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LEGISLATIVE SUMMARY



Bill C-42:

An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts

Publication No. 41-1-C42-E
10 September 2012

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Legislative Summary of Bill C-42

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-42: AN ACT TO AMEND THE ROYAL CANADIAN MOUNTED POLICE ACT AND TO MAKE RELATED AND CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-42: An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts (short title: Enhancing Royal Canadian Mounted Police Accountability Act) was tabled in the House of Commons on 20 June 2012 by the Minister of Public Safety (the Minister), the Honourable Vic Toews.

Bill C-42 essentially repeats the provisions of former Bill C-38¹ by amending the *Royal Canadian Mounted Police Act* (RCMPA)² to establish a new, independent civilian commission – the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police (the Commission) – to replace the existing Commission for Public Complaints Against the RCMP. The bill also gives the force of law to a provisional policy of the Royal Canadian Mounted Police (RCMP) on investigations of serious incidents involving members of the RCMP. In addition to addressing these two matters dealt with in former Bill C-38, Bill C-42 also introduces changes to the enforcement of disciplinary measures, the handling of grievances and the human resources management framework, in order to expedite the processing of serious misconduct cases involving RCMP members and to improve the performance of the organization. Overall, the changes proposed Bill C-42 aim to increase RCMP accountability to its members and to the public.

The bill provides, in particular, that the following elements be included in the RCMPA:

- The RCMP Commissioner is given the power to revoke appointments (new section 9.2 of the RCMPA).
- The Commissioner is given the power to establish procedures to investigate and resolve disputes relating to harassment in the workplace (new section 20.2(l) of the RCMPA).
- Service standards are established respecting time limits for dealing with grievances and public complaints (new sections 28.1 and 45.37 of the RCMPA).
- The establishment of a consolidated procedure and greater powers respecting the violation of the Code of Conduct (new sections 40.2, 40.3 and 43 of the RCMPA).
- The Commission is given the power to review, on its own initiative, specified activities of the RCMP (new sections 45.34, 45.35 and 45.36 of the RCMPA).
- A more extensive right of access to information in the possession or under the control of the RCMP is given to the Commission, although limits on this right of access are imposed (new sections 45.39, 45.4 and 45.42 of the RCMPA).

- The Commission is given the power to summon witnesses and to compel them to produce documents or exhibits in the same manner and to the same extent as a superior court of record and to make any examination of records and inquiries it considers necessary (new sections 45.36 and 45.65 of the RCMPA).
- Complainants are given the possibility to make representations concerning the impact of the conduct to which they have been subjected and to receive regular reports on the progress of an investigation (new sections 45.57 and 45.58 of the RCMPA).
- The Commission is given the possibility to conduct a joint investigation with another authority responsible for investigating public complaints against law enforcement officers in Canada or abroad (new section 45.75 of the RCMPA).
- An investigation may be referred to an independent investigative body when a serious incident involves a member of the RCMP (new sections 45.81 and 45.82 of the RCMPA).

1.1 RESTORING PUBLIC CONFIDENCE IN THE ROYAL CANADIAN MOUNTED POLICE

The preamble to Bill C-42 begins with the words, “Whereas Canadians should have confidence in their national police force.” In recent years, public confidence in the RCMP has been repeatedly shaken by widely publicized events (including the release of an amateur video showing Robert Dziekanski in the final moments before his death at Vancouver International Airport after being shot with a stun gun by RCMP officers³) and major investigations that shed light on shortcomings in the management of national security files and in governance within the organization (for example, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar⁴, the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin,⁵ and the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182⁶).

More recently, this confidence was again shaken by public allegations of harassment and sexual harassment within the organization.

In November 2011, at the height of the allegations of harassment, the government appointed the current RCMP Commissioner, Robert Paulson. At the time of his appointment, Mr. Paulson stated the following:

First on my plate will be addressing the issue of harassment and sexual harassment in the workplace.

I, like the rest of my colleagues in the RCMP, indeed like all Canadians, am very concerned by these recent allegations.

These allegations do not represent the Force I joined, and this situation cannot continue. I will resolve this situation and restore the trust and faith Canadians have in the RCMP and just as importantly, ensure that RCMP employees can thrive in a healthy, productive and harassment free environment.⁷

In various public forums, Commissioner Paulson also spoke of the need to introduce legislative changes to give the RCMP Commissioner the authority to fairly and expeditiously resolve the conflicts tarnishing the organization's reputation.⁸ Part of Bill C-42 seeks to address this aspect by broadening the Commissioner's power with regard to the dismissal of RCMP members for non-disciplinary administrative reasons, and the establishment of a dispute-resolution process to deal with workplace harassment. Details of the proposed changes pertaining to workplace relations at the RCMP will be discussed in the "Description and Analysis" section of this legislative summary.

1.2 CALLS TO STRENGTHEN CIVILIAN REVIEW OF ROYAL CANADIAN MOUNTED POLICE ACTIVITIES

In recent years the need to strengthen civilian review of RCMP activities has been noted on many occasions by various people, including the chairs of the Commission for Public Complaints Against the RCMP,⁹ Justice Dennis O'Connor (tasked in 2004 with chairing the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, David Brown (tasked in 2007 with investigating allegations concerning the management of RCMP pension and insurance plans),¹⁰ the Privacy Commissioner of Canada¹¹ and committees of both the Senate and the House of Commons.¹²

Two inquiry reports submitted following incidents involving the RCMP, those produced by Justice O'Connor and Mr. Brown, recommended the creation of a civilian review body to review RCMP activities. We shall examine the recommendations of the two reports in the "Description and Analysis" section of this legislative summary, highlighting the similarities and differences between the approach taken in Bill C-42 and that advocated in the two reports.

Since those two reports were published, a number of the parties involved, including committees of the Senate and the House of Commons, have supported the recommendations that emerged from the inquiry conducted by Justice O'Connor. Generally speaking, Justice O'Connor recommended the establishment of a civilian agency to oversee the activities of the RCMP that would be given powers similar to those conferred on the agency responsible for providing civilian oversight of the operations of the Canadian Security Intelligence Service (CSIS) – the Security Intelligence Review Committee (SIRC). Acknowledging the increasing frequency of integrated investigations in the field of national security, Justice O'Connor felt that the new RCMP review agency should be able to share information and carry out investigations jointly with other national security review bodies, including SIRC and the Office of the Commissioner for the Communications Security Establishment Commission¹³.

In the next section, we set out the characteristics of the Commission for Public Complaints Against the RCMP (CPC), the review body that Bill C-42 is designed to replace, and of SIRC, and we discuss the factors that distinguish them.

1.3 EXTERNAL BODIES PROVIDING OVERSIGHT OF THE ROYAL CANADIAN MOUNTED POLICE AND THE CANADIAN SECURITY INTELLIGENCE SERVICE

1.3.1 COMMISSION FOR PUBLIC COMPLAINTS AGAINST THE RCMP

The Commission for Public Complaints Against the RCMP (CPC) was established by Parliament in 1988 as an agency to review and resolve complaints from the public against the RCMP. It is an independent agency that reports publicly to Parliament through the Minister of Public Safety.

The CPC primarily investigates complaints from the public concerning the conduct of members of the RCMP where the complainants are dissatisfied with the manner in which the RCMP has treated their complaint. In short, the CPC ensures that complaints made by the public are examined fairly by the RCMP.

The Chair of the CPC also has, in a limited number of cases, the power to file complaints and conduct investigations on his or her own initiative or to hold hearings in the public interest into the conduct of one or more members of the RCMP. In processing the complaints, the CPC may access “relevant documents” held by the RCMP.

Finally, it must be noted that the Commissioner of the RCMP is not required to comply with the recommendations made in the reports of the CPC.

1.3.2 SECURITY INTELLIGENCE REVIEW COMMITTEE

The *Canadian Security Intelligence Service Act*¹⁴ provides the legislative basis for CSIS and the body that monitors it: the Security Intelligence Review Committee (SIRC). Until recently, the *Canadian Security Intelligence Service Act* was also the legislative basis for the Office of the Inspector General. Appointed by the Governor in Council, the Inspector General was responsible for reviewing the activities of CSIS for the Minister of Public Safety in order to support the Minister in his or her role as the person responsible for CSIS. The position was abolished by Bill C-38, the Jobs, Growth and Long-term Prosperity Act,¹⁵ which received Royal Assent on 29 June 2012.

SIRC is the independent external body responsible for reviewing the activities of CSIS and reporting on them to Parliament through the Minister of Public Safety. It has the power to investigate complaints filed by anyone against the actions of CSIS and to review the way in which the agency fulfills its mandate. To this end, it may access any information held by CSIS, with the exception of Cabinet documents.¹⁶ It may also conduct investigations on its own initiative.

As is the case with the CPC, the recommendations made by SIRC are not binding.

1.3.3 DIFFERENCES BETWEEN THE SECURITY INTELLIGENCE REVIEW COMMITTEE AND THE COMMISSION FOR PUBLIC COMPLAINTS AGAINST THE RCMP

While SIRC and the CPC have in common the fact that they are both independent bodies, receive complaints from the public and have the power to undertake and conduct their own investigations, there are still major differences between the two agencies.

First, the mandate of SIRC is much broader than that of the CPC. Generally, the latter agency's mission is merely to receive and investigate complaints concerning failings in the conduct of members of the RCMP, whereas SIRC also has the task of reviewing the way in which CSIS carries out its mandate and performs its functions. In other words, the RCMP – unlike CSIS – is not currently subject to a review designed systematically to determine whether its operations are in accordance with the laws and with ministerial directions. This difference is notable because the power to receive and investigate complaints, while important, is only one of the aspects of a much broader mandate for civilian review.

Second, SIRC has much more extensive powers at its disposal to fulfill its mandate. The most important is its right of access to information. The CPC may access only “relevant documents” in dealing with a particular complaint, and this has been the source of much disagreement between it and the RCMP. By way of comparison, SIRC may access any information held by CSIS, with the exception of Cabinet documents.

At the present time, therefore, there is a major difference between the powers of the CPC and those of SIRC. This distinction is hard to justify since both of the organizations subject to oversight – the RCMP and CSIS – have very extensive intrusive powers.

Bill C-42 attempts to bridge this gap. However, we shall see in what follows that the mandate and the powers of access to information of the Commission created by the bill – although more substantial than those of the existing CPC – still seem to be more limited than those available to SIRC.

2 DESCRIPTION AND ANALYSIS

2.1 WORKPLACE RELATIONS (CLAUSES 2 TO 34 OF THE BILL)

This portion of Bill C-42 amends parts I to V of the RCMPA. The summary states that the bill:

modernizes discipline, grievance and human resource management processes for members, with a view to preventing, addressing and correcting performance and conduct issues in a timely and fair manner [...] In particular, it authorizes the [RCMP] Commissioner to act with respect to staffing, performance management, disputes relating to harassment and general human resource management.

2.1.1 POWERS OF THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE (CLAUSES 10, 13, 20 AND 25 OF THE BILL)

The bill sets out numerous details regarding the new powers of the Commissioner, including the power to revoke the appointment or promotion of a member of the RCMP:

The Commissioner's power to *appoint a person as a member* or to appoint a member, by way of *promotion*, to a higher rank or level, includes the power to revoke the appointment and to take corrective action whenever the Commissioner is satisfied that an error, an omission or *improper conduct* affected the selection of the person or member for appointment. [CLAUSE 10 OF THE BILL; AUTHORS' EMPHASIS.]

The expression "improper conduct" is not defined in the RCMPA.¹⁷ A similar power is currently held by the adjudication board and the discharge and demotion board.¹⁸

In addition, Bill C-42 authorizes the Commissioner to recommend to the Governor in Council the discharge of any RCMP Deputy Commissioner for various reasons, including "for the promotion of economy and efficiency in the Force" (clauses 13 and 25 of the bill; new paragraph 20.2(1)(j) of the RCMPA).

Also noteworthy among the new powers attributed to the RCMP Commissioner are the authority to establish procedures to investigate harassment in the workplace (new paragraph 20.2(1)(l) of the RCMPA¹⁹) and the obligation to establish an informal conflict management system (clause 20 of the bill; new section 30.2 of the RCMPA).

2.1.2 CONDUCT (CLAUSES 26 TO 33 OF THE BILL)

Clause 26 of the bill sets out the purposes of Part IV of the RCMPA, namely the "establishment of a Code of Conduct that emphasizes the importance of maintaining the public trust, and reinforces the high standard of conduct expected of members" (new paragraph 36.2(b) of the RCMPA).

The Code of Conduct provisions applicable to RCMP members are set out in Part III of the *Royal Canadian Mounted Police Regulations*.²⁰ The bill makes no substantive changes to these provisions; rather, it introduces procedural changes whose aim it is to make it possible to deal with contraventions of the Code more quickly and in a more flexible manner. This would be done, for example, by giving greater discretion to the "conduct authority" (i.e., the commander or manager) and by no longer requiring a formal hearing in every case (new section 42 of the RCMPA). This new, more flexible procedure, replaces the hearing before an adjudication board or a discharge and demotion board, which can take five years, on average.²¹

Pursuant to new paragraph 39.1(a) of the RCMPA, the RCMP Commissioner shall establish the disciplinary measures (other than dismissal) that may be imposed by commanders and managers.²² In cases where dismissal may be the outcome, the manager or commander will be required to refer the case to a conduct board that may initiate a public hearing (new sections 41, 43 and 45.1 of the RCMPA). The

Board's decision may be appealed to the RCMP Commissioner (new section 45.11 of the RCMPA).

Another change introduced in the bill broadens the authority to initiate a hearing into an alleged contravention of the Code of Conduct, through the use of search warrants and production orders (clause 29 of the bill; new sections 40.2 and 40.3 of the RCMPA).

2.1.3 GRIEVANCES (CLAUSES 17 TO 25 OF THE BILL)

To make the grievance process more effective, clause 17 of the bill mandates the RCMP External Review Committee to establish and make public standards respecting the time limits within which it is to deal with grievances and appeal cases that are referred to it and specifying the circumstances under which those time limits will not apply or the circumstances under which they may be extended. Moreover, the Committee is required to submit to the Minister of Public Safety an annual report containing information respecting the Committee's performance in relation to these established standards (clause 19 of the bill).

2.2 CIVILIAN REVIEW AND COMPLAINTS COMMISSION FOR THE ROYAL CANADIAN MOUNTED POLICE (CLAUSE 35 OF THE BILL)

2.2.1 ESTABLISHMENT AND OBJECTIVES (PREAMBLE OF THE BILL AND NEW SECTIONS 45.29, 45.3, 45.45 AND 45.5 OF THE RCMPA)

The preamble of the bill states that the establishment of a new body for the civilian review of the RCMP is designed to ensure that the public will have confidence in the RCMP, to promote transparency and accountability of law enforcement and to enhance the accountability of the RCMP to provincial governments.

The bill replaces the existing CPC with a new commission enjoying broader powers: the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police (clause 2(3) of the bill). It establishes the Commission along similar lines to the CPC with amendments designed to ensure that the Commission is more effective than the CPC. At the present time, the CPC concerns itself with only one aspect of the activity of civilian review – complaints. The bill will give the Commission the power to conduct reviews on its own initiative of specified activities of the RCMP.

The bill does not implement the recommendation of the Brown task force to the effect that the new commission should include the CPC and the RCMP External Review Committee, which is responsible for reviewing grievances, disciplinary matters, demotions and dismissals of members of the RCMP.²³ Mr. Brown was of the view that a merger of these two organizations and creation of the new "Independent Commission for Complaints and Oversight of the RCMP" would enable this new commission to better target and deal with recurring problems as well as trends and shortcomings in the policies and procedures of the RCMP, since it would have an overall view of the complaints involving the RCMP, whether they were received from the public or from members of the RCMP.

In accordance with the recommendation of the Brown task force, the bill provides that the Commission shall consist of a maximum of five members – one of whom shall be the chair – appointed by the Governor in Council for a renewable term of not more than five years. The new members must be Canadian citizens or permanent residents and may not be members or have been members of the RCMP (new sections 45.29 and 45.3 of the RCMPA). The existing RCMPA does not expressly prohibit the appointment of a former member of the RCMP.²⁴

The members and staff of the Commission and persons acting on its behalf – for example, experts retained to assist it – will enjoy immunity from criminal, civil and administrative action (new section 45.5 of the RCMPA). They will also be required under the *Security of Information Act* to keep certain information confidential always (new section 45.45 of the RCMPA).

Before a member is appointed to the Commission, the Governor in Council must consider the need to ensure that all parts of the country are represented. In its existing structure, the CPC may consist of up to 29 members and must have one representative from each of the provinces to which the RCMP provides policing services (the “contracting provinces”).²⁵

Finally, the Brown task force had recommended that the Act creating the new commission provide for a review of the commission by a special independent committee created by the Minister five years after the Act is passed and every five years thereafter. This committee would have the task of determining whether the new commission was effective and making recommendations concerning the commission’s mandate, its membership and its operations with a view to increasing its effectiveness.²⁶ The bill does not provide for a periodic review of the Commission.

2.2.2 POWERS, DUTIES AND FUNCTIONS

2.2.2.1 REVIEW OF SPECIFIED ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE ON THE COMMISSION’S OWN INITIATIVE OR AT THE REQUEST OF THE FEDERAL OR A PROVINCIAL MINISTER (NEW SECTIONS 45.34, 45.35 AND 45.36 OF THE RCMPA)

The bill appears to move away from the wording of the recommendations in the Brown task force and the O’Connor commission of inquiry reports concerning the Commission’s mandate.

According to Justice O’Connor’s recommendation, the new commission – referred to in his report as the “Independent Complaints and National Security Review Agency for the RCMP” – should have the power to conduct on its own initiative or on the request of the Minister, systematic review of activities of the RCMP concerning national security, as well as deal with complaints from the public.²⁷

The Brown task force, for its part, recommended that the new commission should be given the power to consider any “incident or aspect of the activities of the RCMP.”²⁸

The bill gives the Commission the power to conduct, on its own initiative or on the request of the Minister, a review of “specified activities” of the RCMP. Whether the expression “specified activities of the Force” used in the bill and included in new section 45.34(1) of the RCMPA is as broad as Mr. Brown and Justice O’Connor recommended remains to be seen, since it is not defined in the bill. This lack of a definition could give rise to interpretations that limit the Commission’s powers. For example, the following questions might arise: could the Commission review information-sharing activities, the RCMP’s relations with other Canadian and foreign organizations, and the training of members of the RCMP, as Justice O’Connor suggested in his report?²⁹

By way of comparison, the wording of the *Canadian Security Intelligence Service Act* appears to give SIRC a broader mandate that allows for a more rigorous review of CSIS.³⁰ Under that Act, SIRC may examine the instructions given by the Minister to CSIS, as well as regulations and arrangements concluded by CSIS with other government bodies, it may collect and analyze statistics concerning the operational activities of CSIS, and it may investigate the public complaints it receives.

The new power given to the Commission will help to ensure that the RCMP carries out its activities in accordance with the RCMPA, the *Witness Protection Program Act*, the regulations made under these Acts, any ministerial direction given under these regulations, or the policies, procedures or guidelines governing the operation of the RCMP. This having been said, the bill does not implement three of the recommendations made by Justice O’Connor, namely that the new commission:

- be able to examine the compliance of the RCMP’s activities with “international obligations” and “the standards of propriety expected in Canadian society”;³¹ and
- have the power, on the request of the Governor in Council, to conduct reviews of activities relating to the national security of one or more federal departments, agencies, employees and contractors.³²
- review the national security activities of the Canada Border Services Agency.³³

Recognizing the increasingly frequent integration of investigations relating to national security, Justice O’Connor specifically recommended the establishment of “statutory gateways” between the new commission, SIRC and the Office of the Communications Security Establishment Commissioner (CSE). These statutory gateways would permit the “exchange of information, referral of investigations, conduct of joint investigations, and coordination and preparation of reports.”³⁴

Finally, we should note that the inclusion of reviews of national security issues would also have been ensured in the model proposed by Justice O’Connor by the creation of a coordinating committee for the integrated review of national security activities consisting of the chairs of the new commission and of SIRC, the CSE Commissioner and an independent person acting as the chair of the committee.

New subsection 45.34(2) of the RCMPA also lays down prerequisites for the exercise of the Commission’s review power that will limit the scope of the civilian review to which the RCMP might be subject.³⁵

- The Commission must have the necessary resources available to conduct a review of specified activities.
- The process of dealing with complaints must not be compromised by the review.
- A federal or provincial entity similar to the Commission may not have reviewed or investigated an issue similar to that which the Commission proposes to review. In other words, a review by another civilian review body will take precedence over that of the Commission. This situation could arise, for example, in the case of reviews of integrated activities involving members of the RCMP undertaken by a provincial body in a contracting province or by a federal agency.

Before commencing its review, the Commission must give notice to the Minister indicating that it is satisfied that these three requirements have been met and setting out the rationale for conducting the review (new subsection 45.34(3) of the RCMPA). Unlike former Bill C-38, Bill C-42 clearly gives the Commission the power to institute public hearings to conduct its review of specified activities of the RCMP (new section 45.36 of the RCMPA).

Following a review of specified activities of the RCMP, the Commission may submit to the Minister, the Commissioner of the RCMP and the minister responsible for policing in a contracting province a report that includes its conclusions and recommendations concerning the compliance with the law of the activities of the RCMP as well as the adequacy, appropriateness, sufficiency or clarity of the policies and procedures of the RCMP (new subsections 45.34(1), 45.34(4) and 45.34(5) of the RCMPA).

Finally, new section 45.35 of the RCMPA also permits the minister responsible for policing in a contracting province to request the Minister to ask the Commission to conduct a review of the activities of the RCMP in that province. The Commission will then provide the Minister and the provincial minister with a report containing its conclusions and recommendations concerning the same elements as the report provided for in new section 45.34 of the RCMPA.

2.2.2.2 RESEARCH, EDUCATION PROGRAMS AND RULES OF PROCEDURE (NEW SECTIONS 45.38 AND 45.49 OF THE RCMPA)

In accordance with the recommendations of the O'Connor commission of inquiry, the Commission may conduct research and put in place information and education programs for the public in order to make its role and its activities³⁶ known (new section 45.38 of the RCMPA). The Commission's rules of procedure will be published in the *Canada Gazette*, and interested parties may make representations concerning them (new section 45.49 of the RCMPA).

2.2.3 RIGHT OF ACCESS TO INFORMATION (NEW SECTION 45.39 AND FOLLOWING OF THE RCMPA)

2.2.3.1 INFORMATION CONSIDERED RELEVANT TO CIVILIAN REVIEW OF THE ROYAL CANADIAN MOUNTED POLICE

The O'Connor commission of inquiry noted that "[i]n general terms, the most serious inadequacy is that [the CPC] is not able to access all relevant information to carry out its mandate."³⁷ There are essentially two ways in which the CPC can access information:

- The CPC may hold a public hearing. It will then exercise the powers that the RCMPA confers on a commission of inquiry, such as the power to compel a person to testify under oath and to produce documents.³⁸ However, this procedure, which is only rarely employed, may be used only where the chair of the CPC considers that it is in the public interest to hold such a hearing.³⁹
- The CPC may access information if a complaint is made. The Commissioner of the RCMP then "furnishes" the Chair of the CPC with the RCMP's report on the results of its investigation and the action taken, as well as with "such other materials under the control of the Force as are relevant to the complaint."⁴⁰ As noted earlier, the lack of clarity in the RCMPA has given rise to disputes between the RCMP and the CPC on the subject of the necessary and relevant information that the RCMP must produce.

The bill states that the Commission "is entitled to have access to any information under the control, or in the possession, of the [RCMP] that the Commission considers is relevant to the exercise of its powers, or the performance of its duties and functions, under Parts VI and VII [of the RCMPA]" (new subsection 45.39(1) of the RCMPA). It accordingly offers clarification by providing, as recommended by Justice O'Connor,⁴¹ that the Commission, and not the RCMP, will determine what information is relevant.

2.2.3.2 LIMITS ON THE RIGHT OF ACCESS TO INFORMATION

Although the Commission's right of access to information is greater than that of the existing CPC, the bill sets out the kinds of information to which the Commission's access is either limited ("privileged information," new section 45.4 of the RCMPA) or prohibited (new section 45.42 of the RCMPA).

Consequently, the power of access to information set out in the bill is not as broad as was recommended by Justice O'Connor, who would have imposed only two exceptions on the right of access:

- confidences of the Queen's Privy Council for Canada (the sole restriction applying to SIRC);⁴² and
- solicitor-client privilege in legal opinions given to the RCMP, other institutions or other persons concerning their defence in legal proceedings or a review conducted by the new Commission.⁴³

Justice O'Connor was of the view that the new commission should not be refused access to any information on the grounds that it was secret or sensitive. He noted that "[f]ull access to all information has worked well in the cases of SIRCS and the CSE Commissioner."⁴⁴

2.2.3.3 PRIVILEGED INFORMATION (NEW SECTIONS 45.4 AND FOLLOWING OF THE RCMPA)

As part of its duties and functions, the Commission is entitled to have access to privileged information (new subsection 45.4(2) of the RCMPA).⁴⁵

New subsection 45.4(1) of the RCMPA defines "privileged information" as "information that is subject to any type of privilege that exists and may be claimed." The provision also contains a list of some of the information that may be considered privileged:

- information subject to the privilege that exists between legal counsel and their client or that is subject to informer privilege;
- information that reveals the identity or the location of a protectee under the federal witness protection program;
- information that compromises the integrity of the program established under the federal witness protection program (e.g., certain information about the methods used in the program and information about the identity or role of a person who provides protection);
- "special operational information" within the meaning of the *Security of Information Act* (e.g., plans of military operations or information concerning a secret investigation being conducted by the federal government);
- "special operational information" concerning or received from any police force or Interpol; and
- medical information about a member or an employee of the RCMP.

Nevertheless, in the event that the Commissioner of the RCMP refuses to give the Commission access to this information, the bill includes a conciliation mechanism (new section 45.41 of the RCMPA). At the request of the Commission, the Minister will appoint a former judge of the superior court of a province or of the Federal Court or an individual who is a member of a category of individuals prescribed by regulation.⁴⁶ After reviewing the information in question and taking certain criteria into account,⁴⁷ the conciliator will provide his or her observations regarding the privileged nature of the information and the relevance and necessity of the information to the matter before the Commission.

After these observations are received, the Chair of the Commission and the Commissioner of the RCMP must review their respective decisions to request access to or to refuse to disclose the information. If no agreement can be concluded at this point concerning access to the information, the parties may then apply for judicial review, but this may be done only after the former judge or other individual has made his or her observations.

Under the bill, when the Commission is allowed to access privileged information as part of any of its duties or functions (e.g. to review a complaint), it may not use the information for any other purpose (new section 45.43 of the RCMPA). Also, it may not disclose this information to anyone other than certain persons listed in new subsection 45.47(2) of the RCMPA, such as the Minister or the Attorney General, if the information is required for criminal proceedings.⁴⁸ Any breach of this obligation will constitute an offence punishable by imprisonment for a term of not more than five years (new paragraph 50.3(a) of the RCMPA). The head of a federal government institution will also be required, under the *Access to Information Act*, to refuse to disclose documents containing privileged information (clause 44 of the bill).

When the Commission prepares a document or a report for distribution, it must first consult and obtain the approval of the Commissioner of the RCMP in order to ensure that the document does not contain privileged information (new subsection 45.44(2) of the RCMPA). Any breach of this obligation will constitute an offence punishable by a maximum fine of \$5,000 or imprisonment for not more than six months, or both (new section 50.2 of the RCMPA). Finally, the members and staff of the Commission must have appropriate security clearance from the federal government (new section 45.45 of the RCMPA).

2.2.3.4 INFORMATION TO WHICH THE COMMISSION DOES NOT HAVE ACCESS (NEW SECTION 45.42 OF THE RCMPA)

New section 45.42 of the RCMPA lists six types of information to which the Commission may not have access at any time. They are:

- information relating to a request made by a member or employee of the RCMP for legal assistance or indemnification from the federal government;
- confidential communications between a member of the RCMP and another member representing or assisting the member of the RCMP in relation to a grievance or to proceedings under the RCMPA concerning, among other things, the review of a disciplinary action;⁴⁹
- information that is protected by the privilege that exists between legal counsel and a member or employee of the RCMP;
- information that is protected by the privilege that exists between legal counsel and their client and that relates to the provision of advice to the RCMP on its dealings with the Commission;
- any report prepared for the Commissioner of the RCMP concerning any meeting held between the RCMP and the Commission containing analysis and advice relating to the meeting; and
- confidences of the Queen's Privy Council for Canada.⁵⁰

2.2.4 ANNUAL AND SPECIAL REPORTS (NEW SECTIONS 45.51 AND 45.52 OF THE RCMPA)

Like the Chair of the existing CPC, the Chair of the Commission must submit an annual report to the Minister on the activities of the Commission, including his or her

recommendations. Furthermore, the bill provides that the Commission must submit an annual report to each minister responsible for policing in a contracting province. This report must indicate the number and subject of all complaints arising in the province, how the complaints were disposed of and any trends that emerge (new subsection 45.52(2) of the RCMPA).

The bill also provides that the Commission may, on its own initiative or at the request of the federal Minister, submit a special report on any subject relating to the Minister's powers, duties and functions (new section 45.51 of the RCMPA). It should be noted that, as for SIRC, only annual reports will be tabled by the Minister in Parliament.

2.3 INVESTIGATIONS, REVIEWS AND HEARINGS CONCERNING COMPLAINTS (CLAUSE 35 OF THE BILL)

It was the view of the O'Connor commission of inquiry that the existing process for dealing with complaints against the RCMP provides "a sound and flexible framework for the investigation and resolution of complaints."⁵¹ The commission of inquiry accordingly recommended that the existing system be kept, albeit with improvements.⁵² The provisions of the bill are also designed to serve this purpose, since the bill retains the existing structure of the complaint resolution process. It will therefore still be the RCMP that initially investigates the complaint, subject to the power of the Commission to do so itself, if it considers this necessary or in the public interest.

2.3.1 THE MAKING, WITHDRAWAL AND INFORMAL RESOLUTION OF COMPLAINTS FROM THE PUBLIC (NEW SECTIONS 45.53 TO 45.56 OF THE RCMPA)

New subsection 45.53(1) of the RCMPA permits "any individual" – which thus includes any member or employee of the RCMP – to make a complaint concerning the conduct of a member of the RCMP or other person appointed or employed under the RCMPA in the performance of any duty or function. As the Brown task force recommended,⁵³ an individual may make a complaint concerning former members of the RCMP who have retired, resigned or joined another police force, if they were members of the RCMP "at the time that the conduct is alleged to have occurred." Moreover, the bill, like the existing process, permits the Chair of the Commission to file a complaint.⁵⁴

At the present time, the Commissioner of the RCMP has the right to refuse to deal with a complaint, particularly where it could be more appropriately dealt with in accordance with another procedure or where the complaint is trivial, frivolous or vexatious or made in bad faith.⁵⁵ New subsection 45.53(2) of the RCMPA gives the Commission similar power.⁵⁶ Furthermore, the Commission – just like the Commissioner of the RCMP – may refuse to deal with a complaint if the complainant is not an individual at whom the conduct of the member of the RCMP was directed, is not the guardian for or any other person authorized to act for the person at whom the conduct was directed, did not see or hear the conduct or its effects because he or she was not present when the conduct or its effects were experienced, has not been given written permission from the individual at whom the conduct was directed or has not suffered damage or inconvenience as a result of the conduct. Existing subsection

45.35(1) of the RCMPA permits any member of the public to make a complaint “whether or not [he or she] is affected by the subject-matter of the complaint.”

Lastly, unlike former Bill C-38, Bill C-42 clearly states that the Commission and Commissioner of the RCMP shall refuse to investigate a complaint concerning the conduct of a member that is a contravention of the RCMP Code of Conduct. Thus, the Code of Conduct process takes precedence over the civilian review of complaints.⁵⁷

The bill imposes certain time limits on the complaint investigation process. Thus, the complaint must be made in the year after the conduct is alleged to have occurred or within any longer period if the Commission considers that there are good reasons for the delay and it is not contrary to the public interest (new subsections 45.53(5) and 45.53(6) of the RCMPA). As at present, complaints may be filed with the Commission, the RCMP or the organization responsible for reviewing police forces in the province where the complaint originates. However, unlike the situation that currently exists, where only the Commissioner of the RCMP must, under the RCMPA, be informed of all complaints,⁵⁸ the bill provides that the three bodies mentioned above will be informed of complaints received, regardless of which body actually receives them (new subsections 45.53(8) and 45.53(10) of the RCMPA). As is the case with the process for dealing with grievances, Bill C-42 requires the Commission to establish and make public the service standards respecting the time limits within which it is to deal with complaints (new sections 45.37 and 45.53 of the RCMPA).

The complainant may at any time withdraw his or her complaint by sending a written notice to the Commission (new section 45.55 of the RCMPA). The Commission must then inform the Commissioner of the RCMP and the body responsible for receiving complaints from the public in the province in which the conduct is alleged to have occurred. Even where a complaint is withdrawn, it may still be reviewed or be the subject of an investigation or hearing by the RCMP or the Commission.

As in the existing system, the Commissioner of the RCMP must, with the consent of the complainant and the member of the RCMP or any other person in question, attempt to reach an informal resolution of the complaint (new section 45.56 of the RCMPA).⁵⁹ Statements made as part of such a resolution are inadmissible in court proceedings, except in the case of proceedings for perjury, contradictory evidence or false or misleading statements. The Commission must be informed of the informal resolution, which must be recorded in writing. Moreover, the Governor in Council may make regulations designating certain categories of complaints that may not be the subject of informal resolutions.

The O'Connor commission of inquiry recommended that the informal resolution process be retained but also that it be possible to postpone the process or not use it if the circumstances surrounding an investigation relating to national security justified this.⁶⁰ Since the complainants in cases involving national security often do not have all the required information concerning the conduct of the police services when they file their complaint, Justice O'Connor suggested that the use of this alternative method be delayed until the investigation into the police action had been conducted.

The complainants would then have all the information they require before the resolution was concluded.

2.3.1.1 REPRESENTATIONS OF COMPLAINANTS (NEW SECTIONS 45.57 AND 45.58 OF THE RCMPA)

In cases where it is not possible to conclude an informal resolution, the complainant (or guardian, other person authorized to act for the individual at whom the conduct was directed or a person who has that individual's consent) may make representations about the consequences suffered as a result of the conduct of the member or employee of the RCMP. The representations may be used in the application of disciplinary measures. The RCMP must keep the person who made the representations informed of the progress and findings of the investigation. This person will be informed of the decision and any disciplinary action to be taken against the member of the RCMP (new section 45.172 of the RCMPA).

2.3.2 INVESTIGATION OF COMPLAINTS BY THE ROYAL CANADIAN MOUNTED POLICE (NEW SECTIONS 45.6 TO 45.64 OF THE RCMPA)

New section 45.6 of the RCMPA provides that the RCMP shall generally investigate any complaint. However, an investigation or hearing by the Commission will take precedence over the investigation by the RCMP. Indeed, if the Commission decides to investigate or to institute a hearing into the complaint, the RCMP may not conduct an investigation into the complaint.

As at present, the Commissioner of the RCMP must, if he or she is of the opinion that such a measure will not harm any other investigation, keep the complainant and the person whose conduct is the subject-matter of the complaint informed of the status of the investigation (new section 45.63 of the RCMPA).

Following the investigation, the Commissioner must provide the complainant, the Commission and the person whose conduct is the subject-matter of the complaint with a report containing a summary of the complaint, the findings of the investigation and the action that has been or will be taken with respect to the resolution of the complaint (new section 45.64 of the RCMPA).

2.3.3 REFERRAL OF COMPLAINTS FROM THE PUBLIC TO THE COMMISSION (NEW SECTIONS 45.7 TO 45.72 OF THE RCMPA)

A complainant who is not satisfied with the decision of the Commissioner of the RCMP to refuse to deal with his or her complaint or with the Commissioner's investigation report may refer his or her complaint to the Commission for review. The bill states that the complainant will have 60 days to submit, in writing, his or her application for review (new subsection 45.7(1) of the RCMPA).

As at present, the Commission may, after reviewing the complaint, ask the RCMP to further investigate, conduct the investigation itself or institute a hearing or provide the Minister and the Commissioner of the RCMP with a written report setting out its findings and recommendations (new subsection 45.71(3) of the RCMPA). The bill

provides, as does the existing section 45.46 of the RCMPA, that once the Commissioner of the RCMP has received this report, he or she will be required to provide a written response to the Minister and the Chair of the Commission. This response must mention any further action that has been or will be taken with respect to the complaint. If the Commissioner decides not to accept the conclusions and recommendations set out in the report, he or she must give reasons for this decision (new section 45.72 of the RCMPA).

After reviewing the Commissioner's response, the Commission must prepare a final report on its conclusions and recommendations and send it to the Minister, the Commissioner, the complainant, the person whose conduct is the subject-matter of the complaint and the minister responsible for police forces in the contracting province in which the conduct is alleged to have occurred, as the case may be. With the exception of the stipulation "as soon as feasible," the bill does not provide any time limit for the sending of the response by the Commissioner of the RCMP to the Minister and the Chair of the Commission, which could cause substantial delays in the processing of complaints from the public.

The provisions of the bill correspond with the recommendation of the O'Connor commission of inquiry, as do, in fact, the existing provisions, that the reports of the new commission should not be binding but that the Commissioner of the RCMP should always be required to respond to them.⁶¹ However, Justice O'Connor felt that, in the interests of transparency, reports on complaints should be made public after deletion of personal information and confidential information relating to national security.

We should note, finally, that the Brown task force recommended that the conclusions of the new commission concerning grievances and disciplinary measures should be binding on the Commissioner of the RCMP.

2.3.4 INVESTIGATION AND PUBLIC HEARING BY THE COMMISSION (NEW SECTIONS 45.66 TO 45.78 OF THE RCMPA)

The bill, like the existing RCMPA, permits the Commission to open its own investigation or to institute a hearing into a complaint, either when a complaint is reviewed (new paragraph 45.71(3)(c) of the RCMPA), or when the Chair of the Commission feels that such action would be in the public interest (new section 45.66 of the RCMPA). The bill states that the Commission may merge several complaints for its investigation or the hearing (new section 45.68 of the RCMPA).

Hearings will, as a rule, be public (new subsection 45.73(6) of the RCMPA). At present, however, the CPC may order that all or part of the hearing take place *in camera* if it feels that certain sensitive information will probably be disclosed. This includes:

- information the disclosure of which could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or to the detection, prevention or suppression of subversive or hostile activities;
- information that could be injurious to enforcement a police investigation; and

- information respecting a person's financial or personal affairs.⁶²

The bill essentially retains these three existing reasons for ordering that a hearing be held *in camera* and adds two other reasons that give the Commission a broad discretionary power:

- “privileged information” will probably be revealed during the hearing; or
- “it is otherwise required by the circumstances of the case” (new paragraphs 45.73(6)(d) and 45.73(6)(e) of the RCMPA).

Furthermore, the bill permits the Commission to order that all or part of a hearing take place in the absence of one of the parties. An *in camera* or *ex parte* hearing may be ordered on the initiative of the Commission or on the request of any party or any witness.

The bill accordingly increases the number of circumstances in which hearings may take place in private. It could be said that the question arises as to whether the balance between the principles of confidentiality and transparency in judicial proceedings that is sought in the bill is appropriate.⁶³ Although Justice O'Connor recommended that the new commission be able to order *in camera* hearings in an effort to protect the confidentiality of matters connected with national security, ongoing police investigations and the identity of police sources,⁶⁴ he also recommended that the new commission have the power to appoint independent counsel to determine the need to maintain the confidentiality of certain information.⁶⁵ This counsel would have been able to check the information that could not be disclosed to the complainant or the public and have made representations on behalf of the excluded parties. This recommendation was not addressed in the bill.

2.3.4.1 REPORTS FOLLOWING INVESTIGATION OR HEARING (NEW SECTIONS 45.76 TO 45.78 OF THE RCMPA)

On the conclusion of the investigation or hearing, the Commission must provide the Minister and the Commissioner of the RCMP with a written report setting out its findings and recommendations. As in the case of a complaint referred to the Commission, the Commissioner must then give a written response to the Minister and to the Chair of the Commission, and the Chair of the Commission will subsequently prepare a final report (new section 45.76 of the RCMPA). The conclusions and recommendations set out in this final report and in the final report of the Commission on conclusion of its review of a complaint are not subject to appeal or review by any court (new section 45.77 of the RCMPA). Unlike former Bill C-38, Bill C-42 does not specifically mention the right to seek judicial review under the *Federal Courts Act*.

2.3.5 POWERS OF THE COMMISSION IN RELATION TO COMPLAINTS (NEW SECTION 45.65 OF THE RCMPA)

At present, only the powers of the CPC in relation to the handling of complaints that are the subject of a public hearing are set out in the RCMPA. In such cases, existing

section 45.45(4) of the RCMPA provides that the CPC may, for example, summon witnesses and order that documents be produced.

Bill C-42 clarifies the Commission's powers regarding all its functions relating to complaints – that is, reviewing a complaint, opening its own investigation or instituting a public hearing (new subsection 45.65(1) of the RCMPA).⁶⁶ In dealing with complaints, the Commission may administer oaths, summon witnesses and compel the production of documents in the same way as a superior court of record,⁶⁷ as well as receive evidence, whether or not it would be admissible in a court of law. Mr. Brown and Justice O'Connor noted in their separate reports that the powers to compel organizations or individuals to produce documents and to testify were important in any civilian review of law enforcement activities.

According to the bill, a person may not refuse to answer a question asked by the Commission or to produce a document or thing on the grounds that it might be incriminating to do so. However, as in the process of informal resolutions of complaints, the answers and things produced will be inadmissible in the courts, except in the case of prosecutions for perjury, contradictory evidence or false or misleading statements (new subsections 45.65(2) and 45.65(3) of the RCMPA).

Failure to appear in order to testify or to produce the documents requested by the Commission constitutes an offence punishable by a maximum fine of \$5,000 or a maximum term of imprisonment of six months, or both (new section 50 of the RCMPA). A person who utters threats, obstructs another person who is carrying out a power, duty or function, makes any false or misleading statement or destroys or falsifies a document will be liable to a maximum term of imprisonment of five years (new section 50.1 of the RCMPA). We should note that the bill increases the maximum penalties currently provided for some of these offences.⁶⁸

2.3.6 SUSPENSION AND JOINT PROCEEDINGS (NEW SECTIONS 45.74 AND 45.75 OF THE RCMPA)

In order to respect the principle of the independence of the police and that of not unduly disturbing or influencing ongoing investigations and criminal prosecutions, the O'Connor commission of inquiry recommended that the new commission should have the power to stay its activities if there was a risk of interfering with these investigations or prosecutions.⁶⁹ The bill implements this recommendation by providing that the Commission must, on its own initiative or on the request of the Commissioner of the RCMP, suspend a review, investigation or hearing concerning a complaint if its members believe that its continuation would compromise or seriously hinder an ongoing criminal investigation or proceeding (new section 45.74 of the RCMPA). The bill also gives this power to the Commission in the case of ongoing civil or administrative proceedings.

Furthermore, as was recommended by the Brown task force,⁷⁰ the bill permits the Commission to conduct a review, investigation or hearing jointly with another similar civilian review body – for example a provincial body that oversees policing – if the complaint relates both to the conduct of a member of the RCMP (or of any other person appointed or employed under the RCMPA) and to that of an officer

responsible for reviewing law enforcement by any other public entity in Canada or abroad (new subsection 45.75 of the RCMPA).

This provision may prove useful, because the RCMP participates in many integrated operations with other police forces. However, it does not appear to apply to the civilian review of integrated operations involving the RCMP and organizations responsible for national security that have, rather than a mandate to enforce the law, a mandate to collate and analyze security information (e.g., CSIS).

The O'Connor commission of inquiry had recommended instead that the new commission have "authority to conduct joint reviews or investigations with SIRC and the CSE Commissioner [responsible for civilian review of CSIS and the CSE respectively] into integrated national security operations involving the RCMP."⁷¹ To ensure that there is rigorous civilian review of activities integrated with national security, Justice O'Connor recommended that the new commission also be responsible for reviewing the activities of the Canada Border Services Agency – a federal agency that is not currently subject to any permanent civilian review mechanism.⁷²

2.4 CREATION OF A MECHANISM TO INVESTIGATE SERIOUS INCIDENTS INVOLVING THE ROYAL CANADIAN MOUNTED POLICE (CLAUSE 35 OF THE BILL)

Under the existing RCMPA, the RCMP may itself conduct investigations of its members who are involved in serious incidents, and it also has a discretionary power to entrust such investigations to other police forces. In February 2010, however, the RCMP adopted a provisional policy applying to such cases: the External Investigation or Review Policy. The bill gives this policy the force of law.

In its report dated August 2009, the CPC recommended that the RCMPA be amended to permit the new commission to "refer the investigation to a police force other than the RCMP or to another criminal investigative body in Canada."⁷³ The Brown task force had also recommended that the new commission be given this power.⁷⁴ The bill provides that this power to refer an investigation to an independent body should instead be exercised by a "designated authority" of the government of the province where the "serious incident" is alleged to have occurred (new section 45.81 of the RCMPA).

New subsection 45.79(1) of the RCMPA provides a definition of "serious incident." It is an incident in which the actions of a member of the RCMP, any other person appointed or employed under the RCMPA or any person assisting the RCMP in carrying out its power, duties and functions under the RCMPA:

- may have resulted in "serious injury" (according to the bill, "a prescribed [by the Governor in Council] physical or psychological injury") or the death of a person; or
- may have constituted an offence under federal or provincial law that the Minister, the Commissioner of the RCMP or the provincial minister who has primary responsibility for policing in the province in which the incident is alleged to have

occurred decides would be in the public interest to be investigated by an investigative body or by a police force other than the RCMP.

The bill states that where the actions of a member of the RCMP lead to the death of a person or to “serious injury,” a body other than the RCMP must investigate. A fuller understanding of the impact of this provision will be had once the Governor in Council assigns a definition of “serious injury” in the regulations. In addition, the fact that “serious injury” has not been defined more precisely in the bill could cause delays in the application of the new provision. For all other “serious incidents” (i.e., other than those resulting in death and those falling within the future definition of “serious injury”), the Minister, the Commissioner of the RCMP or the provincial minister will determine, in the public interest, whether a body other than the RCMP must investigate.

2.4.1 REFERRAL TO AN INVESTIGATIVE BODY OR POLICE FORCE OR INVESTIGATION BY THE ROYAL CANADIAN MOUNTED POLICE (NEW SECTIONS 45.81 AND 45.82 OF THE RCMPA)

Where a serious incident involves a member of the RCMP (or any other person assisting the RCMP or any other person appointed or employed under the RCMPA), the designated authority may appoint an independent provincial investigative body. Alberta and Ontario have established independent bodies with responsibility for investigating serious incidents involving police officers.⁷⁵ If there is no investigative body in the province where the serious incident is alleged to have occurred, the designated authority may appoint another police force to investigate. The RCMP must then refer the investigation as soon as feasible to the investigative body or the other police force, as the case may be (new section 45.81 of the RCMPA).

If for any reason the designated authority does not appoint an investigative body or police force, the RCMP must ask any other provincial investigative body or police force to investigate the serious incident. However, it is not always possible for such a body to investigate because of its workload or a lack of resources. Thus, if the investigative body or police force refuses to investigate and the RCMP feels that there is no other investigative body or police force that can do so, the RCMP itself must investigate. In that case, the RCMP must notify the Commission of its intention to investigate and must provide to the Commission a report outlining all the reasonable efforts it has made to find an investigative body or other police force (new section 45.82 of the RCMPA).

2.4.2 APPOINTMENT OF AN OBSERVER (NEW SECTIONS 45.83 TO 45.87 OF THE RCMPA)

In March 2007, the CPC put a pilot project in place in which members of its staff were assigned to observe and assess the impartiality of investigations into serious incidents conducted by the British Columbia Division of the RCMP. In September 2008, the CPC and the RCMP made this program official. The bill provides for the possibility of appointing such observers.

Indeed, the designated authority or the Commission may appoint an observer if the investigation of a serious incident is conducted by the RCMP itself or by another police force (new section 45.83 of the RCMPA). The bill does not indicate who may be appointed as an observer or set out the criteria the observer must take into account in assessing the impartiality of an investigation.⁷⁶ However, the Governor in Council may make regulations setting out the criteria for the appointment of observers, the scope of the observer's role and the reporting obligations of observers (new section 45.87 of the RCMPA). Moreover, an observer will not have a right of access to "privileged information" (new section 45.86 of the RCMPA).

The observer must report on the impartiality of the investigation and send the report to the Chair of the Commission, the Commissioner of the RCMP and the chief of the other police force that conducted the investigation, as the case may be (new section 45.85 of the RCMPA). If the report raises concerns as to the impartiality of the investigation, the Commissioner or the chief of police, as the case may be, must provide – within a time to be determined by regulation – the Chair of the Commission with a written response containing a statement of the measures that have been or will be taken by the RCMP or other police force to allay these concerns.

If the Chair of the Commission is not satisfied with these measures, he or she must report on the matter to the Minister, the provincial minister responsible for policing and the attorney general of the province where the serious incident is alleged to have occurred. Note that the observer may be compelled to testify in any criminal, civil or administrative action or proceeding, or inquiry (new subsection 45.83(6) of the RCMPA). Finally, if the investigation is carried out by the RCMP and no observer has been appointed, the Commissioner of the RCMP must provide the Chair of the Commission with a report on the measures taken to ensure that the investigation is conducted impartially (new subsection 45.83(4) of the RCMPA).

NOTES

1. [Bill C-38: Act to amend the Royal Canadian Mounted Police Act and to make consequential amendments to other Acts](#), 3rd Session, 40th Parliament (died on the *Order Paper* on 26 March 2011).
2. [Royal Canadian Mounted Police Act](#), R.S. 1985, c. R-10 [RCMPA].
3. Robert Dziekanski died on 14 October 2007 at Vancouver International Airport after RCMP officers shot him with a stun gun. A number of public inquiries were launched following the broadcast of an amateur video of the incident, which received widespread coverage in Canadian and international media. These inquiries include those conducted by Commissioner Thomas R. Braidwood and by Coroner Owen Court, both of British Columbia and by the Commission for Public Complaints Against the RCMP (CPC). The House of Commons Standing Committee on Public Safety and National Security also examined the incident and reported to the House of Commons in June 2008.

4. The government established the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar in February 2004. This commission of inquiry, chaired by Justice Dennis O'Connor, had two major objectives: (1) to investigate and report on the actions of Canadian officials in relation to Maher Arar (the factual inquiry) and (2) to make recommendations concerning the creation of an independent review mechanism of the activities of the RCMP relating to national security (the policy review).

The three-volume report resulting from the factual inquiry was published in September 2006, and the report resulting from the policy review, entitled [*A New Review Mechanism for the RCMP's National Security Activities*](#), in December 2006.
5. The internal inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, chaired by Justice Frank Iacobucci, was launched in December 2006. This inquiry, established by the government in response to a recommendation made by Justice O'Connor following the report of the [*Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*](#) in 2006, was designed to determine (1) whether the incarceration of the parties in question in Syria and Egypt was the result, directly or indirectly, of the actions of Canadian officials, (2) whether there had been shortcomings in the provision of the consular services by Canadian officials to the parties in question during their incarceration, and (3) whether any of the torture administered to them was the result of the actions of Canadian officials. Justice Iacobucci's report was submitted in October 2008. It did not include any recommendations.
6. In 2006, the government asked Justice John C. Major to chair the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. The Commission's report, [*Air India Flight 182: A Canadian Tragedy*](#), was published in June 2010. In the report, consisting of 3,000 pages in five volumes, the Commissioner concluded that the government of Canada and its agencies, including the RCMP, were ill equipped to deal with such a terrorist act. He concluded, among other things, that the communication between the agencies was flawed and that their differing perception of the risk was a major obstacle to an assessment of the terrorist threat.
7. Royal Canadian Mounted Police, [*Statement from Commissioner-designate Bob Paulson following appointment \(Nov. 16, 2011\)*](#).
8. See, among other things, Commissioner Paulson's testimony before the House of Commons Standing Committee on Public Safety and National Security (31 May 2012) and the House of Commons Standing Committee on the Status of Women ([*Evidence*](#), 23 April 2012).
9. The Chair of the CPC from 1997 to 2005, Shirley Heafey, and the Chair from 2005 to 2009, Paul Kennedy, both claimed that the government should give the CPC increased powers to enable it to monitor the activities of the RCMP effectively. In its performance report for 2006–2007, the CPC also announced that it had drafted standard legislation to strengthen civilian review of RCMP activities. See Commission for Public Complaints Against the RCMP, *Draft Legislation Model*, "[*An Act to create the Federal Law Enforcement Review Board and to amend other Acts in consequence*](#)."

10. In April 2007, the government appointed David Brown to conduct an independent inquiry and examine and report on allegations of irregularities in RCMP pension and insurance plans. This inquiry discovered major problems of governance and culture within the RCMP.

In his report, submitted to the Minister of Public Safety in June 2007 ([*A Matter of Trust – Report of the Independent Investigator into Matters Relating to RCMP Pension and Insurance Plans*](#)), Mr. Brown confirmed, among other things, that the power of the Commissioner of the RCMP to direct the policing function is subject to little or no supervision, contrary to modern governance practices, which are based on the principles of oversight and oversight that is independent from management. Feeling that there was insufficient information and time to propose a new governance structure appropriate to the RCMP, he recommended the creation of a task force to find solutions to the problems that the inquiry had highlighted.

Some 30 days after examining the report, the Minister of Public Safety announced the establishment of the Task Force on Governance and Cultural Change in the RCMP. Chaired by Mr. Brown, the task force submitted its report, entitled [*Rebuilding the Trust*](#), in December 2007.
11. The Privacy Commissioner expressed her position in a brief entitled [*Rights and reality: enhancing oversight for national security programs in Canada*](#) submitted to the House of Commons Standing Committee on Public Safety and National Security in May 2009.
12. These committees include the Special Senate Committee on the Anti-terrorism Act and the House of Commons Standing Committee on Public Safety and National Security.
13. [*Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*](#) (2006), recommendations 3(c) and 11, pp. 603–606.
14. [*Canadian Security Intelligence Service Act*](#), R.S. 1985, c. C-23.
15. [*An Act to implement certain provisions of the Budget tabled in Parliament of March 29, 2012 and other measures*](#) (short title: *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19.
16. SIRC also had access to all information held by the Inspector General before the position was abolished in June 2012.
17. A [*Public Safety Canada news release*](#) (“Improving Accountability in Human Resources,” 20 June 2012) mentions performance and absenteeism from the workplace as examples.
18. RCMPA, ss. 45.12 and 45.23.
19. Here is what Public Safety Canada said in this regard: “Currently, RCMP managers faced with harassment issues have two different processes they must follow: one under Treasury Board policy and one under the *RCMP Act*. These processes do not always align, which can lead to confusion. ...” (Public Safety Canada, [*“Improving Accountability in Human Resources,”*](#) News release, 20 June 2012.)
20. [*Royal Canadian Mounted Police Regulations*](#), 1988 (SOR/88-361).
21. Public Safety Canada (20 June 2012).
22. At present, the measures that can be imposed by a commander or officer are set out in section 41 of the RCMPA. According to Public Safety Canada (20 June 2012), under Bill C-42, “managers will also have more options for response, for example through access to a broader range of sanctions, ranging from educational or training-based approaches, to corrective (e.g., suspension of pay, deferral of promotion opportunities for a specific period of time).”
23. Task Force on Governance and Cultural Change in the RCMP, [*Rebuilding the Trust*](#), December 2007, p. 14.

24. RCMPA, subsection 45.29(6).
25. RCMPA, subsections 45.29(1) and 45.29(7). Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, [*A New Review Mechanism for the RCMP's National Security Activities*](#), December 2006, p. 552. Under agreements, the RCMP provides policing services in all the provinces (except for Quebec and Ontario) and all the territories.
26. Task Force on Governance and Cultural Change in the RCMP (2007), p. 18.
27. [*Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*](#) (2006), recommendations 3(a) and 3(d), pp. 516 and 529.
28. Task Force on Governance and Cultural Change in the RCMP (2007), p. 14.
29. See, in this regard, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, (2006), pp. 520–523.
30. *Canadian Security Intelligence Service Act*, s. 38.
31. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), recommendation 3(a), p. 516.
32. *Ibid.*, recommendations 3(e) and 3(f), p. 530.
33. *Ibid.*, recommendation 10, p. 573.
34. *Ibid.*, p. 21.
35. These requirements do not apply to reviews conducted at the Minister's request.
36. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), recommendations 4(c) and 4(d), pp. 541–542.
37. *Ibid.*, p. 532.
38. RCMPA, subsection 45.45(4).
39. RCMPA, subsection 45.43(1).
40. RCMPA, para. 45.41(2)(b).
41. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), recommendation 4(a), p. 535.
42. *Ibid.*, pp. 536–538. See also *Canadian Security Intelligence Service Act*, s. 39.
43. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), pp. 538–539.
44. *Ibid.*, p. 534.
45. The Chair of the Commission and the Commissioner of the RCMP may conclude a memorandum of understanding, and the Governor in Council may make regulations respecting the exercise of the right of access and the protection of this information (new subsections 45.4(5) and 45.4(6) of the RCMPA).
46. These regulations will be made when the bill becomes law.
47. The criteria are set out in new subsection 45.41(6) of the RCMPA.
48. However, the Commission may only under certain conditions disclose to another person or entity information (other than privileged information) designated by the Commissioner of the RCMP and the disclosure of which gives rise to a risk of serious harm to a person (new section 45.46 of the RCMPA).
49. RCMPA, s. 47.1.

50. Section 39 of the [Canada Evidence Act](#) (R.S. 1985, c. C-5) defines the kinds of documents that may be subject to the privilege of confidences of the Queen's Privy Council for Canada. In [Babcock v. Canada \(Attorney General\)](#), [2002] 3 S.C.R. 3, par. 18, the Supreme Court of Canada explained the reasons why this information is protected: "Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: ... If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect."
51. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), p. 544.
52. Ibid., recommendations 5(a) and 5(b), p. 543–545.
53. Task Force on Governance and Cultural Change in the RCMP (2007), p. 15.
54. See section 45.37 of the RCMPA and new section 45.59 of the RCMPA.
55. RCMPA, subsection 45.36(5). The Commissioner may also refuse a complaint if, in his or her judgment, "it is not necessary or reasonably practicable to commence or continue an investigation of the complaint." A similar reason for refusing is retained in the bill (new paragraph 45.61(1)(b) of the RCMPA).
56. The right to refuse a complaint that is trivial, frivolous, vexatious or made in bad faith provided in new paragraph 45.53(2)(b) of the RCMPA is a response to the recommendation of the O'Connor commission of inquiry (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [2006], p. 544).
57. New subsections 45.53(2), 45.61 and 45.67(2) of the RCMPA. See also new section 45.171.
58. RCMPA, subsection 45.35(3). See also Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), note 41, p. 249.
59. This option is also available to the Commission (new subsection 45.56(5) of the RCMPA).
60. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), recommendation 5(d), p. 546.
61. Ibid., recommendation 7, p. 558.
62. RCMPA, subsection 45.45(11).
63. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), p. 552.
64. Ibid., recommendation 5(g), p. 552.
65. Ibid., recommendation 5(h), p. 553.
66. These powers also apply to reviews undertaken by the Commission on its own initiative (new section 45.36 of the RCMPA).
67. Justice O'Connor recommended that the new commission be given investigative powers similar to those exercised under the [Inquiries Act](#) (R.S. 1985, c. I-11), section 5 of which provides that "[t]he commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases." The bill accordingly appears to implement this aspect of recommendation 4(a) of the O'Connor commission of inquiry (see Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [2006], p. 531).
68. Compare new section 50 of the RCMPA with section 51 of the current RCMPA.

69. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), recommendation 4(b), p. 543.
70. Task Force on Governance and Cultural Change in the RCMP (2007), p. 17. However, the Task Force had also recommended that the new commission could establish an advisory body of experts and other stakeholders.
71. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), recommendation 3(c), p. 527.
72. Some aspects of the operations of the Canada Border Services Agency may be reviewed by the Auditor General of Canada, the Privacy Commissioner, the Information Commissioner and the courts.
73. Commission for Public Complaints Against the RCMP, [*Police Investigating Police – Final Public Report*](#), 11 August 2009, p. 97.
74. Task Force on Governance and Cultural Change in the RCMP (2007), p. 16.
75. See section 46.1 of the Alberta *Police Act* and section 113 of the Ontario *Police Services Act*. The Province of Quebec recently tabled a bill to create an independent body responsible for the monitoring of investigations ([Bill n° 46: An Act respecting independent police investigations](#), 2nd Session, 39th Parliament, December 2011).
76. See the Commission for Public Complaints Against the RCMP, *Independent Observer Program*, “[Monitor the Impartiality](#),” for the four criteria to be used by the independent observer in assessing the impartiality of an RCMP investigation: line management, appropriate level of response, timeliness of the response and the conduct of the members of the RCMP investigative team.