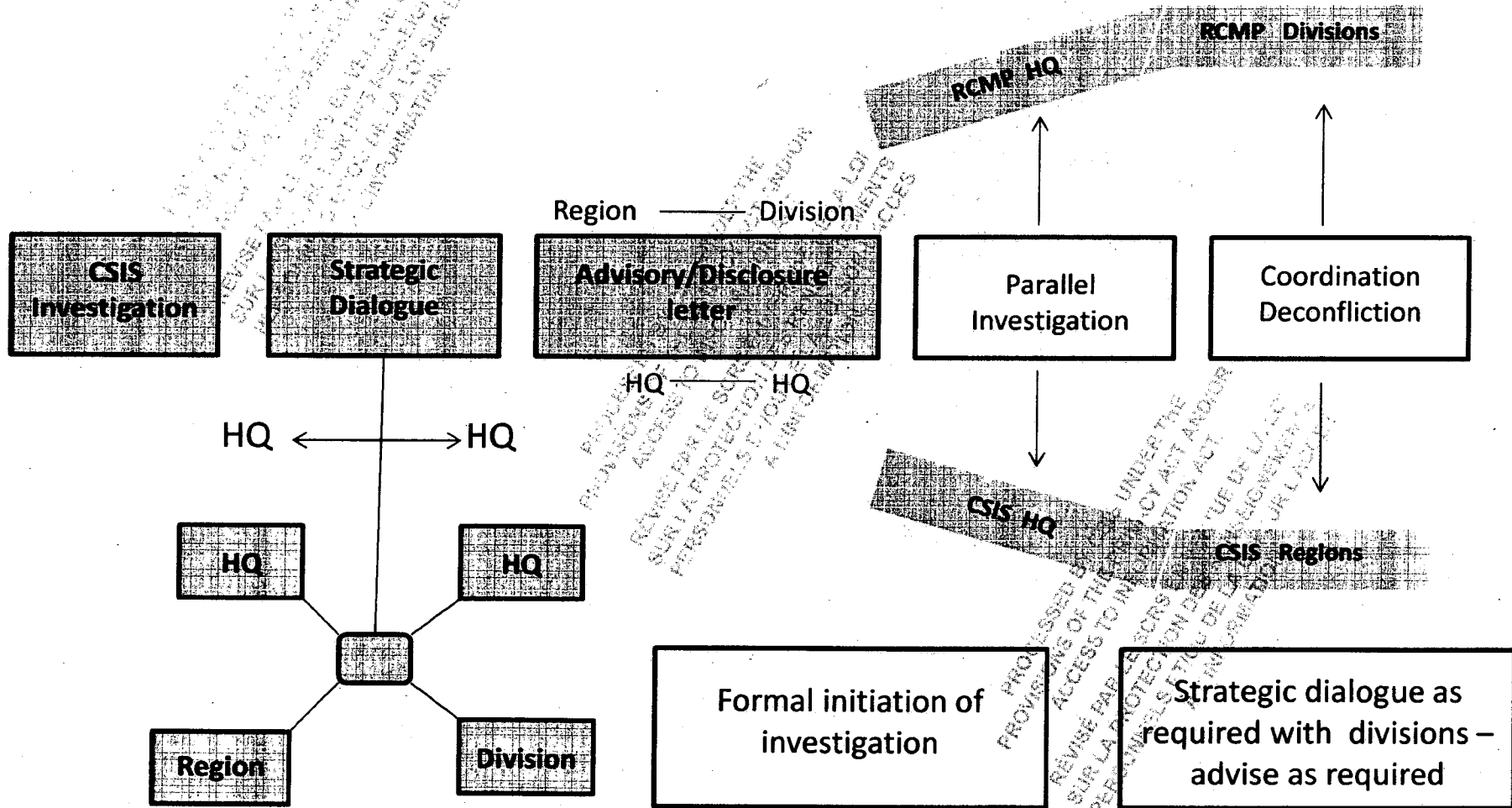


CSIS and RCMP  
One Vision

**An Operational Approach to  
Intelligence and Evidence**

# Intelligence and Evidence Flow



# Introduction

- The following is to assist CSIS and the RCMP to formalize the transition of intelligence into the criminal justice system. It is recognized that the “intelligence to evidence” issue is complicated and evolving. It is subject to legislation and judicial precedent; it is informed by commissions of inquiry; it is affected by our respective policies and procedures; it is guided and assisted by training and mutual understanding. The goal is to create a framework for cooperation - a framework that can be explained to and defended before the courts, and that maintains and creates both an appropriate degree of separation and a functionally operational relationship between CSIS and the RCMP

*“It is my firm view that the distinction between policing and security intelligence should be restored, respected and preserved. I am convinced that Canadians will be best served if the RCMP and CSIS both operate within their distinct mandates and expertise, while sharing information when appropriate and working together in a cooperative and integrated manner”.*

(Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar - hereinafter referred to as the “O’Connor Commission” - Report of the Events Relating to Maher Arar, Analysis and Recommendations, pg. 312)

# Principles

- Public safety is paramount.

“Before I begin, however, I wish to draw attention to one pervasive feature of the RCMP’s national security role: the Force’s response to criminal threats to national security, like the government’s response to national security threats in general, is continuously evolving.”

(O’Connor Commission, ‘A New Review Mechanism for the RCMP’s National Security Activities, pg. 84)

*“To be sure, terrorism is a crime unto itself. It has no equal. It does not stop at, nor is it limited to, the senseless destruction of people and property. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe values which form the essence of our constitutional democracy.”*

(Court of Appeal for Ontario, R.v. Khawaja, Dec. 17, 2010, paragraph 231)

# Principles

- Always consider the effect of your actions upon the other agency.

“When information from a CSIS operation seeps into a police investigation it will often have to be disclosed. In some cases that can lead to the termination of prosecutions or police investigations in order to protect intelligence sources. That is highly undesirable from a police perspective. On the other hand, should intelligence gathering methods or sources used by CSIS be compromised by disclosure, for example during the criminal process, this can be very harmful to the effectiveness of CSIS operations on an ongoing basis. Consequently, both organizations have a distinct interest in maintaining a degree of separation between their operations. Avoiding such problems is clearly in the public interest.”

(Mr. Justice Dawson, Ruling No. 14, paragraph 33)

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# Principles

- Earlier is better when discussing strategy, seeking legal advice, identifying problems and sharing information.

“At the risk of oversimplification, one of the main concerns is contaminating the police investigation with information gathered by CSIS pursuant to its separate mandate. When that occurs it creates problems for each organization in carrying out its respective role.”

(Mr. Justice Dawson, Ruling No. 14, paragraph 31)

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# Principles

- Focusing the information to be disclosed by CSIS will assist both organizations and avoid future problems.

*“CSIS was giving limited information to the RCMP for the purpose of respecting the legislation under which it operates and to ensure that it maintained an appropriate degree of separation from the RCMP.”*

*(Mr. Justice Dawson, Ruling No. 14, paragraph 65)*

# Principles

- Every investigation is different; it is critical to have a consistent process which will recognize and manage these differences.

*“However, it is imperative that a special effort be made by all personnel in each institution to develop a better understanding and appreciation of the mandate and role of the other... Secondments and joint training and information programs would be ways of promoting better understanding and cooperation.”*

*(O'Connor Commission, Report of the Events Relating to Maher Arar, Analysis and Recommendations, pg. 319)*

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# Foundational Criteria for National Security Criminal Investigations

- The initiation of a criminal investigation must be based on a reasonable suspicion or belief that criminal activity has occurred or may occur. The following may initiate a disclosure from CSIS to the RCMP:
  - Information and intelligence (foundational to the initiation of an investigation), which may indicate criminal activity ;
  - An element of an offence under the *Security Offences Act* or any other act of Parliament;
  - An imminent threat;
  - A pattern or behavior that may constitute a threat to the security of Canada.

# Assessment Process Prior to Disclosure Under Section 19, *CSIS Act*

- CSIS receives information and intelligence.
- CSIS makes an assessment which requires a consideration of:
  - The threat to the security of Canada;
  - The nature and seriousness of the potential criminal activity ;
  - The impact that sharing the information may have on the Service's investigations (sources, methods and operations, including the management of third party information);
  - The impact of judicial disclosure obligations on a CSIS investigation;
  - The merit and impact of involving other stakeholders (e.g. CBSA, CRA, foreign and domestic agencies).

# Assessment Process Prior to Disclosure Under Section 19, CSIS Act

- It is recognized that, depending on the nature of the case, the RCMP will wish to be informed about the following information:
  - The subject of the investigation (“who”);
  - The activity (“what”);
  - The time frame (“when”);
  - The location (“where”);
  - The motivation, if known (“why”).

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# Strategic Consultations

- If deemed appropriate by CSIS, CSIS will contact the RCMP to initiate the consultative process. The process will consist of a meeting(s) between the RCMP and CSIS to assess the magnitude and scale of the information and intelligence based on the foundational criteria.

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# Disclosure Under Section 19, CSIS Act

- Contingent upon the results of the foregoing consultation CSIS may initiate a disclosure process.
- The RCMP will, upon receipt of the letter, disseminate as deemed appropriate.
- As soon as practical, the RCMP will advise CSIS of what investigational avenue the RCMP will pursue, if any, based on the information and intelligence CSIS shared.

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# During the Criminal Investigation

- Adherence to these guidelines will help ensure that the RCMP criminal investigation remains separate, distinct and parallel to any CSIS investigation.
- It is recognized that there will be a continuing need for coordination and de-confliction between the two investigations that may lead to disclosure.

“... they understood the need to share certain information of fundamental importance while ensuring a careful separation between their investigations. The evidence indicated that care was taken to ensure that there was a form of “firewall” between the two organizations, through which only certain limited information would be permitted to pass. ...Mr. Brooks and Inspector Jagoe understood that certain information would only be used by Inspector Jagoe for strategic purposes, such as the allocation of resources.”

(Mr. Justice Dawson, Ruling No. 14, paragraph 41)

# During the Criminal Investigation

- There is a continuing requirement for CSIS to report to government on threat-related activities and the RCMP can assist in that regard.

“The evidence reveals that there was a much larger flow of information from the RCMP to CSIS than the other way around. CSIS came to rely on the RCMP providing information from the Osage investigation to satisfy aspects of CSIS’s mandate. The evidence is quite clear, however, that the information flow from CSIS to the RCMP was very limited and carefully controlled.”

(Mr. Justice Dawson, Ruling No. 14, paragraph 43)

# During the Criminal Investigation

- Ongoing inter-agency dialogue may be appropriate to ensure public safety concerns are met and all options are explored.

“The evidence established that the JMTs involved other agencies and police forces as well, and I am satisfied that the exchange of information was restricted to ensuring awareness of each other’s general operations and projects for management purposes. The evidence did not reveal that such meetings were used to pass detailed information that might be regarded as fruits of the investigations.”

(Mr. Justice Dawson, Ruling No. 14, paragraph 40)



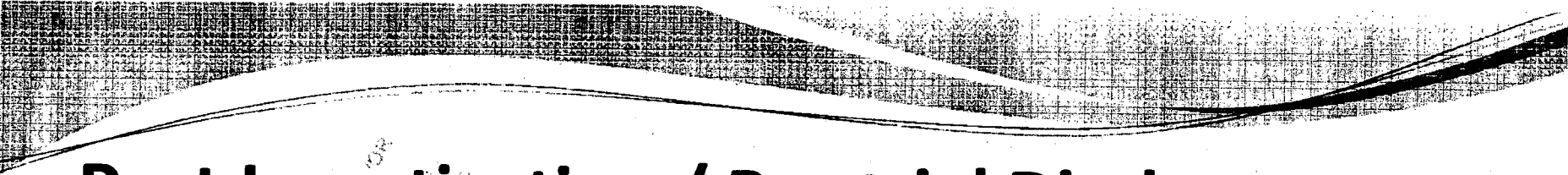
# During the Criminal Investigation

- CSIS, when conducting a parallel investigation, may disclose additional information and/or intelligence consistent with the principles outlined in this document.
- The RCMP will provide CSIS with information and/or intelligence.

“While CSIS faces potentially adverse consequences as a result of sharing information with the police, there are no similar consequences for other agencies that share information with CSIS. There is no excuse for any agency failing to share information with CSIS. Security-related threat information collected by the RCMP for law enforcement purposes can, and ought to be, shared with CSIS in all but the rarest of circumstances. The Commission does not view the report or recommendations of the O’Connor Commission as being in any way inconsistent with this observation.”

(Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 - hereinafter referred to as the “Air India Commission” - Volume One, *The Overview*, pg. 167)

- In accordance with policy, CSIS and the RCMP will ensure the retention of information, intelligence and evidence.



# Post Investigation / Pre-trial Disclosure (Stinchcombe)

- The responsibility for disclosure belongs to the Crown.
- Ongoing inter-agency consultation to ensure the appropriate use of sensitive national security information and its protection as required.

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## THE RCMP'S NATIONAL SECURITY ACTIVITIES

(Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar - hereinafter referred to as the "O'Connor Commission" - Report of the Events Relating to Maher Arar, Analysis and Recommendations, pg. 312)  
[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/AR\\_English.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf)

### Recommendation 1

The RCMP should ensure that its activities in matters relating to national security are properly within its mandate as a law enforcement agency.

#### A) RCMP MANDATE

The RCMP should take active steps to ensure that it stays within its mandate as a police force to perform the duties of peace officers in preventing and prosecuting crime. It should ensure that it respects the distinct role of CSIS in collecting and analyzing information and intelligence relating to threats to the security of Canada.

This recommendation is aimed at reinforcing the division of functions between the RCMP and CSIS set out in the second report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission report).<sup>2</sup> The basic principles that underlay that report continue to apply today, even though the need for co-operation and information sharing between the two agencies has increased since the events of September 11, 2001.

Some have suggested that Canada's response to the events of September 11, 2001, including the enactment of the *Anti-terrorism Act* and implementation of new forms of intelligence-led and integrated policing, has blurred the distinction between the roles of the RCMP and CSIS. If so, it is my firm view that the distinction between policing and security intelligence should be restored, respected and preserved. I am convinced that Canadians will be best served if the RCMP and CSIS both operate within their distinct mandates and expertise, while sharing information when appropriate and working together in a co-operative and integrated manner.

In his John Tait Memorial Lecture in 2003, Ward Elcock, then Director of CSIS, reflected on the differences between law enforcement and security intelligence:

Law enforcement is generally reactive; it essentially takes place after the commission of a distinct criminal offence. Police officers are results-oriented, in the sense that they seek prosecution of wrong doers. They work on a "closed" system of limits defined by the Criminal Code, other statutes and the courts. Within that framework,

they often tend to operate in a highly decentralized mode. Police construct a chain of evidence that is gathered and used to support criminal convictions in trials where witnesses are legally obliged to testify. Trials are public events that receive considerable publicity.

Security intelligence work is, by contrast, preventive and information-oriented. At its best, it occurs before violent events occur, in order to equip police and other authorities to deal with them. Information is gathered from people who are not compelled by law to divulge it. Intelligence officers have a much less clearly defined role, which works best in a highly centralized management structure. They are interested in the linkages and associations of people who may never commit a criminal act – people who consort with others who may be a direct threat to the interests of the state . . . .3

I agree with Mr. Elcock's analysis, although I would add that the RCMP also has a prevention mandate, which I discuss below.

The mandate of the RCMP under section 18 of the *Royal Canadian Mounted Police Act (RCMP Act)* is to preserve the peace, prevent crimes and offences under the laws of Canada, and perform the duties of peace officers.<sup>4</sup> In fulfilling its law enforcement mandate, the RCMP collects evidence and exercises special powers, many of which are intrusive, such as powers of search and arrest. It is because of those intrusive powers, which are necessary for a law enforcement agency, that it is important that the RCMP confine its activities to those that warrant their use. The trigger for many law enforcement powers is the actual or anticipated breach of a law. Thus, the RCMP's mandate is directed at the prevention and prosecution of criminal or other offences, including the many new crimes created by the *Anti-terrorism Act*. Unless there is a link to illegal or criminal activity, a law enforcement agency such as the RCMP should not become involved in an investigation.

It would be wrong, however, to conclude that respecting its institutional mandate requires the RCMP to wait until an act of terrorism has occurred before taking action. The RCMP's mandate includes preventing crime, not just investigating it after the fact. Moreover, many crimes related to terrorism are committed long before a terrorist act causes actual harm. The RCMP's mandate has always involved investigating conspiracies, attempts and counselling of serious crimes. Since the enactment of the *Anti-terrorism Act*, it has also entailed investigating a broad range of acts related to potential terrorist activities, such as the financing and counselling of terrorism, participation in terrorist groups, and related attempts, conspiracies, and threats.

The mandate of the RCMP can be better understood by comparing it to that of CSIS. CSIS is an intelligence agency. It is directed to collect and analyze information and report to government, in order to assist government in developing policy relating to Canada's national security. CSIS may be asked by the Minister

of National Defence and the Minister of Foreign Affairs to collect information and intelligence in relation to national defence and the conduct of Canada's international affairs,<sup>5</sup> and it is subject to the special requirement that its director and an inspector general regularly report to the responsible minister on the "operational activities of the Service."<sup>6</sup> Thus, Parliament intended that CSIS provide services to government that are essentially directed at gathering and analyzing information. Unlike RCMP officers, CSIS personnel are not peace officers and do not exercise law enforcement powers to collect evidence and make arrests. Moreover, the relationship between the responsible minister and CSIS is not coloured by special concerns about protecting police independence, as is the case with the RCMP.<sup>7</sup>

Some might argue that having to ensure that the RCMP's national security activities, including the gathering of information and intelligence, always relate to its policing and crime-based mandate might place national security at risk. Given the magnitude of the harms of terrorism, as reflected in tragedies such as the bombing of Air India Flight 182 and the 9/11 attacks, they may say that the RCMP can no longer restrict itself to law enforcement concerns. I reject this argument, both on principle and for practical reasons.

At stake are the principle of respect for the rule of law and lengthy democratic tradition. All agencies of government must act within their statutory mandates. The current statutory framework appropriately confers on the RCMP the powers associated with and necessary for the enforcement of laws. While the *Anti-terrorism Act* has expanded both offences and the powers available to the RCMP, it also imposes a variety of special safeguards, such as prior approvals by attorneys general and the courts. And the fact remains that, as has long been the tradition, police in a democracy should be concerned primarily with law enforcement, even in the national security context. They should respect these constraints on their powers and expect that the legality of their actions will be reviewed.

Legal obligations aside, adherence by the RCMP and CSIS to their distinct mandates also makes practical sense. CSIS has special expertise and capacity to collect information and to apply analytical skills to that information to produce the intelligence necessary to inform government about threats to Canada's national security. This involves a very different expertise and a different relationship with government than that required by the RCMP for its law enforcement activities. Although both investigate and collect information, the context within which they do so, the purpose for collecting the information and the use to which the information is put are very different.

If the RCMP is not receiving adequate intelligence about threats to the security of Canada from CSIS, the answer lies in improving relations between the RCMP and CSIS, not in reformulating their respective mandates or going back to the days before CSIS was created and developing an intelligence capacity within the RCMP that is not related to its crime-based mandate and expertise.

## B) INTELLIGENCE-LED POLICING

The RCMP should continue to develop its capacity for intelligence-led policing while ensuring that it remains within its law enforcement mandate.

In recent years, the RCMP has increased its capacity for and use of intelligence-led policing significantly. This has been an important and valuable response to the increasingly complex and sophisticated criminal activities that it is required to investigate. Ensuring that the RCMP remains within its law enforcement mandate need not interfere with the use of intelligence-led policing.

From the RCMP's standpoint, intelligence can be understood as information developed to direct police action. In this sense, it is not the same as the work product of CSIS or other intelligence collectors. Rather, it is the strategic, tactical and background information that any large organization requires in order to direct its actions and limited resources in an intelligent and focussed manner.

The *Criminal Intelligence Program Implementation Guide* issued by the RCMP in June 1991 recognized that "the failure to develop a sophisticated strategic as well as tactical intelligence capability within the RCMP has seriously hindered the Force's ability to accurately measure and prevent crime having an organized, serious or national security dimension in Canada, or internationally as it affects Canada."<sup>8</sup> At the same time, the Guide appropriately warned, "it is important that any information collected by the RCMP be pursuant to its law enforcement mandate."<sup>9</sup>

The RCMP's *Criminal Intelligence Program Guide* issued in May 2001 contemplates collection of criminal intelligence in relation to threat assessment, target selection and target tracking. The focus with respect to individual targets is on investigation "to the point of either confirming or disproving the involvement of criminal activity."<sup>10</sup> This focus on criminal activity properly reflects the RCMP's crime-based mandate.

The RCMP's new orientation to "intelligence-led policing" does not mean that the Force's functions extend or should extend beyond its law enforcement mandate. Any information collected by the RCMP should be used to direct legitimate police action related to preservation of the peace, prevention of crime, and investigation and prosecution of crime.

## C) INTERNAL CONTROLS

The RCMP should establish internal controls for all national security investigations to ensure that, when commencing and carrying out investigations and collecting information, it is properly within its law enforcement mandate to prevent, investigate and prosecute crimes.

The following internal controls will help to ensure the RCMP stays within its mandate during national security investigations.

To begin with, the RCMP should take steps to ensure that information about persons that is received from CSIS and other sources falls within its law enforcement mandate and is properly classified.

Further, the RCMP should ensure that individuals being investigated come within its crime-based mandate. In the early stages of a national security investigation, it is sometimes difficult to determine if an individual's activities are criminal in nature, but the RCMP must reach a conclusion nonetheless. If it concludes that a crime-based mandate is lacking, but has concerns about a connection between the person and threats to the security of Canada, the RCMP should provide CSIS with the relevant information so that CSIS may carry out its own investigation. The RCMP should not be reluctant to transfer or return investigations not within its crime-based mandate to CSIS.<sup>11</sup>

The RCMP should also review investigations periodically to be certain that both the investigation and the targets of the investigation remain within its crimebased mandate. Controls designed to ensure that RCMP activities are properly within its law enforcement mandate are necessary to guarantee respect for the rule of law and the proper institutional division of functions between the RCMP and intelligence agencies such as CSIS. In the Policy Review report, I recommend that the review body responsible for reviewing RCMP national security activities specifically focus on ensuring that those activities come within the Force's mandate as a law enforcement agency.

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(O'Connor Commission, 'A New Review Mechanism for the RCMP's National Security Activities, pg. 84)

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Before I begin, however, I wish to draw attention to one pervasive feature of the RCMP's national security role: the Force's response to criminal threats to national security, like the government's response to national security threats in general, is continuously evolving. Many of the threats currently faced by Canada are different from in the past. It is therefore not surprising that the response to them is modified and adapted regularly. Significant changes have been made to the RCMP's national security activities even during the conduct of this Inquiry and, as I drafted this Report, I became aware of further proposals for changes. Two points thus arise: first, some of the details discussed herein may be out of date soon after this report is published; second, it is important that the evolving nature of RCMP national security activities — indeed, of the government's approach in general — be borne in mind in addressing the issue of a review mechanism. An effective mechanism must have the capability to adapt to change.

2.

## ORGANIZATIONAL OVERVIEW

A discussion of the RCMP's national security activities requires a look at the context in which the Force carries out those activities, including how the activities fit into the organization as a whole and into the RCMP chain of command. I therefore begin with a description of the administrative organization in relation to the RCMP's national security activities. Following that, I set out a number of factors relevant to context, including ministerial directives and internal policies governing national security activities, the RCMP's internal accountability mechanisms, the number of RCMP personnel engaged in national security, and recruitment and training requirements in respect of those activities.

2.1

### ORGANIZATION OF RCMP NATIONAL SECURITY ACTIVITIES

The Commissioner of the RCMP is assisted in the management and control of the Force by a number of deputy commissioners: one for each RCMP region or division (Atlantic, Central, North West and Pacific) and one each for Strategic Direction, Corporate Management and Operations (see Chart 1, p. 86). The Deputy Commissioner, Operations, is responsible for the RCMP's national security mandate, as well as for federal and international operations, protective policing, community, contract and Aboriginal police services (CCAPS), criminal intelligence, and technical operations.

National security matters have come within the ambit of the Criminal Intelligence Directorate (CID) since this important component of intelligence-led



policing was created in 1991. CID is headed by the Assistant Commissioner, CID, who reports to the Deputy Commissioner, Operations. In addition to its national security function, discussed below, CID includes the Criminal Intelligence Support Branch, Organized Crime Intelligence Branch, National Operations Centre and Director General, Intelligence Analysis and Communications.

In 2003, a new reporting function was created directly under the Assistant Commissioner, CID: the Director General, National Security. The Director General heads the National Security Directorate, which has three branches: the National Security Intelligence Branch (NSIB), National Security Operations Branch (NSOB) and Threat Assessment Branch (see Chart 2, p. 87).

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(Court of Appeal for Ontario, R.v. Khawaja, Dec. 17, 2010, paragraph 231)  
<http://www.canlii.org/en/on/onca/doc/2010/2010onca862/2010onca862.html>

**The Trial Judge Erred in his Overall Approach to Sentencing and Imposed a Sentence that is Manifestly Unfit**  
**(i) The Sentence does not Reflect the Unique Nature of Terrorism-Related Offences**

[230] The appellant was an active member of a terrorist group whose singular goal was to eradicate western culture and civilization and establish Islamic dominance wherever possible. He was prepared to go anywhere and do anything for the violent Jihadist cause. At the time of his arrest, he was in possession of a prototype remote detonator device and had promised to build 30 more such devices for the Khyam group. As found by the trial judge at para. 32, this device was “intended to unleash fireworks at other as yet unspecified places in aid of the jihad.” The appellant was a willing participant in activity that he knew was likely to result in the indiscriminate killing of innocent human beings on a potentially massive scale. It is hard to imagine a more odious inchoate crime.

[231] To be sure, terrorism is a crime unto itself. It has no equal. It does not stop at, nor is it limited to, the senseless destruction of people and property. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe – values that form the essence of our constitutional democracy.

[232] Much has been written about the features of terrorism that distinguish it from other crimes and place it in a category of its own. In *R. v. Elomar*, [2010] NSWSC 10 – an Australian case bearing many similarities to the present case – Whealy J. made the following observations about terrorism at para. 63:

The mindset evinced by all this [extremist] material may be summarised as follows: First, a hatred of the “KUFR”, that is those Muslims and non-Muslims who did not share their extremist views. Secondly, an intolerance towards the democratic Australian Government and its policies. Thirdly, a conviction that Muslims are obligated by their religion to pursue violent jihad for the purposes of overthrowing liberal democratic societies and to replace them with Islamic rule and Sharia law. *This criminal enterprise was not in any sense motivated, as criminal activities so often are, by a need for financial gain or simply private revenge. Rather, an intolerant and inflexible fundamentalist religious conviction was the principle motivation for the commission of the*

*offence. This is the most startling and intransigent feature of the crime. It sets it apart from other criminal enterprises motivated by financial gain, by passion, anger or revenge.*

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(Mr. Justice Dawson, Toronto 18, Operation CLAYMORE  
Ruling No. 14, paragraph 33)

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COURT FILE NO.: CRIMJ(F)2025/07  
DATE: 20090508

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )

HER MAJESTY THE QUEEN )

) Croft Michaelson and Marco Mendicino,  
) for the Respondent; Charlene Brenzall,  
) Howard Pfafsky and Natalie Herein for  
) the Canadian Security Intelligence  
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) HEARD: March 30, 31 and April 1, 2, 7, 8,  
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RULING NO. 14

CSIS Disclosure Motion: *Stinchcombe* or *O'Connor*?

(Mr. Justice Dawson, Ruling No. 14, paragraph 33)

[33] When information from a CSIS operation seeps into a police investigation it will often have to be disclosed. In some cases that can lead to the termination of prosecutions or police investigations in order to protect intelligence sources. That is highly undesirable from a police perspective. On the other hand, should intelligence gathering methods or sources used by CSIS be compromised by disclosure, for example during the criminal process, this can be very harmful to the effectiveness of CSIS operations on an ongoing basis. Consequently, both organizations have a distinct interest in maintaining a degree of separation between their operations. Avoiding such problems is clearly in the public interest.

[34] At the same time, situations will arise where some sharing of information must occur if each organization is to fulfill its mandate. For example, where CSIS comes into possession of information of a real threat to national security, or learns of serious criminal activity, it must notify the RCMP. As Mr. Brooks indicated at para. 15 of his affidavit, CSIS will normally be engaged in the investigation of threats to the security of Canada before the police would have sufficient evidence to commence an investigation on their own. He also points out in his evidence that intelligence gathering investigations are very open ended and wide ranging, with the focus on looking for trends and relationships to help predict emerging or future threats. Such investigations are not oriented towards prosecution. It is the function of the police to react to any information provided by CSIS and to determine how best to proceed from a police perspective.

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**RULING NO. 14**

**CSIS Disclosure Motion: Stinchcombe or O'Connor?**

(Mr. Justice Dawson, Ruling No. 14, paragraph 31)

[30] Retired Superintendent Richard Reynolds of the RCMP also filed an affidavit and testified. Before he retired, and at the time of this investigation, he was the Officer in Charge of the National Security Criminal Operations Branch of the RCMP at RCMP Headquarters in Ottawa.

[31] Each of these witnesses provided clear evidence in their affidavits and testimony of a sound understanding of the importance of maintaining a distinction between the role of CSIS and the role of the police in circumstances where there is overlap in their independent investigations. At the risk of oversimplification, one of the main concerns is contaminating the police investigation with information gathered by CSIS pursuant to its separate mandate. When that occurs it creates problems for each organization in carrying out its respective role.

[32] For example, the RCMP is a police force with policing duties described in ss. 17 and 18 of the *RCMP Act*, R.S. 1985, c. R-10, and s. 6 of the *Security Offences Act*, R.S. 1985, c. S-7. One of its main functions and duties is to mount investigations that lead to the successful prosecution of those who break the law. CSIS, on the other hand, is an intelligence gathering agency which collects and analyses information (not evidence) for the purpose of advising government. The RCMP works in a forensic environment where evidence must be collected in a manner which renders it admissible, and is subject to having the fruits of its investigations disclosed publicly in the course of criminal prosecutions. CSIS relies on information from many sources, including foreign governments and intelligence agencies and covert domestic sources. Most of those sources must be protected if CSIS is to remain effective. Intelligence information shared by foreign agencies is received on the basis it will be protected.

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**RULING NO. 14**



**CSIS Disclosure Motion: *Stinchcombe* or *O'Connor*?**

(Mr. Justice Dawson, Ruling No. 14, paragraph 65)

[64] While it is true that information collected from both of the civilian agents was passed back to CSIS there is no evidence that CSIS was tasking or directing the agents. The fact that CSIS was relying upon information provided by the RCMP investigation does not indicate that a joint investigation was being conducted. As I have emphasized, the evidence demonstrates that only a limited amount of controlled and documented information was flowing to the RCMP from CSIS. CSIS was not directing the police investigation. The RCMP made all decisions about how to conduct their investigation. To the extent the RCMP did receive information from CSIS they were free to act on it or to disregard it as they saw fit. When the RCMP needed clarification, or wanted to be able to rely on information received by CSIS for warrants or orders, they requested an Advisory Letter. These were separate investigations.

[65] During the cross-examination of Mr. Brooks, Mr. Slansky suggested that CSIS was engaging in an incomplete disclosure process with the police, knowing that if charges were brought and *Stinchcombe* disclosure was made, the accused would be left with an incomplete and misleading picture. In my view, this approach misses the mark when it comes to determining whether CSIS should be regarded as an "other investigating state authority" for the purposes of *McNeil*. CSIS was giving limited information to the RCMP for the purpose of respecting the legislation under which it operates and to ensure that it maintained an appropriate degree of separation from the RCMP. While CSIS may release information pursuant to s. 19(2) of the *CSIS Act*, s. 19(1) provides that information collected in the performance of CSIS duties shall not be otherwise disclosed. While s. 19(2) contains language that accommodates disclosure where required by law, this does not impose a *Stinchcombe* like disclosure obligation on CSIS when determining what information to release to the police for the purpose of national security investigations or to ensure public safety.

[66] Although I have reached the conclusion that in the circumstances of this case CSIS is not an "other state investigating authority" subject to a corollary obligation to provide the contents of its investigation to the Crown, I sought assurance from the Crown that they had complied with their obligation to make efforts to obtain relevant information from CSIS. Everyone agrees CSIS is in possession of some information that is likely relevant to issues that arise in this case.

(O'Connor Commission, 'Report of the Events Relating to  
Maher Arar, Analysis and Recommendations, pg. 319)

[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf)

The events of 9/11 further underlined the need for information sharing and integration between the RCMP and CSIS. The RCMP's institutional response to that development was to take the very important step of setting up Integrated National Security Enforcement Teams (INSETs), with CSIS representation. The RCMP and CSIS should explore other ways to increase the level of co-operation between them. The difference in mandates and, indeed, cultures, need not be a barrier to integrated operations. The report of the U.S. National Commission on Terrorist Attacks upon the United States (9/11 Commission) and the events of the Air India tragedy highlight the importance of institutional co-operation between intelligence and law enforcement investigators. The lessons learned from those experiences must be taken to heart.

During the Inquiry, I had the advantage of hearing testimony from a variety of RCMP and CSIS witnesses, a good deal of which related to the interaction between the two agencies. Although valuable steps have been and continue to be taken, especially at the leadership level, to ensure greater co-operation and understanding between the two agencies, integration is made difficult by the different organizational cultures. Those differences are largely a legitimate, understandable reflection of the different mandates of the two institutions. However, it is imperative that a special effort be made by all personnel in each institution to develop a better understanding and appreciation of the mandate and role of the other. The MOU between the RCMP and CSIS is currently under review. Secondments and joint training and information programs would be ways of promoting better understanding and co-operation.

The framework ultimately developed for the relationship between the two agencies should clearly set out their different mandates and provide for specific ways to promote co-operation. The two agencies should then conduct periodic reviews, to ensure that the objectives of the MOU are being achieved.

### **C) CO-OPERATION WITH OTHER GOVERNMENT AGENCIES AND DEPARTMENTS**

The RCMP should continue to adhere to and refine its policy of co-operating with other federal agencies or departments involved in national security investigations.

Since 9/11, there has been increasing integration of different parts of government involved in national security affairs, both in Canada and elsewhere. The RCMP's integration initiatives with respect to national security matters are not limited to other police forces, but extend to a wide range of other federal departments and agencies. For example, INSETs include representatives of agencies such as the Canada Border Services Agency (CBSA), CSIS, Citizenship and Immigration

Canada (CIC) and the Canada Revenue Agency. Moreover, there has been an increased amount of information sharing among a broad range of federal departments and agencies in relation to these types of investigations. Such integration makes sense given the complexity of national security activities and the involvement of many parts of government in the national security mandate. Agencies such as CSIS and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) have explicit statutory mandates to provide the RCMP with information that is relevant to its crime prevention and investigation mandate.

The increased level of integrated activity makes it essential that there be a clearly articulated framework within which the activity is carried out. I have not heard enough evidence to consider the details of such a framework. However, it is clear that RCMP officers and officials in other agencies should have specific direction about each aspect of their interaction. There should be clear procedures in regard to the sharing of information and the creation of a paper trail to document interaction.<sup>21</sup> In that way, integrated activity can be monitored and reviewed against pre-established norms. The paper trail need not be overly elaborate or legalistic. In some cases, exchanges of letters may suffice, but the ground rules for necessary integration should be clear.

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RULING NO. 14

CSIS Disclosure Motion: *Stinchcombe* or *O'Connor*?

(Mr. Justice Dawson, Ruling No. 14, paragraph 41)

[41] There were also many contacts between Mr. Brooks and Inspector Jagoe. Those took the form of meetings and telephone contacts. They were described as strategic discussions by Mr. Brooks and as theoretical discussions by Inspector Jagoe. I accept the evidence of each of them to the effect that they understood the need to share certain information of fundamental importance while ensuring a careful separation between their investigations. The evidence indicated that care was taken to ensure that there was a form of "firewall" between the two organizations, through which only certain limited information would be permitted to pass. Mr. Brooks isolated himself from the street level investigators and dealt only with Inspector Jagoe and other senior people. Mr. Brooks and Inspector Jagoe understood that certain information would only be used by Inspector Jagoe for strategic purposes, such as the allocation of resources.

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CSIS Disclosure Motion: *Stinchcombe* or *O'Connor*?

(Mr. Justice Dawson, Ruling No. 14, paragraph 43)

[43] Mr. Brooks explained how CSIS had to ensure that the RCMP got onto the right investigative path, without providing more information than was necessary to ensure that public safety was protected. As the RCMP investigation got up and running CSIS monitored it. The evidence reveals that there was a much larger flow of information from the RCMP to CSIS than the other way around. Mr. Brooks testified that as he became more confident in the work the police were doing CSIS pulled back to stay out of the way of the police investigation. CSIS came to rely on the RCMP providing information from the Osage investigation to satisfy aspects of CSIS's mandate. The evidence is quite clear, however, that the information flow from CSIS to the RCMP was very limited and carefully controlled. For example, Mr. Brooks testified that CSIS was aware of the location of the terrorist training camp that was to be held. This information was not provided to the RCMP, who had to uncover that information by their own means. Sometimes CSIS was aware that the RCMP were following the wrong person, or that they had surveillance on a house when the target of the surveillance was not inside, but they did not intervene. Other similar examples were given in evidence.

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CSIS Disclosure Motion: *Stinchcombe* or *O'Connor*?



(Mr. Justice Dawson, Ruling No. 14, paragraph 40)

[40] In addition to the Disclosure and Advisory Letters, some information was shared at meetings of Joint Management Teams (JMT's) that existed at both the regional and national level. The evidence established that the JMT's involved other agencies and police forces as well, and I am satisfied that the exchange of information was restricted to ensuring awareness of each other's general operations and projects for management purposes. The witnesses indicated that everyone involved appreciated the need for separation of investigations. The evidence did not reveal that such meetings were used to pass detailed information that might be regarded as fruits of the investigations. The tenor of the evidence was that one of the purposes of the meetings was to share some information in order to avoid conflicts and to maintain separation between the roles of the police and CSIS operations.

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# Air India Flight 182

## A Canadian Tragedy

### VOLUME ONE

#### The Overview

(Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 - hereinafter referred to as the Air India Commission - Volume One, The Overview, pg. 167)

[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air\\_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/default.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/default.htm)

During the pre-bombing phase, CSIS did not get important information from other agencies, including CSE and the RCMP, and hence was unable to provide a meaningful assessment of the threat to Air India flights. In the post-bombing phase, CSIS collected and dispersed information according to its own rules and intelligence requirements, but in the process made the information unavailable to or unusable by the criminal justice system. This impaired the quality of the evidence available to the prosecution and compromised the fair trial rights of the accused. When CSIS passed information to the RCMP, the RCMP was often careless in respecting caveats or in appropriately protecting sources and methods. As for the criminal justice system, its focus on complete and wide-ranging disclosure repeatedly encountered resistance in the form of the intelligence community's basic imperative to protect the confidentiality of its sources, methods and information.

While CSIS faces potentially adverse consequences as a result of sharing information with the police, there are no similar consequences for other agencies that share information with CSIS. There is no excuse for any agency failing to share information with CSIS. Security-related threat information collected by the RCMP for law enforcement purposes can, and ought to be, shared with CSIS in all but the rarest of circumstances. The Commission does not view the report or recommendations of the O'Connor Commission as being in any way inconsistent with this observation.

Agencies must share information with each other to respond effectively to terrorist threats. However, Canadian agencies have developed a culture of managing information in a manner designed to protect their individual institutional interests. This approach compromises coordination and effective communication among agencies.