



The Honourable Jean-Pierre Plouffe, CD

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December 6, 2017

The Honourable John McKay, MP
Chair
Standing Committee on Public Safety and National Security
House of Commons
6th Floor, 131 Queen Street
Ottawa, Ontario K1A 0A6

Dear Mr. McKay:

In the context of Bill C-59, *An Act respecting national security matters*, having been referred to committee before Second Reading, I am writing to provide you with proposals respecting Part 2 of the Bill, the *Intelligence Commissioner Act* and Part 3, the *Communications Security Establishment Act*. Given the quasi-judicial function of the Intelligence Commissioner (IC), the requirement that the IC be a retired judge of a Superior Court, and given the transition clause in the IC Act, I am directly implicated in these proposed Acts. Witnesses who have already appeared before your committee have raised a number of issues and suggestions concerning the IC. Thus I look forward to appearing before your committee before Second Reading and the opportunity to discuss these proposals and any other issues or questions of interest.

As Minister Goodale stated before your committee on November 20th, the purpose of the Bill being sent to committee before Second Reading is to allow elements of principle to be changed and to allow “maximum flexibility to present new ideas, to offer alternative suggestions”. With this in mind, you will find attached a list of seven proposed changes that relate to the Intelligence Commissioner’s authorities, along with a brief description of each one.

I have other substantive and technical proposals that I have communicated to Ministers Goodale and Sajjan, and that I will submit to committee after Second Reading. Should you wish to receive these as well, I can forward them to you at any time. In the meantime, I am continuing to study and assess Bill C-59 as it affects the Intelligence Commissioner.

Yours sincerely,

Jean-Pierre Plouffe

Encl.

cc: The Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness
The Honourable Harjit Sajjan, Minister of National Defence

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Substantive Proposals Regarding the Intelligence Commissioner's Role Presented to the House of Commons Standing Committee on Public Safety and National Security

The following is a list of substantive proposals for modifications to be brought to Part 2 of Bill C-59 regarding the Intelligence Commissioner's role. Explanations of these proposals can be found in subsequent pages.

1. The Intelligence Commissioner should approve the active cyber operations in addition to the defensive cyber operations that are authorized by the Minister pursuant to subsections 30(1) and 31(1) of the proposed *Communications Security Establishment Act*.
2. Regarding subsection 37(3) of the proposed *Communications Security Establishment Act*, it is suggested that the decision by a Minister to extend, for one more year, an authorization on matters of foreign intelligence or cybersecurity be reviewable by the Intelligence Commissioner.
3. Subsection 41(2) of the proposed *Communications Security Establishment Act* should provide that emergency authorizations issued by the Minister in foreign intelligence and cybersecurity matters be reviewable by the Intelligence Commissioner.
4. The Intelligence Commissioner should have the authority to request clarifications with respect to the information presented to him, short of receiving or accessing information that the Minister would not have seen.
5. The Intelligence Commissioner should be able to conditionally approve authorizations, pursuant to section 13 of the proposed *Intelligence Commissioner Act*.
6. The Intelligence Commissioner should prepare a classified as well as an unclassified annual report to the Prime Minister, the latter report for the Prime Minister to table in both Houses.
7. Regulation-making authority should be inserted in the proposed *Intelligence Commissioner Act* to enable the creation of regulations for carrying out the purposes and provisions of the Act, as well as on more specific matters.

Additional Responsibilities for the Intelligence Commissioner

1. The Intelligence Commissioner (IC) should approve the active cyber operations in addition to the defensive cyber operations that are authorized by the Minister pursuant to subsections 30(1) and 31(1) of the proposed *Communications Security Establishment Act (CSE Act)*.

Discussion

- Under both active and defensive cyber operations, CSE will carry out activities on or through the global information infrastructure to degrade, disrupt, influence, respond to or interfere with the capabilities, intentions or activities of a foreign individual, state, organization or terrorist group as they relate to international affairs, defence or security.
- The Chief of CSE must make a written application and set out the facts that would allow the Minister to conclude that the authorization is necessary. Also, the Minister of Foreign Affairs would need to either request or consent to the active cyber operation.
- These cyber activities are similar to the ones provided for in the proposed changes to the *Canadian Security Intelligence Act (CSIS Act)* with respect to disrupting a communication or means of communications (subsection 21.1(1.1) of the *CSIS Act*).
- There is no role envisaged for the IC to approve such an authorization, even where third party rights, including their privacy rights, could be affected, including those of a Canadian outside of Canada, or where a Canadian law could be contravened.
- A comparison between the current and proposed CSIS processes with the proposed CSE processes for these activities reveals the following:
 1. Both CSE and CSIS may disrupt communications and means of communications.
 2. The nature and types of measures described in both proposed legislations are similar. Proposed paragraph 21.1(1.1)(a) of the *CSIS Act* states that CSIS may alter, remove, replace, destroy, disrupt or degrade a communication or means of communication while the proposed active cyber mandate described in section 20 of the proposed *CSE Act* states that CSE can degrade, disrupt, influence, respond to or interfere with the capabilities, intentions, or activities of foreign entities.

3. Both CSE and CSIS conduct these activities outside of Canada (CSIS can also conduct them within Canada).
 4. Neither CSE nor CSIS collect information when undertaking these activities.
 5. CSIS threat reduction activities are limited to those measures that will reduce threats to the security of Canada while CSE's active cyber operations are broader, as they may relate not only to security, but also to international affairs or defence. In essence, CSE could ask the Minister to authorize active cyber activities on a matter that would be purely of an international affairs nature, such as communications surrounding an international gathering on the economy or the environment.
 6. Under the *CSIS Act*, the Director of CSIS, the responsible Minister and the Federal Court must approve these activities in certain situations; under the proposed *CSE Act*, only the Chief of CSE, the responsible Minister and the Minister of Foreign Affairs are involved in the decision-making process. However, no independent oversight body approves this decision under the proposed *CSE Act*, even in situations where *Charter* rights or privacy rights of third parties (including those of an incidentally affected Canadian) might be engaged or a Canadian law possibly contravened.
2. Regarding subsection 37(3) of the proposed *CSE Act*, it is suggested that the decision by a Minister to extend, for one more year, an authorization on matters of foreign intelligence or cybersecurity be reviewable by the IC.

Discussion

- If the IC was involved in the initial authorization, why should he not play the same role a year later?
- The Minister will be presented with evidence to support the need for an extension.
- If the Minister reaches the conclusion to extend the authorization period, then the IC should approve this decision.
- If the intent of the section is for the Minister to automatically grant the extension, then it is possible that in practice these authorizations will have a two-year validity period.

3. Subsection 41(2) of the proposed *CSE Act* should provide that emergency authorizations issued by the Minister in foreign intelligence and cybersecurity matters be reviewable by the IC.

Discussion

- Emergency authorizations issued by the Minister in foreign intelligence and cybersecurity matters are not reviewable by the IC. These authorizations are valid for a period of 5 days.
- Proposed section 11.22 of the *CSIS Act* provides that the Director of CSIS may authorize the query of a dataset that has not been ordered or authorized to be retained.
- The Director may authorize this query only where exigent circumstances are present.
- Nevertheless, the section provides that the IC must approve the authorization of the Director in order for it to be valid.
- Therefore, although the Director's decision will be made urgently, the law provides a role for IC.
- In addition, under the United Kingdom's *Investigatory Powers Act 2016* (<http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted/data.htm>), there is a similar scheme as the one proposed in sections 41 to 43 of the *CSE Act* dealing with emergency authorizations. In the United Kingdom, a Judicial Commissioner must review emergency authorizations.

Powers of the Intelligence Commissioner

4. The IC should have the authority to request clarifications with respect to the information presented to him, short of receiving or accessing information that the Minister would not have seen.

Discussion

- Section 23 of the proposed *IC Act* does not permit the IC to seek clarification from the Minister or from the requesting agency of the information provided to the IC when the IC is reviewing a Minister's decision.
- In situations where clarification would be needed, but impossible to obtain, the IC may have no choice but to refuse to approve the Minister's decision for lack of reasonableness.

- It is proposed that, short of asking for additional information and ensuring that no new information would be provided to him, the IC be entitled to make requests aimed at clarifying the information that was before the Minister.
 - This would add a degree of flexibility to the process with the goal of making it more efficient.
 - Additionally, it has been suggested that a review based on reasonableness might not be sufficient for purposes of compliance with the *Canadian Charter of Rights and Freedoms (Charter)* given that (1) the IC cannot challenge the record that was before the Minister; (2) the IC cannot benefit from representations; and (3) the IC cannot seek clarification. Adding the possibility of seeking clarifications would make the process more *Charter* compliant.
5. The IC should be able to conditionally approve authorizations, pursuant to section 13 of the proposed *IC Act*.

Discussion

- There will be circumstances where the IC will have no choice but to deny an authorization based on lack of reasonableness.
- This could be avoided in certain circumstances, if the IC could conditionally approve authorizations. Indeed, in certain cases, the insertion of a condition could enable the IC to reach a different conclusion.
- The scheme could provide that the IC may send the matter back to the Minister for the said condition to become part of the authorization.
- In practice, the IC would be issuing a conditional approval that would become valid once the condition would have been added to the initial authorization by the Minister.
- This would add a degree of flexibility to the process with the goal of making it more efficient.

Annual Report

6. The IC should prepare a classified as well as an unclassified annual report to the Prime Minister, the latter report for the Prime Minister to table in both Houses.

Discussion

- The IC is independent of government and will undertake a quasi-judicial role.
- Public reporting helps demonstrate this independence and will enhance transparency, accountability and, by the same token, public trust.
- We propose following a model like the one the United States Foreign Intelligence Surveillance Court (<http://www.uscourts.gov/statistics-reports/analysis-reports/directors-report-foreign-intelligence-surveillance-courts>) has developed for its annual report, consisting mainly of statistics on, for example, the number of applications made and the orders granted, modified or denied.
- If an annual report was to be produced, the number of cases where a decision was rendered with reasons could be made public, i.e. unclassified.

Regulations

7. Regulation-making authority should be inserted in the proposed *IC Act* to enable the creation of regulations for carrying out the purposes and provisions of the Act, as well as on more specific matters.

Discussion

- Regulation-making authority would, for instance, allow the government and the IC to agree on the approval process/procedure of the IC in his dealings with the Ministers.
- It could also provide clarity for what is meant by “all information” in subsection 23(1) of the proposed *IC Act*, e.g. that it includes any verbal communications or briefing materials.
- Section 61 of the proposed *CSE Act* could be used as a model for this type of clause.