

IS IT ENOUGH TO BE ON THE RIGHT TRACK?

The current legislative mandate of the Commission for Public Complaints Against the RCMP (CPC) has its genesis in the events that unfolded in the 1970s and early 1980s. Canadians witnessed the crises that occurred in Quebec during this period with such memorable events as the burning of a barn to frustrate a planned meeting between members of the FLQ and the American Black Panthers. Judge Marin in a 1976 report called for the creation of a federal ombudsman who would act as the people's watchman in relation to the conduct of the RCMP. It wasn't until some 10 years later, following the establishment of the MacDonal Royal Commission and the transfer of the domestic national security intelligence function to CSIS that the government introduced legislation to create a civilian review mechanism to deal with public complaints about the conduct of RCMP members in the performance of their duties. It wasn't until October of 1988, almost two years later, that legislation was actually enacted by Parliament. I believe it would be fair to conclude that civilian oversight or review of policing activity is generally something that has not been welcomed by the policing community and efforts to introduce such regimes are, at a minimum, confronted by a passive aggressive response. It is not by happenstance that government forays into this area are generally triggered by a crisis, one which undermines the public's confidence in the police force. The deference by the government and Parliament to the traditional independence of the RCMP was reflected in the relative weakness of the 1988 legislative mandate of the CPC. The powers afforded the CPC were far less than those given to the Access and Privacy Commissioners in 1981 and to the SIRC in 1984 in respect of its review of the Canadian Security Intelligence Service (CSIS) activities. The frailties of the legislative mandate became readily apparent to the first Chair of the CPC who in his Annual Report of 1989-90 called for some 33 legislative amendments. This phenomena of initial deference to police independence followed by government action in response to a crisis played out not only at the federal level but also at the provincial level and has been the catalyst for subsequent recent enhancements to their respective civilian oversight regimes. You will find this same behaviour pattern occurring elsewhere in the Commonwealth and amongst other western democracies.

In contrast to the tardy reactive response to civilian oversight of policing, we have witnessed a very pro-active government and police response to an ever-changing and more complex public safety environment. The world has witnessed the emergence of transnational organized crime, terrorism and the Pandora's Box of evils spawned by the Internet including, but not limited to, identify theft and the proliferation of child pornography. The Canadian government has provided the police with new powers such as those contained in the *Organized Crime Act (C-24)* and the *Anti-Terrorism Act (C-36)* and has facilitated multi-national cooperation through enhancement to the *Mutual Legal Assistance Act* and the *Extradition Act*. Actions, such as the destruction of property, that were such major issues in the RCMP investigation of terrorist events of the 1970s are by virtue of the two aforementioned Acts now authorized by law.

The police have refined their investigative practices and the integration of police and other investigative bodies both domestically and internationally is now the norm.

The rapid response on the enforcement side as evidenced by new legislation and innovative police investigative practices and the failure to modernize civilian oversight regimes has created significant corners wherein the Watchman's light cannot be cast.

The recent review of the activities of various government agencies in the Arar Inquiry highlights the growing gap between policing activities and civilian oversight. Justice O'Connor looked at the integrated activities of the RCMP, CSIS, DFAIT, OPP, Ottawa Police Services, Sûreté du Québec, Gatineau Police Services and Hull Police Services as well as a representative from the then Canada Customs and Revenue Agency. Two of the major actors whose activities were looked at by Justice O'Connor, CSIS and the RCMP, were already subject to review by the SIRC and the CPC respectively. Their review mandates, however, were narrowly focussed on CSIS and the RCMP. Neither had a mandate that would allow them to look at the wide range of actors who participated in this integrated investigation model — one which included an array of federal, provincial and municipal partners as well as some at the international level such as the FBI and agencies of the Syrian government.

In addition to the limited scope of the mandates of the SIRC and the CPC in respect of the integrated model, it is useful to note that some of the other federal partners such as DFAIT and the enforcement arms of Customs and Immigration which are now grouped within the Canadian Border Service Agency were not and are not subject to any civilian review.

The lack of uniformity of review powers amongst the various federal oversight bodies was commented upon by the Auditor General in 2003 wherein she advanced the proposition that the review powers of such bodies ought to be proportional to the level of intrusiveness of the organizations over which they exercise review. Federally, the RCMP possesses the most intrusive powers.

The government, when faced with a crisis, has been forced to address this misalignment of powers between the review body and the investigative agencies through recourse to a series of investigations as manifested in the personages of Messrs. Bob Rae and David Brown or through inquiries such as those led by Justices O'Connor, Iacobucci and Major.

These inquiries have and will make a valuable contribution to the ongoing public debate concerning public safety issues. However, they are very costly and are re-active in the sense that they deal with the after effects of an event and do not bring with them the deterrent effect that a review body with audit powers would have.

What is required is a modernized legislative mandate for civilian review of policing activities — one which better reflects current public expectations of accountability and transparency.

A new mandate would enable the review body to:

- monitor investigations to ensure impartiality;
- where appropriate, investigate a matter itself or refer it to another police force;
- have unfettered access, as of right, to all information except Cabinet confidences;
- make factual findings that are binding, subject to appeal to the Federal Court;
- conduct joint investigations with other review bodies;
- share reports with other review bodies and provincial ministers responsible for policing.

The new legislation would include:

- subpoena powers;
- audit powers;
- an offence for obstructing or interfering with the review body's functions;
- a positive obligation on law enforcement officers to account for their actions, but such evidence would not be admissible in other criminal, civil or administrative proceedings;
- safeguards to maintain confidentiality of sensitive information;
- the authority for the Minister of Public Safety to refer significant issues to the review body for special reports.

Such a mandate would, in my opinion, address the public expectations of 2007. The mandate should be reviewed by Parliament every five years. Some may feel that such a frequency of review is overkill. I would ask you to note, however, that until 2007, the enforcement officers of CBSA, although "peace officers" as that term is defined in the *Criminal Code*, did not bear firearms. The government has taken the decision to arm them. Over the next 5 to 10 years, we will see a gradual increase in the number of armed customs officers topping out at some four to five thousand persons. These officers, like the RCMP, enforce some 50 plus federal statutes at our border crossings. They have the power to search, detain, arrest and to use force in the discharge of their duties. Unlike the RCMP, they are not subject to a civilian review regime. That may not be a problem as we speak. Will it be a problem five years hence?

The policing world has changed dramatically. It is essential that we maintain public trust in our police agencies. The establishment of the CPC in 1988 was a good first step but as Will Rogers said: "Even if you are on the right track, you'll get run over if you just sit there."

The failure to ensure that our oversight regimes have kept pace with changes in policing powers and practices has contributed to a number of instances wherein the RCMP has been run over. Is it not time to get things back on track?