

## Notes for an Address\*

Bob RAE\*\*

The Security Intelligence Review Committee (SIRC)'s establishment flowed from the conclusions of the McDonald Report, namely that questions of political intelligence and issues of terrorism were more appropriately assessed by an agency that had much broader sets of skills, views, judgments and balances than that of a police force. That view led to the creation of the Canadian Security Intelligence Service (CSIS) and to the establishment of SIRC which was a review agency whose responsibilities are really quite unique. The agency is small in terms of its size. It consists of usually five members of the committee who are all appointed as privy councillors, and a small professional staff. Members take an oath of secrecy and are allowed to see documents which have a high level of secrecy they are allowed to look at all CSIS documents, all information collected by the CSIS. The SIRC is not allowed to look at cabinet documents or to review cabinet recommendations which, in some cases, are issues of quite significant importance for the country. Nor does the SIRC have review powers over any other agency.<sup>1</sup>

---

\* Address given to the "Terrorism, Law & Democracy Conference" organized by the Canadian Institute for the Administration of Justice and Co-Sponsored by the Law Commission of Canada, the Canadian Association for Security & Intelligence Studies, the Centre for Security and Defence Studies, Carleton University, the Faculté de droit, Université de Montréal, the Faculty of Law (Common Law Section), University of Ottawa, and the Institute of Comparative Law and Faculty of Law, McGill University.

\*\* The Honourable, Goodmans LLP, Member of the Security and Intelligence Review Committee, Toronto, Ontario.

<sup>1</sup> I am no longer a member of the SIRC panel, and therefore am probably now a little freer to talk about it than I might have been before. I took the view as a member of the SIRC panel that it was not appropriate for me to comment on legislation before parliament.

The strength of the SIRC is that it has an ability to hear complaints, to look at them in some considerable detail, and to really challenge CSIS conclusions in the course of a hearing in a much more adversarial way than I think would clearly be the case, as Mr. Justice Hugessen has described it, of the Federal Court. But the review takes place after the fact. The SIRC is looking at situations long after they have taken place. The SIRC is a review agency. In some countries a lot of this review activity is carried out by active politicians as opposed to—as I describe the SIRC panel—as “consisting of the deposed and the decomposed.” I will let you decide which group I am in. But still, the SIRC consists of people who have had an active experience in politics or public life who have a very strong view about the need to make the agency work and to make sure that the civil liberties of Canadians are protected. In exchange for that, Parliament has decided to give a group of people complete access to CSIS documents so that there is nothing held back. Experience would show that where active politicians on committees are said to review the activities of the agencies, the agencies in those circumstances are extremely reluctant to share any detailed information because they are afraid of leaks and they are afraid that people will run away with the information and use it for some other purpose.

This obviously causes some anxiety in the relationship between SIRC and Parliament. Also, those of you who have ever read our reports, know that it is very difficult to know exactly what the SIRC is saying.

One of the things that we must look at is how the country is changing following September 11. One of the issues we are going to have to look at as a country is what kind of information can be made more publicly available just so that Canadians are aware of the kinds of issues that are constantly being wrestled with by the SIRC.

How will SIRC change following September 11 and what are some of the dilemmas or challenges that the SIRC faces? This first thing, it seems to me, goes back to the decision that was made by the Government when the SIRC was established. That is, that the SIRC looks at the CSIS. We don't look at intelligence more broadly. Everyone should understand that the intelligence activities of the Canadian Government go way beyond the CSIS. There is an extensive unit in the Privy Council office, there is the whole DND operation which we only touch peripherally and which has one judge without real statutory authority who is reviewing all of that activity, and there is, increasingly, the whole issue of immigration. We cannot review decisions or issues that are touched on

by the Department of Immigration or by the Minister of Immigration. We can only touch on the reports that the CSIS makes to Immigration with respect to individuals. In my experience over the last five years, we have been doing a lot of that. Further, being a review agency means we have no statutory authority in the sense that we cannot change anybody's decision. If the deputy minister denies someone security clearance, we can take issue with that decision, we can ask that he think about it again, but ultimately, the decision is up to the deputy minister and the Cabinet to decide what will happen.

Our capacity to review is not, in my view, as broad as it should be. The SIRC report two years ago said that it was time for the Canadian government to look at the question of the review of activities across the spectrum of the Government because our ability to do this was confined. The Government clearly decided when it established the SIRC that it was going to limit SIRC's activities to the CSIS and it was not going to have access to cabinet decisions and it was not going to be able to review at that political level, or to review activities of the Privy Council. With C-36 and all that has followed September 11, this will be an issue of increasing concern because it really means that there are a lot of activities with respect to the collecting of information about individuals and the assessment of those individuals that is not, in fact, subject to review.

In particular, I want to focus on one question. That is, going back to the McDonald report, remembering the bifurcation between the CSIS and the RCMP, one of the things that Canadians have got to begin to debate and discuss is the fact that, by criminalizing "terrorist activity", we are in fact going back to the pre-McDonald pattern where the powers and work of the RCMP take on an increasing political character. I am not suggesting that there is an easy answer to this dilemma. I don't think that we could, as a country, have sat back and done nothing after September 11, particularly with respect to the knowledge that it gave all of us about the sophistication and the degree of coordination that led to the tragic event of that day. So there is a question, and I think it is a legitimate one: if the RCMP is in effect going to become the lead agency in looking at the question of terrorist activity in the country, then what can the SIRC do in that circumstance? If not the SIRC, then who? The advantage of the SIRC as an instrument is that while it is in part driven by complaints, it is not exclusively a complaint agency. It is an agency that has broad powers of review. It can ask questions about anything with respect to the activities of the CSIS. There is nothing that the CSIS does that it cannot review and question. Governments only encourage review and oversight when they

have to. Clearly, the events that led up to the establishment of the McDonald Report put a tremendous burden on Government to respond. We should not allow the very legitimate and necessary establishment of a capability to deal with a real threat—and I, for one, would not want to suggest to anyone that Al-Qaeda, or any other organization of a similar type, does not pose a real threat to the security and to the lives of Canadians—take away from the need for us to be continually vigilant about the importance of balance, review and oversight. Our review and oversight does not match the extent of the structure which is now in place to deal with the perceived and real threats that exist.

Nothing that happened on September 11 takes away from the challenge of understanding that there is a difference between people who are dissidents and who have a profound disagreement with the politics of any country in the world (and even with the politics of Canada) and the practice of terrorism. This is the continual challenge that we face. It is the reason that the SIRC was created. If you read the McDonald Report you will see that Judge Macdonald points to this question that police agencies are not always that good at making that distinction because they will always err on the side of security. That is understandable. You also want somebody to say wait a minute, this person is a strong critic of the Government of say, Turkey, but that does not make him a member of a terrorist organizations. Typically this person feels very profoundly that when he comes to Canada as a political refugee, he should be able to voice those concerns. He will participate with a number of other people in various rallies, dinners, speeches, events and all sorts of other activities.

We have to be able to distinguish between that kind of activity and that of somebody who is actively participating in a terrorist cell in Canada. It is a very hard thing to do. Sometimes it is not entirely clear. It requires political judgment, the exercise of discipline and intelligence. It requires people who are sensitive to the politics of each one of those countries and each one of those cultures and each one of those jurisdictions. I would just observe that our intelligence community, like that in the United States and like that in the U.K., came out of a Cold War culture in which it was apparently or allegedly relatively easy to tell the good guys from the bad guys, and in which the sides were clearly drawn. We are now in a very different world. I think it is fair to say that there is a lot of catch-up that has to happen within the intelligence community to recognize the incredible complexity of this new world. I would not want my remarks to be construed as saying, that there is no terrorist threat, that we are locking up the wrong people or that we do not know what we are

doing. That is not what I am saying. What I am saying is that we have to have the ability within our agencies to identify clearly and as often as humanly possible, correctly, this distinction, because it is a real distinction. If we do not make this we are, in my view, threatening the fabric of the civil liberties of Canadians.