

The Essential Relationship between Effective Parliamentary Oversight and Independent Expert Review of National Security Activities

**Our Security, Our Rights
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REVIEW AND OVERSIGHT

Having been Commission Counsel to the Arar Inquiry and a Special Advocate for many years, I can attest to the fact that national security intelligence and police agencies make mistakes. In Mr. Arar's case, inaccurate information sent by the RCMP to the FBI and CIA was likely relied upon in sending him to Syria where he was tortured for one year.

Mr. Arar's case is not an anomaly. Many innocent Canadians have been caught up in the response of our government and national security agencies to the threat of terrorism. Since these agencies deal in intelligence and not evidence, mistakes are inevitable. Some describe intelligence as "glorified rumours". Moreover, when mistakes are made the agencies are not always forthcoming. For example, the Federal Court of Canada has been very critical of CSIS's lack of candour in warrant applications and security certificate proceedings. As a result, these agencies must be subject to effective review and oversight. Otherwise we jeopardize the very values which these national security agencies were established to protect. The overarching objective of review and oversight mechanisms is to ensure that CSIS and other agencies engaged in national security investigations are accountable for their activities.

In a democratic system based upon the rule of law and the protection of fundamental freedoms, every public institution must be answerable for its conduct particularly agencies such as CSIS and the RCMP which have such intrusive powers which can profoundly affect the lives of individuals in Canada.

These powers must be limited in order to ensure that the values of a free and democratic society such as Canada are protected – values such as liberty, the rule of law, the principles of fundamental justice and respect for equality.

This is the context in which a national security investigation must be conducted. A basic principle of our system is that any public agency must be answerable for acting outside the limits placed on their powers. Effective review monitors these agencies in order to ensure that the rule of law prevails.

Terrorism is a threat ...however the level of the threat must be kept in perspective. As our Supreme Court has stated "in the end it would be a pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to the values that are fundamental to our democratic society".

Apart from the intrusive powers of national security agencies, there are other aspects of national security investigations which require robust review. In particular, the activities of these agencies, for the most part, are conducted in secret. Indeed, even the legal or court proceedings reviewing their conduct are often held in secret. The other important aspects which call for robust review of these investigations and activities are privacy and the collection, use and sharing of personal information. The Arar case is a good example of what can happen when there are inadequate controls on the sharing of personal information between Canadian agencies or between Canadian agencies and foreign agencies.

Before I get to specifics, let me say that I am pleased that the government has decided that a committee of parliamentarians should be established in order to oversee the

activities and operations of our national security agencies. This brings our national security system more in line with other liberal democracies where elected officials play a significant role in ensuring that our national security agencies are operating in an effective manner. However, I do have concerns that there are significant problems with Bill C-22 which I will refer to later if I have time.

Although the proposed committee of parliamentarians is a step in the right direction of improving our national security review system, it is not enough. In addition, we need a more robust and effective independent expert review body to ensure that our national security agencies are acting properly and within the confines of the powers given to them by Parliament. This independent review body should have "all of government" authority to review all of the agencies engaged in national security activities.

Such a robust review body could play a complementary role to the oversight mandate of the new parliamentary committee. As the Arar Commission pointed out 10 years ago, there are important differences between review and oversight. In general, a review body assesses an agency's activities against standards like lawfulness and/or propriety and reports on that assessment with recommendations to those politically responsible for the agency. These assessments are usually made after the fact. The review body is independent from the agency it reviews and the government. This is what SIRC is.

Oversight mechanisms, like a legislative committee, are more generally involved in overseeing the agency to ensure that it is acting effectively. In this regard, policy recommendations are made concerning how the agency should operate. In short, a

parliamentary committee should be concerned with "blue sky" efficacy issues while a review body is more concerned with propriety issues "on the ground".

This obviously raises the question of whether the new parliamentary oversight committee and our existing review bodies are adequate to ensure that Canada has an effective and accountable national security system.

In my respectful view, the answer is a resounding NO. As long ago as 2006, the Arar Commission concluded that our existing national security review system is clearly inadequate in the contemporary world of national security activities. With the enactment of Bill C-51, the inadequacies of our review system are even more glaring for a number of reasons. First, our national security activities are pursued in an "all of government" manner. Most national security investigations are integrated and are conducted jointly by many government agencies. On the other hand, our existing review bodies have siloed jurisdictions with authority restricted to one agency. This siloed review does not permit the review body to follow the intelligence, information or activity from the agency over which it has authority to another agency which is part of the integrated team. This kind of piecemeal review will inevitably lead to a dead end. To give this situation some graphic reality, our present review system could not adequately deal with any of the situations which gave rise to three recent public inquiries dealing with the actions of Canadian national security agencies. Indeed, public inquiries were called because of the inadequacy and incapacity of the existing national security review system. Although effective, public inquiries are an expensive and exceptional way to deal with these issues today.

A second problem indicating that more robust review is required is that Bill C-51 increases the powers of a number of agencies. For example, CSIS is now given threat reduction or disruption powers which can be exercised in Canada or elsewhere. In order to effectively deal with these increased powers, review powers should be expanded and resources increased to adequately supervise the expanded powers of the security agencies. Otherwise, we will be left with impoverished reviews because the review powers will be no match for the new reality.

A third issue which calls for expanded independent review powers is that Bill C-51 (*Security of Canada Information Sharing Act*) now permits seventeen government departments to receive personal information from over 100 other Canadian agencies and entities if the shared information affects the security of Canada. Fourteen of these seventeen agencies or departments do not have any review mechanism at all. Once again, an "all of government" review body is necessary to ensure that this sensitive information is shared in a responsible way and that effective checks are imposed to prevent the kind of abuse which led to Mr. Arar's tragic experience.

My final comment is that this body with across government review powers must meet a number of democratic values in order for it to achieve legitimacy in the public's eye. First, it must be clearly independent of government and the national security agencies over which it has authority. Second, it must be an expert body which deals with national security issues on a daily basis. As well, the new body must be adequately resourced and staffed in order for it to meet the challenge of effectively reviewing our national security agencies. Third, it must be accountable to the public by making annual public reports assessing whether and how our agencies have lawfully responded to threats to

the security of Canada. This kind of transparency will give the public comfort that the civil liberties of Canadians will not be sacrificed on the "alter of national security". Finally, the new review body should complement the new committee of parliamentarians by making recommendations to the committee in respect of policy changes which would make our national security agencies operate more effectively and our review system more robust in protecting national security and the civil liberties of all people in Canada. The kind of "on the ground" experience gained by this review body will greatly assist the committee of parliamentarians in confronting the systemic issues it will face in fulfilling its important mandate.

BILL C-22 - PROBLEMS

There are numerous problems with Bill C-22 relating to the government's restrictions on the mandate of the committee of parliamentarians and the restrictions it has imposed on the committee's access to information which it seeks in fulfilling its mandate

Mandate

Under s. 8, the committee is mandated to review any national security or intelligence activity of CSIS, the RCMP or other Canadian agencies. However, the Minister can prohibit such a review if he or she determines that it would be injurious to national security. This determination is final and is not subject to judicial review.

Access to Secret Information

Under s. 13, the committee can seek information from CSIS, the RCMP and other Canadian agencies so long as such information relates to its national security mandate.

There are a number of categories of information to which the committee is not entitled under s. 14 such as cabinet confidences, ongoing defence intelligence activities and ongoing law enforcement investigation information, the identity of human sources and other classes of information. Moreover, the Minister may refuse to provide special operational information or information which would be injurious to national security. Such Ministerial determinations are final and are not subject to judicial review.

Review Bodies

SIRC, the CSE Commissioner and the Civilian Review and Complaints Commission for the RCMP can provide information to the committee. However, the review bodies cannot provide information which is excluded by s. 14 or is viewed by the Minister to be special operational information or information which would be injurious to national security.

Finality and Unreviewability of Ministerial Decisions

Under s. 31, any decision by a Minister to prohibit the committee from reviewing certain national security operations or refusing the committee access to information the Minister views to be injurious to national security is final and cannot be reviewed by a court of law. This kind of unbridled ministerial power is very unusual in our legal system.

Resources

There is nothing in Bill C-22 which guarantees that the committee will be adequately resourced with sufficient funding and expert assistance. A Secretariat is established for the committee with an Executive Director and employees appointed under the *Public*

Service Employment Act. There is also provision for the Executive Director to engage legal counsel and other experts to advise and assist the committee. There is no express reference to the engagement of special advocates who would be of great assistance to the committee in its review of secret information. Since the committee reports to the Prime Minister, it would appear that the Privy Council Office would be responsible for appropriating funds. In short, the funding of the committee is left to the discretion of the Prime Minister. This could be problematic in that the committee is created to review the activities of national security agencies which are ultimately responsible to the executive and its head, the Prime Minister. There is an appearance of a conflict of interest in this legislative scheme which could be avoided if the committee was responsible to Parliament.