

**Commission of Inquiry
into the Actions of Canadian Officials in Relation to Maher Arar
Policy Review**

**Questions for Panel Members:
A Background Paper
to the Commission's
Roundtable of Canadian Experts on Review and Oversight**

June 2005

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This paper is designed to set out issues which arise in considering a review mechanism for the RCMP's national security activities.¹ The RCMP is Canada's national police force. It is presently subject to review by a number of accountability and review mechanisms including the Commission for Public Complaints Against the RCMP, or CPC.² The Commissioner may recommend that there be no change in the current review mechanisms, that aspects of the CPC should be amended, or that there should be a different review body for the RCMP's national security activities. As part of the process of considering the design of a review mechanism, this paper sets out six major questions, and briefly reviews various aspects of each question.³ These questions will be the subject of discussion at the Commission's Roundtable of Canadian Experts on Review and Oversight on June 10, 2005.

A. THE REVIEW BODY: STRUCTURE AND JURISDICTION

Question 1: Do the national security activities of the RCMP require a new form of review, or is the status quo sufficient?

Question 2: If so, should review of the national security activities of the RCMP be conducted by:

- (i) the CPC, which would have jurisdiction over all RCMP activities;
- (ii) a new body, which would have jurisdiction over the RCMP's national security activities only;
- (iii) an expanded SIRC, which would have jurisdiction over the RCMP's national security activities in addition to its current mandate; or

¹ There is a list of acronyms at the end of this document.

² See discussion of the CPC's present structure in the Commission's Background Paper, "Domestic Models of Review of Police Forces". Available online at www.ararcommission.ca.

³ This paper is not intended to be an exhaustive discussion of all possible features of a review mechanism, nor the advantages or challenges of each feature. It is designed to facilitate discussion at the Commission's Roundtable of Canadian Experts on Review and Oversight. More detailed analysis and discussion is found in the Background Papers to the Commission's Consultation Paper, and in the Commission's Supplementary Papers, all of which are available online at www.ararcommission.ca.

- (iv) an expanded SIRC, or other new agency, which would have jurisdiction over some or all of the other federal agencies with a national security function?

Question 3: How should the Commission's recommendations address issues of integration and information-sharing among the RCMP and:

- (i) other federal agencies;
- (ii) provincial and municipal police forces; and
- (iii) foreign governments and agencies.

For example: how should secondments and co-locations be treated for review purposes? Should review bodies be empowered to scrutinize integrated activity and information-sharing through cooperative arrangements and joint investigations?

(a) Status Quo?

The first question that must be addressed is whether the current review of the RCMP's national security activities is sufficient. As noted in the Commission's Consultation Paper⁴, and in the RCMP's written submissions to the Commission⁵, the RCMP already has a number of accountability and review structures. For example, it has a governing statute, a code of conduct, internal policies, ministerial directives, and a supervisory hierarchy. It is subject to scrutiny by independent agencies, including the CPC and the Auditor General. It must comply with the *Privacy Act*, the *Access to Information Act*, the *Canadian Human Rights Act*, the *Charter of Rights and Freedoms* and the dictates of the rule of law. The evidence that the RCMP collects and attempts to use in prosecutions is subject to judicial scrutiny.

The CPC has made submissions indicating that in its view, however, the status quo is inadequate, in part because the "powers conferred upon the CPC have never been sufficient to adequately

⁴ Commission's Consultation Paper, p. 36.

⁵ RCMP Submissions to Arar Commission (February, 2005), pp. 25-32.

discharge the mandate given”.⁶ The CPC points in particular to what it refers to as the difficulty in accessing information, and the lack of power to compel the production of evidence, statements or documents unless a public hearing is called. The CPC also notes limitations on any complaint-based process, particularly in the context of national security issues.⁷

A number of groups have also taken the position that the CPC, as presently structured with its present powers, cannot effectively review the RCMP’s national security activities.⁸

(b) Functional or Institutional Review?

One of the central questions is over what agency, agencies and/or activities a review body should have jurisdiction. Should the RCMP have its own review body? Should the review body also review other national security actors (some or all of the RCMP, CSIS, CSE, military intelligence, and various federal agencies and departments)?

In Canada we presently have separate review bodies for each major agency involved in national security activities. Thus, the CPC reviews the RCMP, SIRC reviews CSIS, and the CSE Commissioner reviews the CSE. There are other federal departments and agencies that are also involved in national security and intelligence activities which are not subject to any comparable review.

Members of provincial and municipal police forces are generally not subject to the jurisdiction of the CPC even when working with the RCMP in integrated national security teams unless they are appointed as RCMP supernumerary special constables,⁹ and remain subject to the disciplinary jurisdiction of their home police force.¹⁰ The Canadian Association of Chiefs of Police has

⁶ CPC Submissions to Arar Commission (February, 2005), p. 22.

⁷ CPC Submissions to Arar Commission (February, 2005), pp. 22-23.

⁸ See, for example, International Civil Liberties Monitoring Group Submissions to Arar Commission (February, 2005), p. 3; CAF/CAIR-Can Submissions to Arar Commission (February, 2005), p. 21; British Columbia Civil Liberties Association Submissions to Arar Commission (March, 2005), pp. 7-8.

⁹ *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (“*RCMP Act*”), ss. 7 and 45.35(1).

¹⁰ See Ottawa Police Service Submissions to Arar Commission (February, 2005), p. 5; Ontario Provincial Police Submissions to Arar Commission (March, 2005), p. 8.

urged a legislative solution to issues of accountability and oversight when a police officer from one jurisdiction is subject to a complaint while working in another jurisdiction.¹¹

Since 9/11 there has been increased integration of law enforcement and security intelligence actors. The anti-terrorist investigations conducted by RCMP INSET teams, which may involve CSIS, provincial and municipal police forces, and other federal departments such as the CBSA, is only one example of this integration. It may be argued that the current agency-based review model prevents any one of the review agencies from obtaining the whole picture with respect to an integrated project.

Internationally, there are models of both agency-based and function-based review. In Norway¹² and in the United Kingdom¹³, jurisdiction for some review purposes is defined functionally, meaning it extends to both police and intelligence services insofar as they are engaged in defined national security or investigative activities. The review committee for security intelligence in Norway, the EOS Committee, sees advantages in its multi-agency jurisdiction, including its ability to monitor integrated activity. This view is shared by the Swedish and Australian Commonwealth Ombudsman's offices, which are bodies of general jurisdiction, and which therefore review both police and security intelligence activities.

In Belgium there is an interesting model which combines agency-based jurisdiction with statutory gateways¹⁴ between review agencies. Committee P, which has jurisdiction over the police, and Committee I, which has jurisdiction over two intelligence agencies, have a statutory obligation to exchange information, to hold joint meetings and to jointly discharge duties in

¹¹ CACP Submissions to Arar Commission (March, 2005), pp. 16-19, and the *Cross-Border Policing Act*, C.C.S.M. c. C325.

¹² The Committee for Oversight of the Intelligence, Surveillance and Security Services, known as the "EOS Committee" in Norway, has jurisdiction over all "intelligence, surveillance and security services carried out by, under the control of or on the authority of the public administration". See *The Act relating to the Monitoring of Intelligence, Surveillance and Security Services*, Act No. 7 of 3 February 1995, s. 1.

¹³ The review bodies created by the *Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23 ("*RIPA*"), whose jurisdiction is defined by investigative activity (e.g. intercepts, surveillance), generally monitor any public authority engaged in the defined activities.

¹⁴ We use this term to connote statutory mechanisms that allow for information-sharing and/or other forms of cooperation or interaction among review bodies.

some cases.¹⁵ They have conducted joint investigations and issued separate reports based on those joint investigations.

In the United States, the Inspectors General of the CIA, the Department of Justice¹⁶ and Homeland Security all expressed a preference for agency-based review. The Inspector General of the CIA specifically commented on the desirability of sole-agency jurisdiction for review of CIA activities since the CIA's functions are specialized and complicated, and concentration on one agency allows for the necessary specialization and understanding in the body responsible for accountability as well. The Inspector General of the Department of Justice noted that single-agency review coupled with an ability to coordinate cross-agency reviews was an important feature for review of integrated or overlapping investigative activity. In the U.S., this is accomplished by joint Inspectors General reviews (e.g., the Inspectors General of the CIA and of the Department of Justice may jointly investigate a matter).

Another model to facilitate cooperation with other accountability bodies is found in Australia. In fulfilling its mandate with respect to the integrated Australian Crime Commission (ACC), for example, the Commonwealth Ombudsman has the statutory authority to enter into investigation "arrangements" with other accountability bodies that have jurisdiction over members of the ACC.¹⁷

In the United Kingdom, the IPCC has in the past engaged in joint investigations with other accountability bodies. A "statutory gateway" was also recently created to allow for information exchange and cooperation between the IPCC and the Parliamentary Ombudsman, both of whom have review jurisdiction over certain aspects of the Revenue and Customs Department. Thus, the IPCC and the Parliamentary Ombudsman "may disclose information to each other for the

¹⁵ *Organic Law of 18 July 1991 on Monitoring Police Forces and Intelligence Services*, ss. 52ff.

¹⁶ The Inspector General of the Department of Justice has jurisdiction over a number of agencies with police-like functions including the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency (DEA), the U.S. Marshals Service, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the Federal Bureau of Prisons.

¹⁷ *Ombudsman Act 1976* (Cth), s. 8. A Parliamentary Committee recently recommended that consideration be given to greater liaison between the Commonwealth Ombudsman, the state ombudsmen, and the Inspector-General of Intelligence and Security, with respect to possible joint reviews of combined ASIO/police operations.

purposes of the exercise of” their respective mandates, and “may jointly investigate” certain matters.¹⁸

Some of the submissions to this Commission have taken the position that the single agency model leads to a better understanding of the particular needs of the agency and its actions and effects. For example, the CSE Commissioner has expressed the view that an agency-based model appears preferable, stating:¹⁹

[I]t remains doubtful whether one review body could conduct effective review of the disparate array of activities conducted by the security and intelligence community overall.

On the other hand, the CPC notes that a single review body with jurisdiction over all national security actors would have the advantage of ensuring that all intrusive national security activities are subject to a consistent level of civilian review.²⁰

The BCCLA also preferred a single national security review body, stating that:

A civilian review agency responsible for ensuring accountability in the area of national security must be able to follow the thread of evidence either forward to its conclusion or back to its inception regardless of whether it originated with the RCMP, CSIS or some other agency.²¹

(c) Divided Jurisdiction

Another question is whether to divide the review jurisdiction for the RCMP. Should separate agencies review the RCMP’s national security activities and non-national security activities? In such a case the jurisdiction of the “national security review agency” could be defined by function (i.e., all national security activities) or by agency (RCMP, CSIS, CSE and CBSA, for example).

Norway provides an example of divided jurisdiction. In Norway, there is a complaints-based body which is responsible for the entire police force, while a separate review body, the EOS

¹⁸ *Commissioners for Revenue and Customs Act 2005* (U.K.), 2005, c. 11, ss. 28(3) - (4).

¹⁹ CSE Commissioner Submissions to Arar Commission (January, 2005), p. 4.

²⁰ CPC Submissions to Arar Commission (February, 2005), p. 54.

²¹ BCCLA Submissions to Arar Commission (March, 2005), p. 13.

Committee, has review jurisdiction over the two intelligence agencies as well as the Police Security Service. The EOS Committee not only addresses complaints against the Police Security Service, but also conducts regular inspections. Guidelines direct the complaints-based body responsible for the whole of the police force to advise the EOS Committee of any allegations against the Police Security Service, to keep it apprised of such investigations and recommendations, and to inform the EOS Committee of any matters that may be of interest to the Committee. The EOS Committee has a more limited reciprocal duty. The members of the Police Security Service are thus subject to two forms of review. It should be noted that the Police Security Service has a separate statutory basis from the ordinary police service, and has separate offices. However, there is integrated activity, including information sharing, between the two, and the EOS Committee in a recent annual report raised the question of whether it should have jurisdiction over portions of the ordinary police service that are involved in counter-terrorist national security activities.²²

Such practical difficulties may arise in attempts to define jurisdiction by function in relation to policing functions. In particular, some police investigations start out as ordinary investigations and then become national security investigations. It is theoretically possible that they could switch back again. As the Canadian Association of Chiefs of Police has noted:

[N]ot only are many terrorist related activities considered to be crimes, many of the precursor activities of terror-related criminals involve straightforward, uncomplicated and basic criminal activity that will ultimately lead to terrorist acts.²³

The Police Ombudsman for Northern Ireland holds a similar view, noting that terrorist groups engage in many ordinary crimes, often for financing purposes, such as credit card fraud, fuel smuggling, drug smuggling, robbery and petty crime. She also notes that investigations often switch back and forth or run concurrently in a counter-terrorist unit and/or a different unit of the police force.²⁴ The Ontario Provincial Police has raised a similar concern in the Canadian context. In its submissions, the OPP states that intelligence-led policing, which involves

²² See the discussion of Norway in the Commission's Supplementary International Models Paper.

²³ CACP Submissions to Arar Commission (March, 2005), p. 11 (footnotes omitted).

²⁴ See the discussion of the Police Ombudsman for Northern Ireland in the Commission's Supplementary International Models Paper.

information flows throughout a police force as well as to and from other policing/security agencies, has implications for a review model in that it would “probably not be effective to single out a particular division of a law enforcement agency for oversight or review”.²⁵ The Commission is interested in how these types of issues might be addressed by statutory provisions if a divided jurisdiction model were to be adopted.

(d) Information Sharing

Information-sharing is critical to both criminal investigations and national security/intelligence gathering. This involves issues of how an agency comes into possession of information, the use it makes of that information, the persons to whom the information may be supplied, and under what conditions. In the national security realm, information may be received from or imparted to, domestic and foreign law enforcement agencies, domestic and foreign security and intelligence agencies, and domestic and foreign governments and international agencies.

There may be features specific to national security information, including the security of sources, methods and international information-sharing arrangements, which must be accommodated in the design of a review body. There may also be differences regarding information-sharing by police forces as opposed to security and intelligence agencies, which may lead to different powers, constraints or features in a review body. These are all issues of interest to the Commission.

(e) Interaction with Domestic Review Models

Each of the potential revised models, discussed above, will have some effect on existing review models. There may be gaps or inconsistencies in the review framework. In Australia, the Ombudsman and Privacy Commissioners have noted gaps and inconsistencies in the accountability framework for cross-border law enforcement matters, which may arise in relation to:

- referring complaints;

²⁵ OPP Submissions to Arar Commission (March, 2005), pp. 18-19.

- sharing information;
- delegating power to another accountability body better placed to investigate a matter; and
- initiating involvement in a matter.²⁶

In the Canadian context, examples of issues which may arise include:

- If there is to be a combined agency for federal governmental actors, how would this agency interact with (i) provincial and municipal participants in integrated national security enforcement teams, and (ii) domestic review agencies with jurisdiction over those participants?
- In the Canadian federal system, would statutory gateways between federal review bodies such as SIRC and provincial review bodies such as the Office of the Police Complaint Commissioner (B.C.) or the Police Ethics Commissioner (Québec), be effective?
- Within the federal government system, is single-agency review (e.g., CSE/CSIS/RCMP) with an ability to coordinate cross-agency review through statutory gateways preferable to a super-agency review body? Why or why not?
- On review of information collection and sharing practices, what should be the role of the Privacy Commissioner and how should this be coordinated with review agencies?

The Commissioner welcomes comments as to the principles he should consider, and the issues that arise, relating to the interaction of any RCMP national security review mechanism with existing domestic review models.

²⁶ “Who’s got the Map?”, paper delivered at Australian Institute of Administrative Law, National Administrative Law Forum, Hobart, July 2004, by Claire Pitham, Director of Investigations, Commonwealth Ombudsman (Australia), p. 9.

B. REVIEW POWERS

Question 4: How should the review body be able to initiate a review: complaints; own-motion investigations;²⁷ inspections;²⁸ referral from executive, legislature, or other review bodies?

Question 5: What powers does a review body for national security activities need, and what restrictions should apply? Powers might include access to information and documents; police powers; and remedial powers. Restrictions might include restrictions on the timing of investigations and disclosure in reporting.

(a) Initiating Review

In Canada, review of police forces has typically been complaints-driven.²⁹ Many of the submissions to the Commissioner have taken the position that a purely complaint-based system is inappropriate for national security activities of the RCMP.³⁰ Many foreign agencies that review national security activities also share this view. The central reasons advanced by review agencies for own-motion investigation and inspection powers with respect to national security activities relate to the secretive nature of the investigations, the potential unreliability of information, and other issues which have been discussed in the Commission's Background Paper, "National Security and Rights and Freedoms".³¹

The BCCLA has also identified a number of potential barriers to access for prospective complainants, including:

- (i) Linguistic, educational and literacy obstacles;

²⁷ We use the term "own-motion investigations" to encompass investigations, or complaints, that a review body can initiate of its own motion.

²⁸ We use the term "inspections" to mean a power to inspect the agency's activities, in the absence of a complaint, in a manner resembling audits of an agency's activities, and generally unrestricted in scope. An inspection power differs from the power to conduct own-motion investigations insofar as the latter generally relates to one identifiable matter or course of conduct.

²⁹ See discussion in the Commission's Background Paper, "Domestic Models of Review of Police Forces."

³⁰ See, for example, BCCLA Submissions to Arar Commission (March, 2005), pp. 8-10; CCLA Submissions to Arar Commission (February, 2005), p. 6; CPC Submissions to Arar Commission (February, 2005), pp. 23-25.

³¹ Available online at www.ararcommission.ca.

- (ii) Cultural experience – including ethnic and cultural backgrounds that harbour a distrust of police, or fear of police reprisals;
- (iii) Legal status: refugee claimants or permanent residents may be reluctant to jeopardize immigration status; and
- (iv) Inadequate advocacy or assistance resources.³²

In addition, the Chair of the CPC in her submissions states that a number of Muslims have brought to her attention alleged improprieties in RCMP investigations, but made it clear to her that fear prevented them from making formal complaints.³³

An interesting model with respect to civil liberties complaints in particular is found in the statutory mandate of the Inspector General of the Department of Justice in the United States. He is directed to designate one official in his office to “review information and receive complaints alleging abuses of civil rights and civil liberties” by employees, and to “make public through the Internet, radio, television and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official.”³⁴ He is also to report semi-annually on these issues to Committees of the House and Senate. The Office has commenced an extensive outreach program, including the publication of advertisements in Arabic, Urdu and other languages, in a variety of ethnic media outlets. The BCCLA has recommended that the federal government establish an Office of the Civil Liberties Ombudsperson, with a mandate of promoting and protecting civil liberties, the rule of law and *Charter* values in the context of national security.³⁵

Internationally, most review bodies for police and intelligence agencies have the ability to conduct “own motion” investigations, which is the power to commence an investigation into a particular matter either by filing its own complaint or otherwise. Many also have the power to

³² BCCLA Submissions to Arar Commission (March, 2005), pp. 8-9.

³³ CPC Submissions to Arar Commission (February, 2005), pp. 23-24.

³⁴ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (“PATRIOT Act”), s. 1001.

³⁵ BCCLA Submissions to Arar Commission (March, 2005), pp. 15-18.

generally inspect or audit files at will or periodically. These include review bodies whose remit includes national security policing: Committee P in Belgium; the EOS Committee in Norway; the Inspector Generals for the Departments of Justice and Homeland Security in the United States; and the inspection bodies created by the *RIPA* in the U.K.³⁶

In Canada, SIRC has an inspection function³⁷, while the CPC does not, although the CPC has the power to initiate its own complaints.³⁸

In Québec, the Police Ethics Commissioner is not specifically given the power to initiate a complaint, but the Minister may request an investigation.³⁹

Another potential method by which investigations may be triggered could include a request by the legislative branch or the executive branch to investigate certain matters. In Canada, the Minister may direct SIRC to provide the Minister with special reports on CSIS.⁴⁰ The Australian Prime Minister or the responsible Minister may request the IGIS to inquire into a matter.⁴¹ The Senate and House Committees may request U.S. Inspectors General to inquire into specific matters.

A further question arises as to whether wider powers (such as inspections) could appropriately be given to the CPC in the national security area without giving such powers to the CPC in other areas of the RCMP's activities.

(b) Access to Information

The statutory authority to access information held by other bodies is an important issue. To what extent should the agency have the power to compel documents and information from the agency under review or from any other source? In Canada, SIRC and the CSE Commissioner have

³⁶ The inspection powers of these bodies are circumscribed by the activity under review.

³⁷ *Canadian Security Intelligence Service Act* ("CSIS Act"), R.S.C. 1985, c. C-23, ss. 38-40.

³⁸ *RCMP Act*, s. 45.37(1).

³⁹ *Police Act*, R.S.Q. c. P-13.1, s. 166.

⁴⁰ *CSIS Act*, s. 54.

⁴¹ *Inspector-General of Intelligence and Security Act 1986* (Cth), ("*IGIS Act*") ss. 8-9.

complete access to the files of CSIS and the CSE respectively.⁴² The CSE Commissioner has subpoena powers which extend outside the agency to private actors, to other government departments, or to an agency such as the RCMP.⁴³ In contrast, SIRC has the power to summons witnesses and compel document production, but only in the context of investigations of complaints, and not in its general review capacity.⁴⁴

The Québec Police Ethics Commissioner has powers of entry to police premises and power to require the production of documents. By contrast, there are no such powers for the Ontario Civilian Commission on Police Services for the normal complaint process.⁴⁵ In Manitoba, the Commissioner of the Law Enforcement Review Agency has broad powers of search and seizure pursuant to search warrants, and the agency may demand relevant information from the chief of police of the department involved in the complaint.⁴⁶

There are a number of international review bodies for policing activities that generally have access to classified information relevant to their mandate, including the Police Ombudsman for Northern Ireland, the *RIPA* authorities in the United Kingdom, and Committee P in Belgium.

The Inspectors General of the CIA, Homeland Security and Department of Justice have broad subpoena powers applicable to non-federal government actors.⁴⁷ They are directed by statute to use methods other than subpoenas to obtain information from federal government actors. However, other federal actors cooperate in the provision of information to Inspectors General. If there is an issue about obtaining access to documents held by another federal department or agency, then the Inspector General CIA, for example, can raise the issue with the Inspector General Homeland Security to obtain cooperation from federal employees subject to the latter's review jurisdiction.

⁴² Subject only to Cabinet privilege.

⁴³ *National Defence Act*, R.S.C. 1985, c. N-5, s. 273.63(4).

⁴⁴ *CSIS Act*, ss. 39, 50.

⁴⁵ Commission's Background Paper, "Domestic Models of Review of Police Forces", pp. 9-10.

⁴⁶ *Law Enforcement Review Act*, C.C.S.M. c. L. 75, ss. 12(2) and 12(5).

⁴⁷ *Inspector General Act of 1978*, 5 U.S.C. Appendix §§ 1 – 12 (1978) ("*Inspector General Act of 1978*"), s. 6.

(c) Police Powers

A further question is whether the review agency requires police powers in the course of its investigation.

The Police Ombudsman for Northern Ireland has police powers including search and seizure powers and the power to arrest individuals who decline to assist in her investigations process. The Ombudsman has used this power a number of times. The IPCC, with jurisdiction over all police forces in England and Wales, as well as certain specialized police organizations such as the National Criminal Intelligence Service and certain aspects of Revenue, Customs and Immigration, also has police powers at its disposal.⁴⁸

The U.S. Inspectors General, in addition to their powers to compel documents and testimony, are also empowered to carry firearms, make arrests, and seek and execute search warrants.⁴⁹ It should be noted that the Inspectors General investigations can include criminal investigations.

(d) When to Investigate

Another question is whether there should be restrictions on the timing of investigations. This may be related to the principle of police independence, or to preserving the integrity of ongoing criminal investigations. On the issue of police independence, the RCMP has stated as follows:

Threats to police independence are less apparent with a review model that would operate at a distance from government, and that would conduct retrospective audits without interfering in active investigations. Retrospective audits of case files can serve an important function, and the RCMP supports the proposition that external review strengthens its operations in the national security sphere.⁵⁰

A number of review bodies with jurisdiction over police forces have the ability to run investigations concurrently with police investigations. For example, the Police Ombudsman for Northern Ireland has the power to conduct investigations of the police service concurrently with

⁴⁸ *Police Reform Act 2002* (U.K.), 2002, c. 30, s. 19(4) of Schedule 3, Part 3.

⁴⁹ *Inspector General Act of 1978*, s. 6(e)(1).

⁵⁰ RCMP Submissions to Arar Commission (February, 2005), p. 17.

the police service's criminal investigations, including terrorism investigations, into the same or related events. At times, both the Ombudsman's office and the police force require access to the same evidence and there is negotiation about such access. On occasion, the Ombudsman has even taken primacy over an alleged crime scene.⁵¹

In the United Kingdom, the IPCC conducts investigations that parallel concurrent police investigations, including national security investigations. While there are practical issues to address, such as access to evidence required by both bodies, each has been able to carry out its mandate without interference with the others.⁵²

The Inspectors General in the United States frequently conduct investigations concurrently with ongoing FBI or state police criminal investigations.

(e) Remedies

The final issue is whether the review body should have powers of recommendation only, or whether it should have the ability to issue binding orders.

Existing Canadian review bodies (CPC/SIRC/CSE Commissioner) have recommendation powers only with respect to the broad review issues. Most of the international bodies also have only recommendation powers. These bodies, by and large, believe that public accountability and agency responsibility have meant that the recommendation powers are sufficient, and allow the agency to implement changes in an appropriate manner.

Further, as the CPC has submitted to this Commission, when it comes to the operation of a police force, recommendation powers pose fewer problems with respect to the doctrine of police independence.⁵³ The Canadian Civil Liberties Association also adopted this view, submitting that the review agency should not acquire decision-making power over any law enforcement authority on the grounds that "to whatever extent it had a power of decision, the audit agency

⁵¹ See Commission's Supplementary International Models Paper.

⁵² See discussion in the Commission's Supplementary International Models Paper.

⁵³ CPC Submissions to Arar Commission (February, 2005), pp. 12-14.

would be at risk of inheriting the general reluctance to take on the police that afflicts so many politicians.”⁵⁴

The International Civil Liberties Monitoring Group has made the interesting suggestion that the agency should have a “public education mandate” to ensure that its reports receive public attention.⁵⁵ This is similar to the explicit statutory public education mandate given to the Inspector General of the Department of Justice, discussed earlier.

On the other hand, the Canadian Arab Federation and the Canadian Council on American-Islamic Relations submit that a review body should have a broad variety of remedies, including the ability to order compensation to individuals, and “written and/or public apologies, certification that an individual is not subject to investigation, erasure or rectification of erroneous files, and the issuance of corrective policy and practice directives.”⁵⁶

C. WHO DOES REVIEW/TO WHOM DO THEY REPORT

Question 6: What observations/comments do you have about:

- (i) the qualifications necessary to review national security activities;
- (ii) how members should be chosen;
- (iii) how questions of national security confidentiality should be addressed;
- (iv) to what entity(ies) the review body should report; and
- (v) what form(s) should such reporting take, keeping in mind the sometimes conflicting requirements of secrecy and accountability/transparency?

⁵⁴ CCLA Submissions to Arar Commission (February, 2005), p. 10.

⁵⁵ ICLMG Submissions to Arar Commission (February, 2005), p. 5.

⁵⁶ CAF/CAIR-Can Submissions to Arar Commission (February, 2005), p. 26.

(a) The Review Body

Domestic and international review bodies for police and security and intelligence agencies exhibit different relationships to the legislative and executive branches, and qualifications, membership and appointment or election procedures vary widely.

The CPC can be composed of up to 31 members, although at present, only the Chair and the Vice-Chair are members of the Commission. Members are appointed by the federal Cabinet for five-year renewable terms, and can only be removed for cause. No special qualifications are required. Most of the international models that we reviewed range from one member to seven members. The question arises as to whether the Commission could appropriately review national security activities if it were at its full complement of 31 members.

SIRC is constituted as a Committee consisting of the Chair and two to four other members, all of whom are to be Privy Councillors not serving in Parliament. Members are chosen by the Prime Minister after consultation with the Leader of the Opposition and the leaders of each party in the House of Commons with 12 or more members. Members are appointed for a five year term and are eligible to be re-appointed for a five-year term. Members of SIRC must comply with security requirements and are required to take an oath of secrecy.

A third model is that of the CSE Commissioner. The Commissioner is appointed by Governor in Council. He or she must be a supernumerary judge or a retired judge of a superior court.

The other Canadian model which is often used where independence is critical is that of the independent officer of Parliament. Federal examples are the Information Commissioner, the Privacy Commissioner, and the Auditor General. The Privacy Commissioner, for example, is appointed by the Governor in Council only after approval by resolution of both the House and Senate, for a seven year renewable term. He or she may only be removed from office on address to each of the House and the Senate. He or she reports directly to Parliament.

In Belgium and Norway, members of the review bodies are elected by the legislature, which is not a practice that we have in Canada. Similarly, the Ombudsman in Sweden is elected by the

legislature. Other UK oversight bodies have required that only judges or retired judges may hold certain review positions.

(b) Reporting and Disclosure

There is a tension between the need to protect national security and the desire to provide public information about review of national security activities, whether conducted by the police or by security intelligence agencies. It is generally accepted that there cannot be full disclosure of all information. The question is how best to balance the public need for accountability with the protection of national security.

The CPC presently submits an annual report to the Minister, who must lay it before each House of Parliament on any of the first fifteen days that that House is sitting after the Minister receives it.⁵⁷ As presently constituted, however, the CPC does not have full access to classified information.

SIRC conducts investigations and inspections involving national security and intelligence, and submits annual and special reports to the Minister. The Minister must lay the annual reports before each House of Parliament on any of the first fifteen days that that House is sitting after the Minister receives it.⁵⁸ SIRC does not make its investigations of complaints, nor its special reports public. The Minister is not obliged to make these reports public. Although the reports are subject to requests under the *Access to Information Act*, there are national security exemptions from disclosure under that Act.⁵⁹

By contrast, the Privacy Commissioner and the Auditor General report directly to the legislative branch.⁶⁰

⁵⁷ *RCMP Act*, s. 45.34.

⁵⁸ *CSIS Act*, ss. 53-54.

⁵⁹ *Access to Information Act*, R.S.C. 1985, c. A-1, s. 15.

⁶⁰ *Privacy Act*, R.S.C. 1985, c. P-21, ss. 38 - 40; *Auditor General Act*, R.S.C. 1985, c. A-17, ss. 7, 8.

Some international review bodies have statutory provisions specifically directed to the confidentiality of reporting practices. For example, the Office of the Inspector General for the CIA is specifically directed by legislation:

“to take due regard for the protection of intelligence sources and methods in the preparation of all reports issued by the office and, to the extent consistent with the purpose and objective of such reports, take such measures as may be appropriate to minimize the disclosure of intelligence sources and methods described in such reports.”⁶¹

In the United States, there is an interesting statutory mechanism which allows for an executive branch veto over the disclosure of information in the report of an Inspector General but which requires accountability for the use of such veto to Congress. For example, the Attorney General can prohibit disclosure by the Inspector General of the Department of Justice of “sensitive information”, including information concerning ongoing criminal proceedings, undercover operations, the identity of sources, intelligence matters, and national security information. If the Attorney General does so, he or she must then state his or her reasons for doing so to Congress.⁶² The Department of Justice Inspector General advises that this section is generally interpreted to allow the Attorney General to prohibit disclosure of “sensitive information” only, and not to prohibit the investigation or other scrutiny that the Inspector General might choose to undertake. The Inspector General advises that this power has been invoked only once, in 1998, to delay disclosure of a report by six months.⁶³

In Australia, the IGIS reports to the Prime Minister on inquiries, inspections and compliance by the ASIS and DSD.⁶⁴ The complete report is to be provided to the Leader of the Opposition in the House of Representatives, but there is a statutory obligation of secrecy on the Leader with respect to any part of the IGIS’ Report not tabled in Parliament.⁶⁵ Prior to tabling the Report in each House of Parliament, the Prime Minister may make such deletions “as the Prime Minister

⁶¹ 50 USC Sec. 403q(c)(3).

⁶² *Inspector General Act of 1978*, s. 8E.

⁶³ Office of the Inspector General of the Department of Justice, “Epilogue”, dated July 1998, to its “CIA-Contra-Crack Cocaine Controversy: a review of the Justice Department’s investigations and prosecutions”, dated December 1997. See <http://www.usdoj.gov/oig/special/9712/epilogue.htm>.

⁶⁴ *IGIS Act*, s. 35(2) – (2B).

⁶⁵ *IGIS Act*, s. 35(3).

considers necessary in order to avoid prejudice to security, the defence of Australia, Australia's relations with other countries or the privacy of individuals".⁶⁶

⁶⁶ *IGIS Act*, s. 35(3).

ACRONYMS USED IN THIS PAPER

ACRONYM	MEANING
ACC	Australian Crime Commission (Australia)
ASIO	Australian Security Intelligence Organisation (Australia)
ASIS	Australian Secret Intelligence Service (Australia)
BCCLA	British Columbia Civil Liberties Association (Canada)
CACP	Canadian Association of Chiefs of Police (Canada)
CAF/CAIR-Can	The Canadian Arab Federation/Canadian Council on American-Islamic Relations (Canada)
CBSA	Canada Border Services Agency (Canada) – department of federal government responsible for managing the nation’s borders by administering and enforcing domestic laws governing trade and travel, as well as international agreements and conventions.
CCLA	Canadian Civil Liberties Association (Canada)
CIA	Central Intelligence Agency (U.S.)
Committee I	Standing Committee for the Monitoring of Intelligence Services (Belgium)
Committee P	Standing Committee for the Monitoring of Police Forces (Belgium)
CPC	Commission for Public Complaints Against the RCMP (Canada) – review body for RCMP
CSE	Communications Security Establishment (Canada) – national cryptological agency
CSIS	Canadian Security Intelligence Service (Canada) – national civilian security intelligence service
DEA	Drug Enforcement Agency (U.S.)
DSD	Defense Signals Directorate (Australia)
EOS Committee	Committee for Oversight of the Intelligence, Surveillance and Security Services (Norway)

FBI	Federal Bureau of Investigation (U.S.)
ICLMG	International Civil Liberties Monitoring Group (Canada)
IGIS	Inspector-General of Intelligence and Security (Australia)
INSET	Integrated National Security Enforcement Team (Canada) – RCMP led investigation team, in which provincial and municipal police forces, CSIS, and other federal departments and agencies may participate
IPCC	Independent Police Complaints Commission (U.K.)
OPP	Ontario Provincial Police (Canada) – provincial police force
RCMP	Royal Canadian Mounted Police (Canada) – national police force
RIPA	<i>Regulation of Investigatory Powers Act</i> (U.K.)
SIRC	Security Intelligence Review Committee (Canada) – review body for CSIS