

The Criminal Law Quarterly

Volume 59, Numbers 2 & 3

December 2012

Editorial

Reforming Public Complaints Against the RCMP

Bill C-42 to amend the *RCMP Act* is important but complex legislation that has been rushed through Parliament. Its preamble indicates the importance of public confidence in the national police force and the important role of civilian review and accountability in maintaining such confidence. Events such as the Maher Arar affair, the mass G20 arrests and a series of problematic police shootings in B.C. have strained public confidence in the police.

Bill C-42 proposes to respond to police shootings through s. 45.79 which provides that the RCMP should generally not investigate the involvement of its own officers in “serious incidents” that may have resulted in serious injury or death. In such cases, the matter will be investigated by the designated authority in the province. For example, in Ontario, this would be the Special Investigations Unit; in Alberta, the Serious Incident Response Team and so on.

In cases where there was no provincial unit, another police force would do the investigation perhaps with an observer from the re-named Civilian Review and Complaints Commission for the RCMP to help ensure the impartiality of the investigation. Section 45.82, however, contemplates that the RCMP may have to investigate in some cases. This could strain public confidence, especially because the bill does not provide for the mandatory appointment of observers in what hopefully will be rare cases.

This section is only a partial response to police shootings. Ontario’s SIU experience affirms that even when such investigations result in prosecutions, they will often result in acquittals. Police officers will appropriately be given the benefit of a reasonable doubt and the new self-defence provisions when proclaimed in force may expand self-defence claims.

The rule of law requires full and impartial investigations of suspected serious police wrongdoing, but there is a danger that the emphasis on prosecutions may itself erode public confidence. The public have a right to

expect more from the police than the use of deadly force that cannot be proven to be criminal. There is a growing sense among those who review the police that the continuum of force taught to police officers is not working to de-escalate conflict.

Another challenge revealed by both the Arar affair and the G20 protest is inter-jurisdictional policing. Bill C-42 provides only one recognition of this challenge. Section s. 45.75 provides that the RCMP civilian commission may conduct investigations or hear complaints “jointly with the authority” in another jurisdiction that “is responsible for investigations, reviews or hearings with respect to complaints against law enforcement officers.”

It remains to be seen how useful s. 45.75 will be. The Arar Commission recommended that joint investigations and hearings among federal review bodies be facilitated by the creation of statutory gateways between, for example, the RCMP complaints body and the Security Intelligence Review Committee (SIRC) which reviews the work of the Canadian Security Intelligence Service (CSIS). Provincial review bodies may also require statutory authorization to conduct joint investigations or hearings.

The existing RCMP body and Ontario’s Office of the Independent Police Review Director co-operated in their systemic G20 investigations, but did not hold joint investigations or hearings. The two bodies reached quite different conclusions on the adequacy of the police response to G20. This illustrates how diffuse review of inter-jurisdictional policing may have a diffuse impact. It also helps explain why so many wanted a public inquiry appointed to examine the work of all officials at the G20 protests. Hopefully, the RCMP civilian body and the relevant provincial bodies will be in a position to engage when necessary in joint investigations and hearings, but more work needs to be done especially at the provincial level.

Even a public inquiry into G20 would have, as the prior McDonald and Keable inquiries into RCMP wrongdoing illustrate, have involved many tricky division of powers issues. Although inquiries such as the Arar and Iacobucci inquiries have been given jurisdiction over all federal officials, we cannot rely on public inquiries to plug structural accountability gaps. Governments can, as happened both federally and provincially with respect to the G20, simply refuse to appoint such inquiries.

Governments and police are appropriately breaking down jurisdictional silos and co-operating in their security efforts. Review and accountability must keep pace with the activities being reviewed. The budgets of the reviewers rarely keep pace with the still expanding budgets of police and intelligence services. Accountability gaps become greater when review agencies are kept in watertight jurisdictional compartments. Section 45.75 is a start, but it does not go far enough given that it does nothing to facilitate integrated review at the federal level.

The Arar Commission recommended that the RCMP complaint body be

given jurisdiction to review the national security activities of the Canadian Border Services Agency and that the jurisdiction of SIRC be expanded to cover other agencies exercising national security activities. The federal government has refused to implement these 2006 recommendations. Unfortunately, its commitment to joint investigation and accountability for the co-ordinated activities of federal security agencies appears to be non-existent.

Even with respect to review of the national security activities of the RCMP, Bill C-42 is very disappointing. Section 45.34 provides that the civilian commission may on its own initiative conduct an inquiry into the “specified activities of the force” to ensure that they have been conducted according to the Act, policies or Ministerial directives.

Specified activities are not defined and it is not clear that they would include the information sharing practices that contributed to Maher Arar’s torture. It is also not clear whether this power includes the ability to assess the adequacy of existing policies and Ministerial directives, including for example, the Ministerial directives that seem to contemplate both the receipt and sending of information in cases where torture may be involved.

The new self-initiated review powers of the commission may also take a back seat to the hearing of complaints. Before undertaking self-initiated reviews, the Commission must certify to the Minister that there are sufficient resources that the handling of complaints will not be compromised. The bill prioritizes complaints despite the fact that the Arar commission stressed that complaints would not be sufficient to review the RCMP’s important national security work.

Finally, the bill stops well short of the Arar Commission’s recommendations that in order to ensure public confidence the Commission, like SIRC, must have access to all secret material short of Cabinet and solicitor-client confidences. Instead the Bill contemplates that the RCMP Commissioner can still refuse to provide the Commission with access to any privileged information including broadly defined special operational information and intelligence received from foreign sources.

Bill C-42 then contemplates an expensive and potentially lengthy process under s. 45.41 where a retired judge will be appointed to review the information and make confidential recommendations. The RCMP Commissioner can still refuse to provide information despite the retired judge’s recommendation. The commission then would have to engage in judicial review.

The result of such lengthy and expensive judicial reviews are not clear. Section 45.4 recognizes that commission should have access to information held by the RCMP that is “relevant and necessary to the matter before the Commission”, but the government could still claim privileges relating to national security confidentiality and specified public interests. The bill also

does not follow the Arar Commission's recommendations that the Commission have public inquiry powers or that the adequacy of its new review powers be reviewed in five years.

Bill C-42 should have been carefully reviewed by Parliament before being enacted. The government should have to explain why it decided to stop well short of the Arar Commission's recommendations and explain why the public should have confidence in Bill C-42.

K.R.