

**CIVILIAN OVERSIGHT OF THE RCMP'S
NATIONAL SECURITY FUNCTIONS**

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CANADA

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HISTORICAL CONTEXT

Prior to 1984, the RCMP Security Service was responsible for providing security intelligence services to the Government of Canada. However, the Service's involvement in illegal activities led the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission) to recommend that a new civilian security intelligence service be established.⁽¹⁾ Parliament disbanded the RCMP Security Service when it created the Canadian Security Intelligence Service (CSIS) in 1984. CSIS is subject to a high level of civilian oversight.

On 11 September 2001, terrorists hijacked several aircraft and attacked civilian and military targets in the United States. These attacks resulted in a high number of civilian casualties, caused extensive property damage, and had a disruptive effect on air travel and the global economy.

Following these events, Parliament passed the *Anti-terrorism Act*. This statute enacted the *Charities Registration (Security Information) Act* and amended 20 other laws. By defining terrorist support as a criminal offence, it changed the RCMP's role and provided an opportunity for the organization to be more involved in matters of national security.⁽²⁾ Further, the RCMP is to receive \$576 million in funding over six years under the Public Security and Anti-terrorism funding package.⁽³⁾

Although Parliament expanded the role of the RCMP, it did not subject its national security functions to comprehensive civilian oversight. This has created a disparity between the review mechanisms for CSIS and the RCMP, whereby the RCMP is subject to less rigorous scrutiny.

(1) Patrick J. Smith, "Anti-Terrorism and Rights in Canada: Policy Discourse on the 'Delicate Balance,'" *Arab Studies Quarterly*, Vol. 25, No. 1 and 2, Winter/Spring 2003, p. 141.

(2) Office of the Auditor General of Canada, *November 2003 Report*, Chapter 10, p. 10.128, on-line: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20031110ce.html#ch10hd3f> (date accessed: 23 February 2004).

(3) *Ibid.*

RECENT EVENTS

A series of incidents have drawn attention to the expanded role of the RCMP. American authorities at New York's Kennedy Airport arrested Maher Arar, a Canadian citizen, on 26 September 2002. Mr. Arar was then deported to Syria, where he spent 10 months in captivity, and was tortured.⁽⁴⁾ It has been reported that the RCMP provided information to the United States that may have contributed to his initial detention.⁽⁵⁾ The House of Commons Standing Committee on Foreign Affairs and International Trade attempted to clarify this point in a series of hearings in the fall of 2003, but had limited success.⁽⁶⁾

Also, on 21 January 2004, RCMP officers used search warrants issued under the *Security of Information Act* to raid the home and office of *Ottawa Citizen* reporter Juliet O'Neill. It was reported that they were "looking for evidence that one of their own officers may have leaked damaging allegations in the ... Maher Arar case."⁽⁷⁾

On 28 January 2004, the Government of Canada announced a public inquiry into the actions of Canadian officials dealing with the deportation and detention of Mr. Arar (O'Connor Commission). The terms of reference were issued on 5 February 2004, and included a mandate for the presiding judge to "make any recommendations that he considers advisable on an independent, arm's length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security"⁽⁸⁾ Commissioner O'Connor has indicated that he hopes to submit his reports to the government by 31 March 2006. In the National Security Policy released on 27 April 2004, the Government of Canada pledged to create an arm's-length review mechanism for the RCMP's national security activities.

A parliamentary review of section 4 of the *Security of Information Act*, which pertains to the wrongful communication of secret information, was also promised in January 2004. However, completion of this review was delayed by the federal election called for January 2006.

(4) Stephen J. Toope, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar*, Report of Professor Stephen J. Toope – Fact Finder, 14 October 2005, p. 23, available at: <http://www.ararcommission.ca/eng/17.htm>.

(5) "CSIS, RCMP alerted U.S. about Arar, Powell says," *Globe and Mail* [Toronto], 20 December 2003, A1.

(6) Refer to House of Commons, Standing Committee on Foreign Affairs and International Trade, *Evidence*, 2nd Session, 37th Parliament, 25 September, 7 October and 4 November 2003.

(7) "Mounties raid journalist in search for Arar leaks," *Globe and Mail* [Toronto], 22 January 2004, A1.

(8) Public Safety and Emergency Preparedness Canada, News Release, "Deputy Prime Minister Issues Terms of Reference for the Public Inquiry into the Maher Arar Matter," Ottawa, 5 February 2004.

CANADA'S SECURITY AND INTELLIGENCE INFRASTRUCTURE – IN BRIEF

In Canada, numerous federal agencies have national security functions.⁽⁹⁾ Below is a summary of their activities, whether they are involved in domestic intelligence gathering, and their existing review mechanisms. The list is not exhaustive, however, and a more comprehensive overview is available in Chapter 3 of the *March 2004 Report* of the Auditor General of Canada.

Table 1: Federal Organizations Charged With National Security Functions

Name	Activities	Domestic Intelligence Gathering	Review Mechanism(s)
Canada Border Services Agency	Collects/analyzes/disseminates intelligence regarding threats to Canada's immigration/visitor/refugee/citizenship programs	Yes	None
Communications Security Establishment (CSE)	Acquires information from global information infrastructure (signals intelligence)	Yes, but only in support of targeting foreign entities outside Canada	CSE Commissioner
Canadian Security Intelligence Service (CSIS)	Collects/analyzes information on security threats to Canada	Yes	Inspector General, CSIS; Security Intelligence Review Committee (SIRC)
Department of Foreign Affairs and International Trade	Provides intelligence on world events to promote and protect Canada's national interests	No	None
Financial Transactions and Reports Analysis Centre of Canada	Detects and deters terrorist financing	Yes	None
National Defence	Collects information on the military capabilities and intentions of foreign states and entities	Yes, but only in rare circumstances	None
RCMP	Investigates criminal activity related to national security	Yes	Commission for Public Complaints Against the RCMP

There are great disparities among the activities of these organizations. However, only three of them are subject to review mechanisms. Further, among those subject to review mechanisms, the extent of scrutiny varies.

(9) Office of the Auditor General of Canada, *November 2003 Report*, p. 10.121.

REVIEW MECHANISMS FOR CANADA'S SECURITY AND INTELLIGENCE AGENCIES

A. RCMP

The RCMP is Canada's national police service. It came into existence in 1920 when the Royal North West Mounted Police and the Dominion Police were merged into a single entity. The RCMP was involved in the provision of security intelligence services to the Government of Canada during World War II. Its security operations were expanded after the war with the establishment of the Special Branch (1950), the Directorate of Security and Intelligence (1962), and the Security Service (1970). In 1984, Parliament disbanded the RCMP Security Service and transferred its functions to the newly created CSIS.

The RCMP now provides federal police services throughout the country. In addition, the organization also provides services to provinces, territories, municipalities and First Nations communities on a contract basis. Passage of the *Anti-terrorism Act* in 2001 provided an opportunity for the RCMP to be more involved in matters of national security, as this law defined terrorist support as a criminal offence.

The Commission for Public Complaints Against the RCMP (Commission) was established by Parliament in 1988. It is an independent civilian body that reports publicly to Parliament through the Minister of Public Safety and Emergency Preparedness. The Commission investigates public complaints regarding the conduct of RCMP members. In most cases, complainants must first approach the RCMP. However, the Commission Chair does have limited authority to commence his or her own investigation or may proceed directly to a public interest hearing. The RCMP is not obligated to follow recommendations made by the Chair or by a public interest hearing panel.

Shirley Heafey, former Commission Chair, repeatedly called for new powers to better enable the Commission to review the RCMP's anti-terrorism activities. This call has been echoed by her successor, Paul Kennedy. A rebalancing of the relationship between the RCMP and the Commission might also preclude further litigation between the two bodies regarding the sharing of information.

B. Canadian Security Intelligence Service

CSIS is a civilian agency that does not have any law enforcement powers. Its role is to “investigate threats, analyze information and produce intelligence”⁽¹⁰⁾ and it may gather information only on those individuals and organizations suspected of engaging in espionage and sabotage, foreign-influenced activities, political violence and terrorism, and subversion. The *Canadian Security Intelligence Service Act* prohibits the organization from investigating lawful acts of advocacy, protest or dissent.

To ensure an appropriate level of accountability, CSIS activities are subject to scrutiny by an Inspector General. Appointed by Cabinet, and answering to a deputy minister, the Inspector General is to be “the Minister’s eyes and ears in the Service ... and to maintain an appropriate degree of ministerial responsibility.”⁽¹¹⁾ The Inspector General is charged with monitoring compliance with operational policies, reviewing operational activities, and evaluating reports provided by the Director of CSIS to the Minister of Public Safety and Emergency Preparedness.

The Inspector General does not accept public complaints. However, he or she may conduct research and inquiries at the request of the Minister or the Security Intelligence Review Committee (SIRC). The Inspector General is entitled to have access to all CSIS information except Cabinet documents. However, he or she may not convene public hearings or make binding recommendations. In certain cases, the Inspector General’s reports are conveyed through the Minister to SIRC.

SIRC is an independent, external review body that reports publicly to Parliament through the Minister of Public Safety and Emergency Preparedness on an annual basis. It is empowered to examine CSIS’s performance of its duties and functions, and to investigate complaints made by any person regarding any act performed by the organization. SIRC is entitled to have access to all information held by CSIS and the Inspector General except Cabinet documents, but cannot hold public hearings or make binding recommendations.

(10) Canadian Security Intelligence Service, *Role of CSIS*, on-line: http://www.csis-scrs.gc.ca/en/about_us/role_of_csis.asp (date accessed: 11 January 2006).

(11) Smith (2003), p. 147.

C. Communications Security Establishment

The CSE was established in 1946. Originally, it was the Communications Branch of the National Research Council. In 1975, however, it was transferred to the Department of National Defence.

The role of the CSE is to “provide the Government of Canada with two key services: foreign signals intelligence in support of defence and foreign policy, and the protection of electronic information and communication.”⁽¹²⁾ This role is set out in the *National Defence Act*.

The Office of the Communications Security Establishment Commissioner was created in June 1996. The Commissioner is independent and has authority to review CSE activities to ensure they comply with Canadian law, and investigate complaints against the agency. Although the *National Defence Act* empowers the Commissioner to undertake any investigation that he or she considers necessary in response to a complaint, only complaints made by Canadian citizens and permanent residents, including CSE employees, are accepted at present. The Commissioner has access to all CSE information holdings; however, he or she may not convene public hearings or issue binding recommendations.

The Commissioner submits an annual report to the Minister of National Defence that is tabled in Parliament. Results of reviews of certain CSE activities are also submitted to the Minister; these, however, are not made public as they contain secret information.

REVIEW MECHANISMS FOR CANADA’S SECURITY AND INTELLIGENCE AGENCIES – IN BRIEF

As noted above, only three of Canada’s security and intelligence agencies have review mechanisms. Below is a summary of their roles, their level of independence, and the tools they have to carry out their oversight function:

(12) Communications Security Establishment, *About CSE*, on-line: <http://www.cse-cst.gc.ca/about-cse-e.html> (date accessed: 11 January 2006).

Table 2: Review Mechanisms of Canadian Security and Intelligence Agencies

	Commission for Public Complaints Against the RCMP	CSIS Inspector General	SIRC	CSE Commissioner
Independent	Yes	No, responsible to Deputy Minister	Yes	Yes
Public report tabled in Parliament	Yes	No, reports to SIRC through the Minister	Yes	Yes
Accepts public complaints	Yes, but must first complain to RCMP in most cases	No	Yes, but must first complain to the Director of CSIS	Yes, but accepts complaints only from Canadian citizens and permanent residents, and CSE employees
Power to undertake own investigations of complaints	Yes	Yes	Yes	Yes
Power to review agency's duties and functions	No	Yes	Yes	Yes
Power to hold public hearings	Yes	No	No	No
Power to make binding recommendations	No	No	No	No

While there are many similarities, the Commission's inability to review the RCMP's duties and functions, as well as its discretion to convene public hearings, distinguish it from the other review agencies. It may also be noted that the Inspector General of CSIS lacks the independence afforded his or her counterparts.

OPTIONS FOR OVERSIGHT OF THE RCMP'S NATIONAL SECURITY FUNCTIONS

A. Strengthening the Role of the Commission for Public Complaints Against the RCMP

The table above points to a number of similarities between the Commission and SIRC. Both operate independently, receive public complaints, and have the power to initiate and

conduct their own investigations, and to make recommendations. Key differences remain, however.

First, SIRC has a broader mandate. The Commission is devoted to receiving and investigating complaints of misconduct made by members of the public, while SIRC is charged with reviewing the performance by CSIS of all of its duties and functions. The receipt and investigation of complaints, while important, is but one part of a much larger oversight function.

Second, SIRC has broader powers to carry out its mandate. The most important of these is the right of access to information. The Commission may have access only to information held by the RCMP that is relevant to a particular complaint, and this has caused disagreement between the two organizations. SIRC, however, is entitled to all information held by CSIS and the Inspector General, except Cabinet documents.

There is a certain logic to the arguments that favour an expansion of the Commission's role over the establishment of a second review mechanism. After all, the Commission is well established, already familiar with the RCMP's duties, functions and organizational culture, and known to the public. However, care would have to be taken in tailoring any new powers to the unique circumstances involved in reviewing matters involving national security. In particular, it might be necessary to review the Commission's power to convene public hearings, in order to ensure that the existing legislative safeguards are sufficient for the full protection of secret information.

B. Establishing a New Review Mechanism for the RCMP

Alternatively, the Government of Canada could opt for a two-tiered review mechanism for the RCMP. This mechanism could take a variety of forms, including:

- (1) retaining the Commission in its present form (i.e., primarily a complaint review mechanism) while granting a new agency powers to review the RCMP's national security functions;
- (2) maintaining the Commission as a review mechanism for most complaints while granting a new agency powers to review the RCMP's national security functions and process a limited number of complaints (i.e., only complaints of misconduct against RCMP personnel involved in investigating matters of national security);
- (3) abolishing the Commission and adopting the model used to review CSIS's activities (i.e., an Inspector General or equivalent plus an oversight committee).

It is suggested that in the event that a two-tiered model is selected, care will have to be taken to ensure that the roles of the two agencies are complementary.

C. Leaving the Existing Review Mechanism for the RCMP Unchanged

Finally, the Government of Canada could opt to leave the existing structures in place. After all, the mandate of the Commission does not preclude it from investigating complaints of misconduct against RCMP personnel involved in investigating matters of national security.

While the Commission's oversight powers are more limited than those of either SIRC or the CSE Commissioner, most of the federal departments and agencies with national security functions currently operate without scrutiny by any review mechanism. Nonetheless, the RCMP's apparent reluctance to fully cooperate with the Commission where matters of national security are involved,⁽¹³⁾ coupled with the terms of reference for the O'Connor Commission and the commitments made by the Government of Canada in the National Security Policy make the status quo an unlikely choice.

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(13) Shirley Heafey, *Civilian Review of the RCMP's National Security Activities*, 3 October 2005, on-line: http://www.cpc-cpp.gc.ca/DefaultSite/Archive/index_e.aspx?articleid=874.

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