

Arar Commission Policy Review

Integrated National Security Review Committee: Further Option for Public Comment

November 25, 2005

The Commission would like to circulate further details regarding a review model that was first raised in Question 17 of the October 17, 2005 Further Questions for Public Consultation.¹ This model would be in addition to the models set out in the October, 2004 Consultation paper.² The Commission invites comments on this model, including assessments of its features relative to other models, and proposals for variations of any of its features. All submissions should be made to the Commission on or before December 19, 2005.

A. Review of Integrated National Security Activities

Many of the submissions made to the Commission have emphasized that integrated national security activities are an increasingly common feature of the Canadian national security environment. The RCMP's national security activities are often integrated with the activities of other federal government actors, including CSIS and the CSE; and others such as the CBSA and Transport Canada. The RCMP also conducts national security activities in concert with municipal and provincial police forces. Therefore, the Commission would like to propose a further model for public comment – an Integrated National Security Review Committee combined with enhanced review of the RCMP.

This review model has four main features, discussed in detail below:

¹ http://www.ararcommission.ca/eng/public_consultation_oct17.pdf

²As amended in December, 2004;

see <http://www.ararcommission.ca/eng/Consultation%20Paper%20FINAL%20REV%20Dec%2010.pdf>

- CPC with enhanced investigative powers, and review functions to review the RCMP's national security activities ("New CPC")³;
- Continuation of SIRC and the Office of the CSE Commissioner in their present roles;
- Creation of statutory gateways to allow for information sharing, referrals and joint investigations among accountability bodies; and
- A new Integrated National Security Review Committee ("INSRC") to coordinate the review of integrated national security activities among the RCMP, CSIS and the CSE.

B. Enhanced CPC Powers and Review Functions

RCMP national security activities would be reviewed by the Commission for Public Complaints Against the RCMP, which would undergo a number of substantial changes ("New CPC"). These could include:

- (a) Enhanced investigative powers, similar to those of the CSE Commissioner, to compel documents and testimony from any person for matters that the CPC considers relevant to its investigations. This would include the power to compel documents and testimony from persons outside the RCMP in order to follow the trail of relevant information;
- (b) Review⁴ power over the RCMP's national security activities;

³ Variations on this model could include creation of jurisdiction in SIRC to review RCMP national security activities, rather than enhancement of CPC powers and review functions. Such a change would obviously have many implications for the other features of this model.

⁴ "Review" in this document refers to a review body's power to generally inspect activities, documents, procedures, policies, and to ask questions of employees, in the absence of a complaint, at its discretion, for any purpose consistent with the review body's mandate. "Review" would encompass an audit for propriety or legal compliance, for example.

- (c) Power to conduct investigations of RCMP national security activities of its own motion, upon receipt of a complaint, or at the request of the responsible minister;
- (d) Changes to the requirements for membership and appointment;
- (e) Statutory gateways to ensure that information may be shared with, or matters referred to, other accountability bodies, where New CPC's reviews or complaint-investigations reveal activity by other institutions that New CPC believes may require scrutiny by a body that is better placed to review such activity, or to enable joint investigations where appropriate.

1. Accountability Bodies

“Accountability bodies” are institutions that play a role in ensuring the accountability of public sector actors. These include review bodies, such as SIRC and the Office of the CSE Commissioner, as well as institutions such as the Privacy Commissioner, the Auditor General and Deputy Ministers or other appropriate officials responsible for departments such as CBSA, CIC, CRA, Transport Canada and FAC. A new parliamentary committee for national security activities would also be an accountability body. The precise scope of the class of “accountability bodies” is undefined, and Commissioner O’Connor welcomes comment on this issue.

2. Statutory Gateways

“Statutory gateways” between accountability bodies are statutory provisions that create links between accountability bodies. For example, a statutory gateway may provide that

information may be shared with, matters may be referred to, or joint investigations may be undertaken with, another accountability body.⁵

In the context of integrated national security review, amendments would be made to statutes to provide that relevant accountability bodies would have the appropriate referral authority. The purpose of referral would be to ensure that aspects of the review of integrated activities do not fall between the cracks and escape review. The fact of a referral would not be binding on the institution that received the referral. The scope of information that might be transferred would depend on the nature of the receiving accountability body, including its security clearance and mandate. These referrals would be able to occur between accountability bodies notwithstanding the *Security of Information Act* and the *Privacy Act*, or pursuant to amendments to these statutes. The “need to know” principle would continue to guide the relevant accountability bodies, which would continue to respect national security confidentiality in the context of the necessary sharing of information in order to review integrated activities.

These “statutory gateways” would include a mandate to conduct joint or integrated reviews with certain other accountability bodies. As discussed below, INSRC would assist in coordinating joint reviews among the New CPC, SIRC and the CSE Commissioner. Reviews could also be carried out by one or more of these bodies jointly with other independent accountability bodies, such as the Privacy Commissioner; but not likely offices such as Deputy Ministers of departments, since they would lack a comparable degree of independence.

In our federal system of government, there are issues as to how information transfers and referrals could be made to provincial or territorial review bodies for law enforcement

⁵ For a discussion of statutory gateways and/or joint-review mechanisms in other countries, see the Supplementary Background Paper on International Models of Review of National Security Activities, pp. 7 (Belgium), 18 (England and Wales), 25 (Australia) and 28 – 32 (United States). See also the Background Papers to the Roundtables of International and Domestic Experts. These papers are available at www.ararcommission.ca.

activities, or whether joint or coordinated reviews could be undertaken with provincial or territorial review bodies.

C. SIRC/CSE Commissioner's Office

SIRC and the CSE Commissioner's Office would continue their review mandates over CSIS and the CSE, respectively. To facilitate integrated review, legislation governing both the Office of the CSE Commissioner and SIRC would be amended to provide the same statutory gateways for referral to accountability bodies as discussed in Section B(2), above. It should also be considered whether SIRC's investigative powers should be broadened so that all of New CPC, SIRC and the CSE Commissioner have equivalent powers to compel documents and testimony from any person (i.e., to "follow the trail" of relevant information).

D. Integrated National Security Review Committee

An Integrated National Security Review Committee ("INSRC") would be established by statute. It would consist of the Chairs of the New CPC and SIRC and the CSE Commissioner, or their designates, and a Chair. Like the other members of INSRC, the Chair of INSRC would be a high-profile appointee who would inspire public confidence.

The mandate of INSRC would include the following:

- (a) To coordinate review of integrated national security activities undertaken by the RCMP, CSIS and the CSE;
- (b) To refer matters regarding national security activities of other federal government actors, as well as provincial, territorial, municipal and private sector actors, to relevant review or accountability bodies;

- (c) To coordinate review of integrated national security activities of one or more federal government actors, where the Governor in Council so requests⁶;
- (d) To provide an intake function for public complaints about federal national security activities, and to refer these complaints to other accountability bodies, where appropriate;
- (e) To provide public education and outreach with respect to the complaint intake function; and
- (f) To report on accountability issues relating to Canada's national security practices and trends, including the effects of national security practices and trends on human rights and freedoms.

There are a number of options relating to how INSRC might function. Some of these options are discussed below:

1. Commencing Review

INSRC would coordinate the review of integrated national security activities among the RCMP, CSIS, and the CSE. Coordinated review could be initiated as a result of:

- (a) A referral from New CPC , SIRC, or the Office of the CSE Commissioner;
- (b) A request from the Minister for Public Safety and Emergency Preparedness, the Minister of National Defence⁷;

⁶ A variation on this model could also include a power in INSRC to coordinate the review by New CPC, SIRC and/or the CSE Commissioner of national security activities of other federal government actors, who would be prescribed by Regulation, only where such activities were integrated with any of the RCMP, CSIS and CSE and where INSRC deemed it necessary.

⁷ Another possibility may be the Attorney General of Canada.

- (c) A referral by Order in Council about one or more federal national security actors; or
- (d) A complaint initiated by an individual, group or organization, where INSRC determines that the matter should be the subject of an integrated review. The complaint would be filed with New CPC, SIRC or the CSE Commissioner respectively, who would bring the matter to INSRC's attention. A complaint could also be filed with INSRC, who would determine whether integrated review was necessary, and if so, coordinate such integrated review; and if not, refer the matter to the relevant review or accountability body.

INSRC would determine whether 'integrated review' of the identified activity is required, and if so, it would develop a plan for such integrated review, as discussed below. If INSRC determines that integrated review is not required, it would refer the matter to the relevant accountability body.

The issues of quorum and decision-making rules for INSRC would need to be addressed, particularly since the model currently proposes a membership of four. Possibilities include a quorum of three members, including the Chair and the head(s) of the review agency(ies) involved in the integrated review, with a power in the Chair to cast a vote to break a tie; or the addition of more members (discussed below).

2. Integrated Review

The options for integrated review would be broad. They include:

- (a) delegating an investigation, or parts thereof, to one or more of the New CPC, SIRC and/or the CSE Commissioner's office, as the case may require, in order to carry out the review;

- (b) coordinating a joint investigation among one or more of the New CPC, SIRC and/or the CSE Commissioner's office, or other accountability bodies, and setting the terms and scope of the joint investigation;
- (c) reviewing the investigative findings and/or recommendations, to determine which accountability bodies should receive the investigation findings and/or recommendations;
- (d) referring the investigative findings, recommendations or other matters to the appropriate accountability bodies; and
- (e) reporting.

3. Reporting

INSRC would file annual reports on its activities, possibly to the responsible ministers, and possibly to the new parliamentary committee on national security.

4. Information-sharing

The governing statute of INSRC would allow the Committee's members to share information with each other notwithstanding the *Security of Information Act* and the *Privacy Act*; or there would be amendments to these statutes. Members of INSRC would be sensitive to applicable principles of information-sharing and national security confidentiality. Information-sharing would be for the purposes of enabling review of integrated activities, and following the information trail.

5. Provincial/Territorial Coordination

A variation on this model could include additional members to represent provincial or territorial review bodies for police forces. Since much of the RCMP's national security activity is integrated with provincial and municipal police forces, this might allow for

coordinated review of integrated federal/provincial/municipal policing activity. The addition of further members could also address quorum and decision-making questions discussed above.

However, this addition could raise federal-provincial constitutional questions that would have to be studied. One possibility might be statutory provision for opt-in agreements by provinces whose police forces are integrated with the national security activities of the RCMP and other federal actors, and who wish to take part in this accountability scheme. Manitoba's *Cross-border Policing Act*, Part V, could be a model for or could inform the consideration of such an opting-in scheme.

6. Other Federal Actors

A further possibility could be the inclusion of an accountability representative(s) for other federal government agencies, such as CBSA, CIC, CRA, Transport Canada and FAC. These agencies do not have review bodies comparable to SIRC or the Office of the CSE Commissioner. Where activity came to the attention of INSRC that involved federal actors such as the CBSA, this accountability representative could contribute to INSRC's integrated review plan, which would include gathering of information from that institution, and possible referrals to or joint investigations with other accountability bodies.

7. Staffing

INSRC would have relatively few staff, since it would have no primary investigative role, and since it would consist principally of the heads of New CPC, SIRC, and the Office of the CSE Commissioner, and a Chair. However, this model contemplates a public education and research function, as well as a limited complaint-intake function. Commissioner O'Connor welcomes comments on the staffing requirements that INSRC might have, given the functions detailed in this paper and/or as might be proposed as variations.

8. Five-year review

INSRC could also be directed to conduct a five-year review of the national security accountability landscape, in order to address whether changes or enhancements are required, in particular to identify any accountability gaps and make recommendations for closing these gaps.

E. Discussion and comments

For a discussion of this model, please see the transcripts of the Commission's Policy Review public hearings held from November 15 – 18, 2005.⁸

Commissioner O'Connor invites comments on this model, including assessments of its features relative to other models, and proposals for variations of any of its features. All submissions should be made to the Commission on or before December 19, 2005.

⁸ Available at <http://www.ararcommission.ca/eng/12j.htm>.