Summary of a Consultation Session with the Minister of Public Safety,
The Honourable Ralph Goodale

Introduction

A consultation discussion hosted by the Canadian Association for Security and Intelligence Studies (CASIS) and the Centre for International Policy Studies (CIPS) at the University of Ottawa was held at the University of Ottawa's Odell House on Monday, November 29, 2016. Attendees included the Minister and officials, members of CASIS and CIPS, other academics with expertise on security and intelligence, and people who had held senior positions in the intelligence and security agencies, or review bodies. The meeting was held under the Chatham House rule.

Because the meeting took the form of a conversation, different views were expressed without an attempt to establish a consensus. Where there did appear to be a common view this is noted.

Subsequent to the meeting the committee stage of Bill C-22, *An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts,* was completed and the Bill was reported to the House of Commons with amendments. These amendments were to some of the sections discussed during the conversation, and the changes are noted at the end of this summary. It is important to note that Bill C-22 is still before Parliament and its final shape cannot yet be determined.

Discussion on Bill C-22

A brief opening presentation made several points on Bill C-22 as sent to committee after Second Reading in the House of Commons.

- The effectiveness of the committee would be affected by the quality and permanence of its staff, which would need strong research and legal skills.
- Where the committee and its staff were actually located physically was also important.
- Committee effectiveness would also be impacted by the committee staff's relationship with the staff of existing review bodies, which could enable them to coordinate their efforts to achieve broader coverage. There was concern that SIRC funding was scheduled to decrease, and there would be a significant loss of personnel and capacity for both legal work and research.
- Clauses in Bill C-22 limited the access of the committee to information. Section 14 included a list of information the committee could not access, including confidences of the Privy Council of Canada and information relating to an on-going investigation. 8(b) would deny information to the committee if a Minister thought release would be injurious to national security. Section 16 allowed a minister to deny information if that information constituted "special operational information" according to the *Security of Information Act.* These information exclusion clauses were considered to be too broad and absolute. In particular, since investigations were sometimes extended over a very long period, excluding them should be made discretionary, not automatic.

The opening presentation sparked many comments.

- If the record of the Privacy Commissioner were taken as an example of a very effective review body, the essential ingredients for success appeared to be: a significant fixed term to be served during good behaviour (not at pleasure); competent appointees and staff; transparency of proceedings; relevance of proceedings to the area under review; and, good processes for reviewing questions in an efficient and conclusive manner. By contrast the Executive Director of the Committee of Parliamentarians Secretariat was appointed "at pleasure" as were committee members.
- Where the committee was denied information, it should be able to take the issue to court, rather than simply noting its dissatisfaction.
- It was important that knowledgeable people be appointed to the committee.
- More reflection was needed on the question of review of a committee report by the Prime Minister. The PM was able to direct revisions in some circumstances. If done, this needed to be done more openly in terms of the Prime Minister's interactions with the Committee.
- An information officer was needed as part of the process on the model of the UK (independent reviewer of terrorism legislation).
- The fact that the Secretariat staff for the committee would be public servants and not partisan appointments was very positive.
- Several speakers echoed the concerns about the limitations to the committee's ability to call for information.

Several participants commented on the UK committee model, on which the Canadian legislation was based. The UK committee had gradually expanded its prestige and membership had become sought after. Committee members did not act in the partisan manner they would on a normal parliamentary committee. As a distinct committee of parliamentarians outside the committee structure, they had developed a corporate identity and non-partisan method of operating. In this context it was noted that the committee had evolved to its current status over time, and had not tried to get to the end point in one jump. The need for proceeding with caution and making incremental adjustments to the Canadian model as time went on was emphasized several times during the discussions.

Although the legislation creating the committee had been introduced, there were still reservations about the nature of the system which would emerge. When CSIS had been created the review model chosen was the Security Intelligence Review Committee, rather than a parliamentary committee. Was it a good idea to now have both, plus the Federal Court? However, it was an advantage that there would now be more contact between parliamentarians and those in the S&I agencies.

Some parts of the committee mandate appear to involve oversight rather than review, and this is risky and dilutes ministerial responsibility. SIRC is review only. Would parliamentary party

discipline in Canada be relaxed enough to let the committee of parliamentarians model work? Party discipline in Canada was stronger than in both the UK and Australia. Would parties force their members on the committee to give up information? If they did, the provisions in the Act against releasing information might not be effective, as MPs would use a public interest defence.

If the committee could not protect information this would be a concern for allies, particularly the US. The US itself has a very open congressional system, and in fact Congress and the White House are sometimes divided in their oversight/review objectives.

The committee would be required to develop a culture of acting together and growing in knowledge of the system. Public understanding would also grow. Good staff is essential; in the UK staff comes from the agencies themselves.

The UK committee is part of the executive, and people have to realize that information can't be used in the political arena. The objective is not to find abuse, but to develop a culture of preventing abuse because of the presence of review.

Part of the hesitation over the committee is due to the differences between Canada and our allies. Canada does not have the same vulnerable geopolitical position as Australia and its "Arc of Insecurity," for example, so it is a question as to whether MPs will act as they do there on S&I matters. What will be the impact of the changed nature of the Senate? Will there be enough knowledgeable people to staff the current review agencies, and the parliamentary committee? The apparent provisions for oversight rather than review are a concern. There were differing views on the circumstances in which the Committee could be privy to the details of a criminal investigation. Some believed this should be discretionary given the extended period of time in which an investigation might operate (as for example with regard to Air India); others believed that it was important to have an automatic exclusion to protect the integrity of criminal investigations.

Another view spoke to the general findings of review bodies, which was that the agencies are not malicious when they overstep their powers. They are simply very focused on their mission and everything necessary to accomplish it, and do not always see that their actions may be unnecessary or harmful.

Another view in support of the committee concept was that all activities of government were accountable, but that accountability was very difficult with some kinds of agencies. Even officials supporting a minister had institutional objectives, and could do deals with each other that undermined ministerial accountability. This was exacerbated if information about operations was secret or restricted. The public did not have confidence where the operations of agencies were secret. One of SIRC's important roles was to investigate complaints, which could expose serious problems. Ministers needed better sources and a parliamentary committee would be a benefit to them as well as parliamentarians and the public.

On clause 14, its restrictions should be viewed as an interim step. The chance of leaks was negligible.

The committee had to be able to look at issues related to the military.

Existing review bodies were part of the system of review. Not only was SIRC at risk of losing staff, but the Office of the CSE Commissioner needed more staff.

Overall the committee would need to earn its credibility, and good staff, and a strong leader of that staff, was essential.

Independent Review in General

The conversation then turned to what the entire review system might look like with the addition of the committee. There would now be:

- SIRC and the other current review bodies;
- Parliamentary review, which would cover bodies such as CBSA not covered by a specialized review body;
- The special government-wide review agencies: the Privacy Commissioner, Access Commissioner, Auditor General;
- The Courts.

Some points made in the ensuing discussion were:

- SIRC is about to lose funding just as CSIS is acquiring more powers;
- Counter-terrorism investigations are very long. If Clause 14 were rigorously enforced the committee could never examine CT issues;
- Letting review bodies track an issue across multiple S&I agencies was essential. This might include creating a body with a cross-sector mandate;
- Cross-cutting review might be problematic as the S&I agencies had different powers used in different ways;
- MPs may need more information on how the system currently operates. The courts receive briefings, and the committee will need them even more;
- The committee would require many different kinds of staff and skills—data analysts, agency experts, technical expertise, intelligence assessment, legal. Expertise would have to come from the S&I agencies, but there was a potential for career conflict of interest for those becoming committee staff members.

The role of the committee in educating the public was discussed. One view was that the committee had a direct role in educating the public, while another was that education took place through the House of Commons. Good committee reports would be useful to both Parliament and the public. The committee did have a role in assuring the public that activities necessarily carried on in secrecy were still appropriate and the rights of Canadians were safeguarded.

Views on a cross-cutting committee, or "Super-SIRC" were mixed. While this would help with cross-cutting investigations, the agencies themselves were different, with the RCMP and its criminal investigations being a bad fit with the review of the other S&I agencies. It would not be appropriate for a body to follow a CSIS investigation which became an RCMP criminal investigation. The solution would be to give an RCMP review body similar powers to the other review bodies, not to co-mingle their responsibilities. The committee would have a different mandate than the review bodies, so a Secretariat design encompassing both the committee role of oversight and review, and the review bodies responsibility for complaints along with investigations, would be difficult. Criminal law skills need to be present in the review structures.

It should also be remembered that the Department of Justice is embedded in all the S&I agencies, constituting another form and level of review. The Federal court is a player in the system and all agencies are subject to civil proceedings.

The committee will need to receive good briefings on such things as investigative techniques so that it can do its job properly. Members require a foundational knowledge of operational realities, and a realistic view of what the agencies actually do.

Again it was stressed that there was value in proceeding cautiously so that the parliamentary and review system models could be adjusted drawing on actual experience of how the committee functioned. It would be a mistake to try to design a complicated system at a single stroke.

<u>Concluding Overview</u>

A final brief presentation commented on a number of issues related to an overall review of the S&I system, of which the committee legislation and the Green Paper proposals were only a part. It was necessary to have a broad look at system effectiveness and accountability and how the specific reform proposals might have an impact on the overall system.

Some important points in elaboration of this need for overall balance:

- The CSIS Act needed to be reviewed. Accountability is only one element of this. CSIS needs new tools, but the public needs to be informed of how they will be used;
- The pace of change affecting the S&I agencies has accelerated significantly over the past six years;
    - The wide-spread use of cell phones;
    - The use of encryption on those cell phones;
    - The shift from Canada as an importer of terrorism to an exporter of terrorism, in the form of foreign fighters;
- There are gaps in the powers of the agencies, and they are underequipped.

This latter point led to a discussion on how a broader conversation about system issues and the need for the right balance between needed powers and oversight/review could take place. The

meeting itself was very frank because everyone around the table knew each other and had experience within the system or as a close observer of it. A previous government set up the National Security Advisory Group, but it was too remote from the people in the system to be taken seriously by a Minister. A culture change is necessary so that vital conversations can take place on important issues of system effectiveness.

Everyone needed a reliable source of information. The UK example, with David Anderson as the independent reviewer of terrorism legislation, was one possible model. It was difficult to explain, for example, how little value was now provided by voice interception. Terrorists did not talk on the phone.

Two points emerged from this discussion.

1. There needed to be a vehicle within or close to the community for having informed and serious discussions about the effectiveness of the overall system.
2. There needed to be a mechanism which could provide parliamentarians and the public with reliable neutral information on the operations of the S&I system.

Some additional points were made as the discussions concluded:

- The review bodies need to be able to attract the right people, which not all are currently able to do. A good secondment structure is part of this;
- Little mention is made in accountability discussions of DND, which in fact has a full spectrum of collection capacities;
- The accountability system has to be able to able to address difficult questions on system utility, impact and cost-effectiveness, and make judgments on the place of specific components such as intelligence assessment;
- Education on the S&I system is important to defeat fake news;
- Unless the agencies get more resources, their capacity will diminish as they will need to devote more resources to meeting the demands of the review bodies and the parliamentary committee;
- Lawful access remains a critical issue for the S&I agencies, and the answer may lie in enhanced capacity coupled with increased oversight. More powers would be acceptable if there were more accountability possibilities. There will be no progress on lawful access if agencies are seen as abusing their powers;
- Canada's requirement that the telecoms retain data for 60-90 days is very much shorter than comparable requirements in Australia (two years) and the UK (legislation is pending to set it at one year);
- Canadian experts researching accountability alternatives can get much better briefings in the UK than they can get in Canada.

The discussion closed with the observation that change brought about by new technology, and perhaps by new geopolitical realities, meant that the system which results from the reviews now underway must be capable of enduring in whatever environment develops.

Note on Changes to C-22 at Report Stage

A number of amendments were made to Bill C-22 as reported to the House of Commons, including to clauses which were the subject of this consultation discussion. Since amendments must be read together with an understanding of the Act, and its relation to other Acts, this summary does not comment on the overall impact of the amendments.

- The definition of "Department" was amended to include "a parent Crown corporation as defined in subsection 83(1) of (the Financial Administration Act) or the Canadian Forces".
- The provision that on appointing members of the Senate to the Committee the PM had to consult with "one or more other members of the Senate" was amended to "persons referred to in paragraphs 62(a) and (b) of the *Parliament of Canada Act* and the leader of every caucus and of every recognized group" in the Senate.
- 8(b), relating to the mandate of the Committee now reads "any activity carried out by a department that relates to national security or intelligence, unless the activity is an ongoing operation and the appropriate Minister determines that the review would be injurious to national security"
- An amendment to 13(1) specifies that the Committee is entitled "to send for persons, papers and records" in addition to the previous wording of "any information that is under the control of a department and that is related to the fulfilment of the Committee's mandate.
- 15(2) was amended to add the words "that is in respect of an identifiable person or entity" to description of the ability to request information of FINTRAC.
- Section 16 was deleted.
- Section 21 was amended to provide that the annual report to the Prime Minister must include:

  > "the number of times in the preceding year that an appropriate Minister (i) determined that a review referred to in paragraph 8(1)(b) would be injurious to national security, and (ii) decided to refuse to provide information under subsection 16(1)."

- 21(6) was amended to change the deadline for the PM's tabling of the annual report from 45 days to 30 days.