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**TOP SECRET – CEO**

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**REVIEW OF THE SECTION 16 PROGRAM  
AND THE USE OF INFORMATION COLLECTED**

**(SIRC STUDY 2009-02)**

**Security Intelligence Review Committee  
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## 1 INTRODUCTION

The *CSIS Act* (1984), separates Section 12 (Security Intelligence or SI) and Section 16 (Foreign Intelligence or FI) collection into distinct entities. The legislation was designed to reflect Parliament's expectations that the collection of SI would be the fledgling Canadian Security Intelligence Service's (CSIS) priority. However, over the last twenty-five years, CSIS has steadily adapted its collection, analysis and dissemination activities to meet increasing Government of Canada (GoC) demands for both security intelligence and foreign intelligence. As a result, by 2010, cumulative changes within CSIS have essentially eroded what were once rigid distinctions between s.12 and s.16. This review examines the Service's s.16 program to assess how these changes came about and what the erosion of the lines between s.12 and s.16 means for CSIS and the GoC.<sup>1</sup>

The study is divided into two sections: the first examines what is meant by Foreign Intelligence (FI) in Canada, and the limited mandate for FI collection initially given to the Service. It also explains why the program has emerged as a Service priority in recent years, and some of the steps taken by CSIS to increase its FI capabilities.

The second section provides some observations on the potential consequences of CSIS's transformation from a SI dominated agency to one that increasingly regards SI and FI as linked priorities.

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1 During the course of our review, SIRC examined a wide assortment of CSIS corporate and operational information, in addition to holding briefings with CSIS representatives from the Operations and Intelligence Directorates. The review period covers January 1, 2006 to June 30, 2009.



## 2 WHAT IS FOREIGN INTELLIGENCE?

The need for, and extent of, Canadian FI capabilities has been a recurrent theme of intelligence debate within Canada for over half a century.<sup>2</sup> During this time, various Governments, as well as this Committee, have examined the utility of Canadians becoming spies, in addition to spycatchers.<sup>3</sup> The consensus has always been that the status quo should be maintained, with Canada gathering the vast majority of its FI through open source collection by the Department of Foreign Affairs and International Trade (DFAIT) and by the Department of National Defence (DND), or from covert, technical source collection through the Communications Security Establishment (CSE). Recently, there has been a marked increase in Government interest in FI,

This section examines the meaning of FI in the Canadian context, and how CSIS's s.16 activities have evolved over time.

FI refers to information concerning the capabilities, intentions or activities of foreign states, corporations or persons. It may include information of a political, economic, military, scientific or social nature and can also have security implications.<sup>5</sup> FI and SI are not mutually exclusive; there are varying degrees of overlap between the two.<sup>6</sup>

Section 16 of the *CSIS Act* permits the Service, at the request of either the Minister of National Defence, or the Minister of Foreign Affairs, to assist in the collection of FI, meaning "information or intelligence related to the capabilities, intentions or activities" of

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- 2 Debate over the extent of Canada's "intelligence deficit" started after World War II. See: Canadian Defence & Foreign Affairs Institute, "CFIS: A Foreign Intelligence Service For Canada," November 2007, at: <http://www.cdfai.org/PDF/CFIS.pdf>
  - 3 SIRC argued against the establishment of a separate foreign intelligence agency in Study 95-05, "Audit of Section 16 Investigations & Foreign Intelligence Reports," February 7, 1997.
  - 4 This debate was reinvigorated in 2006, following a Conservative Party election pledge which argued that if elected, consideration would be given to the creation of a dedicated FI agency in Canada. See: "Using our Own Eyes and Ears," *The Ottawa Citizen*, February 6, 2006, p. A14.
  - 5 Solicitor General of Canada, "On Course: National Security for the 1990s," The Government's Response to the Report of the House of Commons on the Review of the Canadian Security Intelligence Service Act and the Security Offences Act," February 1991, p.51.
  - 6 \_\_\_\_\_ for example, could be construed as an FI priority, however, as it also directly implicates the feasibility of \_\_\_\_\_ it could be interpreted as an SI concern. Therefore, access to such information would both promote and protect Canadian national interests.

foreign entities or persons. A critical restriction placed on CSIS is that s.16 information can only be collected *within Canada*.<sup>7</sup> S.16 also states that CSIS cannot collect information on a Canadian citizen, a permanent resident of Canada, or a corporation incorporated by or under an Act of Parliament or of the legislature of a province.<sup>8</sup>

The domestic restriction on s.16 collection was derived, in part, from Parliament following the advice of the McDonald Commission of Inquiry which had weighed the benefits and disadvantages of a dedicated Canadian foreign intelligence service. McDonald held that FI and SI agencies had divergent goals and *modus operandi*, necessitating different formal controls, and thereby making it “extremely important” to keep these responsibilities separate.<sup>9</sup> Ultimately, following considerable public debate, the Government conceded that CSIS would have to be careful when managing defensive (s.12) and offensive (s.16) capabilities within a single agency.<sup>10</sup>

The debate surrounding s.16 and whether the Service was best suited and adequately equipped for conducting FI did not end with the passage of the *CSIS Act*. Just five years later, in its statutory review of the *Act*, the House of Commons Special Committee advocated a change to the s.16 program. The position presented was initially drafted by SIRC, requesting that consideration be given to amending s.16 of the *CSIS Act* by removing the words ‘within Canada’.<sup>11</sup> According to Professor Peter Russell, on whose work SIRC’s recommendation was based:

This amendment of the *Act* would simply mean that there would no longer be a legal constraint on the Minister of Defence or Secretary of State for External Affairs should they wish to have the assistance of CSIS personnel in collecting information relating to the capabilities, intentions or activities of foreign states or persons. Already, under section 16, these Ministers can request such assistance from CSIS within Canada. With the proposed change in place, they could request this assistance outside of Canada.<sup>12</sup>

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7 *CSIS Act*, 1985, s.16 (1).

8 *CSIS Act*, 1985, s.16 (1)(b)(i-iii).

9 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, “Vol.2 - Part V - Chapter 7 C.: Should Canada Have a Foreign Intelligence Service?” 1981, p.645.

10 The report from the Senate Committee was aptly named “A Delicate Balance”. See: Reg Whitaker, “The Politics of Security Intelligence Policy-Making in Canada: I 1970-84,” *Intelligence and National Security*, Vol.6, No. 4 (1991), pp.649-668.

11 SIRC Document, “Reforming the *CSIS Act*: A Draft Position Paper presented by the Security Intelligence Review Committee for the Parliamentary Review,” April 1989, p.33.

12 Peter H. Russell, “Should Canada Establish A Foreign Intelligence Agency?” A Paper Written For the Security Intelligence Review Committee, December, 1988, p.17.



Not included within the House of Commons Special Committee report was Russell's additional cautionary advice:

So long as CSIS participation in foreign intelligence operations is very limited and *ad hoc*, the contamination risk (i.e. that techniques and attitudes engendered by foreign operations will spill over into domestic security intelligence operations) would be minimal. If, however, it became more extensive and systematic, then consideration would have to be given to establishing a separate foreign secret service.<sup>13</sup>

In the event, the Government did not accept the Special Committee's recommendation to amend the *CSIS Act*. The Government argued that deleting the 'within Canada' prohibition, would "impinge on the Service's primary mandate for security intelligence."<sup>14</sup>

In summary, the creation of CSIS saw primacy given to SI – reflected through National Intelligence Priorities,<sup>15</sup> with a narrow secondary mandate to collect FI. The adoption of this position and the maintenance of it throughout most of CSIS's history has distinguished Canada from most other Western democracies: the Service's s.16 collection is constrained by domestic borders, while other FI agencies operate exclusively in foreign jurisdictions and by definition break the laws of those jurisdictions in order to collect information.

## 2.1 Evolution of s.16

CSIS policies and procedures for the collection, reporting, and dissemination of s.16 products have continued to be revised as the GoC's s.16 requests have evolved. One of the early critical documents was the 1987 Memorandum of Understanding (MOU) signed between the then-Solicitor General and the Ministers of National Defence and Foreign Affairs giving effect to s.16 collection.<sup>16</sup>

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- 13 Peter H. Russell, "Should Canada Establish A Foreign Intelligence Agency?" A Paper Written For the Security Intelligence Review Committee, December, 1988, p.22.
- 14 Solicitor General of Canada, "On Course: National Security For The 1990s," February 1991, p.5. Following the collapse of the Soviet Union and the beginning of the information (i.e. internet) revolution, SIRC once again examined the FI issue, albeit briefly in SIRC Document, "Counter-Intelligence Study 93-06," January 28, 1994.
- 15 The Minister of Public Safety's list of National Intelligence Priorities (formerly Requirements) are generally released each year, with some exceptions (i.e. 2006-2008). During the period under review, these Priorities included
- 16 Memorandum Of Understanding, "Tripartite Agreement: External Affairs, National Defence, Solicitor General – Section 16 of the *CSIS Act*," August 21, 1987.

Indeed, during the  
early years of the program, the Service and its primary clients (i.e. DFAIT, DND)  
approached this new line of work with great care and caution.

For example, originally dissemination rules were quite rigid,

was considered the best method to ensure source security.

This

Another recurring theme of the s.16 program involves intelligence analysis.

Since then, the Service has also taken steps to improve the client's ability  
to assess the value of information.





## 2.2 New Demands and New Direction

Following 9/11, the primacy of the Service's s.12 mandate appeared assured for the foreseeable future as CSIS focussed on the threat of global terrorism. According to the Service, however, over the past decade Government demands for intelligence *generally* has grown (i.e. both for s.12 and s.16). **In spite of the priority given to countering terrorism, SIRC found that demands for s.16 products have increased significantly across Government.**

In response, CSIS adjusted  
to help manage growing GoC intelligence demands.

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the legal distinctions between s.12 and s.16 are expected to remain in effect from a collection standpoint, the Service no longer views this as a barrier to responding to Government information needs



SIRC believes that the potential consequences of CSIS's altered organizational structure merit further scrutiny. The Committee provides some advice about this transition within the concluding chapter of this study.

### 3 IS CSIS STILL PREDOMINANTLY A SECURITY INTELLIGENCE SERVICE?

The McDonald Commission forecast that if the demarcation lines between FI and SI were not carefully constructed, there was danger of creating a security and intelligence monolith: basically, an indivisible intelligence organization.<sup>43</sup> This section explores the extent to which incremental changes to the Service's s.16 program have affected the traditional SI posture of CSIS, and the implications of these changes.

The past decade has witnessed the gradual removal of the veil of secrecy surrounding the intelligence business, with CSIS increasingly engaged in more active public communications and outreach efforts, including admittedly limited discussion about the creation of a separate FI agency.<sup>44</sup>

Notwithstanding the Service's arguments in favour of improved FI capabilities within CSIS, the lines of demarcation between s.16 and s.12 were once understood by this Committee as being quite rigid. In February 1991, for instance, the then-Solicitor General of Canada stated that there was an "inherent unsuitability of combining in one agency both security intelligence and foreign intelligence functions," thereby substantiating the rationale behind s.16's "strict limitations on the Service's foreign intelligence role".<sup>45</sup> The Government additionally added:

Different controls are therefore required for the different services. For this reason, the collection of foreign intelligence and security intelligence are separate functions in other Western democracies.<sup>47</sup>

Although the Canadian Government has not publicly altered this position, in the

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- 43 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, "Vol.2 - Part V - Chapter 7 C.: Should Canada Have a Foreign Intelligence Service?" 1981, p.645.
  - 44 CSIS Director Jim Judd, in testimony before the Canadian Senate, suggested that the creation of a dedicated FI agency would require the transfer of human talent from CSIS. See: Senate Document, "Proceedings of the Standing Senate Committee on National Defence: Evidence," April 30, 2007.
  - 45 SIRC is not permitted to review actual Cabinet confidences.
  - 46 Solicitor General of Canada, "On Course: National Security For The 1990s," February 1991, p.55.
  - 47 Solicitor General of Canada, "On Course: National Security For The 1990s," February 1991, p.57.

intervening years demands on the Service's s.16 program have increased dramatically.<sup>48</sup>

However, CSIS also remains committed to its primary SI mandate. Achieving this balance has not been easy. **Indeed, although CSIS still prioritises s.12 collection over s.16,<sup>51</sup> our review found that, in both concept and practice, these two realms have become interconnected.**

For example, this study observed that language used in CSIS documentation to describe s.16 and s.12 activities often was indistinguishable, something that extended to briefings attended by SIRC.<sup>52</sup> This observation is consistent with a 2007 CSIS review of the S.16 program,

Conceptual clarity is only part of the issue.

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48 When the Government last assessed the FI issue in 1991,

51 The 2008-2009 CSIS Public Report outlines that the investigation of potential terrorist threats remains a key priority of the Service.

52 Even public documents such as the CSIS Organizational Chart may be construed improperly. The position of the Assistant Director – Foreign Collection, for example, is a responsibility that if read literally, appears contrary to the s.16 domestic mandate for FI.



and s.12 collection cannot be artificially compartmentalized,

In practice, s.16

A perennial constraint of the s.16 program is that under the current legislation, CSIS cannot task a source, nor return to the source to gather additional intelligence, if that individual obtains 'incidental' s.16 information while overseas.

### 3.1 What Does This Mean?

The Committee believes that the Service's linking of s.12 and s.16 priorities – what CSIS refers to as 'blended collection' – is no longer an *ad hoc* situation.<sup>60</sup> It is therefore our conclusion that these changes are of consequence for the future direction of the Service.<sup>61</sup>

SIRC understands that this transformation has occurred as a result of an increasingly complex threat environment and greater demands for intelligence across Government. At the same time, the Committee believes that the incremental linking of s.12/s.16 raises important questions that require further consideration.<sup>62</sup> In particular, given that these changes have occurred within a relatively short period of time, SIRC is concerned that the Government has not had the opportunity to fully reflect on their significance.

The Committee is concerned at the potential implications of the melding of the Service's s.16 and s.12 mandates.

The Committee believes that similar misperceptions could be possible as CSIS expands its collection of security intelligence overseas.

Finally, should the linking of s.16/s.12 continue, CSIS could become what Parliament never intended it to be: namely, a Service with equal SI and FI mandates. Such a

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60 When Peter Russell advised SIRC on this subject, he warned that if CSIS participation in FI operations became more extensive and systematic, then consideration would have to be given to establishing a separate foreign secret service. See: Peter H. Russell, "Should Canada Establish A Foreign Intelligence Agency?" A Paper Written For the Security Intelligence Review Committee, December, 1988, p.22.

61 Service recognition of the legislative restrictions on s.16 program efficiency (i.e. CSIS Act s.16 domestic collection), led CSIS to conduct an assessment of the potential utility of seeking an amendment to the Act to permit s.16 collection outside of Canada.

development would not only go against public arguments to the contrary,<sup>64</sup> but would additionally ignore the longstanding practice of respected allies who intentionally separated these divergent intelligence functions to help ensure Government control and accountability.<sup>65</sup>

### 3.2 Where Do We Go From Here?

Given that Parliament clearly established limitations on the Service's collection activities under s.16, the Committee believes that significant changes in how that collection is carried out should be subject to public debate and Parliamentary scrutiny.

**Therefore, the Committee recommends that the Government provide direction and/or guidance to the Service concerning its expanding role in foreign intelligence.**

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64 The McDonald Commission (1981) and Government statements (On Course: 1991) are two examples.

65 The foreign intelligence services in both Australia and Britain, for example, are the responsibilities of the Minister of Foreign Affairs and the Foreign Secretary, respectively. However, it is also worth noting that the Netherlands and New Zealand are among the few countries with one intelligence service having a dual FI and SI mandate.



#### 4 CONCLUSION

Throughout the Service's history, both public and Government debate have emphasized that CSIS is primarily responsible for SI collection.

The Committee believes that the Government should bring clarity to, and guidance for, the Service in its dual role as Canada's national security intelligence agency and an increasingly important contributor in the field of foreign intelligence.

## SUMMARY OF FINDINGS

- In spite of the priority given to countering terrorism,
- Although CSIS still prioritises s.12 collection over s.16, our review found that, in both concept and practice, these two realms have become interconnected.

### SUMMARY OF RECOMMENDATIONS

- Therefore, the Committee recommends that the Government provide direction and/or guidance to the Service concerning its expanding role in foreign intelligence.