

## **B.C. Civil Liberties Association Supplementary Submission to the Arar Commission Policy Review**

November 9, 2005

### **I. Introduction**

The British Columbia Civil Liberties Association (BCCLA) favours the creation of a National Security Review Committee and an Office of the Civil Liberties Ombudsman. We have outlined in detail our proposals for these agencies in our brief to the Honourable Justice Dennis O'Connor, Commissioner, Arar Inquiry in March of 2005. Our submission is available via the BCCLA website: <http://www.bccla.org/othercontent/05ararpolicy.htm>

The following submission is in response to the document: "Arar Commission Policy Review - Further Questions for Public Consultation" released on October 17, 2005. We anticipate making further written submissions with respect to specific matters of interest raised by the Arar Commission.

Before responding in detail to the questions in this document, we would like to reiterate the policy justifications for the creation of a National Security Review Committee that would be responsible for reviewing the national security activities of all federal agencies engaged in this work. Many federal departments and agencies are now engaged in national security activities. The Arar Commission has provided us with a list of over 23 agencies engaged in national security activities involving the collection, use or disclosure of security intelligence information and/or prevention, investigation and/or prosecution of criminal offences related to national security. Moreover, there is considerable effort at the federal level and beyond to integrate the work of these various agencies. A good example of this is RCMP's Integrated National Security Enforcement Teams which are led by the RCMP but are staffed by personnel from a diverse number of federal, provincial and municipal agencies. Thus, the breadth of institutional involvement in national security activities and the integration of this work across institutions requires an integrated review mechanism. In addition to these core reasons, we provided additional arguments for a single agency model in our March 2005 submission:

"In addition to issues regarding the number of agencies involved in national security work and the degree of integration across agency boundaries of that work, there are other reasons to rationalize a system of civilian review in one office. First, the standards of review and their equal application to all personnel engaged in national security activity should be harmonized across agencies. Second, the RCMP would not be singled out for special attention in this reform measure, nor should it be. Third, a single review agency would avoid jurisdictional rivalries or conflict between different review agencies such as the CPC and SIRC. Finally, and critically, a single review agency will be in a much better position to survey the entire landscape regarding national security work with a review to ensuring adequate accountability. Whereas the perspective of the CPC or SIRC will be understandably focused solely on the agency they review, they will miss the "big picture" that a single review agency would be able to provide to identify issues of concern that cut across jurisdictional boundaries."

In addition to the policy reasons for a single agency model, or perhaps because these reasons are compelling, this model is preferred by a great number of organizations making submissions to the Arar Commission. Finally, we note that the international experts invited by the Commission to discuss this issue as part of a roundtable overwhelmingly urged a functional model of review rather than review according to specific agencies.<sup>1</sup>

## **II. BCCLA Specific Responses**

### **A. Complaints and Audits**

#### **1. Relative Importance of Audits and Complaints to Effective Review**

Both audits and complaints are important to effective review by a civilian agency overseeing national security activities. A complaint process is important for two reasons. First, individuals, often Canadian citizens, who interact with national security agency personnel should, in principle, have the opportunity to express concerns about the conduct of such personnel. The authority and powers of national security agencies and their personnel ultimately derive from the citizenry and thus a complaint process provides an important means of accountability. All citizens benefit from the willingness of individuals to come forward and express concerns because ultimately a complaint process should assist in making an agency more accountable. Thus, complainants provide an important measure to promote accountability of these agencies. Second, complaints can be very helpful to an agency to identify concerns with respect to the work of particular personnel. Though complaint procedures can assist in providing remedies for the complainant, their primary focus is on ensuring an evaluation of whether the conduct of personnel meets *appropriate* professional standards. The BCCLA does not expect a complaint system to provide the same measures of remedies as available through legal proceedings.

Audits are centrally important in any system of accountability. This is all the more true for the work of national security agencies because their work will often go undetected or unnoticed by the subjects of their work due to the necessarily secretive nature of the work. Thus, there may be no possibility of a complainant coming forward in situations that warrant evaluation because the prospective complainant isn't aware of the scrutiny of national security agencies. In addition, there are a variety of barriers to access that make it difficult for complainants to come forward. We believe that this is particularly the case for the Muslim and Arab communities. Please see our March 2005 submission under III(2) for more detail on this point. Moreover, other forms of accountability such as judicial review and media scrutiny will not be available because of the clandestine nature of national security activities. In this context, it is all the more important that a review agency take *pro-active* measures such as audits to assess the performance of national security agencies like the RCMP and CSIS. Without audits, the review mechanism for national security agencies will simply be inadequate. The Arar Commission's recommendations on this point must be emphatic and clear. The review agency must be adequately funded to undertake proper audits.

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<sup>1</sup> Arar Commission, Transcript of Roundtable of International Experts, 20 May 2005; online: <http://www.stenotran.com/commission/maherarar/2005-05-20%20International%20Roundtable.pdf>

## **2. Audits and Complaints in the Same Review Agency**

Yes, the same agency must be responsible for both audits and the review of complaints. It is important to have the same agency undertake both complaints and audits because that will ensure better conformity with respect to standards, knowledge and expertise. If there were one agency responsible for audits and another for investigations, different standards may be applied (or the agency same standard may be applied differently) to conduct and operations. Moreover the different levels of knowledge, experience and expertise might result in different levels of accountability and indeed different recommendations with respect to standards. In principle, this must not be so. Audits and complaints are complementary means of achieving accountability.

We note that the B.C. Information and Privacy Commissioner and the Privacy Commissioner of Canada have authority to engage in audits and receive complaints.

## **3. Information Sharing between Agencies**

The BCCLA strongly recommends against having two different agencies perform audits and complaint-investigations.

## **B. Reviewing the RCMP's National Security Activities**

### **4. Agency Expertise Required**

#### (a) Expertise with respect to policing

Yes, the agency must have knowledge of and expertise in general policing matters including statutes, case law, policy and standards. The agency will ultimately still be required to apply standards relating to *policing* when reviewing the conduct, operations and policy of the RCMP. To anticipate question (b), the agency will also be required to have expertise with respect to national security matters as well. The BCCLA's proposal would create an agency that would have expertise in national security matters.

#### (b) Expertise with respect to national security/intelligence

Yes, though in theory there is a distinction between the RCMP's criminal intelligence work and CSIS's security intelligence work, in practical application, it is not apparent where this distinction lies. "Intelligence-led" policing certainly creates an overlap between the two agencies' national security activities. Without going into the debate about whether the RCMP should or should not be in this field, the BCCLA believes that the Commissioner's best approach would be to presume that the RCMP will continue to engage in criminal intelligence work and recommend a review agency that covers both the RCMP and CSIS. Indeed, a further justification for a single review agency model is that this agency would be (a) better able to understand where the

distinction between RCMP and CSIS intelligence work begins and ends and (b) to help formulate appropriate law and policy to better define this distinction given the concerns of the McDonald Commission.

The National Security Review Agency, as conceived by the BCCLA, will have expertise in both policing and intelligence.

(c) Relative Importance of Policing/National Security Expertise

Both sorts of expertise are equally important and the understanding of the difference is also crucial. However, we hasten to add that a review agency should have expertise and knowledge with respect to human rights, international human rights law and civil liberties as well in order to ensure that their review work is appropriately informed. This must be part of the recommendations of the Arar Commission with respect to expertise required by the review agency.

(d) Difference in Expertise of Auditing vs. Complaints

Audits and complaints are fundamentally two different kinds of procedures that require specialized knowledge and expertise to with respect to their different functions and procedures. That said, both procedures require the evaluation of conduct, operations and policy against specific standards. Thus, there will be significant similarities with respect to the substantive knowledge and expertise required to undertake both activities while requiring an appreciation of the fundamentally different functions and methodology of the two procedures.

## **5. Review Criteria**

(a) Review Criteria for RCMP

It is difficult to suggest with specificity the exact criteria that should guide an audit of the RCMP's national security activities. That will depend on constitutional standards, relevant legislation, jurisprudence, professional standards and policy and we have not undertaken that detailed review. The criteria may also differ between criminal investigations and information/intelligence gathering. We would also suspect that specific criteria would be developed by the reviewing agency taking into account all of these sources for review. For example, we would expect that the RCMP has specific policy with respect to case investigation criteria. A relevant analogy in British Columbia exists with respect to Crown Counsel approving criminal charges. Charges are only approved if (a) there is a reasonable likelihood of success (based on the criminal standard of evidence) and (b) a criminal charge(s) is in the public interest. RCMP case selection criteria will undoubtedly require a lower threshold for a mere police investigation. With respect to internal policy, one of the purposes of an audit is to review the appropriateness of policy as well as operational and conduct conformity to the policy.

While we understand the desire of the Arar Commission to have as much specific detail as possible with respect to this question in order to understand the implications of its final

recommendations, we believe that the Commission needs to be cautious to ensure that its recommendations are not too specific. While we are not prepared to comment with specificity on this question, we submit that evaluation criteria will differ according to national security agency under review.

#### (b) Relevance of Police Independence

The BCCLA has commented in detail on the concept of “police independence” in our prior submission. We encourage greater direction by political masters with respect to policy and guidelines to ensure conformity with the rule of law and standards with respect to civil liberties. At the same time, we must guard against the improper politicization of police which is why we insist on police independence. One of the justifications, among others, for structuring reporting by a national security review agency to Parliament is to assist in providing better overall accountability and assisting in preventing the politicization of the police. In this way, reporting to Parliament would actually enhance police independence.

That said, given that audits and complaint mechanisms are *after-the-fact* reviews of operations, conduct and policy, we do not see a problem with respect to interference with police independence. This would be a different matter if there was a mandate for an agency to engage in “oversight” (i.e. *before-the-fact* direction) as opposed to “review” of specific cases. It would not be acceptable for elected representatives or a review agency to be directing in advance which cases the RCMP should investigate or target on matters of national security with one exception: where there is RCMP policy or practice that clearly violates constitutional standards and is the basis for investigation decisions. As we note above, the BCCLA believes that it is the responsibility of the Minister to provide *before-the-fact* direction when there is clearly illegal policy and conduct.

Note that the review agency should provide recommendations to responsible Ministers with respect to appropriate policy as they have ultimate responsibility for the police in our system of government.

### **6. Review for Legal Standards and Reasonableness**

The BCCLA believes that a review agency *must* be engaged in examining the legality, proportionality and reasonableness of national security activities of the RCMP and other agencies. This is the defining mandate and responsibility of the review agency and is consistent with the mandate of the Security Intelligence Review Agency. Though the effect of decisions from a review agency differ from that of a court of law, the review agency is another mechanism for accountability of the activities of national security agencies. In addition to matters of legality, we believe that a National Security Review Agency should be free to make recommendations and comments with respect to the *wisdom* of the operations, conduct and policy of national security agencies. The annual or special reports of the review agency would be tabled in Parliament where they would provide a basis for greater political accountability (as distinct from accountability via the judicial process).

Again, the specific standards relating to national security activities of the RCMP or any agency will be agency specific depending on legislative mandate and standards for that agency, constitutional standards, jurisprudence and policy.

With respect to conduct and operations by the RCMP or any other agency that has been authorized by judicial warrant, it would be very useful to have an independent agency review all the circumstances with respect to warranted activities including the process of gathering information to obtain a warrant, the application for the warrant and the execution of the warrant. It is the experience of the BCCLA that there may not be adequate judicial oversight with respect to granting warrants. That is in part the fault of the process: it is never adversarial in nature and thus courts are more apt to grant warrants than when there is a party providing cogent argument for not granting a warrant. A reviewing agency, without being adversarial, would be in a better position to assess the totality of the circumstances to assess the validity of the warrant process in particular cases.

## **7. RCMP Investigating Itself**

The BCCLA believes that the RCMP continues to demonstrate considerable resistance to the idea of civilian review of its activities. Our prior submission commented in detail on this point. Though we believe that a model that permits police agencies to investigate themselves in the first instance is possible where there is adequate civilian oversight to ensure investigations are fair and thorough *and* where a police organization has demonstrated a firm commitment to civilian oversight and review, given the RCMP's continued resistance to civilian oversight, this model would not be appropriate for the RCMP. This is especially so in the context of the RCMP's national security activities. The thrust of the McDonald Commission and legislation constituting the Canadian Security Intelligence Service was to remove the RCMP from the security intelligence field. Now justified under the rubric of "intelligence-led" policing, the RCMP have re-inserted themselves into the field despite the fact that it is very difficult to discern where CSIS's responsibilities end and the RCMP's begin with respect to intelligence. Moreover, the RCMP's re-emergence in the field of security intelligence has gone virtually unchallenged.

## **8. Access to Information**

The review agency *must* have access to as much information as possible including information subject to solicitor-client privilege including where the RCMP seeks legal advice about its rights and obligations in its operations (but not including RCMP members' personal communications with their own lawyers and in the case of legal proceedings between the review agency and an agency to be reviewed), police informer privilege and national security privilege. If this were not the case, the review agency simply could not achieve its mandate. This is one of the problems currently plaguing the CPC as articulated so clearly in their original submission. This lack of access is also out of step with other Officers of Parliament.

With respect to Cabinet confidences, the BCCLA submits that to the extent that Cabinet confidences have been disclosed to the RCMP, CSIS, CSE, DND or any other agency engaging in national security activities, then the review agency must also have access to the confidential

information as it will form an integral part of national security activity review. However, to the extent that Cabinet confidences are relevant to national security but have not been disclosed to an agency but rather maintained by the Cabinet, the review agency should not have access.

## **9. Special Advocates**

Yes, the BCCLA believes that special advocates in the national security complaint context would be of great assistance by creating a much more level playing field. A special advocate would assist in making sure the best case is put forward on behalf of a complainant in circumstances where they would otherwise have no ability to advocate for themselves. It may not be appropriate to make a special advocate available in all complaints (e.g. allegations of rudeness), but where the allegations of misconduct are serious and the impact on the complainant has been significant, special advocates could play an important role in making sure the process is more fair. In this regard, the Office of the Civil Liberties Ombudsman would be perfectly placed to provide such assistance.

## **C. Defining National Security Activities of the RCMP**

### **10. Defining Jurisdiction: What are RCMP National Security Activities?**

Assuming there are two agencies that are responsible for the RCMP, one dealing with national security and the other dealing with all other RCMP activity, it becomes evident that there must be a relatively well defined mechanism to determine jurisdiction of the two agencies. Question 10 focuses on this point.

To answer this question, we would like first to respond to the excellent submission of the Commission for Public Complaints Against the RCMP (the “CPC”). We do so first, because they have raised various important objections to the idea of splitting jurisdiction between two agencies. In reviewing and responding to the CPC’s submission, we believe that many of the concerns and questions of the Arar Commission will be addressed as well.

The CPC’s submission first asserts that “Although the RCMP’s strengthened role in national security is relatively new, the activities carried out under the auspices of that role are not new. Dissected into individual components, the ‘RCMP’s national security activities’ are the same activities that the CPC has been reviewing for 17 years ... ”.<sup>2</sup> The CPC refers to a non-exhaustive list of “activities” it considers that are commonly performed by RCMP members regardless of the policing context (i.e. aboriginal policing, organized crime, drug law enforcement, domestic violence, economic crime, etc.): investigating accidents, interviewing witnesses, interrogating suspects, surveillance, developing human sources, intelligence gathering, obtaining and executing search warrants, detentions, arrests, using force in the execution of lawful duties, etc.

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<sup>2</sup> Shirley Heafey, “Supplementary Submission of the Commission for Public Complaints Against the RCMP Regarding the Policy Review of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar” 18 October 2005, at 5.

The CPC then goes on to assert that the RCMP's national security activities are quite distinct from CSIS: whereas CSIS's responsibility is to advise the government on perceived threats to the security of Canada, the RCMP's role is to prevent, detect, investigate and assist in the prosecution of criminals. The CPC then asserts, quite correctly we believe, that it has considerable expertise with respect to RCMP policing, whether that be in relation to national security or any other area of policing. The CPC's submission on these points is to answer the question posed by the Arar Commission: What expertise or special knowledge does the CPC have that would assist in reviewing the national security activities of the RCMP.

The BCCLA does not for a moment question the CPC's expertise with respect to reviewing the activities of the RCMP. Certainly they make a good case that they would be able to do this in the future given their current knowledge of the RCMP generally and this area specifically notwithstanding their stated difficulties in obtaining relevant information from the RCMP to effectively provide civilian review and oversight of the RCMP in the area of its national security activities.

That said, the BCCLA submits that though specific knowledge and skill sets required by the RCMP members and a review agency in the area of policing national security will extensively (though *not* completely) overlap, it is important to distinguish this common set of general knowledge and skills with the particular area of policing at issue here: national security. We make this point in underlining the important and substantive differences between policing in distinct policing areas such as aboriginal policing, organized crime, drug law enforcement, domestic violence, economic crime, crowd control, violent crime, etc. Though all RCMP members who undertake policing in the diverse range of law enforcement engaged in by the RCMP will have a common set of training and skills, there will be specific knowledge, skills and indeed activities that are unique to each of these areas. We make this point simply to underline that it is, at least conceptually, possible to distinguish national security policing from other types of policing and that a review agency will have to have special expertise in that area. That conceptual distinction doesn't answer the problems of definition, overlap or other objections that are important to creating two distinct agencies which we address further below. Furthermore, we note that the CPC itself has made the point that it does not have the legal tools (nor the resources, we would add) required to undertake effective civilian review of the RCMP's national security activities and has been effectively prevented from do so by non-cooperation from the RCMP. Thus, one can at least query how it has gained the full degree of specialized expertise a review agency would need to do this effectively. As well, this expertise is something that can be gained by a distinct agency, partially through the assistance of the CPC and partly through its own experience.

The CPC's submission then highlights arguments against splitting review jurisdiction for the RCMP into two agencies: one for national security activities and the rest for the CPC. These arguments can be summarized as follows: (1) it is impossible to clearly define the "national security activities of the RCMP" such that it would be impossible to determine jurisdiction between two agencies; (2) the concept of "national security is constantly changing and, at present, seems to be expanding making a definition, if at all possible, quickly obsolete; (3) inevitably there will conflicts between the agencies as to which agency has jurisdiction thus

requiring some mechanism for resolving such disputes; (4) if the level of review and powers differ between the two agencies, complainants may seek redress in the forum more favourable to their concerns; (5) complainants streamed into the national security review process may be unfavourably stigmatized as being someone who poses a national security threat; (6) the RCMP may not want certain complainants to know that they are being targeted for scrutiny by the RCMP; acknowledging the complaint would effectively tip the complainant off; (7) it can be difficult to determine whether a complaint is related to national security or other RCMP policing; furthermore, valuable resources can be wasted by one agency if it is ultimately determined that the other agency should have jurisdiction; (8) given the overlap between RCMP national security policing and its other policing responsibilities, a complaint can implicate more than one area of policing; (9) national security concerns may permeate RCMP policing in other areas giving rise to confusion over jurisdiction (i.e. a problem of overbreadth or overinclusivity leading to profiling for example); (10) RCMP members may not treat a matter as national security activity even though they should (underinclusivity); (11) assessing jurisdiction based on RCMP structure may be over or under inclusive as well; and (12) despite best efforts to determine jurisdiction and stream a complaint appropriately, it is possible that a complaint may be streamed inappropriately until considerably more information is gathered again causing a waste of resources.

Before responding in detail to these serious objections, the BCCLA wishes to acknowledge that split jurisdiction will pose significant challenges. Though we believe appropriate legislation and organizational design can effectively deal with many of these challenges, at an important level, a healthy degree of respect and cooperation will be critical for the two agencies to co-exist and to successfully, together, deliver effective civilian review and oversight of the RCMP. This will require goodwill on a human level that can neither be legislated nor achieved through organizational design but will depend on human elements in the staffing, management and leadership of these agencies.

That said, the BCCLA submits the following answers to the submission.

(1) Jurisdiction of an agency reviewing the RCMP's national security activities should include a definition of national security activities. This definition should include reference to relevant statutes that mandate the RCMP's national security activities as well as include the activities of any units within the RCMP that are designated as focusing on national security activities as well as any RCMP policy that creates responsibility for RCMP national security policing. As RCMP national security units tend to change over time, the definition should be pitched at an abstract level rather than naming specific units. Thus, the RCMP's national security activities would be defined through external criterion in legislation but also by how the RCMP internally interprets those responsibilities through policy and organizational design. Despite the CPC's assertion that it is difficult to ascertain all the areas of policing that encompass the RCMP's national security activities, in discussing relevant legislation they provide a very competent start (see pages 13-17). Legislation identified by the CPC to be relevant to the RCMP's national security mandate includes the *Security Offences Act*, the *Security of Information Act*, *Foreign Missions and International Organizations Act*, *Canadian Security Intelligence Service Act*, specific provisions of the *Criminal Code* such as those relating to terrorism and Internationally Protected Persons. This list is not exhaustive. Nor can a definition be exhaustive and will always be subject to

interpretational difficulties that may be clarified through jurisprudence; but that is true of all legal definitions.

(2) The BCCLA agrees that what is considered to be “national security” is constantly changing and increasingly expanding. In our submission to the Senate and House of Commons committees reviewing the *Anti-Terrorism Act*, we argue that legislative definitions regarding “terrorist activity” and national security are now far too broad and this problem has led to inappropriate policing and intelligence activities.<sup>3</sup> Furthermore, a distinction must be maintained between threats to “national security” that are criminal or potentially criminal in nature involving the intelligence field and threats that are natural disasters or environmental. The former are the proper purview of a review agency, the latter less so if at all.

That said, if legislation relating to national security changes requiring new focus for the RCMP, then consequential amendments can always be made to the constituting legislation for a national security review agency. Changes to RCMP internal policy or organizational structures should not matter since this constituting legislation can reference those in the abstract rather than the specific.

(3) We agree that no matter how one defines “national security” there will likely be uncertainty about jurisdiction in certain cases though the better the definition, the less uncertainty. To deal with uncertainty, there will need to be a mechanism for resolving any conflict. One option is to permit the national security review agency to make a final determination as they will ultimately be in the best position to make this assessment. We note that the CPC’s proposal for a national security review commission cedes authority to this body to make decisions about which cases it will review.

(4) The forum shopping concern is relevant only if there are significant differences in the authority and powers of a review agency and the CPC. This is a real concern if the national security review agency has audit powers and access to *all* relevant information while the CPC maintains their current and inadequate level of authority over the RCMP generally. To address this potential problem, the Arar Commission must recommend that in a model that has two agencies to review the RCMP, both agencies have the same powers. The BCCLA has been calling for significant reform to the CPC for years to address inadequate powers with respect to the review of the RCMP’s policing activities regardless of their nature. We note that this problem would remain even if the CPC undertook national security activity review but had reinforced powers only for that area of RCMP policing and not all other RCMP policing activities.

(5) Concerns about unfair stigmatization are serious. This is a major point of the BCCLA’s submission to Parliament regarding the review of the *Anti-Terrorism Act*. There have been a variety of cases originating in British Columbia involving RCMP’s INSETs that do not, on the surface, appear to raise legitimate concerns about national security or terrorism, properly

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<sup>3</sup> See Parts II and III of the BCCLA Brief: “Curbing the Excess to Protect Freedom and Democracy”, A Brief Prepared for by the House of Commons Subcommittee on Public Safety and National Security and the Senate Special Committee on the *Anti-Terrorism Act*, October 2005; online: <http://www.bccla.org/othercontent/curbing%20excess.pdf>

understood, and so the targets of INSET have, we believe, been unfairly stigmatized. However, in cases in which complainants have already been publicly identified by the RCMP as the subject of their national security activities, we do not see that a complaint to a national security review agency to create the stigmatization. This concern is only valid to the extent that someone or group not publicly identified as a national security or terrorist concern becomes publicly identified as such through the complaint process. In order to avoid this problem, the public reporting of this kind of case could exclude the identity of the complainant or subject of the audit.

(6) Tipping off complainants by acknowledging that they have been the subject of interest to a national security agency is also a legitimate concern. However, we believe that such concerns can be addressed through procedural safeguards. For example, all RCMP complaints could be formerly channeled through the CPC though both agencies would be jointly responsible for streaming decisions. Those that are national security complaints would be referred to the national security review agency. Reporting to the complainant could be done in a neutral way that does not tip off the complainant one way or another. This may ultimately pose a challenge but we believe that similar challenges are posed by the CPC reviewing complaints as well. We note that we would expect that there would be relatively few of these types of complaints since only those complaints that involve a complainant fishing for information would create this problem.

(7) and (12) These objections are really one and the same except that it may be argued that objection (12) assumes that more time and resources would be expended to determine that a complaint is being processed by the inappropriate agency. Our response to this objection is that this is a problem that is inevitable in a split jurisdiction situation but that with experience this will be less of a problem as staff become more proficient in working on complaints. To the extent that resources are expended on a complaint that is processed by the inappropriate agency, we would hope that those expended resources are not completely wasted as information that is gathered will be useful to the appropriate reviewing agency.

(8) Overlap does seem inevitable and it is likely that some complaints that begin as either national security or non-national security will end up being in the other area. How does one handle such complaints? This is an area that will require cooperation between the CPC and the national security review. Though it may be possible to identify that only one area is the true subject of the complaint, to the extent it covers both then both agencies will need to provide review and report out according to their jurisdiction.

(9) This objection seems to focus on general concerns about profiling. Racial, religious and other profiling is a complex topic that we are not in a position to comment on here extensively other than to say that profiling can either be a very legitimate tool for police investigation or it can be a human rights violation. Whether profiling is legitimate or not will depend very much on how profiling is done and the context of the problem. Where profiling is based on individual RCMP conduct not sanctioned by RCMP direction or policy and does not involve a member of a national security unit or a national security investigation, the appropriate reviewing agency would be the CPC. We believe that complaints should be streamed according to how members should conduct themselves, not how they actually conduct themselves. If a member is violating policy

such that they are engaging in national security activities when they shouldn't be, the CPC should have jurisdiction and vice versa. It will again depend on the definition of national security activities.

(10) This objection is the flip side of (9)'s overinclusive problem. Here it is posited that an RCMP member should have treated a matter as a national security concern but did not. It would be more appropriate for the national security review agency to take conduct of such a complaint. Again, this is an area of some overlap that will require cooperation between agencies.

(11) Utilizing RCMP organizational structure as the touchstone for jurisdiction can be misleading. That is why in defining the jurisdiction of the national security review agency, we would urge a definition that references more than just structure but also includes legislative mandate and internal RCMP policy. A definition would read something like:

(a) The national security review agency will have jurisdiction over all matters relating to RCMP activities regarding national security.

(b) In determining which activities relate to national security, consideration will be given to legislation that mandates criminal intelligence gathering, crime prevention and criminal national security investigations including [list of relevant legislation], internal RCMP national security policies and the RCMP's organizational structure relating to national security.

(c) When there is uncertainty regarding the jurisdiction between the national security review agency and the Commission for Public Complaints Against the RCMP over an activity, the two agencies shall seek to cooperatively resolve such jurisdictional uncertainty. Where the agencies can not resolve jurisdictional uncertainty by mutual agreement, the national security review agency shall determine which agency has jurisdiction over the activity.

(d) The national security review agency and the CPC have an obligation to cooperate on the review of an activity when the nature of the activity requires cooperation.

It may also be wise to attempt a broad definition of "national security" like: For the purposes of this Act, national security are matters that threaten or concern the security of Canada as a whole and involve intelligence gathering, crime prevention or investigation.

## **11. Defining National Security Activities by Units**

As noted above in our answer to question 10, the BCCLA does not think subunits alone would be an appropriate method to defining jurisdiction.

## **12. Asymmetrical Review Agency Powers**

As noted in our answer to 10 above, the BCCLA has been urging Ministers and Parliament for years to enhance the powers of the CPC on such matters as complete disclosure and audit

authority. If there remained a discrepancy, aside from being indefensible in principle, practical problems would arise as highlighted by the CPC's supplementary submission. The answers to a, b, c and d in question 12 are all yes, and those answers point to the need for a symmetrical system of review for national security policing as well as any other kind of policing by the RCMP.

### **13. Ensuring National Security Confidences in a Complaint System**

As we have noted in question 10, there is a legitimate concern regarding retaining national security confidentiality in a complaint system. We have suggested that the most appropriate way to resolve this issue is to have a neutral intake and reporting system for all complaints. Where a complaint deals with national security and there is no concern regarding revealing national security activities, the CPC can simply stream the complaint to the national security review . Where there is a concern, the CPC would be the lead agency to formally respond to the complaint though the national security review would be responsible for processing it. There would be no duplication because the CPC would have little to do with the case other than intake and reporting out on its letterhead.

We wish to emphasize that we expect this concern to arise in very few cases and so we urge caution in not overreacting to this problem.

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

### **14. Incidental Information Transfer**

The BCCLA has two points to make with respect to the issue of information sharing. First, the BCCLA rejects the use of the term "cross-contamination". Regardless of the agency conducting review in a national security context, if there is to be true review, then a review agency will need to have access to confidential information from more than one agency engaged in national security activities where the context requires this. Without such access, there can be no effective review because the review agency will be prevented from understanding the entirety of the context. The term "cross-contamination" appears to be a term either invented or used to avoid inter-agency review.

That said, there are obvious safeguards to avoid this problem. National security agencies like CSIS and the RCMP can request that a review agency not share confidential details with another agency that is subject to review. Such requests should be made in writing and should be justified. The review agency will need to assess these requests. When a request is legitimate, the review agency should respect such requests if it would not compromise their review responsibilities. Where the review agency believes that it needs to share information in order to undertake a proper review, it should provide written reasons to the requesting agency and give the agency an opportunity to respond. The review agency should have authority to make final decisions with

respect to sharing information as part of its review. In our view, this concern, though legitimate, is eminently manageable.

## **15. Integrated Activity**

The national security review agency should be following the trail wherever it leads when auditing or reviewing complaints. With respect to federal agencies, this is not an issue as long as it has clear authority to do so in its constituting legislation. This will be more difficult with respect to law enforcement or other agencies clearly within provincial jurisdiction. We suggest that when this occurs, the review agency seek the cooperation of such provincial agencies and failing that, seek the assistance of the civilian review authority in the province where there is an agency with adequate authority.

## **Super-Agency Review Model**

### **16. Super Agency Review**

#### **(a) Federal Agencies Involved in National Security**

The BCCLA has been provided with a brief description of the national security related activities of federal agencies listed in question 16 and they all appear to collect, disclose or use security intelligence information or are involved in criminal law enforcement in relation to national security except for Agriculture and Agri-Food Canada whose responsibilities have passed to the Canadian Food Inspection Agency. Though certain agencies may not be engaged in intelligence gathering or criminal law enforcement in any significant way, if they have a mandate to pass on information and intelligence to CSIS or the RCMP for example, they should still be subject to review. In undertaking national security review, the agency needs to start at the beginning.

#### **(b) Jurisdiction**

The justification for review by a national security review agency is to ensure that national security activities respect the rule of law and do not unjustifiably infringe on civil liberties and human rights. Therefore, the BCCLA believes that any federal department or agency that is involved in national security activities involving the collection, use or disclosure of security intelligence and/or criminal law enforcement that has the potential to impact on individuals civil liberties or human rights should be subject to review by a national security review agency. While this appears to be large number of organizations, we expect that there is a core group of agencies (RCMP, CSIS, CSE, CBSA) that focus on security intelligence and criminal law enforcement in the national security area that would remain the focus of a national security review agency. Agencies that play less of a central role in security intelligence and criminal law enforcement would be less of a focus unless warranted.

#### **(c) Audits or Complaints?**

The reality is that most of the work in the review of national security activities will be by way of audit rather than complaints. In 2004-05, the CPC received a total of 825 complaints and 151 requests for review. We expect that a national security review agency will have significantly fewer complaint files. In contrast, audits should require considerable resources for the new agency.

(d) Comparison to Auditor General

The Auditor General's mandate differs significantly from the proposed national security review agency. The Auditor General's mandate is to undertake performance and financial audits to ascertain whether the subject agency is performing adequately, is managing its financial resources appropriately and is providing good value for money. This is a much different focus than the focus of a national security review agency which would be to assess whether national security agencies' activities respect the rule of law and do not unjustifiably restrict civil liberties and human rights. A good example of how their mandates would differ is the Auditor General's 2004 Report on National Security in Canada. The Auditor General provides criticism that federal agencies are not, for example, sharing intelligence information appropriately or in an adequately coordinated manner that would better enhance national security. Its criticisms are thus focused on enhancing performance and efficiency. A national security review agency would, like the Security Intelligence Review Committee, focus on respect for the rule of law and civil liberties as opposed to mandate effectiveness.

(e) Comparison to the Privacy Commissioner of Canada

The Privacy Commissioner of Canada's responsibilities focus on the value of privacy. While this is an important civil liberties value, it is far from the only one. Other values include respect for fundamental freedoms (free speech, religion, association and assembly) and due process. The Privacy Commissioner's role is also restrained by the language of her audit and review functions under sections 36 and 37 of the *Privacy Act* whereas we would expect that the national security review agency would have a broader mandate to review for compliance with the rule of law.

(f) Different Functions for Different National Security Agencies

The national security review agency would have the same authority and powers with respect to any federal agency engaged in national security activities. It requires this to be able to properly review complaints and undertake audits where the subject matter transcends particular federal agencies. The Maher Arar Inquiry is a perfect example of how the trend in security intelligence and national security criminal investigations is for cooperation among agencies and so the national security review agency must have the same tools with respect to any federal agency engaged in national security activities. That said, certainly some federal agencies are more engaged in national security activities than others and thus the natural focus of the national security review agency will be more on these agencies. However, the national security review agency must be able to focus its resources as it considers necessary, subject to the nature of particular complaints and audits.

(g) Comparison to the Canadian Human Rights Commission

The Canadian Human Rights Commission's (CHRC) responsibilities and authority are outlined in the *Canadian Human Rights Act* which proscribes certain kinds of discrimination. The CHRC's focus is on protecting the value of equality. While this is an important value and one that civil liberties encompasses, it is only one of several other values that a national security review agency would be concerned about. Just as the Privacy Commissioner of Canada plays a limited role in the review of national security activities, so does the CHRC. In fact, we believe that the CHRC and the Privacy Commissioner have been relatively inactive in the review of national security activities that might fall within their mandate. That is not surprising. They do not have the mandate specifically to focus on this area in any real detail, are limited by resource constraints and would not have appropriate remedial powers to provide effective, *comprehensive* review.

(h) Criteria for Review

As we have stated, the mandate of the national security review agency, like the Security Intelligence Review Committee, would be to review for compliance with the rule of law and protection of civil liberties according to appropriate standards.

(i) SIRC and CSE

SIRC and CSE Commissioner would be disbanded and rolled into the new national security review agency. However, we would expect that, at least with respect to their respective areas of expertise (CSIS and CSE), staff in these organizations would be prime candidates for staffing of the new national security review agency.

(j) Report to Parliament

Yes, as our prior submission described, the new national security review agency would report directly to Parliament in order to ensure optimum accountability. This is consistent with other Officers of Parliament like the Access and Privacy Commissioners. As we also note previously in response to question 5(b) in this supplemental submission, reports to Parliament will also enhance police independence by creating a check on responsible Ministers and reduce the risk of the politicization of the police.

**Coordinating Review Among Three Agencies**

**17. Coordinated/Cooperative Integrated Review**

The BCCLA has serious concerns that a sort of ad-hoc body would come together to coordinate the review of the RCMP, CSIS and CSE as necessary. If we understand this proposal correctly, we believe that an ad-hoc, purely cooperative approach would be a recipe for disaster. This

model would not provide adequate direction regarding jurisdiction nor would it have an appropriate structure or dedicated resources to carry out proper review. There would be no institutional expertise developed nor any credibility. It would also preclude review of many other federal agencies involved in national security activities that must be part of integrated review. We note that a national security review agency will develop its own expertise with respect to various federal agencies engaged in national security activities.

## **18. Autonomous Integrated Review**

This proposal, though a marginal improvement over the model in question 17 because of its permanent structure, would still be inappropriate because it would lack a focused mandate. We believe that the significant portion of the work of the national security review agency would be pro-active through its audit authority. Should the audits it undertakes be subject to negotiation with SIRC, the CPC and the review Commissioner for the CSE? This would be unacceptable. Furthermore, we worry that this system would promote institutional envy and competitiveness among the various review agencies.

## **19. Other Models**

The BCCLA has not focused on other possible models other than discussed above because we view them as less than optimal. As the trend in security intelligence and national security criminal law enforcement is toward an integrated approach, so must there be greater integration in the review of federal agencies engaged in national security activities.

## **Hypothetical Situations**

The BCCLA will consider the hypothetical situations posed by the Arar Commission and examine these in the context of the model we recommend: the National Security Review Committee (NSRC).

### **1. Use of Force: Entry and Arrest**

In this example, the planning, operations and conduct of RCMP members will be subject to review by the NSRC. We note that INSETs can include members of provincial and municipal police forces. We believe that where members of other forces have been seconded to an RCMP INSET and are thus under supervision and authority of the RCMP, they should be subject to review by the NSRC. Agreements with provincial and municipal policing authorities that permit such secondments should release their members from discipline authority and transfer this authority to the RCMP. The RCMP should appoint such members as regular RCMP members for a limited period of time.

## **2. International Events and Internationally Protected Persons**

In this example, much depends on the definition of national security activities. If policing the entire event is considered to be national security activity, then any review issues would fall within the jurisdiction of the NSRC. Because it is an international treaty negotiation with visiting internationally protected persons (IPPs), it is arguable that it should be included in the purview of national security activities and thus subject to review by the NSRC. This is affirmed through the use of threat assessments provided by CSIS and DND. This is a good example of where individual RCMP officers who might not normally be considered to be working on matters of national security would be considered to be engaged in national security activities while engaged in policing this event. Thus, any complaints regarding these members would be handled by the NSRC (subject to the neutral intake and reporting scheme we have suggested to preserve national security confidentialities). Police protection for IPPs currently falls within the RCMP's national security mandate and therefore the opposition leader's complaint would also be within the jurisdiction of the NSRC.

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

Hypothetical 3 is a good example of where there would likely be concurrent jurisdiction between the NSRC and the CPC. With respect to complaints, it will depend on who is complained against the nature of the complaint. It may not be clear until significant work is undertaken to make these determinations. After gathering information (which could be undertaken by either the CPC or NSRC or both working cooperatively), appropriate jurisdiction could be determined. It may be that both the CPC and NSRC have jurisdiction with respect to specific RCMP officers. This is an excellent example of why it is absolutely necessary for both the CPC and the NSRC to have equivalent authority. RCMP members should not be subject to different schemes as highlighted by this example. We would remind the Commissioner that this point is equally important whether there is split jurisdiction or if the CPC had jurisdiction over national security review as well.

With respect to audit powers, it appears that both the CPC and NSRC would have authority at first instance. Given the significant involvement of CBSA, this argues for an NSRC audit.

## **4. Credit Card Fraud**

With respect to a complaint, the NSRC would have jurisdiction to review to the extent the subject matter of the complaint relates to national security activities. The obvious method for ascertaining this is with respect to the RCMP members. If the complaint is against NSIS members, then NSRC would have jurisdiction. If not, then CPC would have jurisdiction. In either case, the reviewing agency would likely still require information from members outside of its jurisdiction in order to undertake a thorough review. Cooperation between the NSRC and CPC would again be important.

With respect to an audit, again it will be necessary to ascertain the subject matter of the audit. If an audit focuses on national security activities, NSRC would have jurisdiction if not then the CPC would be responsible. Again, the review agency will need to gather information from and with regard to operations beyond its jurisdiction to undertake an appropriate audit. Again, cooperation between the NSRC and CPC will be important.

These cases underline the importance of cooperation between the CPC and NSRC. While the BCCLA is very confident that jurisdiction can be discerned relatively easily in these cases, the reality is that proper review will require access to information that falls outside of the boundaries of the jurisdiction in order to properly understand context and to provide effective review.