loss of control and breakdown of authority within the Force.

The conduct of Deputy Commissioner Nadon

18. On August 8, 1972, Mr. Nadon asked the C.I.B. to prepare a background paper on the wiretapping policy which would assist in consideration of changing the policy. By October, a paper was prepared entitled "Wiretapping Policy" (Ex. E-5). It was prepared by senior non-commissioned officers at Headquarters who were in the Drug Section, the National Crime Intelligence Unit, the Commercial Fraud Section and the Legal Branch. This brief, intended for internal use only, was circulated to the officers in charge of the C.I.B. branches at Headquarters, who so far as Mr. Nadon knows, did not dissent from its contents. It was then submitted to Mr. Nadon. The brief traced the history of wiretapping policy from the 1930s and recommended a change of policy. The passages of particular importance to us are as follows:

> *Introduction* [p. 1]
>
> Our official policy concerning wiretapping is perfectly clear. For many years we have consistently forbidden our members to use this method of investigation, and consistently denied that we have ever done so....
>
> It is painfully clear that mere perusal of the materials on file would be entirely misleading to anyone not familiar with reality in this area — that official policy has never been followed despite assurances to the contrary.

This brief is presented in a conscious effort to "tell it like it is" — to go beyond the mere commission to extract and summarize (although this has been accomplished to some extent) and permit conclusions and recommendations based on existing realities...

Enabling legislation [p. 7]

...With the dissolution of Parliament in July Bill C-6, the latest in a series of Bills on wiretapping, died after coming closer to passage than any of its predecessors. While we directed our usual representations to Justice, we were conspicuous by our absence at the stage when briefs were presented to the Justice and Legal Affairs Committee. Our present policy effectively prevented us from visibly using our prestige in support of other police agencies. We did not dare risk questioning which could reveal the abyss between policy and practice.

Effects of present policy [p. 9]

It can be unequivocally stated that our members do in fact tap telephones in the face of official policy to the contrary, directly, and indirectly through the medium of other police agencies and telephone companies. The basic reason for this is that the Force, quite properly, expects its members to produce investigative results, and unofficial policy at the working level condones or encourages wiretapping as a medium. A second reason is that members often become so dedicated to their tasks that they are willing to use any means available to accomplish them as long as the means is not personally repugnant, even to the point of jeopardizing their careers.

The justifications for the assertion that our members do tap telephones are these:

(1) personal knowledge on the part of many members, even though they are compelled to deny it officially

(2) common knowledge within the Force

(3) cases developed into the higher levels of serious and organized crime where it is obvious traditional investigative methods could not be responsible

(4) recurring questions from members attending courses concerning the consequences if they are caught.

Why our policy should be changed [p. 12]

...

(2) to bring policy into line with practice

...

(6) to permit representatives of the Force to appear before the Justice and Legal Affairs Committee and attempt to influence prospective legislation.

...

19. It is clear that those who prepared the brief thought that, so long as the policy was not changed, any senior officer of the Force, if he appeared before the House of Commons Standing Committee on Justice and Legal Affairs, would have to disclose that members of the Force violated policy broadly, and

that this might cause such consternation as to imperil the prospects of the adoption of legislation which would, if adopted, clearly permit wiretapping by the police.

20. On November 8, 1972, Mr. Nadon wrote to the Director of Criminal Investigations that he had "perused this excellent study on wiretapping" and suggested that some minor changes be made before it was put in final form for discussion with the Commissioner.

21. A different paper highlighting the basic objections of the R.C.M.P. to the Protection of Privacy Act was prepared about this time for the information of the Solicitor General. On December 18, 1972, that paper was sent by Mr. Nadon to Mr. Bourne, the Head of the Security and Policy Analysis and Research Group in the Department of the Solicitor General (Ex. E-7). In this document the following passages on the wiretapping policy appear:

> The policy on telephone tapping is that it will not be used in the investigation of criminal matters except when one of the parties agrees to such action and there is no prohibitive legislation....
>
> Since the policy of the RCMP forbids wiretapping in the investigation of criminal matters, we cannot speak directly of our own cases when relating positive results from investigations wherein wiretapping has been utilized. We have, however, been involved in several joint forces operations with other police departments who do wiretap with the sanction of their superiors.

It will be noted that the paper sent to the Solicitor General's office did not refer to requests having been made by members of the R.C.M.P. to telephone companies for wiretaps, or to members installing wiretaps themselves, or to members asking other police forces to carry out wiretaps for the R.C.M.P. Moreover, Mr. Nadon cannot say that in discussions with the Solicitor General, Mr. Allmand, concerning the Protection of Privacy legislation, the existence of these possibilities was raised by the R.C.M.P. He has no memory of having told Mr. Allmand that he suspected that in some cases members were not abiding by the policy that prohibited wiretapping. (Vol. 199, pp. 29394-99).

22. Mr. Nadon told us that he sent the internal brief to the Commissioner on December 22, 1972. Mr. Nadon's internal memorandum to the Commissioner dated December 22, 1972 states in part

> This is the brief on wiretapping recently discussed. It is very detailed tracing history of C.I.B. involvement from the 1930s to date and a number of problems encountered on the way. Having lived through most of these problems while in the field I am most sympathetic to members concerned. After careful study of this and additional ammunition from south of the border I agree that it is time to have a good look at our present policy....

Later, according to Mr. Nadon, on January 10, 1973, a discussion was held with the Commissioner and the D.C.I. and the Commissioner decided that the R.C.M.P. policy on wiretapping should not be changed, as to do so might adversely affect the R.C.M.P. position on the wiretapping legislation.

23. In January 1973, the October 1972 internal brief was discussed at a meeting of divisional Commanding Officers in Ottawa. On January 26 Mr. Nadon sent the brief to the Commanding Officers of the Divisions in several of the provinces where the R.C.M.P. is the contracted police force. Mr. Nadon does not recall having received any comments from those Divisions that the brief presented the facts inaccurately (Vol. 199, p. 29364; Ex. E-5).

24. Mr. Nadon told us that "as far as [he] knew, the policy was established, was being generally observed throughout the Force. Now, there may have been the odd exception, but not an abyss..." as claimed in the internal brief of October 1972 (Vol. 199, p. 29335). He testified that, from the statements made in the brief, he "suspected that some of our members . . . were going out on their own and doing some wiretapping; but not on a general basis right across the country. On the exceptional basis." (Vol. 199, p. 29336-7). According to Mr. Nadon, "it certainly was not common knowledge at Headquarters, at the executive level", that members were tapping telephones (Vol. 199, p. 29337). He says that he thinks that the statement made in the brief, that "Present policy has never been followed in the larger crime centres", was "generalized" and that disobedience was "not as widespread" as the brief indicated, but was, he would say, by "very few members in each of the divisions" (Vol. 199, p. 29344). He told us that his views were formed from being in a division and from what he had heard at Headquarters. His experience in Toronto, Vancouver and in Montreal told him "that there was very little [wiretapping] going on, if any" (Vol. 199, p. 29351).

25. Despite the October brief's "unequivocal" statement as to practice, which to Mr. Nadon meant that the NCOs who prepared the brief "could certainly come up with certain incidents where it was done and it is unequivocal that it did occur" (Vol. 199, p. 29348), Mr. Nadon did not inquire as to whether there were grounds for the statement in the brief (Vol. 199, p. 29354, 29436). He told us that his efforts were directed toward getting the legislation passed, and that anyway he thought that members of the Force who submit a brief "pad" their version of the facts so as to impress the senior executive in favour of a change in policy (Vol. 199, p. 29345). By this he says he means that they use exaggerated terminology to describe the facts (Vol. 199, pp. 29346-50). He says that he considered that widespread wiretapping could not be "commonly known" to the NCOs who prepared the brief because wiretapping would be carried out on a need-to-know basis (Vol. 199, p. 29348, 29420). He testified that he thinks "that the people that actually wrote these things probably did not have the knowledge of the specific — so they are just writing on hearsay..."(Vol. 199, p. 29421). Yet, the "unequivocal" nature of what was stated did make him "suspect" that members tapped telephones in contravention of official policy, and that their doing so might be "a little wider spread" than he had originally suspected, although he says that he did not suspect that it was "a wide disrespect for the policy". He says he thought that it was just the odd case that may have occurred over the years (Vol. 199, pp. 29438-9). Mr. Nadon clearly had no intention of investigating on the basis of such suspicion — he would investigate only in the unlikely event that he received a complaint of wiretapping from a court or the public (Vol. 199, pp. 29348-9).

Then he said, he would have to take some action. As it was, however, he did not think it necessary to ask for particulars of the alleged wiretapping.

26. It may be noted that a review of R.C.M.P. files shows that on May 4, 1971, a Chief Superintendent in the C.I.B. at "K" Division in Alberta had written to the Director of Criminal Investigations. The message (Ex. E-5) was titled "wiretapping". It said:

> I again reiterate that members of this Force do not wiretap but over the past few months if a need arose where wiretapping was mandatory, this would be surreptitiously done by [name of a person in the employ of a telephone company].

The reference was to Calgary, where, as in all of Alberta except Edmonton, there was a statutory prohibition of wiretapping. Hence, this message informed Headquarters not only of violation of Force policy but of illegality. We note this as an example of Headquarters being given very specific information about wiretapping contrary to policy. Mr. Nadon had no recollection of this correspondence.

27. On June 12, 1973, the Solicitor General and Mr. Nadon appeared before the House of Commons Justice and Legal Affairs Committee. A written brief had been prepared by the R.C.M.P. for the Committee and was left with the Committee on June 12, 1973. The brief stated:

> The Royal Canadian Mounted Police do not tap telephones in the investigation of criminal offences UNLESS: (a) the consent of one of the parties to the conversation has been obtained; *and* (b) wiretaps are not prohibited by legislation in the jurisdiction in which the investigation is being undertaken...

The members of the Committee at its hearing that day exhibited repeated interest in the policy and practice of the Force as to wiretapping — i.e. tapping of telephone conversations. The transcript records the following:

> (p. 12.)
>
> *Mr. Leggatt* [M.P.]: O.K., then with regard to actual taps, were any of your taps done on lawyers' telephones?
>
> *Mr. Allmand*: On the criminal side you do not tap.
>
> *Deputy Commissioner Nadon*: Well, bugs or whatever you want to call them. No, we do not do any wiretapping.
>
> *Mr. Allmand*: The espionage side does and Mr. Draper is here to answer on espionage.
>
> . . .
>
> *Mr. Atkey* [M.P.]: On a point of order, Mr. Chairman, I think the Minister did say that with the consent of one of the parties they did do wiretaps in criminal matters.
>
> *Mr. Allmand*: It is very, very rare.
>
> *Deputy Commissioner Nadon*: Very rarely.
>
> (p. 14.) (Translation)
>
> *Mr. Olivier* [M.P.]: If you do prevention, do you use wiretapping (telephonic interception)?

Deputy Commissioner Nadon: Not wiretapping. (Pas du téléphone)

Mr. Olivier: You do not use it at all?

Deputy Commissioner Nadon: Not for the criminal side.

(p. 15.)

Mr. Allmand: M. Olivier, the R.C.M.P. would say this very strongly that, although they have not used wiretapping in criminal matters, they recognize that it would be very useful to them because they have seen the other police forces use it, and so on.

Mr. Olivier [our translation]: I would very much doubt that one can say that this has never been used for criminals. What is the R.C.M.P. for?

Mr. Allmand: I am telling you that they tell me that they have not used this wiretapping in criminal matters.

Mr. Prud'homme [M.P.]: And you take their word?

Mr. Allmand: What else could I do?

(p. 34.)

Mr. Allmand: . . . The reason why wiretapping has not been used by the criminal side of the R.C.M.P. is that there were, in our opinion, over the years certain restrictions...

(p. 36.)

Mr. Blais [M.P.] [translation]: However, in view of the fact that you never used wiretapping in the course of your investigations in the criminal field, when you will be allowed to do so, it will mean for you an additional weapon.

Mr. Nadon: That is correct.

28. Mr. Nadon considers that the answers he gave were correct, as far as he was concerned. As to why he did not refer even to those exceptions that were permitted by policy (other than consensual interceptions), he explained to us: "I thought to answer the question as briefly as possible, without going into too many details. . . I think we wanted to get the hearing over..." (Vol. 199, pp. 29433-34).

29. When asked by our counsel why he did not tell the Committee that the R.C.M.P. was not only receiving information from other police forces but was requesting other police forces to conduct wiretaps, Mr. Nadon replied: "Because it was not a common practice..." even though he recognized that such was permissible within the policy of the Force (Vol. 199, p. 29417-18).

30. As to whether there were any exceptions to the statements he made to the Committee, Mr. Nadon considers that the onus rested on the members of the Committee to ask "Now, does it happen on occasion" — and if that question were asked, the answer given would be "Yes, it could happen on occasion and they would be disciplined" (Vol. 199, p. 29427).

31. We are satisfied that, when Mr. Nadon appeared before the Justice and Legal Affairs Committee on June 12, 1973 he knew at the very least, that according to a brief prepared by responsible members of the Force only a few

months earlier, it could "be unequivocally stated that our members do in fact tap telephones in the face of official policy to the contrary, directly, and indirectly through the medium of other police agencies and telephone companies". In view of the responsibilities of the drafters of that statement, and its apparent acceptance as accurate by sections at Headquarters and divisional commanding officers, and Mr. Nadon's own November 8, 1972, memorandum commending it as an excellent study on wiretapping, we cannot accept Mr. Nadon's contention that the brief gave rise only to suspicion on his part that wiretapping was a "little wider spread" than he had thought and that he "believed" that it happened only rarely. However, even if we were to accept as fact that Mr. Nadon was led only to "suspect" that it was a "little wider spread", he had a duty to find out from those who prepared the brief just how accurate the statement was. He did not do so, and we regard the reason he gave us for not doing so as both convincing and unconvincing. It was convincing to the extent that we are sure that, as he told us, he had his eyes set on getting the impending legislation adopted. As he told us, he did not want to "rock the boat". We are satisfied that this meant that he did not want to disclose to the Solicitor General or to the Justice and Legal Affairs Committee that there was (or even that there might be) widespread wiretapping by members of the Force. For to do so would clearly have upset Mr. Allmand and run contrary to assurances that had been given to Mr. Allmand and his predecessors. The reason he gave us was unconvincing because it was extremely unlikely that a court or member of the public would complain about wiretapping; it was illegal in only two provinces, and members of the R.C.M.P. called as witnesses in court were encouraged and briefed to avoid disclosure of all forms of electronic eavesdropping to the court. This is vividly explained in correspondence from Edmonton in 1973 mentioned by Mr. Venner in his testimony before us which makes it clear that members would go to some lengths to avoid disclosing the product of such eavesdropping, even to Crown counsel (Ex. E-8).

32. There is one situation which Mr. Nadon knew was permitted by Force policy even in the absence of a joint forces operation — that members of the R.C.M.P. could ask another force to do a wiretap for the R.C.M.P. He did not disclose this to the Committee. The written R.C.M.P. presentation to the Committee contained only the following somewhat ambiguous reference to co-operation with other police forces.

> There are circumstances in which audio surveillance is undertaken in partnership with other major Canadian police forces on what is termed 'joint forces operations'.

33. Whether Mr. Nadon knew or only suspected that there was more than occasional wiretapping beyond what was permitted by Force policy, he ought to have qualified the assurances to the Justice and Legal Affairs Committee given in the brief to the Committee and in his own answers to questions. His failure to do so misled the members of that Committee, just as the brief sent to the Department of the Solicitor General on December 18, 1972, misled that Department. The misleading was intentional. This was unacceptable conduct. Both the Solicitor General and members of Parliament are entitled to receive accurate and candid information, and it is inconsistent with the needs of

responsible government and parliamentary democracy that the R.C.M.P. would refrain from candour and completeness on the ground that if the right question is asked (by people who may well not, on the spur of the moment, think of the "right question") it will then be answered, but otherwise the information need not be given.

The conduct of Commissioner Higgitt

34. Mr. Higgitt was Commissioner from October 1, 1969, to December 28, 1973. Before that his experience had been largely in security and intelligence work. He testified that he was not aware that on occasion members of the R.C.M.P. in the investigation of criminal offences tapped telephones directly or obtained an installation through the co-operation of the telephone company. On April 20, 1972, at a meeting of the Justice and Legal Affairs Committee when the first Protection of Privacy Act was being considered (before it died on the order paper), the transcript discloses the following question and answer:

> Mr. McGrath [M.P.]: Does the R.C.M.P. conduct wiretapping? Do you tap phones in the course of your responsibilities?
>
> Commissioner Higgitt: No. As a matter of fact, in so far as our law-enforcement operations are concerned, we do not. I want to be very clear in this. We do not tap telephones.

35. Mr. Higgitt told us that, as far as he was concerned, he did not — until 1981, in preparation for his testimony on this point — see the internal R.C.M.P. brief dated October 1972 entitled "Wiretapping Policy". Later he told us that he has no memory of ever seeing the brief (Vol. 199, pp. 29499-500). As for Mr. Nadon's longhand transit slip addressed to "the Commissioner" dated December 22, 1972, which began "This is the brief on wiretapping recently discussed..." and which clearly referred to the October brief, Mr. Higgitt drew to our attention that on December 22, the last working day before Christmas, "nothing of any great importance would probably have come" to him, and the transit slip does not bear the kind of notation by him which it was his custom to make on such a document when received or read by him (Vol. 199, pp. 29500-501).

36. As against Mr. Higgitt's lack of memory of ever having seen the October 1972 brief, we have the following documentation by Mr. Nadon: (i) His longhand transit slips dated August 8, 1972 and November 8, 1972, to the Director of Criminal Investigations which referred to the drafting of the internal brief. Both of these refer to discussing the question with the Commissioner when the brief is ready. (ii) His longhand transit slip to "the Commissioner" dated December 22, 1972, already referred to. (iii) A longhand memorandum for file dated January 10, 1973, which read, in part: "Discuss with Commr. and D-C-I on 10/1/73. Commr. fears a request to Minister to change our policy at this time when legislation is being considered will trigger a negative reaction from Minister, who is in favour of Bill presently before House..." (The memorandum then referred to the dangers of the Bill and concluded: "Our recommendation now is for C.O.s to approach AGs discreetly

on subject, attempt to get their support and if successful let us know so we can use as ammunition to make a presentation to Minister for a change of policy.") (iv) His letter to five divisional C.O.s dated January 26, 1973, which stated: "The Commissioner is presently examining the material that has been prepared...".

37. On May 24, 1973, Mr. Higgitt appeared before the Justice Committee in regard to the Bill on Protection of Privacy. The following appears in the transcript:

> Commissioner Higgitt: . . . There was a question a moment ago . . . you said: does the force use wiretapping?
>
> Mr. O'Connor [M.P.]: Yes.
>
> Commissioner Higgitt: My answer to that question is no.
>
> Mr. O'Connor: It does not.
>
> Commissioner Higgitt: My answer is no.
>
> Mr. O'Connor: So that to get a categorical answer you are saying that the force does not employ wiretapping methods in the course of investigation of crime in Canada, other than the question of security, and we have agreed that I will not delve into it.
>
> Commissioner Higgitt: The answer to that is a direct no.

It will be noted that Mr. Higgitt's answers were in no way qualified, even to the extent of mentioning that Force policy permitted it to receive from other police forces the product of wiretaps made by those forces. Mr. Higgitt told us that he supposed he did not mention that because "it wasn't the question that was asked me" and because "I suppose it did not occur to me" (Vol. 199, p. 29553, 29556). In addition, of course, he did not qualify his answer by referring to the areas in which, according to the October 1972 brief, policy was being violated.

38. We are satisfied by Mr. Nadon's memoranda and letter already mentioned, that Mr. Higgitt did receive the October 1972 brief and his memory in that regard is inaccurate. We believe that Mr. Higgitt's answers to the Justice Committee were misleading and lacking in candour, and that he deliberately refrained from telling the members of that committee of the "use" by the R.C.M.P. of the product of wiretaps by other police forces and of the "use" by the R.C.M.P. of the methods described in the October brief.

39. We are satisfied that Mr. Allmand was never told that members of the R.C.M.P. in the field were using wiretapping by making taps themselves or by asking members of telephone companies to make them. We are also satisfied that Mr. Allmand was not even told of the policy that permitted members of the R.C.M.P. to ask members of other police forces to tap telephone conversations. He testified to his not being told of any of those matters. Mr. Higgitt did not suggest that he had told Mr. Allmand any of those things (indeed, Mr. Higgitt could not have testified that he did, for Mr. Higgitt denied knowing of the first two and could not remember the third). Mr. Nadon testified that he could remember no occasion when Mr. Allmand was told of these matters.

Consequently, our conclusion is that Mr. Allmand did not know of those matters and had no reason to suspect them, the R.C.M.P. having given him the same kind of assurances that were given later to the Justice and Legal Affairs Committee.

Lobbying

40. Another issue arises from the steps taken by Mr. Nadon to discourage the inclusion in the Protection of Privacy Act of provisions to which the Force was opposed. When Mr. Nadon, on January 26, 1973, sent the October brief to the Commanding Officers of Newfoundland, Saskatchewan, Nova Scotia, New Brunswick and Prince Edward Island Divisions for their comments and suggestions, his letter referred both to the legislation then before Parliament and to the possibility of changing Force policy even before the legislation was passed. The letter continued:

> The Commissioner now considers it would be timely to discreetly solicit the views of the Attorneys General concerning telephone tapping by the Force on criminal investigations within their jurisdictions. If it were possible to obtain general endorsement from Attorneys General, or a majority of them, it would certainly strengthen our proposal to the Government. Therefore, would you now personally and discreetly approach your Attorney General to solicit his views in this regard.

It then recommended that each Attorney General should be told of the limits and controls that would be maintained on the use of technique. It continued:

> One Attorney General has endorsed the use of audio surveillance by the Force and extracts from his authorization are included in the attached Appendix "A". In preparation for discussion with your Attorney General, you may wish to use this as a guide.
>
> Insofar as Federal audio surveillance legislation major effort has been made by the Force through CACP, [Canadian Association of Chiefs of Police], Justice Department, Solicitor General's office and other avenues to influence the legislation in order that it could be practically employed by Canadian Law Enforcement. As was mentioned at the COs Conference the legislation which has been drafted is certainly not entirely to our liking but we are still hopeful that it can be amended....
>
> I should also add that the Commissioner is sympathetic to the need for this facility on certain CIB major investigations. He has, however, been placed in a delicate position in view of past events that made it necessary to adopt our existing policy. It is important, therefore, notwithstanding legislative proposals, to obtain an endorsement from the Attorneys General. Assuming a favourable reaction is obtained, this additional influence, as well as other information, will provide support to the Commissioner in making an approach to the Minister for the purpose of obtaining authorization to utilize telephone tapping under certain conditions for criminal investigations.

41. This letter clearly indicates an intention not only to obtain the views of the provincial attorneys general (to which no objection can be taken) but also to try to obtain their support for the Force's views concerning the legislation,

with the intention of placing such "favourable reaction" as might be obtained before the Solicitor General. Mr. Nadon testified that he "thinks" that Mr. Allmand "probably appreciated the fact that we did approach the attorneys general, because it also supported his position in a lot of these issues" (Vol. 199, p. 29376). Mr. Allmand, however, denied that he had been informed that the R.C.M.P. were approaching the attorneys general as indicated in Mr. Nadon's letter (Vol. 200, p. 29585).

42. We agree with Mr. Allmand that it is "not appropriate" for the R.C.M.P. to lobby provincial government officials, without the knowledge and consent of the Solicitor General, to attempt to gain support for the positions taken by the Force on matters of policy (Vol. 200, p. 29587). It is not only inappropriate, it is unacceptable. Similarly, we think that it is unacceptable for the Force, without the permission of the Solicitor General, to solicit support for its views on legislation before Parliament, from persons outside the federal government. For it to do so is improper meddling in the Parliamentary process. In our Second Report, Part V, Chapter 6, we reported that the Security Service had used the press to damage the interests of "targets" of the Security Service and we there stated that in our view such conduct is inappropriate for Canada's security intelligence agency. Similarly, here we recommend that in future, the Force, unless it has the prior consent of the Solicitor General, refrain from all such attempts to gain outside support for its views on legislation that is before Parliament, or for its views on policy matters that will be put before the Solicitor General.

CHAPTER 3

MAIL CHECK OPERATIONS

1. In our Second Report, Part III, Chapter 4, we discussed the nature of the investigative practice known as mail check operations and the legal and policy issues relating to it. Here we examine in detail the extent to which senior members of the R.C.M.P., senior government officials and Ministers were aware of, approved of, and responded to knowledge of the use of this technique and the legal and policy issues that arose from it.

A. GENERAL BACKGROUND

2. The public revelation that the opening of mail had been common practice in the R.C.M.P. came in a television broadcast on CBC-TV on November 8, 1977, during which it was stated that mail had been opened by members of the R.C.M.P. under the code name "Cathedral". By that time we had received an allegation — one of the allegations that resulted in the Commission of Inquiry being established — that members of the Security Service used two systems to obtain access to the mails. These were described as follows by the Assistant Deputy Attorney General, Mr. Louis-Philippe Landry, in a memorandum to the Deputy Solicitor General, Mr. Tassé, on June 24, 1977, after his meeting the day before with two former members of the R.C.M.P., Messrs. Donald McCleery and Gilles Brunet:

> (a) When a subject under surveillance did post a letter, a surveillance officer would place in the mail box a large envelope which would be wide enough to separate all letters posted thereafter in the same mail box.
>
> Later, through a master key held by an unidentified person, letters found under the large envelope would be removed and examined and the suspected letter copied. The letters would be replaced in the postal system within a few hours.
>
> (b) If the system above failed or could not be used the Security Services would operate through contacts in the Post Office to obtain access to letters in the mail.
>
> (Ex. M.154)

3. On November 9, the Postmaster General, the Honourable Jean-Jacques Blais, advised the House that:

> There is no change and has not been any in the policy of the Post Office. I refer to the policy that was made in this House by Bryce Mackasey two years ago, and the one I adopted and have enforced, namely, that there is not to be any intervention in respect of first class mail or, indeed, in respect

of any regular mail unless it is authorized by the Post Office Act. This means there is no interference and no removal of the mail, save and except in certain instances where co-operation is sought by the R.C.M.P. There is co-operation provided by the Post Office relating to the covers and the information contained on said covers. At no time is the mail taken from the custody of the Post Office or diverted from ordinary mail channels.

Upon being asked by the Leader of the Opposition whether any guidelines existed regarding the conditions under which security services of the Government of Canada, under whatever heading, had the right to look at the mail or deal with the mail of a private citizen, the Postmaster General replied:

> Mr. Speaker, there are no specific guidelines. What takes place is that the R.C.M.P. makes a request of the Field Officers of Security and Investigation. That request is then channelled to my Head of Security and Investigation in Ottawa. He studies the particular request and authorizes co-operation between the R.C.M.P. and postal officials. That co-operation relates to investigations being carried on by the R.C.M.P.
>
> Again I suggest [to] the hon. gentlemen, the fact is that the investigation is conducted at the Post Office premises and it is only with reference to the cover information on the envelope.

4. Later the same day, in the House of Commons, the Solicitor General, the Honourable Francis Fox, volunteered that he had had the opportunity that morning of checking into the matter with senior officers of the R.C.M.P. and had asked questions concerning the code name "Cathedral". He continued:

> The code name "Cathedral" goes back to 1954. In some instances, after my examination of the files with senior officers of the Crown, it clearly happened that the mail has actually been opened by the R.C.M.P. Security Service. Because of that, I referred the whole matter to the Attorney General of Canada and also to the McDonald Royal Commission of Inquiry.

5. Shortly thereafter, Mr. Bill Jarvis, M.P., asked the Solicitor General the following question:

> In all the briefings he has bragged about so eloquently, did he never know that the R.C.M.P. may have infiltrated the Post Office? If that is not the case, did he never ask the security officers briefing him, are you or are you not contrary to the law intercepting and reading mail? Did it never occur to him to ask that question?

To this the Solicitor General replied:

> Yes, Mr. Speaker, I repeatedly asked the R.C.M.P., particularly during the course of the preparation of my statement concerning the A.P.L.Q. break-in, whether there were any other illegal incidents that ought to be brought to my attention and the answer was no.
>
> *Mr. Jarvis*: Will the Minister please answer the question. Did he ever ask specifically whether Security Officers were intercepting mail? That is not a general question.
>
> *Mr. Fox*: Mr. Speaker, during the course of my mandate, I gave specific instructions to the R.C.M.P. when I came across the A.P.L.Q. file. As far

as I am concerned, all operations of the Force were to be carried out within the framework of the law.

Upon further questioning, Mr. Fox said:

> ...I sat down with senior officials of the Force this morning, asked them to produce their files, asked them a number of questions on procedural operations and it became very clear to me during the course of that meeting that there had been indeed a number of instances in which the Security Service of the R.C.M.P., in particular areas of counter-espionage, terrorism and counter-subversion, opened a number of pieces of mail. I also told the hon. member that as far as the R.C.M.P. files show, this type of procedure goes back to 1954.

Upon being asked by Mr. Allan Lawrence, M.P., whether he was assuring the House that the opening of mail had been done only in cases of alleged terrorism, alleged bombing or counter-espionage, Mr. Fox replied:

> As the hon. member knows, this matter came to light only last night. I do not think our examination of the whole matter is complete. The initial response I have had from the Force, the initial breakdown of the cases which have occurred, is to the effect that they all come under the classification of counter-espionage, counter-subversion and terrorism. As far as the government is concerned, no matter what heading it comes under it is not authorized either by the Official Secrets Act or the Post Office Act, and in these circumstances, we feel that the matter has to be referred to the Commission of Inquiry set up by the federal government in view of the fact that mail has been opened, and we wish to apprise the Royal Commission of the circumstances in which the mail was opened. Hopefully, the Royal Commission will have some suggestions to make as a result of that very serious presentation.

6. On November 10, Mr. T.C. Douglas, M.P., pressed the Solicitor General as to whether his officials had lied to him and, if so, what disciplinary action he had taken. He also asked why the officials were not aware of the illegalities. He continued:

> If they were not aware they are incompetent, and if they were aware of them and did not tell the Minister, they ought to be discharged.

The Solicitor General replied:

> ...I have already indicated quite clearly in response to other questions, and in the course of my statements in June of this year, that I expect the R.C.M.P. in all cases to bring to my attention any matters of possible illegalities in a very clear and unequivocal manner. Since the establishment of the Royal Commission, the R.C.M.P. has been in the process of preparing briefs on each one of its investigative practices and procedures, in order to bring them to my attention, first of all, and secondly to the Royal Commission of Inquiry. I think that in that regard they are being very candid... I expect the R.C.M.P. to be very candid with me and to make sure I am aware of any potential illegal problems.

7. On November 14, Mr. Lawrence, M.P., referred to the statement which had been made by the Solicitor General on June 17, 1977, that, in the words of Mr. Lawrence:

he had been assured by his security advisers there was no other illegal activity carried on up to that time by the R.C.M.P.

Mr. Lawrence continued and received replies as follows:

Mr. Lawrence: Obviously, the Security Service knew about the mail interceptions in June 1976. My question is whether the Deputy Director General of the Security Service was present at that conference the Minister had with his advisers.

Hon. Francis Fox: No, Mr. Speaker, the Deputy Director General of Operations was not present at that time. The question was put to the then Commissioner and the present Deputy* Director General of the Security Service. They had no knowledge. I have spoken with the Director General of the Security Service. I have not had the opportunity with the former Commissioner. It is quite clear the Director General of the Security Service had no knowledge of mail interceptions which led to opening of the mail.

Mr. Lawrence: Are we to assume that in June 1976 the Deputy Director General of Security Service knew of the mail interceptions but at that time and since the Director General did not know? Are we then to assume that there was a breakdown in communications at that level in the Security Service or that people simply did not tell the truth at the time of the conference with the Minister?

Hon. Francis Fox: Mr. Speaker, I do not think there is any question of people not telling the truth. The people of whom the question was asked, namely the Commissioner and the Director General of the Security Service, both replied that there were no other illegalities to their knowledge. I have no doubt that that was the case. It seems quite clear that the Director General of the Security Service was not advised of any illegal acts concerning the opening of the mail.

8. The same day, Mr. Fox reminded the House that his predecessor, Mr. Allmand, in the report which he had tabled pursuant to the Official Secrets Act in 1976, stated that:

> There had been a request submitted to the Department of Justice for a legal opinion to ascertain whether an interception of the mail could be made legally under s.16(5) and the opinion received from the Department of Justice was that the opening of mail could not be legally carried out under s.16(5) of the Official Secrets Act and that s.43 of the Post Office Act took precedence over the Official Secrets Act.

Mr. Fox also advised the House that in June 1976, when mail interceptions were terminated, the Director General of the Security Service, Mr. Dare, was not aware of any case where the mails had been opened contrary to section 43 of the Post Office Act.

9. Later the same day, Mr. Ray Hnatyshyn, M.P., delivered a speech in which he stated that Mr. Allmand, in the annual reports which he gave on three occasions pursuant to the Official Secrets Act, section 16(5), respecting intercepts employed, "neglected to mention the use of postal intercepts which, considering the frequency with which they were used, shows a complete failure

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*Note: Obviously from what follows Mr. Fox meant the Director General.

to exercise his responsibility to determine what was taking place in his department". Mr. Hnatyshyn said "It stretches credibility to the breaking point to believe that [Mr. Allmand] did not ask a question of his Security Service advisers, Are you collecting mail intercepts at the present?" Mr. Hnatyshyn continued:

> .... it is very suspicious that although the Deputy Director General of the Security Service [Assistant Commissioner Sexsmith] knew all about the mail intercepts over a year ago, the Solicitor General can contend that his officials did not mislead him nor that he misled the House as to the degree of his ministerial knowledge or responsibility.
>
> In June 1977, the Solicitor General told the House that he had met with his officials who had told him that the A.P.L.Q. break-in was an isolated incident. Now we are asked to believe that the officials he met to discuss the question of illegalities did not include the Deputy Director of the Security Service [Mr. Sexsmith] who knew of the mail intercepts. Not only that, but we are asked to believe [Mr. Dare] did not know of the interceptions even though his immediate subordinate did. How far does the arm of coincidence stretch?

10. On November 17, the Postmaster General, Mr. Blais, was reported in the press to have said in an interview:

(a) that district post office officials had passed on mail illegally to the R.C.M.P. for more than 40 years;

(b) that collaboration between postal officials and the R.C.M.P. did not begin in 1954 as earlier alleged, but in the 1930s, and continued until 1976;

(c) that it appeared that the Post Office "had lost control" because no one at the Ottawa Headquarters knew of the collaboration with the R.C.M.P.;

(d) that the co-operation had been arranged on an individual basis with district postal officials, and that he had checked with his Deputy Minister and predecessor and neither knew of the interception;

(e) that "the district people acted beyond their limits" in passing on the mail;

(f) that he was "satisfied" that the interception "dealt only with matters of national security";

(g) that certain of the Post Office's security officials who worked in district offices had been responsible, but that they were likely not the only ones who helped the R.C.M.P.;

(h) that several of these security officers are former employees of the R.C.M.P. and the military; and,

(i) that it appeared that no unionized workers were involved.[1]

11. In the House of Commons on November 23, Mr. Blais said that:

> The information we have to date would indicate that the methods varied and that the information was provided at the request of the R.C.M.P.,

[1] *Edmonton Journal*, November 18, 1977 (a Canadian Press dispatch).

primarily by people involved with security and intelligence in the Post Office and primarily without the knowledge of the regional managers and their immediate subordinates.

Mr. Blais was asked by Mr. T.C. Douglas, M.P., whether co-operation between employees of the Post Office and the Security Branch of the R.C.M.P. in violation of the Post Office Act had occurred for 40 years without either the R.C.M.P. or the Solicitor General informing Mr. Blais of that fact. To this the Postmaster General replied:

> I would say there is some indication although there are no specific records, that the practice could have gone back to the late '30s. However, from the evidence I have been able to ascertain the practice was primarily during the early part of the '70s and it was at the request of the R.C.M.P. There was no knowledge in the upper echelons of the Post Office about that co-operation.

B. KNOWLEDGE OF SPECIFIC SENIOR MEMBERS OF THE R.C.M.P., SENIOR GOVERNMENT OFFICIALS, AND MINISTERS

(a) Commissioner W.L. Higgitt

Summary of evidence

12. Mr. Higgitt was questioned about a memorandum, dated November 2, 1970, from then Assistant Commissioner Parent of the Directorate of Security and Intelligence, addressed to several Commanding Officers and Officers in Charge of Security and Intelligence Branches (Ex. B-16). The memorandum stated in part:

> It must be clearly understood that any form of cooperation received from any CATHEDRAL source is contrary to existing regulations.
>
> (Vol. 84, pp. 13773-4.)

Mr. Higgitt agreed that the inference from the memorandum as a whole was that, as the Security Service was unlikely to get legislation in the near future, they would have to go ahead and use the process selectively in circumstances in which the judgment of senior officers was that it was justified. Under the terms of the memorandum, Cathedral C operations needed the approval of the Director of Security and Intelligence (Vol. 84, pp. 13774-5). This situation continued until June 22, 1973, when all Cathedral A, B and C operations were suspended (Ex. B-17).

13. Mr. Higgitt stated that over the preceding 20 or 30 years the R.C.M.P. had often made representations to various Ministers for legislation authorizing or legalizing the use of Cathedral operations. The basis of the request was the importance of access to mail, particularly in counter-espionage operations. Mr. Higgitt could not recall personally making formal application for legislation in this area, because at that time "... one had been made relatively recently and the various legal obstacles were pointed out" (Vol. 84, pp. 13777-8).

14. Mr. Higgitt testified that the recommendation of the Royal Commission on Security that examination be permitted of the mail of persons suspected of

being engaged in activities dangerous to the state had been discussed in great detail by him and his fellow officers with many Ministers, although he could not recall specific dates of discussions and could not recall discussing the particular paragraph containing the recommendation (Vol. 84, pp. 13779-80). His memory was that he had discussed the question of Cathedral with Mr. McIlraith, Mr. Goyer and Mr. Allmand. He said:

> There was no secret of the fact that we were doing it [CATHEDRAL operations] and that the secret was not held from the Ministers. They were seeing the results in various forms.

Mr. Higgitt felt it fair to say that the expression "they were seeing the results" meant that the Ministers were getting reports which, when read, indicated that "unless you had X-ray eyes, somebody had been looking at the mail" (Vol. 84, p. 13781).

Conclusion

15. Commissioner Higgitt's evidence clearly establishes that, from his experience in Security and Intelligence, he was aware of the opening of mail in such work, and we believe that the effect of his testimony is that he knew it was contrary to law. That being so, his failure to stop the practice and to advise Ministers that such a practice existed was unacceptable.

(b) Mr. J. Starnes

Summary of evidence

16. Mr. Starnes told us that when he joined the Security Service it was clear to him that his talents did not lie in the field of operations. "I wouldn't know one end of a microphone from another" (Vol. 90, p. 14709). He did not involve himself in operational matters as such, since he felt he was totally incapable of doing so (Vol. 90, p. 14710).

17. Mr. Starnes testified that when he took office in 1970 he was made aware of the fact that the exteriors of envelopes in the mail were examined and copied, but he was not informed of the opening of mail (Vol. 90, pp. 14702-3, 14706-7, 14719; Vol. 104, p. 16374). He did not consider that cover checks and reproduction of covers were illegal, although it was made plain to him that some Post Office officials who were helping might be in difficulty with their superiors (Vol. 90, p. 14719). To the best of his recollection, Mr. Starnes never asked his immediate subordinates, Messrs. Parent, Draper or Barrette, whether the Security Service was opening or intercepting first class mail because the subject "wouldn't have been a great matter in [his] life" (Vol. 104, p. 16376). In fact, Mr. Starnes told us that he never asked anyone in the Security Service if they were opening mail (Vol. 90, pp. 14706-7). He said that he had, he thought, been made aware of what the R.C.M.P. Security Service was doing in its relations with postal officials, and as far as he was concerned that was where the matter ended (Vol. 104, p. 16376).

18. Mr. Starnes was shown a memorandum dated November 2, 1970 (Ex. B-16), setting out the centralization of Security Service mail check operations under code names Cathedral A, B and C (Vol. 90, p. 14710). That memorandum was issued during the six-week period when he was ill with pneumonia.

He told us that, had he been at work, he would have expected anything which his officals felt he should know about would have been brought to his attention. Mr. Starnes said he never saw the document centralizing mail check operations, and assumes this was an oversight on the part of his officials. He is reasonably satisfied that his officials were not trying to conceal something from him, although he states that there was no question in his mind that he should have known about it (Vol. 90, p. 14709; Vol. 105, p. 16503). With hindsight, Mr. Starnes views mail opening as a matter that really "just slipped below the floorboards" — a purely accidental oversight (Vol. 105, p. 16503). He said that had he been aware of the actual use of Cathedral operations, he would have been very upset and worried about the safety of his own people who were doing "this kind of thing" (mail opening) and he would have taken the matter to Ministers (Vol. 90, pp. 14711-12). Mr. Starnes told us that he was surprised when he heard (after this Commission of Inquiry had begun) that mail opening had been taking place for a very long time (Vol. 90, pp. 14706-7).

19. Mr. Starnes testified that he had not seen the results of any mail opening (Vol. 91, p. 14951). Mr. Higgitt, however, told us that he would be surprised if Mr. Starnes had not known of Cathedral C operations (Vol. 88, pp. 14482-3, 14485). Mr. Higgitt stated that it would be a reasonable deduction that Mr. Starnes had seen reports from members of the Security Service which, if he had read them, would have given him some level of knowledge of the whole Cathedral matter (Vol. 88, p. 14483). Although he did not have any special recollection of discussing Cathedral C operations with Mr. Starnes, he said it was conceivable that he did (Vol. 88, p. 14505). Later, Mr. Higgitt stated that he did not believe that he personally had briefed Mr. Starnes in respect of Cathedral, nor did he recollect directly mentioning to Mr. Starnes mail opening operations as a Security Service tool. He said that he felt that Mr. Starnes had senior officers reporting immediately to him and had spent considerable time being briefed by those officers. Mr. Higgitt did not have time to take part, personally, in those sorts of briefings (Vol. 112, p. 17260).

20. Mr. Starnes said that Messrs. Parent, Draper and Barrette, or one or more of them, had described mail operations to him during his briefings, but that they did not discuss the need for intercepting and opening first class mail as discussed by the Royal Commission on Security. It was quite clear, however, that the Security Service was urging the government to address itself to a number of the recommendations of that Commission, including that one relating to mail (Vol. 104, pp. 16374-76). Mr. Starnes could recall no discussion with any Minister specifically on the subject of mail interception and amendments to permit it (Vol. 104, pp. 16377-8), although he recalled that the Security Service repeatedly urged Ministers to deal with the recommendations of the Royal Commission on Security, which included a recommendation that the Security Service be permitted to open first class mail (Vol. 91, p. 14881).

Conclusion

21. We believe that Mr. Starnes knew of the techniques of examining the exterior of envelopes and photographing them and that he did not consider

these to be wrong. We further believe that Mr. Starnes did not know that mail was being opened or that an operational policy envisaged the opening of mail. Yet we cannot ignore one piece of evidence, a memorandum dated May 20, 1971 (Ex. MC-7, Tab 16) directed to Mr. Starnes, that indicates that Mr. Starnes was indeed aware of some improprieties in the R.C.M.P.-Post Office relationship. That memorandum states, in part:

> Most departmental records are of course subject to the provisions of various acts i.e. Income Tax Act or other Regulations, i.e. Post Office Regulations and the consequent interpretation or application of these acts and regulations have largely been to our disadvantage. In those few areas where regulations have been disregarded to a large degree, (the Post Office Department is a good case in point) we recognize the unhappy fact that those who cooperate with us are placing themselves in jeopardy, directly in proportion to the measure of their cooperation. This is a problem which has become increasingly frustrating in recent years.

Whatever the nature of the Post Office Regulations being disregarded (the memorandum did not elaborate), it is clear that Mr. Starnes was made aware of improprieties in the R.C.M.P.-Post Office relationship. It appears, however, that he chose not to inquire further into the nature of these improprieties, nor did he attempt to put a stop to them, as he ought to have done. His conduct in that regard was unacceptable.

(c) Commissioner M.J. Nadon

Summary of evidence

22. Commissioner Nadon, whose background was entirely in criminal investigations, told us that even before becoming Deputy Commissioner he assumed that mail was being opened in criminal investigations (Vol. 129, p. 20108). He knew that mail opening had occurred in drug cases, although he was not aware of specific cases, and he knew there was a liaison with Post Office authorities in connection with drug investigations (Vol. 129, pp. 20095, 20097-8, 20105-6). Mr. Nadon stated that before he became Commissioner he had heard that some members of the drug squad had arranged with postal authorities to open certain types of mail, when it was certain that it contained drugs and that the cases would be brought before the courts, but he told us that he took it for granted that the postal authorities had authority to open such parcels or mail (Vol. 129, pp. 20097, 20104-6). (He would have been right if he were thinking of customs officials if they were sure, or even had reasonable grounds to believe, that an article of mail contained drugs.) Mr. Nadon felt that this was the general understanding of members of the Force in the C.I.B. field (Vol. 129, p. 20106).

23. Mr. Nadon's stated belief in the legality of mail openings in drug investigations appears to have changed by the time of a 1975 letter he prepared at the request of Mr. Allmand in response to a question about narcotic smuggling raised by the Right Honourable John Diefenbaker (Ex. M-62). Mr. Nadon replied directly to Mr. Diefenbaker, and forwarded a copy of his reply to Mr. Allmand. Mr. Nadon stated in that reply:

> Under the present regulations, first class mail cannot be opened except in the presence of the addressee or with the written permission of the addressee. At the present time, even if it is reasonably suspected that a first class letter or package contains illicit drugs, the letter or package cannot be tampered with or the contents substituted but must be followed in fact to its final destination.
>
> (Ex. M-62.)

(Mr. Nadon was not asked about this letter when he testified. Nonetheless, it seems reasonable to infer that he was indeed aware, at least by 1975, that mail opening in drug investigations was illegal.)

24. Mr. Nadon was also aware that a liaison existed between the Security Service and the Post Office, but he did not know the exact details of the liaison (Vol. 129, p. 20095). He stated that he was informed that the Security Service was examining mail, but that he did not *know* they were actually opening it, and never asked if in fact they were doing so (Vol. 129, pp. 20098-9, 20102). He said that it did not occur to him to ask if they were (Vol. 129, p. 20120). "I would never go into the detail of the liaison with the Post Office or with the U.I.C. or with the Income Tax or any of the Departments... unless they requested my assistance". He regarded it as a matter of operational policy and apparently not of concern to him (Vol. 129, p. 20098). When asked whether he had examined the practice of the Security Service, he told us that he had had "too many other occupations to allow [him] to go into an audit of various departments" (Vol. 129, p. 20101). He told us that it did not occur to him that the Security Service would have the same type of liaison with the Post Office that existed in the drug field, because the Security Service faced different problems (Vol. 129, p. 20100).

25. Mr. Nadon stated that before 1976 he had probably heard the word Cathedral but it did not register with him as referring to a liaison with the Post Office. He said he is satisfied that the word Cathedral would certainly have been brought to his attention when a report was submitted to the Minister, possibly in 1976, requesting amendments to the postal laws (Vol. 129, p. 20103). However, he said that only recently, (that is, after the commencement of this Commission of Inquiry) was he made aware of the Cathedral A, B and C categories of examining mail (Vol. 129, p. 20096).

26. Mr. Nadon stated that he did not see the letter (Ex. M-59) that was drafted for Mr. Allmand's signature in reply to Mr. Lawrence's query about the correspondence of one of Mr. Lawrence's constituents, Mr. Keeler, and that the matter did not come to his attention (Vol. 129, p. 20139). At the time — December 1973 — he was Deputy Commissioner for Criminal Operations. However, by January 1974, he had become Commissioner. When Counsel for the Commission showed him a letter (Ex. M-102) that he had signed and sent to Mr. Lawrence on January 14, 1974, he still did not recall the matter having been brought to his attention. He believes that he did not regard the matter as "that important" because Mr. Keeler's complaint to Mr. Lawrence arose not from the R.C.M.P. having gone to the Post Office but from another department having referred the card to the R.C.M.P. for investigation (Vol. 129, pp. 20143-5). As for the letter that was drafted for Mr. Allmand's signature,

which he did not see (Vol. 129, p. 20149), (containing the assurance that it was not the "practice" of the R.C.M.P. "to intercept the private mail of anyone") Mr. Nadon said that he would not have written that assurance, as far as the C.I.B. was concerned, because it could mislead the Minister (Vol. 129, p. 20138). His statement is somewhat ironic in the light of the letter that he later sent to Mr. Diefenbaker.

Conclusion

27. We believe that while Commissioner Nadon did not know of specific instances when mail had been opened in the course of post, he became aware of the practice in criminal investigations and, at least by 1975, he knew that it could not be done under the law. Yet he did not forbid the use of the technique and misled both Mr. Diefenbaker and Mr. Allmand by sending the 1975 letter that could only be interpreted as meaning that first class mail was not opened in the course of post. His conduct in this regard was unacceptable.

(d) Mr. M.R. Dare

Summary of evidence

28. Mr. Dare told us that he first became aware of the technique of Cathedral A, B and C in late 1973 or early 1974 during briefings with the Deputy Director General (Operations), Mr. Howard Draper. At that time, Mr. Draper did not indicate whether the Security Service was conducting A, B and C operations, nor did Mr. Dare ask if such operations were being conducted (Vol. 125, pp. 19470-1), 19474-5). Mr. Dare told us that he was not then aware that Cathedral C was in fact being used (Vol. C93, pp. 12661-2; Vol. 127, p. 19869; Vol. 128, pp. 19902-3). He agreed that it seemed anomalous that there was a Cathedral C category if nothing was being done under it (Vol. 127, p. 19868).

29. Mr. Dare stated that after his briefing in late 1973 or early 1974, he learned of a June 22, 1973, communication suspending all Cathedral operations (Vol. 125, p. 19471). Mr. Dare therefore felt that no Cathedral operations were being conducted (Vol. 125, p. 19475). It did not cross his mind that an investigation of this matter was an area of his responsibility (Vol. 127, p. 19868). Mr. Dare told us that he first became aware of the *practice* of Cathedral C (as opposed to being aware of the nature of the technique) in November 1977 (Vol. C93, pp. 12661-2). In June 1977, when Mr. Fox was preparing his statement for the House of Commons, Mr. Dare told us that he, Dare, was aware only of the practice of Cathedral A and B (Vol. C93, p. 12664).

30. We questioned Mr. Dare about a document entitled "A Damage Report Concerning One Constable Samson" (Ex. M-88, Tab 4; Vol. 125, pp. 19486-7). The report in part indicated that "Samson would be aware of our Cathedral capability (mail intercepts)" (Vol. 125, p. 19490). Mr. Dare read that document in August 1974 and discussed it with Mr. Draper, but told us that he did not ask him if, in fact, mail interceptions were occurring at that time, because a policy had been set out that operations were to be conducted

within the law, and both Cathedral A and B were to him within the law. Mr. Dare told us that at the time he had assumed that the reference to Cathedral in the Damage Report meant Cathedral A and B instead of Cathedral C (Vol. 125, pp. 19490-2). Elsewhere in his testimony Mr. Dare told us that when he used the word "intercept" in relation to mail in December 1973, he meant "open" (Vol. 125, p. 19480).

31. Mr. Dare was asked about a letter (Ex. M-88, Tab 7), dated July 9, 1975, from Mr. Ralph Nader to Prime Minister Trudeau (Vol. 125, p. 19504). Mr. Nader's letter raised the general question of interception of mail and asked whether mail intercepts took place in Canada (Vol. 125, p. 19504). A draft reply was prepared for Mr. Trudeau's signature stating:

> Cooperation has been extended to Canadian police authorities from time to time when individual circumstances strongly indicated that it was in the best interests of the public to do so but under no circumstances would the Canada Post Office permit mail to be illegally opened or delayed.
>
> (Ex. M-88, Tab 10.)

Mr. Dare told us he was not aware at that time that the Post Office co-operated with the R.C.M.P. to permit the opening of first class mail (Vol. 125, p. 19506). He told us that he did not inquire if mail openings were being carried out, other than to ask the appropriate staff branch to prepare a reply (Vol. 125, p. 19511).

32. Mr. Dare told us that in June 1977 he had read the Department of Justice memorandum (Ex. M-107) outlining two methods which Messrs. Brunet and McCleery stated were used by the Security Service to obtain access to the mails (Vol. C88, p. 12124). Mr. Dare testified that he considered their statements to be allegations that mail was being opened, not statements of fact (Vol. C88, pp. 12125-27). Mr. Dare discussed the memorandum with Deputy Director General (Operations) Sexsmith. Yet he did not inquire precisely whether the allegations concerning mail opening described in the memorandum were true (Vol. C88, pp. 12128, 12143). Rather, he said that he raised "the whole package" of allegations by Messrs. Brunet and McCleery (Vol. C88, p. 12129).

33. Mr. Fox testified that in January or February 1977 Mr. Dare had indicated to him that the R.C.M.P. was not opening mail (Vol. 161, p. 24790). Mr. Fox recalled Mr. Dare telling him after the November 1977 meeting, called to discuss the CBC allegations of mail opening, that he had not been aware of the practice of mail opening before that meeting (Vol. 161, p. 24787). On November 29, 1977, Mr. Dare told the House of Commons Standing Committee on Justice and Legal Affairs that he had not been aware of mail opening prior to being advised of it by Mr. Sexsmith following the revelations by the CBC on November 8, 1977. After so advising the Committee, Mr. Dare was reminded by Mr. Sexsmith that in July 1976, Mr. Sexsmith had told him about a mail opening operation in the Ottawa area which had been discontinued. Mr. Dare said that, although he did not remember the July 1976 conversation with Mr. Sexsmith, he believed that it took place and accordingly he wrote to the Chairman of the Standing Committee on December 5, 1977, to correct his testimony.

34. Mr. Dare testified that he felt Cathedral A and B to be legal (Vol. 125, pp. 19475, 19490-1, 19518; Vol. C93, pp. 12664-5). He specifically stated that "at no time... would I condone, or have I approved Cathedral C, which is quite illegal" (Vol. 125, p. 19475).

Conclusion

35. We accept Mr. Dare's evidence that until July 1976 he did not know that the Security Service opened mail. It is true that before that he had been told that there was a policy — Cathedral C — that provided for the opening of mail, and after being so informed he was told of the suspension of that policy. In addition, he had received the Samson Damage Report. However, he was not explicitly told that the mail had, until 1973, been opened. When he led Mr. Allmand to believe that mail opening was not a technique in use or that had been used, he did not do so with intent to deceive Mr. Allmand. However, the better course would have been to tell Mr. Allmand that there had been a policy in existence that contemplated the opening of mail.

(e) Commissioner R.H. Simmonds

Summary of evidence

36. Commissioner Simmonds' R.C.M.P. background, before he became Commissioner, was entirely in criminal investigation and administration.

37. He was aware of the longstanding co-operation between the Post Office and the R.C.M.P. on "matters of proper interest". He testified that there could be a great deal of access to mails by members of the Force as customs officers and as policemen (Vol. 168, pp. 25803, 25807, 25811-2).

38. However, he stated that during the approximately 30 years that he had been a member of the Force, prior to 1977 he was not aware of a practice of opening letters without the recipient's permission, other than in conditions where opening was permitted under the Post Office Act (Vol. 168, pp. 25807-8). Mr. Simmonds felt, however, that the Post Office Act was very imprecise, and the definition of what the law allows under the Act was not very clear (Vol. 168, p. 25807, Vol. 165, p. 25425). When asked if, on the criminal investigation side, he knew of a practice or of any instance in which letters were opened to be read, Mr. Simmonds replied that he was not aware of any such incidents and to this day doubts if any occurred (Vol. 168, p. 25812). Mr. Simmonds stated that he probably first became aware of the Security Service programme named Cathedral in November 1977 (Vol. 168, pp. 25803-4).

Conclusion

39. We accept that, neither before he became Commissioner (on September 1, 1977) nor during the ten weeks between that date and the public revelation, did Commissioner Simmonds know that in the past there had been a policy in the Security Service that permitted the opening of mail in the course of post. On the criminal investigation side, we are satisfied that he did not know of any cases when letters were read or when envelopes were opened, except as permitted under legislation.

(f) The Honourable George McIlraith

Summary of evidence

40. Senator McIlraith told us that:

> In any event, mail, I never thought they were opening it, because I did not think anybody in the espionage business would be stupid enough to put things in the mail and have it delivered anywhere, or lost, or picked up by anybody other than the ones for whom it was intended.

Even more positively, he said that his "understanding was that the police were not opening mail, period" (Vol. 118, p. 18336). He said that he never had a request from the R.C.M.P. or anyone else to do anything about the law relating to the issue, it was never discussed, and he did not read the provisions of the Post Office Act until shortly before testifying (Vol. 118, pp. 18340). He has no recollection of having been inspired by what the Royal Commission on Security said as to the need to be able to open mail to ask the R.C.M.P. whether they felt there was any such need (Vol. 118, p. 18341).

41. Mr. Higgitt told us that he discussed with Mr. McIlraith the question of Cathedral, pointing out its importance from his, Higgitt's, point of view (Vol. 84, pp. 13781-2; Vol. 113, pp. 17355-6), but could not recall specific occasions on which he did so, nor could he recall actually using the term Cathedral in those discussions (Vol. 113, pp. 17358-9).

Conclusion

42. We have no reason to disbelieve Senator McIlraith; even former Commissioner Higgitt did not testify that he could recall having used the term "Cathedral" in discussions with him. We believe that Commissioner Higgitt, at most, discussed with Mr. McIlraith the desirability of having the legislation amended, and that, in doing so, he did not disclose the fact that Force policy permitted the opening of mail.

(g) The Honourable Jean-Pierre Goyer

Summary of evidence

43. Mr. Goyer testified that he had no recollection of the opening of mail for the purposes of the Security Service or for those of criminal investigation having been discussed with him whether in terms of such a technique being presently used or in terms of the need for enabling legislation (Vol. 123, pp. 19192-5). He told us that he did not know that the R.C.M.P. opened mail (Vol. 123, p. 19197). He said that he never questioned members of the R.C.M.P. on the subject, and never saw the need to do so, for he always presumed that members of the R.C.M.P. respected the law (Vol. 123, p. 19198). Nor, he told us, did he ever hear the code name Cathedral during his term as Solicitor General (Vol. 123, p. 19310).

44. However, Commissioner Higgitt testified that he discussed the question of Cathedral with Mr. Goyer and pointed out its importance from his, Higgitt's, point of view (Vol. 84, pp. 13781-2; Vol. 113, p. 17355). He could not remember specific times and dates of such discussions (Vol. 88, pp.

14491-3, 14503) but mentioned situations that would lead him to discuss questions related to the mail with Mr. Goyer; namely, when Members of Parliament occasionally raised questions about mail tamperings, and when issues were raised in the press (Vol. 88, p. 14503).

45. Mr. Higgitt did not think he would have distinguished amongst Cathedral A, B and C in his discussions with Mr. Goyer (Vol. 88, p. 14490), and he could not state with precision whether he had indicated to Mr. Goyer that the R.C.M.P. was intercepting and opening mail (Vol. 88, p. 14494). Nor could he recall Mr. Goyer ever asking him if the R.C.M.P. was involved in the interception of anyone's mail (Vol. 88, p. 14494).

46. Mr. Starnes testified that he could recall no discussion with Mr. Goyer on the subject of mail interception and amendments to permit it (Vol. C31, pp. 3807-8). Moreover, as already stated, Mr. Starnes denies that he knew that mail was being opened, and we believe him. Consequently, he could not have told Mr. Goyer about it.

Conclusion

47. We conclude that Mr. Goyer was not informed of the practice of opening mail or of any specific cases in which that was done. While Commissioner Higgitt may have discussed with him the importance of having this technique available, we think that the current use of the practice itself was likely not disclosed to him.

(h) The Honourable Warren Allmand

Summary of evidence

48. Mr. Allmand did not recall hearing the code name Cathedral during his term as Solicitor General (Vol. 117, p. 18071). He first heard the expression used before this Commission (Vol. 114, p. 17574). Mr. Allmand told us, however, that his memory was "very, very clear" that "during many of their discussions I asked the R.C.M.P. whether they had opened mail or whether they were opening the mail and I was repeatedly told that they were not" (Vol. 114, pp. 17552-4; Vol. 115, p. 17866; Vol. 117, p. 18071). Mr. Allmand could not remember which R.C.M.P. officials told him that they were not opening mail (Vol. 117, p. 18070). He testified that they told him:

> If we are pursuing a case and it is a matter that a piece of mail may be evidence or intelligence or whatever, we may go and follow it to its destination and we may take pictures of the envelope, note the return address, if any, the handwriting, et cetera, et cetera, the stamp, the postal...' You know, they said they would observe the envelope and get whatever information they could, but they categorically, to me, denied they opened mail. And the question was put on several occasions during my mandate. As a matter of fact, they would come to me saying, 'We must have — because we can't open the mail, we want your support in an amendment to the law which will allow us to open the mail.
>
> (Vol. 114, pp. 17553-4.)

49. Mr. Bourne's testimony confirms that of Mr. Allmand in regard to one occasion when the subject of mail opening was discussed. He testified that the

R.C.M.P. did not tell him that they opened mail, but he was present on one occasion when senior officials of the R.C.M.P. discussed mail *cover* operations, in which, they said, addresses and return addresses would be noted (Vol. 140, p. 21528). He confirmed that the topic came up in 1974 at a regular meeting between the Solicitor General and the Commissioner and his deputies. He told us that he had a clear memory of the discussion, which arose in connection with Mr. Lawrence's letter, and that the Minister, in answer to his question, was assured that letters were not being opened. He does not remember who it was that gave the assurance (Vol. 140, pp. 21534-6). Mr. Bourne testified that he did not know of mail opening until it was discussed publicly in November 1977 (Vol. 140, p. 21553).

50. Mr. Tassé's testimony also confirms that of Mr. Allmand. He told us that he did know that the R.C.M.P. examined and photographed the exterior of envelopes in the mail but he did not know that they opened mail or that it had been opened (Vol. 156, pp. 23766-7). He recalls that at the time of Mr. Lawrence's query, the managing officials of the R.C.M.P. said that there had not been opening of the mail, in answer to an inquiry by Mr. Allmand. He understood that their policy was that there was no mail opening (Vol. 156, pp. 23766-7, 23772, 23776-7).

51. In April 1976, Mr. Dare applied under the Official Secrets Act for a warrant to open mail in the case of a suspected Japanese Red Army terrorist. Mr. Allmand wrote to the Minister of Justice to say that the execution of such warrants "is predicated on a supporting opinion from your Ministry that the Official Secrets Act takes precedence over section 43 of the Post Office Act" (Vol. 115, p. 17857). The reply indicated that the Post Office Act overrode the provisions of the Official Secrets Act (Vol. 114, p. 17571). The warrant was therefore not executed. Mr. Dare testified that at that time there was no discussion with Mr. Allmand as to whether the Security Service had opened first class mail. Nor did Mr. Allmand inquire whether the Security Service had done so (Vol. 125, p. 19534).

52. Mr. Allmand testified that he had several discussions with the R.C.M.P. about the opening of mail for drug investigations and security purposes (Vol. 114, p. 17569). Mr. Allmand was convinced by R.C.M.P. arguments that in order to do their job properly they required amendments to the Post Office Act (Vol. 114, p. 17555). In 1974 and 1975 the R.C.M.P. approached Mr. Allmand to seek his support in having the Post Office Act amended to allow the opening of mail (Vol. 115, p. 17852; Ex. M-54). As a result he wrote to the Postmaster General in 1975 and 1976, requesting an amendment to assist in the investigation of drug offences. Later he wrote another letter dealing with security matters (Vol. 114, p. 17550-9). In July 1976, at the request of the R.C.M.P., he wrote to the Postmaster General for an amendment to the Act in respect of the Security Service (Vol. 115, p. 17860). He was also aware of a question asked in the House of Commons by the Right Honourable John Diefenbaker concerning amendments to the Post Office Act to deal with drugs, to which he replied that such amendments were being considered; and he saw a reply to Mr. Diefenbaker written by Commissioner Nadon (Vol. 115, p.

17865). He says that, when he was asked for his support of amendments, he asked the R.C.M.P. whether they were, in fact, opening the mail, and again, he asked at the time of Mr. Lawrence's letter about Mr. Keeler (Vol. 114, pp. 17552-3).

53. On the other hand, Commissioner Nadon testified that he does not recall Mr. Allmand ever asking for information on mail opening in his presence nor does he recall any discussion about mail opening in the presence of Mr. Allmand (Vol. 129, pp. 20094, 20111, 20113, 20154-5). He said that he recalled that on one occasion, relating to drugs, and on another occasion, relating to the Security Service, he had written a letter to the Minister requesting amendments to legislation, but that there was no discussion on the matter with the Minister. Commissioner Nadon testified that the correspondence simply came to him, he signed it, and passed it on to the Minister (Vol. 129, p. 20111).

54. Commissioner Higgitt testified that he had discussed the question of Cathedral with Mr. Allmand. He could not recall specific occasions when these discussions took place (Vol. 84, pp. 13780-1). Mr. Higgitt did not elaborate as to just what he "discussed" with Mr. Allmand. However, it is clear from his testimony that he went no further than to discuss the need of mail opening as an investigative technique. He does not say that he told Mr. Allmand that mail had been opened. The most Mr. Higgitt could say was that Ministers were seeing the results in various forms. Our own experience with R.C.M.P. reporting phraseology satisfies us that "seeing the results" would not necessarily enable a Minister to discover that mail had been opened.

55. Mr. Dare said that he felt that Mr. Allmand had every right to assume that the R.C.M.P. had confirmed that they were not opening mail (Vol. 125, p. 19535). "Mr. Allmand at no time had any other perception or should not have had any other perception than the fact that we were not opening mail" (Vol. 125, p. 19536). Some time in 1976 Mr. Allmand had, in his presence, asked if first class mail was being opened. Mr. Dare believes that Mr. Allmand put this question to Mr. Nadon and that Mr. Nadon replied that neither the C.I.B. nor the Security Service had opened first class mail (Vol. 125, pp. 19535-7).

56. Mr. K.J. MacDonald, Executive Assistant to Mr. Allmand from September 1975, to September 1976, attended the weekly meetings between Mr. Allmand and senior officers of the R.C.M.P. He recalls mail opening having been discussed on four or five occasions between March and September 1976 (Vol. 157, p. 23960). He has a note that, after Mr. Allmand appeared on a panel with Mr. Ralph Nader at the end of August 1976, at a convention of the Canadian Bar Association, Mr. Allmand telephoned to say that Mr. Nader had raised the question of mail opening again, as he had in an earlier letter to the Prime Minister. Mr. Allmand asked Mr. MacDonald once again to check with the R.C.M.P. "to see if this could be straightened out at last". Mr. MacDonald recalls having telephoned Mr. Dare, and his note of the conversation indicates that he was told that all requests were on the criminal side, not the Security Service side (Vol. 157, p. 23976). We note, to avoid any confusion, that this reference by Mr. MacDonald to "requests on the criminal side" was made in

the context of mail cover operations, which involved only following and tracing (Vol. 157, pp. 23963-7). Mr. MacDonald was not aware of mail opening in practice.

Conclusion

57. We accept Mr. Allmand's evidence, confirmed as it is by that of Mr. Tassé, Mr. Bourne, Mr. Dare and Mr. K.J. MacDonald. These four witnesses all confirm occasions on which Mr. Allmand asked members of the R.C.M.P. whether mail was being opened and received answers in the negative, both as to the C.I.B. and the Security Service. It is true that Commissioner Nadon said that he could not recall any discussion of mail opening in the presence of Mr. Allmand, but Mr. Dare remembers one such occasion and we think that Commissioner Nadon's memory must have failed him. It is also true that Commissioner Higgitt told us that he had discussed Cathedral with Mr. Allmand, but he could not recall any specific occasions. Again we feel that the current use of the technique was likely not made known to Mr. Allmand.

(i) The Honourable Francis Fox

Summary of evidence

58. On February 11, 1977, Mr. Fox signed, pursuant to section 16 of the Official Secrets Act, the first Annual Report on the interception of communications for submission to the House of Commons. The report indicated that Mr. Allmand had signed a warrant authorizing the interception of mail, but that the warrant had not been executed. Mr. Fox recalled asking for an explanation about this warrant before he signed the report. Mr. Fox directed questions concerning the opening of mail to Mr. Dare, and Mr. Dare communicated the response to him. Mr. Fox told us that he believed, although he was not certain, that Mr. Nadon was present at the time (Vol. 161, pp. 24779-80). This was the first time that he had discussed the opening of mail with the R.C.M.P. It was explained to him that the Department of Justice had offered an opinion that section 43 of the Post Office Act took precedence over section 16 of the Official Secrets Act and that the Solicitor General did not have the authority to issue such a warrant. Mr. Fox recalls at that time that he was told that the R.C.M.P. was not opening the mail, and did not have the right to do so, although the R.C.M.P. indicated to him that they would have liked to have the power legally to open mail (Vol. 161, pp. 24775-9).

59. Mr. Fox told us that he had been offended by an editorial that appeared in the Toronto *Globe and Mail* around the end of August or the beginning of September 1977, stating that the Security Service was opening mail. Mr. Fox testified that he replied to the newspaper in a letter indicating that he found the editorial rather irresponsible, that the R.C.M.P. was not opening mail, and that no section of the Official Secrets Act gave them the right to open mail. He testified that he asked his Department to verify the contents of his letter with the R.C.M.P. before he sent it to the *Globe and Mail* (Vol. 161, p. 24783). Since Mr. Fox testified we have examined the editorial he referred to, which appeared in the *Globe and Mail* on August 30, 1977. The editorial concerned

the law relating to wiretapping, but in passing stated that under section 16 of the Official Secrets Act the Solicitor General was required to submit an annual report to Parliament as to several matters including "a *general* description of the methods of interception used (wiretapping, mail-opening and so on)...". It stated also that "The Solicitor General is not required to inform Parliament, or anyone else, of exactly whose phones have been tapped or whose mail has been opened". We have also obtained a copy of the letter Mr. Fox wrote to the *Globe and Mail* on September 13, 1977. So far as we can tell, the letter was not published. On the subject of the mail, it stated:

> Your reference to authorized opening of mail is also factually incorrect... Rather than your portrayal of indiscriminate interception of the mails, the facts are that no interceptions take place at all.

60. Mr. Fox also testified about the CBC television programme broadcast on November 8, 1977, which alleged that the R.C.M.P. had opened the mail of someone suspected to be a member of the terrorist group, the Japanese Red Army. The morning after, he requested an urgent meeting with the R.C.M.P. because he was certain that there would be questions about these revelations in the Commons that afternoon. Mr. Fox believes that Mr. Dare, Assistant Commissioner Sexsmith, Commissioner Simmonds and some officials from the Post Office came to his office (Vol. 161, pp. 24783-4). At that time, Assistant Commissioner Sexsmith told him that the R.C.M.P. had been opening mail for a long time but that the practice had been terminated by him some time, as Mr. Fox recalled, in 1975 or 1976 (Vol. 161, pp. 24782, 24784). Assistant Commissioner Sexsmith did not explain to him why he had terminated the practice (Vol. 161, pp. 24788-9). That was the first precise confirmation given to Mr. Fox that the Security Service had been opening mail (Vol. 161, p. 24784). Mr. Sexsmith testified that before the revelation by the CBC on November 8, 1977, the R.C.M.P. had told Mr. Fox that it did not use the mail opening technique at all (Vol. 161, p. 24786).

61. Mr. Dare told us that after the allegation by Messrs. Brunet and McCleery, reported in Mr. Landry's memorandum dated June 24, 1977, he could not recall Mr. Fox specifically asking if mail was being opened or had been opened, but he noted that Mr. Fox did seek assurances from him and Mr. Nadon that the R.C.M.P. was acting within the law (Vol. 128, pp. 19907-8).

62. Commissioner Simmonds also recalled that Mr. Fox, in November 1977, had asked whether in fact mail was being opened. Commissioner Simmonds told us that this was the first time he could recollect any Minister having raised that question (Vol. 168, pp. 25809-10).

Conclusion

63. There is no reason to question Mr. Fox's evidence. Indeed, the one occasion when the issue arose before late June 1977, was when, earlier that year, he asked about the incident referred to in the Annual Report he was being asked to sign, and he was told that the R.C.M.P. did not open mail.

(j) Mr. Donald Beavis

Summary of evidence

64. On June 5, 1978, Mr. Donald Beavis, a former employee in the Privy Council Office, was reported in the *Globe and Mail* as having said that it was a "fact of life" among certain government people that the R.C.M.P. was illegally opening mail. The article was based on an interview by telephone. The interview occurred after the "uproar about mail opening" had started and was "appearing in the paper", which he says he had "deliberately" not been following (Vol. 313, p. 301148). Mr. Beavis told us that what he said to the interviewer was that "it would have astounded" him if the R.C.M.P. were not opening mail. He says that this was a

> deduction from whatever else we did, from my background in the Communications Branch and my background as a security officer.
>
> (Vol. 313, p. 301152.)

By this he means that he knew that in the Communications Branch written communications were not sent by mail but by hand, in order to protect them against interception by an enemy. He inferred that

> If we did that, to look after our material, then surely, the opposite side of the coin would be that our own Security Service must be either considering or doing mail opening.
>
> (Vol. 313, p. 301155.)

He admits that it was an "inference" on his part (Vol. 313, p. 301158), and "conjecture" (Vol. 313, p. 301171). He also told us that when he had worked for the Communications Branch of the National Research Council all documents of a nature that required cryptanalysis passed through his hands and that at no time did the R.C.M.P. send a document for such an analysis that appeared to him to have come into the hands of the R.C.M.P. as a result of their having opened mail. He and the analysts, he believes, would have been able to infer that the material submitted for analysis had come from the opening of mail if that had been so (Vol. C84, pp. 11477-9).

Conclusion

65. We asked Mr. Beavis to testify because the newspaper article, if left outstanding as it was, would have suggested that an official of the Privy Council Office had known that the R.C.M.P. were opening mail. We are satisfied that Mr. Beavis (who died in 1980, after he testified *in camera* but before his testimony was made public) did not know of the practice but had inferred that it existed as a result of work he had done in another department of the government. There is no suggestion that Mr. Beavis passed on the results of his conjecture to any other official.

(k) Mr. D.S. Maxwell

Summary of evidence

66. Mr. D.S. Maxwell was Deputy Minister of Justice and Deputy Attorney General from March 1968 to February 1973. He was appointed Associate

Deputy Minister of Justice in 1960 and between that date and 1966, when the R.C.M.P. ceased to report to the Minister of Justice, he has no memory of any opinion having been sought from him with regard to the opening of mail. He does not think that he was aware of the fact that the R.C.M.P. were engaged in the opening of mail during the period from 1960 to 1966 (Vol. C65, pp. 9101-2). He feels quite certain that while he was Deputy Minister of Justice and previously he was not aware that the R.C.M.P. had opened first class mail as a practice or on any specific occasion or occasions (Vol. C66, p. 9251).

Conclusion

67. We accept the evidence of Mr. Maxwell that he was unaware of the practice of mail opening.

C. GENERAL CONCLUSION

68. We are satisfied that Solicitors General and those public servants whose evidence we have discussed did not know that the mail had been opened by members of the R.C.M.P., or that any policy or practice existed or had existed that permitted or tolerated the opening of mail, whether for the purposes of criminal investigation or those of the Security Service.

CHAPTER 4

ACCESS TO AND USE OF CONFIDENTIAL INFORMATION HELD BY THE FEDERAL GOVERNMENT — CRIMINAL INVESTIGATIONS

1. In our Second Report, Part III, Chapter 5, we examined the manner in which the Criminal Investigation side of the R.C.M.P. has sought access to the records of five government departments to obtain information on individuals. These included the records of the Department of National Revenue, Canada Employment and Immigration Commission (formerly known as the Unemployment Insurance Commission), the Department of National Health and Welfare, the Department of Industry, Trade and Commerce, and finally the Foreign Investment Review Agency. In the case of the latter two the attempts to obtain information were unsuccessful.

2. In this Report we now attempt to determine the extent to which this practice was known and reviewed at the level of senior members of the R.C.M.P., senior government officials and Ministers.

3. In this chapter, we also discuss the implementation of Force policy from 1973 to 1978 with regard to the liaison which had arisen between the C.I.B. and the U.I.C., as this matter was not dealt with in the Second Report.

A. KNOWLEDGE OF SENIOR OFFICIALS IN THE R.C.M.P., SENIOR PUBLIC SERVANTS AND MINISTERS OF THE LIAISON BETWEEN THE C.I.B. AND THE DEPARTMENT OF NATIONAL REVENUE

(a) Commissioner W.L. Higgitt

Summary of evidence

4. Commissioner Higgitt testified that during his term as Commissioner he knew that, prior to 1972, members of the Force were obtaining information from the Department of National Revenue (D.N.R.) for the purposes of investigating Criminal Code matters. However, he did not remember whether he knew that the Force was receiving such information for the purpose of investigating crime in general, rather than offences related only to tax matters. He said that, had he been aware that information received from the D.N.R. by the Force was being released to other police forces, he would have taken steps to have the other police forces designated by the Minister pursuant to the Memorandum of Understanding (Vol. 85, pp. 14009-13, 14032, 14048). He

was not aware of any R.C.M.P. policy by which members of the Force could seek biographical data from the D.N.R., for any purpose, but he had a feeling that the Act made a distinction between financial information and other information (Vol. 85, pp. 14064-65).

Conclusion

5. On the evidence before us, we cannot say that Commissioner Higgitt realized at any time that the C.I.B. was obtaining information from D.N.R. sources for purposes that meant the Income Tax Act was being violated.

(b) Commissioner Maurice Nadon

Summary of evidence

6. Commissioner Nadon understood that information received from D.N.R. was to be held in the Commercial Crime Branch and not disseminated from that Branch. As of May 1976 he had not been informed of any breaches of section 241 by which information received under the agreement was being disseminated to other police forces. He told us that in 1976 he asked R.C.M.P. officials specifically if the Memorandum of Understanding was being respected and was told that there was a possibility of some breaches but no examples were given to him and that he therefore reinforced the instructions to the Force that information obtained from D.N.R. should not go to anyone outside of those specifically assigned under the Memorandum of Understanding. Later in his testimony, he said that he had always been informed that the Memorandum of Understanding and the Act were being respected. In 1977 he heard that a police department in the Ottawa area had summonsed an official of D.N.R. to appear as a witness and he was told at the time that it was suspected that some member of the R.C.M.P. had given some information to that police force. He never received information of any specific incident of a breach of section 241 but heard rumours to the effect that it was being violated by members of the C.I.B. (Vol. 128, pp. 20855, 20857, 20862, 20871, 20874).

7. According to his testimony, he believed that anything of a historic nature, if released, would not constitute a violation of section 241 of the Income Tax Act. He thought section 241 is limited to financial information (Vol. 136, pp. 20864-66).

Conclusion

8. There is no evidence before us that Commissioner Nadon knew that information was being obtained, used or disclosed for any purpose that would result in a breach of the provisions of the Income Tax Act.

(c) The Honourable George J. McIlraith

Summary of evidence

9. The only evidence as to Mr. McIlraith's knowledge of any aspect of access to information of this sort was his testimony that on one occasion the R.C.M.P. asked him if, in examining a case where they were called in by D.N.R. to do

investigative work and obtain evidence of other criminal activities outside the Income Tax Act, they could use that evidence to start an investigation into other organized crime activities. He told them they should go to the Department of Justice and get an opinion (Vol. 119, p. 18515).

Conclusion

10. There is no evidence before us that Mr. McIlraith knew of access to this type of information.

(d) The Honourable Jean-Pierre Goyer

Summary of evidence

11. Mr. Goyer testified that in regard to access to tax information under the Memorandum of Understanding, the question of whether the law was being obeyed was never discussed with him; it was taken for granted that it was being respected (Vol. 123, p. 19214).

Conclusion

12. There is no evidence before us that Mr. Goyer knew of any improper access to or use of tax information.

(e) The Honourable Warren Allmand

Summary of evidence

13. Mr. Allmand testified that the first time he was aware of any violation of the Act was when he received a letter, dated June 9, 1976, from the Honourable Bud Cullen expressing concerns about "a technical violation of the Act". He referred the matter to the R.C.M.P. for advice and its response. The matter gave him some concern but did not convey to him a high priority urgency because of the way it was worded. He did not know exactly what was meant by the reference in Mr. Cullen's letter. He found the words "technical violation" difficult to understand because there was no explanation or examples given (Vol. 115, pp. 17828, 17823, 17840). Commissioner Nadon testified that he told Mr. Allmand that he, Nadon, had been assured by those concerned that the Agreement was being respected (Vol. 136, p. 20871).

Conclusion

14. There is no evidence before us that Mr. Allmand knew of any improper access to or use of tax information prior to the June 9, 1976 letter from Mr. Cullen. When Mr. Allmand was told by Mr. Cullen that there were "technical violations", he took the necessary steps, prior to leaving the portfolio of Solicitor General, to ensure that the matter was investigated and dealt with.

(f) The Honourable Bud Cullen

Summary of evidence

15. The Honourable Bud Cullen was appointed Minister of National Revenue on September 26, 1975. He first became aware of possible violations of

section 241 of the Income Tax Act when it was raised with him by his officials on May 31, 1976. He thought that the way that things were being done under the Memorandum of Understanding was "at the very least" a technical violation of the Act. There was some apprehension on the part of his Department that information might be being given to R.C.M.P. members to be used other than for tax purposes or to be passed on to other people for other than tax purposes, and that D.N.R. officials were straining the definition of "for tax purposes". He could not get any definite statement from his officials as to whether information was being passed on improperly; they simply said that it could happen, human nature being what it is. There was one specific example of a Nepean policeman who had apparently received information through the R.C.M.P., and D.N.R. officers were subpoenaed to appear in court as a result. At the meeting with his officials on June 14, 1976, the officials could not assure him that D.N.R. was complying strictly with the secrecy provisions of the Income Tax Act and he told them that he wanted all such activities stopped and instructed them to phone the necessary officers in the Department immediately with those instructions. Those phone calls were made and were followed by a memorandum dated July 16, 1976 (Ex. M-64, Tab L, Vol. 117, pp. 18183, 18187, 18200-5, 18221). On the other hand, Mr. M.J. Bradshaw, who sent out the memorandum, testified that there was no suspicion that section 241 was not being complied with, that the phone calls and the letter were the result of a Parliamentary Committee which had been set up with respect to confidentiality of various Acts, that the Minister wanted an assurance that the Department was abiding by the confidentiality provisions of the Act, and that there was no suspicion that anyone was deviating from the Act (Vol. 62, p. 10066).

Conclusion

16. Mr. Cullen clearly had no knowledge of any conduct on the part of his officials that violated the Act. Indeed, when he even had a suspicion that that might be occurring, he inquired into the matter and issued firm instructions that there was to be no activity in violation of the Act.

(g) Mr. Roger Tassé

Summary of evidence

17. When Roger Tassé, the Deputy Solicitor General, saw the letter of June 9, 1976 from Mr. Cullen to the Honourable W. Allmand (M-64, Tab G) and the mention of "breaches" of "the present secrecy provisions of the Income Tax Act", he phoned the Deputy Minister of National Revenue, Mr. Hodgson, who told him that it was a question that was under study. Mr. Tassé said that Mr. Hodgson seemed to have all the information and to have the matter in hand. He told us that he expected that Mr. Hodgson would eventually bring it up again and discuss it with Mr. Allmand. Mr. Tassé did not think it was up to him to ensure that the Income Tax Act was enforced. That was the responsibility of the Minister of National Revenue and that is why he, Tassé, assured himself that the Deputy Minister of National Revenue was aware of the matter (Vol. 157, pp. 23856-9).

Conclusion

18. We accept Mr. Tassé's evidence that his knowledge was identical to that of his Minister and that he did what his Minister asked him to do.

(h) The Honourable Francis Fox

Summary of evidence

19. Mr. Allmand testified that he does not recall briefing Mr. Fox, his successor as Solicitor General, with respect to the "technical violation" raised by Mr. Cullen in his letter of June 9, 1976 (Ex. M-53, Tab D).

Conclusion

20. We have no evidence before us that Mr. Fox was aware of any violation of the Act, whether technical or otherwise.

B. KNOWLEDGE OF SENIOR OFFICIALS IN THE R.C.M.P., SENIOR PUBLIC SERVANTS AND MINISTERS OF THE LIAISON BETWEEN THE C.I.B. AND THE UNEMPLOYMENT INSURANCE COMMISSION

(a) Commissioner W.L. Higgitt

Summary of evidence

21. Commissioner Higgitt told us that he thinks that he was aware that the Unemployment Insurance Commission (U.I.C.) "was one of the places from which we sought information" but he could not go further than that, and said that he was not "directly involved in the use of that particular source" Vol. 85, p. 14026). He said that he does not recall having been made aware in 1971 that access to these sources was either cut off or severely restricted (p. 14027).

Conclusion

22. There is no evidence before us that Mr. Higgitt was aware of any illegalities involved in obtaining information from the Unemployment Insurance Commission.

(b) Commissioner Maurice Nadon

Summary of evidence

23. Commissioner Nadon testified: "I never would go into the detail of the liaison with the Post Office or with the U.I.C. or with the Income Tax or any of the Departments". He continued that this was "an operational policy that was in the Department concerned" and implied that, even when asked for his assistance by asking the Minister to get changes in legislation, he was not given details of existing or past access to departmental information (Vol. 129, pp. 20098-9).

Conclusion

24. There is no evidence before us that Mr. Nadon was aware of any access by the R.C.M.P. to Unemployment Insurance Commission data.

(c) Messrs. McIlraith, Goyer, Allmand and Fox

Summary of evidence

25. Turning to the Solicitors General, those who occupied that office in Commissioner Higgitt's time did not have any discussions with him, according to his recollection, concerning the difficulties of gaining access to U.I.C. data. Indeed, apart from his attempts to obtain access to Department of National Revenue information, he could not specifically recall seeking to expand the R.C.M.P.'s access to government information banks (Vol. 85, pp. 14027-31). Mr. Starnes told us that he could not recall any detailed discussions with Mr. Goyer concerning the problem of gaining access to Health and Welfare and U.I.C. records, which he had raised in a letter to Mr. Goyer on June 3, 1971 (MC-8, Tab 11), although he does remember talking to Mr. Bourne about access to those and other information banks. It was Mr. Bourne who drafted the letters that were subsequently sent over the signature of Mr. Goyer to Ministers requesting their co-operation. However, Mr. Starnes said that he could not recall the discussions (Vol. 149, pp. 22849-53). Mr. Starnes told us that he has no recollection of having discussed with the Solicitors General (Mr. Goyer and Mr. Allmand) the arrangements that were made with the U.I.C. in 1972 (Vol. C31, pp. 3879-81).

26. Mr. Allmand testified that he was not aware of any relationship between the R.C.M.P. and the U.I.C. (Vol. 115, p. 17850). Indeed, a memorandum dated June 1, 1973, from the Director of Personnel of the Security Service to the Deputy Director General recorded that during a visit to the R.C.M.P. in Montréal a member asked Mr. Allmand whether anything could be done to improve access to departmental records. The memorandum recorded that, according to the member:

> The necessary information is not available from the Unemployment Insurance Commission, and, of course, Statistics Canada and Tax Information is unavailable.
>
> (Vol. 114, pp. 17622-8.)

Conclusion

27. There is no evidence before us that Senator McIlraith, Mr. Goyer, Mr. Allmand or Mr. Fox were aware of R.C.M.P. access to Unemployment Insurance Commission data.

(d) Mr. Roger Tassé

Summary of evidence

28. Mr. Tassé's evidence is that he was never told that the R.C.M.P. was obtaining information from other departments and agencies in violation of the law (Vol. 157, pp. 23863-5).

Conclusion

29. We accept Mr. Tassé's evidence and note that it affords some support for our conclusions concerning the state of knowledge of the Solicitors General.

C. IMPLEMENTATION OF R.C.M.P. POLICY FROM 1973 TO 1978 WITH REGARD TO THE LIAISON BETWEEN THE C.I.B. AND THE U.I.C.

30. In the Second Report, Part III, Chapter 5, although we examined at length the manner in which the C.I.B. developed a working relationship with the U.I.C. and the manner and extent to which confidential information flowed from the U.I.C. to the C.I.B., it was decided to leave the explanation of the various details of the implementation of such R.C.M.P. policy with the U.I.C. to this Report. We now examine this policy implementation on the part of the R.C.M.P., especially from the year 1973 to June 12, 1978, when the flow of confidential information from the U.I.C. to the C.I.B. was terminated. This perusal of policy implementation will centre chiefly upon the individuals who were most responsible in developing the mechanism whereby such information was channelled to the C.I.B.

31. During the period 1973 to 1975 Assistant Commissioner (then Inspector) Jensen was the Officer in Charge of the Commercial Crime Branch at Headquarters. During this time he negotiated an arrangement with the U.I.C. whereby it was agreed that the lines of communication between the two organizations would be between the Commercial Crime Branch at Headquarters of the R.C.M.P. and the Chief of the Benefit Control Section of the U.I.C. (Vol. 58, p. 9551, Ex. H-1, p. 59).

32. At this point, Inspector Jensen was responsible for appointing those R.C.M.P. members who were to act as contacts with the U.I.C. (Ex. H-1, pp. 61-64; Vol. 58, p. 9551). When examined as to the instructions given to these personnel charged with the administration of the policy, Assistant Commissioner Jensen testified that they were "to utilize it of course in terms of seeking information with respect to criminal offences and situations where it was in the public interest to do so". He also stated that these personnel had a discretion to pass along a request for information to the U.I.C. and that "they could exercise their discretion or not" (Vol. 58, pp. 9952-4).

33. He was then asked what instructions were given by him to his subordinates concerning this discretion. He first testified that given their experience with the R.C.M.P. "...I had confidence in their ability to exercise discretion, otherwise they wouldn't have been in the position they were in or the rank that they held...". When asked whether this meant that no instructions were given concerning the exercise of discretion he replied that they were instructed to seek the information when it was sought in "the investigation of a criminal offence, or it is in the public interest, the policy that is cited in the October 3rd memorandum..." and that in respect to the investigation of a criminal offence "There is no discretion on that part of it". However, Mr. Jensen then testified that requests with respect to criminal offences would not automatically be passed on and stated "They could. They had that discretion, but they had a discretion of their own to exercise". On the evidence it seems clear that no instructions were given concerning the exercise of this discretion (Vol. 58, pp. 9555-62).

34. From 1973 to 1978 the various R.C.M.P. field officers contacted C.C.B., Headquarters, via a direct access computer terminal to request the information from U.I.C. The persons who operated the terminals were clerks or secretaries. Since the policy of the Force concerning the occasions on which the U.I.C. arrangement could be used had not been disseminated to the field, C.C.B. Headquarters had no way of knowing whether anyone in authority in the field had cleared the request before the clerk or secretary transmitted it via the computer terminal to C.C.B. Headquarters. It was for this reason that it was imperative that the purpose of the request for information from the field be made known to C.C.B. Headquarters. Assistant Commissioner Jensen agreed that this information was vital to the exercise of discretion by the C.C.B. Headquarters personnel assigned to administer the 1973 arrangement. Mr. Jensen further agreed that it would not be appropriate to seek information from the U.I.C. if C.C.B. Headquarters personnel did not first ascertain the nature and purpose of the request (Vol. 58, pp. 9556-60; 9578, 9589-90).

35. From 1975 to 1978 a public servant, employed in a clerical position by the R.C.M.P., was designated to receive requests for information from the field. Assistant Commissioner Jensen testified that up to 1976 this public servant was told to obtain specific instructions from Sergeant Cooper or Sergeant Butt about each request for information. In 1976 this same public servant was instructed to respond to a request for information, provided only that the request referred to a crime. There was no limitation as to the type of crime.

36. The unrestricted access to U.I.C. confidential information, provided that it related to a crime, continued uninterrupted until late in the year 1976. At that time the R.C.M.P. officer responsible instructed the public servant to respond only to requests for information relating to the list of crimes set out in an arrangement made in 1972 between the C.I.B. and the U.I.C. and which is described in Part III, Chapter 5, of the Second Report. Any requests relating to any category of crime not mentioned on the list, were to be cleared beforehand with the R.C.M.P. Officer in Charge.

37. As Assistant Commissioner Jensen has been mentioned frequently, it should be said that there is no evidence that, while he was involved in making arrangements for access to U.I.C. data, he was aware that such access as representatives of the U.I.C. were prepared to provide might give rise to a legal problem. He told us that until June 12, 1978, when he was informed that the Canada Employment and Immigration Commission was no longer going to provide information from the Central Index because there was a problem of statutory interpretation and we were about to hold hearings into this subject, he was not aware that there was a legal problem and had always regarded any problem as being one "primarily" of "administration". He testified that he

> thought that we were the recipients of information from an information source which, in its discretion, could lawfully pass it on to us. So, therefore, it was not a legal problem for the R.C.M.P.
>
> (Vol. 58, pp. 9638-48.)

In these circumstances we find no fault with Assistant Commissioner Jensen's conduct.

38. With respect to the extent and prevalence of this access by the C.I.B. to confidential information on the records of the U.I.C. reference should once again be made to the abovementioned Part III, Chapter 5 of the Second Report. Finally, it should be noted that all access to the U.I.C. confidential information was terminated on June 12, 1978.

D. KNOWLEDGE OF SENIOR MEMBERS OF THE R.C.M.P. AND OF MINISTERS OF THE LIAISON BETWEEN THE C.I.B. AND THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE

39. There is documentary evidence to justify the inference that in 1968 Superintendent (later Commissioner) Nadon knew, from the reports that were received, that in some Divisions members of the Force were obtaining information from sources in the Department of National Health and Welfare in circumstances prohibited by statute. There is no evidence that when he became Commissioner he took steps to bring such access to a halt. Nor, however, is there any documentary evidence that access was still being exercised after 1973. Mr. Nadon became Commissioner in 1974. No testimony was taken from any witness concerning this matter.

40. There is no evidence before us to indicate that any Minister, whether Solicitor General or otherwise, knew that such access was being obtained and that some members of the R.C.M.P. may have been abetting the commission of an offence.

CHAPTER 5

ACCESS TO AND USE OF CONFIDENTIAL INFORMATION HELD BY THE FEDERAL GOVERNMENT — SECURITY SERVICE

1. In our Second Report, Part III, Chapter 6, we examined the manner in which the Security Service of the R.C.M.P. attempted to obtain access to government information on individuals and its persistent effort to develop sources of information within various government departments. Such departments included the Unemployment Insurance Commission, the Department of National Revenue and the Department of National Health and Welfare. The liaison which developed between the Security Service and these government departments was examined, as were the legal consequences. During the course of examining the relationship which developed between source X in the Department of National Revenue and the Security Service, an issue arose of different magnitude, namely, whether the Department of National Revenue at a deputy ministerial level, or even at a ministerial level, had agreed to supply the Security Service with information in circumstances which would violate the confidentiality provisions of the Income Tax Act. The pivotal evidence tending to indicate that such an agreement had been reached was found in a memorandum for file, dated August 18, 1971, (Ex. MC-8, Tab 14) by Assistant Commissioner L.R. Parent, Deputy Director General of the Security Service, which read as follows:

> 1. Reference is made to letter addressed to the Honourable Herb Gray, Minister of National Revenue, by the Solicitor General dated July 27, 1971.
>
> 2. On this date Deputy Minister S. Cloutier of the Department of National Revenue (Taxation) contacted the undersigned in this connection. Deputy Minister Cloutier advised that agreement had been reached, however, no reply would be forthcoming from his office to our letter of July 27th for obvious reasons. The Department agrees to provide information to S&I in this area strictly on a confidential basis, providing that S&I undertakes not to disseminate this information outside the Directorate. In other words, information received by S&I should not be disseminated to CIB or other agencies. All S&I enquiries should be addressed to _____.

The conclusion of the second paragraph referred to X by name and position.

2. We shall therefore examine the events which occurred between the Security Service and Mr. Sylvain Cloutier, the Deputy Minister of National

Revenue, in regard to affording the Security Service access to confidential information.

3. We also examine the extent to which this general practice of the Security Service of obtaining confidential information from various government departments was known and reviewed at the level of Ministers, senior government officials, and senior members of the R.C.M.P.

A. COMMUNICATIONS BETWEEN THE SECURITY SERVICE AND MR. SYLVAIN CLOUTIER

Summary of evidence

4. There is one development, which occurred in 1970, which we did not mention in Part III, Chapter 6, of our Second Report, for it was not essential to the description of the relationship between the Department of National Revenue and Source X which we set out in that chapter, and we considered it would be more relevant to the matters here reported on. We refer to a memorandum by the Director General, Mr. Starnes, dated April 15, 1970, (Ex. MC-8, Tab 8) which recorded that on that day he had had lunch with Mr. Cloutier. His diary also indicates that he was to have lunch that day with Mr. Cloutier at the Rideau Club. The memorandum must be quoted at length:

> . . . we discussed, among other things, the possibility of making some arrangements for members of this Directorate to have access to income tax information. Mr. Cloutier at once referred to discussions which have been taking place between the RCMP and the Department of National Revenue to enable income tax information to be used for criminal investigations. He mentioned that joint proposals had been worked out and were now before Ministers for their consideration. Mr. Cloutier said that he was very sympathetic towards the RCMP's requirements and was inclined to take a rather relaxed view of Section 133 of the Income Tax Act. In particular, he believed that this section of the Act could be interpreted in such a way as to make this kind of information available to the RCMP if it was likely to result in recovery of lost monies. Mr. Cloutier wondered, therefore, whether the particular requirements of the Security and Intelligence Directorate could not be met within the framework of the proposals which are now before the Ministers.
>
> I explained to Mr. Cloutier, using various examples, the kind of purposes for which we would like to have access to a limited number of income tax records, . . .
>
> Following a discussion of the problem, Mr. Cloutier said that he felt it would be possible to interpret Section 133 in such a way as to provide us the information we were seeking . . .on the grounds that this could lead to recovery of money which was owing to the Crown although he recognized that, in fact, there might be very few occasions when this would be possible or even desirable.. . . In the circumstances he said his earlier suggestion that we might bring our requirements within the framework of the request now before Ministers might not be practicable. Instead, depending upon the outcome of ministerial consideration of those proposals, he suggested we might put a joint submission to the appropriate cabinet committee (presumably Cabinet Committee on Security and Intelligence) aimed at obtaining

ministerial approval for the use of income tax records for investigation into cases affecting the national security. Mr. Cloutier said he would be very willing to co-operate with us in the preparation and submission to our respective Ministers of such a memorandum.

Mr. Starnes has no independent memory of the conversation with Mr. Cloutier that day but says that he was in the habit of making accurate contemporaneous memoranda of conversations and events. He has no recollection of being aware at that time that there was already a relationship in existence between someone in the Department of National Revenue and the Security Service, by which the Department provided information.

5. However, Mr. Cloutier, in his testimony before us, denied that during the period that he was Deputy Minister of National Revenue (Taxation) he was aware of any arrangement under which officials of the Department were providing the Security Service with tax information. His testimony was that he had no recollection of meeting Mr. Starnes for lunch on April 15, 1970, although his calendar recalls that he did have lunch with him at Mr. Starnes' invitation on that date. He has no recollection of what was discussed. He says that any reference he may have made to his having regarded section 133 in a relaxed manner must have referred to the work he had been doing with regard to the proposal that members of the Criminal Investigations Branch of the R.C.M.P. should be recognized as authorized officials under section 133 for purposes of criminal investigations. In that regard, his feeling was that any tax monies collected as a result of such investigations would be less than the cost of D.N.R. resources devoted to the programme, that he therefore could not determine the matter himself and the determination should be made by government. Had it not been for the problem of allocation of resources, it was his view that he could have determined, as Deputy Minister, that the members of the C.I.B. generally could be designated as authorized officials. He had no authority to enter into an agreement with the Security Service.

6. In the Second Report we examined the efforts by senior members of the R.C.M.P., and more particularly Director General Starnes and Commissioner Higgitt, to enter into an agreement with the Department of National Revenue whereby information on individuals would flow from that Department to the Security Service. We looked at various communications from the Security Service, including memoranda drafted by Mr. Starnes dated September 15 and 23, 1970, whereby he attempted to persuade Commissioner Higgitt to encourage the Solicitor General to strike an agreement with the Minister of National Revenue.

7. After these memoranda there is no record of any further development until the months of May to September 1971. During this period the negotiations by the R.C.M.P. Criminal Investigation Branch with the Department of National Revenue continued. In May, Mr. Parent, in a memorandum to Mr. Starnes, suggested that the C.I.B. negotiations were not progressing and that the Security Service should discuss its own problems with the Minister. Consequently, on June 3, 1971, Mr. Starnes wrote to Mr. Goyer concerning access to the records of several departments, including the Department of National

Revenue, pointing out that it was "necessary to have access to the records of the Department of National Revenue, Income Tax Branch, which is difficult to do in the face of section 133 of the Income Tax Act". The letter also said that he recognized

> ... that there would be political and other difficulties in the way of seeking to amend legislation merely to meet the needs of the Security Service, but, in many cases, and we believe that with Ministerial agreement, arrangements could be worked out with the different departments and agencies concerned to meet our requirements within the framework of existing laws and in a manner which would attract no attention or criticism.
>
> (Ex. MC-8, Tab 11.)

Consequently, on July 27, 1971, Mr. Goyer wrote to the Honourable Herb Gray, Minister of National Revenue, outlining the needs of the Security Service and saying that in order to satisfy these needs it "would be necessary to have access to your Income Tax Branch records". He observed that "section 133 of the Income Tax Act creates difficulties in this regard", but proposed discussions between officials of the two Departments as to "whether the requirements of the Security Service could in fact be met within the framework of existing laws and regulations and in a manner which would attract no attention or criticism". In answer, a letter dated August 4, 1971, (Ex. MC-8, Tab 13) was prepared by Mr. Cloutier, and was signed by Mr. Gray and sent to Mr. Goyer. It stated that the Deputy Minister of National Revenue was on holidays, and that the subject matter required his consideration and should not be dealt with in his absence. Mr. Cloutier testified that this letter was prepared for Mr. Gray's signature in the hope that it would have the result that the matter would "go away", be forgotten. However, Mr. Bourne did not forget, for on October 18, 1971, he wrote to Mr. Starnes, sending copies of letters which had been received by Mr. Goyer from some Ministers, but pointing out that "a final reply from the Minister of National Revenue has not yet been received". Mr. Bourne suggested that Mr. Starnes follow the matter up at the level of officials. On the letter a longhand note by Mr. Starnes records for file purposes that he had discussed this matter with Inspector Shorey.

8. Meanwhile, on August 18, 1971, Assistant Commissioner Parent prepared the memorandum for file (Ex. MC-8, Tab 14), quoted in full earlier in this chapter, in which he referred to the letter which Mr. Goyer had sent to Mr. Gray on July 27. (Mr. Parent did not testify on this or any other matter because he has unfortunately been suffering from a degenerative illness which, we are satisfied, made him unable to give evidence before us. It has, therefore, been necessary for us to rely upon Mr. Parent's written records.)

9. While he did not deny it, Mr. Cloutier testified that he has no recollection of ever having met Mr. Parent, or of hearing that name in connection with the R.C.M.P., or of having a conversation with Mr. Parent to the effect referred to in Mr. Parent's memorandum of August 18, 1971. He surmises that he probably called, or asked his secretary to call, either the Commissioner or Mr. Starnes to tell him that the Department of National Revenue would not be replying to the letter Mr. Goyer had written to Mr. Gray. However, he says

that he is baffled as to the suggestion that he had verbally made an agreement over the telephone. He regards this as inconsistent with the lengthy and very careful discussions which had been held with respect to the arrangement with the Criminal Investigations Branch, where there was a likelihood of revenue. Further, he regards it as unlikely that, as a responsible senior official, he would have made a commitment on behalf of the Department of National Revenue when six days before August 18 his appointment as Deputy Minister of the Department of National Defence had been announced. Consequently, he says he has a "moral certitude" that he did not enter into such an agreement, and therefore that he did not designate an official to carry it out. He says that if he did talk to Mr. Parent, he could possibly have referred to the C.I.B. agreement which had just been completed to his satisfaction at that time. The Deputy Solicitor General, Ernest Côté, and Mr. Cloutier, had both signed the memorandum of understanding, and "a couple of weeks" previously the two Ministers had signed a submission to Cabinet. (Actually, Mr. Gray had signed it on June 11.) Mr. Cloutier suggests that it is a possibility that in talks with Mr. Parent he might have explained how the agreement with the C.I.B. operated, and Mr. Parent may have misunderstood.

10. Mr. Cloutier says that section 133 was sacrosanct, that he had written for publication on the subject when he was Deputy Minister, and that he was not likely to have played "very very footloose with a cornerstone of the administration of the Department". He has no recollection of having discussed, with either of the two Ministers of National Revenue under whom he served, any question of providing information to the Security and Intelligence Branch of the R.C.M.P. He has no recollection of ever having discussed Mr. Goyer's letter of July 27, 1971, with Mr. Gray. On the other hand, he says he probably told Mr. Gray "we should have no truck to do with that and I will tell the R.C.M.P.".

11. Mr. Cloutier says that he was not, on his own authority, willing to give to Mr. Starnes information on potential taxpayers other than for the purpose of collecting taxes. In assessing Mr. Cloutier's testimony against the record made by Assistant Commissioner Parent, it is necessary to refer again to the discussion between Mr. Starnes and Mr. Cloutier at lunch on April 15, 1970, as recorded by Mr. Starnes in a memorandum which we have already quoted at length. It will be observed that, on the face of Mr. Parent's memorandum, Mr. Cloutier was prepared to go beyond the bounds of section 133.

12. It is also worthy of note that a Security Service Source, who was employed in the Department of National Revenue at Headquarters, and who testified before us, denied knowing Mr. Parent, or being aware of any contact that took place between Mr. Cloutier and Mr. Parent, or between Mr. Cloutier and anyone else in the R.C.M.P. Security Service. We discussed the arrangement between the Security Service and X, in Part III, Chapter 6, of our Second Report, and our conclusions about that relationship are contained in Part VI, Chapter 3, of this Report.

Conclusion

13. We think that it is a near certitude that Mr. Starnes and Mr. Cloutier did have lunch on April 15, 1970, and that Mr. Starnes, who is quite meticulous, made an accurate record of what was said. We note that Mr. Cloutier is recorded as having suggested no more than that a joint submission be made to a Cabinet Committee. There is nothing in the record made by Mr. Starnes which would suggest in any way that Mr. Cloutier had in mind any clandestine or illegal relationship. Consequently, Mr. Starnes' own record supports Mr. Cloutier's adamant assertion to us that he would not likely have played "footloose" with a cornerstone of the administration of the Department.

14. We turn to our conclusion in regard to the memorandum written by Mr. Parent on August 18, 1971. It will be recalled that Mr. Parent has at no time testified before us in regard to this matter or any other matter, because of his state of health. Therefore we do not have the benefit of his testimony on this point. We note that his memorandum was written one year and four months after the luncheon between Mr. Starnes and Mr. Cloutier; thus we have no indication that during those sixteen months there had been further discussions between the Security Service's senior management and Mr. Cloutier. We do not know what Mr. Parent meant by his memorandum, for we are perfectly satisfied that neither Mr. Cloutier nor his Minister (the Honourable Herb Gray) had "agreed", whether formally or in some informal or under the table manner, that the Department of National Revenue would supply information to the Security Service, the disclosure of which would have violated the confidentiality provisions of the Income Tax Act. For Mr. Cloutier to have "agreed" to the provision of such information would have been contrary to the position that he took with Mr. Starnes sixteen months earlier. In the interval, Mr. Cloutier had been conducting negotiations with the R.C.M.P. with regard to co-operation between his Department and the R.C.M.P.'s Criminal Investigations Branch, which bore fruit after his departure from the Department, when a memorandum of understanding was entered into on April 27, 1972, between the Department of National Revenue (Taxation) and the Department of the Solicitor General. If there was a telephone conversation between Mr. Parent and Mr. Cloutier, we are satisfied that any "agreement" which Mr. Cloutier would have referred to was in regard to criminal investigations and moreover was not an "agreement" to provide information the provision of which was prohibited by the Act. We think that Mr. Parent must have misunderstood what Mr. Cloutier was referring to, and this would not be surprising, for there is every likelihood that Mr. Parent was not familiar with the negotiations that were being conducted between the Criminal Investigations side of the Force, and the Department of National Revenue. The compartmentalization of information, between the Criminal Investigation side of the R.C.M.P. on the one hand, and the Security Service on the other, was such that it would not be surprising that Mr. Parent would be ignorant of developments on the C.I.B. side. As for the sentence in Mr. Parent's memorandum in which he states that Mr. Cloutier had advised that "no reply would be forthcoming from his office to our letter of July 27 for obvious reasons", if Mr. Cloutier did say that, those words are open to a reasonable construction which

is consistent with an intention on Mr. Cloutier's part to behave legally. That construction is that Mr. Cloutier would not have wanted to place on the record, through correspondence, any reference to the provision of information to the Security Service and how it was to be provided, for fear someone in the Department of National Revenue might have access to a copy of such a letter and might reveal the existence of such an arrangement to unauthorized persons.

B. KNOWLEDGE BY SPECIFIC SENIOR MEMBERS OF THE R.C.M.P., SENIOR GOVERNMENT OFFICIALS AND MINISTERS OF THE LIAISON BETWEEN THE SECURITY SERVICE AND THE DEPARTMENT OF NATIONAL REVENUE

(a) Commissioner W.L. Higgitt

Summary of evidence

15. Mr. Higgitt, who was Commissioner from late 1969 until 1973, was aware that the Security Service obtained the co-operation of the Department of National Revenue (D.N.R.) (Vol. 111, p. 17126). He was asked whether he knew how it came about or how the co-operation functioned. He testified that the co-operation was "generated" by the correspondence between Mr. Starnes and Mr. Goyer in which Mr. Starnes requested Mr. Goyer's assistance in obtaining information from government departments. But Mr. Higgitt, when asked how he knew that that correspondence gave rise to the relationship, could say no more than that he *presumed* that there was a response from Mr. Gray, the Minister of National Revenue (Vol. 111, p. 17127). (We have no evidence of any such response.)

16. Mr. Higgitt does not recall Mr. Goyer doing anything more than writing to Mr. Gray and discussing the matter with Mr. Higgitt and Mr. Starnes, in order to attempt to reach an agreement between the Security Service and the D.N.R. He has no memory of whatever conversation there was between Mr. Goyer and himself or Mr. Starnes (Vol. 111, p. 17121).

17. Mr. Higgitt was aware that the data provided to the Security Service and the use to which it was put by the Security Service, in general, in no way related to the Income Tax Act. He was also aware that there was a difficulty created by section 133 of the Income Tax Act (Vol. 111, p. 17117).

Conclusion

18. Commissioner Higgitt knew that the Security Service was obtaining information from the Taxation Division of the Department of National Revenue, and that, at the very least, there was a legal issue involved. Yet he took no steps to stop the practice, or obtain legal advice from the Department of Justice.

(b) Mr. John Starnes

Summary of evidence

19. Mr. Starnes stated that he had no recollection of the fact that there were arrangements whereby members of the Security Service could obtain informa-

tion from the records of the Department of National Revenue (Vol. 149, pp. 22826, 22835). He then stated that his knowledge depended on the point in time being referred to but said firmly that as of 1970 he did not know of such arrangements (Vol. 149, p. 22871). He subsequently said that he "must have been" aware of the arrangements (Vol. C96, p. 12849).

Conclusion

20. There is no evidence to suggest that Mr. Starnes knew of the arrangement that existed with X, the Security Service source who was an employee of the Department of National Revenue. Indeed, our knowledge of the sensitivity of members of the Security Service with regard to the identity of human sources would support the inference that, as there was no *need* for Mr. Starnes to know that access to tax information existed, there was no reason to tell him. Assistant Commissioner Parent, the Deputy Director General on August 20, 1971, in the memorandum to the Commanding Officer of "A" Division (Ottawa), in which he stated that the Deputy Minister had agreed verbally to provide information to the Security Service (an agreement and an assertion which we have concluded did not exist), referred to X by the source code number already in use. From this it is reasonable to infer that he knew of the existing arrangements for access. However, because Mr. Parent could not testify, we lack his evidence as to whether he told Mr. Starnes the whole story. We do know that on May 20, 1971, Mr. Parent wrote a memo to Mr. Starnes concerning the whole question of access to information in the possession of government departments (Ex. MC-7, Tab 16). He listed several departments, one of which was the Department of National Revenue (Income Tax Division), and said in respect of them that "we have had varying degrees of co-operation [with them] in the past", but that they "have now applied controls to the extent that we are virtually without access in all...[the departments]. . . listed".. . . He also discussed the lack of progress being made by the C.I.B. in obtaining Cabinet approval for the arrangement it was seeking, and suggested that the Security Service should launch its own initiative, although nowhere in the memorandum did he advise Mr. Starnes clearly that a firm arrangement was already in existence with a source. In our opinion Mr. Parent's memorandum connoted that for all practical purposes access to information in the hands of the Income Tax Division of the Department of National Revenue was no longer available to the Security Service. Consequently, we conclude from the evidence that Mr. Starnes was not aware that such access continued. There is no reference in Mr. Parent's memorandum to any question of illegality with respect to such access.

(c) Mr. M.R. Dare

Summary of evidence

21. Mr. Dare was aware of the arrangement for access from about 1974. He knew that it was solely for the purposes of the Security Service and in no way intended for the purpose of the collection of income tax (Vol. 126, p. 19707). But he says that he did not consider that it was illegal and that at no time was he aware of the existence of section 133 of the Income Tax Act (Vol. 126, p.

19709). Consequently, he did not address his mind to whether the arrangement was contrary to the instructions he gave in his letter of May 22, 1975, that investigations were to be "within the limits of the law" (Vol. 126, p. 19714).

Conclusion

22. Mr. Dare knew of this access but we believe that he did not know of the legal problem or address his mind to it.

(d) *Commissioner Maurice Nadon*

Summary of evidence

23. Commissioner Nadon testified that it was "standard practice" for the Security Service to obtain information from the D.N.R. But, he told us, as far as he was concerned it was legal because of the nature of the information that was provided (Vol. C61, p. 8492).

Conclusion

24. Commissioner Nadon knew of this practice but thought it was legal.

(e) The Honourable George T. McIlraith

Summary of evidence

25. Commissioner Higgitt stated, in a longhand note to Mr. Starnes on September 23, 1970, that he had raised the issue of access to income tax records with Mr. McIlraith "a number of times" and said he would "do so again". The note continued:

> He has not as yet been able to get the Ministry of National Revenue to give his department the necessary instructions to cooperate even though he seems to be favourably inclined himself...
>
> (Ex. MC-8, Tab 9.)

Commissioner Higgitt was not asked whether he told Mr. McIlraith, but it will be recalled that he testified that neither he, nor, as far as he knows, anyone else on behalf of the Force told Mr. McIlraith (or Mr. Goyer) that the Department of National Revenue was providing tax information to the C.I.B. (Vol. 85, p. 14023). If he did not tell Mr. McIlraith about the C.I.B.'s arrangements, it is unlikely that he discussed with him the even more sensitive matter of the Security Service.

26. There is no evidence that Mr. Starnes told Mr. McIlraith of this access. Indeed, we have found that he did not know of it. Therefore, he could not have told Mr. McIlraith.

Conclusion

27. We have no reason to believe that Mr. McIlraith knew of this practice.

(f) The Honourable Jean-Pierre Goyer

Summary of evidence

28. Mr. Goyer denies having had any knowledge that information obtained by the D.N.R. under the Income Tax Act was provided to the Security Service (Vol. C50, pp. 6845-6). He says that, apart from having written to Mr. Gray on July 27, 1971, and subsequently being told by Mr. Gray that his Department was studying the matter, he had no contact whatever with anyone in the D.N.R. about his request that the D.N.R. provide income tax information to the Security Service.

Conclusion

29. There is no evidence to suggest that Commissioner Higgitt or Mr. Starnes or anyone else from the R.C.M.P. told Mr. Goyer that the Security Service had access to this kind of information. We believe that he had no knowledge of access.

(g) The Honourable Warren Allmand

Summary of evidence

30. Mr. Allmand denies that he was aware of any relationship between the Department of National Revenue and the Security Service whereby the Department provided tax information to the Security Service (Vol. 114, p. 17637). He also testified that he was never told by the Security Service they needed access to such information in order to carry out their duties — in other words, the issue was not raised with him, even in general terms. He does not have a clear memory of co-operation between the Department and the C.I.B. in connection with organized crime (Vol. 114, p. 17638-9). Mr. Dare told us that he does not recall any discussion with Mr. Allmand on this matter (Vol. 128, pp. 19909-10).

Conclusion

31. There is no evidence to suggest that anyone told Mr. Allmand of this practice. We believe that he had no knowledge of the access.

(h) The Honourable Francis Fox

32. We have no evidence that Mr. Fox was informed of this practice.

(i) Mr. R. Tassé and Mr. R. Bourne

Summary of evidence

33. Mr. Tassé testified that he did not know that members of the Security Service, whether pursuant to an agreement or not, obtained information from employees of the D.N.R. (Vol. 157, p. 23852). Mr. Bourne said that he was not aware of any agreement that was reached in connection with access by the Security Service to information in the possession of the D.N.R. (Vol. C85, p. 11682).

Conclusion

34. We accept the evidence of these public servants that they did not know of this relationship. Their ignorance of it fortifies our conclusion that Mr. Goyer, Mr. Allmand and Mr. Fox were unaware of its existence.

(j) The Honourable Bud Cullen

Summary of evidence

35. Mr. Cullen, who was Minister of National Revenue from September 26, 1975, to September 14, 1976, testified that at no time did he know that any member of the Department of National Revenue furnished to the Security Service, for purposes unrelated to the Income Tax Act, information which had been obtained from taxpayers under that Act (Vol. 117, pp. 18235-6).

Conclusion

36. The evidence of Mr. Cloutier, the Deputy Minister, was that he was not aware of the relationship with the Security Service. It supports Mr. Cullen's evidence that *he* did not know either. Furthermore, everything in the evidence of X (summarized in Part III, Chapter 6, of our Second Report) points to that source having acted on his or her own initiative and without telling anyone else in the Department. There is no evidence that suggests knowledge on Mr. Cullen's part, and we believe that he did not have knowledge.

C. KNOWLEDGE BY SENIOR MEMBERS OF THE R.C.M.P., AND MINISTERS OF THE LIAISON BETWEEN THE SECURITY SERVICE AND THE UNEMPLOYMENT INSURANCE COMMISSION

(a) Mr. John Starnes

Summary of evidence

37. Mr. Starnes testified that he has no recollection of being aware of any *ad hoc* arrangements which may have existed in the field between members of the Security Service and employees of the Unemployment Insurance Commission (Vol. 149, pp. 22799, 22824-26). A memorandum written by Assistant Commissioner Parent to Mr. Starnes on May 20, 1971, (Ex. MC-7, Tab 16) informed him that the R.C.M.P. had had co-operation from the Unemployment Insurance Commission, but that access to their information was now virtually non-existent.

Conclusion

38. We conclude that Mr. Starnes was aware that information had been obtained by the Security Service from the Unemployment Insurance Commission and that Mr. Parent's memorandum informed him that such access to information was no longer available. There is no reference in Mr. Parent's memorandum to any question of illegality with respect to such access.

(b) Others

39. With respect to Messrs. Higgitt, Nadon and Tassé and former Solicitors General McIlraith, Goyer, Allmand and Fox, our perception of their knowledge of the liaison between the Force and the U.I.C. may be found in Chapter 4 of Part III of this Report.

D. KNOWLEDGE OF SENIOR MEMBERS OF THE R.C.M.P. OF THE LIAISON BETWEEN THE SECURITY SERVICE AND THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE

(a) Mr. John Starnes

Summary of evidence

40. The memorandum written to Mr. Starnes on May 20, 1971, mentioned previously, (Ex. MC-7, Tab 16) informed him that the R.C.M.P. had had co-operation from the Department of National Health and Welfare, but that access to their information was now virtually non-existent except for some field level sources.

Conclusion

41. We therefore conclude that Mr. Starnes was aware that information had been obtained by the Security Service from the Department of National Health and Welfare and that Mr. Parent's memorandum informed him that such access to information was no longer available. There is no reference in Mr. Parent's memorandum to any question of illegality with respect to such access.

(b) Others

42. With respect to other senior members of the R.C.M.P. and Ministers, our perception of their knowledge of any liaison between the Force and the Department of National Health and Welfare may be found in Chapter 4 of Part III of this Report.