THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill C-22: *National Security and Intelligence Committee of Parliamentarians Act*

CANADIAN BAR ASSOCIATION
IMMIGRATION LAW, CRIMINAL JUSTICE, COMMODITY TAX, CUSTOMS AND TRADE, MILITARY LAW, AND PRIVACY AND ACCESS LAW SECTIONS

November 2016

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Immigration Law, Criminal Justice, Commodity Tax, Customs and Trade, Military Law, and Privacy and Access Law Sections, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Immigration Law, Criminal Justice, Commodity Tax, Customs and Trade, Military Law, and Privacy and Access Law Sections.

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I. INTRODUCTION

The Canadian Bar Association (CBA) appreciates the opportunity to provide our views on Bill C-22, *National Security and Intelligence Committee of Parliamentarians Act*.

The CBA supports creating a National Security and Intelligence Committee of Parliamentarians (Parliamentary Committee). Along with other civil society organizations and commissions of inquiry, the CBA has called for effective review of Canada's national security and intelligence apparatus for many years.[1] In our 2015 submission on Bill C-51 we said:

> If SIRC review is confined to CSIS itself, some state conduct authorized under the new assistance orders will be effectively unreviewable. Like the Arar Commission and others, the CBA agrees that an expert review body must be created with resources and a mandate to *review all national security activity*. *The CBA also recommends the creation of a Parliamentary review committee with access to secret information*. The CBA made this call, unfortunately to no avail, when the *Anti-Terrorism Act* was first introduced in 2001. (emphasis added)

We view the proposed Parliamentary Committee's mandate for review as an important piece of that framework, provided it is coordinated with other parts of an effective review and oversight framework. Certain agencies, like the Canada Border Services Agency (CBSA) in particular, do not have independent review bodies dedicated to their everyday work. The CBA continues to call for independent review of the activities of all national security agencies like the CBSA, in addition to creating the Parliamentary Committee proposed in Bill C-22.

II. MANDATE

The CBA supports a broad mandate for the Parliamentary Committee, allowing comprehensive review of Canada's national security infrastructure. However, we are concerned about three aspects of the proposed mandate.

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1 For some examples, see *Bill C-51, Anti-Terrorism 2015* (CBA: Ottawa, 2015) and *Bill C-36, Anti-Terrorism Act* (Ottawa: CBA, 2001).

First, there is no definition of 'national security' in the Act, nor is there a reference to any other Act. Presumably, the Committee's mandate would include any reference to national security or 'security of Canada' used in other legislation. Given the extremely broad definition of 'security of Canada' implemented by Bill C-51 in the *Security of Canada Information Sharing Act* (*SCISA*), the Parliamentary Committee's mandate could be very broad. While the CBA believes that comprehensive review of the information-sharing provisions in *SCISA* is crucial, the preferred approach would be to harmonize and restrict the definition of 'national security' as the CBA proposed for Bill C-51. We noted then that:

> What will constitute threats to the "security of Canada" includes activities that interfere with the "economic or financial stability of Canada". Canadians have seen this language applied broadly, for example to instances of labour unrest, Aboriginal protest and environmental activism. The exception for "lawful advocacy, protest, dissent and artistic expression" is too narrow. Legitimate advocacy and protest that is both important and common in a democratic society can often be unlawful due to breach of regulatory rules or municipal bylaws.

Second, the Bill would give Ministers special control over the studies undertaken by the Parliamentary Committee. The mandate of the Committee is to review:

> 8.(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.

In our view, the Parliamentary Committee should be able to set its own agenda, with input from Ministers or the public as it sees fit. Ministerial control of the mandate in section 8(c) is problematic, partly because it allows Ministers to influence the agenda and priorities of the Parliamentary Committee. More important, it would appear to envisage a scope of the mandate not covered by sections 8(a) and (b) that the Committee could inquire into only on referral by a Minister.

We recommend that the portion of section 8(c) reading "that a minister of the Crown refers to the Committee" be deleted. Any group tasked with the review or supervision of Canada's national security apparatus should be viewed as independent of Government. The impugned language expressly authorizes government influence on the Committee.

We also recommend that the purpose of the Parliamentary Committee be clearly set out in the context of the mandate, so Canadians and the intelligence and national security community understand the scope and purpose of the Parliamentary Committee. Given the necessarily secret nature of much of the Parliamentary Committee's work, a clear understanding and explicit statement of the purpose is crucial to building public confidence and eliciting cooperation from the national security establishment.

III. COMPOSITION

Section 4(2) of the Bill establishes the membership of the Parliamentary Committee:

> (2) The Committee is to consist of not more than two members who are members of the Senate and not more than seven members who are members of the House of Commons. Not more than four Committee members who are members of the House of Commons may be members of the government party.

The CBA is concerned about the potential politicization and lack of independence of the Parliamentary Committee. As proposed, the Committee would consist in most cases of four government members of the House of Commons and one or more senators appointed by the government. In almost all cases, the majority of Committee members are likely to be loyal to, if not part of, the government.

Several sections of the Bill allow Ministers to refuse to provide information to the Parliamentary Committee for various reasons, and the Committee has no specific recourse or opportunity for review in these situations. It may be difficult for a government-dominated committee to insist on information or documents from a Cabinet Minister, even if it is disposed to do so.

If the Bill is to provide independent review of Canada's security operations, the proposed composition of the Parliamentary Committee would not provide that independence, as members of the government would be reviewing their own government's actions. While the proposed Committee structure may permit a meaningful role in reviewing Canada's legislative, regulatory, policy, administrative and financial framework for national security and intelligence (the mandate in section 8(a)), it would likely fall short of enabling the Committee to carry out the parts of the mandate in sections 8(b) and 8(c).

Allowing the Prime Minister or Governor in Council to name the committee chair is a further unnecessary encroachment on the work and direction of the Parliamentary Committee. We recommend that the Committee be allowed to select its own chair.

The tenure of members of the Parliamentary Committee also raises some concerns, as they serve 'at the pleasure' of the Governor in Council. Allowing the executive branch to remove members of the Committee at will seems fundamentally at odds with rigorous review of executive action. We suggest that members should be appointed for fixed terms or 'during good behaviour' where they could only be removed for cause, but not 'at pleasure'. If a 'cause for removal' occurs, another parliamentary committee should conduct an inquiry and make recommendations to the House or the Senate. Removal of a committee member by the Governor in Council would then occur on address of the Senate or the House, either by a simple or qualified majority (for example, a two-thirds majority).

The security of information pertaining to security and intelligence matters is paramount. Canada is a net importer of intelligence. The law creating a committee dealing with these matters must ensure the security of this intelligence and information. However, the process requiring members to have and maintain security clearance (section 10(a)) also raises some issues. The security clearance of members would be in the hands of the very agencies under review, which could give those agencies power to effectively block the nomination of any member perceived as problematic or to have them removed from the Parliamentary Committee. Several cases dealing with denial of security clearances have shown that Canadian courts tend to defer to the decisions of delegates of the Minister of Public Safety.

The Ministers and other elected members of the government who have access to protected information are subject to security checks by the RCMP and SIRC. We recommend that members of the Committee be subject to the same level of scrutiny, and receive appropriate training on the *Policy on Government Security* and in handling sensitive and classified information and material.

We also recommend that Bill C-22 include a section similar to section 37 of the *CSIS Act*, requiring every member of the Committee and every person engaged by it to comply with all security requirements applicable to the *Policy of Government Security*. This could also be reflected in the oath under section 10(b), and the schedule could set out wording similar to that found in the *CSIS Act* currently.

IV. LIMITS ON ACCESS TO INFORMATION

Bill C-22 would place serious limits on access to information by the proposed Parliamentary Committee. Aside from Cabinet confidences in section 14(a), it is difficult to understand why the other limits in sections14-16 are needed. Essentially, the issue is one of trust in the Committee members. Without trust in the members to act responsibly in the national interest, there is little point in forming a Committee. If there is trust in the members of the Committee, there is no need for unnecessary restrictions that undermine its work and role, and the confidence of the Canadian public that the Parliamentary Committee is able to undertake rigorous and comprehensive review. These issues arise throughout the restrictions in Bill C-22, but some concerns are particularly illustrative.

Sections 14(b) and (e) respectively create limits on information on ongoing military operations, or ongoing investigations relating to a case that may lead to a prosecution. These blanket restrictions may undermine the ability of the Parliamentary Committee to review some long-term issues. The military operations against groups Canada has identified as terrorist in nature have been ongoing for many years and are unlikely to end soon. Considering that involvement and the various roles that Canadians could play (including combat troops, support for allied missions, military or civilian advisors, and others), it is important that the Committee be able to review Canada's involvement in a timely way, including analyzing military or potential prosecution issues. A police investigation into the events like the one on Parliament Hill in October 2014 might go on for months or years after the incident. Both examples would be relevant and even central to the mandate of the Parliamentary Committee, but there would be significant restrictions on its ability to fully review the security establishment approach to the issues in a timely fashion.

Sections 14(c) and (d) are aimed at trust in the good faith of members of the Parliamentary Committee. As suggested above, members of the Committee should be trained on the *Policy on Government Security* and handling sensitive and classified information and material. Applying fundamental security 'need to know' principles, the Committee could implement processes so that only information necessary to pursue the Committee's mandate is given to members. In most cases, there would be no need for detailed information about sources, methods, individuals in witness protection or similar types of sensitive information. However, in cases where the Committee determines that the information is relevant to allow it to assess national security and intelligence activities across government departments, members should be informed of the possible risks in disclosure, and the Committee could decide whether to seek

the more detailed information in question, balancing the competing interests in non-disclosure – much as is done by judges in court applications for disclosure of similar material under section 38 of the *Canada Evidence Act*.

Similarly, sections 14(g) and 15(2) have the potential to restrict the Parliamentary Committee's ability to review the effectiveness and propriety of FINTRAC activities. Again, general respect for the 'need to know' principle would not jeopardize the delicate privacy balance underlying those information collection programs. There would be significant privacy concerns with individual members' ability to inquire into all FINTRAC records. However, in the context of an inquiry into FINTRAC activities and practices, it may be appropriate for the Parliamentary Committee to undertake more detailed examinations of records.

The process for obtaining information also raises some concern, as the Parliamentary Committee does not appear to have powers to compel the attendance of witnesses or the production of documents or information. To be effective, the Committee should have the power to compel witnesses and to order the production of documents or information.

Section 15(3) requires information to be provided in a timely manner, but does not define what is timely. A specific timeframe should be set out in the Act, with specific recourses or consequences for failure to comply.

V. SECTION 16

While we have made suggestions and expressed concerns about various aspects of the Bill, our concerns about section 16 of the Bill are greater by several orders of magnitude. That section would provide broad discretion for Ministers and departments to refuse to provide information on vague national security grounds and on the basis of the expansive definition of 'special operational information' in the *Security of Information Act*. Allowing agencies under review to selectively refuse to disclose information to the Committee would undermine the work of the Committee and the confidence of the Canadian public in the review process.

Put simply, section 16 would gut the proposed law and preclude the Parliamentary Committee from achieving its objective. It would create a broad and largely standardless 'out clause' for Ministers to exempt themselves from the Committee's disclosure regime. The rationale for such an exemption is difficult to discern. The exemption seems unnecessary and illogical, as the Bill proposes that the very members that the Minister might prevent from seeing the information

at issue would have the same lawful authority to see that information as the Minister him or herself.

Section 16 would undermine the Parliamentary Committee's ability to fulfill its mandate for certain files. It would render opaque a mechanism that has been held out to Canadians as enhancing government transparency and accountability in the realm of national security. While Canadians cannot know the information their government decides must be kept secret, their elected representatives, properly trained and security vetted, should be able to know it on their behalf. The Canadian Bar Association opposes passage of Bill C-22 if it contains section 16, and recommends that section be deleted.

VI. POWERS AND RECOURSE

The CBA supports the requirement for annual public reports from the Parliamentary Committee. The broad discretion under section 21(5) to require a revised report is concerning on two levels. The unilateral ability to require a revised report could undermine confidence in the review mechanisms and reliability of the reports from the Committee. There is also the potential for lengthy delays if multiple revisions of a report are requested.

Section 23 appears to encourage and reinforce the silo approach that a Parliamentary Committee is meant to overcome. There should be a process for providing relevant information not otherwise accessible to the oversight bodies that would assist in their mandate.

VII. PROCESS

The ability of the Governor in Council to make regulations [section 33] significantly affecting the work of the Parliamentary Committee is another concern. The executive branch that is under review by the Committee should not be able to curtail the Committee's work without going to Parliament.

It is unclear why a review of the Parliamentary Committee is mandated in five years, or what the consequences would be of not conducting the review.

VIII. CONCLUSION

The CBA has called for Parliamentary oversight of national security agencies, as seems to be the objective of Bill C-22, *National Security and Intelligence Committee of Parliamentarians Act*. With the important amendments we have recommended, we would support the Bill's passage.