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ENSURING INDEPENDENCE FOR THE PARLIAMENTARY NATIONAL SECURITY COMMITTEE

A Review of Bill C-22

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Introduction

In 2014, Canada shared the experience of numerous other Western countries when it suffered two murderous Islamist-inspired attacks in close succession, both committed by "home grown" terrorists. In the first, Martin Couture-Rouleau killed Warrant Office Patrice Vincent by ramming him with his car in St-Jean-sur-Richelieu. Two days later, a lone gunman, Michael Zehaf-Bibeau, killed Cpl. Nathan Cirillo at the War Memorial in Ottawa before storming the Parliament buildings.

Among the results of the terrorist attacks was the introduction in Parliament of the controversial *Anti-Terrorism Act*, Bill C-51, which attracted significant public attention both for what it contained and what it didn't.

C-51 went through the regular parliamentary review process and was the subject of significant, and frankly exaggerated criticism, especially from the NDP, outside advocates, and self-proclaimed experts. The Harper government's response was an equally rigid defence of the Bill, including condemnation of anyone who challenged anything in it. The Macdonald-Laurier Institute attempted to offer an objective assessment of the Bill, written by myself, in a piece entitled *C-51: An Analysis Without the Hype or Hysteria*.

C-51 contained provisions that increased information-sharing authorizations, expanded the No-Fly list, enhanced criminal investigative powers for police, enhanced operational powers for CSIS, and tweaked security certificate case procedures.

The Bill did not contain any provisions for creating the long-recommended independent oversight entity for ongoing national security operations, especially regarding multi-agency operations. Neither did it create a special parliamentary committee with the authority to review national security activities and policies, something that has also been recommended for years, and which Canada's "Five Eyes" national security partners (the US, the UK, New Zealand, and Australia) all have.

Then Prime Minister Harper was dismissive of the need for a special parliamentary review committee implying, without providing supporting evidence, that such a body would create security risks through anticipated information leaks. Several witnesses who appeared before the committee discussing Bill C-51 recommended both independent oversight and review entities, but the government took no action and C-51 passed without either being included.

This distinction between oversight and review is important; while the two are related, they are appropriately separate in nature. Oversight is an ongoing activity requiring an awareness of operations in the field and inter-agency co-operation. The existing "oversight" is provided either through Ministerial approval or *ex parte* (the suspect isn't notified) court authorization to the agency seeking to act (like CSIS).

Review is inherently an after-the-fact exercise that can examine larger policy issues (information sharing, use of new C-51 powers, etc…) as well as specific cases to derive possible "lessons learned" insights to improve future operations. A specially authorized parliamentary committee that reviewed, for example, how convicted Toronto 18 terrorist Ali Mohamed Dirie was able to fly out of Canada to Syria following his release from prison; or why Couture-Rouleau was not subjected to a terrorism peace bond despite the RCMP's concerns that he had become radicalized; or why the RCMP were unaware of Aaron Driver's online activities before he was gunned down by police in Strathroy, Ontario, when the FBI was, could present a real opportunity to improve the system.

Partly in response to the shortcomings of Bill C-51, in June 2016, the new Liberal government introduced Bill C-22, which will create a special National Security and Intelligence Committee of Parliamentarians (NSICOP). The Bill received second reading on Oct. 4 and it has now been referred to the Standing Committee on National Security and Defence. The government's commitment to create a parliamentary review committee is certainly a welcome development and, done right, such a committee could contribute substantially to improving the functioning of Canada's security agencies.

As the recent scathing judgment of M. Justice Noel (*2016 FC 1105*) regarding CSIS' deliberate cover up of its metadata gathering and retention of the personal information of Canadians reveals, there is no guarantee that a review agency can get full disclosure or even truthful answers to the questions it poses. In light of this stark reality, it may be advisable to add a clause to C-22 that creates an offence of knowingly obstructing or misleading the committee in its work without lawful justification.

Unlike the NDP, the then third party Liberals supported C-51, although they explained that they disagreed with several of its provisions which they would act on to correct if they were elected to government. This commitment to enhanced national security accountability was specifically referenced in the Liberal election platform, although in a tangled way that mixes up oversight and review:

> STRONGER NATIONAL SECURITY OVERSIGHT
>
> Among our Five Eyes allies that collaborate on national security and intelligence sharing, Canada is the only country that does not have oversight of its security agencies by legislators. Liberals are committed to correcting this; we will create an all-party national security oversight committee to monitor and oversee the operations of every government department and agency with national security responsibilities. (Liberal Party of Canada (2015), *Real Change: A Fair and Open Government*, p. 6)

The Liberal platform also stressed the importance of parliamentary independence and changing the centralization of power in the Prime Minister's Office that had taken place under Stephen Harper. As the platform stated in at least two places:

> Under Stephen Harper, the government has grown secretive and closed-off from Canadians. Unprecedented power has been concentrated in the hands of the Prime Minister and his office. (*Real Change*, p. 2)

> STRONGER PARLIAMENTARY COMMITTEES
>
> We will strengthen the role of parliamentary committee chairs, including elections by secret ballot. We will also ensure a more robust system of oversight and review for legislation and other matters in the House of Commons and Senate. Specifically, parliamentary committees will be given more resources to acquire independent, expert analysis of proposed legislation. We will also change the rules so that Ministers and Parliamentary Secretaries may not be, or stand in for, voting members on committees. (*Real Change*, p. 5)

This commitment was also manifested in the Prime Minister's mandate letter to Public Safety Minister Ralph Goodale which stated:

> Assist the Leader of the Government in the House of Commons in the creation of a statutory committee of Parliamentarians with special access to classified information to review government departments and agencies with national security responsibilities.

However, as this analysis will demonstrate, the issue of independence from the Prime Minister's Office is central to determining if the committee will perform as promised. And ironically, given the government's stated commitment to the independence of Parliament, that is where this legislation falls short. This independence issue will likely attract significant attention and, in fact, it is specifically and critically referenced in the Library of Parliament's *Legislative Summary*, which is a blunt, candid, and valuable analysis that should be a model for future reports.[1]

The comments in Clause 2.2.3 of the summary regarding the proposed mandate of the committee are especially noteworthy, describing the minister's ability to limit the committee's work as "… a potentially significant limitation on the Committee's remit" (p. 5). The Summary also explains that "… the public may never be aware that a (Committee) initiated review was quashed" (p. 5).

What follows, therefore, is a detailed analysis of C-22 with a special focus on whether the Bill provides the promised independence of the committee, and the potential practical ramifications of its provisions, along with recommended changes to address those issues.

Overview

Bill C-22 establishes the National Security and Intelligence Committee of Parliamentarians (NSICOP) and sets out its composition and mandate. In addition, it establishes the committee's secretariat, the role of which is to assist the committee in fulfilling its mandate. It also makes consequential amendments to certain Acts.

1 Parliamentary Information and Research Service, August 22, 2016, *Bill C-22: An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain acts,* Publication no. 42-1-C-22-E, Unedited Pre-Release, Library of Parliament. Hereafter referred to as the Summary.

The NSICOP is intended to be a statutory committee of parliamentarians administratively housed within the executive branch. This proposed structure is described in the government's backgrounder as being:

> designed to give the committee a high-degree of independence and access to classified government information, while providing for necessary controls on the use and disclosure of this information.
>
> It would consist of up to nine members – two senators and seven members of Parliament (with a maximum of four members from the House of Commons from the governing party) – that would be appointed by the Governor in Council on the recommendation of the Prime Minister.

Unlike other parliamentary committees, the committee would *not* be allowed to elect its own chair, who will instead be appointed by the prime minister. Prime Minister Trudeau has already indicated, for unknown reasons, that the chair will be MP David McGuinty, who has no known security or law enforcement background.

Clause 4 of the Bill specifies that the membership is "up to" the number of persons identified, which functionally creates a designated maximum number of committee members but not a minimum number. This oddity was pointed out to Public Safety Minister Goodale by Liberal Senator Joseph Day when the minister appeared before the Senate for Question Period on Oct. 25. The minister advised the Senate that:

> The intention is a committee of nine: two from the Senate, seven from the house and four from the government – meaning the other five would not be from the government party. If there's a risk of a dysfunctional situation because of there being no minimum or because of the phrase "up to" that you've referred to, we can certainly consider with the draftsmen the proper corrective language to make sure the intention is clear.

It is noteworthy that the minister acknowledged, *before* the Bill had even reached a parliamentary committee, that the Bill may have been improperly drafted.

Pursuant to Clauses 10–12, NSICOP members would be required to obtain a security clearance and swear an oath of secrecy before assuming their position on the committee, and would need to maintain the confidentiality of information they receive. Members would not be able to claim parliamentary immunity if they disclosed classified information, and so could face prosecution (Summary, p. 8).

The committee would seemingly have a broad government-wide mandate to scrutinize any national security matter. According to the backgrounder, "The NSICOP would be empowered to perform reviews of national security and intelligence activities including ongoing operations, and strategic and systemic reviews of the legislative, regulatory, policy, expenditure and administrative frameworks under which these activities are conducted. It would also conduct reviews of matters referred by a minister."

Despite this broad mandate, a minister would have the authority to stop such a review if the minister decided it would be injurious to national security (Summary, p. 7). There is no appeal from such a decision. As the Library of Parliament *Legislative Summary* notes, this is one area where the power of the Executive could significantly infringe on the ability of the committee to hold the executive accountable.

The Legislative Summary goes on to outline other powers of the committee, specifically, to access any information to conduct its reviews, subject to specific limitations such as to protect third parties, to prevent interference in active military operations, and to maintain the independence of law enforcement functions. While the NSICOP would have a right of access to information it requests, the legislation would allow ministers to withhold special operational information if they decided that the disclosure would harm national security (there would be no appeal in the case of such a decision). The responsible minister would need to provide the committee with the rationale for their decision to withhold information.

The NSICOP findings and recommendations will be tabled in Parliament but only *after* being provided to the prime minister, who can review and edit the committee's reports before they are tabled to ensure that they do not contain classified information (Summary, p. 11). Again, the executive would be able to exercise significant powers over the committee's activities.

Finally, in addition to establishing the NSICOP, the legislation establishes a new dedicated secretariat, staffed by public servants, with a deputy head, presumably to ensure that the committee will have the necessary support and resources to conduct its reviews. Also, the executive director of the secretariat is to be appointed by the Governor in Council (executive branch) rather than the committee, and any replacement due to vacancy on an interim basis is to be done by a minister designated by the Governor in Council as being responsible for this Act. Again, the power resides with the executive rather than the legislative branch.

Committee Membership

As noted above, the NSICOP committee will have *up to* nine members effectively appointed by the prime minister as follows:

- 4 from the governing party (no ministers or parliamentary secretaries);
- 2 from the Senate (after unspecified "consultation" with one or more senators)
- 3 MPs from other parties that have at least 12 MPs

Clause 4(3) expressly states that the committee is *not* a House or Senate committee and thus not subject to existing rules and procedures.

Clause 6(1) directs that the committee chair be appointed by the Governor in Council based on the recommendation (direction) of the prime minister, which is a departure from normal procedure and that of the UK model on which this committee is supposedly based.

Clause 5(1) also specifies that upon dissolution of Parliament, committee members lose their positions without any provision for re-appointment, which also results in a potentially powerful tool for the PMO if it wished to shut down an investigation. Clause 5 also contains a requirement of "consultation" with the leader of a party in the House of Commons from which a member is selected, even though that level of consultation is not required for Senate appointments.

The net result of the process is a committee that is likely, but not necessarily, controlled by the government party.

Committee Mandate

Clause 8 provides a broad mandate for the committee that includes reviewing:

(a) the legislative, regulatory, policy, administrative and financial framework for national security and intelligence;

(b) any activity carried out by a department that relates to national security or intelligence, unless the appropriate minister determines that the review would be injurious to national security; and

(c) any matter relating to national security or intelligence that a minister of the Crown refers to the committee.

This would appear to create both a policy and an operational review mandate (subject to a veto by the relevant minister) as well as the ability of the committee to review matters referred to it by a minister.

Clause 9 of the Act obliges the committee and the existing "review" bodies for CSIS (the Security Intelligence Review Committee), the RCMP (RCMP Public Complaints Commission), and Communications Security Establishment Canada (the Office of the CSE Commissioner) to work co-operatively to avoid "unnecessary duplication." It should be noted that the Act does not contemplate additional review bodies being created, such as has been indicated for Canada Border Services Agency (CBSA), which means such an agency would be excluded from this obligation (and others), or the legislation would have to be amended. Clause 34 requires the Act be reviewed within five years of its passage so the necessary change, if required, could potentially be achieved then. Bill S-205, which would create an independent Inspector General for CBSA, has been passed by the Senate and is now before the House. In testifying on the Bill, Minister Goodale was emphatic in his support of the concept of such independent oversight of CBSA, which is currently lacking.

Clause 10 creates the usual security clearance requirements, as well as express restrictions on committee members in disclosing information they received where the relevant department is seeking to "protect" it, unless disclosing it is in performance of their duties or required by law. Clause 11 expressly excludes the usual parliamentary privilege for unauthorized disclosure.

Access to Information

Clause 13 authorizes the committee to have broad access to relevant information, but this access is significantly restricted in Clause 14, which details specific exemptions including:

> (d) the identity of a person who was, is or is intended to be, has been approached to be, or has offered or agreed to be, a confidential source of information, intelligence or assistance to the Government of Canada, or the government of a province or of any state allied with Canada, or information from which the person's identity could be inferred;
>
> (e) information relating directly to an ongoing investigation carried out by a law enforcement agency that may lead to a prosecution;

In addition to this, Clause 16 permits the minister to refuse to provide requested information on the vaguely defined grounds that:

> (a) the information constitutes special operational information, as defined in subsection 8(1) of the *Security of Information Act*; and
>
> (b) provision of the information would be injurious to national security.

Clause 16(3) requires the minister to notify the review agencies for CSIS, the RCMP, and the CSE of the refusal to provide information to the committee, which means they also will not provide such information. This is affirmed in s. 22(2)(b) of the Act.

Clause 15(1) authorizes the committee to request information from a minister. Subsection (3) requires a response from the minister while subsection (4) states that the information may be provided by the minister and or departmental officials.

Internal and Procedural Issues

The proposed parliamentary committee is being created to provide an independent review mechanism by the legislative branch of government for the national security related activities of various federal bodies, all of which are part of the executive branch of government. Inherently, this requires independence from the

executive branch and an appropriate mandate as well as operational capabilities sufficient to discharge these important duties. Considering this, the following matters are of concern:

- Unlike regular committee procedure, meetings are only to be convened at the direction of the chair (Clause 17) which, given the prime minister's selection of the chair, potentially impedes its independence from the executive, and therefore its effectiveness;
- Meetings are to be held in private if "protected" information is likely to be disclosed or if the chair deems it "necessary" (Clause 18);
- Subject to the provisions of the Act, the committee is authorized to craft its own procedures, but despite this, the Governor in Council is authorized to make regulations:

    (a) respecting the procedures and practices for the secure handling, storage, transportation, transmission and destruction of information or documents provided to or created by the committee;

    (b) respecting the procedure to be followed by the committee in the exercise of any of its powers or the performance of any of its duties or functions;

    (c) respecting the expenses referred to in Clause 32 and;

    (d) generally for carrying out the purposes and provisions of this Act.

Once again, this vests greater control of the committee in the Prime Minister's Office.

- The committee must submit an annual report (Clause 21) but it is to be provided to the prime minister, not Parliament, and the PM is authorized, on broad grounds, to direct the committee to edit its report and remove sensitive information before the PM presents it to Parliament.
- The committee is authorized to prepare "special" reports on any matter and submit these to the PM at any time, although such reports are not to be tabled in Parliament (Clause 21(5)).
- Clause 31 makes clear that the PM or a minister's decision to prohibit a review or provide (or withhold) information is final and no appeal exists, although the committee can express its "dissatisfaction" (without detail) in its annual report.
- Clause 34 mandates a special review of the Act and its operations by specially constituted committees of Parliament five years after its enactment.
- Clause 35 exempts the secretariat from the provisions of the Access to Information Act and s. 45 exempts the secretariat from the disclosure provisions (s.12) of the Privacy Act.

Conclusions and Recommendations

Bill C-22 will deliver on the government's commitment to create a specially mandated parliamentary committee of MPs and senators with a defined, but restricted, mandate to review both national security policy issues and specific operations, and to make recommendations related thereto.

The new committee does not provide the independent operational co-ordination and oversight of national security agencies, which has also been recommended and endorsed by the government, but that does not invalidate C-22, as those objectives can be achieved through a different entity created by separate legislation.

Inasmuch as the parliamentary review committee is, in effect, the legislative branch of government reviewing the national security activities of the executive branch of government, the independence and authority of the committee is critical if it is to deliver on its promised role. It is in this area that the current provisions of C-22 raise concerns as there are several areas where the Prime Minister's Office inexplicably retains functional control.

The proposed committee is expressly defined as not being subject to regular committee procedures, such as power of appointment, election of chairs, scheduling of meetings, and filing of reports. Contrary to regular committee practices, the executive branch of government (PM and ministers) has significantly heightened control including the power to authorize investigations or provide (or withhold) information, all expressly without challenge or appeal.

Pursuant to C-22, the PM appoints the committee chair, which is unprecedented as committees always elect their own chairs. As the committee would only meet at the chair's direction, the Prime Minister's hand-picked chair would wield significant power.

Further, committee reports would be provided to the PM for screening *before* being filed in Parliament, and while the committee can conduct special reviews and provide reports to the PM, they are *not* provided to Parliament.

And if the minister responsible for this Act decides to withhold information from the committee, the minister is obliged to notify the review agencies for CSIS, the RCMP and the CSE, which means they also will not provide such information. All of which strengthens the control of the executive branch over the activities of the committee.

On a positive note, C-22 provides that the committee will be supported by a specially created secretariat (staffed with public servants) that also has the authority to engage private contractors. The just released Fiscal Update indicates that a $5.2M allocation has been made for 2017-18 with ongoing annual funding of $3.2M thereafter. The executive director of the secretariat is to be appointed by the Governor in Council (executive branch) rather than the committee; any replacement due to vacancy on an interim basis is to be done by a minister designated by the Governor in Council as being responsible for this Act. Yet again, the power resides with the executive rather than the legislative branch.

Finally, the Bill and its operations are to be reviewed by a specially constituted parliamentary committee five years after coming into force. This mandatory review is a positive feature of C-22, as it will provide an opportunity for the committee to examine whether or not the intended objectives of parliamentary review of national security operations have been achieved.

Given the analysis above, I offer the following recommendations with respect to Bill C-22:

- Clarify the number of committee members to be appointed, including that two are to be from the Senate and three from House opposition parties (two from the Official Opposition) as the text currently suggests that the committee might have fewer than the maximum number of nine members;

- Authorize the committee to elect its own chair by secret ballot, removing the power of the Prime Minister's Office to appoint the chair and thus have undue influence over the committee's activities;

- Authorize the committee to set its own meeting schedule by existing committee procedures, rather than solely on the direction of the chair;

- Clarify that the committee may receive and consider information provided by the public.

- Authorize the Committee to indicate in its report to Parliament that it was denied information by a minister, or that its report was edited by the prime minister, shedding light on potential efforts by the executive to curtail its effectiveness;

- Authorize the committee to require the minister to appear before the committee for in-camera questioning when information has been withheld from the committee;
- Authorize the committee to initiate an examination of an issue and, subject to the process in C-22, to provide that to the PM and, on approval, to Parliament;
- In considering Bill C-22, parliamentary committees should examine why committee internal procedures are subject to Governor in Council regulation. They should also examine the intended functions of the secretariat, and how the secretariat will be independent from the executive branch of government.
- Consider including in C-22 the offence of willfully misleading, obstructing, or knowingly providing false or inaccurate information to the committee without lawful justification for doing so.

C-22 is a positive development in implementing a parliamentary review capability of the government's national security policies and activities. But work needs to be done if it is to live up to the government's stated commitment to parliamentary independence. I hope that the observations and recommendations provided in this report will assist in shaping an even more effective committee that is tasked with vitally important work on behalf of Canadians.

ABOUT THE AUTHOR

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Scott Newark's 35-year criminal justice career began as an Alberta Crown Prosecutor, with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, Director of Operations for the DC based Investigative Project on Terrorism, and as a security and policy advisor to both the Ontario and federal Ministers of Public Safety.

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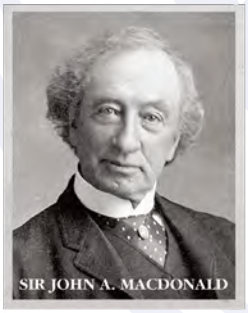
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