

## **Arar Commission Policy Review**

### **Further Questions for Public Consultation**

October 17, 2005

The Arar Commission Policy Review requests your input on the following questions, which attempt to address with specificity how review of the RCMP's national security activities might operate in various review models.

We invite you to answer any number of the questions, and we urge you to refer to concrete operational and practical examples in answering the questions and citing any advantages or challenges. To assist, we have set out at the end of this document several purely hypothetical situations to which you may wish to refer in answering the questions. These hypothetical situations should not be read as referring to actual events or operations, but are designed to provide a factual context within which to discuss issues about review of RCMP national security activities. When considering the hypotheticals, the issue is not whether the actions are properly taken, or the likelihood of any such fact situation arising. Rather, the issue is what kind of review body, and what powers, would be best to review the activities. As flagged in the questions above, these hypotheticals are designed to raise issues such as the jurisdiction, definition of national security activity, the expertise of the review body, and the extent of possible audit powers. These hypotheticals should not limit the scope or detail of the examples to which you may wish to refer.

Commissioner O'Connor invites written responses to any number of these questions prior to November 7, 2005. Commissioner O'Connor also encourages those who have been invited to appear at the hearings to address any of these questions in their submissions.

#### **Complaints and Audits<sup>1</sup>**

1. What is the relative importance of audits and complaints to effective review of RCMP national security activities?
2. Should audits and complaints-investigations be done by the same body? Why or why not? Would the audit function be compromised if the same body did not hear complaints?

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<sup>1</sup> In this document, "**audit**" means the inspection of activities, procedures, policies etc. to ensure compliance with statutory, constitutional and other standards. It may include an audit for propriety and/or effectiveness. Audits generally include inspection of documents, interviews of personnel and other investigatory procedures. Audits are carried out at the discretion of the review body. They may be thematic; they may be a form of regular review of a specific activity; they may be directed at a specific operation or policy or set of procedures. In carrying out its audits, the review body has full access to the documentation and premises and personnel of the subject agency, subject to limited exceptions. SIRC conducts audits of CSIS activity, for example.

3. If audits and complaints-investigation are not done by the same body should there be information-sharing between the two bodies? If so, what is the best method of information-sharing, and what limits should be placed on this, if any?

**Reviewing the RCMP's National Security Activities**

4. What expertise does a body reviewing RCMP national security activities require?
  - (a) Does it require expertise in policing matters such as the statutes, case law principles and other standards applicable to policing; the use of force; the operations; and the legal powers of the police?
  - (b) Does it require expertise in national security matters such as intelligence collection, targeting, investigative techniques, analysis, information retention and sharing of information?
  - (c) Is one area more important than the other?
  - (d) Does the expertise of a body conducting audits differ from that required for a complaints-investigation body?
5. Review conducted by SIRC is guided in part by criteria set out in the *CSIS Act* (e.g. ss. 12, 19, 21). For example, section 12 of the *CSIS Act* refers to the collection, analysis and retention of information in the following terms:

The Service (CSIS) shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada...

SIRC may then evaluate information collection by CSIS against the statutory criteria of "strictly necessary."

- (a) What comparable criteria would or should guide an audit of the RCMP's national security activities, including information-gathering or other investigative activities?
  - (b) Is the concept of police independence relevant to police targeting decisions in the national security area, and how would this affect audits by a review body for the RCMP's national security activities?
6. Should a review body be concerned with the legality, proportionality or reasonableness of national security police action? How would such standards resemble or differ from standards applied to other RCMP activity, or to CSIS activity? Should there be a difference between evaluation by a review body of RCMP activity that has been authorized by warrant, and activity not authorized by judicial warrant?

7. Complaints against the RCMP are first investigated by the RCMP<sup>2</sup>, and then reviewed by the CPC in certain circumstances. Should complaints about RCMP national security activities be investigated by a review body first, rather than by the RCMP as is presently the case?
8. Should the review body for the RCMP's national security activities have access to all relevant documents, including those subject to solicitor-client privilege and police informer privilege? In discussing this, please consider that SIRC, the CSE Commissioner, the Privacy Commissioner and the Information Commissioner all have access, by statute, to documents subject to claims of solicitor-client and police informer privilege, but that CPC does not. Is there a reason these accountability bodies should have access to such privileged materials, but not a body reviewing the RCMP's national security activities? Should the RCMP review body have access to documents subject to Cabinet confidence privilege?
9. Should there be special advocates involved in complaints involving RCMP national security activities, to represent the interests of the individual, challenge claims of national security confidentiality or deal with evidence that cannot be disclosed to the complainant because of national security confidentiality? Or are you of the view that participation by special advocates would be unnecessary or undesirable, and if so, why?

### **Defining the National Security Activities of the RCMP** <sup>3</sup>

10. If complaints-investigations and audits of the RCMP's national security activities are to be carried out by a body separate from the CPC, how should that body's jurisdiction over the RCMP's national security activities, as opposed to the RCMP's other policing activities, be defined? Is it sufficient to define national security activities in terms of terrorism offences and other offences involving threats to the national security of Canada as defined in the *Security Offences Act* (incorporating s. 2 of the CSIS Act)? What about collateral offences (e.g. credit card fraud when a decision is made that a terrorist financing charge would not likely succeed?)
11. Should the national security activities of the RCMP be defined in terms of organizational sub-units, that are explicitly devoted to national security (e.g. INSETs, NSIS, NSOB), or are there reasons the review body's jurisdiction should extend beyond such organizational sub-units? You may wish to consider the hypotheticals set out at the end of this document when answering this question.
12. If the CPC were given enhanced powers (commensurate with SIRC's access to documents and information, for example) to investigate complaints about RCMP national security activities, or if SIRC were given such powers but only with respect to the RCMP's national security activities, would the resultant disparity in

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<sup>2</sup> With the exception of complaints initiated by the CPC.

<sup>3</sup> In answering these questions, you may wish to refer to the hypotheticals set out at the end of this document, or use other examples.

- complaints-processing powers for RCMP activities be acceptable? For example, if the target of an ordinary passport fraud investigation files a complaint, and the target of a national security passport fraud investigation files a complaint, is it acceptable that these complainants would file their complaints with different bodies or with a body that has different powers to deal with the two complaints?
- (a) Is there potential unfairness to members of the RCMP if complaints regarding national security activities are dealt with differently than complaints about other policing activities? Should this affect the recommended review mechanism?
  - (b) Is there potential unfairness to members of the public if complaints regarding national security activities are dealt with differently than complaints about other policing activities? Should this affect the recommended review mechanism?
  - (c) Is there a potential for forum-shopping (by either members or the public) if RCMP national security activities are dealt with by a different body than other national security activities?
  - (d) Is there a concern regarding a potential lack of coherence in review standards if RCMP national security activities are dealt with by a different body than other national security activities?
13. In the course of a terrorism investigation, the RCMP may have national security reasons for not confirming whether or not a person is a suspect or under surveillance. If complaints respecting the national security activities of the RCMP are dealt with by a different body than complaints about other RCMP activities, the very handling of a complaint by the national security body might in itself confirm that there is a national security aspect. Would this be problematic? Is there a way to avoid confirming that national security issues exist if national security complaints are dealt with by a separate body? Would the main RCMP body still have to remain involved to avoid such confirmation (e.g., in correspondence with or interviews of the complaint)? Would this be unduly duplicative?

#### **Issues Arising from Joint Reviews of RCMP and CSIS and of other Police Forces**

14. If one body reviews both RCMP national security activities and CSIS activities, is there a concern that the review body will inadvertently or deliberately share information from the RCMP to CSIS or vice versa (sometimes referred to as “cross-contamination.”)? Is there an advantage to such information-sharing by the review body? Is it problematic? Why or why not? Are there elements in the design of a review body which might protect against these concerns? On the other hand, would the protective steps themselves compromise the effectiveness of review?

15. How would a review body deal with integrated activity? What should happen if an audit of or an investigation of a complaint about the RCMP's national security activities leads to another agency i.e. CSIS, CSE, CBSA, OPP, Toronto Police Service?

**Super-Agency Review Model**

16. A number of submissions to this Commission have suggested that a “super-agency” be established to review all national security activities of the federal government. The Privy Council Office has advised the Commission that the following are the federal “departments and agencies associated with security and/or intelligence”<sup>4</sup>:

Public Safety and Emergency Preparedness Canada (PSEPC)  
Canadian Security Intelligence Service (CSIS)  
Royal Canadian Mounted Police (RCMP)  
Canada Border Services Agency (CBSA)  
Department of National Defence (DND)  
Communications Security Establishment (CSE)  
Privy Council Office (PCO)  
Transport Canada (TC)  
Canadian Air Transport Security Authority (CATSA)  
Foreign Affairs Canada (FAC)  
Citizenship and Immigration Canada (CIC)  
Justice Canada  
Canadian Coast Guard (CCG)  
Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)  
Canada Revenue Agency (CRA)  
Health Canada (HC)  
Public Health Agency of Canada (PHAC)  
Canadian Food Inspection Agency (CFIA)  
Agriculture and Agri-Food Canada (AAFC)\*\*  
Canadian Nuclear Safety Commission (CNSC)  
Environment Canada (EC)  
Natural Resources Canada (NRCan)  
Treasury Board Secretariat (TBS)  
Department of Finance

- (a) Which of these agencies and departments are involved in “national security”?
- (b) Would a super-agency have review jurisdiction over all national security activities of all of these bodies? If not, how should the super-agency's jurisdiction be defined? If so, how would the national security activities of each of these bodies be defined?

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<sup>4</sup> PCO Background Document available upon request from the Commission.

- (c) Would a super-agency's work be primarily driven by complaints or should it include audits?
- (d) How would the role of a super-agency compare with the role of the Auditor General?
- (e) How would an audit function over these agencies and departments differ from the Privacy Commissioner's audit functions (see *Privacy Act*, ss. 36 (review of exempt banks) and s. 37 (review for compliance by government institutions with ss. 4-8 of the *Privacy Act*)? How would a complaints function differ from the complaints function carried out by the Privacy Commissioner?
- (f) Would the audit and complaint functions be different with respect to agencies and departments that have extensive national security intrusive/coercive powers (e.g. the RCMP and CSIS rather than Citizenship and Immigration Canada or the Department of Finance)?
- (g) How would an audit or complaint function of a super-agency relate to the Canadian Human Rights Commission's mandate?
- (h) Would a super-agency review for legality of the activities being reviewed or for some other criteria?
- (i) What would happen to SIRC and to the CSE Commissioner's offices? How would the national security activities of the RCMP subject to the super-agency's jurisdiction be defined, and how would matters be referred back and forth from the CPC?
- (j) Would the super-agency report to Parliament?

#### **Coordinating Review Among Three Agencies**

17. One proposal is that one body should review all RCMP activities, including national security activities, SIRC should review CSIS activities, and the CSE Commissioner's office should review CSE activities. This would be supplemented by the creation of a new coordinating body, composed of the CSE Commissioner and the Chairs of SIRC and the RCMP review body, and a limited number of staff, which would coordinate integrated review and deal with common issues. Essentially, it would identify integrated activities that require integrated review and task their respective bodies to carry out such review, and it would discuss common issues. This would preserve the ability of each direct review agency to develop an expertise in the methods of operation, statutes, administrative policies and culture of each agency under review. Is this a viable alternative to a super-agency?
18. Does your view differ about such a coordinating body if it is established as an autonomous and more substantial body, with different members than SIRC, CSE

Commissioner's office and the RCMP review body; and with the mandate, staff, capacity and powers to carry out its own investigations of integrated activities?

19. Are there other alternatives to these models or to a super-agency, such as statutory mechanisms to allow for information-sharing and joint investigations among review bodies?

## **HYPOTHETICAL SITUATIONS – NATIONAL SECURITY REVIEW**

We set out below four purely hypothetical situations to which you may wish to refer in answering the questions. These hypothetical situations should not be read as referring to actual events or operations, but are designed to provide a factual context in which to discuss issues about review of RCMP national security activities. When considering the hypotheticals, the issue is not whether the actions are properly taken, or the likelihood of any such fact situation arising. Rather, the issue is what kind of review body, and what powers, would be best to review the activities. As flagged in the questions above, these hypotheticals are designed to raise issues such as the jurisdiction, definition of national security activity, the expertise of the review body, and the extent of possible audit powers. You may also wish to use other examples.

### **Hypothetical #1: Use of Force in National Security Entry and Arrest**

Following a twelve-month investigation conducted by an RCMP-led INSET based in Ontario, using information collected from numerous domestic and foreign agencies, charges are laid under sections 465(1)(c) (conspiracy to commit an indictable offence) and 83.18 (participation in activity of terrorist group) of the *Criminal Code*. The charges related to facilitation of terrorist activity in Canada. The RCMP works jointly with the Toronto Police Service. The RCMP INSET develops the operational plan and obtains the arrest warrant. Toronto Police Service members, under the direction of the RCMP INSET, assist in securing and entering the premises. The RCMP members arrest the individual. The entry is forcible, and there is damage to the property. Present in the house are the suspect and his wife. A complaint is made regarding inappropriate use of force and damage to property. The position of the RCMP is that the use of force was reasonable in the circumstances.

### **Hypothetical #2: Internationally Protected Persons Mandate**

An important international treaty negotiation is to be held in Ottawa. A number of heads of state will be attending in Canada. The RCMP (Protective Operations Directorate) has invested a significant amount of time in developing an operational plan for security of visiting diplomats and politicians, which has both tactical and strategic elements. In preparing the operational plan, the RCMP (Protective Operations Directorate) obtain threat assessment and country/political background information from the PCO International Assessment Secretariat, CSIS, and DND. They also draw widely on other RCMP resources, as well as contacts with municipal and provincial police forces and police informants to develop background information on the local criminal threat environment. The tactical aspects of the operational plan involve, where necessary, deployment of police dogs, use of pepper spray and rubber bullets.

One week before the treaty negotiation conference, the RCMP receive information from a credible confidential source of a specific threat to the life of a visiting head of state of a country engaged in civil war and suspected of state participation in terrorism. The source identifies the country's opposition leader as the perpetrator of the death threat. Because of the threat, the RCMP launch an investigation and assign an officer to monitor the

activities of that country's opposition leader for the week prior to the treaty negotiation conference. The country's opposition leader has dual citizenship and is at the time in Vancouver.

There is an anti-globalization demonstration the first day of the treaty negotiation conference. Force is used by the RCMP in response to certain actions by protestors.

After the treaty negotiation conference is over, complaints are made regarding both the monitoring of the opposition leader's activities, and the use of force in response to the anti-globalization demonstration.

### **Hypothetical #3: Simultaneous Take-Down, Immigration Context with Terrorist Concerns**

CBSA investigators are investigating concerns with an immigration fraud ring in Vancouver. RCMP Immigration and Passport Section are consulted and commence an investigation. The investigation focusses on the following charges: dealing in and possession of forged documents used for the purpose of immigration (*Immigration and Refugee Protection Act*, s. 122; forging of passports and possession of forged passports, *Criminal Code* s. 57; fraudulent use of certificates of citizenship, *Criminal Code* s. 58; participation in a criminal organization, *Criminal Code* s. 467.1; conspiracy, *Criminal Code* s. 465). The RCMP's investigation reveals that a number of identified individuals, all males between the ages of 18 and 25, have identical travel patterns to source countries for terrorism, apparent links to two proscribed groups, and irregularities in their immigration documents that are known to be common among such groups. RCMP Immigration and Passport, consult with the INSET regarding concerns about extremist criminal activity. RCMP INSET members assist RCMP Immigration with interviews of three suspects. The RCMP asks for assistance from U.S. authorities regarding background checks of suspects who had previously studied in the U.S. The investigation continues. Eventually a decision is made to lay immigration charges, and the RCMP develops and executes an arrest plan, with CBSA participation. Local law enforcement and the RCMP's Immigration Task Force assist in the simultaneous take-down of ten individuals.

### **Hypothetical #4: Credit Card Fraud**

Local RCMP members in Saskatchewan are investigating identity theft/credit card fraud allegations. The investigation continues over a period of several months. The RCMP identify four suspects, all of whom are Muslim. Techniques used to perpetrate the identity theft and fraud, and the goods purchased, are known to be common among certain proscribed groups. Surveillance also reveals links with certain suspected extremists in the United States. The RCMP become suspicious of potential terrorist financing aspects..Local RCMP members inform the NSIS of their suspicions. The NSIS takes over the investigation with direction from Headquarters. The NSIS investigation continues for some time, and includes requests for information from CSIS, CBSA, CIC and certain American agencies regarding the four individuals. The NSIS concludes that

there are no terrorist financing links, and the investigation is returned to the local detachment. Eventually the four individuals are charged with fraud.