

OVERSIGHT AND ACCOUNTABILITY OF CANADA'S NATIONAL SECURITY AGENCIES: A FRAMEWORK FOR DISCUSSION

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In this paper, the author comments on the mandate and role of agencies in the Canadian security system, using as examples the Canadian Security Intelligence Service and the Communications Security Establishment. The author also comments on the findings of Mr Justice Dennis O'Connor in the Arar Inquiry, notably his recommendations for increased accountability and the creation of independent mechanisms for review of security decision-making. The author notes that prominent features of the current security system include lack of transparency, increased international co-operation and information sharing, and the potential for racial, ethnic and religious profiling.

Dans cet article, l'auteur offre un commentaire sur le mandat et le rôle des agences dans le système de sécurité au Canada, illustrant son propos avec le cas du Service canadien du renseignement de sécurité et du Centre de la sécurité des télécommunications. L'auteur commente en outre les conclusions de M le juge Dennis O'Connor dans l'enquête Arar, plus précisément ses recommandations portant sur une responsabilisation plus importante et la création de mécanismes indépendants pour contrôler le processus de prise de décision en matière de sécurité. L'auteur fait remarquer que le manque de transparence, une coopération et une mise en commun des renseignements accrues à l'échelle internationale ainsi que les possibilités de profilage racial, ethnique et religieux sont des caractéristiques prééminentes du système actuel.

1. Introduction

In order to properly situate our discussion concerning the state of national security oversight and accountability, it is perhaps instructive to sketch out in a preliminary manner the general structure of Canada's national security

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apparatus, particularly as it relates to security intelligence gathering and dissemination.

As a threshold matter, there are a number of different government agencies and departments which deal with issues of national security.¹ The Department of National Defence (DND) and the Department of Public Safety Canada (DPS) are the main branches of government handling national security matters. The main agencies involved in protecting national security include:

- The Communications Security Establishment (CSE), which is Canada's signals intelligence agency;
- The Royal Canadian Mounted Police (RCMP), which engages in national security investigations and policing;
- The Canadian Security Intelligence Service (CSIS), which is Canada's civilian security intelligence agency;
- The Canada Border Services Agency (CBSA);
- The Financial Transactions Reports Analysis Centre of Canada (FINTRAC), which gathers financial intelligence;
- Transport Canada; and
- Citizenship and Immigration Canada (CIC).

These agencies are all subject to ministerial and, to a certain extent, judicial accountability. CSIS and CSE are also monitored by independent review bodies.

A) Canadian Security Intelligence Service

The *Canadian Security Intelligence Service Act (CSIS Act)*,² is the legislation establishing CSIS and setting out its mandate, powers, and accountability mechanisms. CSIS was established in the wake of the

¹ For a comprehensive discussion of Canada's national security landscape, some of the best sources remain the reports resulting from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006) (Chair, Mr Justice Dennis R O'Connor) (Arar Inquiry); see Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, (Ottawa: Canadian Government Publishing, 2006) [Arar Inquiry Policy Review] at 127-242.

² RSC 1985, c C-23 [CSIS Act].

McDonald Commission,³ which documented serious “institutionalized wrongdoing” with respect to the RCMP’s national security activities,⁴ including illegal conduct and numerous violations of civil liberties.⁵ Importantly, the Commission found this pervasive misconduct could be attributed in part to the lack of effective political control or adequate oversight over the RCMP’s national security activities. Accordingly, among the recommendations of the McDonald Commission was the development of a security intelligence regime which would include the infrastructure necessary to ensure appropriate review and oversight.⁶

The *CSIS Act* created two accountability mechanisms for CSIS. The first was the now-eliminated Inspector General (IG), who examined operational activities and was responsible for making sure that CSIS complies with its operational policies. The IG served as an internal review mechanism and reported directly to the Minister overseeing CSIS, serving as the Minister’s “eyes and ears.”⁷ The second accountability mechanism is the Security Intelligence Review Committee (SIRC), which is responsible for auditing CSIS and investigating public complaints. SIRC is designed to serve as an external review mechanism and reports directly to Parliament.⁸ As described by Justice Dennis O’Connor in one of the several reports issuing from the Arar Inquiry, “SIRC’s role has long been understood to be that of assuring Parliament and the Canadian public that Canada’s security intelligence service is fulfilling its mandate to ensure the security of the state while respecting individual rights and liberties as guaranteed under Canadian law.”⁹

³ Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (1979-1981) (Chair: Mr Justice David C McDonald) (McDonald Commission).

⁴ McDonald Commission, *Freedom and Security under the Law: Second Report* (Ottawa: Supply and Services Canada, 1981) [*McDonald Commission Report*] vol 1 at 95ff.

⁵ *Arar Inquiry Policy Review*, *supra* note 1 at 32.

⁶ *McDonald Commission Report*, *supra* note 4, vol 2 at 754.

⁷ The office of the Inspector General was abolished in 2012 when Parliament passed the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19; see Jeff Davis, “Ottawa abolishes spy overseer’s office” *The National Post* (26 April, 2012), online: <http://news.nationalpost.com/2012/04/26/osis-office-of-the-inspector-general>.

⁸ Security Intelligence Review Committee, “The Case for Security Intelligence Review in Canada” *Reflections* (2005), online: Security Intelligence Review Committee <<http://www.sirc-csars.gc.ca/opbapb/rfcrfx/sc02a-eng.html>>.

⁹ *Arar Inquiry Policy Review*, *supra* note 1 at 265.

B) *Communications Security Establishment*

With respect to the CSE, the *National Defence Act*¹⁰ serves as the enabling legislation for the Office of the Communications Security Establishment Commissioner (CSE Commissioner), which reviews the activities of the CSE. Like SIRC, the CSE Commissioner conducts audits of CSE activities and investigates complaints. The CSE Commissioner's mandate is to ensure that all of the CSE's powers are used in accordance with the relevant legislation, and that CSE's activities are lawful.¹¹

The jurisdiction of these review bodies is limited to the agencies they are mandated to cover; accordingly – and importantly – they do not have the authority to conduct cross-agency reviews, and their right to full access of information is limited to only materials within that agency's possession.

There are, however, a number of agencies that deal with national security issues, and it is an uncontroversial proposition that for national security to be effective there has to be inter-agency cooperation. Accordingly, where there is inter-agency cooperation, there should be also a mechanism for cross-agency oversight and accountability. The necessity for developing a framework for review of inter-agency conduct was addressed thoroughly by the Arar Inquiry, whose findings and recommendations bear recapitulation.

2. *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*

The story of Maher Arar is oft-repeated, but nonetheless remains a potent example of the serious mistakes that can be made in the course of protecting national security, and of the importance of robust accountability and oversight to mitigate such errors. In September 2002, acting on erroneous information from the Canadian government, the United States detained Arar while he was on a layover in a New York airport. He was held in solitary confinement in Brooklyn until he was sent to Syria to be tortured, the victim of an extraordinary rendition.

In the Commission of Inquiry that followed, it was established that Canada's national security agencies – and the RCMP in particular – played a significant role in Arar's rendition and torture. Specifically, the Commission found that the RCMP provided American authorities with

¹⁰ RSC 1985, c N-5.

¹¹ For an brief but informative summary of the creation of the office of the CSE Commissioner, see Reg Whitaker and Stuart Farson, "Accountability in and for National Security" (2009) 15:9 *IRPP Choices* 1 at 27-28.

information about Arar that did not comply with the RCMP's own policies for reliability screening. As a result, the information that was shared was "inaccurate, portrayed him in an unfairly negative fashion and overstated his importance to the RCMP investigation."¹² Moreover, the RCMP provided this information about Arar to foreign agencies without any written caveats pertaining to its use, thereby increasing the risk that it would be used for improper purposes. The Commission found that in making its decision to detain Arar and to deliver him to the Syrians, the United States "very likely" relied on information provided by the RCMP. And indeed, while Arar was still in detention in New York, the RCMP continued to provide the US Federal Bureau of Investigation with information about him, some of which was simply incorrect. Moreover, the Commission found that there were serious concerns with respect to the conduct of the RCMP, CSIS and the Department of Foreign Affairs and International Trade (DFAIT) once Arar was in Syria, which likely prolonged his detention there. All told, Arar spent close to a year in Syrian custody, during which time he was subjected to torture and abuse.

In light of its findings, the Commission offered a series of recommendations. Some of these recommendations were directed specifically at the activities of the RCMP and the way it conducts national security investigations. The Commission also made recommendations pertaining to information sharing, both between Canadian agencies and with their foreign partners. With respect to accountability and review, the Commission called for the creation of an independent, arms-length review body that would be housed within the RCMP's oversight and review structure, but would have broad authority to engage in cross-agency review.¹³

Specifically, Justice O'Connor called for the establishment of an independent review body for the RCMP, with the power to provide comprehensive review over the full range of RCMP national security activities via both self-initiated review and through investigations of complaints. This independent review body should also have extensive investigative powers, similar to those granted to public inquiries (such as the power to subpoena documents and compel testimony) and have access to confidential information.¹⁴ Moreover, it should also have the authority to conduct joint reviews or investigations with SIRC and the CSE

¹² *Arar Inquiry Policy Review*, *supra* note 1 at 13.

¹³ *Arar Inquiry, Report of the Events Relating to Maher Arar: Analysis and Recommendations*, (Ottawa: Canadian Government Publishing, 2006) [*Arar Inquiry Factual Review*] at 342-43; *Arar Inquiry Policy Review*, *supra* note 2 at 503-505.

¹⁴ *Arar Inquiry Policy Review*, *ibid* at 603-604.

Commissioner into integrated national security operations, so as to create the possibility of cross-agency review.¹⁵

The O'Connor recommendations also discussed the importance of creating a mechanism for the independent review of the national security activities of the CBSA, CIC, Transport Canada, FINTRAC and DFAIT. To that end, he recommended that review of CBSA activities be placed under the purview of this new independent review body, and review of the other agencies to be delegated to SIRC.¹⁶ Justice O'Connor envisioned a close integration of the three main national security review bodies – SIRC, the CSE Commissioner, and this new RCMP review body – and called for the establishment of an umbrella committee, which would comprise of the head officials from these three review bodies. He also recommended the establishment of what he called “statutory gateways” which would allow for the exchange of information, referral of investigations, joint investigations and coordination of reporting. Importantly, these statutory gateways would create a mechanism by which a review body could follow a trail of evidence from one agency to another.

3. *The Present*

The Arar Inquiry issued its recommendations in 2006, yet Canada's national security apparatus continues to operate under a patchwork of accountability. The national security umbrella and close cooperation between review bodies recommended by Justice O'Connor have yet to materialize. As a result, every time we have been faced with a question about the appropriateness of Canada's national security activities, we have either had to resort to more public inquiries, such as the Iacobucci Inquiry,¹⁷ or to a combination of the courts, specialized oversight bodies and Parliament, as was the case with the Afghan detainee controversy. Indeed, while SIRC itself has said that its mandate should be broadened to allow for review of national security matters that involve CSIS but go beyond the strict confines of that agency,¹⁸ this recommendation has yet to be taken up.

¹⁵ *Ibid* at 606.

¹⁶ *Ibid*.

¹⁷ Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (2008) (Chair, Hon Frank Iacobucci, QC) (Iacobucci Inquiry).

¹⁸ Security Intelligence Review Committee, *Checks and Balances: Viewing Security Intelligence Through the Lens of Accountability* (Annual Report 2010-2011) (Ottawa: Public Works and Government Services Canada, 2011) at 6.

In 2012, the government tabled *An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other acts* (Bill C-42),¹⁹ which purports to be in part its response to Justice O'Connor's recommendations to create an independent review body for the RCMP.

Bill C-42 establishes the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police (the RCMP Civilian Review Commission), an independent civilian commission designed to replace the existing Commission for Public Complaints Against the RCMP (CPC). The RCMP Civilian Review Commission is invested with an expanded mandate and additional powers. Perhaps the most significant change is in the review body's jurisdiction; while the CPC's review mandate extended only to complaints initiated by the public, the RCMP Civilian Review Commission has the power to initiate its own reviews into RCMP conduct.²⁰

Though the proposed civilian commission in this bill improves the oversight regime for the RCMP in some respects, it still falls far short of the review body recommended by Justice O'Connor, as recognized by both the Parliamentary Information and Research Service at the Library of Parliament²¹ and national security experts.²² For example, whereas Justice O'Connor contemplated a RCMP review body that was empowered to conduct a review of all RCMP activities concerning national security, Bill C-42 only permits a review of "specified activities"; the scope of these "specified activities" remains undetermined, however, as Bill C-42 provides no definition or description of these "specified activities."

Moreover, the RCMP Civilian Review Commission's authority to access information is also significantly more limited than was recommended by Justice O'Connor. While the Civilian Review Commission is entitled to access "privileged information" to conduct its

¹⁹ 1st Sess, 41st Parl, 2012.

²⁰ For a useful summary of the key provisions of Bill C-42, which spans approximately 120 pages, see Legal and Legislative Affairs Division, Parliamentary Information and Research Service, "Bill C-42: An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts (Legislative Summary)" (Ottawa: Library of Parliament, 2012).

²¹ *Ibid* at 9-10, 12, 20-21.

²² Kent Roach, Nathalie Des Rosiers and Abby Deshman (Canadian Civil Liberties Association), "Brief to the Standing Committee on Public Safety and National Security regarding Bill C-42, An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts", online: (2012) CCLA <<http://ccla.org/wordpress/wp-content/uploads/2012/10/2012-10-30-CCLA-Submissions-RCMP-oversight.pdf>> [CCLA Submissions].

reviews, the RCMP Commissioner may refuse to provide access to this information.²³ Bill C-42 also sets out entire categories of information which the Commission is prohibited from accessing, including certain types of communications between members of the RCMP relating to grievances and disciplinary proceedings, and reports prepared for the RCMP Commissioner concerning meetings held between the RCMP and the RCMP Civilian Review Commission.²⁴ Justice O'Connor, on the other hand, had contemplated limiting access for only two types of information: confidences of the Queen's Privy Council for Canada and materials protected by solicitor-client privilege.²⁵

Bill C-42 also fails to implement the Arar Inquiry recommendations that the new commission be able to examine RCMP compliance with international obligations, or to have the power to conduct integrated reviews, or to review the national security activities of the CBSA. As observed by the Canadian Civil Liberties Association in its submission to the Standing Committee on Public Safety and National Security on Bill C-42, the federal government's "commitment to joint investigation and accountability for the coordinated activities of federal security agencies appears to be non-existent."²⁶

Six years ago, the Arar Inquiry made clear that the accountability mechanisms for national security oversight had simply not kept pace with the increasingly integrated and cross-jurisdictional nature of national security operations. With respect to national security accountability, however, what is being seen today is not only a failure to keep pace, but an actual deterioration of existing oversight and review mechanisms. Recall that the *CSIS Act* provides for two review mechanisms for CSIS: the Inspector General and SIRC. In early 2012, however, the office of the Inspector General was abolished entirely, eliminating the internal review mechanism specifically contemplated by legislation when CSIS was first established. While the federal government claimed that the Inspector General's duties could be assumed by SIRC, with no loss of

²³ In such circumstances, the civilian commission must then request the appointment of a "conciliator" (who may be, for example, a former judge). The conciliator will review the information sought and provide observations regarding the nature of the information sought, the privileged nature of the information, its relevance, and its necessity to the Commission's work. The Chair of the Commission and the Commissioner of the RCMP are then required to assess their positions in light of the conciliator's observations. If no agreement can be reached, then the parties may apply for judicial review; see Bill C-42 Legislative Summary, *supra* note 20 at 12.

²⁴ *Ibid* at 13.

²⁵ *Ibid* at 11.

²⁶ CCLA Submissions, *supra* note 22 at 13.

accountability,²⁷ such an assertion ignores the fact that SIRC and the Inspector General were designed for different purposes and to work in balance with one another. There would have been little need to create both review bodies if one could do the job of the other. Moreover, even if SIRC were capable of taking up the duties of the Inspector General, it has been provided with no corresponding increase in its resources. Meanwhile, the caliber and qualifications of certain SIRC appointments has come under scrutiny.²⁸

In his final report, Justice O'Connor highlighted certain hallmarks and characteristics of "national security" which make robust and independent review of national security activities necessary.²⁹ These characteristics of national security activities include:

A) Lack of transparency

Secrecy "necessarily" accompanies national security activities, and in particular, national security investigations.³⁰ The lack of transparency in national security investigations means that those affected may be unaware that they are being investigated – not while the investigation is taking place, and perhaps not even after the investigation has been completed. Review mechanisms are necessary to ensure that national security investigations are in conformity with the law and respect fundamental rights.

B) Increased information sharing

Justice O'Connor recognized that "almost all national security activities will affect privacy interests."³¹ Security intelligence may be collected through surveillance, communications intercepts or questioning of individuals. Security intelligence can also be collected from other government agencies and shared between agencies. Because of the secretive nature of security intelligence gathering and national security investigations, individuals may never know the content (or the accuracy) of the information collected, or the breadth of dissemination. Without an

²⁷ Reg Whitaker, "Canadian Government Weakening National Security Accountability" *Prism Magazine*, online: (2013) <<http://prism-magazine.com/2012/08/canadian-government-weakening-national-security-accountability/2/>>.

²⁸ Reg Whitaker, "CSIS Watchdog Misbehaves, Government Shrugs" *Prism Magazine*, online: (2011) <<http://prism-magazine.com/2011/11/csis-watchdog-misbehaves-government-shrugs/>>.

²⁹ *Arar Inquiry Policy Review*, *supra* note 1 at 425-46.

³⁰ *Ibid* at 426.

³¹ *Ibid* at 434.

effective review mechanism, erroneous information may be passed on from one agency to the next, resulting in potentially severe personal consequences for individuals. As Justice O'Connor observed, "As the flow of information between agencies increases, so too does the need for a strong and effective review mechanism."³²

C) Increased international cooperation

National security investigations and intelligence gathering also necessarily involve cooperation with foreign agencies. And yet as the experience of Maher Arar and others illustrate, there can be serious implications for individual rights depending on the type of information shared, and with whom the information is shared. In his report, Justice O'Connor describes a "ripple effect" that goes beyond Canadian borders, "with consequences that may not be controllable from within Canada,"³³ such that information passed on to foreign partners may be abused and lead to human rights violations abroad. Likewise, it is also necessary to be vigilant with respect to information received from foreign partners, and to ensure that this information was collected in a manner that is consistent with the rights and freedoms protected in Canada. Accordingly, a robust mechanism for review and oversight of national security activities is also necessary to ensure that Canada is not complicit in human rights abuses abroad.

D) Potential for racial, ethnic and religious profiling

Justice O'Connor also highlighted the potential for discrimination, acknowledging that "compromises between security and civil liberties are not demanded equally of all who are theoretically made more secure."³⁴ In addition, because profiling takes place as a discretionary operational decision, there is almost no opportunity for legislative scrutiny of such practices, further reinforcing the need for some review mechanism to ensure that such discretionary decisions are lawful.

These observations have equal – and perhaps even greater – force today. The national security apparatus is just as integrated and sprawling as it was during the time of the Arar Inquiry, if not more so. For example, Canada is in the process of increasing "informal sharing" of information and intelligence with the United States, most recently in the form of plans to develop a North American "security perimeter." Yet it is important to keep in mind that it was "informal" intelligence sharing which led to Maher Arar's arrest, detention and torture. And as the panelists this

³² *Ibid* at 501.

³³ *Ibid* at 431.

³⁴ *Ibid* at 437 (internal citation omitted).

morning made clear, profiling remains all too common in national security investigations.

The level of inter-agency integration and international cooperation is even more significant now than at the time of the Arar Inquiry, and yet conversely, in important respects, there is less accountability and oversight. The erosion of oversight stands in disconcerting contrast to government attempts to expand law enforcement powers, through the use of so-called “lawful access” legislation to facilitate online surveillance³⁵ or the resurrection of extraordinary powers such as the investigative hearing power, where individuals would be compelled to take part in judicial investigative hearings, or the power of preventative arrest, which permits holding individuals without charge, based simply on suspicion of future dangerousness³⁶. Meanwhile, troubling directives uncovered in 2012 in which CSIS and the CBSA are effectively given authorization to use information potentially derived from torture, or to share information with foreign agencies with the knowledge that it may result in torture³⁷, continue to serve as clear reminders of why independent review of national security activities is crucial.

Accountability for Canada's national security activities is necessary because it is the only way to ensure that government powers – some of which are quite extraordinary in terms of their incursions into individual rights and freedoms – are being exercised lawfully and efficiently. Strong and robust oversight and review mechanisms are important not only for protecting human rights and civil liberties, but for making certain that Canada's national security policies and practices are ultimately effective.

³⁵ Bill C-30, *An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to Amend the Criminal Code and other Acts*, 1st Sess, 41st Parl, 2012.

³⁶ Bill S-7, *An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act*, 1st Sess, 41st Par, 2012.

³⁷ Jim Bronskill, “Ottawa tells spies to use possible torture info in ‘exceptional’ cases,” *The Globe and Mail*, online: (2012) <http://www.theglobeandmail.com/news/politics/ottawa-tells-spies-to-use-possible-torture-info-in-exceptional-cases/article2329406/>>; Jim Bronskill, “CSIS gets green light to share info despite ‘substantial torture risk’,” *The Globe and Mail*, online: (2012) <http://www.theglobeandmail.com/news/politics/csis-gets-green-light-to-share-info-despite-substantial-torture-risk/article2356857/>>; Jim Bronskill, “Secret CSIS panel decides role of torture in tips from abroad,” *The Toronto Star*, online: (2012) http://www.thestar.com/news/canada/2012/08/06/secret_csis_panel_decides_role_of_torture_in_tips_from_abroad.html>; Jim Bronskill, “Former Arar lawyer criticizes Tory torture directives,” *The Globe and Mail*, online: (2012) <http://m.theglobeandmail.com/news/national/former-arar-lawyer-criticizes-tory-torture-directives/article4510861/?service=mobile>>.

Accountability is necessary because it engenders public confidence and trust. Accountability is necessary because, as the McDonald Commission has taught us, “Canada must meet both the requirements of security and the requirements of democracy: we must never forget that the fundamental purpose of the former is to secure the latter.”³⁸

³⁸ *McDonald Commission Report supra* note 4 vol 1 at 1.